India Law Library Web Version

This Product is Licensed to : Bhagyashree Lele, Advocate

Docid # IndLawLib/118127

(2008) 3 AllLJ 759 : (2008) 26 LCD 579

ALLAHABAD HIGH COURT (LUCKNOW BENCH)

STATE OF U.P.AND OTHERS — Appellant

Vs.

MOTI LAL — Respondent

(Before : Pradeep Kant, J and Shri Narayan Shukla, J)

Special Appeal No.185 of 2008

Decided on : 26-03-2008

- Constitution of India, 1950 - Article 311(2)(b) Proviso II
- Uttar Pradesh Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 - Rule 8(2)(b) Proviso

A. Service Law — Dismissal from service — Unauthorized absence — Dispensing with inquiry — U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 — Rule 8(2)(b) — Analogy with Article 311(2) of the Constitution of India — An employee's unauthorized absence, even if habitual, does not automatically justify dispensing with a departmental inquiry under Rule 8(2)(b) or Article 311(2) proviso (b) for dismissal from service. (Paras 3, 5, 6, 7, 8, 9, 10, 17)

B. Service Law — Departmental Inquiry — Dispensing with Inquiry — Mandatory requirement of recording reasons — Rule 8(2)(b) of 1991 Rules; Article 311(2) Proviso (b) — The power to dispense with a departmental inquiry must be exercised objectively, with recorded reasons demonstrating that holding an inquiry is "not reasonably practicable"; mere presumption or surmise is insufficient. (Paras 6, 7, 13, 14)

C. Service Law — Departmental Inquiry — Opportunity to be heard — Unauthorized absence — Even if an employee is absent without authorization,

due process requires the initiation of an inquiry, issuance of a charge sheet, and affording an opportunity to participate; only if the employee fails to respond after such steps can the disciplinary authority proceed ex parte. (Paras 7, 8, 17)

D. Constitution of India, 1950 — Article 311(2) — Provisos — Scope and Application — The provisos to Article 311(2) are exceptions to the general rule requiring an inquiry before dismissal, removal, or reduction in rank. They must be applied strictly and not take the place of the rule itself; dispensing with an inquiry cannot be based on mere conjectures or to arbitrarily get rid of an employee. (Paras 9, 11, 12, 15)

E. Service Law — Dismissal for misconduct — Requirement of inquiry — Unauthorized absence is misconduct, but for a confirmed employee, an inquiry is generally mandatory before awarding punishment, whether major or minor, unless it falls within the narrow exception of "not reasonably practicable" to hold such inquiry, with valid reasons recorded. (Paras 6, 7, 17)

F. Service Law — Judicial Review — Scope — Dismissal orders passed by dispensing with inquiry — High Court's review of such orders focuses on whether the disciplinary authority correctly applied the "not reasonably practicable" test and recorded valid reasons, ensuring the constitutional protection to the employee is not rendered illusory. (Paras 4, 10, 11, 18)

JUDGMENT

1. Though there is delay of two months and few days in filing the Special Appeal, but the counsel for the respondent Shri Ramesh Singh states that he has no objection, if the delay is condoned and the Special Appeal is heard on merits. Accordingly we condone the delay in filing the Special Appeal.

2. The order passed by the learned Single Judge dated 28th of November, 2007 is under challenge, by means of which the orders dated 10.12.2006 and the order dated 18th April, 2007 communicated on 1.5.2007, namely, dismissal from service and the order passed in appeal have been set aside and the respondent has been allowed only 50% salary of arrears with liberty to the appellants to hold enquiry in accordance with law.

3. In a nutshell the relevant facts of the case are that the respondent, who was appointed as Constable on 26.12.199, while posted at Unnao, went on leave on 3rd of September, 2003 and continued till 30th of December, 2003 i.e. 110 days. The respondent's absence was taken as unauthorized absence from duty and Superintendent of Police assuming that it would not be reasonable and practicable to hold departmental enquiry, passed the order of dismissal from service without holding any enquiry in exercise of power provided under

proviso to Rule 8(2)(b) of the Rules known as U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991.

4. The learned Single Judge has allowed the writ petition after holding that the dismissal order could not have been passed without holding enquiry and Rule 8(2)(b) did not permit such action. Liberty, however, has been given to hold enquiry in accordance with law.

5. Shri T.J. S. Makkar, learned counsel for the State assailing the aforesaid order has submitted that the learned Single Judge did not take into consideration that the respondent was in the habit of remaining on unauthorized absence as is evident by the fact that he remained absent with effect from 3rd September, 2003 to 20th of December, 2003 and again on various other dates and right from 7th December, 2006 he was continuously absconding from his duties till the date of issuance of the order of dismissal. He further submitted that the respondent was issued two notices dated 12th September, 2006 and 16th of October, 2006 requiring him to join, but the respondent did not respond, even after issuance of these two letters. Taking it to be a case of deliberate unauthorized absence and disinterestedness of the respondent in responding to the letters, of request for joining, prompted the appointing authority to get satisfied, if any, departmental enquiry is conducted it would reasonably be not practicable to hold such enquiry and therefore the order has been passed after dispensing with the enquiry.

6. Unauthorised absence from duty is a misconduct. For any misconduct of a government servant who is a confirmed employee, holding of enquiry is must before taking any action or awarding any punishment which may be major or minor as per Rules. The exception to the aforesaid Rule is that in given cases, which fall within the strictly defined area where it is reasonably not practical to hold enquiry, such an enquiry can be dispensed with, but in doing so the Disciplinary Authority/Appointing authority had to record the reasons of his satisfaction in writing. The requirement of recording the reasons and expressing his satisfaction is mandatory which provides a safeguard to the interest of the employees and also to allow the punitive action to be taken against the erring government servants against whom enquiry cannot be held for the reasons so recorded. The question as to whether it was practically possible to hold enquiry or not, has to be considered on objective consideration and not merely on presumption or surmises and conjectures.

7. The government servant who is on leave and overstays or he absents himself from duty without sanctioned leave which would constitute unauthorized absence from duty is liable to be proceeded with for the misconduct committed by him by holding departmental proceedings. Departmental proceedings may be held with or without suspending the government servant. But a charge sheet has to be issued and opportunity is to be given to such a delinquent to participate in the enquiry. It is a different matter that despite full opportunity being given to the charged government servant, he or she as the case may be, does not avail the opportunity of participating in the enquiry and in such cases the disciplinary authority always is at liberty to proceed ex parte and to decide the fate of such

a government servant after recording a finding of proof of guit/charges on the basis of material available with the enquiry officer or the appointing authority, but to presume that a government servant, who is on unauthorized leave or absence would not participate in the enquiry even if such an enquiry is instituted and the charge sheet is issued, is too speculative and too imaginative and without any basis.

8. A government servant may not be sincere to his duties or may be casual in attending his duties but once when his absence is likely to adversely affect his services, there would be no reason for him not to respond to the charge sheet and not to participate in the enquiry and not to give any explanation for his absence. However, if he chooses not to do so, there is no dearth of power with the appointing authority to take appropriate action against such an employee by passing an appropriate order of punishment, but such an action can be taken only after affording opportunity of participating to the delinquent in the enquiry.

9. Rule 8(2)(b) is analogous to the provisions of Article 311 (2) of the Constitution of India, which says that no Police Officer shall be dismissed, removed or reduced in rank except after proper enquiry and disciplinary proceedings as contemplated by these Rules and the proviso attached to the aforesaid rule is pari materia with the second proviso of subclause (b) of Article 311(2), which says that this rule shall not apply where the authority empowered to dismiss or remove a person or to reduce him in rank if satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry.

10. Learned Single Judge has considered the aforesaid rule and has observed that a police officer can be dismissed from service without holding any enquiry after the authority is satisfied that if it is not reasonably practicable to hold the enquiry. Relying upon the various cases of the Apex Court as well as High Court the Court has found that there was no justification for the Superintendent of Police to dismiss the respondent from service by applying the proviso to aforesaid Rule 8(2)(b) that is without holding any enquiry.

11. Without repeating the cases which have been cited by the learned Single Judge we would like to place on record the judgment passed by the Division Bench of this Court in the case of State of U.P. and others v. Chandrika Prasad, (2006) 1 ESC 374 (All.) (DB), where provisions of Rule 8(2)(b) was considered and it was held that mere mention of fact that delinquent person may influence witnesses, without there being any material to support the same, is nothing but a conjectural surmise and ipse dixit on the part of the disciplinary authority to dispense with the enquiry. If the contention of the appellant is accepted, the constitutional protection, available to a government servant under Article 311(2) of the Constitution as reflected in Rule 8(2) of the aforesaid Rules would render illusory and artificial. The normal rule of enquiry can always be defeated by the disciplinary authority in an arbitrary manner whenever it intends to get rid of a government servant for any reason, it did not find conducive to its expectations. Constitutional protection cannot be dispensed with lightly as held by the Apex Court and is to be followed

and observed in words and spirit and strict manner.

12. In another case of Mrigendra Singh v. State of U.P. and others, reported in 2008 (26) LCD 301 the Division Bench of this Court in which one of us (Pradeep Kant, J.) was a member, the question arose whether the dismissal from service of a police officer by applying the second proviso (b) and (c) of Article 311(2) was valid, the Court came to the conclusion as under:

(5) The scheme of the aforesaid provision guarantees an inquiry into the alleged misconduct of the government servant as a rule whereas dispensing with the same is an exception. Subclause 2 of Article 311 specifically prohibits dismissal, removal or reduction in rank of a government servant without holding any inquiry and without giving him any opportunity of being heard in respect of the charges on which he may be subjected to any of the major punishment.

(6) Explanation to the aforesaid rule is given in second proviso wherein subclause (a), (b) and (c) do envisage a possibility when a person is dismissed, removed or reduced in rank on the ground of misconduct which has led to his conviction on a criminal charge or where the authority empowered to dismiss or remove or reduce in rank, is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or where the President or the Governor, as the case may be, is satisfied that in the interest of the security by the State, it is not expedient to hold such inquiry.

13. It has been further held that it is essential that the authority empowered to inflict major punishment must feel satisfied that for some reason or the other, the inquiry cannot be held but that reason also has to be recorded in writing which should indicate that it was not reasonably practicable to hold such inquiry unless such a finding is recorded, the order passed under the said provision would become bad.

14. The Court further held that the reason so recorded must also be valid and relevant and not merely a camouflage. It is not pure subjective satisfaction of the authority to dispense with the inquiry but his discretion is circumscribed by the requirement of recording such a reason, which of course, has to be a valid reason for which the inquiry cannot be practicably held. For example, if a government servant is available, the documents, witnesses or the material on which the inquiry is to be conducted are also available or the material on which the inquiry is to be conducted are also available and there is no other legal or practical impediment, there would be no reason to dispense with the inquiry.

15. Subclause (2) of Article 311, the substantive provision, does not lay down any exception nor confers any discretion upon the empowered authority of not holding an inquiry into the charge of misconduct against a government servat and to pass order without affording any opportunity. It is only in the second proviso that an exception is carved out but an exception cannot take a place of rule and has to be applied only in the circumstances given therein and as may be permissible under the said Article.

16. The proviso to Rule 8(2)(b) can thus not be applied unless the reasons so exist, which would not allow the inquiry to be held.

17. In the instant case no departmental inquiry was, however, set up or instituted, no charge sheet was issued and at no point of time the respondent was required to participate in the inquiry. No such steps were taken, and merely, because the respondent absconded without leave or he was treated on unauthorized absence, there could not have been a case where the services could have been dispensed with, without holding inquiry. In case any such step had been taken and the delinquent, namely, the respondent even if had not responded to the opportunity given, in that case also, it was also open to the appointing authority/ disciplinary authority to proceed with the inquiry may be ex parte and pass appropriate orders.

18. We do not find any illegality or impropriety in the findings recorded by the learned Single Judge. We accordingly hold that the appeal is devoid of merit and the same is hereby dismissed. The order passed by the learned Single Judge is upheld.

(Appeal dismissed)