
(2012) 09 AHC CK 0247
In the Allahabad High Court
Case No : Writ Petition No. 4676 of 2012

Vinay Kumar Singh

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:

Constitution of India, 1950 — Article 23, 311
Penal Code, 1860 (IPC) — Section 419, 420, 467, 468, 471

Citation : (2013) 3 ALJ 305 : (2013) LabIC 1984

Hon'ble Judges : Ritu Raj Awasthi, J

Bench : Single Bench

Advocate : Avinash Chandra, for the Appellant;

Final Decision : Dismissed

Judgement

Ritu Raj Awasthi, J.—Heard Mr. Avinash Chandra, learned counsel for petitioner as well as Mohd. Mansoor, learned Chief Standing Counsel and perused the records. The writ petition has been filed challenging the order dated 29th February, 2012 whereby an amount of Rs. 2,58,781/- has been ordered to be recovered from petitioner and petitioner has been directed to deposit the same otherwise it would be recovered as arrears of land revenue.

2. Learned counsel for petitioner submits that petitioner was not provided opportunity of hearing before passing of the impugned order and, as such, it is not sustainable in the eyes of law.

3. Submission is that the impugned recovery is not simple recovery as contemplated under minor penalties given under Rule 3 of Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (for short "the 1999 Rules") as it amounts to termination of service as the authorities have directed to recover the entire salary paid to petitioner during the period he has worked as Bandi Rakshak.

4. It is further submitted that in any case petitioner has, admittedly, worked

during the period 20.7.2004 to May, 2007 and, as such, he is entitled to get salary for the said period. There is no question of recovery of the said amount.

5. It is also submitted that no formal order of termination of service has been communicated to petitioner till date and mere filing of charge-sheet would not conclude that appointment of petitioner was obtained by fraud.

6. Learned counsel for petitioner in support of his submission has relied on the interim order dated 26.4.2012 passed in Writ Petition No. 1872 (SS) of 2012; Vishwa Nath Verma v. State of U.P. and others which is said to have been passed under similar facts and circumstances.

7. In support of his submission, learned counsel for petitioner has also relied on a judgment of the Supreme Court in the case of Kailash Singh Vs. State of Bihar and Others, wherein the Court has directed that no recovery of salary paid to the appellant shall be made.

8. Learned counsel for petitioner has also relied on a Division Bench judgment of this Court in the case of Sushil Kumar Pandey Vs. State of U.P. and Others, , particularly para 22, wherein the Court has observed that it would be too harsh to recover the salary paid to the appellant for the acts and omission on his part as there is also omission and negligence on the part of the authorities in granting appointment to him.

9. Learned Chief Standing Counsel on the basis of instructions submits that petitioner had forged last pay certificate and transfer order dated 30.6.2004 and on the basis of forged documents he had joined and worked in Azamgarh Division at District Jail, Mau. In this regard, an enquiry was conducted by CB CID and a criminal case at Crime No. 804A of 2007, under Sections 419, 420, 467, 468 & 471, IPC was lodged against the petitioner. The said case is pending trial.

10. It was on the basis of said offence that the authorities have taken a decision to dispense with the service of petitioner. In this regard, petitioner has filed Writ Petition No. 1165 of 2008 which is pending in this Court at Allahabad.

11. It is contended by learned Chief Standing Counsel that since petitioner had obtained appointment by fraud as such he was not required to be given any opportunity.

12. In support of his submission, learned Chief Standing Counsel has relied on the following decisions:

(i) R. Vishwanatha Pillai Vs. State of Kerala and Others, .

(ii) The Secretary, A.P. Social Welfare-Residential Educational Institutions Vs. Sri Pindiga Sridhar and Others,

(iii) State of Chhatisgarh and Others Vs. Dhirjo Kumar Sengar,

13. I have considered the submissions made by the parties' counsel.

14. From the order impugned it is apparent that the impugned recovery has been ordered for the period 20.7.2004 to May, 2007 from petitioner during which he was paid salary while working as Bandi Rakshak at District Jail, Mau under Azamgarh Division.

15. It is also apparent from the order that petitioner had obtained appointment and change of division by forged orders. In this regard, on 29.6.2007 a case for prosecution against the petitioner has been lodged. The enquiry was entrusted to CB CID and charge-sheet has been filed before the competent Court.

16. In the enquiry it has come that no person in the name of petitioner was appointed at Agra and no order dated 30.6.2004 transferring the petitioner from Agra Division to Azamgarh Division at District Jail, Mau was issued. Petitioner was not paid any salary at Agra nor any GPF was deduced there.

17. Considering the enquiry held by CB CID the authorities have come to conclusion that petitioner had obtained salary to the tune of Rs. 2,58,781/- by playing fraud and, as such, has misused the Government money which shall be recovered from him.

18. From the order impugned it is also evident that before passing of the order petitioner was provided opportunity to submit his reply which he filed on 25.4.2011 which was considered by the authorities.

19. It is to be noted that recovery is defined as minor penalty under Rule 3 of the 1999 Rules which is reproduced below"

3. Penalties: The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed upon the Government servants;

Minor Penalties

- i. Censure
- ii. Withholding of increments for a specified period.
- iii. Stoppage at an efficiency bar.
- iv. Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order.
- v. Fine in case of persons in holding Group "D" posts:

Provided that the amount of such fine shall in no case exceed twenty five percent of the months pay in which the fine is imposed.

Major Penalties

- (i) Withholding of increments with cumulative effect;
- (ii) Reduction to a lower post or grade time scale or to a lower stage in a time scale;

- (iii) Removal from the service which does not disqualify from future employment;
- (iv) Dismissal from the service which disqualify from future employment.

Explanation--The following shall not amount to penalty within the meaning of this rule, namely:

- (i) Withholding of increment of a Government Servant for failure to pass a departmental examination or for failure to fulfill any other condition in accordance with the rules or orders governing the service;
- (ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar;
- (iii) Reversion of a person appointed to probation to the service during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation.
- (iv) Termination of the service of a person appointed on probation during or at the end of period of probation in accordance with the term of the service or the rules and order governing such probation.

20. As per rules for imposing major penalty a detail enquiry is required to be held. For the purpose of awarding minor penalty the procedure is provided under Rule 10 of the 1999 Rules which is reproduced below:

10. Procedure for imposing minor penalties-(1) Where the Disciplinary Authority is satisfied that good and sufficient reasons exist for adopting such a course, it may, subject to the provisions of sub-rule (2) impose one or more of the minor penalties mentioned in Rule 3.

(2) The Government Servant shall be informed of the substance of the imputations against him and called upon to submit his explanation within a reasonable time. The Disciplinary Authority shall, after considering the said explanation, if any, and the relevant records, pass such order as he considers proper and where a penalty is imposed, reason thereof shall be given. The order shall be communicated to the concerned Government servant.

21. In the present case petitioner was called upon to submit his reply to the show-cause notice before passing of the impugned recovery order. The reply submitted by petitioner was considered by the authorities. As such, I am satisfied that procedure required for imposing minor penalty was complete and no further opportunity was required to be provided to petitioner before passing of the impugned order.

22. It is also to be noted that under Rule 3 (iv) of the 1999 Rules recovery by way of pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of order can be imposed.

23. In the present case the payment of Rs. 2,58,781/- by way of salary to petitioner was made in pursuance of the appointment as well as transfer which

was on forged documents.

24. It is also to be noted that under Financial Handbook Vol-V Part-1 Appendix XIX B, in case of loss occurred through fraud every endeavour should be made to recover the whole amount lost from the guilty persons. The relevant paragraph of Financial Handbook is reproduced below:

5. The question of enforcing pecuniary liability should always be considered as well as the question of other forms of disciplinary action. In deciding the degree of the officer's pecuniary liability it will be necessary to look not only to the circumstances of the case but also to the financial circumstances of the officers, since it should be recognized that the penalty should not be such as to impair the Government servants future efficiency.

In particular, if the loss has occurred through fraud, every endeavour should be made to recover the whole amount lost from the guilty persons, and if laxity of supervision has facilitated the fraud, the supervising officer at fault may properly be penalized either directly by requiring him to make good in money a sufficient proportion of the loss, or indirectly by reduction or stoppage of his increments of pay.

It should always be considered whether the depreciated value of the Government property or equipment lost, damaged or destroyed by the carelessness of individuals entrusted with their care (e. g. bicycles, calculators, policeman's rifles, a touring officers tents, a factory motor lorry, an engineers instruments etc.) should not be covered from the delinquent official. The depreciated value of the stores may be calculated by applying the 20 per cent depreciation in the case of vehicles including cycles, and 15 per cent in the case of calculating machines, on the reduced balance every year. The amount to be recovered may be limited to the Government servants capacity to pay.

25. As such, it is to be held that no detail enquiry was required to be held by the authorities and the procedural requirement for passing the impugned order was complete and sufficient.

26. So far as the contention of learned counsel for petitioner that the impugned order amounts to termination as the recovery has been ordered on the allegation of obtaining appointment by fraud, suffice is to conclude that the order impugned does not show in any manner that service of petitioner has been terminated or dispensed with. It only relates to recovery of certain amount and, as such, it cannot be presumed that it amounts to termination of service.

27. It is the admitted case of petitioner that against the termination order he has preferred Writ Petition No. 1165 of 2008 before this Court at Allahabad which is pending consideration.

28. So far as contention of learned counsel for petitioner that petitioner has worked during the period 20.7.2004 to May, 2007 and, therefore, he is entitled to get salary for the said period and no recovery of paid amount shall be made is

concerned, it is to be noted that there is allegation that appointment of petitioner was itself based on fraud and he had no right to work on the basis of said appointment as unless and until it is established that appointment of petitioner was genuine, he had no right to get salary.

29. In the case of Kailash Singh Vs. State of Bihar and Others, the facts were that the person had overstayed in service after having completed the age of superannuation. He had actually worked for a period of five years without any dispute as to age. The opposite parties had conceded before the Supreme Court that there would be no recovery of salary paid. In these circumstances, the Court had directed that no recovery of salary paid to the appellant shall be made, as such, the aforesaid judgment is of no help to petitioner.

30. In the case of Sushil Kumar Pandey Vs. State of U.P. and Others, , the Division Bench while modifying the order of learned single Judge wherein direction was issued to terminate the service and recovery of the amount paid as salary had observed that the direction of learned single Judge so far as it relates to termination of service does not require interference. However, since the petitioner has worked for more than 10 years, it would be too severe for the acts and omission on his part as there is also omission and negligence on the part of the authorities in granting appointment to the appellant, as such, no recovery of the amount paid as salary shall be made. The Court has also observed that even otherwise under Article 23 of the Constitution the "Begar" is prohibited. In that case the recovery order was issued on the basis of direction issued by the Court. There was no dispute to the payment given by the opposite parties. However, in the present case it is the specific case of the opposite parties that the petitioner has obtained appointment and transfer from Agra on the basis of forged documents and he was not entitled to get salary. He had worked during the period 20.7.2004 to May, 2007 on the basis of forged documents and, as such, the amount paid as salary during the said period shall be recovered.

31. I am of the considered opinion that the facts of the present case are entirely different from the facts of the case of Sushil Kumar Pandey Vs. State of U.P. and Others, and, as such, the decision in the case of Sushil Kumar Pandey (supra) is of no help to the petitioner.

32. It has been the consistent view of the Apex Court that the appointment obtained by fraud is no appointment.

33. In the case of R. Vishwanatha Pillai Vs. State of Kerala and Others, , the Apex Court has observed as under:

15. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of the law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by

playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of a false caste certificate has become final. The position, therefore, is that the appellant has usurped the post which should have gone to a member of the Scheduled Castes. In view of the finding recorded by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. The appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As the appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment in a service has been acquired by practising fraud or deceit such an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all.

34. In the case of *The Secretary, A.P. Social Welfare-Residential Educational Institutions Vs. Sri Pindiga Sridhar and Others*, , the Apex Court has observed as under:

7. The High Court on the basis of the erroneous view upset the well-merited judgment of the learned single Judge. By now, it is well settled principle of law that the principles of natural justice cannot be applied in a straight-jacket formula. Its application depends upon the facts and circumstances of each case. To sustain the complaint of the violation of principles of natural justice one must establish that he was prejudiced for non-observance of the principles of natural justice. In the present case, the fact on which the appellant terminated the services of the respondent appointed on compassionate ground was admitted by the respondent himself that when he applied for the post on compassionate ground by its application dated 6.5.1996, his mother was in service. So also when he secured the appointment by an order dated 22.11.2002 his wife was in service since 3.8.1997 as Extension Officer in Rural Development and later on promoted as Mandal Parishad Development Officer at the time when he was appointed on compassionate ground. These facts clearly disclose that the appointment on compassionate ground was secured by playing fraud. Fraud clocks everything. In such admitted facts, there was no necessity of issuing show-cause notice to him. The view of the High Court that termination suffers from the non-observance of the principles of natural justice is, therefore, clearly erroneous. In our view, in the given facts of this case, no prejudice whatsoever has been caused to the respondent. The respondent could not have improved his case even if a show-cause notice was issued to him.

35. In the case of State of Chhatisgarh and Others Vs. Dhirjo Kumar Sengar, , the Apex Court has observed as under:

17. It is in the aforementioned premise, the contention in regard to the breach of audi alteram partem doctrine must be considered. Principle of natural justice although is required to be complied with, it, as is well-known, has exceptions. [See V.C., Banaras Hindu University and Others Vs. Shrikant, . One of the exceptions has also been laid down in S.L. Kapoor Vs. Jagmohan and Others, wherein it was held:

24.....In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes (sic) from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs.

(Emphasis supplied).

19. The respondent keeping in view the constitutional scheme has not only committed a fraud on the Department but also committed a fraud on the Constitution. As commission of fraud by him has categorically been proved, in our opinion, the principles of natural justice were not required to be complied with.

21. In these cases, requirement to comply with the principles of natural justice has been emphasized. The legal principles carved out therein are unexceptional. But, in this case, we are concerned with a case of fraud. Fraud, as is well known, vitiates all solemn acts. [See Ram Chandra Singh Vs. Savitri Devi and Others, , Tanna and Modi Vs. Commissioner of Income Tax , Mumbai XXV and Others, and Rani Aloka Dudhoria and Others Vs. Goutam Dudhoria and Others, . The High Court, therefore, must be held to have committed a serious error in passing the impugned judgment.

36. So far as the interim order dated 26.4.2012 passed in Writ Petition No. 1872 (SS) of 2012 on which heavy reliance has been placed by learned counsel for petitioner is concerned, it is to be observed that the interim order has no precedence and it cannot be said to be binding on the Court. For the facts and reasons given above, I am of the considered opinion that the writ petition being devoid of merit is liable to be dismissed, it is accordingly dismissed.