

(1997) 10 AHC CK 0077
In the Allahabad High Court
Case No : Special Appeal No. 9 of 1996

U.P. State Electricity Board, Allahabad	APPELLANT
Vs	
V.J. Alexander	RESPONDENT

Date of Decision : 13-10-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 1 AWC 481 : (1997) 3 UPLBEC 2036

Hon'ble Judges : D.P. Mohapatra, C.J;S.R. Singh, J

Bench : Division Bench

Advocate : B.P. Singh, for the Appellant; J.N. Tewari and Ashok Khare, for the Respondent

Final Decision : Partly Allowed

Judgement

S.R. Singh, J.—U. P. State Electricity Board, in short the Board, through its Executive Engineer, Electricity Civil Construction Division, 57 George Town. Allahabad filed the instant special appeal against the judgment/order dated 27.10.1995 of learned single Judge rendered in Civil Misc. Writ Petition No. 1146 of 1988 filed by V.J. Alexander--the respondent herein--against the order dated 26.9.1987 of his removal from Board's service. The learned single Judge has quashed the order dated 26.9.1987 communicated to the writ petitioner vide letter dated 10.12.1987 with a direction that the petitioner be reinstated with all benefits.

2. The events to which this appeal owes its advent to this Court stated briefly, with a view to appreciating the questions involved herein, are these : The respondent V.J. Alexander was placed under suspension vide order dated 8.10.1974 and served with charge-sheet on 5.4.1975 ; disciplinary proceeding, however, culminated in an order dated 5.5.1982 by the Disciplinary Authority which reads as under :

"No. 828--Sec, (III) 3B-285, dated May 5, 1982 Office Memorandum.--After

careful examination of the disciplinary proceedings initiated against one Sri V.J. Alexander, Junior Engineer (Civil) under suspension so far, it has been found that the disciplinary proceedings have not been properly conducted and there have been procedural lacuna in conducting the disciplinary proceedings. Therefore, the proceedings held against V.J. Alexander, Junior Engineer (Civil) so far, are declared null and void. The proceeding shall now be held de novo."

3. Sri S.K. Jain, Executive Engineer, Electricity Civil Construction Division, Varanasi was appointed as enquiry officer for conducting the fresh enquiry pursuant to the order dated 5.5.1982 on charges, inter alia, that the respondent was guilty of negligence in performing duties ; of misappropriation of Board's material and causing loss amounting to Rs. 25.557 to the Board. It appears that charge-sheet dated 17.3.1983 could not be served on the respondent-employee at his Allahabad address and, therefore, it was sent at permanent home address of the petitioner endorsing a copy of the same to the District Magistrate, Alleppy (Kerala) for its service upon respondent-petitioner but that too was received back undelivered with remark "Incomplete address" and since the charge-sheet so sent at permanent home address of the petitioner recorded in the service book was received back undelivered, he was asked through publication in newspaper including Amrit Prabhat, Allahabad, to receive charge-sheet and submit reply in defence latest by 17.8.1983, but even after publication in the newspaper the respondent did not attend the office to collect charge-sheet from the enquiry officer nor did he submit any reply and, therefore, enquiry was conducted ex parte and enquiry report dated 8.7.1987 was submitted by the enquiry officer. The Disciplinary Authority, upon consideration of the report of the enquiry officer along with other records and facts of the case found the charges levelled against the respondent established/ proved beyond doubt and awarded the following punishment vide order dated 26.9.1987 :

"(i) V.J. Alexander, Junior Engineer (Civil) is hereby removed from Board's service with effect from the date of his suspension, i.e., 8.10.1974.

(ii) Recovery of net shortages worked out as Rs. 25,285.39 (Rupees twenty five thousand two hundred eighty five and paise thirty nine only) shall be recovered from his claims/bills."

4. The petitioner challenged the order of punishment in the writ petition which has given rise to this special appeal. The learned single Judge allowed the writ petition, quashed the order dated 26.9.1987 communicated vide letter dated 10.12.1987 and directed the reinstatement of the respondent "with all benefits" and foreclosed the enquiry holding that since the charges were of the period 20 years back, there is no question of fresh continuation of the disciplinary proceeding. In the judgment under appeal the learned single Judge has observed as under:

"The impugned order also records that the petitioner did not even attend the office to collect the second charge-sheet from the enquiry officer and in absence

of any reply to the charge-sheet the enquiry officer submitted his ex parte report dated 8.7.1987. The categorical case made out by the petitioner of conducting his case after the newspaper publication has not been denied in the counter-affidavit. By the impugned order the respondent No. 2 has not considered the facts of the case in the background of the case and merely approved the finding of the enquiry officer."

And further.

"In the aforesaid circumstances. I do not find that the petitioner was given proper opportunity to defend himself. The respondents have been delaying the proceeding. Admittedly for the first eight years" delay when the entire proceeding was struck out for defective procedure of the respondents, the petitioner could not be made responsible at all and at second stage also, I find that the respondents were not giving opportunity to the petitioner even on admitted facts."

5. We have heard Sri E.P. Singh for the appellant and Sri J.N. Tewari for the respondent. The questions arising for consideration in this special appeal are three-fold : firstly, whether the learned single Judge was justified in holding that the respondent was not given proper opportunity to defend himself ; secondly, whether the relief of reinstatement with all benefits granted to the respondent by the learned single Judge merely because in his view, the enquiry was not properly conducted and the respondent was not given proper opportunity to defend himself, is sustainable in law ; and thirdly, whether the order of respondent's removal from Board's service with a retrospective dale was sustainable in law.

6. On the first question, the learned single Judge held, as noticed hereinabove, that the respondent was not given proper opportunity to defend himself. The conclusion arrived at by the learned single Judge in the penultimate paragraph of his judgment that "I do not find that the petitioner was given proper opportunity to defend himself seems to be based, at least in so far as it relates to the stage of enquiry, upon erroneous assumption that "the categorical case made out by the petitioner of conducting his case after newspaper publication has not been denied in the counter-affidavit." Our attention could not be invited by the respondent's counsel Sri J.N. Tewari to any paragraph of the writ petition containing an averment to the effect that the petitioner conducted his case after newspaper publication. In paragraph 55 of the writ petition, it is averred : ".....The respondent, however, got a notice published in Amrit Prabhat dated 24.7.83 in which it was mentioned that the where about of the petitioner is not known from 22.4.79 and a charge-sheet was sent to him on 17.3.83 but it came back and he should take the charge-sheet and submit its reply by 17.8.83." and in paragraph 56 of the writ petition it has been stated that "above notice never came to the knowledge of the petitioner." When and how did he come across the said notice dated 24.7.83 is nowhere disclosed in the writ petition even though the averments made in paragraphs 55 and 56 of the writ petition are sworn on

personal knowledge. The court can take judicial notice of the fact that the newspaper containing notice dated 24.7.83 has a wide circulation in Allahabad where the petitioner-respondent, according to his own case, has been residing. In the absence of any allegation as to the precise date when the petitioner came across the said notice published in the newspaper, the court may presume that the petitioner who has been residing in Allahabad at the relevant time as alleged by him, must have read the notice on the date of publication of the newspaper or at least within a reasonable time thereafter. It may pertinently be observed here that the order of the Chief Engineer (Hydel) U. P. State Electricity Board, Lucknow, dated 16.10.1982 (Annexure 16 to the counter-affidavit) appointing Sri S.K. Jain, Executive Engineer (Electricity) Civil Construction Division, Varanasi as enquiry officer to conduct the necessary departmental enquiry into the charges levelled against the respondent was endorsed to the respondent--"Sri V.J. Alexander, Junior Engineer (Civil) C/o. Executive Engineer, Electy. Civil Const. Divn. 57, George Town, Allahabad"--but due to non-availability of where about of the petitioner, the same could not be served on him personally, as alleged in paragraph 53 of the counter-affidavit. The fact, however, remains that concededly the petitioner-respondent received the order dated 5.5.1982 on 19.10.1984 and knew it fully well that the disciplinary proceeding was ordered to be held de novo and, as stated by him, he did have the knowledge of the notices dated 24.7.1983 and 11.10.1984 annexed as Annexure XXXII and XXVII respectively to the writ petition which were published in "Northern India Patrika" and "Amrit Prabhat" respectively. By the latter notice, the petitioner was asked to attend the office of the Executive Engineer, Allahabad within a week from the date of publication of the notice, otherwise he would be exposed to suitable disciplinary action. Can it be believed, in these circumstances, that the petitioner-respondent had been visiting the office of the Executive Engineer and Superintending Engineer, Allahabad as alleged in the writ petition? The respondent did not care even after having received the order dated 5.5.1982 to find out as to what happened to the enquiry which was ordered to be held de novo pursuant to the order dated 5.5.1982. It cannot be gainsaid that substituted service of notice by publication in the newspaper is as effective as personal service unless the circumstances of a given case warrant a conclusion otherwise. These aspects of the matter, it seems, escaped the notice and attention of the learned single Judge while examining the question as to whether the respondent was given proper/reasonable opportunity, at the stage of enquiry, to defend himself, As already noticed, it was not the case of the petitioner-respondent that he contested the charges and, hence the question of its denial in the counter-affidavit did not arise.

7. The reasoning given by the learned single Judge in support of the finding that the petitioner was not given proper opportunity to defend himself albeit proceeds, in so far as enquiry is concerned, on erroneous assumption of non-existing fact and has been arrived at without advertng to the relevant circumstances discussed above, yet the ultimate finding that the delinquent

employee was not given proper opportunity to defend himself is not liable to be interfered with due to the reason that requisite show-cause notice following the enquiry, which the disciplinary authority was required to give under clause (iv) of the Board's Order dated August 17, 1978 referred to in paragraphs 66 and 69 of the writ petition, was not issued to the delinquent employee along with a copy of the enquiry report together with the recommendation, if any, in regard to punishment made by the enquiry officer before imposing punishment vide order dated 26.5.1987. Averments made in this regard in paragraph 70 of the writ petition have not been controverted in the counter-affidavit. The show-cause notice dated April 27, 1974 (Annexure C.A. 4) referred to in paragraph 67 of the counter-affidavit which contains reply to the averments made in paragraph 70 of the writ petition is not a show-cause notice following the enquiry held by Sri S.K. Jain. We are, therefore, inclined, for the above reasons to uphold the finding recorded by the learned single Judge that the petitioner was not given proper opportunity to defend himself. The failure to comply with the requirement of giving show-cause notice together with a copy of the enquiry report to the delinquent employee in the instant case vitiates the order dated 26.9.1987 impugned in the writ petition and the learned single Judge has rightly quashed it.

8. Coming now to the second question as to whether the learned single Judge was justified in directing reinstatement of the delinquent employee foreclosing the disciplinary enquiry even though the order of respondent's removal from Board's service was quashed not on the ground that the charges levelled against him were unsustainable on the material on record but on the ground that the domestic enquiry was conducted in breach of principles of natural justice. In *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, , a Constitution Bench of the Supreme Court was called upon to decide, inter alia, the basic questions of law as to what is the effect of non-furnishing of the report of the enquiry officer on the order of punishment and what relief should be granted by the courts in such cases. The following proposition of law has been expounded by their lordships of the Supreme Court in the aforementioned case :

".....The court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-- cuts. Since it is the court/Tribunal which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment (and not any internal appellate or revisional authority) there would be neither a breach of principles of natural justice nor a denial of reasonable opportunity. It is only if the courts/Tribunals find that the furnishing of the report would have made a difference to result in the case that it should set aside the order of punishment. Where after following the above procedure, the court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The

question whether employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extend of benefits, he will be entitled. The reinstatement made as a result of setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held."

9. In *State of Punjab V. Dr. Harbhajan Singh Greasy JT 1996 (6) SC 403*, it has been held as under:

"It is now well-settled law that when the enquiry was found to be faulty, it would not be proper to direct reinstatement with consequential benefits. Matter requires to be remitted to the disciplinary authority to follow the procedure from the stage at which fault was pointed out and to take action according to law. Pending enquiry the delinquent must be deemed to be under suspension. The consequential benefits would depend upon the result of the enquiry and order passed thereon.

10. In *Board of Management of S.V.T. Educational Institution and another Vs. A. Raghupathy Bhat and others, ,* the above principle has been reiterated in the following words:

".....It is now well settled by a Constitution Bench decision of this Court in *Managing Director E.C.I.L.. Hyderabad v. B. Karunakaran (1993) 4 SCC : AIR 1994 SCW 1050*, that as a consequence of setting aside of order of termination or removal or dismissal, further enquiry is required to be undertaken from that stage. Pending enquiry, the employee must be deemed to be under suspension."

11. In *Ruby General Insurance Co. Ltd. v. Chopra, (1970) 1 Lab LJ 63 SC*, the question was whether in the facts and circumstances of the case the relief granted to the workman concerned should have been reinstatement or compensation. The Supreme Court, on consideration of the facts and circumstances of the case, set aside the order of reinstatement and directed the company to pay compensation to the workman concerned. It was held therein as under:

"..... It is true that some of the decisions of this Court have laid down that where the discharge or dismissal of a workman is not legal or justified, the relief which would ordinarily follow would be reinstatement. The Tribunal, however, has the discretion to award compensation instead of reinstatement if the circumstances of a particular case are unusual or exceptional so as to make reinstatement inexpedient or improper. The Tribunal has, therefore, to exercise its discretion

judicially and in accordance with well recognised principles in that regard and has to examine carefully the circumstances of each case and decide whether such a case is one of those exceptions to the general rule."

12. In *The Management of Panitole Tea Estate Vs. The Workmen*, , the Supreme Court has held as under:

"The question whether on setting aside the wrongful dismissal of workman he should be reinstated or directed to be paid compensation is a matter within the judicial discretion of the Labour Court or the Tribunal, dealing with the industrial dispute, the general rule in the absence of any special circumstances being of reinstatement. In exercising this discretion fair play towards the employee on the one hand and interest of the employer, including considerations of discipline in the establishment, on the other require to be duly safeguarded. This is necessary in the interest both of security of tenure of the employee and of smooth and harmonious working of the establishment. Legitimate interests of both of them have to be kept in view if the order is expected to promote the desired objective of industrial peace and maximum possible production. The past record of the employee, the nature of the alleged conduct for which action was taken against him, the grounds on which the order of the employer is set aside, the nature of the duties performed by the employee concerned and the nature of the industrial establishment are some of the broad relevant factors which require to be taken into consideration."

13. In *Hindustan Steels Ltd., Rourkela Vs. A.K. Roy and Others*, , it was held as under:

"As exception to the general rule of reinstatement, there have been cases where reinstatement has not been considered as either desirable or expedient. These were the cases where there had been strained relations between the employer and the employee, where the post held by the aggrieved employee had been one of trust and confidence or where, though dismissal or discharge was unsustainable owing to some infirmity in the impugned order, the employee was found to have been guilty of an activity subversive of or prejudicial to the interest of the industry."

14. In *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, , it was held as under :

"It must be remembered that in the exercise of its certiorari jurisdiction under Article 226 of the Constitution, the High Court acts only in a supervisory capacity and not as appellate Tribunal. It does not review the evidence upon which inferior Tribunal proposed to base its conclusion. It simply demolishes the order which it considers to be without jurisdiction and manifestly erroneous, but does not, as a rule, substitute its own view for those of the inferior Tribunal. In other words, the offending order or the impugned illegal proceeding is quashed and put out of the way as one which should not be used to the detriment of the writ petitioner. Thus in matters of employment, while exercising its supervisory

jurisdiction under Article 226 of the Constitution over the orders and quasi-judicial proceeding of an administrative authority not being a proceeding under the Industrial/Labour law before an Industrial/Labour Tribunal-culminating in dismissal of the employee, the High Court should ordinarily, in the event of dismissal being found illegal, simply quash the same and should not further give a positive direction for payment to the employee full back wages (although as a consequence of annulment of the dismissal, the position as it obtained immediately before the dismissal is restored) such peculiar powers can properly be exercised in a case where the impugned adjudication or award has been given by an Industrial Tribunal or Labour Court. The instant case is not one under Industrial /Labour Law."

15. In *B.H.U., Varanasi v. J.N. Tripathi* (1996) 3 UPLBEC 1976, a Division Bench of this Court in which one of us (Hon. D.P. Mohapatra, C. J.) was a member, held that "an order for payment of full back wages is not to be passed as a matter of course in every case in which the order of dismissal is set aside or quashed by the High Court.

16. On a conspectus of the decisions aforesaid, we veer around the view that in cases where order of dismissal or removal of a delinquent employee is interfered with on the ground of some procedural lacuna or defect in the domestic enquiry and it is not examined independently by the court whether the charges against the delinquent employee are established on the material on record--which exercise is impermissible in court's certiorari jurisdiction under Article 226 of the Constitution except, perhaps, where such exercise is considered by the court convenient and feasible on admitted facts brought before it--the court should demolish the order of removal or dismissal passed by the departmental authority and remit the matter to the disciplinary authority to follow the procedure from the stage at which fault was committed and take action according to law. Pending such enquiry, delinquent employee must be deemed to be under suspension entitled to such subsistence allowance as may be admissible subject, of course, to the fulfillment of the pre-requisite conditions, if any, laid down in the relevant service Rules /Regulations /Executive Orders. In cases where the court finds on consideration of the material on record, that the charges levelled against the delinquent employee are not sustainable and he is entitled to be exonerated, then in that event, notwithstanding the delay that may have taken place, it may direct reinstatement of the employee with consequential benefits unless the case falls within any exceptional category and the court finds that the reinstatement of delinquent employee would be prejudicial to the larger interest of the establishment.

17. In the instant case, the delinquent employee has been ordered to be reinstated with all benefits sans any consideration of the relevant factors indicated above, A perusal of the judgment under appeal makes it abundantly clear that the respondent has not been exonerated by the learned single Judge on the basis of any consideration of material on record. The order of removal

from service has been quashed and the respondent has been directed to be reinstated with all benefits merely on the ground that delinquent was not given proper opportunity to defend himself and further that a period of 20 years has elapsed since the charges were levelled against him. Keeping in view the Supreme Court decisions discussed above and the facts and circumstances of the case, we are of the considered view that the matter should be remitted to the disciplinary authority to proceed from the stage of issuing show cause notice along with a copy of the report of the enquiry officer and other documents/material relied on by the enquiry officer and to take a decision in the matter afresh in due consideration of the reply that may be submitted by the delinquent employee in response to show-cause notice. It may be observed that it would have been better had the petitioner been relegated to the remedy available to him under the U. P. Public Services Tribunal Act. 1976 for the Tribunal could independently, after taking evidence, decide whether the charges were proved or not and grant appropriate relief. True, this Court can grant "any other relief in addition to issuing the appropriate prerogative writ but not without proper self-direction to the relevant factors.

18. We also consider it apt and proper to explain the legal position on the third question as to whether removal with retrospective effect is legally permissible? In *R. Jeevaratnam Vs. The State of Madras*, , it has been held that an order of dismissal with retrospective effect is, in substance, an order of dismissal from the date of the order with super-added direction that the order should operate retrospectively from an anterior date. The said decision has been followed and the view expressed therein reiterated by the Supreme Court in *The Gujarat Mineral Development Corporation Vs. Shri P.H. Brahmbhatt*, and it has been held that super-added direction that the order should have retrospective effect from an anterior date being severable would not affect the validity of the first part of the order discharging the service of the employee on proved misconduct. We are of the considered view that in the absence of any statutory rules/regulations to the contrary, the order of dismissal or removal cannot be given retrospective effect.

19. In view of the above discussion, we are of the considered view that the judgment under challenge is to be sustained in so far as it quashes the impugned order of removal, but it has to be set aside in so far as it directs reinstatement of the delinquent employee with all benefits and the matter has to be remitted to the disciplinary authority to proceed from the stage of issuing show-cause notice along with a copy of the enquiry report and other documents as comprehended by the Board's order (supra) and take decision in the matter afresh in accordance with law after taking into consideration the reply that may be given by the delinquent employee in response to the show-cause notice. The delinquent employee shall stand restored to the position as on date immediately preceding the impugned order of removal, i.e., he shall be deemed to be under suspension entitled to such subsistence allowance as may be permissible under the rules subject, of course, to fulfillment of the pre-requisite conditions, if any,

in that regard.

20. Accordingly, the judgment/order under appeal, in so far as it quashes the order of removal of the respondent from Board's service is maintained, but the direction therein to reinstate the respondent with all benefits foreclosing the enquiry is set aside and the matter is remitted to the disciplinary authority with the direction that the disciplinary authority shall proceed afresh from stage of issue of show-cause notice along with a copy of the enquiry report and take final decision in the matter by means of a reasoned order as provided in clause (iv) of the Board's order dated August 17, 1978 and communicate the decision to the respondent within four months. The show-cause notice, the enquiry report and the decision to be taken hereafter shall be served on the respondent through his counsel Sri J.N. Tewari, Senior Advocate, High Court, Allahabad. The respondent shall be permitted to inspect the record if he moves in that regard.

21. The special appeal succeeds and is allowed in part as indicated above and in view of the mixed success and failure, we make no order as to costs.