

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.10051 of 2012
Date of Decision:-29.4.2016.

Rajesh Kumar Gupta

.....Petitioner

Versus

Presiding Officer, Industrial Tribunal-cum-Labour Court, Panipat and
another

.....Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Mr. Pawan Kumar Mutneja, Advocate for the petitioner.

Mr. Vipin Mahajan, Advocate for respondent No.2.

P.B. BAJANTHRI, J.

1.) In the instant writ petition, the petitioner has questioned the validity of the order dated 3.2.2010 (Annexure P-15) and award dated 13.12.2010 (Annexure P-17) passed by the Labour Court, Panipat.

2.) The petitioner while working as Supervisor, National Fertilizers Limited, Panipat Unit, Panipat was chargesheeted for unauthorized absence on 25/26.11.1998. An extract of the charge is reproduced herein:-

"It has been reported that Shri R.K.

Gupta, Supervisor, E. Code No.77/5523 has been absenting himself from duty since 9-11-1998 without prior permission of the Competent Authority. It has also been reported that he is in habit of absenting himself from duty without any prior approval/sanction of leave. The act of commission/omission on his part constitute gross and serious misconduct.”

3.) Remaining unauthorized absent amounts to breach of Para No.15.11 of the Certified Standing Orders. An extract of Para 15.11 is reproduced herein:-

Para 15.11 of the Certified Standing Orders applicable to him stipulates that:-

“If a workman remains absent without leave, for more than 8 days or for more than 8 days beyond the period of leave originally granted or subsequently extended, he should be deemed to have been voluntarily abandoned his employment and his services shall be treated as having been terminated automatically and his name shall be struck off from the services of the Company without any reference to him unless he gives explanation to the satisfaction of the Management of his unauthorized absence.”

4.) Learned counsel for the petitioner submitted that petitioner's mother was not well, therefore, he was compelled to take his mother to Delhi for medical check up on 9.11.1998. Doctors have advised that his mother is to be admitted. In view of the emergency

situation, the petitioner is stated to have informed his higher officer, one Sh. A.K. Aggarwal and apprised the situation and sought oral leave and Sh. A.K. Aggarwal assured the petitioner that leave would be sanctioned if necessary application is made after his return from Delhi. This communication was made over telephone. The petitioner is stated to have submitted leave application to the Deputy Manager (I.E.), National Fertilizers Limited, Panipat for 30 days followed by leave form on 15.12.1998. The leave form was perused by various authorities and ultimately an observation has been made that *“we may adjust his leave at his credit on 9.11.1998 and the remaining leave can be EOL”* In the meanwhile, leave was refused on 26.11.1998 itself. However, no decision was taken with reference to leave form dated 15.12.1998. The petitioner submitted a detailed reply to the charge memo on 5.12.1998. The respondents dissatisfied with reply proceeded to hold inquiry. Based on the Inquiry Officer's report, petitioner was dismissed from service on 17.7.1999. Petitioner's appeal was also dismissed on 25.9.1999. Thereafter, he has approached Industrial Tribunal-cum-Labour Court, Panipat. The Labour Court refused to interfere with the order of dismissal. Thus, petitioner has presented this instant petition.

5.) Learned counsel for the petitioner submitted that petitioner was compelled to take his ailing mother to Delhi for emergency treatment. Therefore, he was compelled to remain absent from 11.11.1998 till 28.11.1998 and it was beyond his control.

The respondents have not appreciated the facts and circumstances. In fact, the petitioner had informed his Superior Officer, namely, Sh. A.K. Aggarwal, who had assured that leave application would be considered after his return from Delhi. Therefore, the petitioner has not committed any misconduct so as to attract Para 15.11 of the Certified Standing Orders on the ground that it was beyond his control and not with any intention to remain unauthorized absent. Therefore, the very initiation of inquiry itself is not fair and it is highly arbitrary.

6.) It was further contended that (i) charge is very vague; (ii) Presenting Officer, namely, Sh. A.K. Aggarwal i.e. petitioner's Superior Officer to whom the petitioner has informed that he wanted to go on leave had been appointed as Presenting Officer. In other words, he would be one of the witness to the proceedings, therefore, appointment of Sh. A.K. Aggarwal as a Presenting Officer is highly arbitrary; (iii) Inquiry Officer's report and second show cause notice has not been furnished to the petitioner before imposition of major penalty of dismissal from service; (iv) The Inquiry Officer as well as disciplinary authority have considered past allegations which are not part and parcel of chargesheet dated 25/26.11.1998; (v) The Appellate Authority as well as Labour Court failed to appreciate and consider contentions as well as documents relied upon by the petitioner.

7.) Learned counsel for the petitioner in support of non-

furnishing of Inquiring Officer's report and second show cause notice contention relied on a Constitutional Bench judgment of the Hon'ble Supreme Court reported which is reported in **(1993) 4 SCC 727** **(Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others)**. He relied on para 2 of the said judgment which is extracted herein:-

“The basic question of law which arises in these matters is whether the report of the enquiry officer/authority who/which is appointed by the disciplinary authority to hold an inquiry into the charges against the delinquent employee, is required to be furnished to the employee to enable him to make proper representation to the disciplinary authority before such authority arrives at its own finding with regard to the guilt or otherwise of the employee and the punishment, if any, to be awarded to him. This question in turn gives rise to the following incidental questions:

- (i) Whether the report should be furnished to the employee even when the statutory rules laying down the procedure for holding the disciplinary inquiry are silent on the subject or are against it?*
- (ii) Whether the report of the enquiry officer is required to be furnished to the delinquent employee even when the punishment imposed is other than the major punishment of dismissal, removal or reduction in rank?*
- (iii) Whether the obligation to furnish the*

report is only when the employee asks for the same or whether it exists even otherwise?

(iv) Whether the law laid down in Mohd. Ramzan Khan case will apply to all establishments – Government and non-Government, public and private sector undertakings?

(v) What is the effect of the non-furnishing of the report, on the order of punishment and what relief should be granted to the employee in such cases?

(vi) From what date the law requiring furnishing of the report, should come into operation?

(vii) Since the decision in Mohd. Ramzan Khan case has made the law laid down there prospective in operation, i.e. applicable to the orders of punishment passed after November 20, 1990 on which day the said decision was delivered, this question in turn also raises another question, viz., what was the law prevailing prior to November 20, 1990?"

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A

denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of breach of the principles of natural justice.

30. *Hence the incidental questions raised above may be answered as follows:-*

[i] Since the denial of the report of the enquiry officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject."

Thus, it was argued that dismissal from service order is not in terms of the principle laid down by the Apex Court in the aforesaid decision. Consequently, dismissal order and consequential orders dated 3.2.2010 (Annexure P-15) and Award dated 1312.2010 (Annexure P-17) passed by the Labour Court are liable to be set aside. That apart second portion of the charge is vague and reading of it reveals that disciplinary authority is biased. No dates and events are shown and no material was cited in support of the portion charge. In other words, extaaneous material has been considered without giving opportunity to the petitioner in the inquiry proceedings. On this ground the entire proceedings is vitiated.

8.) Per contra, learned counsel for the respondents submitted that the petitioner is a habitual absentee. He was

appointed as a Peon and promoted to the cadre of Supervisor from the date of his initial appointment. Till 9.11.1998, he remained absent on number of occasions. The same has been taken into consideration by the Inquiring Officer as well as disciplinary authority. Therefore, there is no infirmity in the order of dismissal. It was countered that appointment of Presenting Officer, Sh. A.K. Aggarwal who would be the witness in the matter has been changed during pendency of the inquiry. Therefore, contention of the petitioner that one of the prime witness has been appointed as a Presenting Officer and continued as a Presenting Officer is incorrect.

9.) In the Standing Orders, there is no provision for furnishing Inquiry Officer's report and issuance of second show cause notice. Moreover, the petitioner has not stated how he is prejudiced in not furnishing Inquiring Officer's report as well as second show cause notice. In the absence of any prejudice, the petitioner is not entitled for copy of the Inquiring Officer's report as well as issuance of second show cause notice before punishing him. It is true that past records have been taken into consideration while dismissing the petitioner from service. There is no lacuna in considering the past events while imposing penalty of dismissal from service. Overall assessment has been made. The Appellate Authority and Labour Court appreciated the facts of the case as well as misconduct and rightly upheld the order of dismissal from service. Therefore, the petitioner has failed to make out a case so as to interfere with the

order of dismissal and consequential orders of Labour Court.

10.) Heard learned counsel for the parties.

11.) The petitioner was chargesheeted for unauthorized absence from 9.11.1998 on 25/26.11.1998 having regard to the fact that his mother was ailing and he was to take her to the medical care at Delhi and it was beyond his control. The petitioner did inform his Superior Officer over telephone while appraising the situation. Therefore, it is evident that petitioner's absence was not intentional one. The petitioner's contention that charge is vague is incorrect for the reasons that from a reading of the charge (supra), it is crystal clear that the petitioner absented himself from duty since 9.11.1998 without prior permission of the Competent Authority. Rest of the charge/allegation is that *"it has also been reported that he is in habit of absenting himself from duty without any prior approval/sanction of leave"*. So far as this portion of charge is concerned, it is true that it is very vague which do not contain ingredients of framing of charge like dates and events. Therefore, contention of the petitioner that charge is very vague can be accepted partially. So far as appointment of Presenting Officer – Sh. A.K. Aggarwal to whom the petitioner has contacted and apprised the situation for remaining absent from 9.11.1998 is concerned, the disciplinary authority, while appreciating the objection of the petitioner before commencement of inquiry changed the Presenting Officer, therefore, contention of the petitioner that Sh. A.K. Aggarwal who is a Presenting Officer and

would be witness and appointing him as Presenting Officer is incorrect is not tenable. The Inquiring Officer and disciplinary authority while dealing with the proceedings considered various events and allegations which are not part and parcel of charge memo dated 25/26.11.1998. In other words, both the Inquiring Officer as well as disciplinary authority are biased against the petitioner and that they have considered extraneous material to see that petitioner should be ousted from service. The Apex Court in the following cases held that extraneous material, if taken into consideration in the inquiry proceedings as well as punishing an employee without observing principles of natural justice would be bad:-

(i) State of Mysore Vs. K. Manche Gowda AIR 1964 SC

506. Para 8 of the judgment is extracted herein:

“8.....It is suggested that the past record of a government servant, if it is intended to be relied upon for imposing a punishment, should be made specific charge in the first stage of the enquiry itself and, if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a government servant is one continuous process, though for convenience it is done in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinizes it and imposes punishment is the authority empowered to impose the same. Whether a particular person has a reasonable opportunity or not depends, to some

extent, upon the nature of the subject-matter of the enquiry. But it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it relates more to the domain of punishment rather than to that of guilt. But what is essential is that the government servant shall be given a reasonable opportunity to know that fact and meet the same.”

(ii)Nicholas Piramal India Ltd. Vs. Harisingh 2015 (8)

SCC 272.

12.) It is undisputed that before dismissing the petitioner from service after receipt of the Inquiring Officer's report, the disciplinary authority has failed to furnish copy of the Inquiring Officer's report and to seek his explanation i.e. issuance of show cause notice to impose penalty. The argument of the respondents that Standing Orders do not provide for furnishing copy of the Inquiring Officer's report and to seek explanation of the employee before imposing major penalty. In view of the principles laid down by the Apex Court in the case of Managing Director, ECIL (supra), it is made clear that law laid down in **Mohd. Ramzan Khan case** will apply to all establishments – Government and non-Government, public and private sector undertakings. It was also held that copy of the inquiry report should be furnished to the employee even when the Statutory Rules laying down the procedure for holding the disciplinary inquiry

are silent on the subject or are against it vide para 29 and 30 of the Managing Director, ECIL Judgment. In view of the legal position, it was mandatory on the part of the respondents to furnish copy of the Inquiring Officer's and to seek explanation on the report. The said procedure should have been adhered in the present case when the punishing authority is inflicting major penalty of dismissal from service. The Labour Court did not appreciate two issues, namely, in the inquiry proceedings extraneous material i.e., past records has been taken into consideration in the absence of specific charge and non-furnishing of Inquiring Officer's report with reference to decision of the Apex Court, namely, Managing Director, ECIL (supra). Punishment imposed is shockingly disproportionate to the charge of absent for about 15 days and is evident from the charge that petitioner remained absent from 9.11.1998 and the refusal to grant leave is dated 26.11.1998 and the date of charge is also 26.11.1998. The Supreme Court in the case of **Nicholas Piramal India Ltd.** (supra) held as follows:-

“28. The Labour Court at the first instance has erroneously failed to exercise its jurisdiction by not reappreciating the evidence on record after holding that the preliminary issue regarding the domestic enquiry conducted by the appellant Company is legal and valid. The said erroneous finding was challenged by the respondent workman in the appellate court after two remand orders were passed by the Industrial Court. Ultimately, the Labour Court has exercised its jurisdiction

and on reappreciation of the facts and the evidence on record and in accordance with the decision of this Court in Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.⁸, it has found fault with the findings of the enquiry officer which were endorsed by the disciplinary authority which has erroneously held that the workman was guilty of the misconduct. The Labour Court after the two remand orders has rightly come to the conclusion on reappreciation of the evidence on record and held that the charge levelled against the respondent is partially proved and even then the order of dismissal imposed upon him by the disciplinary authority, has been done without notifying the respondent workman about his past service record, as required under Clauses 12(3)(b) and (c) of the SSO, which aspect is rightly noticed and answered by the Labour Court at Para 20 of its award dated 29-10-2007. Thus, the order of dismissal of the workman from the service is disproportionate and severe to the gravity of the misconduct.”

29. The same has been laid down by this Court in Raghubir Singh v. Haryana Roadways, wherein this Court has held thus: (SCC pp. 321-23, paras 39-40)

“39. The abovesaid ‘doctrine of proportionality’ should be applied to the fact situation as we are of the firm view that the order of termination, even if we accept the same is justified, it is disproportionate to the gravity of misconduct. In this regard, it would be appropriate for us to refer to certain paragraphs from the decision of this Court in Om Kumar v. Union of India⁹, wherein it was held as under: (SCC pp. 410-11, paras 66-68)

‘66. It is clear from the above discussion that in India where administrative action is challenged under Article 14

as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the constitutional courts as primary reviewing courts to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Hence the court deals with the merits of the balancing action of the administrator and is, in essence, applying “proportionality” and is a primary reviewing authority.

67. But where an administrative action is challenged as “arbitrary” under Article 14 on the basis of Royappa¹⁰ (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is “rational” or “reasonable” and the test then is the Wednesbury¹¹ test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. [In G.B. Mahajan v. Jalgaon Municipal Council¹² (SCC at p. 111).] Venkatachaliah, J. (as he then was) pointed out that “reasonableness” of the administrator under Article 14 in the context of administrative law has to be judged from the standpoint of Wednesbury¹¹ rules. In Tata Cellular v. Union of India¹³ (SCC at pp. 679-80), Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India¹⁴ (SCC at p. 691), Supreme Court Employees’ Welfare Assn. v.

Union of India¹⁵ (SCC at p. 241) and U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd.¹⁶ while judging whether the administrative action is “arbitrary” under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a Wednesbury¹¹ review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as “arbitrary” under Article 14, the principle of secondary review based on Wednesbury¹¹ principles applies.’

40. Additionally, the proportionality and punishment in service law has been discussed by this Court in Om Kumar case as follows: (SCC pp. 411-12, paras 69-70)

‘69. The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of “arbitrariness” of the order of punishment is questioned under Article 14.

70. In this context, we shall only refer to these cases. In Ranjit Thakur v. Union of India¹⁷, this Court referred to “proportionality” in the quantum of punishment but the Court observed that the punishment was “shockingly” disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India¹⁸, this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in Ganayutham¹⁹.’”

(emphasis in original)

13.) In view of these facts and circumstances as well as legal position laid down by the Apex Court (supra), order of dismissal dated 17.7.1999, order dated 3.2.2010 (Annexure P-15) and award dated 13.12.2010 (Annexure P-17) passed by the disciplinary authority and Labour Court, Panipat respectively are set aside. The respondents are directed to take back the petitioner into service if he has not attained the age of superannuation. Petitioner is entitled to consequential monetary benefits including terminal benefits payable to the petitioner concerned on the basis of the periodical revision of pay scales and the same shall be released within a period of four months from today. The petitioner was dismissed on 17.7.1999. It is not desirable to remand for fresh inquiry for the reasons that the charge is remaining absent for about 15 days viz. From 9.11.1998 to 26.11.1998. The petitioner is entitled to 50% back wages only from the date of dismissal.

(P.B. BAJANTHRI)
JUDGE

April 29, 2016.

sandeep sethi