
(2011) 09 AHC CK 0113
In the Allahabad High Court
Case No : Service Bench No. 506 of 2011

The State of U.P.	Vs	APPELLANT
Sri Suresh Kumar and Another		RESPONDENT

Date of Decision : 22-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 9 ADJ 450

Hon'ble Judges : Sudhir Agarwal, J;Devi Prasad Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—This writ petition has been filed by State of U.P. through Principal Secretary, Kar Evam Nibandhan, and Commissioner of Commercial Tax U.P., Lucknow. They are aggrieved by order dated 16.04.2010 (Annexure1 to the writ petition) of State Public Service Tribunal, U.P., Lucknow (hereinafter referred to as the "Tribunal") in Claim Petition No. 287 of 2010 filed by Respondent No. 1. The Tribunal vide judgement dated 16.04.2010, impugned in this writ petition, has allowed the claim petition and directed the present Petitioners to accord benefit of Rule 5 of "U.P. Government Servants (Disposal of Representations Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995" (hereinafter referred to as the "1995 Rules") to Respondent No. 1 in respect to adverse remarks recorded for the year 200203 by Reviewing Authority and Accepting Authorities and not to treat the same adverse for the purposes of promotion, crossing of efficiency bar and other service matters of Respondent No. 1. It has further directed the present Petitioner to consider the case of Respondent No. 1 for promotion with effect from the date his junior was promoted, i.e., 19.01.2007 with all consequential benefits.

2. Eleven grounds have been taken to assail the order of Tribunal which are basically repetitive. In substance the general grounds of attack is that the Tribunal has passed the order unreasonably, without application of mind, in

absolute mechanical and technical manner, without taking into consideration the facts and circumstances of the matter available on record, has ignored the substantial justice and lawful considerations. It is said that substantial justice and technical considerations when are pitted each other, the substantial justice has to be preferred but the Tribunal has proceeded otherwise.

3. When we heard this matter initially on 24.03.2011 we enquired from learned Standing Counsel, whether the view taken by Tribunal is not consistent with statutory rules, namely, Rule 5 of 1995 Rules and whether the Tribunal has committed any error in interpreting and applying Rule 5 in the present case. He could not dispute that Tribunal has simply followed the mandate of Rule 5 and has implemented the same. We enquired whether he has challenged the validity of Rule 5 to which the answer was obviously in negative. In the circumstances when we made further query whether an order of Tribunal which simply gives effect to a plain and unambiguous statutory provision, can it be said that ignoring the same, the Tribunal ought or could have passed any other order which would have resulted in breach of mandatory statutory provision, the learned Standing Counsel having no option fairly stated that Tribunal could not and ought not to have adopted such approach. Moreover despite repeated query he could not point out any error apparent on the face of record in the order of Tribunal which simply reads Rules 4 and 5 of 1995 Rules and has given effect to Rule 5 in the light of admitted facts of this case.

4. To appreciate, we may also refer the admitted facts of the case, in brief.

5. The Respondent No. 1 after selection by U.P. Public Service Commission (hereinafter referred to as the "Commission") was appointed as Sales Tax Officer GradeII (now designated as "Commercial Tax Officer") on 20.04.1991. In 200203 he was posted as Trade Tax Officer, Mobile Squad, Trade Tax, Baghpat, Meerut. The Reporting Authority recorded his annual confidential report for the year 200203 (03.08.200231.03.2003) as "Very Good" and also certified his integrity. The Reviewing Officer, however, recorded some adverse comments and withheld integrity. The Accepting Authority deferred the decision on integrity till finalisation of inquiry pending against Respondent No. 1. A charge sheet was issued to Respondent No. 1 levelling three charges. Copy of this charge sheet has been placed on record as Annexure3 to the writ petition which shows that the said charge sheet is undated. In absence of any date of charge sheet placed on record, we are not sure as to when the same was issued but from Annexure7 to the writ petition it is clear that the departmental proceedings were initiated by Petitioners vide office memorandum dated 21.03.2006. The inquiry was completed by Inquiry Officer and he submitted report on 30.11.2006 whereafter a minor penalty, "Censure" was awarded by Commissioner, Trade Tax vide order dated 21.08.2007. Respondent No. 1's integrity was also uncertified.

6. Against this order of punishment Respondent No. 1 preferred Claim Petition No. 130 of 2009 which was allowed by Tribunal vide judgment dated 04.09.2009 and punishment order dated 21.08.2007 was quashed. Petitioners writ petition

against Tribunal's order dated 04.09.2009 quashing punishment is pending before this Court. We may, however, at the outset observe that Annual Character Roll of Respondent No. 1 relevant for present writ petition is for the period 200203 hence the departmental proceeding initiated after three years could not have reflected at all in the comments of officers recording entry for the year 200203 in case such recording would have been done within time prescribed in relevant Government Orders.

7. Be that as it may, the fact remains that Reviewing Officer and Accepting Officer made certain adverse comments against Respondent No. 1. The Reviewing Officer made his remarks on 03.06.2004 and Accepting Officer also made his remarks on the same day. The aforesaid adverse remarks were communicated to the Respondent No. 1 on 19.10.2006. He sent a representation against the aforesaid adverse remarks on 22.11.2006 which was rejected by Petitioner No. 2 vide order dated 03.10.2007.

8. The issue up for consideration before the Tribunal was, whether communication of adverse remarks and decision taken on Respondent No. 1's representation was in the manner prescribed in Rule 4 of 1995 Rules. Further if there is a clear breach thereof, whether the Respondent No. 1 was entitled for the benefit of Rule 5 which makes a declaration that in case procedure of Rule 4 is not complied with by departmental authorities in the matter of recording of Annual Character Role, communication of adverse remarks and disposal of representation such remarks shall not be treated adverse for promotion etc.

9. Rule 4 of 1995 Rules reads as under:

4. Communication of adverse report and procedure for disposal of representation.

(1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 45 days from the date of recording the report and a certificate to this effect shall be recorded in the report.

(2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under Sub-rule (1), represent in writing directly and also through proper channel to the authority, one rank above the accepting authority, hereinafter referred to as the competent authority, and if there is no competent authority, to the accepting authority itself, against the adverse report so communicated:

Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation.

(3) The competent authority or accepting authority as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under Sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments who shall, within a period not exceeding 45 days from the date of receipt of the representation, furnish his comments to the competent authority or the accepting authority, as the case may be. Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

(4) The competent authority or the accepting authority, as the case may be, shall within a period of 120 days from the date of expiry of 45 days specified in Sub-rule (3), consider the representation alongwith the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders

(a) rejecting the representation; or

(b) expunging the adverse report wholly or partly as he considers proper.

(5) Where the competent authority due to any administrative reasons, is unable to dispose of the representation within the period specified in Sub-rule (4), he shall report in this regard to his higher authority, who shall pass such orders as he considers proper for ensuring disposal of the representation within the specified period.

(6) An order passed under Sub-rule (4) shall be communicated in writing to the Government servant concerned.

(7) Where an order expunging the adverse report is passed under Sub-rule (4), the competent authority or the accepting authority, as the case may be, shall omit the report so expunged.

(8) The order passed under Sub-rule (4) shall be final.

(9) Where any matter for

(i) communication of an adverse report;

(ii) representation against an adverse report;

(iii) transmission of representation to the appropriate authority for his comments;

(iv) comments of the appropriate authority; or (v) disposal of representation against an adverse report: is pending on the date of the commencement of these rules, such matters shall be dealt with and disposal of within the period prescribed therefore under this rule.

Explanation. In computing the period prescribed under this rule for any matters specified in this Sub-rule, the period already expired on the date of the commencement of these rules shall not be taken into account.

10. Rule 5 of 1995 Rules provides as under:

5. Report not to be treated adverse: Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Part II to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purpose of promotion, crossing of efficiency bar and other service matters of the Government Servant concerned.

11. Learned Standing Counsel could not dispute that neither the communication of adverse remarks nor decision on Respondent No. 1's representation was taken in the manner provided in Rule 4. From record he could not dispute that Petitioner authorities acted in complete defiance of Rule 4. In such a case, Rule 5 comes into picture and declaration which applies by operation of law becomes operative on its own force. This position as is evident from a bare reading of aforesaid provisions vis a vis the facts of this case could not be disputed by learned Standing Counsel.

12. Faced with this situation we enquired as to why the present writ petition has been filed when apparently Tribunal's order is flawless. It simply gives effect to Rule 5 of 1995 Rules in the light of admitted facts of this case. No reply come forth.

13. We can take judicial cognizance of fact that before a writ petition is to be filed by State Government or its authorities, they are supposed to obtain legal opinion from respective law officers (Legal Remembrancer in the Government Secretariat in the matter of State of U.P.). Only when they approve that there is some glaring error and, therefore, the matter should be taken up in superior court, the Government used to proceed to litigate further and not otherwise. We are surprised, how in this case an opinion could be given to file writ petition challenging the order of Tribunal when apparently it did not suffer any error, what to say of apparent error.

14. Learned Standing Counsel obviously was not in a position to reply. We thence were constrained to pass following order on 24.03.2011:

It appears that in spite of repeated directions issued by this Court not to file petition in a mechanical manner against the order passed by State Public Services Tribunal, State on the advice of Law Department is continuously filing frivolous petitions having no foundation under Article 226 of the Constitution of India.

Put up tomorrow i.e. 25.03.2011 at 10.15 A.M. as fresh.

Let the record with regard to present controversy whereby approval has been granted by Law Department to file petition before this Court be produced at 10.15 A.M.. The officer concerned, who advised to file this petition, shall also be present.

The Respondent State shall also inform this Court as to why application has not been filed with regard to extension of time of disciplinary proceeding.

15. Pursuant to above, Dr. Goklesh, Additional Legal Remembrancer, U.P. Government appeared alongwith relevant record on 25.03.2011.

16. The record shows that Sri Matin Ahmad Khan, Presenting Officer who appeared on behalf of Petitioner before the Tribunal rendered his opinion dated 29.06.2010, "..... judgment/order in question does not suffer from any legal infirmity." However, a Departmental Committee of Institutional Finance Tax and Registration, it appears, recommended for challenging the Tribunal's order by filing writ petition in the High Court on two grounds as under:

1. The Accepting Officer in his report for the year 200203 while agreeing with Reviewing Officer did not certify integrity of Petitioner yet the Tribunal has proceeded to hold the integrity certified on the basis of inquiry report.

2. Against the punishment order imposing censure and withholding integrity the Tribunal's order dated 04.09.2009 in Claim Petition No. 130 of 2009 was pending for consideration in Writ Petition No. 453/SB/2010 hence the order dated 04.09.2009 could not have been treated to be a base for deciding matter.

17. On these two grounds the matter was referred to Law Department of U.P. Government for its approval for assailing the judgment of Tribunal in the High Court. After this noting we find a note dated 06.08.2010 by Special Secretary, Law and Additional Legal Remembrancer, Dr. Gokulesh that on the record the reason has been shown and, therefore, the writ petition may be filed. Except this there is nothing on record to show any independent application of mind and scrutiny on the part of Law Department in this matter.

18. Having gone through the record and as discussed above we cannot refrain ourselves from placing on record our serious anguish and concern over the manner, the opinion has been given by Law Department of U.P. Government resulting in a frivolous, vexatious and total meritless writ petition filed by State and its officials.

19. The officials in Law Department are expected to show more vigilance, independence and better application of mind. They are not supposed to surrender to the wishes of department but simply continued litigation for the sake of it. There were two aspects in the matter. One was punishment and another was annual character roll which was adverse in the year 200203.

20. So far as the punishment part is concerned, it was already decided by Tribunal in Claim Petition No. 130 of 2009, decided on 04.09.2009 and, therefore, nothing has to be done. Now the only question was regarding adverse entry. The Tribunal has categorically held that the matter of adverse entry in the year 2002-03 has not been dealt with by Government in accordance with procedure prescribed in Rule 4 of 1995 Rules and the result thereof would be that entry cannot be treated to be adverse for the purpose of promotion,

efficiency bar etc. as provided in Rule 5. On this aspect neither department found any ground to challenge the order of Tribunal nor the Law Department has made any observation. That being so, we do not find on record any justification whatsoever for taking the matter further. The Petitioner and unfortunately the Law Department have dealt with this matter in most casual and reckless manner, as if continuing litigation is the legal right of Petitioner.

21. We intend to place on record our deep dissatisfaction in the manner, the officials in Law Department are functioning. Error of judgment can be excused but surrender or no application of mind cannot. The Judicial Officers are sent on deputation to the Law Department of Government with an objective that they constitute an independent cadre, hence without being influenced by executive, shall advise it impartially, objectively and fairly. If this does not happen, the very purpose in sending Judicial Officers on deputation with Government will frustrate. On the one hand from regular work these officers are taken out and sent on deputation to work like a Consultant but if their advise and opinion is not independent and impartial, it shall loose its gravity and frustrate the purpose. The officials in the Law Department, therefore, have to work with great caution, care and independence.

22. It is a matter of common knowledge that before the superior courts, like High Court and Supreme Court, State (Provincial or Central, as the case may be) is the biggest litigant. In fact in writ jurisdiction, almost in all the cases, State, in one or other manner, is a party.

23. This Court is presently reeling under huge pendency of more than 9.5 lacs cases (more than 7 lacs at Allahabad and more than 2.5 lacs at Lucknow). Innumerable seminars, conferences, meetings, discussions etc. are being held at every level to find out ways and means for expeditious disposal of matters so that access to justice should be quicker and prompt to the people. All out attempt is being made for quick justice since justice delayed is justice denied. We are trying our best so that litigating people should get decision/adjudication of their rights within a reasonable time. To achieve this goal, role of Executive cannot be ignored. On the contrary, being one of the biggest litigant, the Executive has all the more responsibility to behave in a reasonable manner which is consistent with law so that occasion to approach Courts for protection of rights by people may be minimised.

24. Under Article 226 of the Constitution, writ petitions are mostly filed when the Executive behave arbitrarily, oppressively and in defiance of statutes, Constitutional and otherwise. When a common man comes to Court against such action of Executive, it cannot be said that he is unnecessarily burdening the system of administration of justice. The situation, however would be much different when an independent adjudicatory forum has been constituted under an enactment of State or Central Lagislature, the adjudicatory forum consists of not only trained, legal expert and experienced Judicial Officer but also an Executive Officer so that both may consider the matter from the angle of legal principles as

well as departmental provisions, practice etc. and then to consider the grievance of an employee of the Government. Once such a decision is taken by the statutory adjudicatory forum, unless a glaring legal error or otherwise travesty of justice has resulted from such a decision, at least the State must be slow in continuing to engage its employee in further litigation by filing a writ petition in the High Court under Article 226 and thereafter to take up the matter further.

25. We are not suggesting that against the judgment of such statutory adjudicatory forum consisting Judicial and Executive experts should not be challenged at all but our Endeavour is to stress upon a more serious scrutiny at the level of department itself as to whether there is such a glaring error in the judgment of statutory adjudicatory forum, i.e., Tribunal in the present case so as to take up the matter further or not. Most of the departments of Government have their own legal experts and consultants. At the Secretariat level a full fledged cadre of such Experts is available in Law Department. We are told that presently the office of Legal Remembrancer and Secretary, Law, includes more than two dozens of Judicial Officers at the level of Deputy Legal Remembrancer, Joint Legal Remembrancer and Additional Legal Remembrancer headed by a Legal Remembrancer. They are the officers belong to Judicial Service of State, whereof senior posts like Joint Legal Remembrancer, Additional Legal Remembrancer and Legal Remembrancer are manned by members of Higher Judicial Service. Heavy responsibility lie upon these officers also to analyse the judgments of Tribunals in the context of facts, statutory provisions and decisions of High Courts and Supreme Court on the subject and thereafter to find out whether there is any such glaring error which justify further litigation in High Court or not. The approach should not be one to grant approval automatically and mechanically. There must be and there has to be a serious application of mind at the level of authorities who are responsible to tender legal opinion to take up the matters further.

26. We may point out further at this stage that in case of any doubt about the clarity on the subject, the officers of Government including those from Law Department can also seek opinion from Law Officers of State who represent them in High Court including the learned Advocate General and Additional Advocate Generals. It would not be out of place to mention that number of State Law Officers empanelled by State in the High Court, i.e., at Lucknow and Allahabad consists of more than one thousand Advocates, designated as under:

Civil side

1. Chief Standing Counsel
2. Additional Chief Standing Counsel
3. Standing Counsel
4. Brief Holder

Criminal side

Government Advocate

Additional Government Advocate I

Additional Government Advocate II

27. The aforesaid team of Law Officers is headed by learned Advocate General and there are about more than half a dozen Additional Advocate Generals also to take care of the interest of State. Monthly revenue towards fees of this magnitude of State Law Officers, only in the High Court is more than five crores per month. We have experienced that not only this but almost in a routine manner, State is also engaging several private counsels as Special Counsel, paying them a huge amount spending several crores annually. With this assistance of legal brains still the Government, if not able to control frivolous and vexatious cases to be filed by it, it is a matter, not only of serious concern, but condemnation. There is something basically wrong which needs be analysed and rectified at the earliest. The State cannot forget that being custodian of public funds which belong to tax payers of people of this State, it cannot plundered with it in such reckless and negligent manner. Everybody must have to be accountable for spending even a single shell from the public funds. Anybody responsible for wastage must be required to explain and bear it. Public funds cannot be allowed to be thrown and misused in such a manner.

28. Time and again, the Apex Court and this Court have repeatedly said that State should refrain from filing frivolous petitions, wasting precious time of Court so that other substantial matters may be taken up and decided.

29. One of us (Hon"ble Devi Prasad, J.) recently in Writ Petition No. 474 (SB) of 2011 (State of U.P and Anr. v. Brij Bhushan Sharma), decided on 17.03.2011, by a Division Bench presided by Hon"ble the Chief Justice, has deprecated such practice of State of filing frivolous writ petitions challenging the order of Tribunal as under:

We deprecate such practice on the part of the State....

30. In another matter, i.e., Writ Petition No. 473 (SB) of 2011 (State of U.P through Principal Secretary Appointment Deparmtnet v. Vishnu Swarup Mishra and Anr., decided on 17.03.2011 while dismissing writ petition against Tribunal, the Court said:

We direct the Chief Secretary of State to formulate a policy in the matter of filing such petitions which are causing unnecessary burden for disposal, on this Court.

31. Still the State has not learnt its lesson and has not shown any inclination to mend its ways. This is really unfortunate.

32. We are constrained, therefore, not only to dismiss this writ petition but find it appropriate to impose a cost upon Petitioners for filing a frivolous vexatious petition.

33. The writ petition being devoid of merits is dismissed with costs quantified to Rs. 10,000/.