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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 3501/2013

% **Date of decision: 24th May, 2013**

+ **BASANT KUMAR** Petitioner

Through: Mr. D.N. Goburdhun, Adv. with
Mr.Aayush Chandra, Adv.

versus

UNION OF INDIA & ORS. Respondents

Through: Mr. Ravinder Agarwal, CGSC.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

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24.05.2013

GITA MITTAL, J (Oral)

1. Vide this writ petition, the petitioner challenges the action of the respondents in initiation of the disciplinary proceedings against him on the ground that the same is without jurisdiction and illegal.

2. To the extent necessary, the facts giving rise to the writ petition are noted hereinafter. The petitioner contends that he was recruited on 5th January, 1989 as Constable in the Cadre of Executive Branch of Central Industrial Security Force

(CISF). It is undisputed before us that vide an order dated 9th September, 2008, the petitioner was detailed to work in the Accounts (1) Section 8 of the Battalion till 5th December, 2012.

3. The respondents issued a Memorandum dated 17th December, 2012 under Rule 36 of the CISF Regular 2001 against the petitioner for a proposed disciplinary inquiry, wherein he was directed to give his written response within ten days after the receipt of the memorandum in his defence. He was also directed to state if he wanted individual hearing. He was informed that the inquiry shall take place only on those allegations which are denied by him and therefore, he was required to accept or reject each allegation specifically.

4. The respondents duly served the charges on which the disciplinary proceedings were proposed against the petitioner and he was given the opportunity to defend himself. After considering of the defence of the petitioner, the respondents proceeded to appoint an Inquiry Officer.

5. A detailed inquiry was conducted against the petitioner. The petitioner was given an opportunity to make representation and submissions. The Inquiry Officer submitted a report on completion of the inquiry and held the petitioner guilty of all the charges. The inquiry was held against the petitioner upon the following charges.

CHARGE NO.01

Force No. 884656452 H.C./G.D. Basant Kumar

(suspended) who was working in this Battalion in Accounts-1 Section and was doing the work of preparing Bill etc., Bi;Mp/950/Estt. 5th RB/2012-2-13 Force No. 982520123 Head Constable/Driver Devendra Singh for the year 2011 ECL of 11 days without Battalion Service Order Part-II claimed. Being a member of Armed Disciplined force above act is indiscipline against his duty and is violation of the already prevailing rules/procedure. Therefore is the charge.

CHARGE NO.02

Force No. 884656452 H.C./G.D. Basant Kumar working in CISF 5th Reserved Battalion Ghaziabad, who was working in the Accounts Department-1 of this Battalion Force No. 061730838 Constable S.K. Singh under Battalion Service Order Part-2 57/2011 dated 12/02/2011 ECL of 17 days had been published and the above member of force till 30/11/2010 from this Battalion salary (LPC) had been given and he had been made out for RTC Araconum. Head Constable Basant Singh Bill of ECL of the above constable for the year 2011 in the month of February instead of 17 days had claimed for 27 days whereas the above constable in the year 2010 itself had gone for posting. Head Constable Basant Kumar should have sent PDS of 17 days of the constable S.K. Singh but he claimed the amount of ECL of the above member of force from here itself. Being a member of Armed Disciplined force above act is indiscipline against his duty and is violation of the already prevailing Rules/Procedure. Therefore is the charge.

CHARGE NO.03

Force No. 884656452 H.C./G.D. Basant Kumar working in CISF 5th Reserved Battalion Ghaziabad, who was working in the Accounts Department – I of this Battalion Force No. 0616880506 Constable Patil Nilesh Prabhakar who from SSG Noida on transfer had come in this Battalion ECL of 11 days on the basis of PDS preparing the bill two times had claimed. Being a member of Armed Disciplined force above act is indiscipline against his duty and is violation of the already prevailing Rules/Procedure. Therefore is the charge.

6. The petitioner was given a copy of the inquiry report dated 9th April, 2012 and opportunity to make representation against the same. It is contended by learned counsel for the petitioner that the petitioner submitted a representation dated 18th April, 2012 which is pending consideration with the Disciplinary Authority of the petitioner.

7. The present writ petition has been filed primarily on the ground that the petitioner could never be charged under the Ministerial cadre because he was not supposed to work under Ministerial cadre as he was working in the executive cadre; that the executive cadre is different from the Ministerial cadre; that the two cadres i.e. the Executive cadre and Ministerial cadre can never be merged with each other. The petitioner submits that the initiation of the enquiry is illegal and could not be initiated against the petitioner as he did not belong to the Ministerial cadre.

8. We may note that reliance has been placed by the petitioner on the pronouncement of Hon'ble the Supreme Court reported in *AIR 2007 SCC 3153 titled as M.P. State Agro Industries Development Corporation v. Jahan Khan* in support of his submission that the administrative order cannot surpass the statutory provisions or rules of recruitment made thereunder. There can certainly be no dispute to this settled position of the law but the same has to be seen and requires to be applied in the given facts and circumstances of the case. In *M.P. State Agro Industries Development Corporation v. Jahan Khan* (*supra*) it has been observed that though the penalty order impugned in the writ petition was appealable in terms of the

regulations but the appeal was dismissed being devoid of any merits. This is not an issue before us.

9. We may note that, the petitioner does not raise any challenge to the order dated 9th September 2008 whereby the duties of the Accounts Section were directed to be performed by the petitioner. There is no dispute before us in the writ petition that petitioner has actually served in the Accounts Section from as back as on 9th September, 2008 till December 2012.

10. There is nothing on record to show that the petitioner ever objected to the assignment of duties by the letter dated 9th September, 2008.

11. Learned counsel for the petitioner draws our attention to para 24 in the writ petition which reads as under :-

Para 24

“That, as stated hereinabove there is no order in files which shows that the petitioner has to work or has posted work as Accountant or Assistant Accountant. There are no posting orders to the Ministerial cadre. There are no circulars or rules that stipulate that the petitioner who is in executive cadre shall go to work in Ministerial Cadre. That the petitioner did not do anything in the Ministerial Cadre and the said allegation are imaginary”.

12. A bare reading of the above cited para shows that the petitioner has challenged the existence of an order in the file directing his change of cadre from Executive

cadre to Ministerial cadre. There is no challenge to the order which was passed actually posting the petitioner to perform duties performed by the Ministerial cadre. There is not even a whisper in the writ petition to contend that the petitioner has not performed duties in Accounts Section.

13. On the contrary in para 19 of the writ petition the petitioner has in fact for the first time challenged the authority of the respondents to post the petitioner in the ministerial cadre on the ground that such purported posting was in derogation of the Act and Rules. It is also nowhere stated in the writ petition that the petitioner had not consented to the posting. It remains a fact that the petitioner was actually posted and serving in the Accounts Section.

14. This writ petition therefore, lays a challenge to a posting order which was passed on 9th September, 2008 which was accepted without objection by the petitioner.

15. Reliance has also been placed on the pronouncement of Hon'ble Supreme Court reported in *(2008) 4 SCC 171 titled as Dhananjay Malik and others v. State of Uttaranchal and others.*

“7. It is not disputed that the writ petitioners- respondents herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in physical education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion *inter alia* that the advertisement and selection with

regard to requisite educational qualifications were contrary to the Rules.

8. In *Madan Lal v. State of J& K* (1995) 3 SCC 486, this Court pointed out that when the petitioners appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned, the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed writ petitions. This Court further pointed out that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.

9. In the present case, as already pointed out, the writ petitioners- respondents herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done”.

16. As discussed above, in the instant case the posting made in 2009, was never challenged by the petitioner. In view of the facts and circumstances and the above discussion and in view of consideration to the fact that considerable time has lapsed, the petitioner cannot challenge his transfer/posting orders at this stage.

17. So far as the disciplinary proceedings are concerned, the petitioner has also participated in the proceedings which were duly conducted in his presence. The petitioner has not uttered a word that he has been deprived of any rights. There is no complaint of violation of or of principles of natural justice in conducting of the

disciplinary proceedings.

18. The inquiry report stands submitted and copy of the same has been received by the petitioner whose defence thereto is pending consideration before the Disciplinary Authority. The writ petition has been filed before this court challenging and contending that the petitioner could not be charged for discharge of duties in the Ministerial cadre on the sole ground that he was appointed under the Executive cadre. The posting or such assignment of duties was accepted by the petitioner. In our view, it is not possible to treat such posting as a change in cadre which could give rise to an actionable claim.

19. We have no manner of doubt that the disciplinary authority would deal with this objection, in the order if taken before it, while deciding the representation of the petitioner against the inquiry report.

However, so far as this case is concerned, no intervention is warranted at this stage in exercise of extraordinary jurisdiction in the matter which is legally impermissible.

20. The respondent shall consider and decide the representation of the petitioner as expeditiously as possible. In case the consideration has not been effected and a view not taken the same shall be completed within a period of eight weeks and the order shall be communicated to the petitioner immediately. It shall be open to the petitioner to proceed in accordance with law thereafter in case he is aggrieved by the

same.

21. The respondents shall dispose of the representation of the petitioner uninfluenced by the observations made hereinabove by us.

22. This writ petition is disposed of in these terms.

CM No. 6604/2013

In view of the order passed in the writ petition, this application is rendered infructuous and disposed of accordingly.

GITA MITTAL, J

DEEPA SHARMA, J

MAY 24, 2013
j