

(2013) 04 DEL CK 0381
In the Delhi High Court
Case No : Writ Petition (C) 1253 of 2012

Radhey Shyam

APPELLANT

Vs

NDMC and Others

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 148, 149, 307, 323

Citation : (2013) 4 SCT 38

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Rajinder Dhawan, for the Appellant; Arun Bhardwaj, for the Respondent

Judgement

Pradeep Nandrajog, J.—On May 25, 1970 the petitioner joined service under New Delhi Municipal Council (NDMC) as a Vaccinator. He resided in village Fatehpur Billoch, District Faridabad (Haryana). Pertaining to an incident dated November 03, 1990 relating to a plot of land in said village involving one Net Ram during which some persons received gun-shot wounds, FIR No. 228 for offences punishable u/s 323/ 307/ 148/ 149 IPC read with Section 27 of the Arms Act was lodged by Net Ram at PS Sadar Ballabgarh the same day i.e. November 03, 1990 in which the petitioner was named as accused. Charge-sheeted and tried pursuant to the FIR aforesaid, vide judgment dated March 22, 1996 the petitioner was convicted by the Court of Sessions for offences punishable u/s 307 IPC and Section 27 of the Arms Act. Vide order on sentence dated March 25, 1996 he was sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine in sum of Rs. 5,000/- for having committed the offence u/s 307 IPC and pertaining to the offence u/s 27 of the Arms Act to undergo rigorous imprisonment for one year and pay fine in sum of Rs. 100/-.

2. Challenging the conviction and the sentence before the High Court of Punjab & Haryana and seeking suspension of sentence, petitioner was admitted to bail and

upon the fact of he being convicted coming to the knowledge of the department the petitioner was placed under suspension on May 10, 1996. He was served with a show-cause notice under Rule 19 of the CCS (CCA) Rules 1965 requiring him to respond to the proposed action of why penalty of he being dismissed from service be not inflicted upon him keeping in view the gravity of the offence committed by him; and as proved at a criminal trial.

3. It is not in dispute that Rule 19 of the CCS (CCA) Rules 1965 lays down a special procedure in certain cases and empowers the Disciplinary Authority, in supersession of Rule 14 to Rule 18 of the CCS (CCA) Rules 1965, to pass such order as it deems fit against a Government servant who has been convicted on a criminal charge but after providing an opportunity to the Government servant to make a representation against the proposed order, which by its very nature would be a penal order.

4. Petitioner submitted a reply on July 22, 1996 to the show-cause notice and regretfully we note that the Disciplinary Authority slept over the matter like Rip Van Winkle, not for 20 years, but for 8 years, and the result was that placed under suspension on May 10, 1996, the petitioner continued to remain under suspension till he superannuated on August 31, 2004.

5. No action was taken to pay terminal dues to the petitioner. Being allowed to superannuate from service on August 31, 2004, nobody realized that power under Rule 19 of the CCS (CCA) Rules 1965 could no longer be exercised; and things were left floating.

6. On August 13, 2007 appeal filed by the petitioner before the Punjab & Haryana High Court was disposed of upholding the conviction but sentence imposed was modified to the period already undergone with further direction that petitioner would pay Rs. 70,000/- as compensation to the injured.

7. The petitioner had been making representations that his terminal dues should be paid. The department continued to sleep till when on July 22, 2008, exercising power under Rule 9 of the CCS (Pension) Rules 1972, which permits a cut in pension or gratuity payable or both, in full or in part, if a Government servant having pensionable service is found guilty of a grave misconduct, penalty of 100% cut in pension as also gratuity was inflicted upon the petitioner, and the operative part of the order reads as under:-

Therefore, considering the fact that Shri Radhey Shyam has been convicted under Sections of IPC and Arms Act, he is liable to be dismissed from Municipal service under Rule 19 of the CCS (CCA) Rules, 1965. Since Shri Radhey Shyam has already completed his superannuation age during the pendency of his appeal i.e. on 31/8/2004, imposition of a major penalty of "Dismissal from Municipal Service" upon him is not possible. Therefore, I am of the considered opinion that the ends of justice would be made if the pension and gratuity payable to Shri Radhey Shyam, ex-vaccinator, Health Department NDMC, New Delhi is withheld permanently under Rule 9 of CCS (Pension) Rules, 1972

8. The penalty aforesaid was passed ignoring the mandate of Rule 9 of the CCS (Pension) Rule 1972 requiring a notice to be served upon the retired employee intimating the reason for the proposed action of cut in pension and/or gratuity. The Disciplinary Authority passed the order in furtherance of the show-cause notice dated July 01, 1996 which has been issued under Rule 19 of the CCS (CCA) Rules 1965. Challenge by the petitioner to the penalty order dated July 22, 2008 under WP(C) No. 8626/2008 was unsuccessful when the writ petition came to be dismissed on December 05, 2008, but a technical victory was won by the petitioner when LPA No. 17/2009 filed by the petitioner challenging the decision dated December 05, 2008 was disposed of quashing the penalty imposed vide order dated July 22, 2008, for the reason no show-cause notice was issued under the Pension Rules; but the department was left free to take action as per law.

9. The result was that on July 07, 2009 a show-cause notice was issued to the petitioner proposing to withhold entire gratuity and pension i.e. inflict penalty of 100% cut in gratuity and pension. Receiving the representation made by the petitioner against the penalty proposed, the proposed penalty was inflicted as per order dated September 08, 2009, operative part whereof reads as under:-

And whereas I have once again carefully gone through the relevant records of the case and also considered the written submissions of defence very patiently submitted by Shri Radhey Shyam at the time of personal hearing but I do not find any reason or mitigating factor warranting for taking a lenient view in the matter. It cannot be ignored that Shri Radhey Shyam was convicted u/s 307 of IPC and u/s 27 of the Arms Act and is already undergone rigorous imprisonment for the charge of attempting to murder a person. Apart from the above, it is also a fact that Shri Radhey Shyam ceased to be a public servant as soon as he was convicted for criminal charges and as such, he does not deserve any leniency.

Therefore, keeping in view all the facts and circumstances of the case I am constrained to withhold the entire pensionary benefits permanently in respect of Shri Radhey Shyam under authority conferred upon under Rule 9 of the CCS (Pension) Rules, 1952

10. Aggrieved by the order dated September 08, 2009 petitioner filed OA No. 304/2010 which was disposed of vide order dated November 10, 2010 requiring the Disciplinary Authority to reconsider the matter; for the reason the Tribunal found the so called reasons justifying penalty inflicted to be no reasons in the eyes of law; and pass a reasoned order.

11. Confused by the language of the order passed by the Tribunal and thinking that the petitioner was required to be personally heard, but no evidence being required to be led, the Disciplinary Authority issued a memorandum on February 18, 2011 calling upon the petitioner to appear for a skeleton inquiry on February 22, 2011, and as we were given to understand, officers of NDMC call personal hearings as skeleton inquiry.

12. The Disciplinary Authority passed an order on April 15, 2011 imposing

penalty of 100% cut in pension and gratuity.

13. Challenging the penalty imposed vide OA No. 2004/2011 as communicated to him vide communication dated April 15, 2011 the petitioner re-visited the Tribunal raising the following issues:-

(i) The memorandum dated February 18, 2011 requiring him to appear for a skeleton inquiry on February 22, 2011 was received by him on February 23, 2011 and as a consequence he was denied the opportunity to present his case.

(ii) The offence committed by the petitioner was not a serious offence evidenced by the fact that the High Court reduced the sentence to the period already undergone and further the said offence was committed not with reference to any official acts but a private affair concerning the petitioner. We highlight that penalty under Rule 9 of the CCS (Pension) Rule 1972 can be levied only for serious misconduct.

14. Both contentions have been negated by the Tribunal as per impugned decision dated January 10, 2012. Hence this petition.

15. As regards petitioner not being granted any hearing on February 22, 2011, suffice would it be to state that there is no requirement to grant any personal hearing. As noted above, the Division Bench of this Court deciding LPA No. 17/2009 on March 03, 2009 had required the Disciplinary Authority to serve a show-cause notice upon the petitioner disclosing the grounds on which penalty was proposed to be imposed, which the Disciplinary Authority did by issuing a show-cause notice dated July 07, 2009. Considering the response filed by the petitioner penalty was inflicted vide order dated September 08, 2009 which was opined by the Tribunal as per the decision dated November 10, 2010 as not containing adequate reasons, resulting in the matter being directed to be reconsidered by the Disciplinary Authority and thus the Disciplinary Authority was only obliged to pass a reasoned order and not go about holding any skeleton inquiry. Thus, it is inconsequential that the petitioner could not participate at the skeleton inquiry.

16. As regards the quantum of penalty imposed, it is settled law that if a Government servant gets ensnared in the process of the criminal law for a private act of indiscretion, the consequences of said entanglement have to be faced in service jurisprudence depending upon the moral turpitude, and it is no answer to say that the misdemeanour did not pertain to an official act. Can a rapist Government servant be retained in service?

17. But, when we read the penalty order dated April 15, 2011, it becomes manifestly clear that the Disciplinary Authority has, while penalizing the petitioner, tried to save his own skin for the reason the Disciplinary Authority was covering up its indiscreet act of omission, in the form of the petitioner being suspended on May 10, 1996 due to he being convicted by the Court of Sessions. Thereafter a show-cause notice was served upon the petitioner as to why penalty

of dismissal from service be not inflicted upon him under Rule 19 of the CCS (CCA) Rules 1965, but no order thereon was passed resulting in petitioner superannuating from service on August 31, 2004. Even thereafter the Disciplinary Authority kept on sleeping, and to cover up his inaction, passed the order on July 22, 2008 inflicting a penalty under Rule 9 of the CCS (Pension) Rules 1972, but rested the same on the show-cause notice issued for the proposed action under Rule 19 of the CCS (CCA) Rules 1965; which was faulted by the Division Bench of this Court on March 03, 2009. To cover up the supine act of indifference and negligence as also omission of the Disciplinary Authority, the severest penalty has been inflicted upon the petitioner, which is 100% cut in pension as also gratuity.

18. It may be true that the act of the petitioner in firing from a firearm and causing such injuries which attract the offence of attempt to murder, is a serious act and although committed in his personal affair, being a Government servant, some level of probity was expected from the petitioner. The act is a grave misconduct.

19. That the High Court let off the petitioner with a light sentence while maintaining his conviction does not detract from the severity of the criminal wrong and especially when its reflection has to be found in a civil proceeding. It is trite that the same act could be made the subject matter of a criminal as well as a civil action.

20. We have noted herein above that the petitioner had joined service as a Vaccinator on May 25, 1970. His service under the department has been selfless and without any blame. The unfortunate incident in his personal affairs is the only source of taint in his life. Serving the department till he was suspended on May 10, 1996, the petitioner was allowed to superannuate from service due to the supine indifference and negligence of the Disciplinary Authority.

21. Since we have found a taint in the penalty order passed, in the form of the Disciplinary Authority wanting to protect itself for the act of omission of the Disciplinary Authority, corrective action needs to be taken by us for the reason it is settled law that where the taint of a personal bias or a motive is found in an order, the same has to be set aside. Ordinarily, the matter needs to be remanded to the Disciplinary Authority to take decision afresh, but in the instant case we do not do so for the reason it would be difficult for any Disciplinary Authority to overcome the consequence of the supine indifference of the Disciplinary Authority. For if the Disciplinary Authority imposes a lesser penalty by taking into account the act of omission of the Disciplinary Authority, the Disciplinary Authority may come under a cloud itself. Thus, we take upon ourselves the task of inflicting the penalty, a task which we can perform inasmuch as law empowers this Court to do so, but upon an exceptional circumstance, which we have found as above.

22. A pension is not a bounty. It is earned by the dint of labour. Of course, it is

liable to be forfeited even after superannuation from service, but upon a grave misconduct being found, and further the forfeiture can be partial or full.

23. The purpose of a penalty is to penalize the wrongdoer and at the same time set an example for the others. Any penalty which is disproportionate is bound to cause unrest and fear in the mind of the employees. It is settled law that while inflicting penalty all relevant, mitigating as well as aggravating circumstances, have to be kept in mind.

24. The mitigating circumstances favourable to the petitioner are his long length of service. No blemish in the service. The offending act being not in discharge of his official duties. No illegal gain made by the petitioner. No loss caused to the department. The aggravating circumstances would be the petitioner as a Government servant using a firearm to cause grievous injuries attracting the offence of attempting to murder.

25. Weighing all the pros and cons, adequate penalty which would meet the ends of justice would be 50% cut in gratuity and pension.

26. We set aside the impugned order dated January 10, 2012 passed by the Tribunal. We dispose of the instant writ petition as also OA No. 2004/2010 modifying the penalty order dated April 15, 2011 and impose 50% cut in pension and 50% cut in gratuity payable to the petitioner.

27. Compliance be made with our decision i.e. gratuity payable be released and arrears of pension as required to be paid be paid within 12 weeks from today. Parties to bear their own costs.