(2011) 05 AHC CK 0345

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 27001 of 2011

Akhilesh Kumar Mishra		APPELLANT
	Vs	
The Principal Secretary, Department of Revenue, U.P. Secretariat Government and Others		RESPONDENT

Date of Decision: May 20, 2011

Acts Referred:

- Constitution of India, 1950 - Article 311(2)
- Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 - Rule 3, 6, 7, 8

Hon'ble Judges: V.K. Shukla, J

Bench: Single Bench

Final Decision: Allowed

Judgement

V.K. Shukla, J.

Petitioner has approached this Court for quashing of the order dated 25.03.2011 passed by District magistrate, Basti dispensing with the services of Petitioner.

2. Brief background of the case is that the Petitioner had been regularly absenting himself in the months of July, August, October and November, and on account of this situation, on report being submitted, the Petitioner was placed under suspension on 16.12.2010 after due concurrence was taken. Charge sheet was issued to him on 20.12.2010, to which Petitioner submitted his reply on 06.01.2011. Thereafter, it is reflected that the Inquiry Officer submitted his report on 24.02.2011. Thereafter, again show cause notice was issued to the Petitioner on 05.03.2011. Pursuant to the said notice, Petitioner appeared and stated that he was not well and he might be reinstated back in service. Thereafter, impugned order in question has been passed dispensing with his services.

3. On presentation of writ petition, precise contention was raised that in the present case that without holding any enquiry, whatsoever, report had been submitted and the order of dispensation of service had been passed. This Court asked the learned standing counsel to produce relevant record, and the relevant record has been produced, and thereafter, with the consent of the parties, present writ petition has been taken up for final hearing and disposal.

4. In the present case Rules 6, 7 and 8 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 are necessary to be looked into, and for ready reference, they are being quoted below:

6. Disciplinary Authority.- The appointing authority of a Government servant shall be his Disciplinary Authority who, subject to the provisions of these rules, may impose any of the penalties specified in Rule 3 on him.

Provided that no person shall be dismissed or removed by an authority subordinate to that by which he was actually appointed.

Provided further that the Head of the Department notified under the Uttar Pradesh Class II Services (Imposition of Minor Punishments) Rules, 1973 subject to the provisions of these Rules shall be empowered to impose minor penalties mentioned in Rule 3 of these rules.

Provided also that in the case of a Government servant belonging to Group ''C'' and ''D'' posts, the Government, by a notified order, may delegate the power to impose any penalty, except dismissal or removal from service under these rules, to any Authority subordinate to the Appointing Authority and subject to such conditions as may be prescribed therein.

7. Procedure for imposing major penalties.- Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner-

(i) The Disciplinary Authority may himself inquire into the charges or appoint an Authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the Disciplinary Authority:

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the secretary, as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidences and the name of witnesses proposed to prove the same along with oral evidences, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evednce is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence;

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before his in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witness and Production of Documents) Act 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on his or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry

ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The Disciplinary Authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the presenting officer appointed by the Disciplinary Authority is a legal practitioner or the Disciplinary Authority having regard to the circumstances of the case so permits

Provided that this rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably impracticable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules.

8. Submission of enquiry report.- When the inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority along with all the records of the inquiry. The Inquiry report shall contain a sufficient record of brief facts, the evidence and statement of the findings on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.

5. A bare perusal of the aforesaid Rules would go to show that full fledged procedure has been provided for in the matter of procedure to be adhered to while making departmental enquiry, being in consonance with principle of natural justice and rule of fair play.

6. At this juncture the view point of this Court is being looked into. Division Bench of this Court in the case of Sharad Kumar Verma Vs. State of U.P. and Others, , has taken the view that even if it is accepted that Petitioner was given adequate opportunity to inspect record, the present inquiry proceeding cannot be sustained as admittedly after submission of reply to the charge sheet,Inquiry Officer did not give any opportunity to the Petitioner to participate in the inquiry nor fixed any date . Further it has been held that charges unless proved, can not form basis of any punishment, and in this background, disciplinary proceedings are vitiated. Paragraphs 9, 10, 11 and 12 of the judgment being relevant are being quoted below:

9 Even if it is accepted that the Petitioner was given adequate opportunity to inspect record, the present enquiry proceeding cannot be sustained, as, admittedly after

submission of reply to the charge sheet, the enquiry officer did not give any opportunity to the Petitioner to participate in the inquiry nor fixed any date for leading evidence either to the department or to the delinquent officer. In fact, the requests dated 12.10.1998 and 26.10.1998 (annexures-5 and 6) have not at all been considered and the representation dated 6.6.2000 (Annexure-7) has been taken as reply to the charge sheet by the enquiry officer. This fact is evident from the averments made in para 19 of the counter affidavit. The State admits that the enquiry officer did not fix any date, time or place for holding the enquiry or for adducing evidence and the Petitioner was also not called by him to participate in the enquiry after submission of reply to the charge-sheet but defends the order by emphatically asserting that since the charges were based on documents, no oral enquiry was needed. The argument is that charges stood proved by documentary evidence, which were available with the enquiry officer and, therefor,e no illegality has been committed, if the Petitioner was not called for any oral hearing and no oral evidence was led. In support of the submission, it has also been argued that the Petitioner in his reply dated 6.6.2000 has only payed that an impartial enquiry report be submitted and had not asked for any personal hearing or opportunity to adduce evidence.

10. This question has come up before this Court very often and the Court had been explaining in all the cases of departmental proceeding s that if the delinquent denies the charges then whether he asks for personal hearing or opportunity to participate in the proceedings or not, it is the bounden duty of the enquiry officer to afford such an opportunity. The enquiry officer requires that the charges levelled against the delinquent officer should stand proved on the basis of the material on record and the necessary evidence, which may be oral or documentary or both. The delinquent has not participated in the enquiry despite the opportunity being given is a separate issue but where no opportunity is afforded, the enquiry stands vitiated. The Petitioner submitted his reply to the charge-sheet on 12.10.1998 and 21.10.1998 and in both the replies, he did not accept the charges but expressed his inability to give complete answer in t he absence of the documents being supplied. In the representation dated 6.6.2000 again the Petitioner raised the same plea and prayed that impartial enquiry report be submitted. The aforesaid request including the representation of the Petitioner by no stretch of imagination can constitute an admission on his part to the charges levelled nor would mean that he has agreed for submitting of the enquiry report without associating the Petitioner and without giving opportunity to lead evidence.

11. In departmental proceedings,the charges unless proved cannot from the basis of any punishment. The standard of proof is different as against the required standard in the case of a criminal trial but the charges levelled must stand proved on the basis of the relevant material. The moment charge is required to be proved, the necessity would arise for adducing evidence,which may be documentary or oral or both. The burden to prove charges lies upon the departmental, therefore, the

department owes its liability first to adduce evidence and take steps for proving the charge. It is after this stage that the delinquent would be required to rebut the evidence adduced an also to cross examine the witnesses produced or to nullify the documentary evidence by adducing such evidence, as may be necessary and may be available or to show the unworthiness of the documents which are sought to be relied upon but this can only be done if the enquiry officer does not fixes a date for adducing evidence and not otherwise. Merely because the delinquent did not say so in so many words about his participation in the enquiry despite the charges not being admitted to him and they having been denied, the enquiry officer does not stand absolve of his legal obligation of holding enquiry in the manner prescribed. It is to be kept in mind that denial of charges and admission of the charges cannot be taken on the same footing. There may be a case where the delinquent denies the charges specifically and there may be a case where the delinquent does not refer to the charge but does not admit the charge and in such a case also the enquiry officer would be under legal obligation to hold the enquiry to see that the charges are proved or not. It is only where in a case the delinquent admits the charge, the department may not lead any evidence before the enquiry officer and the charge can be taken to be proved, as the facts admitted need not be proved.
12. In the instant case, admittedly the aforesaid procedure was not followed an d that at no point of time the Petitioner was associated with the enquiry and, therefore, he could not get any opportunity to rebut the documentary evidence, which was relied upon nor was in a position to adduce any evidence in rebuttal. The entire proceedings was thus conducted in violation of the principles of natural justice. The charges thus cannot be said to be proved against the Petitioner and the enquiry stands vitiated on this ground alone.

7. Division Bench of this Court in the case of Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mils Federation Ltd., Kanpur and another, has taken the view that for enquiry, date, time and place has to be fixed. Relevant paragraph 4 of the said judgment is being quoted below:

4. Several points have been raised in the petition, but this petition deserves to be allowed on one ground alone, and it is not necessary to go into the other grounds. In paragraph 5 of the petition, it has been stated that no enquiry was held nor any date for holding the enquiry was intimated to the Petitioner nor was any evidence led in the said enquiry. The reply to paragraph 5 of the petition is contained in paragraph 5 of the counter affidavit. There is no denial in paragraph 5 of the counter affidavit to the allegation in paragraph 5 of the writ petition that no date for enquiry was fixed nor any evidence led in the said enquiry. All that has been said in paragraph 5 of the counter-affidavit is that in the charge-sheet fifteen days'' time was given to the Petitioner to submit his reply, and thus the date in the enquiry was fixed. In our opinion, this does not mean that the date for the enquiry was fixed. The charge-sheet is Annexure-3 to the writ petition and a perusal of the same shows

that no date was fixed for the enquiry in the same nor was any date fixed in the supplementary charge-sheet. Thus, the allegation in paragraph 5 of the writ petition that neither the date for the enquiry was fixed nor evidence led in the same stands unrebutted. In paragraph 5 of the counter-affidavit, it has been alleged that Petitioner had asked for some documents, but he was only allowed to see the documents. We are of the opinion this again does not mean that any date for the enquiry was fixed nor was any oral evidence led in the enquiry. In fact it has been admitted in paragraph 5 of the petition that no oral evidence was produced by the management.

8. Hon''ble Apex Court in the case of State of Uttaranchal and Others Vs. Kharak Singh, as to in what way and manner domestic enquiry is to be concluded, has given guidelines. Relevant portion of the said judgment contained in paragraphs 5 to 11 of the said judgment is being quoted below:

5. Before analyzing the correctness of the above submissions, it is useful to refer various principles laid down by this Court as to how enquiry is to be conducted and which procedures are to be followed.

6. The following observations and principles laid down by this Court in Associated Cement Co. Ltd. Vs. The Workmen and Another, are relevant:

... In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye-witness of the impugned incident. As we have repeatedly emphasized, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by an enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself...

... It is necessary to emphasise that in the domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be

closely cross-examined even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross-examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry proceedings by which Malak Ram was elaborately cross-examined at the outset constitutes another infirmity in this enquiry.

7. In Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar and Ors. 1993 (67) FLR 1230 (SC), it was held:

Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer''s report and the delinquent employee''s reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report. the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which representation of the employee against the enquiry officer''s report would be considered. Now the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of

the charges.

Article 311(2) says that the employee shall be given "reasonable opportunity of being heard in respect of the charges against him". The finding on the charges given by a third person like the enquiry officer, particularly, when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee''s reply to the enquiry officer''s report and conclusion of such reply by the disciplinary authority also constitute an integral part of such inquiry.

Hence, 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 of innocence of the employee with regard to the charges leveled against him. That right is part of the employee''s right to defend himself against the charges leveled against him. A denial of the enquiry officer''s report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

8. In Radhey Shyam Gupta Vs. U.P State Agro Industries Corporation Ltd. and Another, it was held:

34. But in cases where the termination is preceded by an inquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the Officer and where on the basis of such a report, the termination order is issued, such an order will be violative of principles of natural justice inasmuch as the purpose of the inquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental inquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employees conduct but are cases where the employer has virtually accepted the definitive and clear findings of the Inquiry Officer, which are all arrived at behind the back of the employee-even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive, in such cases.

9. In Syndicate Bank and Others Vs. Venkatesh Gururao Kurati, , the following conclusion is relevant:

18. In our view, non-supply of documents on which the Enquiry Officer does not rely during the course of enquiry does not create any prejudice to the delinquent. It is only those documents, which are relied upon by the Enquiry Officer to arrive at his

conclusion, the non-supply of which would cause prejudice being violative of principles of natural justice. Even then, the non-supply of those documents prejudice the case of delinquent officer must be established by the delinquent officer. It is well settled law that the doctrine of principles of natural justice are not embodied rules. It cannot be put in a straitjacket formula. It depends upon the facts and circumstances of each case. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of principles of natural justice.

10. In regard to the question whether an enquiry officer can indicate the proposed punishment in his report, this Court, in a series of decisions has pointed out that it is for the punishing/disciplinary authority to impose appropriate punishment and enquiry officer has no role in awarding punishment. It is useful to refer to the decision of this Court in A.N.D Silva v. Union of India, 1962 Supp 1 SCR 968, wherein it was held:

In the communication addressed by the Enquiry Officer the punishment proposed to be imposed upon the Appellant if he was found guilty of the charges could not properly be set out. The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punishment and not for the enquiring Authority.

11. From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all concerned materials relied on by the enquiry officer to enable him to offer his views, if any.

9. On the parameters as laid down above, it is clearly reflected that charge sheet was given to the Petitioner on 20.12.2010, to which Petitioner submitted his reply on 06.01.2011; thereafter, enquiry officer at no point of time ever proceeded to fix any

date, time or place for holding enquiry and straightaway submitted report. Such an enquiry report cannot be accepted and subscribed, for the simple reason that before proceeding to submit report, it was incumbent and obligatory on his part to have made enquires from the Petitioner by fixing date, time and place. Here, in the present case no such exercise has been undertaken and straightaway report has been submitted and action has been taken. Coupled with this, in the present case Disciplinary Authority has proceeded to mention that Petitioner is habitual in making cutting in the attendance register, as such charges are proved. In the charge sheet issued to the Petitioner, no such charge was levelled therein that the Petitioner had been interpolating in the attendance register. Once charge was not there, then on the said charge, order of punishment could not have been passed.

10. Consequently, writ petition succeeds and the same is allowed. The impugned order dated 25.03.2011 passed by District Magistrate, Basti is hereby quashed and set aside. The Disciplinary Authority is free to undertake proceedings against the Petitioner from the stage, he submitted his reply to the charge sheet and conclude the same preferably within four months from the date of receipt of a certified copy of this order, and Petitioner will extend full cooperation in the matter.