

\$~69

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

Decided on 19th October, 2016

+ **W.P.(C) 8144/2010**

HARI OM SHARMA

..... Petitioner

Through: Mr. J.S. Bakshi, Mr. A.S. Bakshi and
Mr. Ankush Sharma, Advs.

versus

KULACHI HANSRAJ MODEL SCHOOL & ORS

..... Respondent

Through: Mr. Rajinder Nischal and Mr. Asish
Nischal, Advs. for R-1 & R-2.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (ORAL)

1. This petition impugns the order dated 07.09.2010 passed by the Presiding Officer, Delhi School Tribunal, the Inquiry Report dated 05.02.2002 of the Enquiry Officer and the order of imposition of major penalty of removal from the service of the petitioner conveyed to him vide Order Ref. No. 17682/2002 dated 14.08.2002.

It is not in dispute that the inquiry was conducted by a retired District & Sessions Judge, a person with a trained legal mind. The petitioner contends that before a person so qualified and experienced in law, the petitioner should have been accorded the opportunity of being assisted by a lawyer; this assistance was not permitted, hence the entire proceedings were

vitiated because of denial of principles of natural justice.

2. Mr. Rajinder Nischal, the learned counsel for the respondent relies upon the Supreme Court judgment in ***Chairman, LIC of India & Ors. v. A. Masilamani*** (2013) 6 SCC 530 which inter alia held as under:

“8. In view of the issues raised by the learned Counsel for the parties, the following questions arise for our consideration:

i) When a court/tribunal sets aside the order of punishment imposed in a disciplinary proceeding on technical grounds, i.e., non-observance of statutory provisions, or for violation of the principles of natural justice, then whether the superior court, must provide opportunity to the disciplinary authority, to take up and complete the proceedings, from the point that they stood vitiated and;

ii) If the answer to question No. 1 is, that such fresh opportunity should be given, then whether the same may be denied on the ground of delay in initiation, or in conclusion of the said disciplinary proceedings.

9. It is a settled legal proposition, that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the Court cannot

reinstate the employee. It must remit the concerned case to the disciplinary authority, for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (**Managing Director, ECIL, Hyderabad etc. etc. v. B. Karunakar etc. etc.** AIR 1994 SC 1074; **Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls and Ors.** (2002) 10 SCC 293; **U.P. State Spinning C. Ltd. v. R.S. Pandey and Anr.** (2005) 8 SCC 264; and **Union of India v. Y.S. Sandhu**, Ex-Inspector AIR 2009 SC 161).

12. The instant case requires to be considered in the light of the aforesaid settled legal propositions.

After hearing the counsel for the parties, we are of the view that the impugned judgment and order dated 10.1.2011, in Writ Appeal No. 7 of 2011, as well as the order of the learned Single Judge dated 17.2.2010, passed in Writ Petition No. 11152 of 2002, cannot be sustained in the eyes of law and are therefore hereby, set aside. The present appeal is allowed. The matter is remitted to the disciplinary authority to enable it to take a fresh decision, taking into consideration the gravity of the charges involved, as with respect to whether it may still be required to hold a de novo enquiry, from the stage that it stood vitiated, i.e., after issuance of charge-sheet.

The disciplinary authority while taking such a decision must bear in mind that charges are merely

technical as the loan was taken for construction of a residential premises and the said loan was used effectually to construct the premises as per sanctioned plan and only then the premises was put to commercial use.

In the event the authority takes a view, that the facts and circumstances of the case require a fresh enquiry, it may proceed accordingly and conclude the said enquiry, most expeditiously.”

3. In Civil Appeal No. 8224 of 2012, titled ***Professor Ramesh Chandra v. University of Delhi & Ors.***, the Supreme Court held that if any person who is or was a legal practitioner, including a retired Hon’ble Judge is appointed as Inquiry Officer in an inquiry initiated against an employee, the denial of assistance of legal practitioner to the charged employee would be unfair.
4. Insofar as the ratio in ***Chairman, LIC of India & Ors.*** (supra) itself provides that the disciplinary proceedings which violate the principles of natural justice would have to be set aside right from the stage when the benefit of assistance of a lawyer was not given, the impugned inquiry report is set aside because the corresponding nature of defense assistance was not accorded to the petitioner. A fresh inquiry would have to be conducted in view of the aforesaid judgment.
5. At this stage, Mr. J.S. Bakshi, the learned counsel for the petitioner further relies upon the Supreme Court’s judgment in ***Deepali Gundu Surwase Vs. Kranti Junior Adhyapak Mahavidyalaya (D. Ed.) and Ors.*** JT 2013 (12) SC 322 which had held inter alia:

“33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to

the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power Under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full

back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior

Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in ***Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited*** (supra).

vii) The observation made in ***J.K.***

Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.”

6. In view of the above settled position in law, the petitioner would be treated as having been reinstated in the service. However, his reinstatement would be taken from the point that the inquiry proceedings against him were vitiated by breach of principles of natural justice. The petitioner was suspended for a period of one year with effect from 24.02.2001. He would therefore be entitled to 75% of his salary after three months’ of such suspension order. Hence, from the 4th month of the suspension order, the petitioner would be entitled to 75% of his salary since he would be treated as being on suspension but in service, along with consequential benefits of service.

7. In the circumstances, the impugned order dated 07.09.2010, Inquiry Report dated 05.02.2002 and imposition of major penalty of removal from the service dated 14.08.2002 are quashed. The petitioner shall be treated as being in service but under suspension and shall be entitled to 75% of the salary from the 4th month of the order of suspension. The money will be paid to the petitioner in two equal instalments in four weeks.

8. Should the respondent choose to proceed against the petitioner as per the charge-sheet issued, it may do so.

9. The petitioner shall be entitled to assistance of a counsel should the inquiry proceedings be conducted by a retired judge or a legally trained mind.
10. The writ petition is disposed off in the above terms.

NAJMI WAZIRI, J

OCTOBER 19, 2016/acm