

(2019) 11 PAT CK 0156

In the Patna High Court

Case No : Letters Patent Appeal No. 1358 Of 2017

State Of Bihar And Ors

APPELLANT

Vs

Yavitri Devi And Ors

RESPONDENT

Date of Decision : 21-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21

Citation : (2019) 11 PAT CK 0156

Hon'ble Judges : Ashwani Kumar Singh, J;Anil Kumar Sinha, J

Bench : Division Bench

Advocate : Kunal Tiwary, Hemendra Pasad Singh, Surj Bansh Roy

Final Decision : Allowed

Judgement

1. Heard learned Counsel for the appellants and learned Senior Counsel appearing on behalf of the respondents.

2. This intra Court appeal is directed against the judgment, dated 30.03.2016, passed, by the learned Single Judge, in CWJC No. 17091 of 2008, by which he has set aside the order affirming Memo No. 894, dated 21.08.2003, issued under the signature of Deputy Secretary, Water Resources Department, Government of Bihar, whereby the deceased husband of the respondent no. 1 (hereinafter referred to as the 'original respondent') was inflicted punishment of dismissal from service.

3. The factual matrix of the instant case is that the original respondent was holding the post of Cashier, in Sone Canal Division, Ara, under the Water Resource Department, Government of Bihar. On 31.08.1991, he was posted as Divisional Cashier in the Office of the Executive Engineer, Sone Canal Division, Ara. In July, 1995, one Birendra Singh Prabhakar joined as Executive Engineer in the said in Sone Canal Division, Ara. One key of the official chest was used to be kept by the Cashier of the Office and another key of the said chest was used to be kept by the Executive Engineer. Since the original respondent failed to deposit

Rs. 2,66,319/-, as the closing balance on 31.03.1997, under the head 2701 in the Treasury and he also failed to make available the official records, such as cash book, cheque book, cash in chest etc. for handing over and taking over the charge, for which he was informed several times, an F.I.R. was lodged against him and others. It transpired in course of investigation that large scale defalcation of the Government money had taken place in the Sone Canal Division, Ara. The Chief Engineer, Water Resources Department, Dehri, made a request for special audit and for this purpose, to send information to the Account General, Bihar/Ranchi for needful action. In the mean time, the District Magistrate, Bhojpur, deputed a Magistrate, who, in presence of the then Executive Engineer of the Sone Canal Division, Ara, broke open the lock of the said official chest and the almirah, and prepared an inventory of the cash and the items found. Since only Rs. 1/- was found in the chest, an audit was conducted. The Financial Advisor -cum- Chief Accounts Officer of the Water Resources Department made a detailed audit of the accounts between 17.07.1997 and 26.07.2007 and submitted his audit report, which transpired huge defalcation of Government money, for which recovery was recommended against the original respondent and the then Executive Engineer.

4. The original respondent was put under suspension and a departmental proceeding was initiated against him, vide resolution, dated 25.07.1997.

5. In the departmental proceeding, charges were framed under four heads for defalcation of Rs. 8,22,000/-. It was also mentioned in the memo of charges that after special audit, the amount of defalcation may increase. After completion of the enquiry, the Enquiry Officer submitted his report, finding the original respondent guilty of all the four charges, whererafter a second show cause notice was issued, asking from the original respondent vide letter dated 09.08.1999, asking as to why an order of dismissal from service be not passed against him. The reply to the second show cause notice was submitted by the original respondent, which was examined and, after due consideration, he was awarded punishment of dismissal from service, vide order, dated 19.12.2001.

6. The original respondent challenged the order of dismissal by way of filing a writ petition before this Court, vide CWJC No. 1228 of 2002. The Writ Court, vide its order, dated 12.02.2002, set aside the order of punishment on the ground that the original respondent could not appear in the departmental proceeding as it was not within his control to participate in the departmental proceeding since he was in jail during the period of departmental enquiry. The Disciplinary Authority/Enquiry Officer was directed to furnish the relevant documents to the original respondent, as asked for by him, and allowed him to file reply to the show cause notice within a reasonable time.

7. After the said order, dated 12.02.2002, the appellant- State quashed the punishment order, through Memo No. 183, dated 02.07.2002, and allowed the original respondent to continue under suspension from 19.12.2001. He was provided with concerned documents and was directed to submit his written reply

to the Disciplinary Authority, pursuant to which, he submitted his reply on 22.07.2003. The same was examined by the Disciplinary Authority and once again, the original respondent was found guilty of the charges and, accordingly, a fresh punishment order of dismissal from service was issued on 21.08.2003 against him.

8. Once again, the original respondent challenged the order of punishment, dated 21.08.2003, by way filing a writ petition, vide CWJC No. 13435 of 2003, which was disposed of by the Writ Court on 13.07.2007, observing as follows:

"In view of the submissions of learned counsel for the petitioner, this writ petition is disposed of with a direction to the Commissioner -cum- Secretary, Water Resources Department, Bihar, to consider the appeal of the petitioner and, if necessary, give an opportunity of hearing to him and pass an appropriate orders on the same preferably within a period of three months from the date of receipt/production of a copy of this order."

9. Thereafter, the Commissioner -cum- Secretary, after giving sufficient opportunity of hearing to the original respondent, passed the order, dated 17.03.2008, by which the appeal filed by the original respondent was rejected and the punishment order of dismissal from service passed by the Disciplinary Authority was upheld.

10. Being aggrieved by the aforesaid order, dated 17.03.2008, the original respondent filed a writ petition before this Court, vide CWJC No. 17091 of 2008. The learned Single Judge, having heard the parties, set aside the order impugned and remanded back the matter to the Disciplinary Authority for taking a fresh decision on the quantum of punishment, vide impugned judgment, dated 30.03.2016.

11. The said judgment, dated 30.03.2016, passed by the learned Single Judge is under challenge in the present intra Court appeal.

12. Mr. Kunal Tiwary, learned Counsel appearing for the appellants, submitted that the learned Single Judge has remanded the matter for taking a fresh decision on the quantum of punishment without appreciating the fact that the charges against the original respondent were of serious nature involving defalcation of Government money, which were duly proved in the departmental proceeding. He contended that the charges were based on a detailed audit report and the delinquent-original respondent could not prove his innocence in course of the departmental enquiry. He contended that there was neither any procedural irregularity nor any irrelevant material had been taken into consideration in the departmental proceeding nor the punishment awarded was too harsh. On the contrary, the learned Single Judge was also of the view that the documents, placed in support of the charges, supported the charges framed against the original respondent. He has contended that though the learned Single Judge has held the punishment of dismissal from service to be not commensurate with the offence committed by the original respondent, he has not assigned any reason

for arriving at the said conclusion.

13. Per Contra, Mr. Hemendra Prasad Singh, learned Senior Counsel for the respondents submitted that the original respondent has already died and his legal heirs have been substituted in this case after his death. He contended that the learned Single Judge has passed the impugned judgment after taking into consideration the totality of the circumstances, including the fact that the key of the chest was possessed not only by the original respondent, but also by the Executive Engineer, against whom also, a departmental proceeding was initiated. However, during the pendency of the enquiry, the then Executive Engineer retired on attaining the age of superannuation and the punishment awarded against him under the Pension Rules has been set aside and the matter has been remanded back for deciding his case afresh. He contended that regard being had to the totality of the circumstances, if the learned Single Judge has held that the punishment of dismissal is not commensurate with the offence committed, no illegality or irregularity can be found with the said judgment.

14. We have heard learned Counsel for the parties and carefully perused the records.

15. Admittedly, the charges levelled against the original respondent were quite serious. They were duly proved in the departmental proceeding. The learned Single Judge, while passing the impugned judgment, has categorically held that the departmental proceeding cannot be faulted on the ground that no evidence was examined. He has held that it is difficult for him to hold that the enquiry report is based on no materials. According to him, there were sufficient documentary evidence, on the basis of which, the charges have been held to have been proved against the original respondent. The operative portion of the judgment under challenge, passed by the learned Single Judge, reads as follows:

"7. I have heard learned counsel for the petitioner and learned counsel for the other side and perused the materials on record.

8. During the pendency of the writ petition the original petitioner died and has been substituted by his wife, two daughters and one son.

9. From perusal of the enquiry report, I find that the enquiry officer recorded his findings on basis of documentary evidence. Further, the enquiry officer has given some details of the facts and figures emerging from the documents on which the prosecution has placed reliance. It is thus difficult for me to hold that the enquiry report is based on no materials. It is true that no witness was examined in support of the charge. I may observe here that a charge can be founded on the basis of both documentary evidence as well as oral evidence duly tendered in the Enquiry. In this view of the matter, the departmental proceeding cannot be faulted on the ground that no witness was examined. However, in view of nature of charge and the enquiry report, as well as submissions of the petitioner, I am of the view that punishment of dismissal is excessive and harsh. The petitioner cannot be solely faulted for not keeping the accounts up to date as the money

was said to be withdrawn by the then Executive Engineer, who was In-charge of one of the keys of the official chest, as being drawing and disbursing officer. In this view of the matter, the punishment of dismissal is not commensurate with the offence committed by him.

10. The impugned order is accordingly set aside and the matter is remanded to the Disciplinary authority for taking a fresh decision on quantum of punishment."

(Emphasis added)

16. Once the learned Single Judge came to the conclusion that the charges were proved on the basis of reliable documentary evidences and there was no procedural illegality in the departmental proceeding, in our opinion, there was no occasion for him to have interfered with the order passed by the Appellate Authority, upholding the order passed by the Disciplinary Authority in the departmental proceeding.

17. It is well settled position of law that where an administrative decision relating to punishment in disciplinary cases is challenged as arbitrary, the Court shall confined itself to Wednesbury test. It is only if the Court is satisfied that the punishment is violative of Wednesbury principle, it may remit the matter to the administrative authorities for a fresh decision in exercise of power of judicial review.

18. In B.C. Chaturvedi vs. Union of India and Others, reported in (1995) 6 SCC 749, the Supreme Court observed that "A review of the above legal position would establish that the disciplinary authority, and on appeal, the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. 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 authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/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."

19. In the case of Union of India and Another v. G. Ganayutham, reported in (1997) 4 SCC 436, the Apex Court, while dealing with the position regarding proportionality in administrative law in England and India, summarized its observations, in paragraph 31, as under:-

"31. The current position of proportionality in administrative law in England and India can be summarised as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was

illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational ?in the sense that it was in outrageous defiance of logic or moral standards. Th e possibility of other tests, including proportionality being brought into English Administrative Law in future is nor ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he had done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Article 19, 21 etc. are involve and not for Article 14."

20. It would, thus, be evident from the ration laid down by the Supreme Court, in the aforesaid cases, that unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court, there is no scope or interference. Further, the power of judicial review should be exercised in exceptional and rare cases, while reviewing the quantum of punishment with cogent reasons in support thereof.

21. Keeping in mind the aforesaid principles when we look to the facts of the present case, we find that the Disciplinary Authority and the Appellate Authority had acted legally and based their opinion on the quantum of punishment taking into consideration relevant factors as also the magnitude and the gravity of the misconduct. The punishment of dismissal, taking into account the magnitude and the gravity of the misconduct cannot be said to be shocking the conscience or that no sensible person could have arrived at such decision. The learned Single Judge was himself of the view that there was no procedural illegality or deficiency in the decision making process. Under such circumstances, we are of the opinion that the learned Single Judge could not have set aside and remit the matter back to the Disciplinary Authority for taking a fresh decision on the quantum of punishment.

22. In the above background, the impugned judgment, dated 30.03.2016, passed, by the learned Single Judge, in CWJC No. 17091 of 2008, cannot be sustained. It is set aside, accordingly.

23. The writ petition stands dismissed.

24. The appeal stands allowed.

25. The parties shall bear their own costs.