

(2017) 08 AHC CK 0017
In the Allahabad High Court
Case No : 39992 of 2006

Union Of India, & Ors.

APPELLANT

Vs

Shyam Lal, & Anr.

RESPONDENT

Date of Decision : 09-08-2017

Acts Referred:

Citation : (2017) 08 AHC CK 0017

Hon'ble Judges : Amreshwar Pratap Sahi, Rajiv Lochan Mehrotra

Bench : Division Bench

Advocate : B.B. Paul, A.P. Paul, Sudama Ram

Final Decision : Allowed

Judgement

1. Pursuant to the order of the Central Administrative Tribunal dated 28.03.2006 in Original Application No. 1435 of 2003 "Shyam Lal Vs. Union of India and three others" thereby setting aside the order of removal of respondent no. 1 and reinstating him in the service with all consequential benefits, the present writ petition has been preferred on behalf of Union of India and three others.

2. Facts in brief are that respondent no. 1 was a Group-"D" Railway Employee. On account of his alleged unauthorized absence with effect from 2.3.1998 to 28.08.1998, an inquiry was initiated in the matter and consequently charge sheet was served on him. The Inquiry Officer fixed several dates for his appearance and further disciplinary proceedings. Despite full knowledge of the pending disciplinary proceedings, respondent no. 1 neither turned up before the Inquiry Officer nor cooperated in the proceedings, therefore, the Inquiry Officer proceeded ex-parte against him and submitted his report dated 27.11.1999 holding the charges leveled against him as proved. The Disciplinary Authority on the basis of the inquiry report submitted by the Inquiry Officer passed the order of removal of respondent no. 1 from service. An appeal against the order of the disciplinary authority was preferred by the respondent no. 1, but that too was dismissed. A revision/special appeal against the same did not yield any result.

Above-said orders were challenged by respondent no. 1 by moving original application before the Central Administrative Tribunal, Allahabad where his claim has been accepted in its entirety with reinstatement and full back wages. An interim order was passed on 27th July, 2006 in this petition staying the operation of the impugned order.

3. Respondent no. 1 filed counter affidavit refuting the allegations made in the writ petition and challenging the validity of the Inquiry Report.

4. In the instant case on the allegation of unauthorized absence from duty with effect from 02.03.1998 to 28.08.1998, a charge sheet was served on the respondent no. 1 directing him to submit his written statement within ten days from the date of receipt of the charge sheet. He was also given the liberty to take the assistance, if so desires, of any other railway employee for inspecting the documents and assisting him in presenting his case before the Inquiring Authority in the event of an oral inquiry being held.

5. At the instance of the Court, the original file relating to disciplinary proceedings of respondent no. 1 was placed before the Court during the arguments by learned counsel for the petitioners.

6. A perusal of the original inquiry file reveals that respondent no. 1 on 01.09.1998 requested the Inquiry Officer to provide him two days time for disclosing the name of the Railway employee who could assist him in presenting his case before the Inquiry Officer. At this, the Inquiry Officer adjourned the proceedings for 18.03.1999. One Mr. M. Ahmed, ASM, Railway volunteered to provide his assistance to respondent no. 1 but despite his willingness, he could not appear on any date before the Inquiry Officer for want of permission from his Controlling Officer. Respondent no. 1, though attended the proceedings on some dates, but in the absence of the help of his defence assistant, he could not participate in it.

7. It shall be proper to mention here that respondent no. 1 informed the Inquiry Officer in writing on 26.04.1999 to the effect that his defence assistant was not being relieved by his controlling officer for the purpose on the pretext of rush of work but no action was taken by the Inquiry Officer. In fact, in the present circumstances, rather than going ahead with the proceedings, Inquiry Officer should have written to the Controlling Officer for getting Mr. M. Ahmed, Defence Assistant spared from duty for some hours for attending the said inquiry. Due to inaction of Inquiry Officer, defence assistance could not appear even on the next fixed date i.e. on 30.04.1999. Because of this reason respondent no. 1 also did not join the proceedings and the Inquiry Officer observing him absent, submitted his report ex-parte holding the charge against the respondent no. 1 established on the basis of the reports submitted already by the office.

8. Documents relied upon by the Inquiry Officer in his report were not proved during the course of departmental inquiry by examining and cross-examining the witnesses. Moreover, the explanation given by the respondent no. 1 for his

alleged absence on account of illness of his wife prior to initiation of the inquiry was also not considered. Apart from this, even though the dates were fixed by the Inquiry Officer calling upon the delinquent to appear but his appearance became ineffective on account of non-availability of the defence assistant. The delinquent, therefore, could not lead his defence and the Inquiry Officer virtually did not fix any date of leading evidence thereafter.

9. Learned Central Administrative Tribunal while deciding the case of respondent no. 1 against the order of removal from service observed that as his defence assistant was not relieved by his controlling authority, the Inquiry Officer should have allowed sufficient time to the delinquent to engage another defence assistant. Moreover, no direction to the Station Superintendent was given by the Inquiry Officer to spare the services of Sri. M. Ahmed, defence assistant, so that the proceedings might be conducted smoothly. It was further observed by the Tribunal that no prosecution witness was examined or allowed to be cross-examined during the entire disciplinary proceedings and the private medical practitioner, who examined the delinquent and treated her wife, was also not examined during the proceedings. Even the employee maintaining the leave account of the delinquent also have not been examined during the course of inquiry in support of the sole charge leveled against the delinquent in the charge sheet. On account of these illegalities and irregularities, the Tribunal observed that there had been a serious violation of the principles of natural justice which in turn has resulted in miscarriage of justice in awarding the punishment of removal from service to the delinquent. The Tribunal, thus, quashed the punishment order and directed the Union of India and others (petitioners of this case) to reinstate the delinquent in service with effect from the date of his removal from service with all consequential benefits.

10. Respondent no. 1 has relied upon the judgment of Hon"ble the Apex Court in the case of Roop Singh Negi Vs. Punjab National Bank and others (2009) 1 Supreme Court Cases (L&S) 398. Paragraph No. 14 of the said judgment is being quoted hereinbelow :-

"(14) Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

11. In Moni Shankar Vs. Union of India SSC Page 492, It was held by Hon"ble the Apex Court :-

"(17) The departmental proceeding is a quasi-judicial one. Although, the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent office relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirement of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality."

12. In *Kaptan Singh Vs. State of U.P. and another*. 2014(8) ADJ 16 (DB), a Division Bench of this Court has held that the documentary evidence have to be examined on the date fixed for inquiry whether in the presence of the delinquent or in absentia (ex-parte)

13. In the instant case, the Inquiry Officer neither examined any oral evidence to prove the documents available on record nor afforded any opportunity to delinquent to lead his defence. Explanation in relation to alleged absence submitted by delinquent regarding the illness of his wife was also not verified. Thus, it is clear that no inquiry as prescribed under law has been held by the Inquiry Officer. Therefore, we are of the opinion that the impugned order of punishment passed on the basis of such report was rightly set aside by the Tribunal for this reason alone.

14. Sri B.B. Paul, learned counsel for the petitioner relied on a judgment of Hon"ble the Apex Court reported in *Balraj Taneja and another Vs. Sunil Madan and another* 1999 (8) SCC 396. Sri. Paul submits that if the evidence was on record and the delinquent had been duly informed of the said material, then in that event the delinquent having failed to rebut the same, the Inquiry Officer was justified in recording his conclusions on the strength of the said documentary evidence of unauthorized absence. We are unable to agree to this proposition inasmuch as the said judgment is in relation to the proceeding before a court of law where also even if the defendant does not proceed to set up a defence or fails to file a written statement, the plaintiff yet has to prove his case and the Court is bound to frame issues thereon and then decide same in terms of the Civil Procedure Code. On principles, in the instant case as well the petitioner-department ought to have proved the documents that it was relying on and it was not for the Inquiry Officer to presume that the documents stood proved if the delinquent employee had failed to set up his defence. We may reiterate that the defence became unavailable as observed by Tribunal because of non-providing of the assistance to the delinquent.

15. The other issue which comes on record is with respect to non-availability of the opportunity to the respondent to present his case with his defence helper. The respondent in his counter affidavit has filed an order of the Central Administrative Tribunal reported in [1990] 13 Administrative Tribunal Cases page-36 Kishore Kumar Rajak Vs. Union of India and others where the Tribunal recognized this right of being represented through an assistant as a valuable right being statutorily incorporated in the Railway Servants (Discipline and Appeal) Rules, 1968. Paragraph Nos. 4, 5 and 6 of the said judgment is extracted hereinunder :-

"(4) Clause (a) of sub-rule (13) of Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968, for short the Rules, lays down that the railway servant may present his case with the assistance of any other railway servant employed on the same railway administration on which he is working. This facility is provided to the railway servant to enable him to present his case effectively, in recognition of the principle of natural justice of affording reasonable opportunity of defence. In the decision of the Madras Bench of this Tribunal on which one of us (G. Sreedharan Nair) was a member in G. Ravindranathan Vs. Union of India after referring to the salient features governing the conduct of an enquiry against a government servant under Rule 14 of the CCS (CCA) Rules, it was held that taking the assistance of any other government servant for presenting the case on his behalf is a very valuable right conferred upon the charged government servant with a view to see that there is no denial of reasonable opportunity of defending himself and consequential violation of natural justice.

(5) It is not in dispute that Shri B.C. Paul was duly appointed as Defence Helper. On the first date fixed for the enquiry, the applicant did appear along with the Defence Helper. However, on that day the proceedings were not held. On the adjourned date, the applicant appeared but as the enquiry authority had not addressed the controlling authority of the Defence Assistant to spare him, the Defence Assistant could not appear and on that ground the applicant prayed for adjournment. Though the adjournment was granted, the Enquiry Officer did not take any steps to address the controlling authority of the Defence Assistant for making available his services on the adjourned date. Hence, though the applicant appeared, he was not in a position to participate in the enquiry. Thereafter, it is seen that the Enquiry Officer proceeded with the matter ex parte and arrived at the finding against the applicant.

(6) The Railway Board has issued specific instructions through letter dated May 25, 1968 that as soon as a railway servant informs the disciplinary/enquiry authority of the name and other particulars of the railway servant, who has been chosen by him to assist in the presentation of his case and the nomination is accepted by the disciplinary authority, this fact should be intimated to the controlling authority of the railway servant concerned, and the date and time of the hearing should be intimated to that authority sufficiently in advance. Apart from the violation of the aforesaid instructions, the action of the Enquiry Officer

in directing the applicant to make his own efforts to procure the assistance of the Defence Assistant amounts to the denial of the reasonable opportunity of defence, which is mandated by Article 311 of the Constitution of India. It is seen from the records that because the assistance of the Defence Assistant could not be had, the applicant was unable to defend himself, and the Enquiry Officer proceeded to hold the enquiry ex parte and arrived at a finding against the applicant. This finding was mechanically accepted and acted upon by the disciplinary authority, which led to the order dated May 10, 1986 imposing the drastic penalty of removal from service on the applicant."

16. In the instant case, the respondent was not in a position to participate in the inquiry in the absence of defence assistant provided to him who did not turn up as the Inquiry Officer did not take any steps to request the Controlling Authority to release him for defending the delinquent. We find ourselves in full agreement with the view expressed by the Tribunal and the ratio of the decision extracted hereinabove squarely applies on the facts of the present case. Consequently for this reason also, the Tribunal was justified in setting aside the order of punishment.

17. The fact remains that the delinquent at this stage has already attained the age of superannuation as he was 50 years of age in the year 2006 when he had filed the counter affidavit. The question is as to what should be the relief granted or mould it on the facts of the present case. In our considered opinion, if the delinquent had been in service, we would have allowed the inquiry to resume in order to assess the defence of the respondent. However, on the peculiar facts as emerging now, it will not be appropriate for resuming the inquiry again as this would entail an unnecessary administrative exercise and would also involve expenditure for both the parties. The fact remains that the charge against the respondent was of a considerable period of unauthorized absence which he was trying to defend on the basis of the alleged ailment of his wife which he was unable to prove in the circumstances indicated above. The respondent, therefore, in our opinion is not entitled for any salary for the period of his absence for which he was charged in the present disciplinary proceeding on the principle of no work no pay.

18. We, therefore, uphold the order of reinstatement with no back wages for the period of absence. The respondent would however, be entitled to 50% of the back wages from the date of removal up to the date of superannuation. He would also be entitled to such consequential benefits that may flow from this order. Appropriate orders to that effect shall be passed by the petitioners within three months and the respondent shall be paid whatever amount is due to him accordingly. He shall also be entitled to consequential post retiral benefits.

19. We have moulded the relief relating to back wages and have modified the order of the Tribunal as we are of the opinion that the Court has the power to mould the relief on the facts of a case as each case turns on its own peculiar facts. Accordingly, this modified relief shall not be treated as a precedence for

any other case.

20. The writ petition is, therefore, partly allowed and the impugned judgment of the Central Administrative Tribunal dated 28th March, 2006 as well as the punishment orders stand modified accordingly.

21. The records that were retained by us have been returned back to the learned counsel for the petitioners.