

(2003) 08 AHC CK 0183
In the Allahabad High Court
Case No : C.M.W.P. No. 13955 of 1990

Nagar Mahapalika, Varanasi and Another	APPELLANT
Vs	
Uttar Pradesh Public Services Tribunal No. II and Others	RESPONDENT

Date of Decision : 19-08-2003

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Government of India Act, 1935 — Section 240(3)
Uttar Pradesh Nagar Mahapalika Sewa Niyamawali, 1962 — Rule 31, 8, 9

Citation : (2003) 6 AWC 5125

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : Beni Prasad Agarwal, C.K. Parekh and Anurag Pathak, for the Appellant; S.S. Sharma, M.C. Dwivedi, D.V. Jaiswal, Advs and S.C., for the Respondent

Judgement

R.B. Misra, J.—In this petition order dated 28.2.1990 (Annexure-4 to the writ petition) passed by U.P. Public Services Tribunal, Lucknow has been challenged whereby the Respondent No. 3 was reinstated in the service with all arrears of salary and allowances and seniority, etc.

Heard Sri C. K. Parekh learned Counsel for the Nagar Mahapalika, Varanasi and Sri S. S. Sharma for the Respondent No. 2 as well as Sri M. C. Dwivedi for the Respondent No. 3 Smt. Sudha Bhargava.

2. It appears that Petitioner appointed Respondent No. 3 as a Social worker in Nagar Mahapalika, Varanasi on 31.7.1967 and she was also given promotion as Extension Educator with effect from 1.8.1970. She proceeded on casual leave from 3.10.1979 to 6.10.1979 and left Varanasi. Thereafter she requested for extension of her leave and she was expected to return on 31.3.1980. Subsequently on the ground of ailment she wanted to avail leave from 20.7.1980 to 30.11.1980 and she also requested leave from 31.3.1980 to 12.7.1980, however considering the absence of the Respondent No. 3 as unauthorised and

after considering her case under Rule 157A of Financial Handbook Volume II, Parts II to IV she was terminated from service. According to Respondent No. 3 the termination could not be made under the provisions of Financial Handbook as well as provisions of U.P. Palika Centralise Rules are also not applicable and the U.P. Nagar Mahapalika Sewa Niyamavali, 1962 (in short called "Rule, 1962"). According to the Respondents the punishment order was passed by the Petitioner terminating the service of Respondent No. 3 without adopting the proper procedure as laid down under Rules 27 and 31 of "Rule, 1962" and without affording the proper opportunity of hearing to the Respondent No. 3, more so, in derogation to the provisions of Article 311(2) of the Constitution of India. The order dated 15.1.1981 is by way of an order simplicitor indicating that the service of Respondent No. 3 has been terminated treating the Respondent No. 3 as a temporary employee w.e.f. 18.12.1979. However, as contended on behalf of the Respondent No. 3 that if the circumstances are unveiled the foundation for termination of the Respondent No. 3 was to give punishment on the ground of long absence. According to the Petitioner Respondent No. 3 was a temporary employee and her long absence was not permissible, therefore, under Rule 157A of Financial Handbook Volume II the service of the Respondent No. 3 has rightly been terminated and the order of the Tribunal dated 28.2.1990 reinstating the service of the Petitioner (Respondent No. 3) with back wages is illegal.

3. Rule 27 of "Rule, 1962" deals with the punishment and Rule 31 deals with the procedure for disciplinary proceedings. For convenience Rule 31 is provided herewith as below:

31. Procedure for disciplinary proceedings.-

(1) No order (other than an order based on facts which have led to his conviction on a criminal charge) of dismissal, removal or reduction in rank (which includes reduction to a lower post or time-scale or to a lower stage in a time-scale but excludes the reversion to a lower post of a person who is officiating in a higher post), shall be passed on any servant of the Mahapalika unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the person charged and which shall be so clear and precise as to give sufficient indication to the charged servant of the facts and circumstances against him. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so directs an oral enquiry shall be held in respect of such of the allegations as are not admitted. At that inquiry such oral evidence will be led as the Inquiring Officer considers necessary. The person charged shall be entitled to cross-examine the witnesses called as he may wish provided that the officer conducting the inquiry may for sufficient reason to be recorded in writing refuse to call a witness. Neither the Mahapalika nor the servants of the Mahapalika shall

be entitled to be represented by a counsel. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the grounds thereof. The officer conducting the inquiry may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged servant.

(2) This rule shall not apply where the person concerned has absconded or where it is for other reason impracticable to communicate with him. All or any of the provisions of the rule may for sufficient reasons to be recorded in writing be waived, where there is difficulty in observing exactly the requirements of the rule and those requirements can in the opinion of the inquiring officer be waived without injustice to the person charged.

(3) This rule shall also not apply where it is proposed to terminate the employment of either a temporary servant, or of a probationer whether during or at the end of the period of probation. In such cases a simple notice of termination which in the case of temporary servant, must conform to conditions of his service, will be sufficient.

4. In view of the above provisions, it is clear that for disciplinary proceeding an employee permanent or temporary has to be served a definite charge and the documents relied upon and after affording the opportunity of hearing and allowing the employee to defend one's case by filing written statement for his defence, by adducing oral and personal hearing and adducing evidence and avail opportunity of cross-examining the witnesses and for conducting proper disciplinary proceeding day, time and place are to be indicated. In my respectful consideration the proper procedure before removing the Respondent No. 3 was to be followed in view of Rule 31 of "Rule, 1961" above mentioned. The Respondent No. 3 was by virtue of holding a civil post in Nagar Mahapalika was entitled to be given protection of Article 311(2) of the Constitution when her service was being terminated, however all these aspects were considered in the impugned order dated 28.2.1990 where the termination of Respondent No. 3 was found not legally justified.

5. The counsel for the Respondent No. 3 has referred several judgments of the Supreme Court and this Court in support of his submission for consideration, the first decision relied by the Respondent No. 3 is Khem Chand v. Union of India and Ors. AIR 1958 SC 800. In paragraph 19 of the aforesaid judgment the Supreme Court has laid down as under:

19. To summarise the reasonable opportunity envisaged by the provision under consideration includes:

(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based ;

(b) An opportunity to defend himself by cross-examining the witnesses produced

against him and by examining himself or any other witnesses in support of his defence ; and finally

(c) An opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant tentatively proposes to inflict one of the three punishments and communicates the same to the Government Servant.

In short the substance of the protection provided the rules, like Rule 55 referred to above, was bodily lifted out of the rules and together with an additional opportunity embodied in Section 240(3) of the Government of India Act, 1935, so as to give a statutory protection to the Government servant and has now been incorporated in Article 311(2) so as to convert the protection into a constitutional safeguard.

6. The next judgment relied upon by the counsel of the Respondent No. 3 is Jagdish Prasad Saxena v. State of Madhya Bharat AIR 1961 SC 1070, where the Supreme Court has held that in taking disciplinary action against the public servant ; a proper disciplinary enquiry must be held against him after supplying him with the charge-sheet, and allowing him the reasonable opportunity to meet the allegations contained in the charge-sheet.

7. Much emphasis has been given by the counsel for the Respondent No. 3 on paragraph 5 of the judgment of the Supreme Court in the case of Kulwant Singh Gill v. State of Punjab 1991 SCC 998, where the Supreme Court has observed in paragraph 5 as under:

5. The further contention of Shri Nayar that the procedure under Rule 8 was followed by issuance of the show cause notice and consideration of the explanation given by the Appellant would meet the test of Rules 8 and 9 of the Rules is devoid of any substance. Conducting an enquiry, de hors the rules is no enquiry in the eye of law. It cannot be countenanced that the pretence of an enquiry without reasonable opportunity of adducing evidence both by the department as well as by the Appellant in rebuttal, examination and cross-examination of the witnesses, if examined, to be an enquiry within the meaning of Rules 8 and 9 of the Rules. Those rules admittedly envisage, on denial of the charge by the delinquent officer, to conduct an enquiry giving reasonable opportunity to the presenting officer as well as the delinquent officer to lead evidence in support of the charge and in rebuttal thereof, giving adequate opportunity to the delinquent officer to cross-examine the witnesses produced by the department and to examine witnesses if intended on his behalf and to place his version ; consideration thereof by the Enquiry Officer, if the Disciplinary Authority himself is not the Enquiry Officer. A report of the enquiry in that behalf to be placed before the Disciplinary Authority who then is to consider it in the manner prescribed and to pass an appropriate order as for the procedure to

vogue under the Rules.

8. In the aforesaid case the Supreme Court held that without reasonable opportunity of adducing evidence both by the department as well as by the Appellant in rebuttal, examination and cross-examination of the witnesses, it cannot be said to be valid enquiry under the Rules. As observed above, there cannot be any dispute that opportunity is required to both the delinquent and the employer. The Division Bench of this Court in the case of Subhash Chandra Sharma v. M. D., U.P. Co-operative Spinning Mills Federation. Ltd. 1994 (4) AWC 3227 held that the dismissal is illegal since no regular enquiry was held in that case. It was held by the Division Bench that the evidence should have been led against the delinquent in his presence and he should have been given opportunity to cross-examine the witnesses. Similar view has been taken in another Division Bench's judgment of Smt. Ram Pyari Vs. State of U.P. and another, .

9. The Petitioner placed reliance on the judgment dated 25.5.2001 of this Court (DB) (M. Katju and R. B. Misra, JJ.) in Writ Petition No. 7133/2001, Radhey Shyam Pandey Vs. Chief Secretary U.P. and others, , where the writ Petitioner working as Incharge Executive Engineer in the Rural Engineering Services and Minor Irrigation Department was charge-sheeted for his alleged involvement of embezzlement, financial irregularities and financial loss, however, was made handicapped to participate in the inquiry for non-payment of subsistence allowance as well as legal dues during his suspension and the request of change of Inquiry Officer was not accepted by the competent authority and the ex parte inquiry was conducted behind his back without adopting proper procedure, no specific date, time and place of inquiry was fixed, oral and documentary evidence against the writ Petitioner was not adduced in his presence and he was not given opportunity to cross-examine the witnesses against him and he was not afforded opportunity to produce his own witnesses and evidences. The ex parte inquiry was found illegal and the order of dismissal of writ Petitioner was quashed while allowing the writ petition, however, keeping in view the financial loss and irregularities it was made open to the Respondents to hold a fresh inquiry in accordance with law and pass a fresh order. It is pertinent to mention that the SLP No. 15226/2001 State of U.P. v. Radhey Shyam Pandey and Ors. preferred against the above order dated 25.5.2001 was dismissed on 1.2.2002 by the Supreme Court.

10. I have heard learned Counsel for the parties. I find that though the order of termination is an order of simplicitor but intention to punish the Respondent No. 3 on the ground of long absence was the foundation and she was entitled to be given protection of the provisions of Article 311(2) of the Constitution and before termination order the disciplinary proceeding was to be conducted in view of the procedure prescribed under Rule 31 of "Rule 1962". Since the proper procedure has not been adopted and the Respondent was not afforded proper and adequate opportunity of hearing as such the termination order was not legally sustainable.

I do not find any impropriety and illegality in the said impugned order dated 28.2.1990 of learned Tribunal, therefore, this Court is not inclined to interfere so far as setting aside the termination order dated 15.1.1981 of learned Tribunal. However since an employee has right to be given pay for the work rendered by him subject to the admissibility of permissible leave in accordance to the provisions of law and the rules applicable to the service of a particular employee. One employee is not to be given salary for the period he has not worked on the principle of no pay without work. Even if it is presumed that the Respondent No. 3 was entitled for reinstated and seniority, however she had not rendered any work and she was only given due leave permissible to her after being reinstated into service but not the payment of those days for which she has not worked. The Respondent No. 3 has not rendered any service during the said period and she is not entitled to be given back wages or salary or arrears of salary or allowances etc. for the back period, however she may be permitted for seniority and if the Respondent No. 3 had already been paid her salary for the period she had not worked and she is not entitled for salary from 15.1.1981 till the date of her reinstatement after adjusting permissible leave, therefore, excess payment is to be adjusted while making payment to Respondent No. 3's retiral benefit. The payment, which has already been made, is to be adjusted towards the payment of retirement.

11. In view of the above observations, writ petition is dismissed.