(2011) 07 AHC CK 0101

In the Allahabad High Court

Case No : Writ Petition No. 3733 (SS) of 1982

Rudra Narain Pandey APPELLANT

Vs

The State of U.P. and Others RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (2011) 7 ADJ 428

Hon'ble Judges : Devendra Kumar Arora, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Devendra Kumar Arora, J.—By means of instant writ petition, the Petitioner has sought a writ in the nature of certiorari for quashing of the order dated 09.07.1980, as contained in Annexure No. 8 to the writ petition. He has further prayed for a writ in the nature of mandamus commanding the opposite parties to pay uptodate salary and other emoluments and allowances, pension and gratuity amount to the Petitioner as per Rules.

2. This writ petition was dismissed in default vide order of this Court dated 01.10.1997 against which Petitioner moved applications for recall of the said order but that too were rejected vide orders dated 10.01.2000 and 29.01.2002. Feeling aggrieved, the Petitioner preferred Special Appeal No. 99 of 2002 before Division Bench of this Court which was allowed and orders dated 01.10.1997, 10.01.2000 and 29.01.2002 were set aside and writ petition was restored to its original number.

3. Facts of the case, in nutshell, are that Petitioner was initially appointed as a Group III employee in Agriculture Department in the year 1946 and was promoted to Group II in the year 1965. In the year 1971 while Petitioner was working as Buffer Godown Inspector, Naugarh, district Basti, was placed under suspension vide order dated 02.07.1971 without contemplation of any enquiry.

The suspension order also does not contain any allegation/ charge which resulted in passing of the same. However, it only indicates that the Petitioner will be paid 1/4th of the salary as subsistence allowance. The suspension allowance was not paid to the Petitioner for sufficient long period. After repeated request, it was only in the month of October, 1971, the subsistence allowance was paid but without any justification the subsistence allowance from the month of July to September, 1971 was withheld. The Petitioner time and again approached the authorities for apprising him regarding the grounds of suspension/ charges against him and also paying him 1/3rd of the salary as subsistence allowance and in pursuance to the repeated request of the Petitioner, the Deputy Director of Agriculture, Gorakhpur Region, Gorakhpur vide his letter dated 17.01.1974 directed to the District Agriculture Officer, Basti for taking steps for payment of subsistence allowance 1/2 of the salary of the Petitioner, as nothing was done in the departmental proceedings by the authorities.

4. Approximately after four years a charge-sheet dated 06.03.1974 was served upon the Petitioner on 09.07.1975 under the signature of opposite party No. 5 levelling four charges against the Petitioner broadly relating to illegal removal of the fertilizers. The Petitioner was never informed about the appointment of opposite party No. 5 as Enquiry Officer. The first charge relates to removal of manures to Chilihiya Agriculture Seed Store (which was fake and the said manures were never transferred to Chilihiya). The second charge relates to deficit of manures found at the time of the physical verification of the godown in 1970-71 and not showing entries in the ledger with respect to Uria and NPK fertilizers shown in the RR amounting to Rs. 22,792.51. The third charge relates to the certain irregularities relating to receipt of 3000 bags by the Petitioner in the year 1969-70. Out of which, it is stated that 1920 bags have been utilized in rebagging and rest of 1080 remained unaccounted for and have not been shown in the ledger. The fourth charge relates to unauthorized payment of Rs. 54 as wharf age at the Railway Station on the receipt of fertilizers. In the charge-sheet so many documents have been shown in support of the charges.

5. The Petitioner on receiving the charge-sheet requested the District Agriculture Officer, Basti for inspection of record as well as supply of the certain documents necessary for making reply to the charge-sheet. The Petitioner was neither allowed the inspection of the record nor requisite documents were supplied to him. The Petitioner ultimately submitted his reply on 23.07.1975 dealing exhaustively with all charges levelled against him and also produced original receipts relating to the manures costing Rs. 64,449/- issued to the Petitioner by Sri Babun Ji Tewari, the Assistant Agriculture Inspector, Chilihaiya, district Basti. Three receipts of different dates were also mentioned in the reply along with the attested Photostat copies of the same. While replying to the second charge, it was mentioned that 0.75% deficiency is natural when the fertilizers remains in the stock due to chemical reaction and as such the deficiencies are normally written off. The charge No. 2 (ba) relates to 3.71% deficiency, the manure in question was two years old and according to the departmental rules the

deficiency to the extent of 3% is written off. The charge No. 2 (kha) relates to damage caused in the rail transport of various fertilizers while the bags were brought to the godown. The Petitioner took steps in the matter and wrote to the Railway Authorities, the steps taken by the Petitioner were shown in his reply along with documentary evidence. The charge No. 3 relates to 1080 bags, which were shown in the ledger as used. In fact all the bags were utilized in rebagging and the stocks were found rebagged and it was just by inadvertence that 1080 bags were not shown as used. tually they were found as used. The charge No. 4 relates to payment of Rs. 54/- as wharf age, as the same has been paid as per the rules of Railways and there was no illegality in the same.

6. The submission of learned Counsel for the Petitioner is that the Petitioner filed three receipts of Sri Babun Ji Tiwari and all of them bears his signature and were written by him and it was he who had in fact misappropriated the stock. Sri Babun Ji Tiwari admitted one of the receipt out of three receipts amounting to Rs. 33,712.80, and disowned the other two receipts (department challans bearing his signatures) and stated that the same had not been signed by him. The Petitioner insisted that the receipts were in his hand writing and requested the Enquiry Officer that he may take sample signatures from Sri Babun Ji Tiwari as well as the Petitioner and sent for expert opinion, but the request of the Petitioner for verification of the signatures by the expert was not accepted by the Enquiry Officer. Ultimately, by means of order dated 09.07.1980 the Petitioner was dismissed from service, and the remaining salary of the Petitioner was withheld. Further the suspension period was not to be counted towards his service period. The recovery of Rs. 1,00,685.04 was also directed to be made from the Petitioner. Though the impugned dismissal order indicates that the copy of the enquiry report is enclosed as encloser, but the same was not served along with the impugned order. It is also submitted that the perusal of the impugned order will shown that the same is non-speaking. As the enquiry report was not enclosed with the dismissal order, the Petitioner requested for supply of the same by means of letters dated 21.08.1980, 09.09.1980, 15.10.1980 and 27.10.1980 and finally the Deputy Director of Agriculture directed for supply of the enquiry report on 31.10.1980. The Petitioner after receipt of enquiry report submitted an appeal before the Commissioner-cum-Secretary, Agriculture Department, Government of U.P. on 24.11.1980 and when sufficient time expired and no action was taken on the appeal of the Petitioner, the Petitioner by means of letter dated 14.04.1982 requested for disposal of his appeal. When no action was taken for disposal of the appeal, the Petitioner approached this Court by means of present writ petition.

7. Counter affidavit has been filed on behalf of opposite parties, denying the allegations of the writ petition and it has been mentioned that the Petitioner was given full opportunity to defend himself, but the Petitioner deliberately did not cooperate in the enquiry and is responsible for delay in the enquiry proceedings. The Petitioner submitted his reply after inspecting the documents in the office of District Agriculture Officer, Basti. The Petitioner also appeared for personal

hearing before the Enquiry Officer on 25.04.1977. It is also stated that since Sri Babun Ji Tiwari denied his signatures on two receipts produced by the Petitioner, therefore, the same were not taken into consideration by the Enquiry Officer. The copy of the enquiry report was handed over to the Petitioner by means of letter dated 27.10.1980. Since all the charges were proved against the Petitioner, therefore, the Disciplinary Authority passed the impugned dismissal order as well as recovery of amount of Rs. 100,685.04 as the Petitioner caused loss to the department. The date of birth of the Petitioner is 01.01.1923, therefore, he has already attained the age of superannuation on 31.12.1980. The impugned order has been stayed on account of concealing the correct facts by the Petitioner.

8. The Petitioner in his rejoinder reiterated that the suspension order has been passed without contemplation of any enquiry. The Petitioner submitted his exhaustive reply thereby explaining his stand against each and every charge levelled against him, but neither Enquiry Officer nor Punishing Authority took care to look into the reply of the Petitioner. It is also submitted that the receipts given by Sri Babun Ji Tiwari, the Assistant Agriculture Inspector were not sent for experts examination by the Enquiry Officer. The fertilizers worth Rs. 64,459/- were transferred to Shri Babunji Tiwari and admittedly he acknowledged the receipt of the same worth Rs. 33,712/- only. So far as the balance of Rs. 30,780/- is concerned, though the Petitioner produced the receipt of Shri Tiwari, since two receipts were not accepted by him, therefore, it was necessary from the Enquiry Officer to get verified from the writing expert. It has also been mentioned that the fertilizers were kept in Kachcha building for more than two years and were exposed to all amount of natural decay and rains etc. The stocks were verified on 26.06.1970 by Sri Rama Pati Tewari, Additional District Agriculture Officer, Basti and the decay and deficiency in the stock had been brought to the notice of the verifying officer and in fact they themselves detected the deficiency and found that it was natural under the circumstances. It is also submitted that Sri N.A. Malik, Assistant Chemist also came on a surprise visit for checking of buffer godown and found that the stock had been rendered to all amount of natural calamities and was kept in Kachcha building/ Kachcha flooring & roofing, as such was bound to deteriorate and the loss was natural. It is also submitted that 3% formula is applied to the cases where the stock is kept in good house and accordingly to the scientific formula relating to roofing & flooring no loss was occurred due to fault of the Petitioner and he cannot be held responsible for any loss and the loss was deserves to be written off at right. It is also submitted that instead of repeated request, the Petitioner was not permitted to see the record. The copy of the enquiry report was given to the Petitioner on his repeated request after passing of impugned order vide letter dated 27.10.1980 through registered post and was received by the Petitioner on 08.11.1980.

9. The supplementary counter affidavit has been filed on 31.01.2010, in which it has been mentioned that on 07.12.1977 the Petitioner cross-examined Sri Babun Ji Tiwari, in which, Sri Tiwari admitted his signature on temporary receipts, but

denied the signature on Challans. A copy of the cross-examination was also annexed as Annexure-SCA-1. It is also stated that though the Enquiry Officer not compared the signature made on challans with the signature admitted by Sri Babunji Tiwari, but it is established that without any order of Competent Authority the Petitioner transferred the stock amounting to Rs. 64,492.80 to Sri Babunji Tiwari and if Sri Tiwari has not given the three receipts then the Petitioner ought to have informed the higher authorities. The impugned order does not suffers from any illegality, and has been passed in accordance with law.

10. The Petitioner in his supplementary rejoinder while denying the averments of the supplementary counter affidavit submitted that he had not indulged in any irregularity and illegality in performing his duties. The misappropriation has been committed by Sri Babun Ji Tiwari. The most outstanding features of the enquiry was that the Petitioner filed three receipts of Sri Babun Ji Tiwari. All of them bears his signature and were written by him and it was he who had in fact misappropriated the stock. Sri Babun Ji Tiwari admitted one of the receipts amounting to Rs. 33,712.80, but he disowned the other two receipts (department challans bearing his signatures). The Petitioner insisted for referring the matter for expert opinion after taking sample of signature of Sri Babun Ji Tiwari. The request of the Petitioner was not accepted by the Enquiry Officer. While denying the averments with respect to the cross-examination of Sri Babun Ji Tiwari, it is submitted that the alleged cross-examination is merely recording of questions answer and Annexure-SCA-1 is not a original copy, rather, it is a typed copy. The authenticity of the same could only be verified from the original record. It is also submitted that the basic principle of enquiry is that the employer/ department should take steps first to lead evidence against the workman/ delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer, only thereafter the workman/ delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him. But in the present case, nothing has been done. The whole enquiry was conducted in violation of principles of natural justice and the same is liable to be set aside. It is also submitted that the opposite parties are trying to supplement the impugned order after filing their counter affidavit in the writ petition, which was suitably replied by the Petitioner by filing rejoinder affidavit. It is also submitted that it is settled law that the impugned order must stand on its own legs and could not be supplemented by way of filing affidavit. The impugned order could not be sustained in the eyes of law and is liable to be set aside. Learned Counsel for the Petitioner in support of his submission placed reliance on the judgments of Hon''ble Supreme Court in the matters of State of Uttaranchal and Others Vs. Kharak Singh, Roop Singh Negi Vs. Punjab National Bank and Others, and Shafatullah v. Commissioner, Varanasi Division, Varanasi and Ors. 2002 (20) LCD 733.

11. Sri R.D. Shahi, learned Standing Counsel while opposing the writ petition submitted that the Petitioner has challenged the decision, but there is no challenge of the procedural irregularities in the departmental proceedings.

Personal hearing was offered to the Petitioner. The transaction is admitted by the Petitioner in para-19 of the writ petition. The transfer of stock is to be done by the act of handing and taking over and there is no denial of the fact that the Petitioner has transferred the articles to Sri Babun Ji Tiwari. Sri Shahi in support of his submission relied on the judgments of Ganesh Santa Ram Sirur Vs. State Bank of India and Another, and Deo Kumar Ojha v. Board of Directors, U.P. State Warehousing Corporation, Lucknow and Ors. 2003 (1) UPLBEC 33.

12. On scrutiny, both the judgments relied upon by the learned Standing Counsel do not apply to the facts and circumstances of the preset case. In the case of Ganesh Santa Ram Sirur (supra) the question was involved before the Hon''ble Supreme Court with respect to providing opportunity of personal hearing by the Appellate Authority before enhancing the punishment, after issuing a notice to show cause against the proposed enhancement of reduction of salary to that of dismissal and in the case of Deo Kumar Ojha (Supra) it has been held that the Court/ Tribunal in its power of judicial review does not act as Appellate Authority to re-appreciate the evidence. The Court/ Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribed the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence and adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the High Court/ Tribunal.

13. The perusal of the record of the writ petition reveals that the Petitioner was placed under suspension vide order dated 02.07.1971 without contemplation of any enquiry. The perusal of suspension order further reveals that the same does not contain any allegation/charge against the Petitioner. A charge-sheet dated 06.03.1974 was served on the Petitioner approximately after four years on 09.07.1975 levelling four charges against the Petitioner relating to the year 1970-71. The perusal of the suspension order further reveals that the same is balled in nature and no charges or allegations have been mentioned in the suspension order.

14. The first charge relates to the removal of manures to Chilihiya Agriculture Seed Store in the year 1970-71. The second charge relates to deficit of manures found at the time of physical verification of godown in the year 1970-71 and not shown in the ledger with respect to Urea and NPK fertilizers shown in the R.R. amounting to Rs. 22,792.51. The third charge relates to certain irregularities with respect to receipt of 3000 bags by the Petitioner in the year 1969-70. Out of which 1920 bags have been utilized in re-bagging and rest of 1080 remained uncounted for and the same have not been shown in the ledger. Fourth charge relates to unauthorized payment of Rs. 54/-as Warf rage at the Railway Station on the receipt of fertilizers. The record further reveals that the Petitioner requested for inspection of records as well as supply of certain documents for making reply to the charge-sheet. Though the allegations of the Petitioners are

that the Petitioner neither allowed for inspection of the records nor requisite documents were supplied to him, but the pleadings of the counter affidavit reveal that the Petitioner after inspecting the record in the office of District Agriculture Officer, Basti on 15.07.1975 submitted his reply to the charge-sheet on 23.07.1975. The record further reveals that the Petitioner was allowed to put question to one Sri Babun Ji Tiwari, the Assistant Agriculture Inspector, but out of three receipts, one receipt with respect to transferring the manures worth Rs. 33,712/- was admitted by Sri Tiwari and denied regarding rest of two receipts. The request of the Petitioner for expert opinion of Writing Expert with respect to remaining two receipts alleged to have been issued by Sri Babun Ji Tiwari was refused by the Enquiry Officer.

15. The perusal of the enquiry report reveals that no evidence was produced by the department to establish the charges and the Enquiry Officer proved the charges against the Petitioner on the basis of documents relied by the department. The Enquiry Officer also recommended for termination of services of the Petitioner.

16. It is admitted position that the enquiry report was served to the Petitioner after passing of the impugned order of dismissal dated 09.07.1980 through registered post dated 27.10.1980, which was received by the Petitioner on 08.11.1980 and after receipt of the same, the Petitioner submitted appeal before the Appellate Authority on 21/24.11.1980. The Appellate Authority did not take care to consider and decide the appeal of the Petitioner.

17. The perusal of the impugned dismissal order reveals that the Punishing Authority agreed with the findings of the Enquiry Officer with respect to charge Nos. 1, 2-c, 3 and 4 and disagreed with his findings of charge Nos. 2 (a) and 2 (b) and substituted his own finding without affording any opportunity to the Petitioner. The impugned order further reveals that the same is non-speaking as nothing was discussed by the Punishing Authority except on the charges of 2 (a) and 2 (b), on which he deferred from the findings of the Enquiry Officer.

18. It is settled view and has been repeatedly emphasised that the domestic enquiry must be conducted honestly and bonafide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities.

19. The Constitution Bench of Hon''ble Supreme Court in the matter of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., on the issue of disciplinary proceedings pleased to observe as under:

(1) Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer''s report and the delinquent employee''s reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the

basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz. before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised bad stood deferred till the second stage viz. the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer''s report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

Article 311(2) says that the employee shall be given a ''reasonable opportunity of being heard in respect of the charges against him''. The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee''s reply to the enquiry officer''s report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry.

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer''s report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee''s right to defend himself against the charges levelled against him. A denial of the enquiry officer''s report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

20. In the recent judgment of State of Uttaranchal and Others Vs. Kharak Singh, the Hon''ble Apex Court pleased to observe that:

(i) The enquiries must be conduced bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the enquiry officer. If the said position becomes known after the appointment of the enquiry officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/ department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/ delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

21. Again in the matter of Roop Singh Negi Vs. Punjab National Bank and Others, The Hon''ble Supreme Court further pleased to observe in para-14 that:

Indisputably, a departmental proceeding is a quasijudicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

22. After applying the aforesaid legal position to the facts and circumstances of the present case, this Court comes to the conclusion that the opposite parties failed to prove the charges by adducing evidence and the Enquiry Officer established the charges against the Petitioner only on the basis of documentary evidence in utter violation of principles of natural justice. The Enquiry Officer even did not accept the request of the Petitioner to get the expert opinion of the

Writing Expert on the two receipts denied by Sri Babun Ji Tiwari, the Assistant Agriculture Inspector. The Petitioner has also been deprived of his valuable right of making representation against the enquiry report as the same has been admittedly served on the Petitioner after passing of the impugned dismissal order dated 09.07.1980 by means of registered post dated 27.10.1980 and received by the Petitioner on 08.11.1980.

23. Another aspect of the matter is that the impugned order is not supported by any finding and reason of the Disciplinary Authority. Since the proceedings suffers from legal infirmity, the present petition deserves to be allowed.

24. In normal circumstances, this Court would have remanded back the matter to the Disciplinary Authority for proceedings afresh against the Petitioner, in accordance with law, from the stage defect occurred in the enquiry proceedings. But taking into consideration the fact that the Petitioner attained the age of superannuation on 31.12.1980 and presently he is about 89 years, therefore, considering the peculiar facts and circumstances of the present case, this Court decline to remand back the matter of the Petitioner to the Disciplinary Authority and quash the impugned dismissal order dated 09.07.1980, contained in Annexure-8 to the writ petition.

25. This Court further directs that the Petitioner will not be entitled to his salary for the period from the date of his suspension i.e. 02.07.1971 to the passing of the impugned dismissal order dated 09.07.1980 except the payment which he has already been received as subsistence allowance, but the said period will be counted for the purposes of calculation of the pension.

26. The writ petition is allowed accordingly. There shall be no order as to costs.