

Court No. - 33**Reserved**
A.F.R.**Case :-** WRIT - A No. - 13013 of 2023**Petitioner :-** Pankaj Kumar Sharma**Respondent :-** State Of U.P. And 5 Others**Counsel for Petitioner :-** Ajai Kumar Singh Kushwaha, Pankaj Agarwal**Counsel for Respondent :-** C.S.C, Abhishek Srivastava, Pankaj Agarwal**Hon'ble J.J. Munir, J.**

1. This writ petition is directed against an order of termination from service dated 28.06.2023 passed against the petitioner by the Chairman, U.P. Power Corporation Ltd., Lucknow. The petitioner has prayed that the order be quashed and a *mandamus* issued to the respondents to reinstate the petitioner in service without consequential benefits.

2. The brief facts giving rise to this petition are that the petitioner was appointed a Junior Engineer on 14.03.2016 in terms of an appointment letter dated 03.02.2016, issued by the Chief Engineer (Hydro-Electric), U.P. Power Corporation Ltd., Lucknow. The petitioner successfully completed his probation and confirmed in service. While posted as a Junior Engineer at the Sultanpur Electricity Substation, Moradabad, a complaint was laid against him by one Nazim Ali to the effect that the complainant's application for sanction of a commercial electricity connection was pending with the petitioner. The complainant alleged that on 16.09.2022 when he went to meet the petitioner, he told him that he would take proceedings on his application, if the complainant paid him a bribe of Rs.15,000/-. In fact, the complaint says that the petitioner asked the complainant to come back again on 17.09.2022 to his office with the bribe. The complainant is said to have alleged that he

does not want to pay any bribe and wishes that the petitioner be caught red-handed. The complainant demanded action.

3. The case of the petitioner is that he has been falsely implicated in the case at the instance of the complainant, the scribe of the complaint and his co-workers at the substation. The petitioner's co-workers, according to him, were not discharging their duties and the petitioner being the Junior Engineer, had complained to higher authorities against the erring employees. His employees were contractual and on the petitioner's complaint, their contract was terminated. It is on this account that these employees/ workmen bore a grudge against the petitioner and sought to wreak vengeance, leading to the ill-found complaint against him. It is averred that the complainant acted in connivance with the errant employees in order to harass, humiliate the petitioner and spite him. The petitioner says of the complainant, Nazim Ali, that he had applied for a commercial connection seeking sanction of a 3 KW load. The application was transferred to the S.D.O., whereas the petitioner was asked to prepare a Technical Feasibility Report. The petitioner drew up the report on 10.09.2022 and sent the same to the S.D.O. for review. It is after a review by the S.D.O. of the Technical Feasibility Report drawn up by the petitioner and an onsite visit undertaken by the S.D.O. that a payment receipt would be issued. Afterwards, the connection would be sanctioned and a meter installed.

4. In the present case, the petitioner, being a Junior Engineer, was supposed to draw up a Technical Feasibility Report, which he did on 10.09.2022 and submit it to the S.D.O., which was done. Thereafter, the petitioner's obligation came to an end and the other proceedings had to be undertaken by the

S.D.O. There was nothing, according to the petitioner, to be done by him, which the complainant could be aggrieved about. Nevertheless, the motivated complaint was made at the instance of Nazim Ali and without hearing the petitioner, he was placed under suspension *vide* order dated 17.09.2022. The petitioner was issued a charge-sheet carrying two charges in respect of which disciplinary proceedings were undertaken. The charge-sheet was issued on 19.12.2022. The petitioner sought time on 28.12.2022 and 19.01.2023 to tender his reply, so that he could submit a proper one. The Inquiry Officer neither gave the petitioner documents relative to the charge, nor a copy of the preliminary inquiry report, on the basis of which the charge-sheet was issued.

5. There are then averments showing that the petitioner sought time on more than one occasion to submit a reply and ultimately did submit one on 12.04.2023, denying the charges. It appears, however, that before that could be done, an inquiry report was submitted in the matter through an office note dated 24.02.2023 by the Temporary Inquiry Committee-VII. It also appears from the averments and the record annexed to the writ petition that in connection with the charge of demanding bribe from the complainant, Nazim Ali, which is the subject matter of disciplinary proceedings, the petitioner was trapped and arrested on 17.09.2022, accepting a sum of Rs.15,000/- in his office; or as the allegations would go. In this connection, the petitioner was *challaned vide* Case Crime No.315 of 2022, under Section 7 of the Prevention of Corruption Act, Police Station Bhojpur, District Moradabad. This Court granted bail to the petitioner on 20.12.2022 in Criminal Misc. Bail Application No.55718 of 2022.

6. The Chairman, U.P. Power Corporation *vide* the order impugned dated 28.06.2023 dismissed the petitioner from service, acting on the antedated inquiry report submitted through the office note dated 24.02.2023.

7. Heard Mr. Pankaj Agarwal, learned Counsel for the petitioner, Ms. Monika Arya, learned Additional Chief Standing Counsel for respondent No.1 and Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos. 2, 3 and 5. No one appears on behalf of respondent Nos. 4 and 6.

8. Mr. Pankaj Agarwal, learned Counsel for the petitioner has urged that the impugned order is patently flawed and one passed in violation of rules of natural justice. The inquiry report, that is the foundation of the order impugned, is also flawed, inasmuch as the Inquiry Committee did not fix a time, date and place of inquiry. Also, the Establishment did not produce witnesses in support of the charges, though the charge was so serious that if proved, would have led to the imposition of a major penalty; and in fact major penalty was imposed. The attention of the Court has been drawn to Paragraph Nos.36, 37 and 38 of the writ petition, where in the first of the two mentioned paragraphs, it is averred that a copy of the inquiry report was not served upon the petitioner and in the last paragraph, it is averred that no witness was produced in support of the charges by the Establishment to prove their case. It is also averred in Paragraph No.36 that the inquiry proceedings were held *ex parte*.

9. In answer, it is averred in Paragraph No.5 of the counter affidavit that the petitioner was provided a copy of the charge-sheet dated 19.12.2022 and supplied the necessary documents on 22.12.2022. It is also pleaded that at the time the petitioner

filed his reply, he was informed by the Inquiry Committee that he can in writing intimate the Inquiry Committee the names of witnesses, whom he wants to examine or cross-examine and the names of all those persons, whom he wishes to produce to examination or cross-examination. It is also averred that during departmental inquiry, the petitioner was issued a letter by the Inquiry Committee on 31.03.2023, by which the petitioner was called to participate in the inquiry on the date, time and place scheduled. The date was 07.02.2023. The petitioner appeared before the Inquiry Committee on 07.02.2023 along with his reply to the charge-sheet as well as evidence. It was thereafter that the inquiry report was submitted on 24.02.2023.

10. The learned Counsel for the U.P. Power Corporation, Mr. Abhishek Srivastava, has drawn the Court's attention to Annexure No.1 to the counter affidavit, which is a memo dated 31.01.2023 issued to the petitioner by the Chief Engineer, heading the Inquiry Committee. It intimates the petitioner that the charges against him would be heard by the Inquiry Committee-VII on 07.02.2023 at 11:00 a.m. It was also indicated that the petitioner could appear in person before the inquiry. It is further contended by Mr. Abhishek Srivastava that Regulation 7 of the U.P. Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 (for short, 'the Regulations of 2020') provides *vide* Regulation 7(4) that along with the charge-sheet a list of documents and the list of witnesses together with their statements, if any, are to be provided to the delinquent employee and *vide* Regulation 7(7) of the Regulations of 2020, it is provided that where the delinquent denies the charges, the Inquiry Officer would call witnesses proposed to be examined *vide* the charge-sheet in the presence of delinquent, who would have opportunity to

cross-examine them. He argues that witnesses are not required to be produced in every case, because if no names are mentioned in the charge-sheet, then the Inquiry Committee cannot be said to be under obligation to examine witness.

11. This Court has carefully considered the submissions advanced by learned Counsel for both parties.

12. The principles, according to which a departmental enquiry is to be held, are well established in cases where the charges are so serious, that if proved, may lead to the imposition of a major penalty. The establishment/ employer is under an obligation to produce not only documentary evidence, but witnesses by whom the charges, may be proved. In an enquiry, which may lead to the imposition of a major penalty, the production of witnesses by the establishment, in the first instance, to prove the charges is imperative. The further requirement is that the Inquiry Officer has to act as an impartial arbiter and not someone, who identifies himself as an officer of the establishment, more friendly to the presenting officer than the delinquent or the defence assistant. It is before such an impartial arbiter of an enquiry officer, who has, for the purpose of the enquiry, distanced himself of his loyalties with the establishment, that the presenting officer has to produce evidence on behalf of the establishment, particularly, witnesses, besides documentary evidence, to prove charges against the employee.

13. It is only after some evidence has been let in on behalf of the establishment that the burden shifts to the employee to produce evidence in his defence. Of course, even if the employee does not produce any evidence in his defence, the establishment nevertheless have to prove the charges and face

the employee's cross-examination. It is not that the employee is to be asked, if he wants to cross-examine any witness.

14. Here, it is the respondents' case pleaded in paragraph No.5 of the counter affidavit that it was mentioned in the charge-sheet that the petitioner/ employee can also inform the Inquiry Committee in writing providing the names of witnesses, whom he wants to examine or cross-examine, and the names of those persons as well, whom he wants to produce for examination or cross-examination. The averment, to say the least, betrays utter lack of understanding of the elements of procedural law, that applies to domestic inquiries. One cannot imagine that an employee would be asked by the establishment to name witnesses for the establishment, whom he wants to examine on their behalf and then wishes to cross-examine them.

15. From a reading of the averments in paragraph No.5 of the affidavit, it appears that the deponent as well as the officer, who issued the charge-sheet, calling upon the petitioner, to inform the Inquiry Committee, providing the names of witnesses, whom he wants to 'examine or cross-examine', does not understand what is meant by examination and cross-examination. It is unimaginable to think of cross-examination by the employee unless the establishment choose to produce their witnesses for their examination-in-chief in support of the charge/ charges. Cross-examination is a procedure or a tool in the hands of the side arrayed opposite the one producing a witness to test the veracity of the witness and discredit him. Of course, in the process, the witness's testimony in the examination-in-chief may come out sterling.

16. This Court does not wish to say that the Evidence Act ought to be imported into the relatively informal and untrained arena of a domestic enquiry, but the essentials of what is meant by examination-in-chief and cross-examination, cannot be mixed up, misunderstood and given a go-by. There is just no way in which the employee, as suggested in paragraph No.5 of the counter affidavit, could be asked to request production of the employers' witnesses and then opt to cross-examine them.

17. This submission advanced on behalf of the respondents that the petitioner has not disputed the genuineness of the documents provided to the petitioner during the course of the enquiry nor had shown any interest in asking the establishment to produce any evidence for examination or cross-examination, would relieve the establishment of their obligation to produce witnesses, is completely misplaced. There is nothing on record to show that the petitioner admitted the documents either by endorsement or a record of his statement to that effect by the Inquiry Committee. No minutes of the enquiry have been produced to show that the Inquiry Committee recorded the fact that all documents cited on behalf of the establishment have been admitted – either with reference to particular documents, or all of them generally. With the petitioner/ employee denying the charges, it cannot be said that he has admitted the documents, or deemed to have admitted them. Therefore, the burden to prove the charges, galvanizing the documents that are idle papers into documentary evidence, through testimony of the witnesses before the Inquiry Committee, could never be forsaken by the respondents, if charges against the petitioner were to be proved.

18. It would be of profit to review authority on the point regarding the establishment's obligation to prove charges before the Inquiry Committee and in what manner that burden is to be discharged. In **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, 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."

19. The question fell for consideration before a Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB)**, where it was held:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541.

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, **2008 (3) ESC 1667**, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

"10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11.A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also."

(emphasis by Court)

20. The issue under consideration here engaged the attention of this Court in **Dukh Haran Prasad v. State of U.P. and others, 2015 (3) ADJ 677**. In **Dukh Haran Prasad (supra)**, it was observed:

"**16.** It is not disputed by the learned Standing Counsel that the imposition of the penalty of stoppage of three increments with cumulative effect upon the petitioners was a major penalty.

If that be the admitted position, the procedure prescribed under Rule 7 was to be mandatorily followed. It has been repeatedly held by this Court that in the case of imposition of a major penalty, a failure to hold an oral inquiry is fatal. If there be any need to refer to authority for this proposition, one may only note the judgment rendered by a Division Bench of this Court in the case of Sharad Kumar Varma v. State of U.P. and others; 2006 (110) FLR 630."

21. It is of prime importance in this case to look into the nature of the charges against the petitioner and how they could be proved. The charges against the petitioner are about accepting illegal gratification. The event is the same that is said to have happened on 17.09.2022 at 1 o'clock. Two charges against the petitioner read:

"आरोप संख्या 1 :-

आपके द्वारा दिनांक 17.09.2022 को समय लगभग 13:00 बजे श्री नाजिम अली पुत्र श्री तसब्बूर अली हुसैन निवासी ग्राम जटपुरा जनपद मुरादाबाद से वाणिज्यिक संयोजन निर्गत करने के एवज में उत्कोच ग्रहण करते हुये भ्रष्टाचार निवारण संगठन मुरादाबाद इकाई सिविल लाईन्स, मुरादाबाद (उ०प्र०) द्वारा रंगे हाथो गिरफ्तार किया गया था। विभागीय कार्य के एवज में उत्कोच ग्रहण किया जाना उ०प्र० सरकारी सेवक आचरण नियमावली-1956 का स्पष्ट उल्लंघन है। इस पूरे प्रकरण में आपके द्वारा विभाग की छवि धूमिल की गयी है।

आरोप संख्या 2 :-

आपकी उपरोक्त अवधि में, 33/11 के० वी० विद्युत उपकेन्द्र जहाँगीरपुर का अतिरिक्त कार्यभार देखने के दौरान, श्रीमति तयैबा खतून पत्नी मौ० रिजवान निवासी ग्राम गौहरपुर सुल्तानपुर को, 01 नं० घरेलु विद्युत संयोजन निर्गत किया गया। जिसकी विद्युत पोल से दूरी 43 मी० थी एवं यह विद्युत संयोजन घोसीपुरा 11 के० वी० फीडर से निर्गत किया गया। जिसकी जाँच करने पर पाया गया कि, परिसर पर दवाईयों की पैकिंग इत्यादि का कार्य होता है। जिसका विद्युत संयोजन वाणिज्यिक विधा में होना था एवं उक्त विद्युत संयोजन की पोल से दूरी 300 मी० पायी गयी। ऐसी स्थिति में विद्युत संयोजन का प्राक्कलन तैयार करके

विद्युत संयोजन वाणिज्यक विधा में निर्गत किया जाना था । परन्तु आपके द्वारा उक्त संयोजन को उत्कोच ग्रहण करके घरेलू संयोजन विधा में दिया गया। आपके द्वारा उक्त संयोजन को सही विधान में निर्यात किया जाता तो विभाग को आर्थिक क्षति नहीं होती।"

22. The first charge is that the petitioner was arrested red-handed while accepting illegal gratification on 17.09.2022 at 1 o'clock in the afternoon from Nazim Ali son of Tasabbur Ali for the purpose of sanctioning the latter's commercial electricity connection. The other charge is that while holding additional charge of 33/11 KV Electricity Substation Jahangirpur, the petitioner sanctioned a domestic connection in favour of one Smt. Taiyyaba Khatun, whose premises were located at a distance of 43 meters from the pole. The connection was sanctioned from the 11 KV Feeder. Upon inspection, it was found that in the premises, where the connection was sanctioned, commercial activity of packaging of medicines etc. was done. The connection that had to be sanctioned, should have been a commercial one. It was also found during inspection that the distance of the premises from the electricity pole was 300 meters. The charge was that the petitioner accepted a bribe, sanctioned a domestic connection, where a commercial connection ought to have been sanctioned, causing financial loss to the Corporation.

23. The aforesaid charges, by their very nature, are such that these involve transactions between persons at multiple levels and certain parts within those transactions. The foremost is acceptance of the bribe, where the petitioner was caught red-handed. Regarding the other charge, what is of importance is the nature of the work done in the premises, where a domestic connection was sanctioned, instead of a commercial one, that

ought to have been sanctioned, as the respondents say, by the petitioner's accepting illegal gratification.

24. The second charge is based on inspection of the premises and then about a case that bribe was taken to sanction a domestic connection. All these various facts, that form the gamut of the two charges, inherently require oral testimony by production of witnesses. The witnesses of the trap may or may not have been produced before the learned Judge, trying the criminal case arising out of the incident, but before the Inquiry Committee witnesses of the trap are so essential to prove the first charge that in their absence, it is difficult to imagine the first charge being established. Likewise is the position of the second charge.

25. The man, who did the inspection of the premises, where the petitioner sanctioned a domestic connection and found commercial activity going on there, was an essential witness to prove the said charge. Nothing of the kind was undertaken in the enquiry. A reading of the enquiry report shows that in support of the first charge, report of the Executive Engineer, Electricity Distribution Division-III, regarding the case where the petitioner is said to have been trapped accepting a bribe, was taken into consideration. Both the charges have been held proved, looking into documents which are nothing but mute papers, that shed no light and speak no word to substantiate both the charges. In the circumstances, the failure to examine witnesses in this case renders the enquiry report a document to be outrightly discarded.

26. From a reading of the inquiry report, it appears that, not only was there a failure to examine any witness, no presenting officer seems to have functioned before the Inquiry Committee,

to present the establishment's case. The Inquiry Committee acted as presenting officers, to wit, prosecutors and arbiters at the same time. This kind of a procedure has been disapproved by the Supreme Court in **State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236**, where it was observed:

"17. On the other hand, one Mr P.C. Lohani, Dy. Divisional Forest Officer, Nandhaur acting as an enquiry officer after putting certain questions and securing answers submitted a report on 16-11-1985. No witnesses were examined. Apparently there was not even a presenting officer. A perusal of the report shows that the enquiry officer himself inspected the areas in the forest and after taking note of certain alleged deficiencies secured some answers from the delinquent by putting some questions. It is clear that the enquiry officer himself has acted as the investigator, prosecutor and judge. Such a procedure is opposed to principles of natural justice and has been frowned upon by this Court."

27. In the totality of circumstances, this Court finds that the impugned order dated 28.06.2023 passed against the petitioner cannot be sustained, as also the undated enquiry report submitted along with covering memo dated 24.02.2023.

28. In the result, this petition succeeds and is **allowed**. The impugned order dated 28.06.2023 passed by the Chairman, U.P. Power Corporation and the enquiry report dated nil submitted through covering memo dated 24.02.2023 are hereby **quashed**. A *mandamus* is issued to reinstate the petitioner in service forthwith. It will be open to the respondents to resume disciplinary proceedings against the petitioner from the stage the charge-sheet was issued and hold an enquiry afresh in accordance with law, bearing in mind the guidance in this judgment. Should the respondents elect to proceed afresh against the petitioner, he will not be paid his back wages or any part thereof, pending such enquiry. However, the petitioner will

be entitled to receive current salary from the date of this judgment. The question of back wages will be decided by the respondents dependent on the event in the disciplinary proceedings. If at the end of all proceedings, the petitioner is reinstated in service, with or without penalty, he would be entitled to continuity and seniority. Costs easy.

Order Date :- 19.10.2023
Anoop