

(2004) 08 AHC CK 0261
In the Allahabad High Court
Case No : Writ Petition No. 5728 of 1996

Rama Shankar Shukla

APPELLANT

Vs

Nagar Mahapalika and Another

RESPONDENT

Date of Decision : 13-08-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 403

Citation : (2004) 3 UPLBEC 2801

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Vikas Budhwar and R.M. Saggi, for the Appellant; Rakesh Dwivedi, S.D. Kautilya and A.K. Shukla, for the Respondent

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—The petitioner was initially appointed as a daily wager in the Nagar Mahapalika, Allahabad in the year 1984. His services were regularised in the year 1992 and on 5.6.1992, the petitioner was appointed as a Tax Collector. It transpires that on the basis of a preliminary enquiry it was found that large sums of money collected by the petitioner was not deposited in the Trcasuiy. Accordingly, the petitioner was placed under suspension vide an order dated 22.2.1994. A charge sheet dated 13.2.1995 was issued in which it was stated that large sums of money collected by the petitioner was not deposited in the Treasury, which he had misappropriated for his own use and therefore, caused a loss to the dcpaitmisnt. The charge-sheet further stated that when this fact was brought to the notice of the petitioner, the said amount was deposited subsequently but there was a short fall of Rs. 100.60. The petitioner, vide his reply, admitted that whatever amount was found short was deposited by him and that he was also willing to deposit the short fall of Rs. 100.60. The Enquiry Officer after holding the enquiry, submitted his report holding that the charge No. 1 was serious in nature and that the petitioner had collected a sum of Rs. 1,48,000.00 and odd and that he deliberately did not deposit this amount in the

Treasury and deposited the amount only after he was suspended. The Enquiry Officer found that the petitioner was guilty of misusing and misappropriating the funds of the Nagar Mahapalika. On the basis of the enquiry report, a show cause notice was issued to the petitioner and subsequently by an order dated 19.1.1996, the services of the petitioner was terminated. Against the order of termination, the petitioner has filed the present writ petition.

2. Heard Sri Vikas Budhwar, the learned Counsel for the petitioner and Sri S.D. Kautilya, the learned Counsel for the respondents.

3. A preliminary objection was raised by the learned Counsel for the respondent Sri S.D. Kautilya that against the order of termination, the petitioner had a right of an appeal before the Commissioner and, therefore, the writ petition was not maintainable and should be dismissed on the ground of alternative remedy. This writ petition was entertained in the year 1996 and after eight years, I am not inclined to dismiss the writ petition on the ground of alternative remedy and, therefore, I propose to deal with the matter on merits. The preliminary objection raised by the learned Counsel for the respondents is accordingly rejected.

4. The learned Counsel for the petitioner contended that the charges mentioned in the charge-sheet dated 13.2.1995 did not constitute any misconduct and, therefore, the petitioner's services could not be terminated. The learned Counsel for the petitioner submitted that once the amount of Rs. 1,48,000.00 and odd was deposited, the question of misappropriation does not arise nor does it constitute a misconduct. So far as the second charge is concerned, the learned Counsel for the petitioner stated that there could have been a bonafide error in not depositing a sum of Rs. 100.60 and that the petitioner was willing to deposit the short fall. In any case, the petitioner could not be made guilty of misappropriating this small amount of Rs. 100.60. The petitioner contended that since a sum of Rs. 1,48,000.00 and odd had been deposited, no loss was caused to the respondents. In support of his submission, the learned Counsel for the petitioner relied upon the decisions of this Court in *Chain Sukh v. State of U.P.*, reported in 1997 ALJ 1310 and *Ram Bharat Tewari v. Town Area Committee* 2000 (18) LCD 1040.

5. In my view, I am not at all impressed by the submissions made by the learned Counsel for the petitioner and the judgment cited are distinguishable. In *Chain Sukh* case (supra), charges levelled against the incumbent was dereliction of duty and in that light, the Court held that since there was no charge of dishonest misappropriation, the mere delay in depositing the money could not constitute dishonest misappropriation. In *Ram Bharat Tewari's* case (supra), the Court held that the retention of Rs. 3,000.00 by the incumbent did not amount to misappropriation, inasmuch as the incumbent had stated from the very beginning that he had drawn the amount to purchase National Savings Certificate for the staff members, which certificates were not available in the post office and in that connection he had retained the amount. The Court also found that the retention of the amount was also recorded in the cash book, hence the Court

came to a conclusion that the delay in depositing the money did not constitute misappropriation. In my view, the aforesaid decisions are distinguishable and do not apply to the present facts and circumstances of this case.

6. In the present case, the petitioner collected a sum of Rs. 1,48,000.00 and odd and did not deposit the money in the Treasury for a long time. The Petitioner retained and used this amount for his own personal gain. Subsequently, on the basis of a preliminary enquiry, it was found that the petitioner had retained a large sum of money on the basis of which the petitioner was suspended and it was only, thereafter, that the petitioner had deposited the amount. If the respondents had not found out about the shortfall, in that event the petitioner would have retained the amount. The deposit of the amount was made after a considerable period of time and no explanation had been given by the petitioner as to why he could not deposit the money earlier. Therefore, in my view the petitioner was guilty of dishonest misappropriation.

7. Section 403 of the Indian Penal Code defines dishonest misappropriation of the property as under:-

"403 Dishonest misappropriation of property.-Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation 1.-A dishonest misappropriation for a time only is a misappropriation within the meaning of this Section."

8. Section 24, IPC defines "dishonestly" as :

"Dishonestly".-Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

9. Section 25 IPC defines fraudulently as:

"Fraudulently".-A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

10. In Krishan Kumar Vs. The Union of India, , the Supreme Court held that "wrongful gain" includes wrongful retention.

11. From the record, it is clear that the misappropriation of the money was for a certain period of time, which "constitutes dishonest misappropriation u/s 403 of the Indian Penal Code. The intention of the petitioner was loud and clear that he had a dishonest intention to misappropriate the amount and defraud the respondents. The mere fact that he deposited the entire amount after he was suspended would not absolve him of his dishonest intentions to misappropriate the amount.

12. The Maxim "actus non facii reum nisi mens sit rea" is fully applicable and

clearly applies in the present facts and circumstances of the case. The action of the petitioner is irrelevant, and it is the guilty intention which is relevant. From the record, it is clear that the intention of the petitioner was to misappropriate the money. The deposit of the amount at a later stage would not absolve the petitioner of the charge of misappropriation. The charges clearly constituted a misconduct. Thus, the submissions made by the learned Counsel for the petitioner are wholly erroneous and the judgment cited by the petitioner are distinguishable.

13. The learned Counsel for the petitioner next submitted that the documents were not supplied to him which were referred in the charge-sheet and, therefore, the petitioner was prejudiced by the non-supply of the relevant documents and on this basis, the enquiry proceedings are vitiated on account of violation of the principles of natural justice. In this regard, the learned Counsel for the petitioner invited the attention of the Court to the letter dated 28.2.1995 which contemplates demanding of certain documents by the petitioner.

14. In my view, the submission of the learned Counsel of the petitioner is totally devoid of any merit. The letter dated 28.2.1995 was a reply of the petitioner to the charge-sheet and was not a letter demanding documents from the Enquiry Officer. The reply of the petitioner no doubt states that the list of witnesses had not yet been supplied to him, but the said statement was only made in a casual manner. In any case, the respondents have categorically stated in the counter affidavit that whatever documents that was demanded by the petitioner was supplied to him and that he was also permitted to inspect various documents. Thus, no prejudice has been caused to the petitioner.

15. The learned Counsel for the petitioner next submitted that no oral enquiry was conducted by the Enquiry Officer and that an oral enquiry was a must especially when a major punishment is awarded. Since no oral enquiry was conducted, the order of termination was illegal and was liable to be quashed. In support of his contention, the learned Counsel has relied upon the decision of a Division Bench of this Court in Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills and Others, , in which it was held that in cases where a major punishment was proposed to be imposed, an oral enquiry was a must, even though the employee may have repressed for it or not. The learned Counsel also relied upon another decision in Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another, , in which it was held :

"In the present case it appears that no regular enquiry was held at all, All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

16. There is no quarrel with the aforesaid submission, but the judgment cited are not applicable in the present facts and circumstances of the case and are also distinguishable. In the cases cited by the petitioner, the incumbent denied the charges levelled against him and, therefore, it was incumbent for the employers to hold an oral enquiry and examine the witnesses, etc. Since no oral enquiry was conducted, the Court held that there was a violation of the principles of natural justice. However, in the present case, the facts are different. The petitioner admitted the charges, and had justified his innocence on the ground that since he had already deposited the money, the charge of misappropriation disappears. Since the charges were admitted by the petitioner, the question of holding any further oral enquiry by the Enquiry Officer did not arise. The Enquiry Officer was only required to submit the enquiry report on the basis of the reply given by the petitioner. In my view, there is no infirmity in the enquiry proceedings conducted in the present case nor is the same violative of the principles of natural justice. The petitioner in his letter dated 27.3.1995 clearly admitted the charges given in the charge-sheet. Consequently, no oral enquiry was required. The submission made by the learned Counsel is devoid of any merit.

17. The last submission made by the learned Counsel for the petitioner was that the punishment of dismissal was wholly excessive and disproportionate to the misconduct. The learned Counsel submitted that since the amount had already been deposited and no loss was sustained by the respondents, therefore, in the absence of any intention to defraud or misappropriate the amount, the petitioner should have been given a lesser punishment. As I have already held the petitioner had a clear intention to misappropriate the amount, and the petitioner had retained the amount for a considerable period of time and utilized the money for his own gain/benefit. The fact that the petitioner deposited the amount only after he was suspended does not absolve the petitioner of his initial guilt of misappropriating the amount. Further, no explanation had been given by the petitioner as to why he could not deposit the money earlier. In the absence of any explanation, it is clear that the intention of the petitioner was to misappropriate the amount. Thus such a person who was posted as a Tax Collector, which is a post of trust, could not be retained in service.

18. In my view the punishment awarded commensurated with the gravity of the charges and which was squarely proved against the petitioner and I see no grounds to interfere with the punishment awarded by the Disciplinary Authority.

19. For the aforesaid reasons, I find no merit in the writ petition and is accordingly dismissed. However, in the circumstances of the case, there shall be no order as to cost.