
(2012) 02 AHC CK 0348
In the Allahabad High Court
Case No : Special Appeal No. 388 of 2012

Ravi Kumar Sonker

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-02-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 6 ADJ 632

Hon'ble Judges : Syed Rafat Alam, C.J.; Ran Vijai Singh, J

Bench : Division Bench

Advocate : R.K. Singh Yadav, for the Appellant; Naval Singh and C.S.C., for the Respondent

Judgement

1. This intra Court appeal arises from the judgment and order of the learned Single Judge dated 31.1.2012, passed in Writ Petition No. 3928 of 2012 (Ravi Kumar Sonker v. State of U.P. and others), by which the appellant's writ petition challenging the order of termination dated 1.11.2011, passed by Adhyaksh, Nagar Panchayat, Bharwari, District Kaushambi (hereinafter referred to as the Adhyaksh), has been dismissed. The learned Single Judge has dismissed the writ petition on the ground that the learned counsel for the petitioner-appellant could not show any error in the decision making process, warranting interference under Article 226 of the Constitution of India. The facts giving rise to this case are that the petitioner-appellant was appointed as a Clerk in Nagar Panchayat, Bharwari, District Kaushambi on the fixed salary of Rs. 3,500/- against the sanctioned post by the Adhyaksh. Pursuant to the appointment letter, the appellant joined. However, since juniors to the appellant were regularised, he Writ Petition No. 31134 of 2011 for his regularisation. In the said writ petition, on 1.11.2011, the Court directed the Adhyaksh to apprise the Court as to under what provision the petitioner-appellant has been appointed on contractual basis without advertising the vacancy when the persons are waiting for regular appointment. It is contended that the writ petition is still pending and because of that, on the fake charges, the appellant's service has been terminated on the basis of the alleged

temporary embezzlement. It is submitted that although the charge-sheet was served but without there being any enquiry in accordance with the Uttar Pradesh Municipal Board's Servant (Inquiry, Punishment and Termination of Service) Rules (hereinafter referred to as Municipal Board Servants Rules), the services of the appellant has been terminated for the alleged misconduct of temporary embezzlement. For appreciation, order of termination is reproduced hereunder :

2. It is contended by learned counsel for the appellant that no opportunity was given to the appellant for rebutting the charges levelled against him with regard to the alleged embezzlement. It is stated in the writ petition that forged and fabricated papers have been prepared for the purposes of termination of the appellant's service and the termination order has been passed without affording opportunity of hearing. The learned Single Judge without having the version of the other side has dismissed the writ petition on the ground that the learned counsel for the petitioner-appellant could not show any error in the decision making process. It is submitted by the learned counsel for the petitioner-appellant that the error in the decision making process is apparent from the perusal of the impugned order which would reveal that the appellant was asked orally to submit the reply to the charge-sheet, which was not submitted. It is not in dispute that the appellant's service has been terminated for misconduct of temporary embezzlement of certain amount. For that, a charge-sheet was issued and Inquiry Officer was appointed. It is contended by the learned counsel for the petitioner-appellant that only on verbal instructions, which according to the appellant is false, the disciplinary authority has passed the impugned order. The appellant was never informed about the date and place of the inquiry and no material was supplied, demanded by him, for rebutting the charge. In the submissions of the learned counsel for the petitioner-appellant, once the charge-sheet was served alleging financial embezzlement, then procedure contained under the Municipal Board Servants Rules ought to have been followed, which, admittedly, has not been followed. Therefore, there was apparent error in the decision making process and the learned Single Judge has not considered this aspect hence fell in error.

3. On the other hand, learned counsel for the respondent Nos. 4 and 5 on being asked by the Court as to whether he would like to file counter-affidavit, stated that he did not propose to file counter-affidavit, as he could not improve the factual position with respect to the denial of proper opportunity to the petitioner-appellant while passing the impugned order.

4. We have heard learned counsel for the appellant and the learned counsel appearing for the Nagar Panchayat, Bharwar. and perused the record and also gone through the Municipal Board Servants Rules.

5. From the perusal of the impugned order of termination (Annexure "1" to the writ petition), it transpires that the petitioner-appellant was verbally asked to file reply to the charge-sheet, which too has been denied by the petitioner-appellant.

6. It is well-settled that if the termination order is founded on the alleged act of misconduct, then misconduct has to be proved by the authorities concerned and for that an inquiry giving due opportunity to the employee is imperative and in the absence of such inquiry, the termination order cannot be sustained. Rule 5 of the Municipal Service Rules provides the procedure with respect to the imposition of major penalty of dismissal, removal or reduction in rank. For ready reference, Rule 5 of the aforesaid Rules is quoted below-

5. (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 revision on the ground of general un-suitability for holding the higher post to a lower post of a person who is officiating in a higher post) shall be passed on a servant 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 charged servant and which shall be so clear and precise as to give sufficient indication of the fact 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 the enquiry such oral evidence will be heard as the inquiring authority considers necessary. The person charged shall be entitled to cross-examine the witnesses, to give evidence in person, and to have such witnesses called in his defence as he may wish, provided that the authority conducting the inquiry may for sufficient reasons to be recorded in writing, refusing to call a witness. Neither than Municipal Board nor the servant charged shall be entitled to be represented by a counsel. The inquiry proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof. When the punishing authority is different from the inquiring authority, the latter may also, separately from these proceedings, make his own recommendations regarding the punishment to be imposed on the charged servant:

Provided that the provisions of this sub-rule shall not apply where the person charged has absconded or where it is for other reasons, to be recorded in writing impracticable to communicate with him:

Provided further that all or any of the provisions of this sub-rule may, for reasons to be recorded in writing, be waived where there is a difficulty in observing such requirements and the non-observance thereof is not in the opinion of the inquiring authority, likely to result in injustice to the person charged.

(2) After the inquiry against the servant has been completed and after the punishing authority has arrived at a provisional conclusions in regard to the penalty to be imposed, the charged servant shall, if the penalty proposed is

dismissal, removal, reduction in rank, be supplied with a copy of the proceedings prepared under sub-rule (1), excluding the recommendation, if any, of the inquiring authority in regard to punishment, and asked to show-cause by a particular date, which affords him reasonable time, why the proposed penalty should not be imposed on him:

Provided that if the punishing authority disagrees with any part or whole of the proceedings prepared under sub-rule (1), the point or points of such disagreement, together with a brief statement of the grounds thereof, shall also be communicated to the charged servant alongwith the copy of the said proceedings.

(3) The explanation submitted by the charged servant in this behalf shall be duly taken into consideration by the punishing authority before passing final orders.

(4) Every order of dismissal, removal or reduction in rank shall be in writing and shall specify the charge or charges brought, the defence, if any, and the reasons for the order.

7. From the perusal of Rule 5, it transpires that the ground on which it is proposed to take action, shall be reduced in the form of definite charge or charges which shall be communicated to the charged servant and which shall be so clear and precise as to give sufficient indication of fact and circumstance against him. The delinquent employee shall be required within reasonable time to put in a written statement of his defence and to state whether he desires to be heard in person, and if he so desires, or if the authority concerned so desires, a full inquiry shall be held in respect of such allegations as those are not admitted. The Rules also provides for cross-examination of the witnesses relied upon. After going through the provisions of Rule 5, it transpires that a complete mechanism has been provided for holding a disciplinary proceeding for imposing major penalty of dismissal, termination or removal from the service.

8. In the instant case, there is nothing on record to show that the Inquiry Officer had fixed any date for oral enquiry, rather it appears that there was no oral enquiry conducted by the Inquiry Officer, wherein the charges would have been shown to have proved. The delinquent appellant, as claimed on behalf of the respondents, was orally asked to submit reply to the charges which he failed. The Inquiry Officer, thereafter, without taking recourse of oral enquiry to find out as to whether the charges are substantiated on the basis of material on record, proceeded to submit his report on the basis of charge-sheet, which is in gross violation of the Rule. Even, non-submission of reply to the charges will not ipso facto make the charges proved or deemed to have been proved unless, from the oral evidence or the records of the department, the charges are found to be substantiated. In the case in hand, admittedly, the impugned order of termination has been passed without following the mandatory provision besides being in violation of principles of natural justice and, thus, the same cannot be allowed to sustain.

9. It is well-settled proposition of law that where a Statute provides a particular procedure for doing some act, it has to be followed and done in that very manner and cannot be allowed to act in contravention thereof. In other words, where the Statute requires to do certain thing in certain way, it must be done in that way and not at all. In the case in hand, the punishment of termination from service has been imposed which could have only been inflicted after following the procedure prescribed in Rule 5 which, admittedly, has been contravened while passing the impugned order of termination.

10. A Division Bench of this Court, in which one of us (S. Rafat Alam, J., as he then was) was member in *Paras Nath Pandey v. Director, North Central Zone, Cultural Centre, Nyay Marg, Allahabad*, 2008(10) ADJ 283 (DB), while dealing with the termination of temporary Government servant, has observed as under :

....once it is evident that the termination simplicitor is founded on the alleged act of misconduct said to be proved by the authorities concerned, an inquiry giving due opportunity to the employee is must and in the absence of such an inquiry, a punitive termination cannot be sustained. It is not the case whether the authorities acted fairly or unfairly but the question is whether inquiry conducted by the authorities was in accordance with law or not and whether before recording a finding against an employee in respect to the alleged misconduct the employee was given adequate opportunity of defence.

11. Another Division Bench of this Court in *Subhash Chandra Gupta v. State of UP*, 2011(10) ADJ 879 (DB), also taking the similar view has held that when a statute provides to do a thing in a particular manner, then that thing has to be done in that very manner, and the procedure prescribed under the Rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any outcome based on that will be of no avail.

12. Similar view has been taken in *Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur* and another, and *Birbal Sharma Vs. Chief Medical Officer and Others*, .

13. In view of the above legal position and admission of the respondents that no proper opportunity was offered to the appellant to rebut the charges, the order impugned cannot be sustained and learned Single Judge has erred in holding that there was no error in the decision making process. In the result, the appeal succeeds and is allowed. The impugned order dated 31.1.2012, passed in C.M.W.P. No. 3928 of 2012 is quashed. Respondents are directed to reinstate the appellant, and to hold a fresh inquiry from the stage of service of charge-sheet, in accordance with the provisions contained under the Municipal Servants Rules. The appellant shall be placed at the position as on the date of the commencement of the inquiry. However, no back wages shall be paid to the appellant and he shall be only entitled for the current salary in terms of the appointment letter subject to his satisfactory work. The payment of back wages shall depend on the fate of the inquiry, which shall be completed by the

respondents expeditiously, in which the appellant shall cooperate. However, if despite notice, the appellant does not cooperate with the enquiry or tries to linger on the proceeding unnecessarily, it would be open to the respondents to proceed ex parte in accordance with law.

No order as to costs.