Shyam Charan Tripathi Vs State of U.P.

Civil Misc. Writ Petition No. 21282 of 2007

Court: Allahabad High Court

Date of Decision: Jan. 3, 2014

Citation: (2014) 3 UPLBEC 2213

Hon'ble Judges: Rajes Kumar, J

Bench: Single Bench

Advocate: Amit Saxena, P.K. Asthana, Shyam Bahadur and Shyamal Kumar, Advocate for the Appellant; Anurag Sharma, Advocate for the Respondent

Judgement

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Rajes Kumar, J.
Heard Sri Shyamal Kumar, learned Counsel for the petitioner and the learned Standing Counsel, appearing on behalf of

the respondents. By means of the present petition, the petitioner is challenging the impugned punishment order dated 7.10.2005, appellate order

dated 4.7.2006 and the order dated 16.1.2007, rejecting the Review Application.

2. The brief facts, as set up by the petitioner in the writ petition, are that in the month of August, 2001, the petitioner was posted as a Junior Clerk

in the office of the Assistant Commissioner, Excise, Kaushambi. During the tenure of his posting in the district of Kaushambi, on 5.10.2002, the

petitioner received an information in regard to sudden illness of his mother as a consequence of which, the petitioner moved an application for one

day leave to visit his house at Allahabad in order to look after his ailing mother on which the respondent No. 3 granted the leave and permitted the

petitioner to leave the station also. On reaching to Allahabad, the petitioner found that his mother is seriously ill as a consequence thereof, he

remained at Allahabad and was unable to join his duty on 8.10.2002. On 8.10.2002, he moved an application before the respondent No. 3 to

extend his leave upto 15.10.2002. Thereafter, the petitioner again sent an application on 15.10.2002 for extension of his leave upto 22.10.2002.

Further, on 22.10.2002, he moved another application for extension of his leave upto 2.11.2002, thereafter, he moved yet another application on

2nd November to extend his leave upto 25.11.2002. By application dated 25.11.2002, the petitioner sought extension of leave upto 20.12.2002.

The petitioner again sent application on 20.12.2002, seeking extension of his leave upto 31.12.2013 and by application dated 31.12.2002, he

sought extension of his leave upto 13.1.2003. All the applications for leave were duly received in the office of the respondent No. 3. However, no

further communication was received by the petitioner from the respondent No. 3. Sri R.C. Gupta, the then Assistant Commissioner, Excise,

Kaushambi, respondent No. 3, vide his letter dated 24.10.2002, addressed to the Deputy Commissioner, Allahabad, recommended that since the

petitioner is absent from the duty after 7.10.2002, and on being contacted on telephone, he has informed that he would not return back to join his

duty, therefore, disciplinary action be taken against him. On the basis of the aforesaid letter of the respondent No. 3, the Deputy Excise

Commissioner, Allahabad, vide his letter dated 30.10.2002, referred the matter to the respondent No. 2 to take appropriate action against the

petitioner. The respondent No. 2, in pursuance of the aforesaid letters of the Assistant Excise Commissioner, Kaushambi, dated 24.10.2002 and

the letter of the Deputy Excise Commissioner, dated 30.10.2002, vide office order dated 9.1.2003, suspended the petitioner from service

contemplating the disciplinary proceeding. A chargesheet dated 9.1.2003 has been issued to the petitioner by the Enquiry Officer, after obtaining

approval from the respondent No. 2, which has been served upon the petitioner on 6.9.2003 asking the petitioner to submit his reply to the

allegations made in the chargesheet, within fifteen days.

3. In the chargesheet, following charges have been framed:

4. In the chargesheet, the letter dated 24.10.2002, issued by the Assistant Excise Commissioner, Kaushambi and the letter dated 30.10.2002,

issued by the Deputy Excise Commissioner, Allahabad have been relied upon. The petitioner filed a detailed reply to the chargesheet, which is

Annexure-5 to the writ petition. In the reply, it has been categorically stated by the petitioner that it is wrong to say that the applications for leave

have not been moved. The telephonic talk with Sri R.C. Gupta, Assistant Excise Commissioner, Kaushambi has also been denied by the petitioner.

The other allegations have also been denied. During the enquiry proceeding, the statement of Sri R.C. Gupta, Assistant Excise Commissioner,

Kaushambi has been recorded on 26.10.2004. The copy of the statement is Annexure-7 to the writ petition. The statement of the petitioner has

also been recorded on the same day. The copy of the statement of the petitioner is annexed as Annexure-8 to the writ petition. The Enquiry Officer

concluded the enquiry and submitted the enquiry report dated 5.11.2004 wherein following conclusion has been drawn:

5. On the receipt of the enquiry report, the Disciplinary authority issued a show cause notice dated 5.6.2005, proposing three punishments,

namely, (i) stoppage of three increments with cumulative effect, (ii) awarding one special adverse entry and (iii) non-payment of remaining part of

the salary apart from subsistence allowance for the period of suspension.

6. The petitioner filed a detailed reply to the show cause notice issued to him proposing the punishment.

7. The Disciplinary authority, vide order dated 7.10.2005, awarded the punishment as proposed in the show cause notice. Against the said order,

the petitioner filed appeal, which has been dismissed vide order dated 4.7.2006. The petitioner filed a review application before the appellate

authority, which has also been rejected on 16.1.2007. Against the said orders, the petitioner filed the present writ petition.

8. Learned Counsel for the petitioner submitted that the punishment awarded to the petitioner is wholly unjustified. The respondents failed to prove

that Sri R.C. Gupta, Assistant Excise Commissioner, Kaushambi, ever had any telephonic talk with the petitioner, particularly, when the petitioner

has categorically denied any such telephonic talk, therefore, the allegation that the petitioner stated on the telephone that he would not come back

and would not join the duty, which has been referred in the letter dated 24.10.2002, is incorrect and further there is no basis to state that in the

telephonic talk, the petitioner has stated that unless he is transferred to Allahabad, he would not join the duty. Such allegation is without any basis

and is contradictory. He submitted that in the enquiry report, receipt of the leave applications has been admitted and all the leave applications are

on record. Possibility cannot be ruled out that the applications may have been received in the office a little late. It is also submitted that the leave

sought for have been sanctioned by the Joint Excise Commissioner, Agra Zone, Agra vide his office letter dated 4.11.2006, for the period

7.10.2002 to 14.1.2003 as earned leave with full pay. This fact which has been stated stated in paragraph 27 of the writ petition has not been

denied in the counter affidavit. The averments made in the said paragraph have been replied in paragraph 16 of the counter affidavit wherein the

facts stated in paragraph 27 of the writ petition have not been disputed. Therefore, the major punishment of stoppage of three increments with

cumulative effect awarded to the petitioner is wholly unjustified. It is further submitted that non-payment of remaining part of the salary apart from

the subsistence allowance for the period of suspension is also not justified.

9. Learned Standing Counsel relied upon the impugned orders and submitted that the petitioner has been awarded punishment on account of his

misconduct as the petitioner has given such reply on telephone to Sri R.C. Gupta, Assistant Excise Commissioner, Kaushambi, which was not

expected from an employee and further the leave applications have been received in the office not in time before availing the leave. Therefore, the

punishment awarded is fully justified.

10. I have considered rival submissions and perused the impugned order as well as relevant documents available on record.

11. It is true that the jurisdiction of the Court in judicial review in a departmental proceeding is very limited, but if the order is based on no material

or on surmises and conjunctures and on irrelevant facts, this Court has the jurisdiction to review the punishment order. The Apex Court, in the case

of M.V. Bijlani Vs. Union of India (UOI) and Others, , while considering the issue of judicial review in a departmental proceeding, held as follows:

25. It is true that the jurisdiction of the Court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there

should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial

i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the

documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record.

While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of

proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmise and conjectures. He cannot enquire into the allegations

with which the delinquent officer had not been charged with.

12. In the present case, the petitioner has been held guilty of misconduct mainly on the ground that while having a telephonic talk with Sri R.C.

Gupta, Assistant Excise Commissioner, Kaushambi, he made reply which was uncalled for. In this regard, it has been stated that the petitioner in

his reply before the Enquiry Officer has specifically denied any talk on telephone with Sri R.C. Gupta. Neither in the letter dated 24.10.2002 nor in

the enquiry report, it is stated that Sri R.C. Gupta, Assistant Excise Commissioner, Kaushmabi ever had any such telephonic talk with the

petitioner. Moreover, the allegation is contradictory. In the letter dated 24.10.2002, it is stated by Sri Gupta that on the telephone it has been

informed by the petitioner that he would not join the duty. There is nothing in the letter to suggest that the petitioner has stated that he would not

join the duty, unless he is transferred to Allahabad, while in the charge, it has been alleged that during telephonic talk, he informed that he would

not join the duty, unless he is transferred to Allahabad. Such charge is without any basis inasmuch as the respondent failed to prove any such

telephonic talk with the petitioner and, therefore, the allegation in respect of telephonic talk could not be established.

13. So far as the allegation that the leave applications have not been submitted in time is concerned, it is not in dispute that the petitioner has sent

the leave applications seeking leave. The applications are on record. It is also not in dispute that the leave sought for has been sanctioned by the

Joint Excise Commissioner, Agra Zone, Agra. In the circumstances, for the reason that the application has been moved a little late and could not be received in the office in time, major punishment should not have been awarded. The respondents failed to prove that the petitioner remained

absent from duty willfully and, therefore, no case of misconduct has been made out. In the case of Krushnakant B. Parmar Vs. Union of India

(UOI) and Another, , the Apex Court, while dealing with the similar controversy, held as follows:

16. In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and

his behavior was unbecoming of a Government servant. The question whether ""unauthorised absence from duty"" amounts to failure of devotion to

duty or behavior unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of

compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held

to be willful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean

willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his

control like illness, accident, hospitalization, etc., but in such case he employee cannot be held guilty of failure of devotion to duty or behavior

unbecoming of a Government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the

absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

The aforesaid decision of the Apex Court has been followed by a Division Bench of this Court in Writ Petition No. 21454 of 2010, Ram Jiyawan

v. The Union of India and others, decided on 28.2.2012.

14. It was pleaded by the petitioner that he sought leave on account of illness of his mother, therefore, there may have been compelling

circumstances on account of which he could not submit the leave application within time before availing the leave, but such an act does amount a

willful absence from the duty. In the facts and circumstances of the case, I am of the view that the punishment awarded for such a little lapse that

the leave application could not have been given in time is too harsh. The petitioner can, at best, be awarded censured entry only.

15. In the light of what has been discussed above, the writ petition is allowed in part. The impugned orders, dated 7.10.2005, 4.7.2006,

16.1.2007, are hereby quashed. There will be no order as to cost.