
(2017) 12 AHC CK 0033
In the Allahabad High Court
Case No : 44212 of 2013

Maqsood Ahmad

APPELLANT

Vs

State Of U.P.& 3 Ors.

RESPONDENT

Date of Decision : 14-12-2017

Acts Referred:

[Government Servant Conduct Rules, 1972](#), Rule 41, Rule 35

Citation : (2017) 12 AHC CK 0033

Hon'ble Judges : Sangeeta Chandra

Bench : Single Bench

Advocate : Bed Kant Mishra, A.Z.Khan, Mohd. Ibrar Khan, Praveen Mishra, S.K. Singh, Satyendra Kumar Mishra, Vishwa Ratan Dwivedi, M.C.Tripathi, Pradeep Kumar Tripathi, Vivek Verma

Judgement

1. This writ petition has been filed challenging the order dated 2.3.2012 passed by Nagar Ayukt, Kanpur Nagar, Kanpur and the order dated 2.6.2013 passed by the Commissioner, Kanpur Division, Kanpur rejecting the Appeal of the petitioner.
2. Counsel for the petitioner has argued that the petitioner was initially appointed as Gangman / peon in Kanpur Nagar and he worked satisfactorily for a long time on the said post, but was later on transferred in the year 2004 to Nagar Nigam Girls Inter College, Kidwai Nagar, Kanpur in 2004. In 2004-2005, the petitioner fell ill frequently. He filed an application for Medical Leave along with Medical Certificates issued by the Doctor concerned each time he took leave due to illness, but the Principal of the said college became annoyed with the petitioner and therefore arbitrarily marked him absent in the attendance register. He was also not paid salary for several months and he also sent legal notices to the Principal in this regard.
3. Later on, it was informed to the petitioner that an enquiry had been set up against the petitioner by the order of Up-Nagar Ayukta dated 23.8.2006 and Section Officer was appointed as Inquiry Officer with a direction to serve a copy of the charge sheet upon the petitioner and to conduct an enquiry and submit a

report to the Nagar Ayukta. In pursuance of the order passed on 23.8.2006, no enquiry was conducted by the Inquiry Officer for a long time and after three years, all of a sudden, a charge sheet was served upon the petitioner on 19.5.2009 wherein the Inquiry Officer who had now been promoted as Sahayak Nagar Ayukt informed him of two charges levelled against the petitioner.

4. The first charge in the charge sheet related to an alleged loan of Rs. 4,00,000/- (Rs. Four Lacs) taken by the petitioner for business purposes for running the firm Al- Mansoor Garments without prior permission / information of his employer, Kanpur Nagar Ayukta, which was against the Government Servant Conduct Rules, 1972 and the other charge related to unauthorised absence for a period of 280 days in between January 2004 to December 2005. With regard to second charge, the documentary evidence sought to be relied upon was a report sent by the Principal of Nagar Nigam Girls Inter College, Kidwai Nagar, and it was alleged that unauthorised absence of the petitioner was against Rule 88 of the Service Rules governing municipal employees.

5. It has been argued by learned counsel for the petitioner that in response to the said charge sheet, a detailed reply was submitted by the petitioner, wherein it was seriously disputed that the petitioner had ever taken any loan from the State Bank of India, Kanpur Nagar and it was also alleged that regarding the said loan alleged to have been taken by him for business purposes for Al-Mansoor Garments, a criminal case had already been filed and the first charge was without any basis as he had never taken any such loan.

6. With regard to charge no. 2 of unauthorised absence for 280 days in between January 2004 to December 2005, the petitioner in his reply dated 24.7.2009 specifically stated that he fell ill frequently during the said period and he submitted Medical Certificates. He was never careless in the performance of his duties and the Principal of the College out of some personal dislike for the petitioner, had not let him sign the attendance register. Even when he was ten minutes late in reporting for duty he was marked absent for no reason at all, although he remained present in the college.

7. In the Enquiry report submitted by the Inquiry Officer dated 25.7.2009, the first charge regarding taking of loan of Rs. 4,00,000/- (Four Lacs) in the name of Al-Mansoor Garments was not found to be proved with regard to second charge, however, the Inquiry Officer found that although the petitioner had alleged that he was frequently ill and had submitted Medical Certificates whenever he fell ill and then reported for duty. On examination of records, it was found that the petitioner did not work regularly at all in between January 2004 to December 2005. The chart dated 7.6.2006 submitted by the Principal of the College regarding attendance of the petitioner shows that the petitioner was absent most of the time and the medical certificates submitted by the petitioner for grant of medical leave could not be relied upon by him because the petitioner had already availed of the whole of medical leave admissible to him for his service tenure. The Inquiry Officer found the petitioner guilty of unauthorised absence, which

was not liable to be condoned.

8. A show cause notice was issued to the petitioner thereafter on 6.5.2012, wherein the petitioner was asked to submit a reply as to why he should not be reverted to his basic pay for unauthorised absence w.e.f. January 2004 to December 2005, and why he should not be issued a warning in this regard.

8. It has been submitted by the learned counsel for the petitioner that in reply to the show cause notice the petitioner submitted his explanation on 18.1.2012, wherein he again cast allegation on the Principal of the College that he continued to remain annoyed with him, as a result of which he was marked absent even for those days, for which the petitioner reported late for duty. A request was made by the petitioner to drop the enquiry and proposed punishment as mentioned in the show cause notice.

9. Counsel for the petitioner has argued that ignoring the reply submitted by the petitioner to the show cause notice, a non speaking order was passed, holding the petitioner guilty of carelessness and a dereliction of duty, and reverting him to his basic pay and issuing a warning to him for the future. This order passed by the Nagar Ayukt dated 2.3.2012 was challenged by the petitioner in Appeal before the Commissioner, Kanpur Division, Kanpur, wherein the Commissioner, Kanpur Division called for the records and examine the matter afresh. He found that only a submission was made in the Appeal that medical certificates have been filed by the petitioner when he fell ill in between January 2004 to December 2005, but no such certificates were actually filed along with reply to charge sheet, show cause notice or even in the Appeal as documentary evidence of the genuineness of his claim of falling ill frequently.

10. Moreover, the petitioner had admitted that he was absent for 280 days, but the Principal of the College concerned had illegally shown him to be absent for 357 days and had also deducted salary for 357 days. The fact that the petitioner had admitted absence for 280 days made it amply clear that the petitioner was careless in the performance of his duty and therefore he affirmed the punishment order by his order dated 20.6.2013 and rejected the appeal.

11. Counsel for the petitioner submitted before this Court that from a bare perusal of the enquiry report, it is evident that documentary evidence in support of the allegation of unauthorised absence was not provided to the petitioner and the enquiry for alleged absence of the period 2004 to 2005 continued for an inordinately long period of time, and the charge sheet itself was given to the petitioner on 19.5.2009, although the enquiry was instituted on 19.6.2006 and the Inquiry Officer was appointed on 23.8.2006.

12. The petitioner was seriously prejudiced as documentary evidence in support of the charge of unauthorised absence was never given to him and from a bare perusal of the charge no. 2 in the charge sheet, it is evident that even the dates on which he allegedly remained absent were not mentioned in the charge sheet, the dates of unauthorised absence were alleged to be given along with the report

of the Principal of the College, which was never received by the petitioner.

13. Sri Pradeep Kumar Tripathi, who appears for the Kanpur Nagar Nigam on the basis of his counter affidavit has pointed out that the petitioner's services were governed by the provisions of U.P. Nagar Mahapalika Sewa Niymawali 1962 framed under the Municipal Corporation Act, 1959 and that the petitioner had the remedy of filing a Revision before the State Government under Rule 41 of the Service Rules of 1962 against an order passed under Rule 35 rejecting the Appeal of the petitioner and the writ petition was liable to be dismissed on the ground of alternative remedy available to the petitioner for approaching before the State Government against the order passed by the Commissioner.

14. It has also been argued that the petitioner was absent for 280 days for the period between January 2004 to December 2005, without any prior permission or information or grant of leave and this itself showed that the petitioner was not interested in discharging his duties as an employee of Nagar Nigam, Kanpur.

15. It has also been argued that the petitioner could not establish before the Appointing Authority or Appellate Authority that he was actually sick for about 280 days in a short span of about two years, and even before this Court the Medical Certificate annexed with the writ petition show that medical leave can only can be granted for the period w.e.f. 10.7.2004 to 5.8.2004, the absence of the petitioner beyond this period has remained explained.

16. It has also been argued that the Inquiry Officer delaying the conduct of the enquiry after service of charge sheet and had been enquiry not been fair, the Inquiry Officer would not have found the petitioner guilty of only one charge, out of the two levelled against him. The petitioner was afforded fullest opportunity of hearing not only by the Inquiry Officer and the Appointing Authority, but also by the Appellate Authority.

17. Counsel for the petitioner in reply to the submissions made by the counsel for the Nagar Nigam has argued that alternative remedy is not always a bar to exercise of writ jurisdiction. Moreso when from a perusal of the orders impugned, it is evident that they are non speaking and passed on the basis of an enquiry conducted in violation of principles of natural justice.

18. This Court having considered the rival submissions has perused the punishment order by which the petitioner has been found guilty of unauthorised absence, and has been reverted to his basic pay, and issued a warning for the future, finding the petitioner guilty of negligence and dereliction of duty.

19. The Appointing Authority in the punishment order impugned does not refer to the reply to the show cause notice, which the petitioner had filed before him with sufficient details, but in the order passed by the Appellate Authority, a detailed consideration has been made of the explanation given by the petitioner to his alleged unauthorised absence of 280 days, which he had admitted, on the other hand the Principal of the College concerned had submitted a report of

unauthorised absence of 357 days and the petitioner's salary for absence of 357 days was also withheld by the Principal of the College treating his absence to be unauthorised.

20. The Commissioner in the Appellate order has considered the various documentary evidence including Medical Certificates filed by the petitioner, and the applications for earned leave, and the repeated applications made by the petitioner regarding withholding of salary of 357 days, but the Appellate Authority has come to a conclusion that since the petitioner had himself admitted an absence of 280 days as against 357 days as alleged, the punishment order has been rightly passed, reverting the petitioner to his basic pay and it needed no interference.

21. From a perusal of various documents filed along with the writ petition and the orders impugned, it is evident that the disciplinary proceedings against the petitioner were not conducted in a fair manner as the charge itself, which was levelled against the petitioner of remaining absent unauthorisedly on various dates was vague. No dates were mentioned of such absence in the charge.

22. Although over the years there has been a steady refinement as regards the particular doctrine of natural justice and it is settled law that no Strait-jacket formula can be made applicable but adjudication of any case on compliance with this doctrine is solely dependent upon the facts and circumstances of each case. The totality of the circumstances ought to be taken note of, and if on examination of such facts, it comes to light that the executive action suffers from the vice of non-compliance with the doctrine of natural justice, this Court can certainly set right the wrong inflicted upon the person concerned. It would be within the scope of its judicial power to interfere if disciplinary proceedings smack of arbitrariness and unfairness. When the findings recorded are totally perverse and based on no evidence at all, and such findings or the punishment based upon them shocks the judicial conscience of the Court, this Court may exercise its power of judicial review and set aside the punishment order. Reduction in rank or reversion to basic pay is a major penalty and judicial review of disciplinary proceedings in such cases has to be strictly applied.

23. Except for the admission of the petitioner as recorded by the Appellate Authority of absence for 280 days w.e.f. January 2004 to December 2005, there was no basis on which the Inquiry Officer could have found the charge against the petitioner proved. For such absence being not without valid reasons, the petitioner had pleaded that he had fallen sick on several occasions during this period, and also that his wages were deducted not only for 280 days of admitted absence, but in fact for 357 days by the Principal of the College concerned for extraneous reasons.

24. The petitioner being low paid employee had already suffered in terms of his wages being deducted for 357 days by the Principal of the College. There was no reason to believe that the petitioner was malingering and deliberately not

attending his duties as the Medical Certificates that he submitted to the authority were never confirmed but also never sought to be verified by sending them to the office of the Chief Medical Officer, for examination by either the Inquiry Officer or the Appointing Authority. There could have been a valid explanation of absence for long period of time and the petitioner had indeed given such explanation by submitting Medical Certificates. These Medical Certificates were discarded and the admission of absence for 280 days by the petitioner was taken as admission that the said absence was unauthorised.

25. The Hon"ble Supreme Court in Channabasappa Basappa Happali Vs. State of Mysore 1971 (1) SCC 1 has observed that at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses, and to give his own version or explanation about the evidence on which he was charged and to lead his defense. In this case, fair and reasonable opportunity to defend himself was not given to the petitioner as he was never faced with a definite charge regarding periods in which the petitioner had allegedly remained absent unauthorisedly.

26. Admittedly, the petitioner was appointed as a Gangman / peon in Nagar Nigam, Kanpur in 1978 and he had rendered almost 20 years of service when he was assigned duty as peon in Nagar Nigam Girls Inter College, and it is not very difficult to believe the petitioner's case that he repeatedly fell ill. The petitioner had also denied the charge that the petitioner was deliberately absenting himself and he had also pointed out that no notices were ever issued to him by the Authorities to join his duties during the period of his alleged absence. Although not many Medical Certificates were placed on record, but indeed some of them were placed before the Appellate Authority. The Appellate Authority could have considered the circumstances which the petitioner brought on record as his justification for remaining absent and his plea for lesser punishment could have been certainly looked into by the Appellate Authority. The petitioner had already put in almost 20 years of service and a lesser punishment could have been imposed taking into account the fact that salary of 357 days for which he allegedly remained absent had already been withheld by the Principal of the College, and the petitioner was a low paid employee and he would suffer great hardship on being reduced / reverted to his basic pay.

27. The Hon"ble Supreme Court in Krushnakant B. Parmar Vs. Union of India & other 2012 (3) SCC 178 has held that for sustaining a charge of unauthorised absence the Authority must not only consider the periods of such absence, but also come to a conclusion that such absence amounted to misconduct. The evidence was led by the appellant therein in support of his claim that he was prevented to sign the attendance register and to perform his duties was though noticed by the Inquiry Officer, the Inquiry Officer nevertheless had held the charge proved on presumption and surmises.

28. The Hon"ble Supreme Court held that in case of the appellant therein, referring to the unauthorised absence, the Disciplinary Authority had alleged that

the appellant had failed to maintain devotion to duty, and his behaviour was unbecoming of a Government servant.

29. The question whether unauthorised absence from duty amounted to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be answered without deciding the question whether the absence is wilful or because of compelling circumstances.

30. The Supreme Court observations in paragraph 17, 18, 19 & 20 of the said judgment in case of *Krushnakant B. Parmar (supra)* are being quoted herein below:- "17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant. 18. In a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

20. The question relating to jurisdiction of the Court in judicial review in a Departmental proceeding fell for consideration before this Court in *M.V. Bijlani Vs. Union of India* reported in (2006) 5 SCC 88 wherein this Court held: (SCC p. 95, para 25)"

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasijudicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

31. The Supreme Court thereafter took into account that the proceedings were drawn in 1996 for absence from duty and the Appeal was being decided by it in 2012, and held that keeping in view the fact that the charged officer had suffered

a lot, the matter was not fit to be remitted back to the disciplinary authority for any further action. The dismissal order of the appellant therein was set aside and he was directed for being reinstated and also to be paid 50% of the back wages.

32. This Court is of the view that the charge against the petitioner of absence from duty was admitted by the petitioner himself, but he had submitted his explanation regarding his repeated illness during the said period. The said explanation ought to have been considered sympathetically. If such explanation was to be doubted, then the Medical Certificates submitted by the petitioner ought to have been sent to the Chief Medical Officer of the District concerned for verification, which was not done in the case of the petitioner.

33. As such the punishment order imposing major penalty of the reverting the petitioner to his basic pay seems to have been imposed arbitrarily and is liable to be set aside.

34. The impugned order of punishment and the Appellate order are set aside.

35. The matter is remanded to the Appointing Authority to consider afresh with regard to punishment, keeping in mind that the petitioner has already suffered as he has been denied wages for 357 days during the period w.e.f. January 2004 to December 2005.

36. Let the Appointing Authority consider the matter in the light of the observations made herein above, and pass appropriate orders with regard to punishment to be awarded to the petitioner, within a period of three months from the date a certified copy of this order is produced before him.