(2015) 12 DEL CK 0269

In the Delhi High Court

Case No : W.P. (C) 5304/2008 and CM Appl. 10141/2008

Rajendra Singh APPELLANT

Vs

U.O.I. and Others RESPONDENT

Date of Decision : 22-12-2015

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (2016) 226 DLT 392

Hon'ble Judges : V. Kameswar Rao, J.

Bench : Single Bench

Advocate : S.K. Das, Advocate, for the Appellant; Naushad Ahmed Khan, Advt., for the Respondent

Judgement

V. Kameswar Rao, J.—The challenge in this writ petition is to the dismissal order dated June 18, 2008, show-cause notice dated May 16, 2008, enquiry report dated May 12, 2008 and charge sheet dated December 28, 2007.

The Facts:-

2. Some of the relevant facts are, a show cause notice dated September 14, 2007 was issued to the petitioner calling for his explanation in relation to his alleged absence from duty at Raipur Unit, as also non maintenance of the attendance register. It is the case of the petitioner that a reply to the show cause notice dated September 24, 2007 was filed denying the allegations. Vide another Office Memorandum dated October 9, 2007, petitioner was called upon to explain his alleged commission of misconduct by remaining absent unauthorisedly from the duty. Vide his reply dated October 30, 2007, the petitioner held out assurance of discharging of his duties at Raipur Unit. A charge sheet dated December 28, 2007 was served upon the petitioner containing four Articles of Charge being;

(i) Disobey of Office Orders dated July 5, 2007, July 9, 2007 and July 15, 2007 violating Rule 47, Rule 44 and 33 (i) (b) & (c) of the FISHCOPFED Staff

Regulations;

(ii) Unauthorised absence from duty violating Rule 15 (iii), 31, 32(2), 33 (i) (b) & (c), 43, 44(a) and (d) of the FISHCOPFED Staff Regulations;

(iii) Negligence of duty violating Rule 44(a), (b) & (g), Rule 33 (i), (a), (b) & (c) and Rule 33 (ii), (iii), (iv) of the FISHCOPFED Staff Regulations;

(iv) Insubordination and disobedience violating Rule 44(a) and (i) of the FISHCOPFED Staff Regulations.

3. It is the case of the petitioner that he submitted the written statement of defence dated January 8, 2008 denying the allegations contained in the charge sheet. The Enquiry Officer appointed vide letter dated February 4, 2008 informed the petitioner about the preliminary hearing to be held on February 21, 2008 and February 22, 2008 at Raipur. It is the case of the petitioner, the petitioner vide his letter dated February 12, 2008, addressed to the Enquiry Officer, he raised certain fundamental issues with regard to his functioning as the Enquiry Officer and expressed his inability in the proceedings because of non payment of salary with effect from July 2007. The petitioner would submit, that he appeared before the Enquiry Officer on February 22, 2008 and the Enquiry Officer refused to postpone the proceedings on the ground of non payment of salary and passed the order advising the petitioner to borrow money from his other sources. The petitioner, under protest, did not attend the proceedings on March 24, 2008 and March 25, 2008 and the Enquiry Officer proceeded ex-parte against the petitioner. The Enquiry Officer concluded the proceedings ex-parte and submitted his report dated May 12, 2008, wherein he had proved all the charges against the petitioner. Another show cause notice dated May 16, 2008 was issued calling upon the petitioner to submit his representation against the proposed penalty of dismissal from service. The petitioner submitted his reply vide letter dated June 5, 2008. The petitioner''s case is, vide the impugned order dated June 18, 2008 issued under the signature of the President of the Board of Directors and the respondent No. 3 i.e. the Managing Director, a penalty of dismissal from service was imposed on the petitioner.

4. Mr. Sanjay Kumar Das, learned counsel for the petitioner would challenge the impugned orders by stating that the order of dismissal is unsustainable, as the same has been issued by an Authority not empowered to issue such orders under the provisions of the Multi State Co-operative Societies Act, 2002 by referring to Section 49 of the Act, which inter-alia states that; (i) the Board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its function under the Act and; (ii) Without prejudice to the generality of the foregoing powers, such power shall include the power to appoint and remove a Chief Executive and such other employees of the Society as are not required to be appointed by the Chief Executive. Thus, it is the Board of Directors of the respondent Federation, who can function as Disciplinary Authority as neither the Staff Regulations nor bye-laws contain any provision vesting disciplinary power

either on the President or the Managing Director or jointly by them. In any case, it is his submission that disciplinary power has to be exercised either by the Board of Directors or the Managing Director being appointing authority. It cannot be by the President and the Managing Director jointly. He would also state, that the impugned order is a non speaking order considering the fact that none of the grounds taken by the petitioner in his reply to the show cause notice imposing the penalty of dismissal, have been considered by the so-called Disciplinary Authority or any reasons recorded to that effect. He would also state, that the ex-parte enquiry proceedings are liable to be declared vitiated as the same run contrary to the Principles of law laid down in Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, , to contend that every Government Servant under suspension who has pleaded his inability to attend the enquiry on account of financial stringency by non payment of subsistence allowance to him, the proceedings conducted against the said Government Servant ex-parte would be in violation of provisions of Article 311 (2) of the Constitution of India as the person concerned did not receive a reasonable opportunity to defend himself in the disciplinary proceedings. He would also state that the entire enquiry proceedings stands vitiated on the ground of a past transaction between the Enquiry Officer and the Managing Director respondent No. 3 in which the respondent No. 5 I.O. gave a clean chit to the respondent No. 3 in an enquiry proceeding. In this regard, he would rely upon the judgment of the Supreme Court in the case of Manak Lal Vs. Dr. Prem Chand, . He also clarifies that the salary to him was released on June 16, 2008, only after the order dated May 8, 2008 was passed by this Court in W.P.(C) No. 8535/2007, whereas the Enquiry Officer had concluded the ex-parte proceedings in a hurry on May 12, 2008 to deny the petitioner, a reasonable opportunity of hearing. It is also the submission of Mr. Sanjay Das that the petitioner was denied an opportunity to prefer an appeal against the penalty order as the show cause notice dated May 16, 2008 and order of dismissal dated June 18, 2008 were issued jointly by the Disciplinary Authority and the President of the Board of Directors. He challenges the finding of the Enquiry Officer on merit as well. According to him, the Enquiry Officer, in his report solely relied upon the testimony of two prosecution witnesses; (i) The officer of the respondent Federation who came to Raipur on September 8, 2008 and did not find the petitioner in office on September 8, 2008 and (ii) The officer of the respondent Federation who had been deputed to Raipur and did not find the petitioner in office at 8.25 hours on October 12, 2007.

5. So far as the ground No. 1 is concerned, the respondent Federation observes a five day working and thus, the petitioner was under no obligation to remain present in office on September 8, 2008, which happened to be a Saturday and unless he was specifically instructed to do so in the interest of the organisation. So far as other ground is concerned, the normal office timings being 9 am to 5.30 pm, it was obvious for the petitioner not to remain present at 8.25 hours in the morning at the office premises when the senior officials alleged to have visited the office and could not find the petitioner there.

6. According to Mr. Das, the first two Articles of Charge levelled against the petitioner were disobeying of office order and negligence of duty and the enquiry report states that the charged officer did not join duty at transferred place of posting within stipulated time, whereas the petitioner admittedly joined Raipur on August 13, 2007, immediately after he was paid T.T.A on August 10, 2007 in the premises of this Court. Similarly, the I.O., in his report, has recorded a finding to that effect "he had challenged the said order before the Hon''ble High Court, Delhi which was dismissed by the Hon''ble High Court" and has admitted that "after failing from his efforts he joined the said Unit on August 13, 2007" and concluded his finding in respect of this charge and stated "in view of the above, the said charge is sustainable". According to Mr. Das, it is a matter of record that T.T.A was not paid to the petitioner despite his demand. The same was paid with the intervention of this Hon''ble Court only on August 10, 2007, after which he immediately joined the transferred place of posing. Therefore the findings of the I.O., referred to above, are clearly unsustainable.

7. According to Mr. Das, the third charge levelled against the petitioner was of negligence of duty. According to him, the documents filed by him would show the account of his presence at Raipur, his tours to Delhi with proper application for transfer and resuming the duty at Raipur, final correspondence sent/received at Raipur. A letter dated September 19, 2007, which on the one hand brings out the truth with regard to the petitioner attending to his duty at Raipur and on the other hand disproves all the allegations of the petitioner''s absence at Raipur and negligence of duty on the part of the petitioner. The letter reads as under:-

"Shri Rajendra Singh, Deputy Director, Raipur Chhattisgarh) Unit of FISHCOPFED C/o Shri Jagjit Singh Bhatia, Behind Dena Bank, Kharora, Raipur Chhattisgarh) -493225.

This is in reference to your fax dated 17.9.2007 received on 18.9.2007 at 3.28 pm. You may avail the leave to attend Court Cases dated 24.9.2007 and 11.10.2007 as mentioned in your fax as per the Rules. As regards the discussions on the subject of setting up of Regional Office at Raipur and other matters at the head- office, we will direct you accordingly as and when required. As regards Congress, your presence is not required.

You are hereby directed to act accordingly."

8. Mr. Das would also submit that the fourth charge levelled against the petitioner was insubordination and disobedience which is added to the charge superficially not supported by evidence oral, documentary. The enquiry report is also silent on this account. In the last, it is his submission that the charge sheet itself should be declared illegal and nonest as the same has been issued by the respondent No. 3 whose appointment as Managing Director is, under challenge by the petitioner in W.P.(C) No. 5594/2007. He would rely upon the following judgments in support of his contention.

(i) Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others, ;

(ii) Sawai Singh Vs. State of Rajasthan, ;

(iii) Surath Chandra Chakrabarty Vs. State of West Bengal, ;

(iv) Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others, ;

(v) U.P. Power Corporation Ltd. and Another Vs. Virendra Lal (Dead) through L.Rs., ;

(vi) Indrani Bai (Smt) Vs. Union of India (UOI) and Others, ;

9. On the other hand, Mr. Naushad Ahmed Khan, learned counsel appearing for the respondent Nos. 2, 3 & 4 would justify the impugned orders. According to him, the respondent No. 3, who was appointed as a Managing Director, In-charge vide Board Resolution dated October 1, 2006 and later on by a communication dated April, 23, 2008, his appointment was approved and forwarded by the Board of Directors and also approved and ratified by the Ministry of Agriculture, Government of India respondent No. 1 under Section 51 of the Multi State Co-operative Societies Act, 2002 and also under bye-law 31 (1) and 38(a) of the bye- laws of the National Federation of Fishermen''s Cooperatives Ltd. The Managing Director is competent to take disciplinary action against the subordinate as per section 52 of the Multi State Co-operative Societies Act, 2002 and as per bye-law 40 of the bye-laws of the Federation. He would state, that the petitioner was transferred to Raipur and was asked to join the Chhattisgarh Unit prior to July 15, 2007 and to hand over the charge to Sh. A.P. Ansari, which he deliberately failed to comply with. The petitioner was time and again issued several memorandum and was directed to join the aforesaid Unit and was also asked about his absence, non handing over of charge, non maintenance of the attendance register etc, to which his reply was being the same, he is not supposed to mark his attendance in the attendance register. He would state, that one Mr. Rajiv Kumar Singh, who was working as Marketing Assistant at Chhattisgarh at Raipur with the petitioner had pointed out that the petitioner joined and attended the office only for two days on August 13, 2007 and August 14, 2007, which is supported by the attendance register. Vide office memorandum, his reply regarding the unauthorized absence was sought by the respondents and to further seek his whereabouts. His information was also sought through Sh. Rajendra Prasad, the then Director and Sh. S.S. Mahhour, Assistant Director on October 12, 2007, December 20, 2007 and September 8, 2007 and the copy of the attendance register was also sought where it was found that he was absence throughout. In the aforesaid circumstances, the respondents issued memorandums and initiated departmental proceedings by charge sheet dated December 28, 2007, which was duly approved by the Board of Directors. Since the aforesaid gravity of charges against the petitioner was proved by duly appointed Enquiry Officer, he was dismissed from service vide office order dated June 18, 2008. The petitioner impugned the order of transfer in W.P.(C) No. 5382/2007 in this Court, which was dismissed by this Court on

July 25, 2007 and held the transfer as valid. By the said order, the respondents were directed to clear the approval of T.T.A. Since, the petitioner was not receiving the communications, sent by the respondents and also the T.T.A etc, by way of orders passed by this Court in L.P.A. No. 1146/2007, the documents were directed to be accepted by the petitioner in Court. The L.P.A., assailing the order of the Learned Single Judge, was dismissed as withdrawn with a direction to make a fresh representation to the Competent Authority. The Competent Authority did not find the representation in order, therefore rejected the same.

10. He would also state, that the petitioner was promoted from the position of the Assistant Director to the Deputy Director under the signature of the respondent No. 3 namely Mr. B.K. Mishra, who was Managing Director, In-charge. The charge sheet having been issued by Mr. B.K. Mishra, the petitioner cannot blow hot and cold while accepting one order and challenging the other order issued by the same person. He would also state, that the order of the dismissal from service dated June 18, 2008 was issued by the Competent Authority and duly approved by the Board of Directors. The Board of Directors further, by way of 133rd meeting held on June 30, 2010 had declared Loss of Confidence in the petitioner and the retention in the organisation was undesirable. Mr. Khan would rely upon the following judgments in support of his contention of no confidence against employee and seeks the dismissal of the writ petition.

(i) Air-India Corporation, Bombay Vs. V.A. Rebellow and Another, ;

(ii) Francis Klein and Co. (P) Ltd. Vs. Their Workmen and Another, ;

(iii) U.P. State Road Transport Corporation Vs. Mohan Lal Gupta and Others, ;

(iv) Binny Ltd. Vs. Their Workmen, .

11. Having heard the learned counsel for the parties, even though many grounds have been urged by Mr. Das but one ground, which appeals this Court is the issuance of the order of penalty dated June 18, 2008 by the Managing Director respondent No. 3 and the President of the Board of Directors, which in a way prevented the petitioner from filing an appeal, more particularly in its meeting dated June 30, 2010, the Board of Directors had approved the order of June 18, 2008, passed by the authorities.

12. Before I give reasoning to my observation as made above, the first issue to be decided is who is the disciplinary authority of the petitioner, who was competent to pass an order of the dismissal. It is the case of the respondents that the order of promotion of the petitioner from Assistant Director to the Dy. Director was issued by the Managing Director respondent No. 3. It is an admitted position also that the charge sheet dated December 28, 2007 was issued by the respondent No. 3 in exercise of its powers under Section 52 of the Multi State Co-operative Societies Act, 2002 read with Rule 34 of the Bye-laws of FISHCOPFED and FISHCOPFED Staff Regulations. Rule 34 of the bye-laws stipulate that the duties of the Managing Director includes;

(xiii) to select and appoint personnel and to determine the powers, duties and responsibilities of the employees of FISHCOPFED for ensuring proper conduct of the day to day business.

13. Some of the provisions of the Staff Regulations would reveal that the Appointing Authority "means the authority with whom powers of appointment of particular category of staff are vested in the bye-laws". Regulation (6), which relates to Appointing Authority stipulate, the Board of Directors/Managing Director shall be the appointing authority for various categories of post as provided in the bye-laws of FISHCOPFED. The Board/Managing Director may from time to time delegate the powers in this regard to such authorities as it may deem fit. I may note here that the bye-laws stipulate the functions of the Board of Directors to include, to appoint, suspend, punish and remove the Managing Director.

14. On a reading of the aforesaid provisions, it is clear that the Board of Directors is the Appointing Authority of the Managing Director. The Managing Director is the Appointing Authority of the other functionaries including the Dy. Director, which was the post, the petitioner was holding at the relevant point of time. Suffice to state, the position that emerges is the Managing Director respondent No. 3 was the Appointing Authority/Disciplinary Authority of the petitioner. If that be so, the order of penalty should have been issued by the respondent No. 3 without the interference or application of mind/assistance from any of the Authority, more particularly, the President of the Board of Directors as has been done in this case. Even though, there are no Rules framed for holding of the disciplinary proceedings, it is expected that the appeal against the order of the Managing Director as a Disciplinary Authority would lie to a higher Authority of the Board of Directors.

15. In this case, it is also noted that the order of the penalty dated June 18, 2008 was approved by the Board of Directors not on an appeal filed by the petitioner but on its own. This resulted in a denial of opportunity to the petitioner to file an appeal before the Board of Directors both on account of the order of the penalty having been passed by two authorities including the President of the Board of Directors and secondly the Board of Directors had itself approved the order without there being an appeal. This has resulted in a denial of opportunity to the petitioner and the case is covered by the recent judgment of the Supreme Court in the case of U.P. Power Corporation Ltd. and Another Vs. Virendra Lal (Dead) through L.Rs., , wherein, the Supreme Court was considering a case of an Assistant Engineer in the Electricity Department wherein for certain misconduct, enquiry was initiated and a penalty of recovery from pension was imposed on him. The employee challenged the penalty before the Tribunal on the ground that there was violation of Principles of Natural Justice, the delay in commencement of the departmental proceedings and prejudice has been caused to the employee. In the writ petition, filed by the Corporation, the High Court disposed of the writ petition noting the submission made by the counsel that the

Chairman is the Disciplinary Authority, who is competent to pass the order. The justification given by the petitioner''s counsel for the power to pass an order was that since the claimant i.e employee was a retired person, power was exercised by the Board. The High Court was of the view, even if an employee is retired, the power should be exercised by the same authority who has been conferred power to work as disciplinary authority. Power cannot be usurped by the higher authority in violation of the service rules. The Supreme Court, after referring to the position of law and also noting the law that an Authority higher than an Appointing Authority would also be the Designated Authority for the purpose of imposing a punishment subject, of course, to the condition that by reason thereof, the delinquent officer should not be deprived of a right of appeal in view of the fact that the right of appeal is a statutory right. However, if such right of appeal is not embellished, an authority higher than the appointing authority may also act as a disciplinary authority. In other words, a higher Authority may pass an order imposing a punishment and the same would withstand scrutiny if the right of appeal is not taken away. That apart, if the appellate authority passes an order as the primary authority and there is provision for further appeal or revision or review, it cannot be said that the said order suffers from any illegality. In the case in hand, the order of the penalty was passed by the Managing Director respondent No. 3 and the President of the Board of Directors. The said order was approved by the Board of Directors subsequently not in an appeal filed by the petitioner. It is as good as saying that it is the Board of Directors, which had passed the order of penalty. As there is no further Authority to whom an appeal could lie, the order stands vitiated. I set aside the order of penalty dated June 18, 2008. The judgments relied upon by Mr. Khan, on loss of confidence have no applicability on the point on which I have decided the writ petition.

16. During the course of submissions, I was informed that the petitioner had reached the age of superannuation. It is also noted that in a separate proceedings, the petitioner was further imposed a penalty of dismissal which is a subject matter of Writ Petition No. 1084/2011, in which judgment is reserved.

CM No. 10141/2008

17. In view of the order passed in the writ petition, the present application is dismissed as infructuous.

