

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 15.03.2012
Judgment pronounced on: 30.03.2012

+ W.P.(C) 6428/2011

... Petitioner

versus

... Respondent

Advocates who appeared in this case:

For the Petitioner	: Mr Ruchir Mishra
For Respondent	: Mr S.C. Luthra

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V.K..JAIN

V.K. JAIN, J.

1. This writ petition is directed against the orders dated 23.12.2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, whereby OA No. 1670/2010 filed by the respondent was allowed. The brief facts of the are summarized as under:-

The respondent was working as a Heavy Vehicle Driver with Delhi Milk Scheme (DMS). A charge-sheet was served upon him alleging therein that he had attempted to pilfer 35 milk poly packs while on the duty of distribution of milk. A penalty of compulsory retirement was inflicted upon the respondent by the General Manager, DMS. The appeal preferred by the respondent was dismissed by Secretary, Department of Animal Husbandry, Dairying & Fisheries. The penalty of

compulsory retirement was challenged by the respondent by filing OA No. 193/1992 which was decided on 15.10.1997. It was contended before the Tribunal that the Disciplinary Authority in the case of the respondent was Deputy General Manager and not the General Manager and Appellate Authority was General Manager and not the Secretary to the Government. It was further submitted that on account of the General Manager functioning as the Disciplinary Authority and the Secretary as the Appellate Authority, the respondent had been deprived of an opportunity to submit representation before the Secretary, Department of Animal Husbandry, Dairying & Fisheries which had caused serious prejudice to him. The Tribunal, therefore, quashed the order of the Disciplinary Authority as well as the Appellate Authority and remanded the matter to the competent Disciplinary Authority “to pass appropriate order in accordance with law in the departmental proceedings” within three months. In the meanwhile, the respondent had superannuated on 30.06.1993. The matter was carried by the petitioners to this Court by way of WP(C) No. 1628/1998. The writ petition was disposed of in terms of the following order:-

“It has been brought to our notice that in the normal course the respondent would have superannuated on 30.06.1993. Today, it is not possible to give effect to the order of the Tribunal because of the intervening superannuation of the respondent. The only authority that appears to be competent to pass an order today in respect of the respondent’s alleged misconduct is the President.

Under the circumstances, the direction given by the Tribunal has become infructuous by efflux of time. Therefore, without commencing one way or the other on the merits of the case, we remit the matter to the Deputy General Manager (Administration) for taking a decision in respect of the disciplinary enquiry held against the respondent in accordance with law.

(emphasis supplied)

2. A representation dated 10.08.2009 was submitted by the respondent to Deputy General Manager (DMS) stating therein that the order of General Manager and Secretary (Appellate Authority) already stood quashed and, therefore, he was requested to issue formal orders. He also claimed that he shall be deemed to have retired on the date of his superannuation in the normal course and was entitled to back wages from 03.08.1990. Since Deputy General Manager (DMS) did not pass any such order, the respondent filed OA No. 1670/2010 on 17.05.2010. On 03.07.2010, an order was passed by Deputy General Manager (Administration) of DMS compulsory retiring the respondent from service w.e.f. 03.08.1990. The OA was amended by the respondent so as to challenge the aforesaid order.

3. The Tribunal, vide impugned order dated 23.12.2010 observed that the order of punishment as well as the order of appeal had ceased to exist having been quashed by the Tribunal and respondent having superannuated in the end of June, 1993, any action thereafter had to be taken only in accordance with CCS Pension Rules and the order under those rules could have been passed only by the President.

The Tribunal, therefore, set aside the order dated 03.07.2010 and directed the petitioners to treat him as retired on superannuation on 30.06.1993 and pay him full retiral benefits which would have accrued to him if the order of compulsory retirement had not been passed.

4. The learned counsel for the petitioners has contended before us that the matter having been remanded back by this Court to the Deputy General Manager, vide order dated 28.07.2009 passed in WP(C) No. 1628/1998, he was competent to pass an appropriate order imposing penalty of compulsory retirement from service upon the respondent. The learned counsel for the respondent, however, maintained that the order of the Disciplinary Authority as well as the Appellate Authority having been quashed by the Tribunal, the only option available to the petitioners was to proceed against the respondent under CCS (Pension Rules), since he had in the meanwhile superannuated on 30.06.1993. The learned counsel for the respondent also relied upon the observations “the only authority that appears to be competent to pass order today in respect of the respondent’s alleged misconduct is the President” made in the order dated 28.07.2009. The learned counsel for the petitioner, however, contended that the aforesaid observation was only the contention of the respondent which the Court had noted in the order dated 28.07.2009.

5. In our view, the order passed by this Court on 28.07.2009 cannot be interpreted in the manner suggested by the learned counsel for the respondent. Had this Court held that on the date of its order, the President was the only person competent to pass an order in respect of the alleged misconduct of the respondent, it would not have remanded the matter to the Deputy General Manager (Administration), directing him to take decision within six months. We also take note that the matter was remitted to the Deputy General Manager (Administration) who according to the respondent was his Disciplinary Authority “for taking a decision in respect of the inquiry held against the respondent” which would mean that the decision was to be taken on the basis of the inquiry which had already been held against the respondent and no fresh inquiry was required to be instituted by the petitioners against the respondents.

6. In **State of Punjab v. Harbhajan Singh Greasy** 1996 SCC (L&S) 1248, the report of the inquiry officer leading to removal of the respondent from service was passed on an admission alleged to have been made by him. The High Court set aside the order of dismissal on the ground that the alleged admission was not supported by any written statement of the respondent. The High Court while setting aside the order directed reinstatement of the respondent in service. Setting aside the order of the High Court, Supreme Court, *inter alia*, held as under:-

“Under those circumstances, High Court may be justified in setting aside the order of dismissal. It is

now well settled law that when the enquiry was found to be faulty, it could 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 the 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. The High Court had committed illegality in omitting to give the said direction.”

7. In **Union of India v. Y.S. Sadhu-Ex.-Inspector** 2009 (1) SCC (L&S) 126, the departmental inquiry against the respondent was found to be defective inasmuch as the witnesses who had been examined earlier were not produced for cross-examination. Based upon the findings returned in the inquiry, the respondent was dismissed from service. The order of dismissal of the respondent from service was set aside by the High Court which also directed his reinstatement without back wages. The Supreme Court, however, held that the proper course which the High Court should have adopted was to allow the proceedings to continue from the stage where it stood before the alleged vulnerability surfaced.

8. In **Chairman-cum-M.D., Coal India Ltd. & Ors. v. Ananta Saha & Ors** Civil Appeal No. 2958/2011, decided by the Supreme Court on 06.04.2011, the delinquent was dismissed from service vide order dated 17.06.1993 passed by the CMD of ECL, a subsidiary of CIL. The order of dismissal was set aside in a writ petition filed by the delinquent on the ground that it had not been passed by CMD

of CIL, who was the Competent Authority under the Disciplinary Rules. The appeal filed by CIL against that order was dismissed. While dismissing the appeal, it was held by the High Court that the delinquent would be treated in the light of judgment of Supreme Court in Managing Director ECL, Hyderabad etc.etc. v. B.Karunakar etc.: AIR 1994 SC 1074. However, the direction for holding the disciplinary proceedings de-novo was not altered. In view of the decision of the Division Bench, the delinquent was reinstated. The disciplinary proceedings were initiated and a fresh suspension order was passed. Vide an order dated 24.2.2004 passed by CMD of CIL, the delinquent was dismissed from service. An appeal was filed by the delinquent challenging the order of dismissal. However, without waiting for the outcome of the appeal, he filed a Writ Petition challenging the order of dismissal. The Writ Petition was allowed on the ground that the Disciplinary Authority did not ensure compliance with the order of the High Court and the fresh inquiry was initiated by the Officer on Special Duty who was not the Disciplinary Authority. The learned Single Judge was of the view that the proceedings could have been initiated only by the CMD of CIL. The order of dismissal dated 24.2.2010 was therefore quashed. CIL was however, given liberty to hold a fresh inquiry. The appeal filed by CIL was dismissed holding that the disciplinary proceedings had not been initiated by a competent person since no one other than CMD of CIL could have initiated the same. It was also held that the CMD of ECL

was not the Competent Authority for the purpose. The Supreme Court, after examining the rules applicable to the delinquent, held that the disciplinary proceedings could be initiated either by the CMD of Coal India Limited or CMD of its subsidiary ECL, and therefore the High Court had erred in holding that CMD of ECL was not competent to initiate the proceedings. The Supreme Court also held that since the High Court had given liberty to the appellants to hold a de-novo inquiry it was not permissible for them to proceed on the charge-sheet which they had issued earlier and therefore the question of initiating a fresh inquiry without giving a fresh charge-sheet could not arise. It was also found by the Supreme Court that CMD of ECL had merely signed the proposal mooted by the OSD for appointment of an Inquiry Officer to hold a fresh inquiry into the earlier charge-sheet and there was nothing on record to indicate that he had applied his mind before putting his signature on the proposals, though the law required him to pass some positive order taking into consideration the material on record. On this count Supreme Court found no fault with the order of the High Court. The appeal filed by CIL was partly allowed by reversing the finding of the High Court that the CMD of ECL was not competent to initiate the disciplinary proceedings. The Supreme Court directed that it was open to the appellants to initiate a fresh disciplinary proceeding by issuing a fresh charge-sheet. The delinquent sought directions from the Supreme Court for his reinstatement and payment of arrears of salary till the

date of the order. This was opposed by the appellants who informed the Court that the delinquent had been practicing privately and question of back wages shall be determined by the Disciplinary Authority on conclusion of the fresh inquiry. It was also submitted that the result of the fresh inquiry in such a case relates back to the date of termination. Supreme Court was of the view that the submissions of the appellants that the result of the inquiry in such a fact-situation relates back to the date of imposition of punishment, stands fortified by a number of decisions including **R.Thiruvirkolam v. Presiding Officer & Anr:** AIR 1997 SC 637, **Punjab Dairy Development Corporation Ltd & Anr. v. Kala Singh etc.** AIR 1997 SC 2661 and **Graphit India Ltd. & Ors. v. Durgapur Project Ltd. & Ors.** (1999) 7 SCC 645. The Court also noted that in *Managing Director, ECL (supra)* it had been held that where the punishment awarded by the disciplinary authority is quashed on some technical ground, the authority must be given an opportunity to conduct the inquiry afresh from the stage where it stood before the alleged vulnerability surfaced. It was also observed that for the purpose of holding the fresh inquiry, the delinquent need not be reinstated and may be put under suspension and the question of back wages etc. is to be determined by Disciplinary Authority after the fresh inquiry was concluded. Supreme Court also noted that even if the delinquent was reinstated it would not automatically make him entitled

to back wages as entitlement to back wages was independent of reinstatement. The Court therefore declined to direct payment of back wages.

9. In **R.Thiruvirkolam** (*supra*), the appellant was employed as a technician with Madras Fertilizers Ltd. He was dismissed from service after a domestic inquiry on 18.11.1981. The dismissal was challenged by him before the Labour Court. The Labour Court found the inquiry to be defective and permitted the management to prove the misconduct before it. On the basis of the evidence adduced before the Labour Court, it was held that the punishment was justified. The writ petition as well as the writ appeal filed by the appellant having been dismissed, the matter was taken to the Supreme Court by way of Special Leave. The question which came up for consideration before the Court was as to whether the dismissal will take effect from the date of the order of the Labour Court or it would relate to the date of the order of dismissal passed by the employer. It was held that the issue was covered by the Constitution Bench decision in **Kalyani v. M/s Air France Calcutta** 1964 (2) SCR 104, where the Court had made a distinction between a case where no domestic inquiry had been held and a case in which the inquiry was defective for any reason and the Labour Court on its own appraisal of evidence adduced before it, reached the conclusion that the dismissal was justified. The Court noted that the view taken by the Constitution Bench that where the inquiry was found to be defective by the Labour Court and it then came

to the conclusion on its own appraisal of evidence adduced before it, that the dismissal was justified, the order of dismissal made by the employer in a defective inquiry would still relate to the date when that order was made and, therefore, the Labour Court's approval of the order of dismissal made by the employer in a defective inquiry would still relate back to the date when the order was made.

10. In **Punjab Dairy Development Corporation Ltd & Anr.** (supra), the employee was dismissed from service after conducting a domestic inquiry. The Supreme Court found the inquiry to be defective, but allowed the management to adduce evidence afresh to justify the order of dismissal and thereafter upheld the charge as well as the punishment. The High Court, however, confirmed the dismissal only from the date of judgment of the Labour Court and not from an earlier date. Relying upon its decision in **R.Thiruvirkolam** (supra), Supreme Court held that since the Labour Court had recorded a finding that the domestic inquiry was defective and after recording evidence had found the dismissal to be valid, it would relate back to the date of original dismissal and not from the date of judgment of the Labour Court.

11. In the case before this Court, the order of dismissal was not passed by an authority which lacked competence to pass that order. The order passed by General Manager of DMS, imposing penalty of compulsory retirement from service upon the respondent, therefore, cannot be an order which is void or *non est*

in the eyes of the law. The order passed by the General Manager was quashed on the ground that he being the Appellate Authority the order passed by him had resulted in the respondent being denied opportunity to file a representation before the Secretary, Department of Animal Husbandry, Dairying & Fisheries. The sole ground on which the order imposing penalty of compulsory retirement from service was quashed by the Tribunal on 15.10.1997 was that the order was passed by an authority higher in rank to the Disciplinary Authority which had resulted in a situation where the respondent had to file appeal before the Secretary, Department of Animal Husbandry, Dairying & Fisheries and did not have an opportunity to file a representation against that order. We would like to note here that there is no legal bar on an authority superior to the Disciplinary Authority imposing a major penalty upon an employee since such an order does not violate the mandate of Article 311 of the Constitution which *inter alia* stipulates that no employee of the State shall be dismissed or removed by an authority subordinate to that by which he was appointed. The remedy of filing a representation, after the dismissal of appeal is not a constitutional remedy. This remedy, we presume, was provided in the Rules applicable to the respondent. Had the remedy of representation not been available to the respondent, under the rules applicable to him, he would have no grievance on account of the penalty being imposed by General Manager of DMS since the appeal of remedy could be availed by him by submitting the same to the Secretary,

Department of Animal Husbandry, Dairying & Fisheries. The order passed by the General Manager and the Secretary, Department of Animal Husbandry, Dairying & Fisheries, were therefore, quashed on account of a procedural irregularity and not because the General Manager lacked inherent competence to pass the initial order imposing penalty of compulsory retirement from service.

12. In view of the proposition of law laid down by Supreme Court in the cases mentioned hereinabove, we are of the view that Deputy General Manager of DMS, while passing order in terms of the direction of this Court dated 28.07.2009 in WP(C) No. 1628/1998, could have compulsorily retired the respondent from service w.e.f. the date similar order was passed by General Manager of DMS. The order of Tribunal, therefore, cannot be sustained. The Writ petition is accordingly allowed and the impugned order dated 23.02.2010 passed by the Central Administrative Tribunal is hereby set aside. In the facts and circumstances of the case, there shall be no order as to costs.

V.K.JAIN, J

BADAR DURREZ AHMED, J

MARCH 30, 2012

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