

Neutral Citation No. - 2024:AHC-LKO:64432

A.F.R.

Court No. - 4

Case :- WRIT - A No. - 4987 of 2024

Petitioner :- Rameshwar Kumar Mishra

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Deptt. Of Irrigation And Water Resources Lko. And 2 Others

Counsel for Petitioner :- Rani Singh, Gaurav Mehrotra, Jai Narayan Pandey, Maria Fatima

Counsel for Respondent :- C.S.C., Prashant Singh Atal

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Gaurav Mehrotra, learned counsel assisted by Ms. Rani Singh and Ms. Maria Fatima, learned counsel for the petitioner and Sri Sandeep Sharma, learned Standing Counsel for the State.

2. By means of this writ petition, the petitioner has prayed for the following reliefs:-

“(I) to issue a writ, order or direction in the nature of certiorari quashing the impugned punishment order dated 15.05.2024 issued by the Respondent No.2, copy whereof is annexed as Annexure No.1 to the writ petition.

(II) to issue a writ, order or direction in the nature of mandamus commanding the Respondents to reinstate the petitioner on the post on which he was working prior to the passing of the impugned punishment order dated 15.05.2024, with all consequential benefits including the arrears of difference in salary from the date of passing of impugned punishment order till date of actual reinstatement on the post of Superintending Engineer.

(III) to issue a writ, order or direction in the nature of mandamus commanding Respondents to consider promotion of petitioner from the post of Superintending Engineer to Chief Engineer (Level-II) with effect from the date when promotion has been granted to incumbents' junior to petitioner ignoring the impugned

punishment order dated 15.05.2024 within such time frame as deem proper by this Hon'ble Court."

3. On the first date of admission, this Court passed an order dated 05.07.2024, which reads as under:-

"1. Heard Sri Gaurav Mehrotra, learned counsel for the petitioner and Sri Prashant Singh Atal, learned C.S.C.-I for the opposite parties.

2. By means of this petition the petitioner has assailed the impugned order dated 15.5.2024 passed by the Principal Secretary, Department of Irrigation, Lucknow, U.P. reverting the petitioner from the post of Executive Engineer to the original post.

3. Sri Gaurav Mehrotra has firstly placed reliance regarding major penalties which have been indicated in Rule 3 referring sub-rule II of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (in short Rules) which provides that the reduction of a lower post, grade or time scale or to a lower grade may be provided to an employee as a major punishment. Sri Mehrotra has stated that as per aforesaid provision of law any employee if found guilty may be reverted to a lower post but not to the original post as there is no prescription of the term 'Original Post'. He has further submitted that in view of Rule 7(iii) of the Rules the charge-sheet shall consist the proposed documentary evidence and the name of the witnesses proposed to prove the same along with oral evidence, if any, but in the charge-sheet no such documentary evidence has been supplied to the petitioner. He has further submitted that after completion of the departmental inquiry by the inquiry officer and the report is submitted before the disciplinary authority, the disciplinary authority may issue show cause notice in terms of Rule 9. In the present case the inquiry officer has earlier exonerated the petitioner from the charges and the disciplinary authority was not agreeable with such findings, therefore, he has given show cause notice but not on the point of disagreement whereas the law is clear that the disciplinary authority may issue a show cause notice, if he is not convinced with the findings of the inquiry officer on the point of disagreement. Not only the above, in the present case a second show cause

notice has been issued enclosing therewith one fact finding inquiry report though that material was not supplied to the petitioner with the charge-sheet, therefore, Sri Mehrotra has submitted that the impugned punishment order is unwarranted, uncalled, illegal and arbitrary, therefore, same is liable to be quashed.

4. Learned C.S.C. and Addl. C.S.C. pray for and are granted three weeks time and no more to file detailed counter affidavit.

5. List on 30. 7.2024 as fresh.

6. This matter may be taken up immediately after fresh.”

4. Learned Standing Counsel has drawn attention of this Court towards the counter affidavit wherein the preliminary objection has been raised to the effect that the petitioner should file the departmental appeal challenging the punishment order or he may file the claim petition before the State Public Service Tribunal, but on being confronted on the point that an alternative remedy is not an absolute bar if the punishment order has been passed in utter violation of the principles of natural justice or rules and there is an error apparent on the face of record, learned Standing Counsel has stated that this Hon'ble Court may pass any appropriate order considering the facts and circumstances of the case.

5. The impugned order was assailed mainly on the ground, *inter alia*, that the penalty which is not enumerated in service rules cannot be inflicted upon the delinquent employee; when the Disciplinary Authority dissents with the view of the Enquiry Officer on exoneration and comes to a different conclusion, the delinquent employee ought to be given an opportunity of hearing on the dissent note to persuade the Disciplinary Authority to accept the favourable conclusion of the Enquiry Officer and the evidence which did not form part of the charge-sheet cannot be made basis of the punishment order.

6. In the counter affidavit, no satisfactory reply has been given on the aforesaid submissions of Sri Gaurav Mehrotra, learned counsel for the petitioner.

7. Sri Gaurav Mehrotra, learned counsel for the petitioner has submitted that the impugned punishment order of reversion to original post is a penalty which is not enumerated as a penalty in the 1999 Rules, and as such, a penalty which is not enumerated in the Rules, 1999, as could not have been inflicted upon the petitioner in view of the law laid down by the Hon'ble Supreme Court of India in a catena of pronouncements. The petitioner was exonerated from the charge levelled by Enquiry Officer in the disciplinary proceeding by means of enquiry report furnished on 23.12.2020. Despite exoneration, the Disciplinary Authority proceeded to take a different view by holding the petitioner guilty of charge levelled and after holding so furnished show cause notice to petitioner seeking response to the same. It is no more res integra that if the Disciplinary Authority takes a view different than that of the view expressed by Enquiry Officer exonerating the delinquent employee, then expressing dissent, in such a scenario, an opportunity of hearing at the aforesaid stage is required to be given by the Disciplinary Authority providing the dissent note to the delinquent employee and calling for his version on the same.

8. Sri Mehrotra has further submitted that reference may be made to the law laid down by Hon'ble Supreme Court of India in the case reported in *AIR 1998 Supreme Court 2713 in re: Punjab National Bank and Others vs. Kunj Behari Misra*, which have been followed by this Hon'ble Court in catena of matters one of such being Judgment and Order dated 20.01.2020 passed in *Writ Petition No. 1489 (S/B) of 2009 (Shiv Mangal Verma vs. State of U.P. and Others)*, wherein it has been categorically held that despite exoneration if a disciplinary authority is taking a different view then opportunity at the

aforesaid stage is mandatory. Thus, the impugned punishment order dated 15.05.2024 is unsustainable in the eyes of law on aforesaid ground as well. Besides the above, the impugned punishment order dated 15.05.2024 cannot sustain even for a moment for the reason that extraneous material which formed part of the charge-sheet was never served upon the Petitioner along with the charge-sheet was served belatedly along with the second show cause notice and has been made basis of the impugned punishment order dated 15.05.2024. The aforesaid extraneous material, was never subjected to a formal enquiry by fixing date, time, place and examination/cross-examination of the same, however, has been adversely relied upon by the disciplinary authority thus causing great prejudice to the Petitioner and making the order *per se* illegal.

9. Sri Mehrotra has also submitted that prior to holding the petitioner guilty of the charge contained in chargesheet dated 06.10.2020 *de hors* the material and evidence on record, the Respondent No.2 neither bothered to afford any opportunity of hearing whatsoever to the petitioner in blatant disregard to the solemn principles of natural justice nor recorded any cogent reasons as to why the specific findings contained in the enquiry report in favour of the petitioner are not acceptable to the Respondent No.2. Though the aforesaid enquiry report dated 03.07.2023 has been adversely relied upon against the Petitioner while passing the impugned punishment order dated 15.05.2024, however, copy of the aforesaid enquiry report dated 03.07.2023 has never been made available to the petitioner by issuance of any show cause notice or otherwise, resulting in serious prejudice to the petitioner.

10. As per Sri Mehrotra, even otherwise, the report dated 03.07.2023 furnished by the Special Secretary, Irrigation and Water Resources Department, U.P. has been prepared *ex parte*, behind the back of the petitioner without affording him any opportunity of hearing whatsoever and as such, any reliance on the aforesaid report dated 03.07.2023 while passing the impugned punishment order dated 15.05.2024 not only manifests high handedness on the part of the Respondent Authorities but also amounts to flagrant violation of the principles of natural justice, on which ground alone, the Impugned punishment order dated 15.05.2024 is liable to be set aside.

11. In support of his first submission Sri Mehrotra, learned counsel for the petitioner has placed reliance of the dictum of Apex Court rendered in the case in re: ***Vijay Singh vs. State of U.P. & others*** reported in (2012) 5 SCC 242. In support of his second submission, Sri Mehrotra has placed reliance upon the dictum of Apex Court rendered in the case in re: ***Punjab Nation Bank and others vs. Kunj Behari Mishra*** reported in (1998) 7 SCC 84 and in support of his third submission Sri Mehrotra has placed reliance upon the judgment and order of this Court ***dated 07.05.2022 passed in Writ-A No.2555 of 2022; Prakash Chandra Agarwal vs. State of U.P. & others.***

12. So far as the objection regarding availability of an alternative remedy is concerned, Sri Mehrotra has placed reliance upon the dictum of Apex Court rendered in the cases in re: ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai*** reported in (1998) 8 SCC 1 and ***Godrej Sara Lee Ltd. vs. Excise and Taxation Officer reported in 2023 SCC OnLine SC 95.***

13. Sri Sandeep Sharma, learned Standing Counsel tried to defend the impugned order dated 15.05.2024 and impugned inaction of the authorities but could not defend the same as those inactions are apparent on the face of the record and no material or evidence or averment has been given in the counter affidavit.

14. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that if any penalty is not enumerated in the service rules, the same cannot be inflicted upon the delinquent employee in view of the dictum of Apex Court rendered in the case in re: ***Vijya Singh (supra).***

15. This is also a trite law that when the Disciplinary Authority dissents with the view of Enquiry Officer of exoneration and comes to a different conclusion, the delinquent employee ought to be given an opportunity of hearing on the dissent note to persuade the Disciplinary Authority to accept favourable conclusion of the Enquiry Officer.

16. The aforesaid position has been settled by the Apex Court in re: ***Punjab National Bank and others vs. Kunj Behari Misra, AIR 1998 SC 2713*** and following the aforesaid judgement of the Apex Court, this court in re: ***Shiv Mangal Verma vs. State of U.P. and others, vide order dated 20.1.2020 passed in Service Bench No. 1489 of 2009*** has observed in para nos. 8, 12, 13, 14, 15, 20 & 21 as under:

"8. Upon perusal of material available on record and submission advanced by learned counsel for parties, it is clear that the charge-sheet issued to petitioner indicated two charges levelled against him. It is also apparent that the inquiry report dated 9th June 2008 has clearly exonerated the petitioner of charges levelled against him. Although in the show cause notice dated 11th September 2008, reasons for disagreeing with the inquiry report have been given by the disciplinary authority but the impugned order does not indicate any consideration of either the findings recorded in the inquiry report nor the reply submitted by petitioner. In fact the impugned order has clearly recorded an incorrect fact that petitioner was found guilty in the inquiry proceedings although as indicated hereinabove, petitioner was actually exonerated from the charges levelled against him. Thus, it is clear from the aforesaid facts that the impugned order has been passed against the material available before the disciplinary authority. A perusal of the impugned order also indicates that no reasoning whatsoever has been recorded by disciplinary authority with regard to reply submitted by petitioner against the show cause notice and as such, the impugned order is clearly non-speaking in nature.

12. Hon'ble the Supreme Court in the Case of Punjab National Bank(supra) has held as follows:-

"17. These observations are clearly in tune with the observations in Bimal Kumar Pandit's case (AIR 1963 SC 1612) (supra) quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the inquiry officer had given an adverse finding, as per Karunakar's case (1994 AIR SCR1050) (supra) the first stage required an opportunity

to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the inquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be over-turned by the disciplinary authority then no opportunity should be granted. The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the inquiring officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings what is of ultimate importance is the findings of the disciplinary authority.

18. Under Regulation - 6 the inquiry proceedings can be conducted either by an inquiry officer or by the disciplinary authority itself. When the inquiry is conducted by the inquiry officer his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the inquiry officer. Where the disciplinary authority itself holds an inquiry an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the inquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the inquiry officer they are deprived of representing to the disciplinary authority before that authority differs with the inquiry officer's report and, while recording of guilt, imposes punishment on the officer. In our opinion, in any such situation the

charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of inquiry as explained in Karunakar's case (1994 AIR SCW 1050)(supra).

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

13. Although, the aforesaid judgment was rendered in the terms of Punjab National Bank Officer Employees (Discipline and Appeal) Regulation 1977, but Rule 6, 7 and 8 of the said Rules are pari materia with Rule 9 of the Rules of 1999. It is clear that Hon'ble the Supreme Court has held that in case the disciplinary authority disagrees with the inquiry officer on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for disagreement and has to provide the delinquent officer an opportunity to represent before it records its findings. It has further been held that report of inquiry officer will have to be conveyed to the delinquent officer who will then have to be given an opportunity of hearing to persuade the disciplinary authority to accept the favourable conclusion of inquiry officer. It has also been held that after giving such an opportunity of hearing to

the officer concerned, the disciplinary authority has to record its findings on the charges framed against officer. The said judgment has been followed with approval in case of Yoginath D. Bagde (supra) with the same proposition of law being followed.

14. The proposition of law laid down by Hon'ble the Supreme Court in the aforesaid judgments regarding procedure to be followed by the disciplinary authority in case of disagreement with the inquiry report is clearly applicable in the present case.

15. Upon applicability of aforesaid judgments in the present case, it is clear that after issuing a show cause notice to the petitioner disagreeing with the inquiry report, the reply submitted by petitioner has been completely ignored by the disciplinary authority. In fact reading of the impugned order clearly indicates that it is a completely non-speaking order and has been passed against the material on record and without application of mind.

20. In view of aforesaid, it is held that the impugned order being contrary not only to the Rules of 1999 but also being contrary to the judgments of Hon'ble Supreme Court and in this Court is vitiated.

21. Consequently, a writ in the nature of Certiorari is issued quashing the order dated 03rd September 2009 with all consequential benefits to the petitioner. Order dated 14th January 2010 is also quashed by issuance of writ in the nature of Certiorari and further writ in the nature of Mandamus is issued directing the opposite parties to make payment of salary for the period of suspension of services of petitioner. Necessary orders with regard to same shall be passed by the competent authority within a period of four months from the date a copy of this order is received by the said authority."

17. This Court in the case in re: **Prakash Chandra Agarwal (supra)** has held in para-11 that if there is violation of Rule 7 as the documents relied upon by the Enquiry Officer were never provided to the petitioner nor the inquiry is concluded following the procedure prescribed under Rule-7, i.e. by summoning the witnesses of the department, giving chance of cross-examination,

providing opportunity to the delinquent employee/ petitioner to call his witnesses, then the impugned order cannot sustain and would be liable to be set aside.

18. The aforesaid observations made in the case in re: ***Prakash Chandra Agarwal (supra)*** would be applicable in the present case.

19. Since the punishment order has been passed in an utter violation of Rules 7 & 9 of the Rules, 1999 and the petitioner has not been afforded an opportunity of hearing, strictly in accordance with law then the objection of the availing an alternative remedy would not be treated as bar in the present case in view of the dictum in the case in re: ***Whirlpool Corporation (supra)*** and ***Godrej Sara Lee Ltd. (supra)***.

20. Accordingly, the instant writ petition is ***allowed***.

21. A writ in the nature of certiorari is issued quashing the impugned punishment order dated 15.05.2024. The opposite parties are directed to pass the consequential order ignoring the punishment order dated 15.05.2024 including the order of promotion of the petitioner with effect from the date his juniors have been promoted. However, it is needless to say that the disciplinary authority may pass fresh order strictly in terms of Rule 7 and 9 of the Rules, 1999, if it is so required.

22. No order as to cost.

Before parting with I appreciate the efforts of research work done by Sri Piyush Tripathi, Research Associate attached with me in finding out the relevant case laws applicable in the present case.

[Rajesh Singh Chauhan,J.]

Order Date :- 18.9.2024

Suresh/Mohd. Sharif