
(2006) 05 AHC CK 0239

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14452 of 1988

Shri Shri Krishna Singh

APPELLANT

Vs

U.P. Public Services Tribunal I and Others

RESPONDENT

Date of Decision : 23-05-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Financial Hand Book Rules — Rule 53(2)
Penal Code, 1860 (IPC) — Section 409

Citation : (2006) 6 AWC 6026

Hon'ble Judges : Sanjay Misra, J;R.K. Agrawal, J

Bench : Division Bench

Advocate : R.P. Goyal and Manish Goyal, for the Appellant; C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Misra, J.—This writ petition is directed against the judgment dated 27.1.1988 passed by the U.P. Public Services Tribunal- I, Lucknow in claim petition No. 554/1/1985 (Sri Krishna Singh v. State of U.P. and Ors.) and the order of dismissal dated 27.12.1983 as also the order dated 27.9.1982. The petitioner has further claimed for a declaration that he is continuing in service and is entitled to his salary and emoluments.

2. It is the case of the petitioner that he was appointed as Lekhpal in the year 1953 and was subsequently promoted as Supervisor Kanoongo in the year 1960. The respondent No. 4 who was Collector of Mainpuri at the relevant time is alleged to have been biased against the petitioner and therefore awarded four adverse entries which were however expunged. On 27.9.1982 the petitioner was suspended in contemplation of a disciplinary enquiry on various allegations by the respondent No. 4. It is the case of the petitioner that he was not paid subsistence allowance inspite of repeated demands and that a criminal case u/s 409 IPC was filed against the petitioner but the said proceedings were quashed

in Criminal Revision No. 142 of 1986 from the court of V Add. District and Sessions Judge, Mainpuri. No charge sheet was served on the petitioner and the publication of notice was made in an insignificant news paper only so that the petitioner may not be able to meet out the charges and exparte enquiry may be conducted against him. The show cause notice was replied by the petitioner but by ignoring the same the order of dismissal dated 27.12.1983 was passed. He has filed the claim petition before the U.P. Public Services Tribunal supported with an affidavit and although no reply was filed by the respondents the Tribunal has proceeded to illegally dismiss the claim petition.

3. A counter affidavit has been filed on behalf of respondent Nos. 2, 3 and 5 wherein it has been stated that the petitioner was working in stop gap arrangement as Supervisor Kanoongo on the date he was suspended. The order of suspension was passed in contemplation of departmental enquiry for serious financial irregularity whereupon the charge sheet was prepared which was not accepted by the petitioner. A notice was published in the news paper Dainik Jagaran on 2.12.1983 since the petitioner had not participated in the departmental enquiry the Enquiry Officer had given his report finding all the charges proved. It is the case of the respondents that show cause notice was also served upon the petitioner personally but the petitioner did not file his reply, consequently, the authority has proceeded to pass the order dated 27.12.1983 dismissing the petitioner from service. The FIR lodged against the petitioner was because he was absconding and not handing over the charge after his suspension. It has been stated that during his suspension period the petitioner never attended Tahsil head quarter nor he produced any certificate as required by the suspension order for payment of subsistence allowance to him. Since he absconded himself without handing over charge therefore it is alleged that the petitioner is himself to blame for not availing the opportunity afforded to him at the stage of disciplinary proceeding.

4. The petitioner has arrayed the then Collector of Mainpuri Sri Rajendra Bhonwal as respondent No. 4 in his personal capacity. However, from a perusal of the order sheet it appears that inspite of an order directing notice to be issued, no step was taken by the petitioner for service of notice on the respondent No. 4. No rejoinder affidavit has been filed by the petitioner.

5. Learned Counsel for the petitioner has argued that even if the enquiry had proceeded exparte it was a necessary requirement that the charges if found proved should have been based upon some evidence. In the absence of any evidence the charges would not stand proved even in an exparte departmental enquiry. He therefore submits that the exparte enquiry report is liable to be set aside. The next submission of the learned Counsel for the petitioner is that no subsistence allowance was paid to him during suspension period and therefore in view of the decision of the Hon''ble Supreme Court in the case of Ghanshyam Srivastava v. State of M.P. reported in 1973 ALR 305 he was unable to attend the enquiry hence was denied of reasonable opportunity to defend himself. Learned

Counsel for the petitioner has further contended that the disciplinary authority has not given his reasons while concurring with the report of the Enquiry Officer and as such the same is liable to be set aside. It is also contended that the punishment awarded to the petitioner is disproportionate to the charges levelled and found proved against him. Learned Counsel for the petitioner has argued that respondent No. 4 was biased against the petitioner and therefore the entire proceedings are liable to be quashed. In support of his contention he has placed reliance on the averments made paras 12 and 13 of the writ petition wherein it has been stated that the notice regarding charge sheet was published in an insignificant news paper with the intention that the petitioner may not have knowledge of the publication and, therefore, the enquiry may proceed *ex parte*. It is contended that in the aforesaid manner the respondent No. 4 got the enquiry completed by not following the principle of natural justice.

6. In reply learned Standing Counsel submits that the enquiry report has not been brought on record nor his plea that the charges were found proved in the absence of any evidence was raised by the petitioner before U.P. Public Services Tribunal. He has relied upon the averments made in the counter affidavit and contended that the petitioner was absconding from the office and he did not submit the required certificate to the effect that he was not engaged in any business or profession and consequently in absence of the petitioner and the required document the petitioner himself is to blame for not taking subsistence allowance. The respondents have denied the averments relating to bias made against the respondent No. 4 and have contended that the petitioner himself absconded from the departmental proceeding in spite of notice and, therefore, the allegation of bias being made is unfounded and has not been proved. The Tribunal while considering the claim petition has held that the petitioner has failed to discharge his burden of proof regarding departmental enquiry having been conducted not according to law. In support of his claim before the Tribunal the petitioner had filed the suspension order and the order of dismissal. Since the opposite party therein had not filed any written statement the case had proceeded *ex parte*. The Tribunal found that the petitioner had not filed any other evidence nor he has summoned the record of the enquiry proceeding, therefore, the Tribunal concluded that the observation in the impugned order of dismissal had to be taken to be correct statement of facts. On the service of charge sheet the Tribunal has recorded that the same was pasted on the door of his residence when his wife had refused to accept the same and had also refused to disclose the address at which the petitioner may be available. The petitioner did not himself participate in the enquiry in spite of having knowledge and publication in the news paper and, therefore, the enquiry officer has proceeded *ex parte* and given his report. The Tribunal has recorded that the show cause notice along with enquiry report was personally served upon the petitioner through Tahsildar, Sikohabad on 12.10.1983 and on the same date the notice was also pasted at the residential house of the petitioner in Jasrana and Karhal. Such notice was also published in the news paper "Dainik Jagaran" on 2.12.1983. Since the

petitioner failed to submit his explanation, the punishing authority agreeing with the report of the enquiry officer passed the order of punishment. The Tribunal found that the petitioner had admitted having received the show cause notice and no explanation was given by him and further that the petitioner had not filed a copy of the explanation. Therefore, on the above facts, the Tribunal concluded that the petitioner has failed to demonstrate that he was denied opportunity to defend himself before the departmental proceeding. On the question of non-payment of subsistence allowance the Tribunal has recorded that no such certificate was produced by him as required by the suspension order and held that no such plea had been taken before the Tribunal to the effect that he was not able to participate in the disciplinary proceeding due to non-payment of subsistence allowance. Consequently, the Tribunal found that the facts of the present case were clearly distinguishable from the facts of the case of Ghanshyam Srivastava (Supra). On the aforesaid findings, the Tribunal has proceeded to dismiss the claim petition.

7. We have heard Sri Manish Goyal learned Counsel for the petitioner and the learned Standing counsel.

8. Sri Goyal has placed reliance on the decision of the Hon"ble Supreme Court in the case of The Imperial Tobacco Company of India Ltd. Vs. Its Workmen, the relevant portion relied upon is quoted here under:

There can be no doubt in this case that the enquiry was not conducted in the manner required by the Standing Orders of the appellant. Even though Akhileshwar Prasad had withdrawn from the enquiry whether rightly or wrongly the enquiry should have been completed and all evidence should have been taken exparte.

9. In the present case the Enquiry report has not been brought on record. The plea that the Enquiry Officer found the charges proved without recording any evidence could be substantiated only upon producing the enquiry report and on perusal of the same. The petitioner did not produce the enquiry report before the Tribunal nor before this Court. In the absence of the enquiry report such plea raised by the petitioner can not be accepted. It has not been shown that the enquiry officer arrived at his conclusion without recording or taking into consideration any evidence. The disciplinary authority has clearly recorded in his order that the enquiry report was furnished to the petitioner along with the show cause notice served upon the petitioner personally by the Tahsildar, Shikohabad. The receipt of the show cause notice is admitted by the petitioner in paragraph 13 of the writ petition. There is no averment made by the petitioner that he was not given the enquiry report alongwith the show cause notice. Such plea was not raised by the petitioner before the Tribunal nor the petitioner has stated that he was not given a copy of the enquiry report before this Court. Since the record indicates that the petitioner was served with a copy of the enquiry report, he ought to have produced the same in support of his plea. It is settled law that a person in possession of the best evidence must produce the same to throw light

on the facts in issue and by withholding the same from the court he can not rely upon the abstract doctrine of onus of proof.

10. Reliance placed by the petitioner on the decision in the case of Ghanysham Srivastava (supra) is also not of any help to him in as much as the facts of the present case are totally different. In the present case the petitioner had absconded and never attended the office. The suspension order required the petitioner to file a certificate to the effect that he is not engaged in any business or profession. He did not produce the required certificate. Under such circumstances the petitioner cannot blame the respondents. He did not attend the enquiry proceeding nor informed the enquiry officer of his inability to attend the proceedings due to lack of resources for the reason of non-payment of subsistence allowance.

11. In the case of Jagdamba Prasad Shukla Vs. State of U.P. and Others, the Hon"ble Supreme Court held that the payment of subsistence allowance is not a bounty, it is a right. Paragraphs 7 and 8 of the judgment are quoted here under:

7. Reverting now to the other reason which prevailed with the High Court, namely, the appellant having not furnished a certificate stating that he is not engaged in any other employment, business, profession or vocation and having thus not complied with Rule 53(2) of the Financial Hand Book, it may be notified that at no stage, the appellant was told that he had to furnish such a certificate and that he could not be paid subsistence allowance without it. It was not the case of the respondents that in response to the appellant's request for payment of subsistence allowance he was asked to furnish such a certificate and since he did not furnish it, the amount of subsistence allowance was not paid to him. Therefore, the second reason for rejecting the appellant's contention for non-payment of subsistence allowance also does not deserve to be sustained.

8. The payment of subsistence allowance, in accordance with Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance. No justifiable ground has been made out for nonpayment of subsistence allowance although the period of suspension i.e. from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of nonpayment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed.

12. In the present case, the petitioner was asked to produce the required certificate. He did not produce it. The petitioner was repeatedly asked to present himself in the office. He absconded. An FIR was lodged against him. He obtained

bail and contested the case upto the revisional court successfully but never presented himself at the office or even before the enquiry officer. He never informed the enquiry officer about not been paid subsistence allowance as being a reason for his inability to participate in the enquiry. Under such circumstances it cannot be held that the principles of natural justice were violated for non-payment of subsistence allowance.

13. The disciplinary authority has concurred with the findings given by the enquiry officer. It is settled law that if the Disciplinary Authority comes to a conclusion that the reasoning and conclusion of the Enquiry Officer are correct and he concurs with the same he need not restate the reasons. In such an eventuality the Disciplinary Authority adopts the conclusion and the basis of the conclusion of the Enquiry Officer as his own. Moreover in the present case the petitioner did not reply to the show cause notice and therefore, the Disciplinary Authority had only the Enquiry report before him. The failure of the petitioner to submit his explanation was a circumstance indicating that the petitioner had nothing to explain. The petitioner has not filed any copy of an explanation either before the Tribunal nor before this Court. Therefore, the submission of learned Counsel for the petitioner on this ground cannot be accepted.

14. On a perusal of the order of dismissal it appears that there were as many as six charges against the petitioner. The charges related to negligence, indiscipline, insubordination, absentism and non-performance of duties. Such charges if found proved would amount to serious misconduct. The punishment to be awarded is to be commensurate to the charges found proved. However the choice of punishment is the exclusive domain of the Disciplinary Authority. The courts would interfere only if such choice is in defiance of logic or moral standards. The jurisdiction of the High Courts is very limited.

15. In the case of Om Kumar v. Union of India reported in (2001) 2 SCC 386 the Hon"ble Supreme Court has held in paragraph 24 as quoted here under:

We agree that the question of the quantum of punishment in disciplinary matters is primarily for the disciplinary authority and the jurisdiction of the High Courts under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or other of the well-known principles known as Wednesbury Principles, (See Associated Provincial Picture Houses v. Wednesbury Corporation). This Court had occasion to lay down the narrow scope of the jurisdiction in several cases. The applicability of the principle of "proportionality" in administrative law was considered exhaustively in Union of India v. Ganayutham where the primary role of the administrator and the secondary role of the courts in matters not involving fundamental freedoms, was explained.

16. In Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and Another, the Hon"ble Supreme Court has laid down in paragraph 6 as quoted below:

A perusal of the above judgments clearly shows that a court sitting in appeal

against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief either by directing the disciplinary/ appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the abovenoted judgments of this Court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.

17. In case of K.N. Gupta v. Enquiry Officer Allahabad Bank and Ors. reported in 2003(2) AWC 1509 (SC) the Hon"ble Supreme Court has laid down in paragraph 10 as quoted here under:

It is also further stated in the same judgment that " the High Court/ Tribunal while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate shocks the conscience of the court/Tribunal, it would appropriately mould the relief either directing the disciplinary authority/ appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself in exceptional and rare cases impose appropriate punishment with cogent reasons in support thereof.

18. In the case of Damoh Panna Sagar Rural Regional Bank and Another Vs. Munna Lal Jain, , the Hon"ble Supreme Court has clearly held in paragraphs 14 and 15 as is being quoted below:

14. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view what has been stated in Wednesbury's case (supra) the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision making process and not the decision.

15. To put differently unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/ Tribunal, there is no scope for interference. Further to shorten litigation it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the Disciplinary Authority or the Appellate Authority to reconsider the penalty imposed.

19. Upon the settled position in law while considering a plea of disproportionate punishment the scope of judicial review is very limited. On the facts of the

present case it is apparent that the decision making process cannot be faulted. The conduct of the petitioner, his non-cooperation with the Enquiry Officer, his not responding to the show cause notice given by the Disciplinary Authority are indicative of the attitude adopted by the petitioner in the disciplinary proceedings. He was given opportunity at the stages of enquiry but he remained absent. He was asked to file his certificate for being paid subsistence allowance but he did not comply. He was required to hand over charge of his office but he absented himself. He was given due notice to submit his explanation but he did not avail the opportunity. He was given the enquiry report which he has not denied. Under such circumstances the Tribunal has rightly come to the conclusion and dismissed the claim petition. Upon these circumstances and the charges found proved against him he has been awarded the punishment of dismissal from service. The charges relate to various acts of misconduct which are serious in nature. The very duties he is required to perform are not performed by him. There is charge of indiscipline, negligence and insubordination apart from absentism found proved against the petitioner. This Court therefore does not find that the punishment is in any way disproportionate to the charges found proved against him.

20. An allegation of "bias" has been made against the respondent No. 4. In relying upon paragraphs 12 and 13 of the writ petition learned Counsel has submitted that publication of notice in an insignificant news paper was only for the purpose that the petitioner may not get the charge sheet and hence an exparte enquiry may be conducted. From the facts of this case it is apparent that the petitioner has avoided service of notice and was not available at his residence. His wife refused to receive the notice and did not disclose where the petitioner could be found. The charge sheet was pasted on his door. The petitioner faced criminal proceedings but still did not attend office. In fact it appears that he remained absent during the entire suspension period. Even during suspension the petitioner was required to report at his place of attachment but he did not do so. All efforts were made to serve the charge sheet upon him by the respondents.

21. In the case of Union of India and Others Vs. Dinanath Shantaram Karekar and Others, the Hon"ble Supreme Court has held as under:

The appellant was an employee of the appellants. His personal file and the entire service record was available in which his home address also had been mentioned. The charge sheet which was sent to the respondent was returned with the postal endorsement " not found". This indicates that the charge sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the sender with the endorsement " not found", it can not be legally treated to have been served. The appellant should have made further efforts to serve the charge sheet on the

respondent. A single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings was bad. It was ex parte even from the stage of the charge sheet, at no stage, was served upon the respondent.

22. In the present case the charge sheet was pasted on the door of the petitioner's residence when he was not available and his wife refused to accept the same. The respondents also got the same published in a daily news paper. Therefore, actual service of the charge sheet was done by adopting two modes of service. The pasting of charge sheet at the petitioner's residence would therefore, be sufficient to hold that the same was actually served. It cannot therefore be held that the respondents did not make efforts to serve the charge sheet. With respect to show cause notice it is on record that it was served personally on the petitioner by the Tahsildar as also by publication in daily news paper "Dainik Jagaran" having wide circulation in the area. Therefore, the allegation made against respondent No. 4 are not supported by the facts as have come on record. The averment in paragraphs 12 and 13 are not borne out from the circumstances as have emerged from the record.

23. In the case of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shanker Pant and Ors. reported in (2001) 1 SCC 182 the Hon"ble Supreme Court has held in paragraph 35 as under:

The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this scope that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom- in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in Locabail case.

24. For the reasons as aforementioned no case has been made out for interference by this Court.

25. The writ petition lacks merit and is accordingly dismissed. No order is passed as to costs.