
(2016) 03 JH CK 0093

In the Jharkhand High Court

Case No : LPA No. 151 of 2015 and I.A. Nos. 1545 and 1546 of 2015

Union of India and Others

APPELLANT

Vs

Karuna Shankar Mishra

RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Central Industrial Security Force Act, 1968 — Section 18

Citation : (2016) 3 AIRJharR 135 : (2017) 1 JBCJ 413 : (2016) 4 JLJR 658

Hon'ble Judges : Virender Singh, C.J. and S. Chandrashekhar, J.

Bench : Division Bench

Advocate : Binod Singh, Advocate, for the Appellant; Anand Kr. Sinha and Binod Kr. Jha, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Virender Singh, C.J.

I.A. No. 1545 of 2015

1. For the reasons carved out in the instant application and there being no serious objection from the side of the respondent-writ petitioner, the delay of 53 days in filing the accompanied appeal being L.P.A. No. 151 of 2015 is condoned.

2. I.A. No. 1545 of 2015 stands disposed of accordingly.

L.P.A. No. 151 of 2015

3. Heard learned counsel for the parties.

4. The learned counsel for the appellant referring to the "disagreement note" vide, Annexure-1 to the Letters Patent Appeal submits that the learned Single Judge interfered with the penalty order primarily on the ground that before disagreeing with the findings recorded by the enquiry officer, the disciplinary authority did not issue a show-cause notice to the delinquent whereas, as a matter of fact, "disagreement note" was furnished to the delinquent which was

received by him on 28.12.1993. It is further submitted that the respondent was previously awarded as many as 5 minor penalties and thus, the charge of habitual offender having been proved, no interference was required with the penalty inflicted upon the respondent.

5. Per contra, the learned counsel for the respondent supporting the impugned order dated 10.11.2014 in W.P.(S) No. 1737 of 2008 contends that the appellant has pleaded altogether different facts in the Letters Patent Appeal which were not pleaded in the counter-affidavit filed before the writ court. Referring to the counter-affidavit filed by the Union of India in the proceeding of W.P.(S) No. 1737 of 2008, the learned counsel for the respondent submits that it was neither pleaded that a copy of 2nd show-cause notice containing the disagreement of the disciplinary authority with the findings recorded by the enquiry officer was served upon him nor a copy thereof was filed in the writ proceeding. In fact, the stand taken by the writ petitioner that the charge of being a habitual offender i.e. charge No. (iii) cannot be said to be proved as he was finally discharged from all the charges, was not denied by the Union of India. The learned counsel contends that the petitioner was not afforded a fair opportunity to defend himself and the order of removal from service was passed in complete violation of the rules of natural justice.

6. The main question involved in the case is, "whether the disciplinary authority, while disagreeing with the findings recorded by the enquiry officer, issued 2nd show-cause notice containing his tentative findings and whether he gave a fair opportunity to the delinquent-writ petitioner to defend himself or not?".

7. The writ petitioner-respondent herein was served a memorandum of charge dated 20.02.1993, to which he replied on 12.03.1993. However, the reply of the respondent was not found satisfactory and departmental enquiry was initiated by appointing an enquiry officer to enquire into the charges framed against him. The following three charges were framed against the respondent:

Article of Charge No. I

That, No. 8417284 Const. K.S. Mishra of CISF Unit, UCIL-BTN Narwapahar project. Deployed at tramdih project, was found absent from duty post on 23.12.92 at about 1015 hrs, when he was detailed in "A" shift from 0500 hrs at 1300 hrs at stores and steel yard duty post of turemdih project, when checked by No. 88446012 SI/EXE. A N Sallal, post Commander, Turemdih project, which amounts to cross misconduct and dereliction of duty within the meaning of section 18 of CISF Act 1968.

Article of Charge No. II

That, No. 8417284 Const. K S Mishra leaving his place of duty, stores and steel yard duty post, on 23.12.92 came to old security barrack, while on "A" shift duty from 0500 hrs to 1300 hrs and engaged himself in removing copper cable, and was caught red handed alongwith three meters of copper cable piece, by the post

Commander No. 88446012 SI/EXE. A N Sallal at about 1015 hrs. which amounts to gross misconduct within the meaning of section 18 of CISF Act 1968.

Article of Charge No. III

That, No. 8417284 Const. K S Mishra is a habitual offender in that he was negligence towards duties and involvement in malpractices in his past service in CISF."

8. On conclusion of the enquiry, an enquiry report was submitted to the disciplinary authority on 14.10.1993 holding charge No. (i) and charge No. (ii) not proved however, charge No. (iii) was found proved. The respondent was furnished a copy of the enquiry report vide, order dated 18.12.1993 with liberty to him to submit his representation within 15 days. The respondent submitted his representation on 11.01.1994 and, the punishment of "removal from service" was awarded by the disciplinary authority vide, order dated 03.02.1994. In his reply dated 11.01.1994, the respondent took the stand that he was not provided the statement of the witnesses and the enquiry was conducted in breach of the rules of natural justice. The respondent asked for Hindi version of the enquiry report and he claimed that the same was not provided to him. The respondent after receiving the said order on 21.02.1994, submitted appeal before the Deputy Inspector-General/DAE on 13.03.1994. The appeal preferred by the respondent was, however, dismissed on 04.10.1994, against which the respondent preferred a writ petition before the Allahabad High Court vide, Civil Misc. W.P. No. 1611 of 1995 which was disposed of with liberty to the respondent to prefer revision petition within one month. Subsequently, the revision petition filed by the respondent was dismissed vide, order dated 07.04.2006. Challenging the order dated 03.02.1994 whereby, the penalty of removal from service has been inflicted upon him and the appellate order dated 04.10.1994 as well as the order passed by the revisional authority dated 07.04.2006, the respondent approached the writ court in W.P.(S) No. 1737 of 2008 which was allowed vide, order dated 10.11.2014. Aggrieved, the appellant-Union of India has preferred the Letters Patent Appeal which, at the admission stage, has been taken up for final consideration.

9. The question, whether the disciplinary authority is under a duty to furnish his tentative findings, disagreeing with the favourable findings recorded by the enquiry officer, has been settled in a catena of judgments of the Hon"ble Supreme Court. It has been held that if a finding is recorded by the enquiry officer which favours the delinquent and it is found that the charge is not proved, it is necessary to give an opportunity to the delinquent employee before reversing the favourable findings recorded by the enquiry officer. Once the disciplinary authority forms a tentative opinion disagreeing with the findings recorded by the enquiry officer, the delinquent employee must be informed the reasons, on the basis of which the disciplinary authority proposes to disagree with the findings of the enquiry officer.

10. The penalty order dated 03.02.1994 passed by the Commandant/CISF narrates all the proceedings before the final order of removal from service was passed by him however, the said order does not speak of 2nd show-cause notice issued to the respondent. It merely records that a copy of the enquiry report was furnished to the delinquent vide, letter dated 18.12.1993, which the charge-member received on 28.12.1993 and submitted his representation on 11.01.1994. Neither the order passed by the disciplinary authority nor the appellate authority or the revisional authority discloses that a 2nd show-cause notice alongwith the "disagreement note" of the disciplinary authority was issued to the respondent. In the present proceeding also, it has not been pleaded that such a 2nd show-cause notice was issued to the respondent and he responded to the same or did not submit his reply. The "disagreement note", a copy of which has been annexed as Annexure-1 to the memorandum of appeal, was not produced before the writ court. The reply dated 11.01.1994 submitted by the respondent also does not refer to the "disagreement note" of the disciplinary authority. Considering the aforesaid facts, the plea raised by the learned counsel for the appellant that a show-cause notice communicating disagreement of the disciplinary authority with the findings recorded by the enquiry officer was supplied to the respondent, cannot be accepted.

11. The learned Single Judge referring to the decision in "Punjab National Bank & Ors. v. Kunj Behari Misra", reported in , (1998) 7 SCC 84 has held that the penalty order is not sustainable in law. In "Kunj Behari Misra" case the Hon'ble Supreme Court has observed that when the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, the authority which proposes to decide against the delinquent officer must give him an opportunity of being heard, otherwise the delinquent officer would be condemned unheard. The view taken by the Hon'ble Supreme Court in "Kunj Behari Misra" has been consistently approved and followed by the Supreme Court in subsequent judgments.

12. However, leaving aside this issue, we for our satisfaction have perused the "disagreement note" allegedly furnished to the respondent on 28.12.1993. In the "disagreement note", the disciplinary authority has clearly recorded a finding that charge No. (i) and charge No. (ii) have stood proved. Even if it is assumed that the said "disagreement note" was supplied to the respondent, the respondent was not afforded an opportunity to respond to the findings recorded by the disciplinary authority. In fact, the respondent could not have filed representation objecting to the findings recorded by the disciplinary authority because the disciplinary authority had already concluded that the charge No. (i) and charge No. (ii) have stood proved. In cases where the disciplinary authority proposes to disagree with the findings recorded by the enquiry officer, the formation of opinion by the disciplinary authority must be "tentative" and not final and at this stage, the delinquent employee must be given an opportunity to meet the same. In the present case, the disciplinary authority instead of communicating the tentative finding, confronted the respondent with definite conclusion of his guilt.

Even if an opportunity would have been afforded to the respondent, the same would have been an empty ceremony and it would have been, as summarised by the Hon"ble Supreme Court in "Oryx Fisheries Private Limited v. Union of India & Ors.", , (2010) 13 SCC 427, "merely knocking his head against the impenetrable wall of prejudged opinion". The penalty order, in our opinion, was passed in breach of the rules of natural justice.

13. Insofar as, the third charge of habitual offender framed on the basis of previous misconduct of the respondent is concerned, the writ petitioner (respondent herein) specifically pleaded that his past conduct was scrutinized by the authorities concerned and he was finally discharged from all charges and as such, no punishment can be awarded to him on the basis of the charge for which he was already discharged. In response to the assertions in paragraph No. 10 of the writ petition, in the counter-affidavit the following stand was taken by the appellant herein:

14. "That in reply to statement made in paragraph 10 of the writ petition, it is humbly submitted that it need no comments as already narrated in the preceding para. The petitioner can not take this plea that the past service record can not be taken into consideration by the competent authority. It can very well take into consideration with a view to highlights the real character of Govt. Servant. Hence, no further comments."

14. It is well settled that previous misconduct of a delinquent can be considered by the punishing authority for the purpose of quantum of punishment to be inflicted upon the delinquent however, in a case where other charges framed against the delinquent have been found not proved, only on the basis of the past misconduct, the delinquent cannot be punished. In the present case, the challenge thrown by the respondent to the finding recorded by the enquiry officer that charge No. (iii) stood proved, has not been answered by the appellant-Union of India.

15. As a sequel to the aforesaid discussion, we conclude that no interference is required with the impugned order dated 10.11.2014 passed by the writ court in W.P.(S) No. 1737 of 2008.

16. Resultantly, the Letters Patent Appeal fails and accordingly, it is dismissed.

17. Consequently, I.A. No. 1546 of 2015, filed for stay, also stands disposed of.