HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPASW No. 282/2002
c/w CROSS No. 388/2002

Date of Decision: 10.07.2014

Union of India and anr.. **Vs.** Bharat Singh
Along with connected matter.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice
Hon'ble Mr. Justice Hasnain Massodi, Judge

Appearing counsel:
For appellant(s): Mrs. Neeru Goswami, Dy. AG.
For Respondent(s): Mr. M.L Gupta, Advocate

i) Whether approved for reporting in Press/Journal/Media : Yes/No/optional

ii) Whether to be reported in Digest/Journal : Yes/No

Per Massodi J:

1. Shri Bharat Singh-respondent herein and appellant in cross appeal No. 388/2002, an employee of National Seeds Corporation Limited (a Government of India undertaking) was held guilty by Chief Judicial Magistrate, Jammu, vide judgement dated 17/02/1977, of offence punishable under Section 409, RPC and sentenced to six months imprisonment and a fine of Rs 1000/-. He was found to have while discharging his official duties during 1969-1971, embezzled an amount of Rs 9417.75 received by him on account of sale proceeds and fraudulently reported to have been deposited with National Seed Corporation Limited, Regional Office Chandigarh.

2. On the allegation of criminal breach of trust levelled against the respondent during the course of his official duties, he was placed under suspension and a departmental inquiry initiated against him. Soon after respondent was convicted of the offence punishable under Section 409 RPC, the respondent was dismissed from

service vide Order no. 5(49)/71-Vig/NSC Dated 26/05/1977.

3. The respondent immediately after he was convicted and sentenced by the trial court, questioned the trial court judgment through medium of criminal appeal before Learned Sessions Judge, Jammu. The appeal was transferred to Additional Sessions Judge, Jammu who vide judgement dated 26/12/1996 accepted. The appeal and set aside the trial court judgment, acquitting the respondent of all charges.

4. Encouraged by his acquittal, respondent on 14/10/1998 filed a writ petition being SWP 2152/1998, questioning Order No. 5(49)/71-Vig/NSC dated 26/05/1977, whereby he was dismissed from service. He on the strength of averments made in the petition sought a writ of *"certiorari"* quashing the aforesaid order and a writ of *"mandamus"* commanding the respondent in the writ petition (National Seeds Corporation Limited) to allow him to resume his duty and pay him all emoluments including unpaid salary and also to accord consideration to his promotion.

5. The main plank of the petitioner's case was that the allegations levelled against him were false and frivolous, and as he was acquitted of all charges, the dismissal order dated 26 May 1977, was liable to be set aside. It was pleaded, that once charge-sheet was dismissed and accused acquitted, dismissal order passed on the same allegation found to be without substance by the appellate court, would be striped of its force. He claimed to have submitted his joining report after his appeal against sentence and conviction allowed but was not permitted to resume his duty.

6. The writ petition was opposed by the respondents in the writ petition (present appellant) on the ground that the criminal mis-appropriation of Rs 9417.75 subject matter of the charge-sheet filed on 23/10/1972 and decided on 17/02/1977 was not the only case of mis-appropriation detected against the writ petitioner (respondent in the present appeal). It was pleaded that another case of mis-appropriation of Rs 3127.50, led to registration of an FIR with P.S CBI and the charge-sheet (file No. 216/Challan) filed on conclusion of investigation on 26/11/1977 taken to its logical end and respondent, convicted of the offence punishable under Section 409 RPC vide judgement dated 17/02/1977 and that the appeal against the convictional sentence dismissed vide judgement dated 20/08/1985 and conviction and sentence upheld. However, criminal revision registered as criminal revision No. 73/1985 against the trial court and appealate court judgments was accepted vide judgement dated 1/10/1992 and conviction and sentence was set aside.

7. The counter affidavit referred to one more case of embezzlement detected against respondent involving mis-appropriation of amount of Rs 4039.20. The appellant was claimed to have initiated enquiry against the respondent and framed charge-sheet vide Memo No. 5(1)/71/VIS/ NSC dated 19/08/75 and duly served it on the respondent. The copy of the enquiry report was said to have been also served on the respondent on 27/08/1976. It was averred that on conclusion of the enquiry proceedings, having regard to finding returned by the enquiry officer and the conviction and sentence awarded by the competent court on charge of criminal mis-appropriation of Rs 9419.75 penalty of dismissal from service was imposed on the respondent.

8. The appellants claim to have acted in exercise of powers conferred by Rule 19 (1) read with Rule 11, C.C.S (CCA) Rules 1965 and that the dismissal order No. 5(49)/71-Vig/NSC dated 26/5/1977 was duly served on the respondent on 05/06/1977. The appellants insisted that the dismissal order impugned in the petition, was accepted by the respondent and challenge to the order, 22 years after it was made, makes writ petition non-maintainable on the ground of delay and laches. The writ court was reminded that it would not be open to it to deal with factual averment made in the petition, or sit in appeal over the findings returned in departmental enquiry. The acquittal of accused according to appellant would not entitle him to resume his duty or get the dismissal order set aside. The appellants denied that the dismissal order was based exclusively on respondent's conviction of offence punishable under section 409 RPC. It was pleaded that a full-fledged enquiry was made and all the charges framed against the appellant were substantiated and the respondent dismissed from service. The dismissal order was said to be in strict conformity with the rules and therefore, not open to challenge.

9. Respondent in his rejoinder filed on 1st May 2000 admitted to have received a charge-sheet, but insisted that a detailed and elaborate reply was submitted by respondent in reply to charge-sheet. The respondent claimed to have volunteered to deposit the amount found to have been retained by him, in easy instalments of Rs 50/- per month. It was also admitted that on conclusion of enquiry, notice was issued, requiring him to show-cause against "removal from service". Respondent claimed to have filed in reply to the notice reiterating that allegations of mis-appropriation of corporation money

was without any substance and that in view of Civil Service Rules (1965), no action was warranted against him.

10. The writ court, on going through the pleadings and record available on the file, found appellants to have issued a notice to the respondent on 19/8/1976, requiring respondent to show-cause against his "removal from service". The court held that after the appellant decided to dismiss petitioner from service instead of "removal from service" it did not serve a fresh notice on the respondent enabling him to show-cause against proposed punishment. In the opinion of the writ court failure on part of the appellants to serve final notice afresh on the respondent indicating therein that they proposed to dismiss him from service, was fatal to the departmental enquiry and order, whereby respondent was "dismissed from service". The writ court did not agree with contention that petition suffered from delay and laches, as according to writ court, respondent had cause to question his dismissal only after criminal appeal filed against the trial court judgment was decided by the appellate court. It was pointed out that as the criminal appeal was decided on 26/12/1996, cause to file writ petition did not accrue to the respondent till 26/12/1996. The respondent was held not to have been slept over the matter, so as to warrant dismissal of the writ petition on the ground of delay and laches.

11. The writ petition was accordingly disposed of with a direction that the respondent shall stand reinstated and would enjoy the same status as he was enjoying when the order of dismissal was passed. The respondent however was required to show-cause as to why he should not be "removed from service", unless a fresh show-cause

notice for a different punishment was issued. The appellants were thereafter to examine the cause shown by the respondent and pass appropriate orders within two months from the date cause was shown by respondent.

12. The writ court judgment dated 13th July 2001 is questioned by the Union of India and National Seeds Corporation Limited through medium of instant Letters Patent Appeal on the grounds set out in memo of appeal. The respondent also is not satisfied with writ court judgment and question is in cross appeal registered it Cross No. 388/2002.

13. The appellant's case is that three instances of embezzlement of Government money were detected against the respondent, committed while discharging his duties as employee of the appellant Corporation, that first case of embezzlement involving Rs 9419.75 relating to period of 1969-71 led to registration of case by Central Bureau of Investigation resulting in filling of charge-sheet in the court of Chief Judicial Magistrate, Jammu, decided on 17/02/1977; that second such instance involving an amount of Rs 3127.50 during the period 30/12/1970 to 7/6/1971 also led to registration of a case and filing of chargesheet in the court of Chief Judicial Magistrate, Jammu decided on 27/09/1979 and third instance of criminal mis-appropriation involving Rs 4039.20 became subject matter of departmental enquiry and respondent was charge-sheeted on account of third instance of mis-appropriation i.e mis-appropriation of Rs 4039.20 vide Memo No. 5(1)(71)/VIS/NSC dated 19/8/1975; that the departmental enquiry was concluded in accordance with rules and in the meantime, respondent was convicted of the offence punishable under section 409 RPC, involving embezzlement of Rs 9419.75 vide trial court judgment

dated 17/2/1977 and respondent vide order No. 5(49)/71-Vig.NSC dated 26 May 1977 dismissed from service.

14. It is pointed out that, as the respondent's dismissal was ordered on conclusion of departmental enquiry relating to mis-appropriation of Rs 4039.20 not subject matter of either of the criminal cases, the cause to question dismissal order dated 26/5/1977 did not accrue to the respondent after the criminal appeal was decided. The view taken by writ court that petition did not suffer from laches and delay is said to be erroneous and based on mis-appreciation of facts. The respondent is said to have vide communication dated 26 March 1976, during pendency of departmental enquiry admitted to have mis-appropriated a sum of Rs 4039.20 and even agreed to re-deposit the amount. The appellant insists that acquittal in criminal charges is not necessarily to result in quashment of the decision in the departmental proceedings or to reinstatement of dismissed employee.

15. It is denied that respondent was prejudiced because a fresh notice regarding proposed punishment i.e "dismissal from service" was not issued to him as according to the appellant, the two punishments i.e "dismissal of service" and "removal from service", are alternate punishments and the disciplinary authority is competent to impose appropriate punishment on consideration of enquiry report and the reply received from a delinquent official.

16. Respondent is aggrieved with the writ court judgment as it does not direct the appellants to pay back-wages to the respondent from the date he was placed under suspension and to provide him all the service benefits including promotion that would come his way except for

his suspension and "dismissal from service". It is pleaded that once the writ court held the dismissal order to have been passed in violation of rules and ordered his reinstatement, it was incumbent upon the writ court to direct the appellant to pay all the emoluments and service benefits including promotion to the respondent.

17. We have gone through memo of appeal and the Cross Appeal as also the record placed on the file. We have heard learned counsel for the parties at length.

18. It is well settled that where misconduct alleged against a government employee leads to a criminal case as well as departmental enquiry, the outcome of criminal case is not necessarily to clinch the departmental enquiry. To illustrate, if an allegation of embezzlement of government money results in an FIR registered against delinquent official and the competent authority is prompted to direct a departmental enquiry, acquittal of delinquent official, of the charges is not to automatically exonerate the delinquent official of charges in departmental enquiry and his reinstatement. The reason being that standard of proof in a criminal trial is different from one required in departmental enquiry. While in a criminal trial the prosecution has to prove its case beyond reasonable doubt and even the lapse on the part of the investigating officer or the prosecution may earn the accused acquittal, same is not true about departmental enquiry wherein even an admission by the delinquent official may be considered by the enquiry officer to return findings of guilt against the employee.

19. *Supreme Court in Divisional Controller, KSRTC Vs. M.G. Vittal Rao (2012) 1 SCC 422,* where the employee was found guilty of offence punishable under section

457, 381 read with section 34 IPC by the trial court and criminal appeal against trial court judgment was dismissed though the criminal revision filed by him succeeded and his conviction was set aside and the High Court allowed the writ petition filed after the acquittal declaring the petitioner entitled to be reinstated into service with all consequent benefits, setting aside the High Court order reinstating the petitioner, held;

> *".....The question of considering reinstatement after decision of acquittal or discharge by a competent criminal court arises only and only if the dismissal from services was based on conviction by the criminal Court in view of the provision of Article 311(2) (b) of the Constitution of India, 1950, or analogous provisions in the statutory rules applicable in a case. In a case where enquiry has been held independently of the criminal proceedings, acquittal in a criminal court is of no help. The law is otherwise. Even if person stood acquitted by a criminal Court, domestic enquiry can be held, the reason being that the standard of proof required in a domestic enquiry and that in a criminal case are altogether different. In a criminal case, standard of proof required is beyond reasonable doubt while in a domestic enquiry it is the preponderance of probabilities that constitute the test to be applied"*

The court after scanning case law on the subject referred to following observation made in *Nelson Motis Vs. Union of India & Anr., AIR 1992 SC 1981*

> *"The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceedings.".*

20. The court referred to following observation made in *Ajit Kumar Nag Vs. General Manager (PJ) Indian Oil Corporation Ltd., 4 (2005) 7 SCC 764,*

> *"In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules or evidence and procedure would not apply to departmentally proceedings. The degree of proof which is*

> *necessary to order a conviction is different from the degree or proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is one the prosecution and unless the prosecution is able to prove the guilt of the accused "beyond reasonable doubt," he cannot be convicted by a Court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability.*

Emphasizing the need to ensure that departmental proceedings are not unduly delayed, the court extracted following observation made by it in *State of Rajasthan Vs. B.K.Meena & Ors., 5 AIR 1997 SC 13*

> *".....The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any change of misdemeanour is enquired into promptly. The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements. The interest of delinquent*

officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely i.e for long periods awaiting the result of criminal proceedings, it is not in the interest of administration . It only serves the interest of guilty and dishonest….".

21. In the present case merely because the respondent earned acquittal after his criminal appeal against the trial court judgment 17/2/1979 holding him guilty of having embezzled Rs 9419.75 was allowed on 26/12/1996 and would not automatically negate findings returned by the enquiry officer in departmental enquiry concluded on 19th August 1976 . Having said so, let us now go to the reasons that persuaded the writ court to dispose of the writ petition in the manner stated above.

22. The writ court was impressed by the argument that the appellant failed to issue a fresh notice to respondent indicating that it proposed to dismiss him from service and that such failure was fatal to the departmental enquiry and its outcome. The argument had its foundation on the contents of show-cause notice served on respondent on conclusion of the departmental enquiry vide No. 5(1) 75 VIG/NSC/ 1041 dated 19th August 1976, whereby the respondent was informed that it was

proposed to impose penalty of "removal from service" on him and he given an opportunity to represent against the proposed punishment. The respondent filed a detailed representation against the proposed punishment on 4th October 1976. The enquiry record and representation filed by the respondent were considered by the disciplinary authority and the respondent vide order No. 5(49)/71-Vig.NSC Dated 26/05/1977 "dismissed from service".

23. The disciplinary authority ordered respondent's dismissal from service instead of his "removal from service" as indicated in show-cause notice dated 19th August 1976 possibly because the authority in addition to the enquiry report whereby respondent was found to have embezzled an amount of Rs 4039.20 also took notice of trial court judgment dated 17/2/1977, whereby respondent was convicted of offence punishable under Section 409 RPC involving embezzlement of an amount of Rs 9417.75 The writ court took the view that once the respondent was asked to show-cause against his "removal from service" he could not have been subsequently "dismissed from service". We do not agree with the reasoning given by the writ court in support of the judgment impugned in the appeal. The notice dated 19th August 1977 reproduced the findings recorded by the enquiry officer to the effect that the respondent was found to have embezzled an amount of Rs 4039.20 and the conclusion drawn by the disciplinary authority that respondent was not a fit person to be retained in service of National Seeds Corporation Limited and that it was proposed to remove him from service. The respondent therefore, was through notice dated 19th August 1997 informed with sufficient

clarity that disciplinary authority proposed to get rid of him and that he was to be no-more retained in the service of Corporation. Respondent well aware of all the charges proved against him and provisional conclusion arrived at by the disciplinary authority, submitted a detailed reply/representation making an effort to prove that the amount alleged to have been embezzled by him was not so embezzled as it was reflected in the relevant R&P statement made by the respondent.

24. Respondent assailed the enquiry report on the number of grounds detailed in his reply/representation. He insisted that as the charge was not proved against him no penalty was to be imposed as he was not guilty . The respondent did not refer to any mitigating circumstances that according to him called for a lesser punishment or lenient view to be taken up in the matter. Even if, a notice indicating that penalty of "dismissal from service" was proposed to be imposed on the respondent, he would not have come with any better explanation than one set out in his representation spread over 17 Paragraphs and 6 pages, with all aspects of the matter dealt with.

25. Departmental enquiry involves issuance of notice at the threshold informing the delinquent official that departmental enquiry was proposed to be held against him on the charges conveyed to him, as also, the evidence by which the charges were proposed to be proved. Once the enquiry is concluded after the delinquent official is given an adequate and reasonable opportunity to put forth his stand and the enquiry officer records his findings and submit the enquiry record with findings to disciplinary authority, second

notice is to be given to the delinquent official now informing him about the outcome of enquiry and the penalty tentatively proposed to be imposed. In reply to the second notice, the delinquent may voice his reservation about the result of the enquiry or conclusion drawn by the enquiry officer and also make an effort to convince the disciplinary authority that there are extentuing and mitigating circumstances, that call for a lesser punishment.

26. In the present case, the respondent made full use of opportunity given to him to show-cause against the proposed punishment and set out in detail the reasons that according to him belie the conclusion drawn by the enquiry officer. The respondents did not question penalty proposed to be imposed or label it as excessive and disproportionate or project mitigating circumstances ask for a lesser punishment. Failure on the part of the disciplinary authority to issue the second final notice informing the respondent that it was propose to dismiss him from service, in our opinion in the facts and the circumstance of the case has not caused any prejudice to the respondent , more so, when there is very little difference between two punishments, having regard to their fall out on the service career of a government employee.

27. The requirement to give a notice to a delinquent official informing him of proposed penalty is only an extension of principle of natural justice. It is well settled, that the principle of *audi alteram partem* (right to be heard) is not of universal application and may not warrant compliance where it is not going to make a change in the final outcome or change in the final decision. *Supreme*

Court in Managing Director, ECIL Hyderabad v. B. Karunakar AIR 1994 SC (1074) held that;

> *"When an employee is dismissed or removed from service and the enquiry is set aside because the report is not furnished to him, in some cases , the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual".*

The court further observed:

> *".....The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report has to be considered on the facts and circumstances of each case..... if after hearing the parties, the court/ Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the*

ultimate finings and the punishment given, the Court/Tribunal should not interfere with the order of punishment……."

28. The above discussion apart, writ court appears to have failed to notice that the respondent was not "dismissed from service" on the ground that he was held guilty by the trial court and sentenced to imprisonment. The enquiry related to embezzlement of Rs 4039.20 that was not subject matter in either of the criminal trials commenced against the respondent. It would be apt to reproduce conclusion of departmental enquiry brought to the respondent attention in final notice dated 19th August 1976;

"Shri Bharat Singh while working as SPA, Jammu received on 03/06/1971 two cheques No.s (1) Vot. 86605 for Rs 2039.20 and (2) Vot 86604 for R. 2000/- from M/s Disttt-60-op Marketing Society Ltd., Jammu in favour of NSO Ltd, Chandigarh. He got these cheques en-cashed himself instead of crediting to the account of the party and did not also intimate the receipt to NSC Chandigarh and thus mis-appropriated a total sum of Rs 4039.20 putting NSC to a loss to this extent. He is a man of doubtful integrity and by his devotion he has violated Rule 3(1)(i) of the CCS (Conduct) Rules, he made applicable to the employees of the N.S.O."

29. It was not therefore a case of dismissal because of conviction by trial court. Therefore acquittal of the respondent in criminal appeal or criminal revision would not automatically absolve him of the penalty imposed in departmental enquiry.

30. The writ court has also not appreciated the facts in rigid perspectives while dealing with appellant's preliminary objection to the maintanbility of writ petition on the ground of delay and laches. The writ court presumed that the dismissal was direct outcome of respondent's conviction by the trial court of the offence punishable under Section 409 RPC . The writ court concluded that as the trial court judgment was set aside by the appellate court 20 years after it was rendered, the respondent got a cause to seek his reinstatement and assail the dismissal order only after the respondent was acquitted. It was not noticed that the dismissal order impugned in the writ, was not based on trial court judgment dated 17/2/1977 but on the charge of embezzlement Rs 4039.20. The respondent, therefore, had a cause immediately after the dismissal order dated 17/2/1977 was made, to question it on the ground that the conclusion drawn by the enquiry officer were not based on any evidence and also that the appellants were under an obligation to issue a fresh notice to the respondent. The grounds available to the respondent to question the dismissal order did not depend on the outcome of criminal appeal filed by the respondent. The respondent's writ petition, therefore, was badly hit by delay and laches and the writ court unmindful of the settled legal position entertained, dealt with and allowed a claim based on cause become available more than two decades back and become stale by efflux of time.

31. For the reasons discussed, the Letters patent Appeal is allowed and writ court judgment dated 17/2/1977 set aside. Resultantly, the writ petition is dismissed, In the said background, cross appeal filed by the respondent, has to meet the same fate and is hereby dismissed.

(Hassnain Massodi)
Judge

(M.M Kumar)
Chief Justice

Jammu
Date : __/__/2014
Asif