

(2008) 12 RAJ CK 0046
In the Rajasthan High Court

Ummed Singh

APPELLANT

Vs

Chairman and Technical Assistant (District Level Inquiry Committee) and Others

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Rajasthan Co-operative Societies Act, 2001 — Section 57(1)

Citation : (2009) 3 RLW 2148 : (2009) 7 SLR 71

Hon'ble Judges : H.R. Panwar, J

Bench : Single Bench

Judgement

H.R. Panwar, J.—The instant writ petition under Article 226 of the Constitution of India has been filed by the petitioner on 9th August, 2005 seeking a direction to the respondents to restrain them from proceeding further in pursuance of the second enquiry report and for some reason if the punishment of removal or dismissal from service is visited to the petitioner, same may be declared illegal and may be quashed.

2. This matter came up before this Court on 10th August, 2005. While issuing notice to the respondents of the writ petition as well as of stay application, by an interim order, further proceedings in pursuance of notice dated 11.8.2005 (Annexure-7) in the writ petition was directed to be stayed till next date of hearing. However, by order Annexure-11 dated 11th August, 2005, the services of the petitioner came to be terminated by the respondents and therefore, the petitioner amended the writ petition and challenged the order Annexure-11 terminating his services.

3. Briefly stated facts and circumstances giving rise to the instant writ petition are that the petitioner was appointed on the post of Manager under the Primary Agriculture Credit Cooperative Society (for short "PACCS" hereinafter). Contemplating an enquiry, the petitioner was placed under suspension, however, he was not paid subsistence allowance and therefore, the petitioner preferred a writ petition being S.B. Civil Writ Petition No. 2416/2005 before this Court. After

placing the petitioner under suspension, a charge-sheet Annexure-9 dated 30th November, 2004 was served on him. In pursuance of the order Annexure-1 dated 12th May, 2005 passed by this Court, amount of Rs. 6,719/- was paid to the petitioner as subsistence allowance. However, thereafter, the respondents failed to pay any subsistence allowance during the period the petitioner remained under suspension. The enquiry proceeded ex-parte. Since the subsistence allowance was not paid to the petitioner, therefore, he could not afford the expenses in defending the enquiry though a reply to the charge-sheet was supplied by the petitioner vide Annexure-3 taking a plea that in absence of payment of subsistence allowance, he is not in a position to attend the inquiry. After considering the reply filed by the petitioner, the Chairman, District Level Enquiry Committee and Technical Assistant, vide Annexure-4 4th May, 2005, decided that no final action can be taken against the petitioner as the proceedings u/s 57(1) of the Rajasthan Cooperative Societies Act, 2003 (for short "the Cooperative Societies Act" hereinafter) are pending against the petitioner. According to the petitioner, for the same charges, an enquiry was pending against the petitioner before the Joint Registrar, Cooperative Societies, Bikaner Division Bikaner. By order Annexure-6, the Joint Registrar, Cooperative Societies without informing any reasons for disagreeing with the enquiry report Annexure-4 ordered for re-enquiry and consequent thereupon, re-enquiry was conducted which the petitioner could not defend since he was not paid subsistence allowance. By order Annexure-6, a major penalty terminating the services of the petitioner was recommended and thereafter, by order Annexure-11 dated 11th August, 2005, the respondent No. 5 terminated the services of the petitioner w.e.f. 11th August, 2005. Hence, this writ petition.

4. A reply to the writ petition has been filed by the respondent State as well as by respondent No. 5. In the reply filed by the respondent No. 5, a preliminary objection was taken to the effect that order terminating the services of the petitioner dated 11th August, 2005 Annexure-11 is appealable under Rule 37 of the Primary Agriculture Credit Cooperative Society/Multipurpose Large Cooperative Society Managers (Selection & Appointment) Service Conditions, 2003 (for short "the Service Conditions, 2003" hereinafter) before the Joint Registrar, Cooperative Society. It was also averred that the auditor found serious allegation against the petitioner in the audit reports for the years 1999-2000, 2000-01 and 2001-02 vide Annexures-R/5/2, R/5/3 and R/5/3A respectively. So far as the competency of the Joint Registrar, Cooperative Societies terminating the services of the petitioner vide Annexure-11 dated 11th August, 2005 is concerned, the respondent in para 9 of the reply to the writ petition stated that the Joint Registrar is appellate Authority under Rule 37 of the Service Conditions, 2003 and he enjoyed the power of supervision and therefore, has a jurisdiction to pass the order under challenged. In the reply filed by the State, various pleadings in the writ petition came to be denied.

5. I have heard learned Counsel for the parties.

6. It is contended by learned Counsel for the petitioner that firstly the order terminating the services of the petitioner Annexure-11 dated 11th August, 2005 is willful disobedience of the order of this Court dated 10th August, 2005 whereby the further proceedings in the enquiry came to be stayed by this Court; Learned Counsel has relied on two decisions of this Court in Anil Kumar and Others Vs. State of Rajasthan and Others, and in Ganesh Mal Surana and two Ors. v. State of Rajasthan and Ors. 1996(3) WLC (Raj.) 34 : RLW 1996(2) Raj. 275.

7. It is also contended by learned Counsel for the petitioner that the order Annexure-6 ordering re-enquiry by the Joint Registrar, Cooperative Societies is without authority of law. The Joint Registrar, Cooperative Societies is neither the appointing Authority nor disciplinary Authority of the petitioner. It is further contended that ex-parte enquiry and consequent thereupon, imposing penalty of terminating the services of the petitioner are bad in law inasmuch as the petitioner has not been paid subsistence allowance during the period of his suspension and therefore, in absence of subsistence allowance, he was unable to afford the expenses in defending the enquiry and therefore, the enquiry is bad in law. Learned Counsel has relied on the decisions of Hon"ble Supreme Court in Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh, Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, LRs of Bhanwar Lal Soni v. State of Rajasthan and Ors. 2006(7) RDD 3805 (Raj.)(DB).

8. It is further contended by learned Counsel for the petitioner that in the instant case, no oral evidence was produced in the departmental enquiry and the conclusion arrived at only on the basis of the documents produced before the Enquiry Officer and according to learned Counsel, without there being any oral evidence, the charges levelled against the petitioner cannot be said to have been proved. Learned Counsel has relied on a decision of Hon"ble Supreme Court in Bareilly Electricity Supply Co. Ltd. Vs. The Workmen and Others, and the decision of this Court in Amrit Lal v. State of Raj. and Ors. 1981 WLN (UC) 457 (Raj.).

9. It is lastly contended by learned Counsel for the petitioner that the conclusion arrived at by the Enquiry Officer cannot be reviewed by the Joint Registrar. According to learned Counsel, the power of review is conferred by Statute and no Statute provides such power of review by the Joint Registrar. The Enquiry Officer has concluded that enquiry is not warranted against the petitioner till proceedings u/s 57(1) of the Cooperative Societies Act are finalized. However, the Joint Registrar, Cooperative Societies who has no authority to review the order of Enquiry Officer, directed for re-enquiry. Learned Counsel has relied on a decision of Hon"ble Supreme Court in Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others,

10. Learned Deputy Government Counsel as also learned Counsel appearing for the respondent No. 5 contended that the Joint Registrar enjoined the supervisory power and therefore, is competent to direct for further/re-enquiry in the matter. On this strength, they supported the order under challenged.

11. I have given my thoughtful consideration to the rival submissions made by learned Counsel for the parties.

12. The respondent No. 5 has raised preliminary objection regarding maintainability of the writ petition and stated that an appeal lies under Rule 37 of the Service Conditions, 2003 before the Joint Registrar, Cooperative Societies. In the instant case, it was the Joint Registrar, who has directed for re-enquiry and therefore, as to whether the appeal would lie before the Appellate Authority at whose instance a re-enquiry was ordered to be held and ultimately, imposed a penalty terminating the services of the petitioner? In my view, in the peculiar facts and circumstance of the case, the writ petition cannot be thrown on the ground of alternative remedy when the Appellate Authority itself is the authority at whose instance, the re-enquiry has been reinitiated.

13. It is not in disputed that the writ petition was filed by the petitioner apprehending the order of punishment seeking a direction to the respondents not to proceed further in the matter of enquiry. This Court by order dated 10th August, 2005 restrained the respondents to proceed further in the enquiry and according to the learned Counsel for the petitioner, the order dated 10th August, 2005 was served upon the respondents on the next date i.e. 11th August, 2005 before passing the order Annexure-11, however, the order Annexure-11 dated 11th August, 2008 terminating the services of the petitioner came to be passed by the respondents. Thus, the order visiting penalty of terminating the services of the petitioner has been passed in defiance of the order of this Court and therefore, on this ground alone, the order impugned deserves to be quashed.

14. In Anil Kumar and Ors. v. State of Rajasthan and Ors. (supra), this Court relying on a decision of Hon"ble Supreme Court in Mulraj Vs. Murti Raghonathji Maharaj, held that any action taken by an authority/Court in contravention of the interim order passed by a Court of Law, is not only illegal but tantamounts to a nullity. In Mool Raj v. Murthy Raghunath Maharaj (supra), the Hon"ble Supreme Court observed as under:

But a mere order of stay of execution does not take away the jurisdiction of the Court. All that it does is to prohibit the Court from proceeding with the execution further... As soon as the Court has the knowledge of the order, it is bound to obey and if it does not, it acts illegally and all proceedings taken after the knowledge of the order would be a nullity.

15. In Ganesh Mal Surana and two Ors. v. State of Rajasthan and Ors. (supra), a Division Bench of this Court observed as under:

Any order passed in the open Court restraining the parties to proceed with the matter and forbidding them from taking any step, must be presumed to have been communicated to the parties affected thereby because it has been passed in the presence of their counsel and the party cannot disobey the order by way of publishing/notifying the Scheme and taking an excuse that the order passed by the Court was not communicated to them by their counsel. Though in the cases

of prohibitory or restraining orders the knowledge to the authority which is prohibited, is essential before the authority is deprived of the power to carry-on the proceedings but when the order has been passed in the presence of their counsel then that will amount to have been passed in the presence of the parties and within their knowledge and, therefore, from the date the stay order was passed, the respondents No. 1, 4 and 2 were bound to obey it and as the order has not been obeyed by the respondents, the respondents' act was illegal in publishing the Scheme and, therefore, all the proceedings taken after 6.1.87 relating to the publication of the Scheme would become nullity and deserve to be quashed and set aside. The learned Single Judge was not justified in holding that the order was not communicated by Shri B.R. Mehta to the authorities and as such they had no knowledge of the order. No reply has been filed on behalf of the State or the respondent No. 2 or respondent No. 4 that the order was not communicated to them and the Scheme was notified without any knowledge of the stay order passed by this Court. The reply has been filed only by the R.S.R.T.C. which had no personal knowledge so far as the communication of the order to the respondents is concerned. But even otherwise, when the order has been passed by the High Court in the presence of the counsel for the respondents then it means that the order has been passed in the presence of the parties themselves and the parties had the knowledge of the stay order. The Scheme notified by the State Government in the presence of the prohibitory order dated 6.1.87, therefore, deserves to be quashed and set aside.

16. In the instant case, the order dated 10th August, 2005 came to be passed though ex-parte but the petitioner very specifically stated in rejoinder to the reply to the writ petition that the order of this Court dated 10th August, 2005 staying further proceeding in pursuance of the notice dated 11th August, 2005 Annexure-7 came to be served on the respondents on very next date i.e. 11th August, 2005 before passing the order impugned terminating the services of the petitioner and this fact has not been controverted by the respondents. The question to be considered is ex-parte enquiry can be sustained in absence of payment of subsistence allowance to the delinquent petitioner who came with a specific case that since he has not been paid the subsistence allowance, therefore, he could not incur the expenses in defending the enquiry. The Hon'ble Supreme Court in Ghanshyam Das Shrivastava v. State of M.P. (supra) observed as under:

With respect, we find it difficult to share the view taken by the High Court. Paragraph 5 of the writ petition expressly alleges that on December, 5, 1964, the appellant sent a letter to the Enquiry Officer informing him that unless he was paid subsistence allowance he would not be able to face the enquiry proceedings. The letter was filed along with the petition. It is annexure H. The letter stated that "Until and unless I am paid subsistence allowance.... I categorically refuse to face any proceeding...as I have no capacity to do so because of acute shortage of funds. This is obviously specific pleading on the point that for non-payment of subsistence allowance he was short of funds and could not attend the enquiry. It

is true that his affidavit does not give any particulars about his sources of income and the estimate of expenses to be incurred in the enquiry. But it would prima facie suggest that he had no other sources of income except his pay. If he had no other sources of income, he could not invent them for the purpose of mentioning them in the affidavit. More significantly, the Government affidavit does not allege that he had any other source of income except pay.

17. In the instant case by a communication Annexure-3 dated 4th May, 2005 addressed to the District Level Enquiry Committee stating therein that he is low paid employee and for last 7 months, he has not been paid subsistence allowance and therefore, he is unable to attend the enquiry on each and every date fixed by the Enquiry Officer.

18. In *Ghanshyam Das Shrivastava v. State of M.P.* (supra), the delinquent therein categorically came with a case that a letter was sent to the Enquiry Officer stating therein that he has no capacity to do so because of acute shortage of funds and the Government affidavit does not allege that he had any other source of income except pay. The Hon'ble Supreme Court observed that enquiry proceedings during those days when the delinquent employee was not paid the subsistence allowance are vitiated and on that premises, the Hon'ble Supreme Court held that the order passed by the Enquiry Officer was in violation of the provisions of Article 311 (2) of the Constitution for the appellant therein did not receive a reasonable opportunity of defending himself in the enquiry proceedings.

19. In *Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and Anr.* (supra), the Hon'ble Supreme Court held that nonpayment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee. When the employee is placed under suspension, he is demolished and the salary is also paid to him at a reduced rate under the nick name of "subsistence allowance, so that the employee may sustain himself. Relying on the observation made by Hon'ble Supreme Court in *O.P. Gupta Vs. Union of India (UOI) and Others*, the Hon'ble Supreme Court held that if, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of non-payment of Subsistence Allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of Subsistence Allowance, would gradually starve himself to death.

20. In para 33 of the judgment, the Hon'ble Supreme Court observed as under:

Since in the instant case the appellant was not provided any Subsistence Allowance during the period of suspension and the adjournment prayed for by him on account of his illness, duly supported by medical certificates, was refused resulting in ex parte proceedings against him, we are of the opinion that the appellant has been punished in total violation of the principles of natural justice and he was literally not afforded any opportunity of hearing. Moreover, as pleaded by the appellant before the High Court as also before us that on account

of his penury occasioned by non-payment of Subsistence Allowance, he could not undertake a journey to attend the disciplinary proceedings, the findings recorded by the Inquiry Officer at such proceedings, which were held ex-parte, stand vitiated.

21. So far as contention of learned Counsel for the petitioner that no oral evidence was produced by the departmental nominee before the Enquiry Officer is concerned, this fact has not been disputed. Obviously, the departmental nominee failed to produce any evidence and conclusion arrived at by the Enquiry Officer is only on the basis of documents placed on record.

22. In *Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors.* (supra), the Hon"ble Supreme Court noticed that now it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act but that Act has no application to enquiries conducted by Tribunal even though they may be judicial in character. The law requires that such Tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with law and on that premises, the Hon"ble Supreme Court held that the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true? When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the appellant therein must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with principles of natural justice as also according to the procedure under Order XIX CPC and the Evidence Act both of which incorporate these general principles.

23. In *Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Ors.* (supra), the Hon"ble Supreme Court held that it is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissal of the Principal acts as a quasi judicial authority. The provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-

Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing the order and the order is a nullity.

24. In the instant case, firstly there was an interim order staying the further proceedings in the enquiry dated 10th August, 2005 and the same was conveyed to the respondents on the very next date i.e. 11th August, 2005 before passing the order impugned terminating the services of the petitioner as has been stated by the petitioner in rejoinder to the reply to the writ petition and this fact has not been controverted by learned Counsel for the respondents. Even otherwise, there is no power to review the order of the Enquiry Officer by the Joint Registrar. The respondents failed to show any provision empowering the Joint Registrar, Cooperative Societies to review the order of Enquiry Officer and direct for re-enquiry. So far as the jurisdiction of the Joint Registrar is concerned, there is no material on record to show that the Joint Registrar is either the appointing Authority or the disciplinary Authority of the petitioner and over and above, the facts remains that during the period of enquiry, the petitioner remained under suspension and except the amount of Rs. Rs. 6,719/- which came to be paid as subsistence allowance in pursuance of the order of this Court Annexure-1 dated 12th May, 2005, thereafter, no subsistence allowance was paid to the petitioner. At any rate when the enquiry proceeded ex-parte, during that period, no subsistence allowance was paid to the petitioner and the petitioner by Annexure-3 communicated to the Enquiry Officer that in absence of payment of subsistence allowance, he could not afford the expenses in defending the enquiry as he has no other sources of income. In the circumstance, it was incumbent upon the Enquiry Officer either to have made subsistence allowance requesting the employer to pay the subsistence allowance to the delinquent or to stay the enquiry till the subsistence allowance is paid to the delinquent and therefore, in my view, the petitioner has not been afforded any opportunity to defend in the enquiry. Even the procedure established by law has not been followed in the enquiry arriving at conclusion for the reason that indisputably, no oral evidence has been recorded by the Enquiry Officer and the documents placed on record has not been tendered in evidence or no cross-examination of the person tendering the evidence was permitted. In the circumstances, therefore, in my view, the enquiry as also the conclusion arriving at by the Enquiry Officer and in pursuance thereof, the punishment imposing terminating the services of the petitioner cannot be sustained and liable to be quashed and the matter deserves to be remanded to the Enquiry Officer to proceed afresh with the enquiry after paying subsistence allowance to the petitioner for the period of which subsistence allowance has not been paid to him.

25. Consequently, the writ petition is allowed. The order impugned Annexure-11 dated 11th August, 2005 is set aside and quashed and the matter is remanded back to the Enquiry Officer to proceed afresh with the enquiry and conduct the enquiry in accordance with the law after paying subsistence allowance to the petitioner for the period of which subsistence allowance has not been paid to him. The subsistence allowance may also be paid to the petitioner for the period

till the enquiry is concluded. This exercise will be completed within two months from the date of producing the certified copy of this order. Stay petition stands, accordingly, disposed of. There shall be no order as to costs.