

(2003) 05 AHC CK 0121
In the Allahabad High Court
Case No : C.M.W.P. No. 21941 of 2000

Vibhuti Prasad Mishra

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 23-05-2003

Acts Referred:

Citation : (2003) 4 AWC 2994

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : Arun Tandon, Dhananjai Rai, Rajesh Nath Tripathi and Ekta Kaur, for the Appellant;

Final Decision : Allowed

Judgement

R.B. Misra, J.—Heard Sri Rajesh Nath Tripathi and Ekta Kaur, learned counsel for the petitioner as well as learned counsel for the respondents.

2. In this petition prayer has been made for issuance of writ of certiorari to quash the order dated 7.4.2000, passed by respondent No. 2 Inspector General of Police, Lucknow Zone, Lucknow and order dated 8th November, 1989, passed by respondent No. 3 Deputy Inspector General of Police, Lucknow Zone, Lucknow. Further prayer has been made for writ of mandamus commanding the respondents to treat the petitioner in continuous service even after 8th November, 1989 and to pay full salary to the petitioner. Further prayer has also been made for seeking direction to the respondents to pay the difference of salary for the period between 6th October, 1987 till 8th November, 1989 and for payment of the interest at the rate of 24% on the arrears of salary and the difference of salary unpaid to the petitioner.

3. Brief facts necessary for adjudication of the writ petition was that the petitioner was appointed as Sub-Inspector in U. P. Police in the year 1987 and when he was posted as Sub-Inspector in Special Investigation Cell Sahkarita Mukhyalaya, Sitapur the petitioner left the place of posting on 5.10.1987, after

recording his leaving at serial No. 3 in G.D. of the office at 9.00 p.m. on 5.10.1987 for recording his evidence before Special Investigation Cell Sahkarita Mukhyalaya, Lucknow, for 5.10.1987 as such the petitioner was on duty on 5.10.1987 and 6.10.1987.

4. The information of recording his evidence was intimated to the petitioner by the Superintendent of Police, Sitapur, as such the permission was already granted, however, without waiting the return of the petitioner, the petitioner was placed under suspension on the charge that the petitioner had not taken permission prior to leave the office on 5.10.1987. In the suspension order the petitioner was not attached to any place or posted to any office. As contended by the petitioner no charge-sheet was served to the petitioner neither any inquiry officer was appointed nor the petitioner was intimated with regard to the any disciplinary proceeding or departmental inquiry being conducted against the petitioner till 8.11.1989, no information was given to the petitioner, however the petitioner when unofficially gathered information about the disciplinary proceeding, he immediately moved an application before the D.I.G. for supply of notice and charge-sheet so that he may participate in the alleged inquiry. After five months the petitioner's service was dismissed on the ground of unauthorised absence for a period of 28 days, i.e., from 7.10.1987 to 4.11.1987. One charge for unauthorised absence is for a period of 5.10.1987 and 6.10.1987 for which the petitioner was on duty for recording the evidence before Investigation Cell. The petitioner has been visiting the police office for receiving substantial amount even then no charge-sheet was served to the petitioner and no notice was ever given to the petitioner before passing of the dismissal order.

5. The petitioner has also submitted that he was never served charge-sheet and he was not afforded opportunity to file the reply and no opportunity was afforded to him for adducing evidence or cross-examine the witnesses. The documents relied upon by the respondents have not been furnished to him and no date, time and place of inquiry was intimated to him and by paper work the respondents have endeavoured to show that the intimations were sent to the petitioner by way of affixing the notice at the residential address of the petitioner. According to the petitioner no inquiry report or any show-cause notice in respect of the dismissal was also intimated to the petitioner. According to the petitioner the dismissal order is illegal and the appeal of the petitioner has been dismissed by non-application of mind.

6. The counter-affidavit has been filed. According to the respondents the order of suspension dated 6.10.1987, was served by the Superintendent of Police, Sitapur to the petitioner and it was the prime duty of the petitioner to remain present during the period of suspension to give full co-operation in disciplinary proceeding against him. According to the respondents efforts were made to serve the charge-sheet by Special Messenger and when the petitioner did not receive, the same was pasted at the house of the petitioner. According to the respondents the information about the suspension and disciplinary proceedings were

communicated to him through the Superintendent of Police, Deoria, on 29.12.1987, as he was continuously absent from the District Headquarters, Sitapur. Effort was made to serve the copy of the show-cause notice to the petitioner through Sub-Inspector. Om Shankar Shukla, District Sitapur and when the petitioner could not be traced out the said Sub-Inspector pasted a copy of show-cause notice at the residence of the petitioner on 22.4.1989 in presence of two witnesses. The respondents have contended in the counter-affidavit that all the notices and orders were served to the petitioner's residence by paste.

7. According to the petitioner the contents of paras 22, 23, 24, 25, 26 and 30 of the writ petition that neither notice nor any charge-sheet or the information of the appointment of the inquiry officer was ever served upon the petitioner or the petitioner was never informed the date, place and time of enquiry by the inquiry officer for the purpose of his participation and no letter about the disciplinary proceedings were ever sent by registered post to the petitioner and the entire proceedings were taken behind the back without involving the petitioner in violation of para 490 of the Police Regulation. According to the petitioner the averments made in the above paragraphs of the writ petition were not emphatically denied and reply was given only by paras 19, 20, 22 and 25 of the counter-affidavit by admitting that they have not sent the notices, charge-sheet or information with regard to the disciplinary proceeding by registered post or by publishing the same in the news paper, as such the endeavourance of the respondents in respect of communication about the disciplinary proceedings including the notices were in violation of the decision of the Supreme Court in Union of India and Others Vs. Dinanath Shantaram Karekar and Others, as followed by this Court in the judgment dated 8.12.1999 decided in the case of Shobh Nath Gautam Vs. State of U.P. and others,

8. I have heard learned counsel for the petitioner and perused the documents.

9. In Union of India and Others Vs. Dinanath Shantaram Karekar and Others, the respondent was appointed as an unskilled labour in the Naval Armament Depot, Bombay. He was subsequently promoted to the post of Gun Repair Labourer Grade I, He was removed from the service which was challenged before the Services Tribunal on the grounds that neither the charge-sheet nor the show-cause notice were ever served upon him, therefore, the entire proceedings were vitiated. The Tribunal found that the charge-sheet issued to the petitioner by registered post was returned with the postal endorsement "not found", while the show-cause notice was published straightway in Dainiki Sagar, Navashakti. The Tribunal found the service of the charge-sheet and the show-cause notice on the respondent as insufficient and, therefore, set aside the order of dismissal by which the respondent was removed from service. In SLP preferred by the Union of India, it was contended that the respondent-writ petitioner has been absented himself from the office unauthorisedly and the service of charge-sheet sent to him by registered post should be treated as sufficient. The Supreme Court Dinanath Shantaram Karekar (supra) has observed as below :

"3. The respondent was an employee of the appellants. His personal file and the entire service record was available in which his home address also had been mentioned. The charge-sheet which was sent to the respondent was returned with the postal endorsement "not found". This indicates that the charge-sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the sender with the endorsement "not found", it cannot be legally treated to have been served. The appellant should have made further efforts to serve the charge-sheet on the respondent. A single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings was bad. It was ex-parte even from the stage of the charge-sheet which at no stage, was served upon the respondent.

4. So far as the service of show-cause notice is concerned, it also cannot be treated to have been served. Service of this notice was sought to be effected on the respondent by publication in a newspaper without making any earlier effort to serve him personally by tendering the show-cause notice either through the office peon or by registered post. There is nothing on record to indicate that the newspaper in which the show-cause notice was published was a popular newspaper which was expected to be read by the public in general or that it had a wide circulation in the area or locality where the respondent lived. The show-cause notice cannot, therefore, in these circumstances, be held to have been served on the respondent. In any case, since the very initiation of the disciplinary proceedings was bad for the reason that the charge-sheet was not served, all subsequent steps and stages, including the issuance of the show-cause notice would be bad.

5. Lastly, in order to save the lost battle, a novel argument was raised by the learned counsel for the appellant. He contended that since the charge-sheet as also the show-cause notice, at different stages of the disciplinary proceedings, were despatched and had been sent out of the office so that no control to recall it was retained by the department, the same should be treated to have been served on the respondent. It is contended that it is the communication of the charge-sheet and the show-cause notice which is material and not its actual service upon the delinquent. For this proposition, reliance had been placed on the decision of this Court in *State of Punjab and Others Vs. Balbir Singh and Others*,

7. As would appear from the perusal of that decision, the law with regard to "communication" and not "actual service" was laid down in the context of the order by which services were terminated. It was based on a consideration of the earlier decisions in *State of Punjab Vs. Khemi Ram*, ; *Bachhittar Singh Vs. The State of Punjab*, ; *State of Punjab Vs. Amar Singh Harika*, and *S. Pratap Singh Vs. The State of Punjab*, . The following passage was quoted from *S. Partap Singh* judgment :

"It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the Government servant concerned, it must be held to have been communicated to him no matter when he actually received it."

9. Where the services are terminated, the status of the delinquent as a Government servant comes to an end and nothing further remains to be done in the matter. But if the order is passed and merely kept in the file, it would not be treated to be an order terminating services nor shall the said order be deemed to have been communicated.

10. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show-cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "communication" cannot be invoked and "actual service" must be proved and established. It has already been found that neither the charge-sheet nor the show-cause notice were ever served upon the original respondent. Dinanath Shantaram Karekar. Consequently, the entire proceedings were vitiated.

10. In K.K. Dutta Vs. Managing Director, U.P. Cooperative Spinning Mills Federation Ltd. and Another, dismissal was set aside in reference to non-communication of the date of inquiry or for recording evidence and the day, time and place of inquiry following the judgment of Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another,

11. In Shobh Nath Gautam Vs. State of U.P. and others, , dismissal of the Sub-Inspector of Police was set aside in reference to the non-compliance Regulation 490 of U. P. Police Regulations and for non-compliance of mandatory provisions of the procedure prescribed in Regulation 490 and in the circumstances when notice of show-cause was not served upon the petitioner directly and for violation of principles of natural justice and depriving the writ petitioner to defend himself the High Court in Shobh Nath Gautam has observed as below :

"12. Regulation 490 specifically provides that in the departmental trial of the police officer, after the preliminary enquiry, charge-sheet shall be framed, copy of which shall be given to the delinquent, police officer shall be asked to submit his reply, it should be oral or in writing. If the Officer accepts the charge, no further

evidence will be required to be recorded, the orders may be passed on the basis of the same but in case of denial, evidence will have to be produced to prove the charge/charges. It further provides that the delinquent police officer, if the evidence is produced by the prosecution, shall be allowed to cross-examine the witnesses. He shall also be allowed to inspect the record of the case. The documents mentioned in the charge-sheet shall also be supplied to him. Officer shall be at liberty to make his defence and produce such witnesses, he desires, in his defence. After the evidence is concluded, Superintendent of Police shall record findings taking into consideration the evidence on the record. If he intends to award any major penalty, i.e., dismissal, removal or reduction in rank, the officer charged shall be supplied copy of the findings and shall be called upon to show-cause as to why said penalty be not awarded to him. After receipt of the reply, papers are required to be forwarded, in cases of major penalty, to the D.I.G. Police through District Magistrate for final orders. The D.I.G. on receipt of the papers, is required to supply copy of the findings recorded by the Superintendent of Police, to the officer charged simultaneously calling upon him to show-cause against the imposition of punishment. On receipt of the explanation of the officer charged, he may pass order of punishment. Clause II of the Regulation 490 provides that in any case in which Superintendent of Police considers that special circumstances justify a departure from any of these rules, he should record reasons for his decision. In any such case, it will be for the Superintendent of Police to show in his finding that the officer charged has not been prejudiced by this departure from the usual procedure. In the present case, no reasons have been recorded by the Superintendent of Police for deviation from the normal procedure under the aforesaid Regulation and the orders have been passed against the petitioner without following the procedure prescribed under the said Regulation and in contravention thereof.

15. Even if the petitioner was evading service of charge-sheet and show-cause notice issued by the department of the inquiry officer, it does not give any licence to the respondents to proceed ex-parte against the petitioner. A reference in this regard may be made to the decisions in *State of Maharashtra and Others Vs. Uttamrao Rayala Nikam*, and *Union of India and Others Vs. Dinanath Shantaram Karekar and Others*, wherein it has been ruled by the Apex Court that notice charge-sheet should be served personally, and if they are not served, they should be sent under registered cover. Even if service is not effected they may be published in the newspapers."

12. In *Raj Bahadur Singh Vs. Director of Agriculture and Others*, this Court has observed as below :

The petitioner has placed reliance on the decision *Jagdamba Prasad Shukla Vs. State of U.P. and Others*,

"Where the Supreme Court has held that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right. An employee is entitled to be paid the subsistence allowance, No

justifiable ground has been made out for non-payment of the subsistence allowance all through the period of suspension, i.e., from suspension till removal. One of the reasons for not appearing in inquiry as intimated to the authorities was the financial crunch on account of nonpayment of subsistence allowance and the other was the illness of the appellant. The appellant in reply to the show-cause notice stated that even if he was to appear in inquiry against medical advice, he was unable to appear for want of funds on account of non-payment of subsistence allowance. It is a clear case of breach of principles of natural justice on account of the denial of reasonable opportunity to the appellant to defend himself in the departmental enquiry. Thus, the departmental enquiry and the consequent order of removal from service are quashed."

The petitioner has also placed reliance on Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, "where employee 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, 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, on account of his penury occasioned by non-payment of subsistence allowance, during pendency of departmental proceedings he could not undertake a journey to attend the disciplinary proceedings from his home town, the findings recorded by the inquiry officer at such proceedings, which were held ex-parte, stand vitiated :

"The petitioner also placed reliance on the judgments of this High Court K.P. Giri v. State of U. P. and Ors. 2001 (1) UPLBEC 908 paras 7 and 8, as well as on Bajrang Prasad Srivastava Vs. U.P. Pariyojana Prabandhak and others, It was held in the case of K.P. Giri (supra) :

"even in the absence of any reply submitted by the petitioner to the charge-sheet, it was incumbent upon the inquiry officer to fix the date in the enquiry and to intimate the petitioner about the same which has not been done in the present case. Moreover, from a perusal of the order of dismissal dated 20.3.1998 it will be seen that the management had produced the evidence in support of the charges levelled against the petitioner making had been accepted by the inquiry officer without making any effort to confront the same to the petitioner. Thus, the entire proceedings have been conducted in gross violation of equity, fair play and is in breach of the principles of natural justice."

In respect of change of inquiry officer the petitioner has further placed reliance on Registrar of Cooperative Societies, Madras and Another Vs. F.X. Fernando, where it was held that justice must not only be done but must be seen to be done, therefore, the Supreme Court has directed that an another inquiry officer be appointed in order to remove any apprehension of bias on the part of the respondent. In Indrani Bai (Smt.) v. Union of India and Ors. 1994 Supp (2) SC 256 para 5. The Supreme Court has held that :

"It is seen that right through, the delinquent officer had entertained a doubt about the impartiality of the enquiry to be conducted by the inquiry officer. When he made a representation at the earliest, requesting to change the inquiry officer, the authorities should have acceded to the request and appointed another inquiry officer, other than the whose objectivity was doubted."

The petitioner has placed reliance on Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another, . In this judgment of this Court in which one of us Hon"ble Mr. Justice M. Katju was part has expressed that :

"In our opinion, after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry, then an ex-parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case, it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet, he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion, this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion, the impugned order is clearly violative of natural justice.

In Meenglas Tea Estate v. Workmen, AIR 1963 SC 1719, the Supreme Court observed :

"It is an elementary principle that a person, who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and the requirement must be substantially fulfilled before the result of the enquiry can be accepted."

In S.C. Girotra Vs. United Commercial Bank (UCO Bank) and Others, the Supreme Court set aside the dismissal order which was passed without giving the employee an opportunity of cross-examination. In The Punjab National Bank Ltd. Vs. Its Workmen, the Supreme Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in Associated Cement Co. Ltd. Vs. The Workmen and Another, and in Tata Oil Mills

Co. Ltd. v. Their Workmen 1963 (II) LLJ 78.

In the case of Radhey Shyam Pandey v. Chief Secretary, State of Uttar Pradesh, Lucknow and Ors. 2001 (3) AWC 2043 : (2001) 2 UPLBEC 1676, this Court (D.B.) has held that:

"The respondents have not conducted the inquiry according to the proper procedure prescribed under Rule 99. No specific date, time and place of inquiry was fixed. Oral and documentary evidence against the petitioner should have been adduced in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. A dismissal order is a major punishment having serious consequences and hence should be passed only after complying with the rules of natural justice. Since in the present case no regular and proper inquiry was held nor was subsistence allowance paid, hence in these circumstances, it is clear cause that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principle of natural justice and fair play. The ex-parte inquiry is illegal and the order of dismissal dated 27.3.2001 is quashed."

In Raj Bahadur Singh (supra), this Court has observed in para 12 as below :

"(12) I have heard learned counsel for the petitioner and perused the pleadings of both the writ petitions and also I have heard learned standing counsel for the respondents and I find that proper procedure for making the disciplinary inquiry has not been followed. The petitioner has not been given subsistence allowance and taking into consideration only the explanation of petitioner, the dismissal order has been passed, and no date, time and place has been fixed while making an inquiry. The petitioner has not been afforded opportunity to adduce the evidence and cross-examination the witnesses which indicates that the principle of natural justice has not been observed, therefore, for lack of opportunity of hearing to the petitioner the dismissal in question based on is illegal and erroneous, disciplinary inquiry could not be sustained. The dismissal order dated 27.1.1991 is set aside and petitioner is directed to be reinstated in service with all consequential benefits however keeping in view the gravity of charges alleged against the petitioner, it is open to the employer after giving charge-sheet to hold a fresh proper inquiry in accordance with law. With these observations the writ petition is allowed."

13. It was held in Radhey Shyam Pandey v. Chief Secretary, State of Uttar Pradesh, Lucknow and Ors. 2001 (3) AWC 2043 : (2001) 2 UPLBEC 1676 para 25, that the respondents have not conducted the inquiry according to the proper procedure prescribed under Rule 99. No specific date, time and place of inquiry was fixed. Oral and documentary evidence against the petitioner should have been adduced in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. A dismissal order is a

major punishment having serious consequences and hence should be passed only after complying with the rules of natural justice. Since in the present case no regular and proper inquiry was held nor was subsistence allowance paid, hence in these circumstances, it is clear cause that the petitioner had not been afforded a fair opportunity much less a reasonable opportunity to defend himself that has resulted in violation of principles of natural justice and fair play. The ex-parte enquiry is illegal and the order of dismissal dated 27.3.2001 was quashed.

14. In the present case, it appears that proper effort was not made to convey the intimation of suspension, charge-sheet, disciplinary inquiry being conducted against the writ petitioner by means of communication of the registered letter or by publishing the same in the newspaper, only one mode has been adopted by affixing all the information to the door of the house of the petitioner which was not sighted without asserting that the petitioner was residing at the place or not? No notice of suspension and charge-sheet and day, time and place was ever communicated or served personally to the petitioner. The petitioner has not been afforded to adduce evidences or allowed opportunity to cross-examine the witnesses. The documents relied by the respondents have also not been furnished or was shown to the petitioner. In the present case, notice of charge-sheet and inquiry was neither served personally nor sent by the registered post nor the same were published in the news papers, even the petitioner was not given proper attachment order in respect of the place and the office in the suspension order, consequently the charge-sheet, notice for disciplinary inquiry cannot be deemed or held to have been served upon the petitioner. If the petitioner was evading service of notice or charge-sheet issued by the police department or any of the information of the inquiry officer, it does not give any licence to the respondents to proceed ex-parte against the petitioner. Here, this is a glaring case where the petitioner has been dismissed from service without adopting the proper procedure for dismissal on the aspects of the lack on the procedure and by not providing the petitioner proper opportunity of hearing, the dismissal order and the appellate order both are in violation of the principles of the natural justice and cannot legally be sustained.

15. The allegations against the petitioner was not irrespective of the moral or in respect of the financial irregularities or embezzlement, the charges are mainly for absence from duty, therefore, this Court cannot think even in the present, facts and circumstances to allow the respondents to initiate to give charge-sheet afresh to initiate the disciplinary proceeding because it is irony of fate of the petitioner that since the appointment from the year 1964 as Sub-Inspector, he could not visualise fortunate comfortable days in his service career and has been only dragged under inquiry for frivolous allegations for which the respondents have not even bothered to conduct the inquiry in accordance with law.

16. In these circumstances, the orders dated 8th November, 1989, 7th April, 2000 and 17th February, 1994, passed by respondent Nos. 3, 1 and 2 respectively are set aside and the petitioner is directed to be treated into service

and shall be allowed to be given 75% of the back wages only. The petitioner is reinstated without consequential benefits of back wages as well as increments. All the benefits to be given to the petitioner consequent upon this order to be finalised within three months from this order.

The writ petition is allowed.

No order as to costs.

Certified copies of the judgments delivered today where the State Government is party may be given to Sri M.C. Chaturvedi, Additional Chief Standing Counsel free of cost.