
(2014) 04 AHC CK 0200
In the Allahabad High Court
Case No : Writ Petition No. 87 (S/B) of 2014

Vijay Shankar Pandey

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 4 ADJ 282 : (2014) 6 AWC 6505 : (2014) 2 ESC 1180

Hon'ble Judges : S.S. Chauhan, J;Rakesh Srivastava, J

Bench : Division Bench

Advocate : Anil Tiwari and Prakhar Mishra, Advocate for the Appellant; Upendra Nath Misra and Raj Kumar Singh, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.S. Chauhan, J.—Heard Sri Anil Tiwari, Senior Advocate, assisted by Sri Prakhar Mishra, learned counsel for the petitioner and Sri Upendra Nath Misra, learned counsel appearing on behalf of the State of U.P. as well as Sri Raj Kumar Singh, learned counsel for opposite party No. 1. Through this petition, the petitioner has challenged the judgment and order dated 20.12.2013 passed by the Central Administrative Tribunal in Original Application No. 395 of 2012, contained as Annexure 1 to the writ petition.

2. The facts giving rise to the present petition are that the petitioner was served with a charge-sheet containing five charges on 22.7.2011. He raised certain objections to the charge-sheet and also demanded all the correspondence and letters received from D.O.P.T., various other departments and offices of Government of India to enable him to submit detailed reply to the charge-sheet. Certain documents were provided by the State of U.P. on 2.12.2011. The petitioner submitted his explanation denying all the charges levelled against him. The disciplinary authority proceeded to appoint Mr. Jagan Matheus, I.A.S. as the enquiry officer on 27.2.2012. The petitioner submitted his reply on 5.3.2012. The petitioner challenged the charge-sheet before the Central Administrative

Tribunal, Allahabad by means of O.A. No. 623 of 2012, inter alia, on the ground that it was without jurisdiction as the same has been issued without approval of the competent authority i.e. Chief Minister on 25.5.2012. In the aforesaid O.A., an order was passed on 25.5.2012 by the Tribunal that case of the petitioner shall be considered by the Government of India for empanelment to the post of Secretary by not taking cognizance of the charge-sheet but declined to stay the operation of the charge-sheet. Finally, O.A. No. 623 of 2012 was dismissed on 29.8.2012 granting liberty to the petitioner to raise all the pleas available to him in reply to the charge-sheet and the disciplinary authority was directed to take decision on the same. The petitioner filed writ petition against the order dated 29.8.2012 but he got the writ petition dismissed as withdrawn subsequently. Thus the said order became final.

3. The enquiry officer submitted his report on 30.8.2012 exonerating the petitioner from all the charges levelled against him but no final decision was taken by the competent authority in the matter. The Selection Committee for considering the promotion of I.A.S. officers of the 1979 batch to the above super time scale-II was held on 9.9.2012 but the recommendation made in favour of the petitioner was placed in a sealed cover. The petitioner submitted a representation to the Chief Secretary on 11.9.2012 requesting therein that the enquiry proceedings be concluded in view of the report of the enquiry officer and the promotion order of the petitioner be issued. The petitioner feeling aggrieved with the inaction of the opposite parties in not concluding the departmental enquiry proceedings preferred O.A. No. 381 of 2012 before the Central Administrative Tribunal on 26.9.2012 praying therein that the opposite parties be directed to take final decision on the enquiry report and be directed to open the sealed cover and give effect to the recommendations of the Selection Committee. The said O.A. was heard by the Tribunal on 27.9.2012 and the matter was directed to be listed on 8.10.2012 to enable the counsel for the State of U.P. to seek instructions.

4. The petitioner was in the meantime served with an order dated 26.9.2012 passed by opposite party No. 2 whereby the enquiry report has been rejected and a Two Member Board was constituted to enquire into the matter afresh. The said order was challenged by way of O.A. No. 395 of 2012. O.A. No. 381 of 2012 was dismissed as having become infructuous vide order dated 16.4.2013 but liberty was granted to the petitioner to file amendment application if permissible under law to claim the consequential relief for opening the sealed cover. The petitioner moved (application) M.P. No. 897 of 2013 seeking to incorporate the prayer regarding opening of the sealed cover. The said application was allowed vide order dated 10.5.2013.

5. The State of U.P. filed counter-affidavit in O.A. No. 395 of 2012 and it was stated that the order dated 26.9.2012 was perfectly valid and the enquiry officer did not adhere to the All India Services (Discipline and Appeal) Rules, 1969 (for short "the Rules") and as such, the Board has been constituted and there is no

illegality in the said order. After O.A. No. 395 of 2012 was dismissed vide judgment and order dated 20.12.2013, the State of U.P. was directed to reconstitute the Inquiry Board by amending or modifying the constitution of the Inquiry Authority or the Enquiry Board so that both the officers constituting the Board be senior in Batch to the petitioner and they were directed to conclude the disciplinary proceedings within three months. The said order has been put to challenge in this writ petition.

6. Submission of learned counsel for the petitioner is that Public Servants" (Inquiries) Act, 1850 is not applicable and has wrongly been relied upon by the Tribunal. He has also submitted that a wrong finding has been recorded that there is stay order from the Court whereas there is no stay order regarding stay of disciplinary proceedings from any Court. No fresh enquiry can be ordered on the basis of Public Servants" (Inquiries) Act, 1850. The entire report of Mr. Jagan Matheus, I.A.S. is in violation of principles of natural justice. No opportunity was given to the petitioner. The State cannot be prejudiced in any manner on account of violation of principles of natural justice and it is the petitioner, who can plead violation of principles of natural justice. Learned Tribunal has committed manifest error in holding that the enquiry report submitted by Mr. Jagan Matheus is void and non-est. The enquiry report could be termed to be illegal if it is in violation of natural justice but could not be termed to be void. While appreciating the effect of Rule 9 of the Rules the Tribunal has failed to take into consideration the fact that reasons have not been recorded by the Government in writing before remitting the case to the enquiry officer for further enquiry and therefore, the order is bad in law.

7. Learned counsel for the State of U.P. has submitted that against the order dated 29.8.2012, the petitioner preferred writ petition and subsequently got the writ petition dismissed as withdrawn and therefore, the said order has become final and is binding upon the petitioner. In the said O.A. the petitioner has challenged the validity of the charge-sheet and the disciplinary proceedings. The Tribunal has refused to interfere with the matter and dismissed the Original Application in that regard. The petitioner filed writ petition before this Court at Allahabad and got the writ petition dismissed as withdrawn on 4.10.2012. The said order has attained finality and therefore, validity of the said order cannot be assailed here. The Tribunal has summoned the record pertaining to the disciplinary proceedings and perused the same and found that no enquiry was conducted by the enquiry officer. He did not observe any formalities for holding of enquiry by issuing notice fixing date, time and place and in those very special circumstances, it was found that the enquiry was not held in accordance with law. When no enquiry was held as contemplated under law and it was a farce in the eye of law, then rightly the State Government has taken decision to hold a fresh enquiry in accordance with law while appointing a Board as contemplated under Rule 8(1) of the Rules. The requirement of Rule 9 of the Rules has been fully complied with by stating therein that the enquiry which was held was in violation of Rule 8 of the Rules and therefore, the Board was being appointed.

The Board has been appointed following the mandate of Rule 8 of the Rules, which was necessary in the facts and circumstances of the case.

8. I have heard learned counsel for the parties and perused the record.

9. The first argument raised on behalf of the petitioner that there was no stay by any Court and a perverse finding has been recorded by the Tribunal has to be appreciated in the light of the finding recorded by the Tribunal.

10. In paragraph-94 of the judgment, the Tribunal has specifically stated that the files relating to disciplinary enquiry were summoned from the office of the previous enquiry officer as he has retired after attaining the age of superannuation, the said files were produced before the Tribunal and they were perused by the Tribunal and it was found that not the least was done and even a single step was not taken in respect of holding enquiry; no notices were issued to the petitioner but the enquiry report was submitted in one day bypassing the entire procedure for holding enquiry. The enquiry proceedings were forwarded to the State Government. The State Government did not take any action and the matter remained pending, so the petitioner proceeded to challenge the charge-sheet as well as disciplinary proceedings by filing O.A. No. 623 of 2012 but the said O.A. was dismissed on 29.8.2012. The said order was subjected to challenge by way of Writ Petition No. 44864 of 2012 and the said writ petition was got dismissed as withdrawn on 4.10.2012. The said order became final. Therefore, the finding of the Tribunal in respect of interim order passed in O.A. No. 623 of 2012 has not been vacated on 29.8.2012 has to be considered in the light of the fact that the interim order dated 25.5.2012 was passed directing the Government of India to consider the case of the petitioner for empanelment to the post of Secretary by not taking cognizance of the charge-sheet. Under what context, this interim order was understood by the enquiry officer, it is for the enquiry officer to explain. The enquiry officer has not done anything except that on 30.8.2012, the enquiry report was submitted as soon as the O.A. No. 623 of 2012 was dismissed. It appears that under some misconception, the enquiry officer was not proceeding with the enquiry though it was directed by the Tribunal that the proceedings may go on. Misunderstanding on the part of the enquiry officer appears to have been there which led to the submission of enquiry report on 30.8.2012 as the O.A. No. 623 of 2012 was finally dismissed on 29.8.2012 even if there was no interim order. The finding recorded by the Tribunal goes to indicate that the enquiry officer did not proceed with furtherance of enquiry in any manner and kept the matter under wraps till pronouncement of judgment on 29.8.2012 and immediately without adhering to any procedure by fixing date, time and place abruptly the enquiry officer submitted his enquiry report on 30.8.2012. All these points have been argued in the earlier round of litigation in O.A. No. 623 of 2012 and the said points have not found favour of the Tribunal. The writ petition filed by the petitioner against the said judgment has also been dismissed as withdrawn. Now, therefore, the argument to that extent cannot be gone into by this Court.

11. The next argument which has been advanced on behalf of the petitioner is that as contemplated under Rule 9 of the Rules, reasons ought to have been recorded before remitting the case to the enquiry authority for further enquiry and the enquiry authority shall thereon proceed to hold further enquiry in accordance with Rule 8(1) of the Rules as far as it may be.

12. It is to be noted that the matter was referred to the State Government by the enquiry officer and when the matter remained pending at the level of the State Government, the charge-sheet was challenged before the Tribunal by means of Original Application, which was finally dismissed by means of order dated 29.8.2012 and the State Government while considering the report submitted by the enquiry officer came to the conclusion that it was in violation of Rule 8(1) of the Rules and looking to the provisions contained in Rule 8 of the Rules, it was incumbent that the enquiry be held by a Board consisting of officers of sufficient seniority at appropriate level as the petitioner himself happens to be a senior officer. The State Government realised the mistake committed and also realised that the enquiry report which has been submitted by Mr. Jagan Matheus was in violation of Rule 8 of the Rules rightly proceeded to reject the said enquiry report and rightly appointed a Board as contemplated under Rule 8(2) of the Rules which provide that officers from other All India Services may also be included for the purposes of constituting enquiry authority and Rule 8(3) of the Rules specifically provides that when a Board is appointed as enquiry authority, it shall consist of not less than two senior officers, provided that at least one Member of such a Board shall be a Member of the Service to which the Member of Service belongs. The Board which has been constituted now by means of order dated 26.9.2012 goes to indicate that both Members of the Board belong to the same service as the petitioner i.e. I.A.S., but only one of them is senior to him and one is a batch-mate. Therefore, it was thought proper by the Tribunal to direct that the order dated 26.9.2012 be amended and modified by the State Government in such manner that both the officers constituting the Board of Enquiry against the petitioner be senior to the petitioner, with at least one being from the I.A.S. of U.P. cadre and the other may be in case it is so necessary, from either the Indian Police Service or the Indian Forest Service Cadres of State of U.P., which are two other All India Services available to the opposite parties.

13. The provision as contemplated under Rule 9 of the Rules is manifest and reasons have been sufficiently indicated by the State Government, therefore, the said order cannot be faulted in any manner.

14. So far the question of holding enquiry to be null and void is concerned, it is only technical in nature and therefore, the end result of the decision will not be effected in any manner by the aforesaid observation. The enquiry can be termed to be an ex parte enquiry in violation of principles of natural justice and to be an illegal enquiry in the eye of law. If that argument is to be considered, then interest of the petitioner has been secured by constituting a fresh board.

15. The petitioner has adopted an alternative argument and submitted before the

Tribunal that if the Tribunal comes to the conclusion that the disciplinary enquiry against the petitioner can be further held by an Enquiry Authority or Board, of the type as presently constituted under Rule 8(1) of the Rules, through the order dated 26.9.2012, then at least directions should be given to the State Government to complete the said disciplinary enquiry in a time bound manner, say in three months.

16. The alternative argument advanced on behalf of the petitioner has been accepted by the Tribunal and a direction has been given to complete the enquiry proceedings after amending the Enquiry Board as soon as possible, say within three months. The petitioner cannot resile from the aforesaid argument. The aforesaid argument is binding upon the petitioner. The petitioner is estopped from challenging the order on the aforesaid ground. Accepting the argument of the counsel for the petitioner whatever, direction has been given by the Tribunal cannot be faulted in any manner.

17. After considering the entire facts and circumstances of the case and the finding recorded hereinabove, I do not find any merit in this writ petition. It is accordingly dismissed.

Rakesh Srivastava, J.

18. I have gone through the judgment prepared by my esteem brother Justice S.S. Chauhan. I agree with him that this writ petition deserves to be dismissed but would like to separately record my views.

19. The facts of the case which led to the filing of Original Application No. 395 of 2012 have been mentioned in detail by brother Chauhan and do not call for any repetition.

20. By judgment and order dated 20.12.2013, the Original Application No. 395 of 2012 was dismissed by the learned Tribunal with a direction to the State of U.P. to amend or modify the Enquiry Board so that both the Officers in the Board were senior to the petitioner. The opposite parties were further directed to conclude the enquiry within three months from the date of receipt of the said order. Judgment and order dated 20.12.2013 passed by the learned Tribunal in Original Application No. 395 of 2012 is under challenge in the present writ petition.

21. Sri Anil Tiwari, learned Senior Advocate appearing on behalf of the petitioner vehemently submitted that the judgment and order passed by the learned Tribunal was liable to be set aside on the ground that finding of fact recorded in paragraph 90 of the judgment was perverse being contrary to the evidence on record. He further submitted that by constituting a board under the Public Servants (Inquiries) Act, 1850 the State of U.P. had in fact instituted a fresh enquiry into the same set of charges which had been inquired into earlier by the first Enquiry Officer. He has submitted that while remitting the case for further enquiry no reasons were recorded by the Disciplinary Authority as contemplated

under Rule 9 of the Rules and as such the order dated 26.9.2012 was liable to be set aside.

22. To deal with the first argument of Sri Tewari, it would be prudent to reproduce paragraph No. 90 of the judgment. The relevant portion of paragraph No. 90 is being quoted below:

In the instant case before us, the earlier Enquiry Officer concerned, Shri Jagan Mathews, I.A.S., had not been able to go ahead with the conduct of the Disciplinary Enquiry against the applicant earlier, because of the stay orders issued by the Allahabad Bench of the Tribunal in the first O.A. No. 623 of 2010 filed by the applicant. That stay order came to be vacated and merged in the final order of the Tribunal which was passed only on 29.8.2012.

23. The learned counsel for the petitioner has submitted that there was no stay order in Original Application No. 623 of 2010 restraining the Enquiry Officer from proceeding with the enquiry and as such the finding to the contrary recorded by the learned Tribunal was perverse and in this view of the matter the judgment and order under challenge was liable to be set aside.

24. In case the finding recorded in paragraph 90 of the judgment was incorrect, as alleged by the learned counsel for the petitioner, it was open to the petitioner to get the same corrected by moving an appropriate application for correction/ review before the learned Tribunal. The petitioner has failed to demonstrate any prejudice which may have been caused to him on account of the alleged incorrect finding of fact recorded by the learned Tribunal in the judgment under challenge. The writ petition, only for correction of the alleged incorrect finding of fact, is not maintainable and is liable to be dismissed.

25. In order to appreciate the other submission made by the learned counsel for the petitioner, it is necessary to peruse the last three paragraphs of the judgment under challenge. The last three paragraphs i.e. paragraphs Nos. 132 to 134 of the judgment dated 20.12.2013 are being quoted below:

(132) At the absolute end of the arguments, while concluding his response, the learned Counsel for the applicant had, after opposing the impugned order truth and nail, made an alternative submission. His alternative submission was that if this Bench comes to a conclusion that the disciplinary enquiry against the applicant can be held "further" by an enquiry Authority of Board, of the type as presently constituted under Rule 8(1), through the impugned order dated 26.9.2012, at least directions should be issued to the Respondent No. 2-State of U.P. to complete the said disciplinary enquiry in a time bound manner, say in three months approximately, in order that the applicant is able to come out of the cloud early, and the "sealed cover" regarding the consideration of his case for promotion can thereafter be opened. We find full merit in this alternative submission, and therefore, it is allowed.

(133) The respondent No. 2-State of U.P. can, therefore, reconstitute the enquiry

Board, by amending or modifying the constitution of the enquiry Authority or the Enquiry Board, as discussed above, so that both the officers constituting the Board are senior in Batch to the applicant, and they are further directed to ensure, that, to the extent possible, the disciplinary enquiry, against the applicant by that enquiry Board would be held on an urgent basis, and would be completed in, as far as possible, say, within three months from the date of receipt of a copy of this order.

(134) With these observations and limited concessions in favour of the applicant, the alternative prayer made by the learned counsel for the applicant orally during his arguments is allowed, but the rest of the O.A. is rejected. But there shall be no order as to costs.

26. The arguments in Original Application No. 395 of 2012 were concluded on 31.10.2013 and the judgment was reserved. The judgment was delivered on 20.12.2013. On merit the order dated 26.9.2012 was upheld. However, the alternative argument of the learned counsel for the petitioner was accepted by the learned Tribunal and the State of U.P. was directed to conclude the enquiry within three months from the date of receipt of the copy of the said order.

27. The fact that the learned counsel for the petitioner had made the alternative argument before the learned Tribunal is not in dispute.

28. The order dated 26.9.2012 by means of which the Enquiry Report dated 30.8.2012 was rejected and a Board of two members was constituted to hold an enquiry against the petitioner was challenged by the petitioner before the learned Tribunal on the ground which are now being urged before this Court.

29. It appears that before the arguments were concluded on behalf of the petitioner before the learned Tribunal, the petitioner had an inkling that he was not going to succeed on merit and as such an alternative argument was made on his behalf. The alternative submission made before the learned Tribunal was that if the Tribunal upheld the order dated 26.9.2012 at least directions be issued to the State of U.P. to complete the Disciplinary Enquiry in a time bound manner. The original application was dismissed. The order dated 26.9.2012 was upheld. However, the alternative submission made on behalf of the petitioner was accepted by learned Tribunal and the State of U.P. was directed to complete the enquiry within three months.

30. After concluding his arguments the petitioner chose to make an alternative argument and the same has been accepted by the learned Tribunal. The argument was conditional that in case the order under challenge before the learned Tribunal was upheld, the enquiry be ordered to be concluded within a stipulated time. At the time of making the alternative argument, the petitioner was fully aware of the consequences flowing from such a submission. By making the alternative argument, the petitioner has obtained a benefit and now the petitioner has challenged the said judgment before this Court. In my opinion, the petitioner cannot be permitted to assail the said order. A party cannot be

permitted to "blow hot and cold", "fast and loose" or "approve and reprobate".

31. In R.N. Gosain Vs. Yashpal Dhir, the Apex Court has observed as under:

10. Law does not permit a person to both approve and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

32. In the Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (Intern.) Company Ltd., , the Apex Court has held as follows:

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel--the principle that one cannot approve and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

33. The petitioner by making the alternative submission as mentioned above, voluntarily and intentionally relinquished his right to challenge the order dated 20.12.2013. Once the petitioner has waived or abandoned his right of challenging the order dated 20.12.2013, the petitioner is estopped from challenging the said order before this Court.

34. There is another good ground to dismiss this petition. It is well-settled that this Court would not interfere with an order only because it will be lawful to do so. Article 226 of the Constitution vests this Court with a discretionary jurisdiction. In a given case, it may or may not exercise its power. The case in hand is not a fit case where interference with the Tribunal's judgment is called for. In the circumstances mentioned above, I am of the opinion that the petitioner is precluded from challenging the judgment and order dated 20.12.2013 passed by the learned Tribunal. The writ petition is not maintainable and is accordingly dismissed.