
(2013) 05 AHC CK 0083
In the Allahabad High Court
Case No : C.M.W.P. No. 35472 of 1998

Munna Lal (D) through his L.Rs.

APPELLANT

Vs

Ayukta Khadya Tatha Rasad Vibhag and Others

RESPONDENT

Date of Decision : 07-05-2013

Acts Referred:

Citation : (2013) 4 AWC 3918

Hon'ble Judges : Pradeep Kumar Singh Baghel, J

Bench : Single Bench

Advocate : H.N. Tripathi, S.K. Chaturvedi and Ram Kumar Nigam, for the Appellant;

Final Decision : Allowed

Judgement

Pradeep Kumar Singh Baghel, J.—The petitioner was a barrier chowkidar in the office of the respondent No. 2 herein. He was subjected to the disciplinary proceedings on the ground that he proceeded without leave on two different dates. The petitioner having died during the pendency of the writ petition Is now represented by his legal representatives. He shall be referred as a petitioner in this order for the sake of convenience. Brief reference to the factual aspects would suffice.

The petitioner was working as Class IV employee/Barrier Chowkidar In the office of the respondent No. 2. It Is stated that he was absent from his duty from 26.6.1994 without sanction of proper leave. He was placed under suspension on 20th September, 1994. On 3.1.1995 he appeared in the office and submitted an application that he has not received the charge-sheet and in future he will not repeat the same mistake and his suspension order may be revoked. The concerned authority taking sympathetic view revoked the order by means of order dated 3.1.1995 and he was permitted to Join. Vide order dated 22.4.1995 Inquiry Officer was appointed.

During the pendency of the disciplinary proceedings it is stated that petitioner

again without moving any application absented from 1.4.1995. Another charge-sheet was issued on 3.6.1995 in respect of the said misconduct. However, no reply was submitted to the said charge-sheet. The Inquiry Officer submitted his report on 11.7.1995 wherein the charges against the petitioner were found to be proved. The Disciplinary Authority issued show cause notice on 14.7.1995 with a direction to submit reply within seven days. It is stated that the petitioner even did not reply to the show cause notice. The Disciplinary Authority after considering the enquiry report found that both the charges against the petitioner were established and it was found that the petitioner was absent from 31.5.1995 and again from 17.11.1995 his services were dismissed by means of impugned order.

2. A counter-affidavit was filed the stand taken In the counter-affidavit is that the petitioner did not submit his reply to the charge-sheet and he was absent without any proper application.

3. I have heard Sri S.K. Chaturvedi learned counsel for the petitioner and learned standing counsel.

4. Learned counsel for the petitioner submits that no enquiry report was given to the petitioner, in fact he has submitted his reply to the charge-sheet. He has drawn my attention to the Annexure-11 to the writ petition. A perusal of Annexure-11 to the writ petition reveals that petitioner has replied to the charge-sheet dated 3.6.1995. He has also drawn my attention to paragraph 21 of the writ petition wherein a detailed facts with regard to service of charge-sheet has been mentioned. A categorical statement of the fact have been made that the copy of the enquiry report was not given to the petitioner and that has caused serious prejudice to the cause of the petitioner. In absence of the enquiry report petitioner could not submit his reply effectively and that irregularity goes to root of the jurisdiction of the entire enquiry proceedings. Paragraph 21 of the writ has been replied in paragraph 19 of the counter-affidavit. Paragraph 21 and Its reply in paragraph 19 of the counter-affidavit reads as under:

Paragraph 21 of the writ petition:

21. That the impugned order of dismissal dated 21.11.1995 (Annexure-XII) to this writ petition is liable to be quashed on the following facts and circumstances:

(a) That the petitioner was a confirmed class IV employee working under respondent No. 2. The sole charge against the petitioner was absent from duty, though the petitioner proceeded on leave and thereafter continuously made applications for extension of leave which was received in the office of respondent No. 2 and was not rejected and no information in respect of rejection of the application was given to the petitioner, so the petitioner was under impression that the leave has been extended but when the petitioner appeared before the respondent No. 2 having medical fitness certificate to submit his joining report, then he was informed that he has been placed under suspension. Thereafter, without following the principle of natural justice the impugned dismissal order

was passed which is arbitrary, illegal and liable to be set aside.

(b) That no departmental enquiry was initiated against the petitioner by the appointing authority or by any competent authority but the respondent No. 2 illegally placed the petitioner under suspension without making any preliminary enquiry. The appointment of the Enquiry Officer without initiating the disciplinary proceeding against the petitioner was also without Jurisdiction.

(c) That alongwith charge-sheet issued by the Enquiry Officer which was not approved by the appointing authority no document was given to the petitioner inspite of demand of the petitioner. The petitioner submitted reply whatever was in the memory of the petitioner but the requirement of natural justice was not complied, so sufficient reply could not be given by the petitioner.

(d) That for the sole charge of absence from duty to impose major penalty of dismissal from service is not justified. It is submitted that before imposing the major penalty of dismissal respondent No. 2 did not record finding that the misconduct committed by the petitioner. In case of State of Punjab and others Vs. Dharam Singh, , Hon"ble Supreme Court held that "For absence from duty instead of removal from service, compulsory retirement is appropriate punishment.

(e) That there was no evidence on record in respect of allegation, so the impugned dismissal order is arbitrary, unfair and too harsh. Hon"ble Supreme Court in case of B.C. Chaturvedi Vs. Union of India and others, , held that "High Court can reconsider the proportionality of penalty imposed upon the employee."

(f) That before imposing the major penalty of removal from service Enquiry Report was not given to the petitioner, so the petitioner could not submit his reply.

(g) That it is incorrect to say that the petitioner did not submit reply to charge-sheet. It is submitted that though inspite of demand of petitioner the materials evidence on record was not given to petitioner and before passing the impugned order reply submitted by the petitioner was neither considered by the respondent No. 2 nor by the Enquiry Officer.

(h) That it is also incorrect to say that the petitioner did not return to duty. It is submitted that petitioner returned to duty and submitted his joining report to respondent No. 2 but the respondent No. 2 did not receive the joining report of the petitioner and told that the petitioner has been placed under suspension.

(i) That the allegations made in the impugned order that the petitioner did not return to his duty is incorrect. The petitioner proceeded on leave when he fell ill. Thereafter, he made several applications for extension of medical leave and ultimately petitioner after getting medical fitness appeared before the respondent No. 2 and requested to accept his joining report but that was refused by the respondent No. 2.

(j) That it is submitted that the impugned order has been passed on the basis of the report submitted by the Inquiry Officer but neither the enquiry report nor the contents of the enquiry report was actually given to the petitioner, so no reply could be given to competent authority in respect of enquiry report. The allegation in respect of absence from duty with effect from 1.4.1995 to 31.5.1995 without leave application is incorrect. The petitioner submitted application for extension of leave that was not considered and without passing any order on the application submitted by the petitioner in the year 1995 the impugned order has been passed.

(k) That the petitioner has been removed from service solely on the ground of absence from duty. It may be assumed for argument sake without admitting the fact that the petitioner was absent from duty then in view of settled law by the pronouncement of the Hon"ble Supreme Court penalty of dismissal from service is not justified. The petitioner should have been compulsorily retired from service, so that he may get all the post retirement benefits and the petitioner and his family may not have suffered irreparable loss.

Paragraph 19 of the counter-affidavit:

19. That the contents of para 21 of the writ petition are argumentative in nature and the same will be suitably replied to at the time of argument. It is, however, relevant to state that the contentions raised in the para under reply are not tenable in the eye of law.

5. Learned standing counsel submits that petitioner did not submit reply to the charge-sheet. He has also drawn the attention of the Court to paragraph 5 and 6 of the counter-affidavit.

6. Learned counsel for the petitioner has relied on the judgment of the Supreme Court in State of U.P. and Others Vs. Saroj Kumar Sinha, and State of Punjab and others Vs. Dharam Singh, .

7. I have heard counsel for the parties and considered their respective submissions and perused the record.

8. The petitioner was subjected to disciplinary proceedings. In the impugned order itself it is mentioned that suspension order was revoked and he was allowed to continue. However, he was again absent without any application for leave. The said fact is seriously disputed by the petitioner and he has brought on the record several applications to establish that he was suffering from Tuberculosis and he has submitted several applications which he has "sent under Postal Cover. In the enquiry it is mentioned that Disciplinary Authority has sought comments from the said department and one Shaheen Clerk submitted a report that no such application is on the record. I find the submissions of learned counsel for the petitioner that the said clerk was not examined in the departmental proceeding has considerable force. The Clerk concerned ought to have been examined to prove the said facts.

9. From perusal of the order it appears that no oral evidence was adduced by the Department to establish the charges. It is demonstrably established from the record that the copy of the enquiry report was not served upon the petitioner. From the perusal of the relevant paragraph of the pleadings extracted herein above it is irrefutable fact that the enquiry report was not served on the petitioner. The Supreme Court in *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, laid down that in case enquiry report is not served on the employee the enquiry is vitiated and fresh enquiry may be conducted after giving copy of the enquiry report to the employee concerned. In the present case the enquiry is vitiated on the other ground also, as the petitioner has brought on the record his reply to the charge-sheet. However this fact has been denied and his reply has been considered and oral evidence has been adduced confirm the charges.

10. It is a trite law that even a employee does not co-operate in the enquiry even then the department has to prove the charges in case of major punishment. Reference may be made to the Judgment of the Supreme Court in *Roop Singh Negi Vs. Punjab National Bank and Others*, and also of the Division Bench of this Court in the case of *Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another*, ; *Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills and Others*, ; *Mahesh Narain Gupta Vs. State of U.P. and Others*, ; *Subhas Chandra Gupta v. State of U.P.*, 2012 (1) UPLBEC 166 and a recent Division Bench judgment delivered in *Sohan Lal v. U.P. Cooperative Federation Ltd. and another*. Writ A No. 43331 of 2000, delivered on 11th January, 2013.

11. From the aforesaid judgments it emerges that while imposing major penalty oral evidence is necessary. In the present case no witness has been produced by the department to prove the charges. Concededly inquiry report was not served on the petitioner, for the said reasons enquiry is vitiated.

12. Learned counsel for the petitioner submits that during the pendency of the writ petition the sole petitioner died.

13. In somewhat similar circumstances the Supreme Court in the case of *Basudeo Tiwary Vs. Sido Kanhu University and Others*, , had considered the effect of the death of an employee during the pendency of the writ petition. The Supreme Court in the said case also had found that the disciplinary proceeding was vitiated as the order in the said case was found to be violative of Article 14 of the Constitution. The petitioner in the said case also died during the pendency of the case. The Supreme Court while setting aside the termination order has passed the order in the following terms:

The appellant has since demised during the pendency of these proceedings, no further direction either as to further inquiry or reinstatement can be given. We declare that the termination of the appellant by the respondent as per the notification referred to by us is invalid. Consequently, it would be deemed that

the appellant had died in harness. Needles to say that the appellant would become entitled to the payment of arrears of salary from the date of termination of his services up to the date of his death on the basis of the last pay drawn by him. Let the respondent take action within a period of three months from today to work out the arrears due to the appellant from the date of his termination till his death and pay the same to his legal representatives.

14. For the aforesaid reasons dismissal order dated 21.11.1995 (Annexure XII to the writ petition) is liable to be struck down. It is accordingly set aside and it shall be treated as the impugned order has not been passed and it would be deemed that the petitioner had died in harness.

15. The petitioner would become entitled to the payment of salary from the date of termination upto the date of death on the basis of last pay drawn by him. All the dues stated above shall be paid to the substituted petitioners within six months from the date of communication of this order.

16. The writ petition is allowed. No order as to costs.