

Court No. - 33**Case :-** WRIT - A No. - 13315 of 2023**Petitioner :-** Rajesh Kumar Saraswat**Respondent :-** The Director Board of U.P. Power Corporation Limited and others**Counsel for Petitioner :-** Indra Raj Singh, Adarsh Singh, Varun Kumar Agnihotri**Counsel for Respondent :-** C.S.C., Abhishek Srivastava, Manu Ghildyal**Hon'ble J.J. Munir, J.**

The petitioner, who was an Office Assistant-III/Cashier (Revenue) in the employ of the U.P. Power Corporation Limited (for short, 'the Corporation'), impugns his dismissal from service *vide* order dated 07.12.2021 passed by the Chairman of the Corporation as well as the order dated 17.09.2022 passed by the Board of Directors of the Corporation, dismissing the petitioner's appeal and affirming the Disciplinary Authority.

2. The facts giving rise to this petition are that the petitioner was appointed as an Office Assistant-III under the Dying-in-Harness Rules, favoured with a compassionate appointment on account of his father's demise in harness. The petitioner's father was a Junior Engineer. He died on 12.08.2008. The petitioner was appointed on 20.11.2008. The petitioner joined service on the date the letter of appointment was issued and commenced discharging his duties. The petitioner was appointed in the office of Superintending Engineer, Dakshinanchal Vidyut Vitran Nigam Limited, District Hathras. The petitioner was transferred to the newly created office of the Electricity Distribution Division, Sadabad, Hathras and relieved on 21.08.2010. The petitioner joined as an Assistant-III in the newly created office of the Electricity Distribution Division-IV, Sadabad, Hathras on 22.08.2010. The petitioner says that while holding the

post of a Cashier (Revenue) in the office of the Executive Engineer, there was a robbery on 16.04.2013. The petitioner reported the incident to the respondents and also lodged a first information report at the Police Station the same day. The Superintending Engineer made a preliminary inquiry into the incident and submitted a report dated 16.04.2013. He held no employee of the Corporation responsible for the incident. It was a case of loot of the bag, carrying cash in the sum of Rs. 22,70,000/- by three motorcycle-borne robbers, who robbed the petitioner at gun point, just as he was about to enter the Bank with the cash bag, after parking his vehicle. It is averred that at the relevant date and time i.e. 16.04.2013, there was neither any guard appointed nor any security detailed to facilitate the safe deposit of cash in the Bank. It is also pleaded that there was an insurance to the extent of Rs. 16,00,000/-, whereas the recovery and collection in the Bank was always more than the said sum. Subsequently, on account of aforesaid incident dated 16.04.2013, the Superintending Engineer passed an order dated 03.05.2013, placing the petitioner under suspension pending inquiry. The petitioner was arrested in Crime No. 395 of 2013 under Section 409 IPC, P.S Sadabad, District Hathras and sent to jail. It is submitted that the petitioner was falsely implicated and has been charged with loss of the said sum *vide* a charge-sheet dated 16.03.2017. The petitioner submitted his reply to the charge-sheet after gathering relevant facts and materials in support of his case. The charge-sheet carried twelve charges, all of which were denied by the petitioner.

3. It is the petitioner's case specifically pleaded in paragraph no. 15 of the writ petition that the Inquiry Committee, without issuing any notice, conveying the date, time and venue of inquiry to the petitioner to participate, without perusing the relevant records or giving the petitioner an opportunity of hearing, submitted an inquiry report dated 12.03.2019, holding charges nos. 1, 2, 3, 4, 5, 8 and 12

proved, charges nos. 9, 10, and 11 partly proved and charge no. 7, not proved. A copy of the inquiry report is also on record.

4. The Executive Engineer(Administration-2), Dakshinanchal Vidyut Vitran Nigam Limited, Agra issued a notice dated 13.08.2020 to the petitioner, asking him to submit his response to the inquiry report. The petitioner, in response to the notice dated 13.08.2020, submitted a reply dated 29.09.2020. He mentioned in his reply that the inquiry was not properly held in accordance with law, and without any cogent evidence, documentary or oral, the charges were held proved in manifest error of law.

5. The Disciplinary Authority, according to the petitioner, without application of mind, passed the order impugned, dismissing him from service *vide* order dated 07.12.2021. The Authority further directed recovery of a sum of Rs. 72,13,237/- from the petitioner, after adjusting the sum of money, already recovered.

6. The petitioner filed an appeal dated 07.01.2022 to the Board of Directors of the Corporation, raising cogent grounds. Since the petitioner was facing recovery pursuant to the order of the Disciplinary Authority, he instituted Writ-A No. 5220 of 2022 before this Court. This Court, *vide* order dated 05.05.2022, disposed of the said writ petition, directing that the competent Authority shall examine the petitioner's case in appeal/representation preferred against the order of dismissal within a period of two months from the date of submission of a certified copy of the order. It was further directed that in the meanwhile, until decision is taken by the Board of Directors, no recovery shall be made pursuant to the impugned order passed by the Disciplinary Authority. The Board of Directors, sitting as the Appellate Authority *vide* order dated 17.09.2022, dismissed the petitioner's appeal, affirming the Disciplinary Authority.

7. Aggrieved, the petitioner has instituted the present writ petition under Article 226 of the Constitution.

8. Heard, Mr. Adarsh Singh, learned counsel for the petitioner, Mr. Ujjawal Srivastava, Advocate holding brief of Mr. Abhishek Srivastava, learned counsel for respondent nos. 1, 2 and 3, Mr. Manu Ghildyal, learned counsel for respondent no.4 and Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent no. 5.

9. It must be remarked here that this writ petition has been heard on a solitary affidavit filed on the respondents' side, which is a personal affidavit of respondent no. 2, the Chairman, U.P. Power Corporation Limited, Lucknow. This course of action has been taken in view of the stand of the parties before this Court recorded in the order dated 23.08.2023, which reads:

"Statement is made on behalf of respondent nos. 1,2 and 3, that no further affidavit is required to be filed. Ms. Monika Arya, learned Additional Chief Standing counsel appears on behalf of respondent no.5. Mr. Manu Ghildyal, learned counsel appearing on behalf of respondent no.4, states that he does not propose to file a counter affidavit. Learned counsel for the petitioner states that personal affidavit may be treated as a counter affidavit to which he does not intend to file a rejoinder."

10. The personal affidavit of respondent no.2 was filed in response to an order dated 11.08.2023, the material part whereof reads:

"Mr. Abhishek Srivastava, Advocate shall file an affidavit within a week on behalf of the Chairman, U.P. Power Corporation Limited, Lucknow clearly indicating whether at the inquiry, the Inquiry Officer fixed a date, time and venue, with notice thereof to the petitioner, and further, if the employers-respondents examined any witnesses (oral evidence), in support of the charges against the petitioner. There is an assertion that neither date, time and place of inquiry was fixed by the Inquiry Officer nor witnesses examined by the establishment."

11. This issue was inquired into by the Court because the petitioner has averred in paragraph no. 15 of the writ petition that no date, time

and place of the inquiry was fixed, enabling him to participate in the oral inquiry. Though, in the writ petition, it is not said in words very specific but the fact that the Establishment did not produce any witness in support of the charges or lead oral evidence to prove them, is precisely what the petitioner wishes to canvass. It was, therefore, imperative for the Court to inquire of the respondents, if they examined any witness in support of the charges against the petitioner. Of course, it was also inquired if any date, time and place of the inquiry was fixed. The personal affidavit that has been filed is not a para-wise reply to the contents of the writ petition but substantially answers the petitioner's case. In paragraph nos. 8, 9 and 11 of the personal affidavit, it has been averred:

"8. That during the departmental enquiry the petitioner was also issued a letter by the enquiry committee on 11.01.2018, directing him to appear before the enquiry committee, fixing the date and time, in response to which, the petitioner appeared before the enquiry committee on 30.01.2018 and participated in the enquiry. A copy of the letter dated 11.01.2018 and the minutes of the proceedings dated 30.01.2018 are being annexed herewith and marked as Annexure-CA-2 & CA-3 respectively to this personal affidavit.

9. That after giving due opportunity of hearing to the petitioner and on the basis of material evidence on record, the enquiry committee submitted its report. During the course of departmental enquiry, the petitioner had not shown any interest in asking the department to produce any witness for examination/cross examination. Therefore, once the petitioner has duly participated in the departmental enquiry and enquiry committee has given him all the necessary opportunities in his defence, it can not be said that any prejudice is caused to him in not examining any witness by the department.

11. That from perusal of the record it is evident that no witness was proposed either in the charge sheet or any witness was named by the petitioner to be examined during the departmental enquiry. Therefore, no witness was examined by the Corporation to prove the

charges during the course vastava of departmental enquiry in the present case. Further to remove all these anomalies, an Office Memorandum has been issued on 14.8.2023 wherein directions have been issued to all the authorities of the Corporation/discoms enquiry that they should strictly adhere to the provisions of Rule-7 of the Regulations-2020."

(emphasis by Court)

12. The petitioner's case that no date, time and place of inquiry was fixed is, therefore, not established, particularly, in view of the fact the petitioner did appear before the Inquiry Committee, which seems to have held a single sitting on 30.01.2018. The proceedings of the inquiry with reference to the minutes, and the impact of the affidavit filed by the petitioner before the Committee, also dated 30.01.2018, will be adverted to a little later in this judgment. What is not denied, therefore, reading across paragraph no. 9 and 11 of the personal affidavit filed by respondent no. 2 is the fact that indeed the Establishment in order to prove its charges did not produce witnesses, or documentary evidence through a presenting officer before the Inquiry Committee. The sole sitting of the Inquiry held on 30.01.2018, or at least the session, where the petitioner appeared, the recorded minutes thereof read:

टिप्पणी एवं आदेश

केस सं० - 26

30.01.2018

पत्रावली व्यक्तिगत सुनवाई हेतु प्रस्तुत हुई।

आरोपी श्री राजेश कुमार सारस्वत, त० कार्यालय सहायक तृतीय विद्युत वितरण खण्ड- चतुर्थ, सादाबाद , हाथरस ने आज दिनांक 30.01.18 को अपने बचाव में " समिति" के समक्ष व्यक्तिगत रूप से उपस्थित हुये। अनुपूरक आरोप पत्र का अभिकथन एवं साक्ष्य प्रस्तुत करना चाहता हूँ। इस आधार पर आरोपी सेवक ने 15 दिन का समय मांगा जिसे समिति ने स्वीकार कर लिया। इस प्रकार आज की कार्यवाही पूर्ण की जाती है।

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30.01.2018

(Rajesh Kumar Saraswat)

O.A IIIrd (Suspended)

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13. A reading of the minutes of the inquiry shows that during the proceedings, the Committee went by the assumption that the charges numbering twelve were all proof of themselves and that during personal hearing on 30.01.2018, the petitioner, who requested time to file a reply to the supplementary charge-sheet and produce evidence in his defence, was granted fifteen days' time to do so, adjourning proceedings of the inquiry. On the other hand, an affidavit has been taken on record on 30.01.2018 on a printed proforma with blanks filled up. The printed proforma, which the petitioner has signed also seems to be the product of a very objectionable practice. The so-called affidavit, which does not even show the expression of an oath or the verification of its contents, is a printed proforma with blanks to be filled up.

14. A reading of the said affidavit on the printed proforma seems to show that Inquiry Committees of the Corporation are employing this proforma to extract statements from a charged employee, opting to give up his defence. The reason is that the printed script and not the blanks say it without option that the employee has inspected all the records and that the charged employee, apart from his written statement, has nothing else to say in his defence. It is also scripted in printed form that the charged employee does not wish to examine or cross-examine any witness. The last is a printed acknowledgment that the Inquiry Committee has given him full opportunity of hearing.

15. This proforma affidavit annexed as Annexure No. 3 to the personal affidavit, filed by the Chairman of the Corporation, leaves this Court with no option but to believe that the Inquiry Committees of the Corporation, not just in this case but generally, since it is a printed proforma, are proceeding with departmental inquiries hardly

as impartial arbiters with commitment to enquire and discover the truth of the charges. This printed proforma shows the outlook of the Inquiry Committee almost to trick the employee into giving up his defence on charges that may lead to grave civil consequences for him. It also shows that the Inquiry Committee is minded to think its business of inquiring into the charges, more a matter of formality to endorse the Establishment's case, than a duty to act as an impartial arbiter, where the Establishment bears the burden of proving the charges in the first instance by leading evidence.

16. This Court has no hesitation in condemning the practice of asking employees to sign a printed proforma of an affidavit, where the only option is to say that they do not want to produce any evidence in their defence, examine or cross-examine witnesses. The blanks in the affidavit are only about the particulars of the charge-sheet, the name of the employee, etc.; everything else is pre-scripted. There is already a passing remark by this Court about the validity of the kind of document that is dubbed as an affidavit by the Corporation, and apparently, in general use in their establishment. The document, to say the least, is not at all an affidavit, notwithstanding its authentication by a notary public. The reason is that an affidavit to qualify as such must clearly carry a solemn affirmation or an oath in the name of God, which the document does not show. In addition, there has to be a verification by the deponent of the contents based on personal knowledge or information received or whatever is the source, but there is no such clause in the proforma document so essential to an affidavit.

17. The approach of the Inquiry Committee apparent from the contents of the proforma affidavit dated 30.01.2018 and the minutes of the inquiry dated 30.01.2018 is one not conforming to the basic standards of fairness in holding a domestic inquiry, in accordance with the settled procedure. The minutes dated 30.01.2018 show that

the petitioner was called upon to produce his defence, regarding which he sought opportunity. However, there is nothing on record to show that the Establishment discharged its burden through the agency of a Presenting Officer to produce documentary as well as oral evidence on its behalf before the Inquiry Committee, in support of the charges. In a domestic inquiry, it is imperative that the Inquiry Committee/Officer should act as an impartial arbiter, and not an agent of the Employer in order that the inquiry may qualify as valid in law. It is the duty of the Establishment/Employer to examine before the Inquiry Committee/Officer evidence, documentary, and particularly, oral, where the charges are so serious that, if proved, may lead to the imposition of a major penalty. This is a salutary principle which has come to be accepted by preponderant judicial opinion. Nothing of the kind has been done and the Inquiry Committee seems to have proceeded on an assumption that the charges are proof of themselves and it is for the charged employee/petitioner to offer evidence to establish that he is not guilty.

18. The procedure well settled would require the Establishment, as already said, to examine the witnesses in support of the charges and it is then that the petitioner would have the option to cross-examine them. After evidence on behalf of the Establishment has been led, the burden would shift to the petitioner or the employee to produce evidence in his defence, including witnesses. Even if the petitioner, or for that matter, any charged employee does not produce any witness in his defence, that would not absolve the Establishment of their burden of proving the charges, by producing documentary as well as oral evidence in support thereof, at the hearing before the Inquiry Committee/Officer. Nothing of the kind has been done in the present case rendering entire inquiry proceedings and the resultant report flawed.

19. The issue here fell for consideration before the Supreme Court in **State of U.P. and others vs. Saroj Kumar Sinha**¹, where it has been 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."

20. In **Roop Singh Negi vs. Punjab National Bank and others**², it was observed by their Lordships of the Supreme Court:

"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

1. (2010) 2 SCC 772

2 (2009) 2 SCC 570

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."

21. A Division Bench of this Court in **State of U.P. and another vs. Kishori Lal and another**³ had occasion to consider the issue about the procedure by which an inquiry is to be held in matters involving the imposition of a major penalty and observed:

"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.

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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).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

'At this stage, we are to observe that in the disciplinary proceedings against a

delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In any case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect.'

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)

22. The issue again came up before a Division Bench of this Court in **Smt. Karuna Jaiswal vs. State of U.P.**⁴, where it was held:

"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."

23. I also had the occasion to consider this issue in **Ashish Kumar Tiwari vs. State of U.P. and others**⁵ as well as **Ranveer Singh vs. Union of India and others**⁶, besides **Prem Narain Singh vs. State of U.P. and another**⁷. The substance of the principle followed in all these decisions is that in cases involving the imposition of a major penalty, no valid inquiry can be held, unless the Establishment proves charges by examining evidence, particularly, witnesses.

24. The Court must observe here that the charges in this case, that are twelve in number, are about loss of cash belonging to the

5 [2021 (1) ADJ 420]

6 [2021 (5) ADJ 136]

7 [2023 (2) ADJ 580]

Corporation to robbery just outside the Bank and some discrepancy, in the sum of money shown looted in the FIR and the cash shown on papers to be in transit to the Bank. There are other charges apart from the robbery as well, such as the one relating to embezzlement of Rs. 8,75,875/- collected through sixty-two receipts, but not shown in the books of accounts. All these charges by their very nature would require to be established by oral evidence on behalf of the Establishment, that is totally wanting. The charges being grave do not mean that the employee can be punished surreptitiously in breach of the established procedure to hold a departmental inquiry. In fact, the more serious the charge and its consequences, the more strict adherence to the procedure prescribed ought to be.

25. In view of what this Court has found above, we are of the considered opinion that the impugned orders dated 07.12.2021 passed by the Chairman of the Corporation and the order dated 17.09.2022 passed by the Board of Directors of the said Corporation cannot be sustained.

26. In the result, this petition succeeds and is **allowed**. The impugned order dated 07.12.2021 passed by the Chairman, U.P. Power Corporation, Lucknow and the order dated 17.09.2022 passed by the Board of Directors of the Corporation are hereby **quashed**. A *mandamus* is issued to reinstate the petitioner in service **forthwith**. The petitioner shall be entitled to salary from the date of this judgment. It will, however, be open to the respondents to proceed afresh against the petitioner from the stage the charge-sheet was issued to him and conclude the disciplinary proceedings expeditiously, wherein the petitioner will cooperate. If the respondents elect to take fresh proceedings, the petitioner shall not be entitled to any backwages, until conclusion of all disciplinary proceedings against him and final orders being made. In the event, fresh proceedings are taken and the petitioner is finally reinstated in

service, the respondents will decide upon the issue of backwages to be paid to the petitioner for the period that he has remained out of service. But in that event, the petitioner would be entitled to seniority and continuity in service. It is also made clear that upon reinstatement in terms of this judgment, it would be open to the respondents, either to take work from the petitioner, or not assign him duties during pendency of the disciplinary proceedings, the further course of action being dependent upon the outcome of the proceedings, as indicated above. The petitioner upon reinstatement in service, whether he is assigned work or not, would be entitled to his salary from the date of this judgment. It is also made clear that it will be open to the respondents, if they choose to initiate fresh disciplinary proceedings, to place the petitioner under suspension pending inquiry, and in that event, the petitioner would be entitled to subsistence allowance alone, which shall be paid regularly and promptly.

27. There shall be no order as to costs.

28. Let a copy of this order be communicated to the Chairman, U.P. Power Corporation Limited, Lucknow by the Registrar (Compliance).

Order Date :- 19.10.2023

Deepak