
(2015) 04 AHC CK 0100
In the Allahabad High Court
Case No : Special Appeal No. 191 of 2015

Purvanchal Bank

APPELLANT

Vs

Umesh Prasad Gupta

RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Citation : (2015) 4 ADJ 364 : (2015) 4 ALJ 71 : (2015) 110 ALR 862 : (2015) 3 AWC 2898 : (2015) 3 ESC 1317 : (2015) 2 UPLBEC 1523

Hon'ble Judges : D.Y. Chandrachud, C.J.;Manoj Kumar Gupta, J

Bench : Division Bench

Advocate : Aditya Kumar Singh and Ashok Khare, for the Appellant; M.R. Goswami, Advocates for the Respondent

Judgement

Manoj Kumar Gupta, J.—This intra Court appeal is directed against a judgment of the learned Single Judge dated 27.2.2015, whereby the writ petition filed by the respondent was allowed and the punishment of removal inflicted on him during the course of disciplinary proceedings has been set aside. He has been held entitled to reinstatement in service without backwages and the punishment of removal has been substituted with that of the withholding of two increments with cumulative effect. The background facts are that the respondent while being posted as messenger in Branch Kevara. District Ballia of the Ballia Etawah Gramin Bank (now stands merged with Purvanchal Gramin Bank, Gorakhpur and has been re-designated by the name of the appellant) was served with a charge-sheet dated 31.10.2011 for alleged unauthorized absence from duty totaling 355 days during the year 2009, 2010 and 2011. The other charge was that inspite of registered notices to show-cause regarding unauthorized absence and to report on duty forthwith, the respondent failed to comply with the said direction. A regular disciplinary inquiry was conducted and the Inquiry Officer submitted a report on 23.7.2012, in which the respondent was found guilty of the charges levelled against him. He was issued a show-cause notice dated 4.9.2012 against the proposed punishment of removal from service. In response, the respondent gave his reply on 17.9.2012, in which he submitted that the absence was on

account of reasons beyond his control, as he was ill during the said period. It was further stated that his absence be condoned and an opportunity be granted to him to serve the Bank. However, the disciplinary authority, finding no credible evidence to justify the absence of the respondent, by order dated 5.10.2012, inflicted the punishment envisaged under Regulation 39.2 (b)(v) of the Ballia Etawah Gramin Bank (Officers and Employees) Service Regulations, 2010 which stipulates removal from service but which does not disqualify for future employment. Aggrieved, the respondent carried the matter in appeal before the Chairman of the Bank, which was also dismissed on 11.1.2013. The respondent, thereafter, filed a revision on 1.2.2013 and during its pendency, the respondent filed the writ petition challenging the order of the disciplinary authority dated 5.10.2012 and the order of the appellate authority dated 11.1.2013.

2. Before the learned Single Judge it was conceded by the parties that the revision filed by the respondent was not maintainable and, therefore, the learned Single Judge proceeded to hear the petition on merits and allowed it by the impugned judgment dated 27.2.2015. The learned Single Judge held that the period of unauthorized absence until 1.10.2010 was the subject-matter of an earlier disciplinary proceeding against the respondent and for which, he was also punished by withholding annual increments for two years with cumulative effect. It was thus concluded that for the alleged misconduct which is the subject-matter of the present proceedings, the respondent had already been punished in the past. It was further held that absenteeism during the year 2009, 2010 and 2011 on which a charge of misconduct had been levelled against the respondent in the present proceedings, were all treated as leave without pay. It was thus concluded as under:

"From time to time the petitioner was absent but equally he had been punished either by stoppage of annual increments for two years with cumulative effect or had been sanctioned leave without pay. Therefore, the Court is of the view that the order impugned is disproportionate."

3. The basic issue before this Court is whether the respondent had already been punished for the alleged absenteeism which now constitutes the main charge of misconduct against him and whether the same had been condoned by sanctioning leave without pay and if it was so, whether the appellant Bank was still justified in treating it to be an act of misconduct. The other ancillary question which would arise is whether in the facts and circumstances of the case, the punishment imposed was commensurate to the alleged misconduct on part of the respondent.

4. It appears from the material placed on record before the writ Court that the present disciplinary proceedings were drawn on the basis of a charge-sheet dated 31.10.2011, in which there were two charges against the respondent; (1) the respondent was unauthorisedly absent from duty for 355 days during the year 2009, 2010 and 2011 (88 days in the year 2009, 189 days in 2010 and 78 days in 2011); and (2) in spite of registered notices to the respondent to furnish

an explanation for unauthorized absence and to report on duty forthwith, the respondent failed to comply with the directions. For convenience of reference, the charges are reproduced below:

5. In the earlier proceedings by a charge-sheet dated 31.12.2008, the respondent was charged for unauthorized absence of 363 days during the period 2004 to 2008. In this regard, the charge, inter alia, was as under:

6. It thus transpires that though the charge in the earlier proceedings was for unauthorized absence from duty, it was for an entirely different period i.e. for the years 2004 to 2008, whereas in the instant proceedings, the charge was regarding unauthorized absence during the years 2009, 2010 and 2011.

7. Counsel for the respondent, however, drew the attention of the Court towards an administrative order dated 3 November, 2010 and submitted that the findings in the impugned judgment have been recorded by the learned Single Judge in context of the said order. We, therefore, consider it useful to reproduce the relevant part of the said order dated 3 November, 2010 as follows:

8. Admittedly, on the basis of the earlier disciplinary proceedings two increments of the respondent were withheld on permanent basis and it was specifically provided that during this period he would not earn any increment. The order dated 3 November, 2010 is in sequel to the order of punishment, passed in the earlier proceedings. The order records that on 1.10.2010, the date on which the disciplinary authority passed the order inflicting the punishment, the respondent was getting basic salary of Rs. 9800/-. It further mentions that since increments have been withheld for two years, the said period would expire on 1.10.2012. It goes on to mention that from 1.5.2004 to 1.10.2010 the respondent remained without pay for 649 days, being the total duration of his unauthorized absence and as a result whereof, the period of next increment would get extended to 19.2.2013.

9. Concededly, the period of unauthorized absence was treated as loss of pay, as during the said period the respondent was neither given pay nor any allowances. In view of the said fact, the order dated 3 November, 2010 states that the period of unauthorized absence also cannot count for increments and consequently, the date of increment gets extended from 1.10.2012 to 19.2.2013. The order dated 3 November, 2010 does not indicate that the respondent was punished by granting leave without pay during the period of his unauthorized absence. The unauthorized absence for the period 2009, 2010 and 2011 was merely taken into consideration for reckoning the date on which the next increment became due.

10. It is noteworthy that under the Service Regulations, an extract of which has been filed alongwith writ petition, it is provided that in certain circumstances extraordinary leave can be sanctioned which, incidentally, the respondent also claimed, though not sanctioned in his case. Therein, it is specifically provided that even where extraordinary leave is sanctioned. "No pay and allowances are admissible during the period of extraordinary leave and the period spent on such

leave shall not count for increment." It is a clear indicator of the fact that even where extraordinary leave is sanctioned, resulting in loss of pay, the period spent on such leave shall not count for increment. In the instant case, the case of the appellant Bank is that even extraordinary leave had not been sanctioned, as the respondent was not entitled for the same. The period of absenteeism was unauthorized and the respondent having not served the Bank during this period, the same cannot count for purposes of grant of increment to him.

11. Loss of pay is based on the principle of "no pay no work". It is an action quite separate and distinct from a disciplinary proceeding, which may visit an employee for such misconduct. In *State of U.P. and Others Vs. Madhav Prasad Sharma*, (2011) 128 FLR 915 : (2011) 1 JT 326 : (2011) 1 SCALE 209 : (2011) 2 SCC 212 : (2011) 1 SCC(L&S) 300 : (2011) 1 SCR 266 : (2011) AIRSCW 752 : (2011) 1 Supreme 334 , the Apex Court was considering the question whether the employer who had already sanctioned the leave, albeit without pay, was justified in terminating the service for the same charge and whether such an action is hit by the doctrine of double jeopardy. The Apex Court after noticing the relevant statutory service rules concluded by holding that leave without pay is not a punishment prescribed under the rules and thus, denial of salary on the ground of "no pay no work" cannot be treated as a penalty nor the doctrine of double jeopardy would be attracted in case the employee is inflicted with the punishment of dismissal for the same charge. The Apex Court observed as under:

".....The perusal of major and minor penalties prescribed in the above Rule makes it clear that "sanctioning leave without pay" is not one of the punishments prescribed, though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not one of the punishments prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties. Denial of salary on the ground of "no work no pay" cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms. Rule 7 empowers the Government or any officer of the police to award the punishment mentioned in Rule 4. Rule 8 provides for punishment of dismissal and removal. Thus the punishment of dismissal from the service is the punishment which has been awarded to the respondent in accordance with Rules 4 and 8 of the Rules. There is no question of awarding two punishments in respect of one charge."

12. In the same judgment, the Supreme Court also considered the question whether by sanctioning leave without pay the employer condones the misconduct. The Supreme Court noticed that initially there was some doubt on the issue on account of a previous decision of the Apex Court in the case of *The State of Punjab and Others Vs. Bakshish Singh*, AIR 1999 SC 2626 : (1999) 82 FLR 761 : (1998) 7 JT 142 : (1999) 1 LLJ 1208 : (1998) 5 SCALE 580 : (1998) 8 SCC 222 : (1999) SCC(L&S) 183 : (1998) 1 SCR 478 Supp : (1999) 1 UJ 18 :

(1999) AIRSCW 1704 : (1998) 8 Supreme 128 , as it conveyed an impression that where the absence has been treated as leave without pay, the charge of misconduct did not survive. In order to clear the issue, the matter was referred to a Larger Bench in Maan Singh Vs. Union of India (UOI) and Others, AIR 2003 SC 1800 : (2003) 97 FLR 1 : (2003) 2 JT 514 : (2003) 2 SCALE 209 : (2003) 3 SCC 464 : (2003) SCC(L&S) 314 : (2003) 2 SCR 129 : (2003) 2 SLJ 359 : (2003) AIRSCW 1245 : (2003) 2 Supreme 247 , wherein the Supreme Court clarified that the earlier judgment in Bakshish Singh case did not affirm the said legal position but it was only confined to the issue of remand by the High Court to the punishing authority for imposing fresh punishment. It was held that in the case of Maan Singh the Supreme Court re-affirmed the law laid down in State of M.P. v. Harihar Gopal, (1969) 3 SLR 274 (SC), wherein it was held that regularization of unauthorized absence was to ensure that there is no break in service and thus, empowers the disciplinary authority to continue with the disciplinary proceedings.

13. In view of the discussion made above, it is clear that the learned Single Judge had erred in concluding on the basis of the administrative order dated 3 November, 2010 that the respondent was subjected to disciplinary proceedings in the previous inquiry for absenteeism, which is the subject-matter of the present proceedings and also in so far as it holds that the period of unauthorized absence was treated as leave without pay.

14. Before parting with the issue, it is pertinent to note that even in the grounds taken in the writ petition, there is not even a suggestion to the effect that the period of unauthorized absence was sanctioned as leave without pay. Rather, the contention was that the absence was for reasons beyond the control of the respondent and, therefore, the appellant should have sanctioned medical leave or other permissible leave for the said period. In any case, as discussed above, even if for the sake of argument it is assumed that the appellant had sanctioned leave without pay during period of unauthorized absence, which is the subject-matter of the present disciplinary proceedings, the same would neither absolve the respondent of the misconduct, nor would reduce the rigour of the misconduct, so as to justify interference with the order of the disciplinary authority.

15. On the one hand, the learned Single Judge has held that the respondent had already been punished for the same misconduct in the previous inquiry but had, thereafter, proceeded to hold that the respondent is guilty of misconduct of unauthorised absence from duty and should definitely be punished, which in our opinion is incongruous. We have already noticed that the respondent was punished for unauthorised absence of 363 days during the year 2004 to 2008 by withholding two increments on permanent basis, but even then the respondent did not mend his ways. He continued to remain absent without getting the leave sanctioned from the Bank. The period of absence was 88 days in 2009, 189 days in 2010 and 78 days in 2011. He was given notices to submit his explanation for

unauthorised absence and to forthwith report on duty but he had not complied with the notices, as is evident from the findings recorded by the disciplinary authority in its order dated 05.10.2012. If the delinquent is found to be indulging in such misconduct repeatedly, as in the instant case, where he was found to be incorrigible, it would amount to a grave misconduct warranting award of a major penalty.

16. The learned Single Judge has noticed certain decisions where the Courts have intervened in regard to the quantum of punishment imposed by the disciplinary authority. In *Mithilesh Singh Vs. Union of India (UOI) and Others*, AIR 2003 SC 1724 : (2003) 97 FLR 122 : (2003) 2 JT 264 : (2003) 2 SCALE 467 : (2003) 3 SCC 309 : (2003) SCC(L&S) 271 : (2003) 2 SCR 377 : (2003) 1 SLJ 27 : (2003) AIRSCW 1145 : (2003) 2 Supreme 302 the learned Single Judge noticed that the Supreme Court held that "absence from duty without proper intimation and permission amounted to grave offence warranting removal from service". The learned Single Judge had further noticed that a similar view has been taken by the Supreme Court in *State of U.P. Vs. Ramakant Yadav* 2003 (1) AWC 84(SC) and *State of U.P. and others Vs. Ashok Kumar Singh and another*s, AIR 1996 SC 736 : AIR 1995 SC 736 : (1995) 6 SCALE 465 : (1996) 1 SCC 302 : (1996) 1 UJ 6 .

17. However, it appears from the impugned judgment that the learned Single Judge relied on the decisions cited on behalf of the respondent. The first of those judgments is in *Ranjit Thakur Vs. Union of India (UOI) and Others*, AIR 1987 SC 2386 : (1988) CriLJ 158 : (1987) 4 JT 93 : (1988) 1 LLJ 256 : (1987) 2 SCALE 773 : (1987) 4 SCC 611 : (1988) 1 SCR 512 : (1989) 1 SLJ 109 , where it was held that "the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Marital, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review." In *Union of India and others Vs. Giriraj Sharma*, AIR 1994 SC 215 : (1994) 1 LLJ 604 : (1994) 3 SCC 755 Supp the incumbent had overstayed the period of leave by 12 days. The Supreme Court found that though there was overstay but the same was satisfactorily explained and for circumstances beyond the control of the incumbent. The counsel for the respondent conceded before the Supreme Court that the authorities could have imposed a minor penalty and in this view, the order of dismissal was set aside leaving it open to the department to impose a minor penalty, if it so desired. However, it is noticeable that even in that case, the Supreme Court did not itself prescribe the punishment as it is always considered to fall in the exclusive province of the employer. The next decision is in *Alexandar Pal Singh Vs. Divisional Operating Superintendent* 1987 (2) ATC 922 (SC), where the charge was that the delinquent had not reported to a government hospital for treatment and instead submitted the certificate of a private doctor. The Supreme Court after holding that it was not a case for award of a major penalty, proceeded on the statement

made by counsel appearing for the Department leaving the question of punishment to the Court. In the aforesaid background, the Supreme court directed withholding of two increments with cumulative effect for a period of three years. The next judgment is in Harpal Singh Vs. State Public Services Tribunal, Lucknow 2000 (2) AWC 1075, where a Division Bench of this Court after holding that the incumbent was only guilty of negligence quashed the order of dismissal passed by the disciplinary authority and further held that a severe warning and half of back wages would serve the ends of justice.

18. However, in the present case, as noticed above, the charge against the respondent is not merely of unauthorised absence but it is evident that the respondent since he had joined service, had been in the habit of remaining unauthorisedly absent from duty. This was notwithstanding the withholding of two increments in the past. The disciplinary authority, while passing the order of removal from service dated 05.10.2012, had specifically taken notice of the said fact. He had also noticed the finding returned by the enquiry officer on the second charge that inspite of repeated notices, the respondent had neither furnished any satisfactory explanation for his absence, nor had reported for duty. The Court does not ordinarily interfere with the quantum of punishment inflicted by the disciplinary authority unless the punishment awarded is grossly disproportionate to the misconduct proved, and thus would shake the conscience of the Court. In the present case, we do not find that any such ground is made out. In our view, keeping in mind the totality of the facts and circumstances of the case, it cannot be said that infliction of punishment of removal, which does not disqualify the respondent for future engagement, by the disciplinary authority, was in any manner harsh or disproportionate to the charges proved against the respondent. We are unable to subscribe to the view of the learned Single Judge that the punishment imposed was disproportionate, as to warrant interference by the writ-Court.

19. Accordingly, the appeal stands allowed. The judgment of the learned Single Judge dated 27.02.2015 stands set aside and Writ-A No. 28740 of 2013 shall stand dismissed. No order as to costs.