

(2015) 09 SHI CK 0040
In the High Court Of Himachal Pradesh
Case No : LPA No. 232 of 2014

Sher Mohammed

APPELLANT

Vs

Himachal Road Transport Corporation and Others

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Citation : (2015) LabIC 4043

Hon'ble Judges : Mansoor Ahmad Mir, C.J.; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : P.P. Chauhan, for the Appellant; Varun Chandel, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Mansoor Ahmad Mir, C.J.—This Letters Patent Appeal is directed against the judgment dated 13.05.2011, made by the learned Single Judge of this Court in CWP(T) No. 11554 of 2008, titled Sher Mohammad versus Himachal Road Transport Corporation & others, whereby the writ petition came to be dismissed, for short "the impugned judgment", on the grounds taken in the memo of appeal.

2. The writ petitioner/appellant herein who was appointed as driver in Himachal Pradesh Road Transport Corporation, hereinafter referred to as "HRTC" for short, was on his duty on 28.6.1994 to Dehra. He was to leave Dehra on the next day i.e. 29.6.1994 for Palampur. The petitioner is stated to have left Dehra for his native place on 28.6.1994 and did not report for duty on 29.6.1994 and remained absent, which was made basis to hold a departmental inquiry against him, which resulted in his removal from service vide order dated 15.1.1998, constraining him to file Original Application No. 204 of 2004. The said Original application was disposed of vide order dated 26.6.2004, with a direction to the Managing Director of HRTC to treat the Original Application as representation and to decide the same. It is apt to reproduce order dated 26.6.2004 herein:

"26.6.2004. Present: Sh. Madan Thakur, Advocate, for the applicant.

Sh. S.C. Sharma, Advocate, for respondents.

At the request of learned counsel for the applicant and in the peculiar circumstances of the case the present Original Application itself is directed to be treated as representation to the Managing Director, HRTC Shimla with a direction to decide the same within a period of two months from this order. The Managing director concerned is further directed to hear the applicant in person before deciding the representation. The learned counsel for the respondents has no objection to this proposition.

With these aforesaid observation and directions the Original Application stands finally disposed of with no order as to costs."

3. The said representation was rejected vide order dated 6.9.2004 by the Managing Director HRTC.

4. The petitioner, feeling aggrieved, questioned the said order and the removal order dated 15.1.1998, by the medium of Original Application No. 367 of 2004 which, on abolition of the H.P. State Administrative Tribunal came to be transferred to this Court and was registered as CWP(T) No. 11554 of 2008, which was dismissed by the learned Single Judge of this Court on 13.5.2011, subject matter of the present appeal.

5. The learned counsel for the appellant argued that the inquiry officer has not held that the absence of the writ petitioner/appellant herein was willful. As per the law occupying the field, it was the duty of the department to prove that the absence of an employee was willful and inquiry officer had to hold accordingly.

6. The learned counsel for the respondents argued that the petitioner has remained deliberately absent from duty and had gone outside the country. The learned counsel for the respondents further argued that the writ petitioner has questioned the impugned order after a considerable delay and the writ petition merits to be dismissed.

7. The argument though attractive is devoid of any force for the reasons that the petitioner had filed Original Application No. 204 of 2004 which was treated as representation. The plea of delay and laches had not weighed with the Administrative Tribunal at that time, thus stands over-ruled.

8. We have examined the record and heard the learned counsel for the parties.

9. The argument of the learned counsel for the appellant is having force for the following reasons.

10. The charge-sheet was framed against the writ petitioner/ appellant herein on 5.9.1994. It contained three charges.

"(i) Willful absence,

(ii) Violation of the Central Civil Service (Leave) Rules, 1972; and,

(iii) Misappropriation of Rs. 182/- for consuming four litres more mobil oil."

11. The inquiry officer, after examining the record held that charge No. (iii) was not proved and exonerated the petitioner from the said charge. However, it was held that charges No. (i) and (ii) have been proved against the petitioner.

12. The inquiry officer has nowhere recorded the findings that the absence of the petitioner was willful. In the inquiry report, it is recorded by the inquiry officer that the writ petitioner has submitted the documents but has not given reasons for rejecting the same. It is apt to reproduce relevant para of Annexure A3 appended with the writ petition herein:

".....The charged official has in his defence statement and arguments ascertained that he has availed the leave due to illness of his wife for which he refers to his postal receipts of telegrams sent to the R.M. HRTC, Dehra and Medical Certificates of his wife. In the postal receipt produced by the charged official, the address on which these have been made is not clear and even if these are taken to be true, these do not make the stated period of leave as authorized one. Out of the produced medical Certificates, one has been obtained from the Govt. Distt. Hospital, Dharamshala and the remaining from the Private Doctor. Moreover, the patient has obtained out door treatment. Had these been any seriousness in the illness, the Distt. Hospital Authority might have admitted her and treated her as in-door patient. Secondly switching over to a Private treatment from a Hospital of the Distt. Level, reasons therefor are quite silent. Still further, on the Medical Certificate furnished by the Medical Officer, Distt. Hospital, Dharamshala the words "She needs one attendant to look after her" have been added at a later stage and with different ink purposely to give shelter to the charged official."

13. There is no finding recorded in the inquiry report that the defence taken is false or afterthought and not tenable. If the employer fails to prove the willful absence on the part of the employee, he cannot be removed from the service.

14. The writ petitioner/appellant herein has explained the circumstances, which led to his absence, which fact finds place in the inquiry report and has not been rebutted but despite that, the petitioner/appellant stands removed from service.

15. The Apex Court in a case titled as *Krushnakant B. Parmar Vs. Union of India* (UOI) and Another, (2012) 132 FLR 1023 : (2012) 2 JT 352 : (2012) 2 SCALE 545 : (2012) 3 SCC 178 : (2012) 2 SLJ 19 : (2012) AIRSCW 1633 : (2012) 2 Supreme 254 , discussed all the aspects and held that in case an employee explains that his absence was beyond his control and due to compelling circumstances, it was not possible for him to attend the duties, it cannot be said to be willful absence. It is apt to reproduce paras 16 to 24 of the judgment herein:

"16. In the case of appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion of duty and his behaviour

was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty.

20. The question relating to jurisdiction of the Court in judicial review in a departmental proceeding fell for consideration before this Court in *M.V. Bijlani Vs. Union of India (UOI) and Others*, AIR 2006 SC 3475 : (2006) 102 CLT 635 : (2006) 109 FLR 717 : (2006) 4 JT 469 : (2006) 2 LLJ 800 : (2006) 4 SCALE 146 : (2006) 5 SCC 88 : (2006) SCC(L&S) 919 : (2006) 3 SLJ 184 : (2006) AIRSCW 2096 : (2006) 3 Supreme 393

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi- criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

21. In the present case, the disciplinary authority failed to prove that the absence from duty was wilful, no such finding has been given by the inquiry officer or the appellate authority. Though the appellant had taken a specific defence that he as prevented from attending duty by Shri P. enkateswarlu, DCIO,

Palanpur who prevented him to sign the attendance register and also brought on record 11 defence exhibits in support of his defence that he was prevented to sign the attendance register, this includes his letter dated 3rd October, 1995 addressed to Shri K.P. Jain, JD, SIB, Ahmedabad, receipts from STD/PCO office of Telephone calls dated 29th September, 1995, etc. but such defence and evidence were ignored and on the basis of irrelevant fact and surmises the Inquiry Officer held the appellant guilty.

22. Mr. P. Venkateswarlu, DCIO, Palanpur, who was the complainant and against whom appellant alleged bias refused to appear before the Inquiry Officer in spite of service of summons. Two other witnesses, Shri Jivrani and Shri L.N. Thakkar made no statement against the appellant, and one of them stated that he had no knowledge about absence of the appellant. Ignoring the aforesaid evidence, on the basis of surmises and conjectures, the Inquiry Officer held the charge proved.

23. Though the aforesaid facts noticed by the appellate authority but ignoring such facts giving reference of extraneous allegations which were not the part of the charge, dismissed the appeal with following uncalled for observation: "The appellant even avoided the basic training required for the job and asked JAD Ahmedabad to send all the training papers for his training at IB Training School, Shivpuri (Madhya Pradesh) to his residence at Ahmedabad. "An untrained officer is of no worth to the department".

24. In the result, the appeal is allowed. The impugned orders of dismissal passed by disciplinary authority, affirmed by the Appellate authority; Central Administrative Tribunal and High Court are set aside. The appellant stands reinstated."

16. Admittedly, the writ petitioner/appellant herein has given explanation and tendered some documents as discussed hereinabove. It was for the inquiry officer to hold that the absence was willful.

17. The Apex Court in its latest judgment in a case titled as Chhel Singh Vs. M.G.B. Gramin Bank, AIR 2015 SC 598 : (2014) AIRSCW 6539 : (2014) 8 SCALE 485 , held that the unauthorized absence beyond control, cannot be termed as willful absence. It is apt to reproduce paras 10 and 12 of the judgment herein:

"10. After giving our careful consideration to the facts and circumstances of the case and the submission made by the learned counsel for the parties, we are of the view that the Division Bench was wrong in setting aside the order of reinstatement. The Division Bench has accepted that the inquiry stood vitiated by disallowing the request of the appellant to summon the rest of the five witnesses. For the said reason, the Division Bench has not interfered with such part of the finding and order passed by the learned Single Judge whereby the impugned order of termination dated 17-10-1994 and the Appellate Authority order dated 26-12-1994 were quashed. The order of termination being quashed by the High Court, in absence of any observation and grounds to refuse the reinstatement, the appellant automatically stood reinstated. Without

reinstatement in service, the question of further inquiry does not arise. There was no occasion for the Division Bench of the High Court to direct further inquiry, without reinstatement of appellant.

11.....

12. From a plain reading of the charges we find that the main allegation is absence from duty from 11-12-1989 to 11-12-1989 approximately 10 1/2 months), for which no prior permission was obtained from the competent authority. In his reply, the appellant has taken the plea that he was seriously ill between 11-12-1989 and 11-12-1989, which was beyond his control; he never intended to contravene any of the provisions of the service regulations. He submitted the copies of medical certificates issued by Doctors in support of his claim after rejoining the post. The medical reports were submitted after about 24 days. There was no allegation that the appellant's unauthorized absence from duty was willful and deliberate. The Inquiry Officer has also not held that appellant's absence from duty was willful and deliberate. It is neither case of the Disciplinary Authority nor the Inquiry Officer that the medical reports submitted by the appellant were forged or fabricated or obtained for any consideration though he was not ill during the said period. In absence of such evidence and finding, it was not open to the Inquiry Officer or the Disciplinary Authority to disbelieve the medical certificates issued by the Doctors without any valid reason and on the ground of 24 days delay."

18. PW1 Uttam Chand Puri, Adda Incharge, HRTC Dehra, before inquiry officer had virtually supported the case of the petitioner that he has submitted the telegram and all other documents, including Medical Certificates, was not discarded by him. Thus, how it can be said and held that absence of the petitioner was willful.

19. The Apex Court in a case titled as Roop Singh Negi Vs. Punjab National Bank and Others, (2009) 120 FLR 610 : (2009) 2 JT 176 : (2009) 2 LLJ 21 : (2009) 1 SCALE 284 : (2009) 2 SCC 570 : (2009) 1 SCC(L&S) 398 : (2009) 3 SLJ 14 : (2009) 4 SLR 78 : (2008) 1 UJ 183 , held that it is the duty of the Inquiry Officer to scan the entire evidence in order to arrive at a finding after adjudging the case of all the parties, adhering to the principles of natural justice, otherwise, the inquiry is vitiated and the finding recorded is also not in accordance with law. It is apt to reproduce para 23 of the judgment herein:

"23. Furthermore, the order of the disciplinary authority as also the appellate authority are not supported by any reason. As the orders passed by them have severe civil consequences, appropriate reasons should have been assigned. If the enquiry officer had relied upon the confession made by the appellant, there was no reason as to why the order of discharge passed by the Criminal Court on the basis of self-same evidence should not have been taken into consideration. The materials brought on record pointing out the guilt are required to be proved. A decision must be arrived at on some evidence, which is legally admissible. The

provisions of the Evidence Act may not be applicable in a departmental proceeding but the principles of natural justice are. As the report of the Enquiry Officer was based on merely ipse dixit as also surmises and conjectures, the same could not have been sustained. The inferences drawn by the Enquiry Officer apparently were not supported by any evidence. Suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof."

20. The inquiry officer has not supplied the copy of inquiry report to the writ petitioner/appellant. There is no evidence on the file that the same has been supplied to the writ petitioner/appellant herein.

21. The Apex Court in the case titled as Union of India (UOI) and Others Vs. R.P. Singh, AIR 2014 SC 2541 : (2014) AIRSCW 3475 : (2014) LabIC 2812 : (2014) 7 SCALE 678 : (2014) 7 SCC 340 : (2014) 5 SCJ 28 : (2014) 3 SCT 3 , held that non-supply of copy of the inquiry report to the delinquent at pre-decisional stage amounts to violation of principles of natural justice. It is apt to reproduce paras 24 to 28 of the judgment herein:

"24. We will be failing in our duty if we do not refer to another passage which deals with the effect of non-supply of the enquiry report on the punishment. It reads as follows: -

"[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the [pic]concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice".

25. After so stating, the larger Bench proceeded to state that the court/tribunal should not mechanically set aside the order of punishment on the ground that

the report was not furnished. The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal finds that the furnishing of report could have made a difference to the result in the case then it should set aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome.

26. We have referred to the aforesaid decision in extenso as we find that in the said case it has been opined by the Constitution Bench that non- supply of the enquiry report is a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence. We have been apprised by Mr. Raghavan, learned counsel for the respondent, that after the decision in S.K. Kapoor's case (2011 AIR SCW 1814), the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 has issued the following directions:

"4. Accordingly, it has been decided that in all disciplinary cases where the Commission is to be consulted, the following procedure may be adopted :--

(i) On receipt of the Inquiry Report, the DA may examine the same and forward it to the Commission with his observations;

(ii) On receipt of the Commission's report, the DA will examine the same and forward the same to the Charged Officer along with the Inquiry Report and his tentative reasons for disagreement with the Inquiry Report and/or the advice of the UPSC;

(iii) The Charged Officer shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the Inquiry report/advice of UPSC is in his favour or not.

(iv) The Disciplinary Authority shall consider the representation of the Charged Officer and take further action as prescribed in sub-rules 2(A) to (4) of Rule 15 of CCS (CCA) Rules, 1965.

27. After the said Office Memorandum, a further Office Memorandum has been issued on 5.3.2014, which pertains to supply of copy of UPSC advice to the Charged Officer. We think it appropriate to reproduce the same:

"The undersigned is directed to refer to this Department's O.M. of even number dated 6.1.2014 and to say that it has been decided, in partial modification of the above O.M. that a copy of the inquiry report may be given to the Government servant as provided in Rule 15(2) of Central Secretariat Services (Classification, Control and Appeal) Rules, 1965. The inquiry report together with the representation, if any, of the Government servant may be forwarded to the Commission for advice. On receipt of the Commission's advice, a copy of the advice may be provided to the Government servant who may be allowed to submit his representation, if any, on the Commission's advice within fifteen days. The Disciplinary Authority will consider the inquiry report, advice of the Commission and the representation(s) of the Government servant before arriving at a final decision".

28. In our considered opinion, both the Office Memoranda are not only in consonance with the S.K. Kapoor's case (2011 AIR SCW 1814) but also in accordance with the principles of natural justice which has been stated in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., AIR 1994 SC 1074 : (1993) 6 JT 1 : (1994) 1 LLJ 162 : (1993) 3 SCALE 952 : (1993) 4 SCC 727 : (1993) 2 SCR 576 Supp : (1993) 3 SLJ 193 ."

22. The findings recorded by the inquiry officer nowhere disclose that what were the reasons for recording the findings.

23. Applying the test the first charge against the petitioner fails.

24. The inquiry officer has recorded that the defence taken by the petitioner was that he had applied for leave and also sent telegram. He has also produced receipt of telegram and medical certificates, the mention of which is made by the inquiry officer at internal page 2 of the inquiry report Annexure A-3 appended with the writ petition. It is apt to reproduce relevant para at page 2 of the inquiry report herein:

"While going to the defence side, the charged official filed his defence statement before the enquiry officer on 21.9.1995. He stated that he reached Dehra after entering Faridabad-Pathankot service on 28.6.1994 and the crew avails rest and has to go on duty on the next day evening. Accordingly he went to this quarter for rest purpose but there he came to know about his wife having fallen down and the delivery case was also due. He further states that he come to the bus stand and sought verbal permission to go to home from the Adda in charge. The Adda in charge in turn told that he has been deputed with Dehra-Palampur service the next day at 5.30 p.m. He stated that he told the Adda Incharge that in case his wife is alright, he will return to duty and in case her condition will be bad, he will not be in position to come back. He also produced receipts of telegrams, sent to the R.M., HRTC, Dehra from time to time for the extension of

leave and medical certificates of his wife for the period 25.6.1995 to 11.12.1994. Out of these certificates one certificate is from the Medical Officer Distt. Hospital Dharamsala and the remaining three certificates for the period from 26.7.1994 to 11.12.1994 are from a Private Doctor."

25. Applying the test, it can safely be held that the petitioner has not violated the Central Civil Service (Leave) Rules. It was for the officer concerned to inform him that his request was rejected and leave was not sanctioned.

26. This Court in Himachal Pradesh State Electricity Board, versus Mahesh Dahiya, LPA No. 340 of 2012 decided on 9.4.2015 has also laid down the similar principles of law.

27. Applying the test in this case, the said judgment is squarely attracted to the facts and circumstances of the present case.

28. Having said so, the impugned judgment merits to be set aside and the order of removal merits to be quashed.

29. The question is whether the petitioner is entitled to all service benefits from 28.6.1994 till today?

30. The apex Court in Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, AIR 2005 SC 768 : (2005) 1 ESC 125 : (2005) 104 FLR 863 : (2005) 1 JT 336 : (2005) 2 LLJ 153 : (2005) 2 SCC 363 : (2005) SCC(L&S) 270 : (2005) 1 SCR 374 : (2005) 2 SLJ 261 , U.P.S.R.T.C. Ltd. Vs. Sarada Prasad Misra and Another, AIR 2006 SC 2466 : (2006) 110 FLR 622 : (2006) 5 JT 114 : (2006) 2 LLJ 829 : (2006) 4 SCALE 507 : (2006) 4 SCC 733 : (2006) SCC(L&S) 857 : (2006) 2 SCR 1 Supp : (2006) 3 SLJ 178 : (2006) AIRSCW 3216 : (2006) 3 Supreme 662 , Reetu Marbles Vs. Prabhakant Shukla, AIR 2010 SC 397 : (2010) 124 FLR 72 : (2009) 14 JT 585 : (2010) 1 LLJ 305 : (2009) 14 SCALE 308 : (2010) 2 SCC 70 : (2010) 1 SCC(L&S) 555 : (2009) 1 SCR 34 : (2010) 3 SLJ 219 : (2009) 6 SLR 693 : (2010) 1 UJ 67 and Jasmer Singh Vs. State of Haryana(2015) 2 AD 215 : (2015) 144 FLR 837 : (2015) 1 SCALE 360 : (2015) 4 SCC 458 : (2015) 2 SCJ 391 : (2015) 2 SCT 91 : (2015) 1 SLJ 389 , has laid down the principles how to grant back-wages while keeping in view the facts and circumstances of each case. In some cases 50% back wages were granted and in some cases 100% back-wages were granted. Applying the test in the instant case, we deem it proper to hold that the petitioner is entitled to all service benefits notionally from 28.6.1994 till filing of the Original Application No. 367 of 2004, i.e., 16.10.2004 and is entitled to 50% back wages from 16.10.2004 till today.

31. Accordingly, the impugned judgment is set aside and the order of removal from service is quashed and the petitioner is held entitled to service benefits notionally from 28.6.1994 till 16.10.2004 but shall qualify for all service benefits and held entitled to 50% back wages from 16.10.2004 till today. However, respondents are at liberty to conduct fresh inquiry if they so desire, within three

months from today. If the inquiry is conducted, the said period shall remain subject to the outcome of the said inquiry.

32. The appeal is disposed of, as indicated hereinabove, alongwith pending applications, if any.