

(2001) 08 GUJ CK 0010
In the Gujarat High Court

Case No : Special Civil Application No. 2210 of 1994

Mr. P.D. Kapdi

APPELLANT

Vs

Superintending Engineer

RESPONDENT

Date of Decision : 09-08-2001

Acts Referred:

Citation : (2001) 08 GUJ CK 0010

Hon'ble Judges : Kundan Singh, J

Bench : Single Bench

Advocate : Y.N. Oza, for the Appellant; M.G. Doshit and Co., for the Respondent

Final Decision : Allowed

Judgement

Kundan Singh, J.—By means of this petition, the petitioner has sought for quashing and setting aside the order dated 19-8-1993 removing the petitioner from service of the respondent Gujarat Electricity Board (hereinafter referred to as the "respondent Board" for short) with immediate effect which is confirmed by the Appellate Authority - Deputy General Manager (P) of the respondent Board by the order dated 6-12-1993 dismissing the appeal dated 25-9-1993 filed by the petitioner.

2. The petitioner was appointed as a trainee helper in the year 1976 by the Executive Engineer, Palanpur District Banaskantha in the respondent Board. The petitioner was promoted to the post of Meter Reader in the year 1987 and thereafter he was removed from the service by the order dated 19-8-1993 passed by the respondent no. 1. The charge sheet dated 13-8-1993 was issued to the petitioner by the respondent no. 1 for holding summary inquiry as per Clause 8 of the Bombay State Electricity Board Employees Conduct, Discipline and Appeal Procedure. He was charged for contravention of Rules 6, 8, 9 and 13 and the allegation of misconduct have been enumerated in the charge sheet. The petitioner remained present before the respondent no. 1 on 18-8-1993 at 4-00 p.m. as per the charge sheet. The petitioner was asked certain questions by the

respondent no. 1 in presence of two witnesses and those questions and answers were treated as summary proceedings by the order dated 19-8-1993. The petitioner was removed from service with immediate effect.

3. Being aggrieved and dissatisfied with the order of the respondent authority, the petitioner preferred an appeal before the Appellate Authority of the respondent Board. The appeal was rejected by the order dated 6-12-1993. The order of removal has been removed passed by the competent authority under Rule 8 of the aforesaid Procedure, which reads as under :

"8 - The competent authority prescribed in Schedule "C" may in cases covered by clause 7 (g) hold summary proceedings (Vide model charge sheet form given in schedule E (ii) on the spot and take a decision on the evidence available. The charge and the decision taken shall be recorded and copies thereof handed over to the accused employees. The summary decision may be made effective forthwith but punishments involving termination of service discharge removal or dismissal shall be subject to the confirmation by the next higher authority or the Board as the case may be. The summary decision is appealable and may be stayed by the appellate authority pending disposal of appeal."

4. Relevant portion of Clause 7 (g) referred to for punishment under Clause 9 reads as under :

xxx xxx xxx "7 (g) : When summary proceedings are held by the competent authority as provided in clause 8 in cases

(i) When the employee is caught red-handed having committed or while committing an act of misconduct.

(ii) Where there is obvious evidence to the misconduct.

(iii) Where the misconduct or misbehaviour is considered to grave and convincing to warrant or justify the normal procedure to be followed Provided that no person can be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which had led to his conviction on a criminal charge.

(b) Where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing it is not reasonably practicable to give to that person an opportunity of showing cause.

5. It is stated that aforesaid proviso is not attracted in the present case for the following reasons :

i. Summary proceedings were not held on the spot. They were held after expiry for more than one month. Some incidents mentioned in the charge sheet were

more than six months" old.

ii. The charges and decision was taken on the evidence available. There is no such evidence available.

iii. The decision could not have been made effective forthwith since it was a case of termination. Such decision should have been subject to confirmation by the higher authority. The impugned order of removal has not been confirmed by the higher authority as required under Clause 8. The appeal of the petitioner was dismissed which will not amount to confirmation as contemplated under clause - 8.

iv. The petitioner was not caught red handed having committed or while committing an act of misconduct.

v. There was no obvious "evidence" to the misconduct. What was stated in the charge sheet was only "facts" and not "evidence".

vi. The misconduct was so grave that normal procedure was required to be followed.

vii. Looking to the facts of the case summary proceedings were not justified.

viii. No Reasons have been recorded in the impugned order of removal. For dispensing with the regular inquiry no reasons have also not been recorded that it is not reasonably practicable to give an opportunity of showing cause.

Thus, the reasons in the order for dispensing with the regular departmental inquiry have not been recorded.

6. On behalf of the respondents, an affidavit-in-reply has been filed stating therein that in the year 1993 reports of thefts of electricity in Palanpur were made and the same came to the knowledge of the Head office, Vadodara. The Member (Technical) of the respondent Board had apprised him about the reports received by the respondent Board which had directed him to take measures to detect such cases and also to take steps against the concerned employees of the respondent Board. A checking squad was constituted. Mr. V.K. Mevada, Deputy Engineer was one of the member of the squad. They checked the meters of large number of consumers and as a result of such checking it was decided to take departmental action against three meter readers in Palanpur including the petitioner and the departmental action against the employees of the respondent Board are regulated by the Bombay State Electricity Board Employees' Conduct, Discipline and Appeal Procedure. The Superintending Engineer who was the competent authority decided to hold departmental proceedings against three meter readers including the petitioner. The charge sheets were issued against them on 13-8-1993 and the summary inquiry was held against them on 18-8-1993. The order dismissing all the three including the petitioner was passed on 18-8-1983. The other two persons adopted the proceedings before the Labour Court, at Ahmedabad and the petitioner filed the present petition before this

Court challenging impugned action of the respondents in removing him from service.

7. During the course of hearing of this petition learned counsel for the petitioner invited attention of this court to the questions raised and answers given by the petitioner in the summary proceedings held against him wherein he stated that true facts have been stated by him. It was found that about 4 consumers were engaged in committing theft of electricity. On verification it was found that the petitioner had no bad intention. It was stated that actual number of consumers was 182 and the list of meter of 37 consumers had been checked and whenever tampering with the meters or low billing was found, supplementary bills have been issued and sum of Rs.2,68,805-35 ps. has been recovered from such consumers. It was not practicable to take action in each case; whenever such check was made tampering with the meter or low billings and statement recording the findings to be drawn up on the spot and the consumer's signature has to be taken on such statement. Whenever checking squad visits an area and checking is begun, other consumers in the vicinity take a cue and contrive to see that they are not checked and therefore the squad has to act with circumspection. The list submitted by the petitioner did not contain the names of any of the consumers whose reading was taken by him but of consumers whose meters were being read by other meter readers. The meter reader is required to submit a daily report showing any irregularity as noticed by him. The petitioner has not submitted any such report at any time. The modus operandi employed is that for several billing periods the premises of a consumer are shown as closed and minimum bill was prepared and sent to the consumer, after some billing periods the seal on the meter was broken and the meter reading was reversed and the meter was again sealed. By this way theft of electricity has taken place.

8. Sur-rejoinder affidavit has been filed by the Superintending Engineer of the respondent Board stating therein that there is no list submitted by the petitioner of 400 consumers involved in theft of electricity power. The meter readers were duty bound to submit report every month of the case where theft of electricity power was suspected. The petitioner had submitted list of 271 consumers but the actual number of consumers involved were 182 as several names were duplicated. On scrutiny it was found that 37 consumers were involved in theft of power and therefore checking sheets were prepared and an amount of Rs.2,68,805-95 was recovered from them. The petitioner had given list of consumers involved in power theft which does not lead to a conclusion or even an inference that the petitioner was not involved. It was denied that the summary proceedings were without any jurisdiction. As per Board's Employees' Conduct Discipline and Appeal Procedure, Chapter-VIII, Clause 8 Schedule "C" Superintending Engineer of the Circle Office is competent authority to hold summary inquiry and summary proceedings pursued by the Respondents are regular proceedings. It is not as if no, or little, opportunity was given to a delinquent to defend himself. The inquiry was held against the three meter readers including the petitioner and as a result of which services of three meter

readers including the petitioner were terminated and ample opportunity of his defence was given to the petitioner and after the impugned order of termination was passed, against that order of termination the petitioner preferred an appeal 25-9-1993 before the Appellate Authority which was rejected by the Appellate authority by the speaking order dated 6-12-1997. Thereafter, the petitioner filed second appeal before the Chairman of the respondent Board which was also turned down by a speaking order dated 28-3-1995.

9. The contention of the learned counsel for the petitioner is that under the constitutional proviso to Article 311(2) of the Constitution of India, the concerned authority is required to record reasons in writing that it is not reasonably practicable to hold such inquiry, then, the concerned authority can pass an order dispensing with the regular inquiry. In the present case, proviso to aforesaid Clause 7 (g) requires that there must be satisfaction that some reasons to be recorded by the authority in writing, that it is not reasonably practicable to give that person an opportunity of showing cause. In the similar manner, Rule 161 of the Railway Protection Force Rules, 1987, requires that the authority is required to satisfy for the reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner under the Rules.

10. In the present case, no reasons have been recorded for holding summary proceedings. Hence, the summary proceedings awarding punishment of removal is in violative of the constitutional provisions of law. He has relied on the decision of the Supreme Court in the case of Jaswant Singh Vs. State of Punjab and others, , wherein it has been held as under :

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No. 3 in the impugned order. Clause (b) of the Second Proviso to Article 311(2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observations at Union of India and Another Vs. Tulsiram Patel and Others,

A disciplinary authority is not expected to dispense with a disciplinary authority lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the Government servant is weak and must fail.

The decision to dispense with the departmental inquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

11. Learned counsel for the petitioner also relied on the decision of the Allahabad High Court in the case of Union of India Vs. Shiv Mangal and Another reported in

1991 (II) LLJ 1990, wherein it has been held that punishing authority has patently erred in dispensing with the enquiry contemplated by Rule 47 of R.P.F. Rules, 1959. the reasons given are based on surmises, conjectures and on incorrect facts regarding non-availability of the evidence during the course of enquiry. The mere inability or inefficiency of the investigating authority to obtain evidence to prove the charge cannot be a ground for dispensing with the enquiry. In these circumstances, the order dispensing with enquiry is wholly arbitrary and the order of removal of the workman cannot be sustained.

12. Learned counsel for the petitioner also brought to the notice of this Court the latest decision of the Division Bench of this Court delivered on 8-2-2001, wherein it has been observed as under :

"This Article requires grant of reasonable opportunity of defence by holding an inquiry into the alleged misconduct. Clause (b) of the second proviso to Article 311(2) empowers disciplinary authority to dispense with holding of disciplinary inquiry only if he is satisfied, for the reasons to be recorded by him in writing, that it is not reasonably practicable to hold such inquiry. In constitutional bench decision of the Supreme Court in *Tulsi Ram Patel* followed subsequently in the case of *Jaswant Singh* stated above, the constitutional provision conferring power to the disciplinary authority to dispense with inquiry has been interpreted to determine its scope and it has been held "the decision to dispense with the departmental inquiry cannot be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

xxx xxx xxx xxx Ignoring the aforesaid constitutional provisions and the provisions in the rules statutorily framed for holding inquiry, it was totally unconstitutional and illegal on the part of the disciplinary authority to straightway dismiss the petitioner on the alleged confessional statement in writing and orally made. Confessional statement in itself did not warrant dispensation of inquiry.

xxx xxx xxx xxx Clause (b) of the second proviso to Article 311(2) of the Constitution of India permits dispensation of inquiry only where holding of inquiry is not "practicable". The proviso, in the Constitution does not permit dispensation of inquiry only on the subjective satisfaction, may be based on objective material, of the disciplinary authority, that it is not necessary to hold inquiry."

13. As per second proviso to Article 311(2) of the Constitution of India, the authority is empowered to dismiss or remove a person or to reduce in rank. If the authority is satisfied that for some reasons to be recorded by that authority in writing that it is not reasonably practicable to hold such inquiry the, regular inquiry can be dispensed with. Even relevant Rule 8 is special proviso to Rule 7 (g) wherein the authority is empowered to dismiss or remove a person or to reduce him in rank if satisfied that for some reasons to be recorded by that

authority in writing it would be reasonably practicable to give to that person an opportunity of showing cause.

14. On the contrary the learned counsel contended the vires of clause 7 (g) (i) (a) of the Bombay State Electricity Board Employees Conduct, Discipline and Appeal Procedure were challenged in this Court whereby show cause notice for the proposed punishment can be dispensed with. The validity of the aforesaid provision has been upheld by this Court in the case reported in 1997 (1) G.L.H. 1037. In the present case the inquiry was conducted and full opportunity to defend was afforded to the petitioner. As immediate action has to be taken hence it is not practically possible to hold full-fledged enquiry and reasons are not required to be recorded. Moreover, when the order for enquiry is passed the reasons are recorded and sent to higher authority. Those reasons are not required to be recorded in the impugned order. It is also contended that the provisions of Article 311(2) of the Constitution of India are not applicable as the petitioner is not a Government employee. He also argued on the gravity of misconduct of the petitioner.

15. I have carefully considered the contentions of the learned counsel for the parties. From the charge sheet, questioned, and impugned order it does not appear that any reason for dispensing with regular enquiry has been recorded and to show that it was impracticable to give show cause for proposed action as required by principle of natural justice as contemplated under Article 311(2) of the Constitution of India and under Clause 7 (g) of the Procedure. Even an opportunity of showing cause is required to be given in view of the constitutional mandate and if Rule is inconsistent with the constitutional mandate, Rule will not prevail. In the present case, constitutional mandate requires the authority concerned to reduce into writing reasons to show that it is not reasonably practicable to hold such regular inquiry. It is not disputed that reasons have not been recorded by the authority concerned while holding summary proceeding. It is not mentioned in the order that it was not reasonably practicable to hold regular inquiry nor it is mentioned in the order itself that these are the reasons and hence it was not reasonably practicable to hold such regular inquiry and summary proceedings are being initiated for passing an order of major punishment.

16. The impugned order does not show any reason required to be recorded to show that it was not reasonably practicable to hold regular inquiry and no reason has been recorded to show that it is not reasonably practicable to give show cause for proposed action against the petitioner. The impugned order is vitiated and is not sustainable in the eye of law. Therefore, the present petition deserves to be allowed and the impugned order is required to be quashed and set aside. Accordingly, this petition is allowed and the impugned order dated 19-8-1993 Annexure - C passed by the respondent no. 1 terminating services of the petitioner and order dated 6-12-1993 rejecting the appeal are hereby quashed and set aside. In the facts and circumstances of this case, the petitioner is

reinstated forthwith with continuity of service with 25% back wages, with all consequential benefits, as is not impugned order of termination is passed. The respondents are directed to reinstate the petitioner forthwith and to make payment of 25% back wages with all consequential benefits, within three months from the date of presentation of a certified copy of this order or receipt of the writ. Rule is made absolute to the aforesaid extent, with no order as to costs.