

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision : August 27, 2015*

+ **LPA 461/2009**

H.P. GUPTA Appellant

Represented by: Mr.R.K.Saini, Adv.

versus

DELHI ADMINISTRATION AND ORS. Respondent

Represented by: Mr.Anurag Mathur, Adv. for
R-3.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. H.P.Gupta the appellant herein while employed in the Vivekananda Mahila College, Vivek Vihar Delhi (in short the College) affiliated to the University of Delhi was charge-sheeted with the following Articles of charge:

“ARTICLE – I

When the main account of the College was checked by the Principal on 1st September, 1982 and the cash balance was verified physically, a shortage of ₹41.01 (Rupees Forty one and paise one only) was detected. The amount had apparently been misappropriated for his personal use, Shri H.P.Gupta to us failed to maintain absolute integrity and his action amounted to misappropriation of College funds.

ARTICLE – II

When the account books of Alumni Association were checked by the Principal in 1st September, 1982 and the physically verification of the cash belonging to Alumni

Association was done, it was detected that a sum of ₹989.67 (Rupees Nine Hundred Eight Nine and Paise sixty seven only) was missing. The said amount had apparently been misappropriated for his personal affairs. Shri H.P.Gupta thus failed to maintain absolute integrity and his action amounted to misappropriation of College Funds.

ARTICLE – III

According to the existing orders the fees are to be accepted only from these students who are declared successful and promoted to the next higher class. Nevertheless, Shri H.P.Gupta accepted fees from the following three students:-

- 1. Poonam Jain – Roll No.21 – III year*
- 2. Arvinder Kaur – Roll No.363 – III year*
- 3. Kamlesh Kumari – Roll No.384 – III year*

without verifying the results, and in the case of two students even after noting and receiving the College notification dated 27th July, 1982 whereby the names of these students were removed from the College rolls. This resulted in permitting these students to attend the classes to which they had not been promoted. This action on the part of Shri H.P.Gupta not only shows complete and wilful neglect of duty but also placed the College in a highly embarrassing position.

ARTICLE – IV

It has been noticed that while Kamlesh Kumari actually paid for fees on 16th August, 1982, Shri H.P.Gupta stated in his note dated 13th August, 1982 that Kamlesh Kumari had already paid the dues. Shri H.P.Gupta thus made a false statement deliberately misleading the administration for some ulterior motive. This amounts to misconduct on his part.”

2. The enquiry officer appointed by the Governing Body of the College after conducting an enquiry held the first three charges to be proved and charge No.4 to be partially proved. The disciplinary authority served H.P.

Gupta with a show cause notice proposing penalty of dismissal from service. The disciplinary authority awarded termination of service with immediate effect under Rule 67(vi) read with Rule 74(4)(ii) of the University Non-Teaching Employees (Term and Condition of Service) Rules, 1971 (in short the Rules).

3. Aggrieved by the termination of service H.P.Gupta filed an appeal before the appellate authority which converted the penalty of termination of service to that of compulsory retirement with effect from the date of termination i.e. March 20, 1985 for the reason that the appellate authority found that Article No.1 and Article No.2 of the charge-sheet were not proved, only Article No.3 was proved and Article No.4 was partially proved observing negligence. H.P.Gupta challenged the order of compulsory retirement by way of a writ petition being W.P.(C) No.2551/1991 which was dismissed vide the impugned order dated July 16, 2009, hence the present appeal.

4. Learned counsel for H.P.Gupta contends that the appellate authority and the learned Single Judge failed to notice that the charge-sheet was a counterblast to the earlier actions of H.P.Gupta wherein he had pointed out anomalies in utilization of the College funds including payment made to the Principal in the shape of dearness allowance from March to July 1982 in connivance with her niece who prepared the salary bills and the Section Officer who checked those bills. H.P.Gupta had also pointed out about some bogus payments and misuse of College van and had given evidence before an enquiry committee appointed by the Governing Body of the College to enquire into the expenditure incurred in the play field. The three witnesses against H.P.Gupta were Mrs. Neelam Bakshi, Senior-most Lecturer,

Dr.(Mrs.) Veer Bala, Bursar and Mr.K.B.Gupta, Section Officer (Administration) who were all interested as Mrs.Neelam Bakshi and Dr.(Mrs.)Veer Bala were paid house-rent allowance in excess and Shri K.B.Gupta was a near relative of the Principal. After having come to the conclusion that it was only a case of negligence on the part of H.P.Gupta the appellate authority could not have passed the order of compulsory retirement at the age of 39 when H.P.Gupta had 21 years of service left. Even as per the appellate authority in regard to first charge and the second charge misappropriation was not proved but the petitioner's handling of the accounts left much to be desired and third and fourth charge having been proved which were innocuous, the punishment of compulsory retirement was too severe. The learned Single Judge noted that if it was a case of no evidence or the findings were perverse not based on legally permissible evidence, the punishment was liable to be set aside and unless the punishment imposed shocks the conscience of the Court there was no scope of interference however failed to interfere on facts.

5. While looking into the conclusions arrived at by the disciplinary authority the learned Single Judge failed to notice the articles of charge Nos. 3 and 4 proved against H.P. Gupta. Article 3 related to the wilful neglect of the duty as the fee of three students who had not been declared successful was accepted and later their names had to be removed from the College Rolls. Article 4 related to the allegation that though Kamlesh Kumari actually paid the fee on August 16, 1982 Shri H.P.Gupta noted it vide note dated August 13, 1982. Even on the Article No.1 and 2 of the charges the allegations of misappropriation have not been proved and at best it is a case of negligence on the part of H.P.Gupta. There can be no two views that if

the only charges proved against an officer is negligence or carelessness and not gross negligence leading to serious consequences the punishment of compulsory retirement would be a unconscionably disproportionate punishment.

6. Supreme Court in (1979) 2 SCC 286 Union of India & Ors. Vs. J.Ahmed bringing out the distinction between lack of efficiency, failure to attain the highest standard of administrative ability, negligence and misconduct held:-

“9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, Charge 2 refers to the quality of lack of leadership and Charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words “act or omission” contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 (“Conduct Rules” for short). The Government has prescribed by Conduct Rules a code of conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would

undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding responsible post or lack of aptitude or qualities of leadership would not constitute as failure to maintain devotion to duty. The expression “devotion to duty” appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can be safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.

10. It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant

conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pierce v. Foster [17 QB 536, 542]). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers) [(1959) 1 WLR 698]]]. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur [61 Bom LR 1596] , and Satubha K. Vaghela v. Moosa Raza [10 Guj LR 23] . The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:

“Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct.”

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik [AIR 1966 SC 1051 : (1966) 2 SCR 434 : (1966) 1 LLJ 398 : 28 FJR 131] in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India [(1967) 2 SCR 566 : AIR 1967 SC 1274 : (1967) 2 LLJ 249] the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta [AIR 1963 SC 1756 : (1964) 2 SCR 104 : (1963) 1 LLJ 679 : 24 FJR 464] wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be

negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Coop. Department Stores Ltd. [(1978) 19 Guj LR 108, 120]). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.”

7. Considering the facts and circumstances of the case we deem it fit to set aside the punishment as no loss has been caused to the College for any act of H.P.Gupta nor the allegation of misappropriation been proved particularly in the light of the fact that it has been the consistent case of H.P.Gupta that he had been pointing out various discrepancies and manipulation of funds and was also a witness in an enquiry.

8. Learned counsel for H.P.Gupta fairly admits that having not actually worked it would be too onerous to seek a direction to the College to pay 100% back wages and thus the appellant would restrict his claim to 50%

back wages.

9. Since H.P. Gupta has attained the age of superannuation, no directions for reinstatement can be passed. There is another problem. In the year 1987, a fact conceded to by the learned counsel for the University of Delhi i.e. respondent No.3, in the year 1987 as directed by the UGC the University of Delhi wrote to all colleges affiliated with it to seek fresh options from its employees concerning whether they desired to continue to be members of the Contributory Provident Fund Scheme or opt for the pension scheme. Those who opted for the pension scheme were made members of the pension scheme. Since the appellant was dismissed from service on March 20, 1985 he was not called upon to give his option. When he was dismissed from service the money lying to his credit in the Contributory Provident Fund Account which was the sum total of the monthly contribution credited to the account by the college and the monthly sum deducted from out of the salary paid to the appellant so credited, was paid to the appellant. This needs rectification.

10. Disposing of the appeal and setting aside the penalty of compulsory retirement inflicted upon the appellant with effect from the date his services were terminated i.e. March 20, 1985 we direct that the appellant would be paid 50% wages which he would have earned till he superannuated from service. Treating the appellant to have opted for pension because the appellant so desires, treating the appellant as in service and giving benefit of increments the last pay drawn by the appellant would be computed and with reference to the same he would be paid pension from the first month onwards post the month in which the appellant would have superannuated from service. The appellant would pay to the college i.e. respondent No.1

by means of a cheque the management share contributed in his CPF account which appellant received together with interest @ 6% per annum reckoned from the date he received the money till he pays back the same and this would be done by the appellant within sixty days from today. Arrears of salary directed to be paid as also arrears of pension to be paid by respondent No.1 shall be disbursed to him within four months from today failing which the same shall be paid with interest @ 6% per annum till date of payment.

11. Parties shall bear their own cost throughout.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

AUGUST 27, 2015
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