

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 1718 of 2014 (O&M)

Date of decision : 4.5.2016

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K. C. Garg

.....Petitioner

vs.

Food Corporation of India and others

.....Respondents

Coram: Hon'ble Mr. Justice P.B. Bajanthri

Present: Mr. O.P. Goyal, Senior Advocate with
Mr. Mukesh Verma, Advocate for the petitioner.

Mr. Rajesh Garg, Senior Advocate with
Ms. Nimrata Shergill, Advocate for the respondents.

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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?*

P.B. Bajanthri, J.

In the instant petition, the petitioner has questioned order of suspension dated 22.9.2009 (Annexure P-2), Charge Memo (Annexure P-3), Enquiry Report dated 21.2.2011 (Annexure P-6), Punishment order dated 30.3.2011 (Annexure P-8) and the Appellate Order dated 17.5.2013 (Annexure P-13).

2) The petitioner while working as Area Manager, Food Corporation of India (for short 'the FCI'), Rohtak, was asked to hold additional charge of District Karnal for the period from 3.1.2009 to 5.1.2009 and 10.1.2009 to 5.5.2009. He was placed under suspension on 22.9.2009 on the allegations that Rice Raw Grade-A out of stock found at FSD Karnal, received from various depots of Karnal District,

were found to be beyond laid down specifications as per the report submitted by Vigilance of FCI. On the very same allegations, the petitioner was subjected to disciplinary proceedings. Charge memo was issued (Annexure P-3). During pendency of the enquiry, the petitioner is stated to have attained age of superannuation and retired from service on 30.4.2010.

(3) The respondents proceeded with the enquiry and concluded on 30.3.2011 by imposing penalty of compulsory retirement and forfeiture of gratuity to the extent of 25% to recovery part of losses suffered by the respondent-corporation under Regulations 60-A and 56 of Food Corporation of India (Staff) Regulations, 1971 (hereinafter referred as 'Regulations 1971'). The suspension period from 22.9.2009 to 30.4.2010 has been treated as "period not spent on duty" for all purposes under Regulation 66 of Regulations 1971, vide Annexure P-8.

4) The petitioner, feeling aggrieved by the order of compulsory retirement, forfeiture of gratuity to the extent of 25% and treating the suspension period as not spent on duty, preferred an appeal before the Appellate Authority. On 17.5.2013, the Appellate Authority while deciding the appeal modified portion of forfeiture of gratuity from 25% to that of 15% vide Annexure P-13. Thus the petitioner has presented this petition challenging the orders cited Supra in paragraph 1.

5) Learned counsel for the petitioner vehemently contended that petitioner retired on 30.4.2010, therefore, retiring compulsorily

by way of penalty on 30.3.2011 is without authority of law and it is highly impracticable to implement the penalty of compulsory retirement when the petitioner has attained the age of superannuation and retired from service on 30.4.2010. Therefore, there is total non-application of mind in imposing the penalty of compulsory retirement. On this ground, compulsory retirement penalty is to be set aside.

6) Learned counsel for the petitioner further submitted that while issuing charge memo, while giving finding by the Inquiry Officer in its report and while imposing the penalty of forfeiture of gratuity to the extent of 25% to recovery part of losses suffered by the corporation, the authorities have not determined what are the financial losses caused to the corporation. In the absence of determination of financial loss, question of forfeiture of gratuity to the extent of 25% to recover part of losses suffered by the corporation is only imaginary. Without there being a concrete finding regarding monetary losses suffered by the corporation and in the absence of such determination in an enquiry by adducing necessary evidence, imposing forfeiture of gratuity to the extent of 25% and subsequently modifying to 15% by the Appellate Authority, is impermissible and highly arbitrary. In fact the Appellate Authority while reducing forfeiture of gratuity from 25% to 15%, he has stated as follows “Exact quantum of loss incurred has not been indicated, nor final loss assessment statement amount has not been cited”. On presumption that there is a monetary loss has been caused to the corporation, on

such presumption recovery of gratuity amount is illegal and impermissible. Consequently, the petitioner's suspension was not warranted and the same has to be regulated as duty for all purposes.

(7) Per contra, the learned counsel for the respondents, raised a preliminary objection that Regulations 1971 provides for appeal as well as review against decision of the disciplinary authority. In the present case, the petitioner has exhausted remedy of appeal. However, he has failed to exhaust remedy of review under Regulation 74. Therefore, instant writ petition is not maintainable before this Court and the writ petition is liable to be dismissed. In support of this contention, learned counsel for the respondents cited the decision of the Supreme Court reported in **State Bank of India and others vs. Narendra Kumar Pandey, (2013) 2 SCC 740** paragraph 25 of which is reproduced herein:-

“25. The High Court, in our view, under [Article 226](#) of the Constitution of India was not justified in interfering with the order of dismissal passed by the appointing authority after a full-fledged inquiry, especially when the Service Rules provide for an alternative remedy of appeal. It is a well accepted principle of law that the High Court while exercising powers under [Article 226](#) of the Constitution does not act as an appellate authority. Of course, its jurisdiction is circumscribed and confined to correct an error of

law or procedural error, if any, resulting in manifest miscarriage of justice or violation of the principles of natural justice. In *State Bank of India and Others v. Ramesh Dinkar Punde* (2006) 7 SCC 212, this Court held that the High Court cannot re-appreciate the evidence acting as a court of Appeal. We have, on facts, found that no procedural irregularity has been committed either by the Bank, presenting officer or the Inquiring Authority. Disciplinary proceedings were conducted strictly in accordance with the Service Rules.”

(8) Learned counsel for the respondents further submitted that penalty of compulsory retirement imposed on the petitioner and forfeiture of gratuity amount are in accordance with Regulations 1971, in particular, Regulation 56, 60-A and 66. Reading of Regulation 60-A, it is crystal clear that during pendency of disciplinary proceedings if an employee is retired, the enquiry proceedings would be continued and concluded. Therefore, it is permissible for imposition of penalty of compulsory retirement under Regulation 54, even though the petitioner has attained the age of superannuation and retired from service on 30.4.2010. In support of this contention, learned counsel for the respondents relied on decision of the Supreme Court in *State Bank of India vs. Ram Lal Bhaskar and another* (2011) 10 Supreme Court Cases 249, paragraph No. 8

of which is reproduced herein:-

“8. Learned counsel for the respondent no.1, on the other hand, supported the impugned order of the High Court and submitted that there is no infirmity in the impugned order of the High Court. He further submitted that in any case the respondent no.1 had retired from service on 31.01.2000, and though the charge-sheet was served on him on 22.12.1999 when he was still in service, the enquiry report was served on him by letter dated 28.09.2000 and he was dismissed from service on 15.05.2001 after he had retired from service. He submitted that after the retirement of the respondent no.1, the appellant had no jurisdiction to continue with the enquiry against the respondent no.1. In support of this contention, he cited the decision of this Court in [UCO Bank and Another v. Rajinder Lal Capoor](#) .”

9) Learned counsel for the respondent further submitted that no doubt monetary loss caused to the respondent-corporation has not been determined exactly, however, it is evident that there is a loss caused to the respondent-corporation with reference to the sub-standard rice found in the stock, for which the petitioner is held responsible. Even now if the Court directs, the monetary loss caused

to the respondent-corporation would be determined. For not determining the loss caused to the respondent-corporation, the disciplinary authority has chosen to impose the penalty of forfeiture of 25% of the gratuity amount of the petitioner. Therefore, there is no infirmity in the order.

10) Learned counsel for the petitioner countered the argument in respect of non-exhausting remedy of review, contending that petitioner has already exhausted the remedy of appeal. Therefore, there is no point in once again approaching the higher authorities by filing review. Review petition is not an efficacious remedy and scope of review is not exhaustive and it is limited. That apart, he has pointed out that retiring the petitioner compulsorily as a measure of penalty after attaining the age of superannuation and retired from service is without authority of law for the reasons that compulsory retiring as a measure of penalty against a retired employee is impracticable to implement the penalty. Therefore, retired employee can invoke Article 226 of the Constitution of India by filing writ petition without exhausting remedy of review petition, since the order of penalty is without jurisdiction. In support of this contention, learned counsel for the petitioner cited a decision of the Supreme Court reported as *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai 1999 (1) RCR (Civil) 220*, paragraph 13 of which is reproduced herein:-

“13. Under Article 226 of the Constitution, the

High Court, having regard to the facts of the case,

has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

Yet another decision cited which is reported in *M.P. State Agro Industries Development Corporation Ltd. and another vs. Jahan Khan 2007 (4) SCT 309*, paragraphs 10 and 11 of which are reproduced herein:-

“10. Before parting with the case, we may also deal with the submission of learned counsel for

the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under [Article 226](#) of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar.

(See: Whirpool Corporation Vs. Registrar of

Trade Marks 1999 (1) RCR (Civil) 220: (1998)
8 SCC 1: , Harbanslal Sahnia & Anr. Vs.
Indian Oil Corporation Ltd. & Ors. (2003) 2
SCC 107, State of H.P. Vs. Gujarat Ambuja
Cement Ltd. (2005) 6 SCC 499 and Sanjana
M. Wig Vs. Hindustan Petroleum
Corporation Ltd. 2005 (4) RCR (Civil) 160 :
2005 (8) SCC 242).

11. In the instant case, though it is true that the penalty order impugned in the writ petition was appealable in terms of the aforementioned Regulations but having coming to the conclusion that the order was per se illegal being violative of the principles of natural justice, it cannot be said that the High Court fell into an error in entertaining the writ petition filed by the respondent.”

In view of the aforesaid judgments respondents contention to exhaust review remedy is not tenable.

11) Heard learned counsel for the parties..

12) It is relevant to reproduce certain provisions of the Regulations 1971 to decide the present petition. Regulations No. 1, 54, 56, 60-A and 74 are reproduced herein:-

“1.Short title, commencement and application:

1) These regulations may be called the Food

Corporation of India (Staff) Regulations, 1971.

2) They shall come into force at once.

3) **They shall apply to all the employees of the Corporation including transferred employees, other than:**

(a) Persons employed on a purely part-time basis;
and

(b) Persons employed on special contracts to the extent that the terms and conditions of such contracts are inconsistent with the provisions of these regulations:

(c) *Persons governed by the Industrial Employment (Standing Orders) Act, 1946 (Act 20 of 1946) and / or the Food Corporation of India (Industrial Establishments) Standing Orders framed under the said Act.

[**Provided that nothing contained in these regulations shall apply to any Director of the Corporation or to the Secretary who is not an **employee** of the Corporation].

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54. **Penalties:**

Notwithstanding any thing contained in any other regulations, and without prejudice to such action to which **an employee may become liable**

under any other regulation or law for the time being in force, the following penalties may (for good and sufficient reasons and as hereunder provided) **be imposed on any employee of the Corporation.**

Minor Penalties:

- (i) Censure;
- (ii) withholding of his promotion;
- (iii) recovery from his pay of the whole or part of any pecuniary loss caused by him to the Corporation by negligence or breach of orders;
- (iv) withholding of increments of pay:

Major Penalties:

- (v) reduction to a lower stage in the time-scale of pay for a specified period, with further directions as to whether or not the **employee** of the Corporation will earn increments of pay during the period of such reduction and whether on expiry of such period, the reduction will or not have the effect of postponing the future increments of his pay;
- (vi) reduction to a lower time-scale of pay or post which shall ordinarily be a bar to the promotion of the **employee** to the time -scale of pay or post from which he was reduced, with or

without further directions regarding conditions of restoration of the post from which the **employee** of the Corporation was reduced and his seniority and pay on such restoration to the post;

(vii) **compulsory retirement**;

(viii) removal from service which shall not be a disqualification for future employment under the Corporation;

(ix) dismissal from service which shall ordinarily be a disqualification for future employment under the Corporation.

Explanation: The following shall not constitute a penalty within the meaning of Regulation-

(a) Discharge of an **employee** for failure to pass any examination or test or a medical test prescribed for fresh appointment to any category of post;

(b) Compulsory retirement of an **employee** in accordance with the provision relating to superannuation or retirement;

(c) Termination of service or reversion to a lower category or post of an **employee** appointed or promoted on probation either

during or at the end of the period of probation;

(d) Discharge of an **employee** under regulation-19 or as a measure of retrenchment for want of vacancy;

(e) Termination of service of an **employee** employed under a contract or agreement in accordance with the terms of such contract or agreement or in the case of an **employee** appointed for a specific period, at the end of such period;

(f) Reversion of an **employee** promoted from lower post to a higher post, to such lower post for want of vacancy;

(g) Non-promotion of an **employee** after consideration of his case for promotion for promotion whether on regular or on ad-hoc basis to a post to which he is eligible for being considered;

(h) Replacement of services of an **employee** whose services had been borrowed at the disposal of his parent organisation.

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56. **Disciplinary authorities:**

The Board or the authority specified in Appendix 2 in this behalf or any other authority

(higher than the authority specified in Appendix 2) empowered in this behalf by a general or special order of the Board may impose any of the penalties specified in Regulation 54 on any **employee**.

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60-A – Procedure for disciplinary proceedings after retirement:

(i) Any disciplinary proceeding, if instituted by issue of chargesheet while the **employee** was in service, whether before his retirement or during his re-employment, shall after the retirement of the **employee**, be **continued and concluded** by the authority by which it was commenced, in the same manner, as if the **employee** had continued in service.

(ii) Such proceeding after retirement should be completed expeditiously and within twelve months from the date of delivery of charge sheet to the charged official, subject to Court Orders, if any.

(iii) During the pendency of the disciplinary proceedings, the disciplinary authority may withhold payment of gratuity for ordering the recovery from gratuity of the **whole or part of**

any pecuniary loss caused to the the Corporation if the employee is found in disciplinary proceedings or judicial proceedings to have been guilty of offence or misconduct as mentioned in the relevant Sections of the Payment of the Gratuity Act, 1972 (39 of 1972) or to have caused pecuniary loss to the Corporation by misconduct or negligence during his service, including service rendered on deputation or on re-employment after retirement, provided that the provisions of relevant Sections of the Payment of Gratuity Act, 1972 shall be kept in view in the event of delayed payment, in case the employee is fully exonerated.

[1st Amendment, 2007 dated 15.5.2007]

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74. Review:

(1) ******(Notwithstanding anything contained in these regulations, the Board may, at any time either on its **own motion or otherwise**, call for the records of any inquiry and review any order made under these regulations), and

(a) confirm, modify or set aside the order; or

(b) confirm, reduce, enhance or set aside the

penalty imposed by the order, or impose any penalty where no penalty has been imposed; or

(c) Remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances of the case; or

(d) pass such other orders as it may deem fit;

****Provided that no order imposing or enhancing any penalty shall be made by the reviewing authority unless the **employee** concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in clauses (v) to (ix) of Regulation 54 or to enhance the penalty imposed by the order sought to be viewed to any of the penalties specified in those clauses; no such penalty shall be imposed except after an inquiry in the manner laid down in Regulation 58**

(2) No proceeding for review shall be commenced until after:

i) the expiry of the period of limitation for an appeal, or

ii) the disposal of the appeal, where any such

appeal has been preferred.

(3) An application for review shall be dealt with in the same manner as if it were an appeal (4) under these regulations

(4) Powers similar to those specified in clause(1) above may be exercised by the (Chairman)**,
Managing Director, Zonal Manager and Regional Manager(Additional/Joint Manager) in respect of orders passed by authorities subordinate to them.”

13) The petitioner had been subject to disciplinary proceedings initiated under the aforesaid regulation while he was in service (1.4.2010). He had attained the age of superannuation and retired from service in the normal course on 30.4.2010. The respondents continued enquiry pursuant to Section 60-A of the Regulation 1971 and concluded the enquiry, while imposing the penalty of compulsory retirement on 30.3.2011 and forfeiture of 25% of gratuity amount and appeal of the petitioner was rejected on 17.5.2013, while modifying forfeiture of 25% of the gratuity amount to that of 15%. Having regard to the applicability clause of the Regulation 1971 Supra, it is crystal clear that Regulation 1971 would not apply to the retired employees. As on date of punishing the petitioner, i.e., on 30.3.2011, he ceased to be an employee of the respondent-corporation, since he had already attained the age of superannuation and retired from service on 30.4.2010. Thus master and servant relationship was ceased on 30.4.2010. Therefore,

Regulation 1971 would not apply. If Regulation 60-A is taken into consideration, there is provision for continuation of disciplinary proceedings and conclusion of the same against a retired employee. If the applicability clause of the Regulations 1971 is taken into consideration, which excludes retired employee, Regulation 60-A would be redundant in the absence of necessary amendment to Regulation No. 1 (3) and other Regulations like 54, 56, 66 and 74 etc., to the extent that Regulation applies to retired employee also. On this score, the penalty order dated 30.3.2011 and consequential appellate order dated 17.5.2013 are without authority of law. Moreover the punishing authority invoked Regulations No. 54, 56, 60-A and 66. Except 60-A the other Regulations No. 54, 56 and 66 can be invoked in respect of corporation employee. Since petitioner ceased to be an employee on 30.4.2010, aforesaid provisions cannot be invoked against retired employee unless Regulations No. 1 (3), 54, 56 and 66 are amended appropriately by incorporating Regulation 1971 are applicable to retired employee.

14) Assuming that Regulations 1971 is applicable for retired employees, if Regulation 60-A is read in isolation, even then the petitioner cannot be punished by imposing penalty of compulsory retirement as a measure of penalty for the reasons that prior to 30.3.2011 the date on which penalty order was passed, the petitioner was already attained the age of superannuation and retired from service on 30.4.2010. Therefore, the respondents cannot revive the date of retirement of the petitioner, who retired in the normal course

on 30.4.2010. Moreover, imposition of compulsory retirement penalty on a retired employee has no effect. In other words, it is highly impracticable to implement the order of compulsory retirement against retired employee. If the compulsory retirement dated 30.3.2011 is to be upheld then the authorities have to extend the petitioner's service from 30.4.2010 to 30.3.2011 and salary for the intervening period is to be paid. That apart compulsory retirement cannot be given effect from 30.4.2010 for the reason the petitioner cannot be punished retrospectively. Therefore, Regulations 1971 is not applicable to retired employee of the FCI. Hence, there is a total non-application of mind in imposing the penalty of compulsory retirement against retired employee. Thus the penalty order of compulsory retirement is illegal and without authority of law.

15) In so far as forfeiture of gratuity amount is concerned, there was no determination of monetary loss caused to the respondent-corporation before framing charge, in the enquiry proceedings and while passing the penalty order. In fact the Appellate Authority has recorded "Exact quantum of loss incurred has not been indicated, nor final loss assessment statement amount has been stated". In the absence of determination of monetary loss caused to the respondent-corporation, question of recovery by means of forfeiture of gratuity amount, 25% or 15%, is impermissible. Consequently, ordering forfeiture of gratuity amount, as well as, modification by the Appellate Authority as a measure of penalty, is impermissible.

16) Preliminary objection of the respondent-corporation that the petitioner has failed to exhaust remedy of review under Regulation 74 and invoking Article 226 of the Constitution of India, by presenting this petition is concerned, it is evident that petitioner has attained age of superannuation and retired from service on 30.4.2010 in the normal course. On 30.3.2011, punishing the petitioner by imposing penalty of compulsory retirement as a measure of penalty, is without authority of law. Scope of Regulation 60-A is only for continuation of enquiry and conclusion. The conclusion means against retired employee penalties stated in Regulation 54 cannot be imposed. Penalties stated in Regulation 54 can be imposed against serving employee only. This is evident from reading of Regulation 54. The relevant portion is :-

“Notwithstanding any thing contained in any other regulations, and without prejudice to such action to which **an employee may become liable** under any other regulation or law for the time being in force, the following penalties may (for good and sufficient reasons and as hereunder provided) **be imposed on any employee of the Corporation.**”

Since petitioner was not a corporation employee as on 30.3.2011, Regulation 54 is not applicable. Compulsory retirement is one of the penalty under Regulation 54. Thus the penalty order is without authority of law. Hence, there is no infirmity in invoking Article 226 of the Constitution by the petitioner by filing this petition. The

Supreme Court in *M.P. State Agro Industries' case (Supra)* has held that writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or (iii) where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. The present case falls under where the orders or proceedings are wholly without jurisdiction. Therefore, the petitioner need not exhaust remedy of review under Regulation 74. It was also noticed that petitioner has already exhausted remedy of appeal. Respondents' counsel relied on *Narendra Pandey's case (Supra)*. It was case of no procedural errors. Consequently, the Supreme Court has held that in such matter one must exhaust the remedy of appeal. Whereas in the present case, the penalty order is without authority of law.

17) Learned counsel for the respondents argued that if the matter is remanded, determination of monetary loss caused to the respondent-corporation would be determined and the matter would be proceeded. The petitioner has attained the age of superannuation and retired from service on 30.4.2010. Therefore, at this juncture, it is not appropriate to remand the matter for determination of monetary loss caused to the respondent-corporation. The petitioner's counsel restricted his arguments/challenge to the penalty order and Appellate order. Therefore, question of interference with suspension, initiation of enquiry and enquiry report etc. need not be interfered. The

impugned penalty order dated 30.3.2011 (Annexure P-8) and Appellate Authority order dated 17.5.2013 (Annexure P-13) are set aside. The respondents are directed to grant and release consequential benefits which are due to the petitioner in accordance with law within a period of three months.

18) The present civil writ petition is allowed.

May 4, 2016
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(P.B. Bajanthri)
Judge