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24.6.2021

WPCT 38 of 2020

(Via Video Conference)

Manish Kumar
Vs.
The Comptroller & Auditor
General of India & Ors. WPCT 38 of 2020

with

WPCT 49 of 2020

Union of India & Ors.
Vs.
Manish Kumar & Ors.

Mr. Manish Kumar (in person)
...For the Petitioner in WPCT 38 of 2020 & for the Respondent no. 1 in WPCT 49 of 2020

Mr. Sandip Kunar Bhattacharyya
Mr. Suman Basu
...For the Petitioners in WPCT 49 of 2020 & for the Respondents in WPCT 38 of 2020

Both the writ petitions are taken up together as similar questions of law and facts are involved in both the matters.

The impugned order was passed on 29th May, 2020 in O.A 350/1550 of 2014 by Central Administrative Tribunal, Kolkata Bench.

The petitioner in WPCT 38 of 2020, Manish Kumar, (hereinafter 'the petitioner' or 'Mr. Kumar') appeared for the Audit Examination of 2005 and being successful, he was appointed to the Section Officer (Audit) post on 22nd May, 2006. Prior to joining his present employment (Audit), he was an employee under the Ministry of Agriculture, Department of Agricultural

Research and Education (in short 'DARE') in the post of LDC from 18th August, 2003 to 2nd June, 2006 as a non-physically handicapped candidate. During his employment in DARE he suffered an injury and the petitioner was declared to be physically handicapped person with 50% disability by the Government Hospital at Chapra.

On the basis of such disability certificate he applied for the present employment. At the time of his appointment as a probationer in the present department he had given a declaration that during the period of his probation he would neither apply for any employment elsewhere nor sit for any examination to qualify for other employment.

The facts reveal that in course of his employment in the office of the Controller & Auditor General he applied for the post of Inspector (Examiner) under CBEC (Central Board of Excise and Customs), Ministry of Finance, Department of Revenue and reported to the office of the Customs, Mumbai on 26th October, 2009 under OBC/PH category. Contemporaneously, he also applied for the post of Deputy Director, ESIC on 18th May, 2009 in the OBC, non-PH category. CBEC offered appointment to the petitioner on 1st December, 2009 but it was kept in abeyance on a complaint and the said appointment was ultimately cancelled on 5th July, 2011.

These facts were reported to the present employer by the Customs department. This triggered of an enquiry against the petitioner and led to the issuance of the charge sheet.

On 24th April, 2014 the Accountant General issued a memorandum which, inter alia, contains articles of charge. Four articles of charge were framed against the petitioner.

The 1st article is with regard to his contradictory and inconsistent declaration of PH status in his applications for employment in different government organisations. It is stated that on the one hand the Petitioner claimed to be a non-PH candidate in his application dated 18th May, 2009 while applying for the post of Deputy Director in ESIC, on the other hand, he submitted physically handicapped certificate while joining the office of Customs for getting benefits and also passed medical and physical tests in the office of the Commissioner of Customs, Mumbai for appointment to the post of Inspector under PH category. The charge is that there is a deliberate attempt on his part to take undue advantage by suppressing facts and this is gross misconduct under Rule 3(1) (i) and (iii) of CCS (Conduct) Rules, 1964.

The second charge is based on a private complaint made by one B. Kumar alleging that the certificate of PH status of Mr. Manish Kumar was false. It is alleged that in view of such communication the petitioner was asked to appear before Medical Board of NRS Medical College and Hospital, Kolkata on 30.01.2013 for confirmation of his physically handicapped status followed by another date on 26.06.2013, as he did not turn upon 30.01.2013. However, he did not turn up in the second occasion also and thereby it was alleged that he deliberately and willfully disobeyed the orders of the authorities that is unbecoming of a government servant and in violation of Rule 3(1) (i) and (iii) of CCS

(Conduct) Rules, 1964.

The third charge is that while the petitioner was in the employment of the present employer he had applied to different departments of Government without obtaining prior permission from the authority, which is in violation of Rule 5 of CCS (Conduct) Rules, 1964 read with Rule 3(1)(i) and (iii) of CCS (Conduct) Rules, 1964.

The fourth charge appears to be that for the purpose of reporting to the office of the Customs, Mumbai on 26th October, 2009, he made a false ground in his leave application.

The sum and substance of the charges are that the acts of Mr. Kumar are nothing but proof of his unfaithfulness and untrustworthiness because of his gross misconduct appearing from the four charges mentioned above.

Mr. Kumar participated in the disciplinary proceeding. The enquiry officer after detailed enquiry returned his findings in a report.

In relation to Article-I, it was found that paragraphs 3 and 4 of Article I were proved. The findings all are set out below:

> *"Hence the charges under para-3 of article-I is proved that CO did not provide correct information to the best of his knowledge while submitting the application form for the exam for the post of Dy. Director in Employees State Insurance Corporation."*
>
> *Thus charges mentioned under 18(a) is proved 18(b) is proved and based on this the charges under para 4 of Article-I, that the CO has suppressed some information while participating in the combined Graduate level(preliminary) examination 2006 is proved".*

In relation to Article II which stems from his

PH certificate furnished during his appointment, the allegation that Mr. Kumar deliberately and willfully ignored to appear before the Medical Board and thereby disobeyed. The order of superior authority that is unbecoming of a Government servant did find favour with the enquiry officer. However, the enquiry officer also stated:

> *"It cannot be proved that CO deliberately and willfully ignored the order of authority since there was no order of the authority either along with the letter from medical board on 29/01/2013 or prior to it intimating CO that on receiving intimation from medical board that he should appear before it."*

Further the Enquiry Officer held that non-adherence of Medical Board on 26.06.2013 was not a deliberate and willful ignorance of the order of the authority.

In relation to the third charge, it was held that:

> *"Thus, Shri Kumar violated terms and condition for offer of appointment. The act of Shri Kumar is nothing but un faithfulness and untrustworthiness which tantamount gross misconduct and attract Rule 3(1) (i) and (iii) of CCS (Conduct) Rules, 1964."*

In relation to the fourth charge it was held that:

> *"Initially Shri Kumar submitted leave application on 20.10.2009 for five days Earned Leave from 26.10.2009 to 30.10.2009 (Prefixing 24.10.2009 and 25.10.2009; suffixing 31.10.2009 and 01.11.2009) for visit to Mumbai on LTC. Accordingly his leave was sanctioned on 21.10.2009. Without giving any information he extended leave and on being joined on 09.11.2009. Shri Kumar cancelled the earlier*

> *leave and submitted a revised leave application for the period 26.10.2009 to 06.1.2009 on the ground of private affairs which was sanctioned on 12.11.2009.*
>
> *His leave application and change of nature of leave also proves that Shri Kumar deliberately suppressed the fact of his attendance in the office of the Commissioner of Customs, Mumbai. Thus suppression of facts by Shri Kumar is nothing but unfaithfulness and untrustworthiness which tantamount to gross misconduct and attract Rule 3(1) (i) and (iii) of CCS (conduct) rules 1964."*

The Disciplinary Authority on consideration of the enquiry report issued a second show-cause notice upon acceptance of the report of the enquiry officer to which Mr. Kumar replied.

The Disciplinary Authority on consideration of the materials on record held that the circumstances, as enumerated in the enquiry report and in course of hearing before the disciplinary authority, proved that Mr. Kumar did not maintain absolute integrity, which reflects that he is behaving in a manner unbecoming of government servant and such acts of Mr. Kumar proved his deliberate attempt to take undue advantage by suppressing facts of his attendance in the office of the Commissioner of Customs, Mumbai.

On consideration of the aforesaid facts, the disciplinary authority imposed major punishment by reduction of pay band by two stages for a period of two years from Rs. 18,950/- to Rs. 17,570/- with effect from 1st April, 2016 with cumulative effect adversely affecting his pension.

It was further ordered that Mr. Kumar would not earn increments during the period of such reduction and on the expiry of such period, the reduction will have the effect of postponing future increments of his pay.

Mr. Kumar dissatisfied with the order impugned preferred a statutory appeal before the Appellate Authority. The Appellate Authority in dismissing his appeal enhanced the penalty to dismissal from service.

This order was challenged by Mr. Kumar in the Central Administrative Tribunal, Kolkata Bench.

We have perused the order of the Central Administrative Tribunal. It appears that the Tribunal on perusal of the materials on record and the order of the enquiry officer, disciplinary authority and the appellate authority had arrived at a finding that in absence of clear finding that the PH certificate is fake the authorities could not have imposed any of the punishments on the basis of suspicion.

It is important to note that the genuineness of the certificate was put to challenge by one B. Kumar, a resident of Umanagar, Bihar in the month of September 2010. This was the basis of Article-II. The determination of the genuinity of the said certificate goes to the root of the matter. The issuing authority of PH certificate at Government Hospital of Chapra has confirmed the genuineness of the certificate. However, on the basis of a suspicion that the said certificate may not be genuine, as the conduct of the petitioner would reveal that the petitioner recklessly used this certificate for getting employment at his convenience the authority held against the genuinity of the certificate issued in favour of the petitioner. The materials on record showed that the petitioner used his PH status for the purpose of getting his employment. It is true that he applied before the ESIC Authority but he did not disclose his status as PH. However, while he applied before the Customs authority he relied upon PH certificate. The important issue is that whether the petitioner belongs to PH category. So long as the certificate issued by the issuing authority is not in dispute and the said authority on examination of the petitioner had issued the said certificate, the status of the petitioner as PH cannot be disputed merely on a suspicion based on a complaint made by one B. Kumar, who was neither called nor summoned by the enquiry officer or Disciplinary Authority to prove the veracity of the complaint.

In our considered opinion, PH category would have benefited the petitioner more as the area of competition there would have been less in comparison to a general category or non PH OBC category. The said declaration of status, in fact did not enure much to the benefit of Mr. Kumar. The competence of the petitioner cannot be doubted. In fact, the petitioner has rightly drawn our attention to the R.T.I report appearing at page 39 of the affidavit-in-opposition (R-3) filed by Mr. Kumar in WPCT 49 of 2020. It is important to note that Mr. Kumar applied under OBC(PH) category in the present employment with all requisite and valid certificates but he was selected in the post reserved for OBC since he obtained higher marks in the merit list. Hence, it is clear that he did not get the benefit of PH status to secure the job of Section Officer (Audit). The document being annexure R-3 clearly supports the contention of Mr. Kumar. This factual aspect has not been controverted or taken into consideration by the authority concerned.

The dictionary meaning of integrity is the quality of having strong moral principles or values. It implies lack of corruption or dishonesty. The alleged conduct of not obtaining prior sanction, in the facts and circumstances of the case, does not show the badness of character or disposition of Mr. Kumar. It may not be virtuous conduct in the eyes of the department but is it so bad in the given facts that it calls for dismissal? Conduct of the petitioner in applying for the posts in E.S.I.C and Customs in the facts and circumstances of the case cannot be described as inherently base, vile, depraved or having any connection showing depravity. The relevant rules do not show that under no circumstances sanction can be granted. An order granting sanction, keeping in mind the requirement of the department and the future prospects of the employee, can be granted. The petitioner did not apply for any private employment as rule 15 speaks of private trade or employment and does not specifically refer to public employment. It can give the impression that only in respect of private employment such prior sanction is required. However, the fact remains that the petitioner had applied for government employment under different Ministries in breach of his terms of his appointment.

Although it is alleged that the petitioner has failed to maintain absolute integrity the devotion to his job and discharge of duties by the petitioner in his present employment has not been disputed or reflected from the order of the disciplinary authority or the appellate authority. His devotion to work is not put to test or doubted. The question of integrity which may result in a harsh punishment of dismissal would mean and include dishonesty and malpractice in discharging his lawful duties. There may be instances of embezzlement of fund or taking undue advantage of one's position in the organization or extending undue favour to a third party thereby causing any pecuniary loss to the establishment which may be viewed as gross misconduct. If a government servant in the course of his employment does not show diligence or acts in a manner prejudicial to the interest of the organization or by his conduct earned disrepute for his organization then undoubtedly it would be an instance of undesirability of the employee in the institution. There is no material to show lack of devotion or sincerity in his work or that his conduct is prejudicial to the interest of the establishment.

Unless the findings are perverse, arbitrary or mala fide and the punishment imposed is shockingly disproportionate, in a judicial review, the court should not interfere with such finding. However, if it appears to the court that the basis or foundation of charges is non-existent or there may be certain factors which taken together does not call for a harsh decision.

The court, in such situations, can interfere with the said finding and remit the matter back for fresh consideration.

The order of dismissal of service results in civil death and such harsh punishment ordinarily should not be passed unless the misconduct is grave and serious involving moral turpitude and corruption.

In the instant case, as observed by us, the findings of the authorities proceeded on the basis of the PH certificate, which the petitioner obtained, being fake and of him having acted in breach of undertaking while applying for jobs at ESIC and Customs. However, as stated by us and also by the Tribunal the findings of the disciplinary authority or the appellate authority on the genuinity of PH certificate is merely on suspicion and they could not have ignored the confirmation and reconfirmation by the issuing authority i.e the Government hospital at Chapra certifying the genuineness of the PH certificate. However, since we are of the view that the petitioner ought to have informed his present employer before applying to ESIC and Customs and that he may not have discreetly used his PH Certificate there is some dereliction on his part, which however, does not show lack of integrity or moral turpitude. He ought to have obtained prior sanction, which in our view, he is bound to do before applying to ESIC and Customs.

The ambit of 'misconduct' has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve.

Taking to drink by itself may not be a misconduct. Out of office hours one may take to drink and remain in the house. But being on duty in a disciplined service like police service, the personnel shall maintain discipline and shall not resort to drink or be in a drunken state. When such a person in a drunken state wanders in the market with service revolver and abuses the medical officer on duty it constitutes gravest misconduct warranting dismissal from service. ***[State of Punjab v Ram Singh Ex-Constable* (1992) 4 SCC 54, PP 58, 60, (1992) SCC (L&S) 793, (1992) 2 Serv LJ 160, (1992) 21 ATC 435], *State of Uttarakhand v Prem Ram* 2020 (12) SCC 658**.

The reason being that his conduct is unbecoming of a public servant.

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 services, it is misconduct. A disregard of an essential condition of the contract of service may constitute misconduct. 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, it may amount to misconduct. Such deficiencies in capacity like inefficiency, lack of qualities of leadership and deficiency in the faculty of decision making would not constitute misconduct. [***Union of India v J Ahmed* [1979] 3 SCR 504].**

The word misconduct on reflection receives its connotation from the context.

The sum and substance of the Article 1 of the charge is that Mr. Kumar did not provide correct information to the best of his knowledge while submitting the application form for the post of

Deputy Director in ESIC and has suppressed some information while participating in the Combined Graduate Level Preliminary Examination 2006. The alleged suppression and providing incorrect information relates to the physically handicapped status of Mr. Kumar. Such conduct of Mr. Kumar prompted the authority to verify the genuineness of the Disability Certificates issued by the Sadar Hospital, Chapra which were produced by Mr. Kumar at the time of entry into the present office.

The Sadar Hospital, Chapra in its letter dated 22.09.2014 acknowledged to have issued the medical certificates and also that Mr. Kumar was suffering from 50% physical impairment. The Disciplinary Authority after taking into consideration the said letter issued by the Sadar Hospital, Chapra observed that it cannot be said that the certificates are forged and the benefits availed by him under PH category was undue. However, the Disciplinary Authority upon taking into consideration the fact that Mr. Kumar did not specify while applying for the post in ESIC as to his physical impairment and also that the physicians of St. George Hospital did not discover any constitutional weakness or infirmity in his body held that Mr. Kumar deliberately suppressed facts which prove a deliberate attempt to claim undue advantage which tantamounts to gross misconduct under Rule 3(1)(i) and (iii) of CCS (CCA) Rules 1964.

The Appellate Authority, however, doubted the physically handicapped status of Mr. Kumar and directed him to appear before the Medical Board for reassessment of his physical disability.

The Medical Board headed by the Superintendent, North 24 Parganas, Barasat in its report dated 05.04.2018 reported that the temporary disability of Mr. Kumar was 10%.

The focus of the entire adjudication by the appellate authority was fixed upon the veracity and genuineness of the Medical Certificates issued by the Sadar Hospital, Chapra. The Appellate Authority relied upon the expert opinion of the Medical Board of Barasat Hospital only on the ground that Mr. Kumar has not challenged the same before any competent higher medical authority.

There is however, no allegation against Mr. Kumar that he had procured the medical certificates from Sadar Hospital, Chapra. The genuineness of such certificates were certified by the issuing authority. The Appellate Authority relied on the expert opinion of the Medical Board of Barasat Hospital while discarding the other available expert opinion of the Sadar Hospital, Chapra without any valid ground. When Mr. Kumar relied upon a Disability Certificate issued by a competent authority at the time of his appointment, he cannot be said to have made a false declaration as to his status of a physically handicapped person while applying for the present post.

Moreover, the Appellate Authority held that Mr. Kumar was not eligible for appointment as Section Officer (Audit) against a vacancy reserved for a candidate of OBC (PH) category as his disability is only 10% and that also temporary without taking into consideration a relevant fact that though he applied under OBC (PH) category but he was selected for the post reserved for OBC since he obtained higher marks in the merit list. It is not in dispute that Mr. Kumar belongs to OBC category. For the reasons as aforesaid we are unable to accept the finding of the appellate authority that he was not eligible for appointment.

The Learned Tribunal misdirected itself by giving liberty to the authorities to verify the genuineness of the Disability Certificate that was used by Mr. Kumar to seek employment when the issuing authority of Sadar Hospital, Chapra has already certified its genuineness. Thus, no useful purpose will also be served by examination of the complainants as observed by the Learned Tribunal as the complaints are in fact a challenge as to the physically handicapped status of Mr. Kumar which is no longer necessary.

However, it is beyond any doubt that Mr. Kumar violated the terms and conditions of his offer of appointment and purposefully attempted to suppress the fact of his attendance and participation in the final selection in the post of Customs Inspector held in Mumbai.

The Learned Tribunal, however, erred in law by making out a third case while granting liberty to the authorities to consider whether Mr. Kumar violated the terms and conditions while he was still on probation when it is not in dispute that he was on probation at the relevant point of time.

The quantum of punishment in disciplinary matters is primarily for the disciplinary authority to decide and the jurisdiction of the High Court under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or the other of the well-known principles known as the Wednesbury principles.

Interference with the order of punishment in a disciplinary proceeding is not permissible unless the order is contrary to law, or if relevant factors have not been considered, or if irrelevant factors have been considered, or if the decision is one which no reasonable person could have taken. These principles were consistently followed in the UK and India to judge the validity of administrative actions. (Om Kumar & Ors v. Union of India, 2001(2) SCC 386, paragraphs 24 and 26).

The power of judicial review exercised under Article 226 of the Constitution of India is circumscribed by limits of correcting errors of law or procedural errors leading to manifest injustice or the violation of the principles of natural justice and is not akin to adjudication of case on merits as an appellate authority. The limited scope of enquiry is confined to find out whether (i) enquiry was held by competent authority; (ii) whether there was compliance with the principles of natural justice and (iii) whether findings are based on some evidence and the jurisdiction of the authority to arrive at such conclusion. In addition thereto, the courts would not interfere with findings of fact arrived at in the disciplinary proceedings except in cases of mala fides or perversity. Perversity would mean where there is no evidence to support finding or findings is such that no reasonable person could arrive at such a decision. Another facet of perversity is if the finding is based on mere suspicion since “a mere suspicion or presumption should not be allowed to take place

of proof even in domestic enquiry." The evidential material must be such that it amounts to guilt of the employee in relation to the charge levelled against him with some degree of definiteness [See: ***SBI v. Ajay Kumar Srivastava***, **2021 (2) SCC 612;** ***Union of India v H.C. Goel*** **AIR 1964 SC 364;** ***Nand Kishore Prasad v State of Bihar*** **AIR 1978 SC 1277: 78 (3) SCC 366**]
In this proceeding on the basis of the materials available to the disciplinary authority and the appellate authority it cannot be said that the decision was proper or that a reasonable authority on the basis of the materials on record could have arrived at the said conclusion. In fact, the disciplinary authority did not impose the punishment by way of dismissal. On the same set of facts the appellate authority enhanced the punishment. Even if we accept that there is some lapse or dereliction on the part of the petitioner in not obtaining prior sanction from the present employee before the petitioner applied for the other government jobs or has used his PH Certificate conveniently the quantum of punishment was "shockingly disproportionate to the misconduct proved."

The Appellate Authority is directed to reconsider the quantum of punishment upon revisiting the order of punishment passed by the Disciplinary Authority and to pass any appropriate order in the light of our observations short of dismissal within a period of eight weeks from the date of communication of this order by either parties after giving a reasonable opportunity of hearing to the petitioner only on the quantum of punishment.

The orders of the disciplinary authority and the appellate authority are set aside.

The order of the Tribunal is modified to the aforesaid extent.

Both the writ petitions being WPCT 38 of 2020 and WPCT 49 of 2020 are disposed of.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of all undertakings.

(Hiranmay Bhattacharyya,J.) **(Soumen Sen, J.)**