

Court No. - 33**Reserved
A.F.R.****Case :-** WRIT - A No. - 10601 of 2023**Petitioner :-** Dinesh Chand Sharma**Respondent :-** State Of U.P. And 5 Others**Counsel for Petitioner :-** Sujeet Kumar Rai**Counsel for Respondent :-** C.S.C, Brij Raj Verma, Rajesh Kumar Tiwari**Hon'ble J.J. Munir, J.**

1. This writ petition is directed against the order dated 18.05.2023, notifying a decision of the Board of Directors/ Committee of Management, Kisan Sewa Sahkari Samiti Ltd., Chaudhera, Block Pahasu, District Bulandshahr, signed by the Chairman and the Secretary of the said society, resolving to dismiss the petitioner from service.

2. The Kisan Sewa Sahkari Samiti Ltd., Chaudhera, Block Pahasu, District Bulandshahr (for short, 'the Society') is a registered Primary Agricultural Cooperative Society, registered under the U.P. Cooperative Societies Act, 1965 (for short, 'the Act of 1965'). The service conditions of employees of Primary Agricultural Cooperative Credit Societies are governed by regulations, known as U.P. Primary Agricultural Cooperative Credit Societies Regulations, 2020, notified on 31.07.2020. These shall hereinafter be called, 'the Regulations of 2020'.

3. The petitioner was a peon in the employ of the Society. According to a resolution of the Board of Directors of the Society, adopted in their meeting dated 22.10.2022, he was promoted to the post of an accountant. The petitioner thinks that he became the victim of a dispute between a Cadre Secretary, Yadram and another Banwari Lal Sharma, who was given additional charge of the Society *vide* order dated

22.11.2022 passed by the Member Secretary, District Administrative Committee Cooperatives, Bulandshahr.

4. Yadram, the Cadre Secretary instituted Writ-A No. 20683 of 2022, questioning the additional charge of Secretary of the Society being given to Banwari Lal Sharma. The writ petition aforesaid was disposed of, substantially allowed, *vide* order dated 12.12.2022, in terms of the following orders:

"It has been submitted that Sri Banwari Lal Sharma belongs to the same Block i.e. Development Block Pahasu and this Court in its judgment and order dated 07.09.2022 passed in Writ A No.13425 of 2022 (Harish Kumar Sharma Vs. State of U.P. and 3 others) placing reliance upon the Chapter VII Regulation 36(c) of the Uttar Pradesh Primary Agricultural Cooperative Credit Societies Centralized Service Rules, 1978, had observed that no member shall be posted in the Society of the block where he permanently resides. It has been submitted that the order dated 22.11.2022 has been passed without noticing the aforesaid judgment.

Sri M.N. Mishra, learned counsel, on the basis of the instructions, says that Banwari Lal Sharma has only been given additional charge. He has not been made Cadre Secretary of the Society of the Block of which he is original resident.

This Court is of the opinion that additional charge also cannot be given to Banwari Lal Sharma. The order dated 22.11.2022 is quashed with liberty to the respondent no.3 to pass a fresh order within a period of three weeks from today.

In the meantime, the petitioner has already been suspended by order dated 02.12.2022, he shall not be allowed to function but some other regularly appointed Cadre Secretary shall be given charge of the Society in question."

5. The petitioner thinks that Banwari Lal Sharma came to believe that Yadram, the Cadre Secretary, who instituted Writ-A No. 20683 of 2022 against the additional charge of the Society that Banwari Lal Sharma held, was set up by the petitioner. The petitioner says that on this account Banwari Lal Sharma, who is

till date discharging duties of the Secretary in additional charge of the Society, got disciplinary proceedings instituted against the petitioner *mala fide*, and had him placed under suspension pending enquiry *vide* order dated 09.12.2022. A charge-sheet dated 12.12.2022 was issued to the petitioner carrying five charges, to which the petitioner filed a reply, which is on record as Annexure No.6 to the writ petition.

6. It is the petitioner's case that after submission of his reply to the chargesheet, no proceedings were taken. It is averred in paragraph No.13 that it is incorrectly mentioned that *vide* an order dated 21.12.2022, a last opportunity was given to the petitioner to give a reply together with evidence. Rather, it is asserted in paragraph No.13 of the writ petition that after the submission of his reply to the chargesheet, the petitioner was dismissed from service *vide* order dated 31.12.2022.

7. The petitioner challenged the said order dated 31.12.2022 by taking resort to the remedy of a departmental appeal under Regulation 18 of the Regulations of 2020. The Appellate Authority, *vide* order dated 13.03.2023, set aside the order of dismissal from service, passed against the petitioner by the Committee of Management of the Society. The Committee of Management were directed to pass fresh orders in accordance with law, after giving opportunity to the petitioner and adhering to the rules of natural justice.

8. It is the petitioner's case that on 16.03.2023, he submitted his joining report, which was acknowledged by the Society. On 20.03.2023, the petitioner moved an application before the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, requesting that the petitioner's salary held up since November, 2022 may be directed to be paid. The

Assistant Commissioner/ Assistant Registrar aforesaid by an order dated 24th March, 2023 directed the Committee of Management to ensure payment of the petitioner's salary. The petitioner asserts that despite acknowledging the petitioner's joining report, nothing was done to meaningfully accept the petitioner back in employment pursuant to the appellate order. Therefore, the petitioner instituted Writ-A No. 7033 of 2023, seeking the following material relief:

"i) issue a writ, order or direction in the nature of mandamus, directing respondents no.3 and 4 to reinstate petitioner in service and pay his salary;"

9. Instead of reinstating the petitioner or paying him his emoluments, the petitioner was served with a notice dated 19.04.2023 jointly issued by the *Sabhapati* and the Secretary of the Society and another dated 25.04.2023, both requiring the petitioner to appear and produce evidence in his defence. An order of dismissal was passed against the petitioner again on 18.05.2023 by the Committee of Management of the Society, that has been notified by the *Sabhapati* and the Secretary by the order impugned dated 18.05.2023.

10. The petitioner has averred in paragraph No.23 that a copy of the dismissal order was never served upon him, but during the hearing of Writ-A No. 7033 of 2023, a copy of the said order was produced before this Court. It was then that the petitioner came to know about an order of dismissal being passed against him again. This Court, therefore, dismissed Writ-A No.7033 of 2023 as infructuous, *vide* order dated 29.05.2023. A copy of the said order was directed to be supplied to the petitioner by this Court.

11. In paragraph Nos. 29, 30 and 31 of the writ petition, it is averred that no date, time and place of enquiry was fixed before proceeding in the matter. It is further averred that neither any enquiry has been conducted nor an enquiry report drawn up and supplied to the petitioner, despite clear directions in that regard by the Appellate Authority, setting aside the dismissal order on the earlier occasion. It is averred in paragraph No. 31 that no show cause notice was issued to the petitioner before the imposition of the major penalty of dismissal.

12. In the counter affidavit dated 23.08.2023 filed on behalf of the respondents, which is an affidavit filed by Banwari Lal Sharma, the In-charge Secretary of the Society, it is averred in paragraph No.22 of the counter affidavit, while answering paragraph Nos.28, 29 and 30 of the writ petition, thus:

"22. That the contents of paragraphs no.28,29,30 of the writ petition are not admitted and in reply it is stated that all the proceedings initiated against the petitioner in accordance with law after due procedure."

13. A counter affidavit has been separately filed on behalf of respondent No.3, the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr. In paragraph No. 25 of the counter affidavit filed by respondent No.3, the averments in paragraph Nos.29, 30 and 31 of the writ petition have been answered by saying that these need no comments.

14. A personal affidavit of respondent No.3 was also invited because of certain allegations regarding permitting Banwari Lal Sharma to function as the In-charge Secretary of the Society, despite his appointment being quashed by this Court. The said affidavit is confined to the issue aforesaid and allusion would be made to that part of the controversy to the extent necessary.

15. Two rejoinder affidavits have been filed by the petitioner in answer to the counter affidavit on behalf of respondent No.6, Banwari Lal Sharma dated 28.03.2023. Another rejoinder affidavit has been filed in answer to the counter affidavit and personal affidavit filed by respondent No.3.

16. Heard Mr. Anil Kumar Rai, learned Counsel for the petitioner, Mr. Rajesh Kumar Tiwari, learned Counsel appearing on behalf of respondent No. 6 and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of respondent Nos.1, 2 and 3. No one appears on behalf of respondent No.4 and 5.

17. Much has been made on behalf of the petitioner of the issue that respondent No.6, Banwari Lal Sharma, who had been given additional charge of the Society, and upon a challenge about that assignment by the regular Cadre Secretary, Yadram before this Court in Writ-A No.20683 of 2022, was held not entitled to be given additional charge of the Society, but still permitted to continue in that office.

18. The petitioner has raised a grievance about it, because it is the petitioner's case that Banwari Lal Sharma bore a grudge against him, thinking that the petitioner was instrumental in setting up Yadram to question his additional charge of the Society before this Court. The petitioner has urged that a biased Banwari Lal Sharma has sponsored these disciplinary proceedings and even signed the order impugned along with the *Sabhapati*, acting as the In-charge Secretary of the Society, a position he could not have held after the orders of this Court dated 12.12.2022 passed in Writ-A No.20683 of 2022. The petitioner says that he has been much prejudiced because of Sharma's bias.

19. Banwari Lal Sharma has been impleaded *eo nomine* and notice was issued to him. He has filed a personal affidavit being a counter affidavit dated 23.08.2023. In paragraph Nos. 9, 10, 11 and 12 of the affidavit filed by Banwari Lal Sharma, it is said that after the orders of this Court, one Ramesh Chandra Sharma was given additional charge of the Society on 02.01.2023. He did not take that additional charge and submitted a memo dated 18.01.2023 to the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, expressing his inability in the matter, on ground that he was a handicapped man, without one of his limbs, and the distance of the Society from his residence was over 30 kilometers. It is then said in the affidavit that on account of Ramesh Chandra Sharma not taking charge of the Society and the Competent Authority not appointing another Secretary, Banwari Lal Sharma continued to work as the In-charge Secretary.

20. The explanation given about permitting Banwari Lal Sharma to continue as the Officiating Secretary of the Society by the Assistant Commissioner/ Assistant Registrar, Cooperatives, Bulandshahr, is more startling than the one offered by Banwari Lal Sharma himself. It is expressed in the following words in paragraph No.5 of his affidavit dated 24.01.2023, which must be quoted for every word of it:

"5. That in compliance of the order dated 12.12.2022 passed by this Hon'ble Court, the District Administrative Committee vide letter dated 02.01.2023 posted Sri Ramesh Chandra Sharma (Cadre Secretary) by giving Additional Charge in place of Sri Banwari Lal Sharma (Cadre Secretary). In pursuance of the order dated 02.01.2023, Sri Ramesh Chandra Sharma joined in the Chaudhera Committee on 14.03.2023.

It is further submitted that by proposal no. 3 of the meeting dated 27.03.2023, the committee of management Chaudhera Committee rejected the

contribution of Sri Ramesh Chandra Sharma and by proposal no. 4 of the said meeting again taken a decision to send Sri Banwari Lal Sharma, Cadre Secretary alongwith the signatory Chairman to the Branch of Bank.

Thereafter, Mr Jagvir Singh, Cadre Secretary, was directed for taking the Addl. Charge in Chaudhera Committee vide office order dated 03.05.2023, but due to the reason that the Committee of Management has not allowed to contribute Sri Jagvir Singh in the Society, by the office letter no. 493 dated 06.06.2023 Sri Raj Mal Singh Cadre Secretary, was directed to have Addl. Charge of the Chaudhera Committee, it is further submitted that Sri Raj Mal Singh Cadre Secretary was also not allowed to contribute by the committee of management of Chaudhera Committee. Thereafter, vide office letter no. 757 dated 28.06.2023 Sri Arvind Kumar, Cadre Secretary was appointed at the original post in the aforesaid society. In pursuance of which Sri Arvind Kumar has given his contribution in the society on 17.07.2023. By the letter dated 28.06.2023 of the Member Secretary, under the forwarding year transfer policy and District Administrative Committee, Sri Banwari Lal Sharma was again transferred and appointed from Home Development Block to another Development Block.

That the deponent called meeting of District Administrative Committee two times for deciding the issue on 17.04.2023 & 09.06.2023 of removal of Banwari Lal Sharma but the decision could not be taken due to the reason that the corum of the committee was not fulfilled."

21. This Court is opinion that *ex facie* there was no justification for respondent No.3 to permit Banwari Lal Sharma to function for a single day as the Officiating Secretary after this Court passed order dated 12.12.2022 in Writ-A No.20683 of 2022. The reason, apart from the order itself, is that this Court acted to prohibit Banwari Lal Sharma holding that additional charge because it was in violation of Regulation 36(c) of the Uttar Pradesh Primary Agricultural Cooperative Credit Societies Centralised Service Rules, 1978, that forbids a member to be posted in a society located in the block, where he permanently resides. Banwari Lal Sharma was held to be a resident of Block

Pahasu. It was, therefore, most exceptionable to permit him to continue as the Officiating Secretary of the Society or holding its additional charge in violation of the order of this Court dated 12.12.2022 passed in Writ-A No.20683 of 2022.

22. But, the issue here does not turn much, though it may in the slight, upon Banwari Lal Sharma illegally continuing as the In-charge Secretary of the Society. The reason is that the decision, that was taken in terms of the order impugned to dismiss the petitioner from service, is a decision of the Board of Directors/ Committee of Management of the Society. The *Sabhapati* and the Secretary of the Society may have participated in some manner in the decision making process, but they have formally notified it. It is not a decision entirely attributable to Banwari Lal Sharma. Rather, it is the decision of a multi-membered body. Therefore, the element of bias, even if present, is minimum and not efficacious enough to influence the result.

23. What this Court, therefore, has to see is if the petitioner was proceeded with in departmental proceedings according to a procedure that is just, fair and reasonable, and further, if it conforms to the fundamentals of the established procedure to hold a valid departmental enquiry.

24. In paragraph Nos.29, 30 and 31 of the writ petition it is averred that no date, time and place of enquiry was fixed and further that no enquiry has been conducted nor an enquiry report drawn up. It is also averred that no show cause notice was issued to the petitioner before the impugned dismissal order was passed. These averments have not been denied in any of the counter affidavits or personal affidavits filed on behalf of respondent No.3 or 6. Rather, these have been admitted. It is

also true that in none of the returns filed on behalf of the respondents, is a copy of the enquiry report annexed, on the foot of which the impugned order of dismissal could be based.

25. It is true that notices appear to have been sent to the petitioner to appear before the Committee of Management, which as the Disciplinary Authority could have held the enquiry themselves. If the petitioner did not appear in response to the notice, the enquiry could be held *ex parte*. During the enquiry to be held either by the Committee of Management of the Society, sitting as the Disciplinary Authority or by a duly appointed Inquiry Officer or Inquiry Committee, the establishment would have to prove the five charges by leading evidence, both documentary and oral. The burden would initially rely upon the establishment to let in some evidence before whoever was inquiring into the charges. It is not that if the petitioner did not appear and submit a reply, the burden to prove the charges that lies on the establishment would stand discharged *ipso facto* and the charges proved.

26. After all, the law in disciplinary proceedings too is that it is the establishment that has to prove the charges before the Inquiry Officer/ Committee of Management, or whoever is acting in that capacity through a presenting officer, producing evidence both oral and documentary on behalf of the establishment. After that is done, the delinquent is burdened with a duty to produce evidence in his defence. If the employee/ delinquent is *ex parte*, still the establishment have to prove the charges by their evidence, may be *ex parte*.

27. The findings recorded in the impugned order show that the statement of a *Chowkidar* and an Accountant was considered on the charge if manure was unauthorisedly got taken out by the petitioner and black-marketed. The order does

not show at all if this was the statement offered by way of oral evidence before an Inquiry Committee or before the Committee of Management themselves, sitting as an Inquiry Committee. From a tenor of the order, it appears that the Disciplinary Authority relied upon a recorded statement of the *Chowkidar* and the Accountant, may be during a preliminary enquiry, because there is no reference to oral evidence being recorded, either before the Disciplinary Authority or some other Inquiry Committee or enquiry officer.

28. In regard to the second charge, which is about unauthorised felling of Eucalyptus trees, selling them off and misappropriating the price, all done without sanction of higher Authorities, the statement of a former Secretary, Nahar Singh has been taken into consideration. That statement too says that the petitioner brought pressure upon the Committee of Management to permit the sale after felling the trees, whereas there was no permission by the Committee of Management to sell those trees. It is not at all clear if before a Committee of Inquiry or the Disciplinary Authority, sitting as a Committee of Inquiry themselves, Nahar Singh was examined as a witness. A reading of the impugned order shows that some statement by Nahar Singh, earlier recorded, was acted upon. Likewise is the position with the other charges.

29. In the absence of a copy of the enquiry report or minutes of the enquiry, if the enquiry was held before the Disciplinary Authority, the Committee of Management themselves, being annexed to the counter affidavit, the inevitable conclusion is that the impugned order of dismissal was passed on the basis of perusal of records without any evidence, documentary and particularly oral, being led on behalf of the establishment. This

Court holds so assuming that the petitioner remained *ex parte* and did not appear. Even then, the respondents are not relieved of the burden of holding an enquiry by salutary principles of a fair procedure applicable to domestic inquiries, where a major penalty is imposed. In this connection, reference may be made to the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it was held:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, *inter alia*, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

30. Likewise is the position of the law enunciated by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it was held:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry *ex parte*. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the

inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the un rebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

31. A Division Bench of this Court sitting at Lucknow in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, considering the same issue and taking note of the decision of their Lordships in **Saroj Kumar Sinha (supra)**, held:

"14. It is also equally relevant and significant to notice in this case that though the petitioner failed to submit her reply to the charge-sheet, however, the Enquiry Officer did not fix any date, time and place for oral enquiry. It is settled principle that even in a situation where the delinquent officer/employee does not submit reply to the charge-sheet, the Enquiry Officer still needs to prove the charges on the basis of material and evidence available on record and for the said purpose he needs to fix and intimate to the charged officer, the date, time and place for oral enquiry.

15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to

see as to whether the un rebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

32. In view of what has been said above, this Court finds that the impugned order cannot be sustained.

33. In the result, this writ petition succeeds and is **allowed**. The impugned order is hereby **quashed**. A *mandamus* is issued to the respondents to reinstate the petitioner in service forthwith, and pay him salary from the date of this judgement. It will be open to the respondents to proceed afresh from the stage of the charge-sheet, strictly in accordance with law, and as per guidance in this judgement. If the respondents elect to proceed in accordance with law, they may not, for the present, consider the issue of payment of back wages, which shall be subject to the result of the disciplinary proceedings to be taken afresh. If the petitioner is exonerated in the disciplinary proceedings, the respondents will consider, depending on the findings, the petitioner's entitlement to back wages. Likewise, if the

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respondents do not elect to proceed afresh, the petitioner will be entitled to 50% back wages together with continuity of service and seniority.

34. There shall be no order as to costs.

Order Date :- 19.10.2023

Anoop