

Neutral Citation No. - 2024:AHC-LKO:10092-DBReserved on 02.01.2024Delivered on 25.01.2024**Court No. - 1****Case :-** SPECIAL APPEAL No. - 187 of 2023**Appellant :-** State Information Commission, U.P. Rti Bhawan, Lko.
And Others**Respondent :-** Shivendra Pati Tripathi**Counsel for Appellant :-** Shikhar Anand**Counsel for Respondent :-** Lalita Prasad Misra**Hon'ble Attau Rahman Masoodi,J.****Hon'ble Brij Raj Singh,J.****(Per: Brij Raj Singh, J.)**

1. Heard Shri Shikhar Anand, learned counsel for the State appellants and Dr. L.P. Mishra, learned counsel appearing for the sole-respondent.
2. This intra-Court appeal under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 has arisen from the judgment and order dated 23.03.2023 passed by the learned Single Judge in *Writ Petition (A) No.7388 of 2011 (Shivendra Pati Tripathi vs. State Information Commission and others)* restricting the consequential benefit of past salary up to 50% i.e. half.
3. Brief facts, relevant for adjudication of issues, raised in this appeal are narrated as under:-
4. The sole respondent was appointed on the post of Peshkar vide Office Order dated 01.02.2007 by the appellant no.2 along with 18 other employees. The respondent (petitioner) was served with a notice dated 27.06.2012 by which an enquiry was initiated, in response to which, the respondent filed his detailed explanations on 29.06.2012 and 02.07.2012 denying all the charges levelled against him. He was again required to submit his reply to the letter dated 04.07.2012 which was replied by the respondent (petitioner). The entire facts regarding the enquiry indicate that the impugned termination order has been passed without affording proper opportunity to the respondent (petitioner). However, his services were terminated under the

provisions of The Uttar Pradesh Temporary Government Servants (termination of Service) Rules, 1975 (hereinafter referred to as '**Rules, 1975**') vide letter dated 21.09.2012. The termination order was challenged before the learned Single Judge by the respondent (petitioner) by filing Civil Misc. Writ Petition (A) No.7338 of 2012 and after hearing learned counsel for both the parties, the writ petition was allowed and the termination order was quashed with a direction that the respondent (petitioner) will be entitled for all consequential benefits including 50% back wages. The said order passed by the writ court dated 23.03.2023 is under challenge before this Court.

5. Learned counsel for the appellants has submitted that termination order was passed in exercise of the powers conferred under Rule 3 (1) of Rules, 1975 and without attributing any stigma to the work, termination order was passed stating that his services were no more required as he was a temporary employee. In nutshell, the termination order passed in the case of respondent (petitioner) is simplicitor. He has further argued that the learned Single Judge has travelled on wrong premise that a temporary Government Servant is also entitled to the protection of Article 311 (2) of the Constitution of India. It is argued that the respondent (petitioner) was not holding any civil post under the State Government therefore, he cannot claim protection under Article 311 of the Constitution of India. It has further been submitted that the State Information Commission is an autonomous body, therefore, the respondent (petitioner) cannot take a plea that there is violation of Article 311 of the Constitution of India. It is also submitted by learned counsel for the appellants that a direction given by the writ petition to pay 50% back wages to the respondent (petitioner) is too high. In support of his submissions, learned counsel for the appellants has relied upon the judgments rendered by Hon'ble Supreme Court in *State of U.P. and another vs. Kaushal Kishore Shukla (1991) 1 SCC 691*; *Rajasthan State Road Transport Corporation vs. Gurudas Singh (2004) 13 SCC 418*; and *State of U.P. and others vs. Rekha Rani (2011) 11 SCC 441*.

6. On the other hand, Dr. L.P. Mishra, learned counsel for the respondent (petitioner) has submitted that the order impugned is punitive in nature. It has been submitted that although the impugned order appears to be a simpliciter but the respondent-petitioner was called upon to submit an explanation by the Department and appellant no.3 had conducted fullfledged enquiry on the direction of appellant no.2. The said enquiry was conducted in connection with some complaint made by an anonymous person against the respondent (petitioner) in respect of an amendment made in the cause list by the respondent (petitioner) which has been stretched upto that the respondent had purchased residential house for Rs.15 lacs after taking bribe. It has been submitted by learned counsel for the respondent (petitioner) that the impugned order of termination 21.09.2012 is stigmatic inasmuch as the enquiry was held by the appellants and it was found that the respondent (petitioner) was held guilty but proper opportunity of hearing to the respondent (petitioner) was not afforded to defend himself by production of evidences and examination of witnesses.

7. Learned counsel for the respondent has vehemently submitted that although the order of termination is simplicitor but on lifting the veil, the Court can look into the matter and it can be inferred that the termination order is based on the foundation of the enquiry which was not done in accordance with law and the termination order is the result of the enquiry conducted by the appellant no.3.

8. It has been further submitted that respondent (petitioner) was appointed way back in the year 2007 on substantive vacancy and he had worked in the Department for more than five years. Learned counsel for the respondent has further submitted that the counter affidavit filed in the writ petition by the appellants clearly indicates that the order is punitive in nature because in para 4 of the counter affidavit, the appellants had directed for preliminary enquiry to be conducted against the respondent (petitioner). Relevant paras 4, 5 and 12 of the counter affidavit filed by the appellants in the writ proceedings are quoted below:

“4. That the contents of para no. 3 of writ petition are absolutely false, hence specifically denied. There is neither any illegally nor oblique motive on the part of opposite parties in passing the impugned termination order. The preliminary enquiry which was conducted in the petitioner's matter was only to ascertain the suitability of the petitioner for the post in question. The aforementioned preliminary enquiry, which is also permissible in the facts and circumstances of the present case, was definitely not intended to impose punishment upon the petitioner. As such, there has been absolutely no violation of the principles of natural justice on the part of the opposite parties in any manner whatsoever. Therefore, the very basis of writ petition has no legs to stand upon. The petitioner is malafidely trying to give a colour of punitive nature to the impugned order whereas the truth of the matter is that the impugned termination order is absolutely simpliciter and not punitive as falsely stated in the writ petition. Moreover, on account of the termination order dated 21-09-2012, the petitioner is not visited with any evil consequences. For these reasons alone the writ petition is devoid of merits and hence liable to be dismissed in the interests of justice.

5. That the contents of para no. 4 of writ petition are absolutely false, hence specifically denied. Neither the impugned termination order is stigmatic nor any full scale departmental enquiry was held against the petitioner as wrongly alleged in the para under reply. It is wrong to state that opportunity to show cause or giving explanation was not afforded to the petitioner. It is once again reiterated here that the opposite parties had in fact conducted only a preliminary enquiry to ascertain the suitability of the petitioner upon the post which was held by him. The opposite parties had not conducted any full-fledged departmental enquiry for imposing punishment upon the petitioner. Therefore, at no stage, there was any violation of the principles of natural justice on the part of the opposite parties.

12. That the contents of para no. 15 of writ petition are absolutely false, hence specifically denied. It is completely wrong to allege that enquiry was conducted at the back of the petitioner without affording him adequate opportunity of hearing. The petitioner has also admitted that show cause was given to him in response to which he also tendered his explanation. Moreover, as already stated earlier, since the enquiry was a preliminary one, the detailed procedure meant for imposing punishment was not to be followed in the present case. It is again stated here that the petitioner's services were terminated by means of a completely

simpliciter order and not a punitive one. Therefore, the requirement of a detailed enquiry procedure was not needed. In spite of that opportunity to show cause was duly afforded to the petitioner, which adequately fulfills the requirement in the present case. True photostat copy of the preliminary enquiry report prepared by the opposite party no. 3 is filed herewith as ANNEXURE NO CA-3.

In para no. 14 of writ petition the petitioner has mentioned about a show cause notice dated 04-07-2012 which was replied by petitioner vide his explanation dated 05-07-2012. Although the petitioner has annexed the aforementioned show cause notice as annexure no. 6 to the writ petition but has deliberately omitted to produce his reply before this Hon'ble Court. In his reply dated 05-07-2012, the petitioner has clearly admitted that he failed to list the matters/cases which were to be done on the relevant dates. True photostat copy of the said explanation dated 05-07-2012 tendered by petitioner is filed herewith as ANNEXURE NO CA-4."

9. It has been submitted by learned counsel for the respondent that after looking into the averments made in counter affidavit, it is clear that the appellants have admitted that show cause notice was given to the respondent (petitioner) to call for his explanation. Once the preliminary enquiry was held, it was incumbent upon the appellants to hold regular proceedings by way of affording opportunity of hearing to the respondent (petitioner) to lead the evidences. The termination order is passed only for the reason that the appointing authority came to the conclusion that the respondent (petitioner) was found guilty of committing misconduct though the same is not mentioned in the termination order. Learned counsel for the respondent has relied upon the judgments which are hereunder :

(i) High Court of Punjab and Haryana through Registrar General vs. Ishwar Chand Jain and another (1999) 4 SCC 579 ;

(ii) Chandra Prakash Shahi vs. State of U.P. and others (2000) 5 SCC 152 ;

(iii) Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya (D.ED.) and others (2013) 10 SCC 324 ;

(iv) *Gowramma C (Dead) by LRS vs. Manager (Personnel) Hindustan Aeronautical Ltd., and another.*

(v) *R.R. Naidu vs. State of M.P. and others (2000) 10 SCC 141 ;*

(vi) *Parshotam Lal Dhingra vs. Union of India AIR 1958 SC 36.*

10. Heard learned counsel for the parties and perused the material available on record.

11. The record reveals that the Deputy Secretary, State Information Commission issued letter dated 27.06.2012, which is worth to be quoted hereunder:-

“श्री शिवेन्द्र त्रिपाठी

पेशकार (कोर्ट संख्या एस-11)

मा० मुख्य सूचना आयुक्त पत्र सं 043/सी०आईसी/पी०ए०/2012. दिनांक 26 जून 2012 द्वारा आपके में एक शिकायती पत्र मा० मुख्य सूचना आयुक्त को उपलब्ध कराया गया है, कि जांच करने हेतु मुझे आदेशित किया गया है शिकायती पत्र में यह शिकायत की गई है कि आप के द्वारा काललिस्ट में पैसे लेकर संशोधन किया गया है। दिनांक 16.4.12 से 30.04.12 तक की काजलिस्ट जो कि कम्प्यूटर के अनुसार होनी चाहिए थी उसके हिसाब से न होकर आपके द्वारा अपने मन माफिक तैयार कर फेंस लगाये गये। कोर्ट संख्या एस 11 में दिनांक 16,17,18,19,20,23,25,26,27,30 अप्रैल 2012 को उम्प्यूटर के अनुसार कमश: 101.8397.165, 167119,46,101,161,351, वाद लगाये गये थे जब कि आप के द्वारा उक्त तिथियों में कमश, 88,57,63.135.95.87,38,169,144,149 केस लगाए गए ऐसा क्यों या किसके आदेश पर किया गया या आपने अपने फायदे के लिए नियमों का उल्लंघन किया इस कारण दो दिनों के अन्दर अधोहस्ताक्षरी को सबूतों के साथ उपलब्ध कराये।

गा० मुख्य सूचना आयुक्त को शिकायत कर्ता ने यह भी अवगत कराया है कि आपने एक मकान 15 लाख रुपये का कय किया है उपरोक्त के सम्बन्ध में भी अधोहस्ताक्षरी को वस्तु स्थिति से लिखित रूप में अपने स्पष्टीकरण के साथ अवगत कराये।

उपरोक्त बिन्दुओं पर सुस्पष्ट स्पष्टीकरण आख्या दो दिनों के अन्दर अधोहस्ताक्षरी को उपलब्ध कराये।”

12 After perusing the letter, it is clear that respondent (petitioner) has been charged for taking bribe, whereas the allegations levelled against the petitioner are ranging from manipulation of cause list to purchase of house worth Rs.15 lacs collected from taking bribe. This letter indicates that there is an imputation and the termination order

appears to be result of the preliminary enquiry conducted by the Department. In this regard, it is worthwhile to mention here that Hon'ble Supreme Court has held in case of ***Parshotam Lal Dhingra (supra)*** that veil can be lifted by the court to find out whether the order is based on any charges framed against an employee.

13. As regards, in para – 7 of the judgment in ***Kaushal Kishore Shukla's case (supra)*** relied on by the learned counsel for the appellants itself shows that if the authority decides to take a punitive action, it may hold a formal enquiry by framing charges and shall give opportunity to the Government Servant in accordance with the provisions of Government Servant Rules.

14. The learned counsel for the appellants has submitted that the respondent is not protected under Article 311 of the Constitution of India in view of the law laid down in ***Rajasthan State Road Transport Corporation (supra)***. It is evident that the State Information Commission is an autonomous body and the respondent employed therein is not holding post in the State Government therefore, the argument that opportunity of hearing was not required to be given to the respondent (petitioner) as envisaged under Article 311 of the Constitution of India has force. However, sufficient reason has been recorded that after unveiling the correct facts it has come on record that punitive action was initiated against the respondent by terminating his services treating the same as simplicitor thus, it leaves scope for interference on the settled principles of law that even if the termination order is simplicitor and it is unveiled that punitive action was taken, such termination order would become illegal.

15. In the present case, admittedly, no such opportunity was provided by the appellants and only reply was called for and thereafter neither cross examination nor opportunity of hearing to lead evidence was provided to the respondent (petitioner), therefore, the said action is violative of Article 14 of the Constitution of India. Once the Department had taken decision to charge the respondent (petitioner), it was incumbent upon the Department to hold enquiry in proper manner

which is missing in the present case. The Court has to unveil the real position in the present case and the termination order passed is the result of the punitive action though the Department had tried to establish that the order has been passed under Rules, 1975.

16. In the present case, the termination order is passed in pursuance of the punitive action as the respondent (petitioner) has been called upon to submit his explanation before proceeding further, but the enquiry was not conducted by affording opportunity of hearing. Since it has not been done, the order of termination which is punitive in nature is not sustainable. **However, we leave it open to the appellants to proceed against the respondent in accordance with law, if so advised.**

17. Since the termination order has been set aside, learned counsel for the respondent (petitioner) prays that he may be granted full back wages, instead of granting fifty percent as has been done by the Writ Court.

18. In this regard, it is to mention here that the law on the question of award of back wages has taken some shift. It is now ruled in cases that when the dismissal/removal order is set aside/withdrawn by the Courts or otherwise, as the case may be, directing employee's reinstatement in service, the employee does not become entitled to claim back wages as of right unless the order of reinstatement itself in express terms directs payment of back wages and other benefits as has been held in '*M.P. State Electricity Board vs. Jarina Bee(Smt.)* [(2003) 6 SCC 141] and '*Sukhdev Pandey vs. Union of India* [(2007) 7 SCC 455]. The principle has been laid down keeping in view the public interest that a Government servant who does not discharge his duty is not allowed pay and arrears at the cost of public exchequer. It cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court. Denial of salary on the ground of '**no work no pay**' cannot be treated as a penalty as has been held in **State of U.P. vs. Madhav Prasad Sharma (2011) 1 JT 326** and mechanical application of normal Rule "no work no pay " may in some cases be

found to be wholly unjust. No absolute proposition of law in this behalf can be laid down as held in *Somesh Tiwari v. Union of India (2009) 2 SCC 592*. While dealing with the prayer for back wages, factual scenario, equity and good conscience and a number of other factors; like the manner of selection; the nature of appointment; the period for which the employee had worked with the employer, etc. have to be kept in mind. All these factors are illustrative and no precise formula can be laid down as to under what circumstances full or partial back wages should be awarded. It depends upon the facts and circumstances of each case. In this regard, reference can be had in *Kanpur Electricity Supply Company Limited v. Shamim Mirza (2009) 1 SCC 20*.

19. Considering the factual aspects of the matter regarding the punitive action taken against the respondent (petitioner) by terminating his services without affording opportunity to participate in the enquiry; the respondent (petitioner) remained out of service for more than twelve years; and the respondent (petitioner) suffered a lot who was kept away from the employment out of illegal termination order, the impugned judgment and order dated 23.03.2023 passed by the Writ Court granting 50% wages is exorbitant, it is modified to the extent that the respondent (petitioner) is held to be entitled for 25% of the past salary due and no more for the period remaining out of service.

20. With the aforesaid observations and directions, the special appeal is **disposed off**.

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(Brij Raj Singh, J.) (Attau Rahman Masoodi, J.)

Order Date :-25.1.2024

Pks