
(2016) 05 P&H CK 0485
In the Punjab And Haryana At Chandigarh
Case No : CWP 16523 of 2011 (O&M)

Major Puri

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-05-2016

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2016) 4 PLR 404 : (2016) 4 SCT 586

Hon'ble Judges : P.B. Bajanthri, J.

Bench : Single Bench

Advocate : Rajeev Anand, Advocate, for the Petitioner; B.S. Ichhewal, Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.B. Bajanthri, J. (Oral)—In the instant writ petition the petitioner has questioned the Inquiring officer's report dated 20.12.2008 (Annexure P-8), removal order dated 16.01.2009 (Annexure P-11), Appellate order dated 22.04.2009 (Annexure P-12) and the order dated 23.11.2009 (Annexure P15). The petitioner was appointed as a Cook in the respondent Department. He was charge-sheeted on 16.8.2008 for over staying from 08.02.2008 (forenoon) and remained absent from duty without the permission of any competent authority. Charge-sheet was sent to the petitioner to a wrong address. Consequently, the same was not served before the commencement of the inquiry. The respondents proceeded with the inquiry. During pendency of the enquiry on 3.12.2008, petitioner was asked to file statement and he had filed statement along with medical certificate. The Inquiring Officer submitted his report holding that the charge against the petitioner is proved. Thereafter, the disciplinary authority forwarded copy of the Inquiring Officer's report along with show cause notice. The disciplinary authority imposed penalty of removal from service on the petitioner on 16.1.2009. Aggrieved by the order of the removal, he preferred an appeal and revision which were rejected on 22.4.2009 and 23.11.2009

respectively. Hence this petition.

2. Learned counsel for the petitioner submitted that he had applied leave for the period from 02.02.2008 to 07.02.2008. During leave period the petitioner's grand-father and his sister died in motor vehicle accident. Thereafter, petitioner himself fell ill. Initially he took treatment from Government Hospital and later with Private doctor. Thus, he was compelled to remain absent from 08.02.2008 till 24.11.2008. He reported back to duty on 25.11.2008. He was assigned duty on 2.12.2008. Remaining unauthorized absence for the above period was due to genuine reason that petitioner's grand-father and sister died in motor vehicle accident. He was mentally ill for which he was taking treatment. In this regard, he had produced medical certificate before the Inquiring Officer. The Inquiring Officer failed to consider and appreciate mental stress of the petitioner due to death of his grand-father and sister in a motor accident and the medical certificate. Inquiring Officer out rightly rejected on the sole ground that medical certificate has been issued by a private Doctor. Without summoning the author of medical certificate about genuineness of the medical certificate, it has been rejected and held that the charge is proved. While initiating enquiry proceedings charge-sheet is to be served on the employee. If the same is not served amounts to denial of opportunity to meet charge, it was duty of the disciplinary authority to notify in the newspaper if the charge-memo is not served through post. Here is a case where charge-sheet has been addressed to a wrong place to that extent postal department returned with remarks which has been received by the disciplinary authority. In view of these facts and circumstances, it was duty of the disciplinary authority to publish in the newspaper about chargesheeting the petitioner. Without resorting to the aforesaid action, the Inquiring Officer was appointed. Inquiry was proceeded and the petitioner has been punished by imposing penalty of removal from service. It was further contended that the respondents while imposing the penalty of removal from service have considered the past events which is not part and parcel of charge-sheet. Extraneous material has been taken into consideration for the purpose of imposing penalty of removal from service. The disciplinary authority, appellate authority as well as revisional authority have not taken into consideration whether enquiry proceedings are in accordance with the prescribed procedure or not. Therefore, decision of the appellate and revisional authority are arbitrary.

3. On the other hand, learned counsel for the respondent submitted that the charge-sheet was sent and post was returned stating that addressee is not available. Therefore, disciplinary authority proceeded for appointing Inquiry Officer to hold ex-parte enquiry. Inquiring Officer has rightly rejected the medical certificate produced by the petitioner on the ground that the petitioner should have taken treatment with the Government hospital. Even though, the petitioner was referred to Rajindra Hospital, Patiala but the petitioner failed to take treatment in Rajindra Hospital, Patiala. Thus, the Inquiring Officer rejected the medical certificate. It is further contended that it is an admitted fact that petitioner remained absent after expiry of leave period. If an employee remained

unauthorized absent for a longer period, punishment of removal would be ideal. Hence, there is no infirmity in the order passed by the disciplinary authority, appellate authority and revisional authority.

4. Petitioner had been given ample opportunity in the inquiry and he had submitted his statement of defence by producing medical certificates. Medical certificates were examined by the Inquiring Officer and the same has been discarded as it was issued by a Private Doctor and reasons are not acceptable. Hence, there is no illegality in the Inquiring Officer's report and there is no infirmity in the entire disciplinary proceedings. Petition is to be rejected.

5. Perused the records made available by the parties.

6. Petitioner's unauthorized absence was not an intentional one. He was compelled to over stay from 08.02.2008 as his grand-father and sister died in motor vehicle accident. Thereafter, he himself fell ill for which he has taken treatment with the Government Doctor as well as private Doctor. To that extent, the petitioner had submitted medical certificate. There is some substance in the plea that remaining absence is not an intentional one. None of the authorities have appreciated.

7. In case titled as State of Punjab v. Dr. P.L.Singla, reported in 2008(3) SCT 742, the Supreme Court of India had held as follows:-

"8. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct.

9. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of days overstay is viewed very seriously. Be that

as it may.

10. Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted, it will result in break in service, thereby affecting the seniority, pension, pay etc., of the employee. Any consequential order directing how the period of absence should be accounted, is an accounting and administrative procedure, which does not affect or supersede the order imposing punishment."

8. On 16.08.2008 charge-sheet was filed. The same was not communicated to the petitioner as it was addressed to a wrong place. Before completing the communication of charge sheet on 16.08.2008, Inquiring officer was appointed on 24.09.2008 as on that date, the charge sheet was not communicated to the petitioner. For the first time, the petitioner was made known of filing of charge-sheet only on 25.09.2008, the date on which the Inquiring officer sought statement of defence of the petitioner. The disciplinary authority hurriedly appointed Inquiring Officer without completing the procedure of communication of charge-memo. Thus, the petitioner has been denied principle of natural justice in not allowing him to say on the charge-memo. In other words, before communication of chargememo and receipt of the reply, if any, the disciplinary authority proceeded to hold an enquiry. Supreme Court in the case of UOI and others v. Dinanath Shantaram Karekar (1998) 7 SCC 569 held as follows:

"3. The respondent was as employee of the appellants. His personal file and the entire service record was available in which his home address also had been mentioned. The charge sheet which was sent to the respondent was returned with the postal endorsement "not found". This indicates that the charge sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the sender with the endorsement "not found", it cannot be legally treated to have

been served. The appellant should have made further efforts to serve the charge sheet on the respondent. A single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings was bad. It was ex-parte even from the stage of charge sheet which, at no stage, was served upon the respondent.

4. So far as the service of show-cause notice is concerned, it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him personally by tendering the show-cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show cause notice was published was a popular newspaper which as expected to be read by the public in general or that it had a wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circumstances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge-sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad.

10. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "Communication" cannot be invoked and "Actual Service" must be proved and established. It has already been found that neither the charge-sheet nor the show-cause notice were ever served upon the original respondent, Dinanath Shantaram Karekar. consequently, the entire proceedings were vitiated."

In the present case principle laid down by the Apex Court not followed. Hence disciplinary proceedings is vitiated.

9. The Inquiring Officer discarded the medical certificate without examining the author of the medical certificate. The Inquiring Officer had ample power to summon the Doctor under the Inquiries Act. Unless the author of the medical certificate is examined or cross examined, the same cannot be discarded. The disciplinary authority while passing the order of removal from service has taken extraneous material namely past events which is not part and parcel of the charge-memo dated 16.08.2008. Relying on extraneous material by the disciplinary authority indicates that he is biased in punishing petitioner. On this issue, Supreme Court in the case titled as Nicholas Piramal India Ltd. v. Harisingh reported as 2015(8) SCC 272 held as follows:-

"18. It has been further contended by him that the statutory duty cast upon the

Disciplinary Authority under Clause 12(3)(c) of the SSO requires it to take into consideration the gravity of the misconduct, the previous record of the workman and any other extenuating or aggravating circumstances at the time of passing an order of dismissal. In the present case, the appellant- Company has not notified the workman about any of his past record in the show cause notice as required in law as per the Constitution Bench decision of this Court in the case of *State of Mysore v. K.Manche Gowda*, (1964) 4 SCR 540."

In the case of *State of Mysore v. K.Manche Gowda* reported in (1964) 4 SCR 540 it is held as follows:-

"7. Under Article 311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in the *State of Assam v. Bimal Kumar Pandit* Civil Appeal No. 832 of 1962 Decided on 12.02.1963. If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the Government servant. It would be no answer to suggest that every Government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that, what the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his

explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation."

The petitioner has not been provided opportunity to meet the allegations of past conduct.

10. In view of the above lacunas in the inquiry proceedings removal order dated 16.01.2009 is set aside. Consequently, decisions of the appellate authority as well as revisional authority are set aside. Concerned respondent-Disciplinary authority is directed to reinstate the petitioner with all service and monetary benefits within a period of two months from today.

11. Quashing of the above mentioned orders would not come in the way of disciplinary authority to regulate absence period as leave. If the sufficient leave is not available in the credit of petitioner the remaining period be treated as leave without pay.

12. Civil Writ Petition stands allowed.