BEFORE UTTARAKHAND PUBLIC SERVICES TRIBUNAL AT DEHRADUN

Present: Hon'ble Mr. Justice J.C.S.Rawat
------ Chairman

Hon'ble Mr. D.K.Kotia
------Vice Chairman (A)

Claim Petition No. 59/2011

Mahipal Singh Son of Shri Jugga Singh age above 45 years C/o Reserve Police Lines, Pauri Garhwal.

……Petitioner

Versus.

1. State of Uttaranchal through Secretary to the Government Department of Home.
2. Superintendent of Police, Pauri Garhwal.
3. Deputy Inspector General of Police Garhwal Range, Pauri Garhwal.

…….Respondents.

Present: Sri V.P.Sharma, Ld. Counsel
for the petitioner.
Sri Umesh Dhaundiyal, Ld. A.P.O.
for the Respondent.

JUDGMENT

DATED: NOVEMBER 22, 2013.

Justice J.C.S. Rawat, (Oral)

1. This claim petition has been filed by the petitioner for seeking following relief:

   "That the Hon'ble Tribunal may graciously be pleased to quash the impugned orders dated 20.5.2010 and 11.6.2010 contained in Annexure Nos. 2 & 4 passed by Respondent No. 2 & to direct the opposite party to pay arrears of pay and allowances for 3945 days from 23.4.1999 to 3.3.2010 of together with interest at the market rate and allow the claim petition with heavy cost in favour of the applicant and against the respondents with consequential benefits."

2. In nutshell it is admitted case of the parties that the Respondent No.1 appeared in a meeting presided over by the Superintendent of Police,

Pauri and the S.P. directed in the meeting that the delinquent who was attending the meeting, be examined medically and after the medical examination it was found that the petitioner had consumed alcohol, but he was not found under the influence of intoxication. Consequently, a preliminary enquiry was conducted and the delinquent employee was found guilty. Thereafter, a regular departmental enquiry was ordered by the punishing authority, namely the S.P., Pauri. The petitioner denied all the charges and after the full-fledged enquiry, the punishing authority dismissed the petitioner from service on 23.4.1999. Feeling aggrieved by the said order, statutory appeal was filed and thereafter he preferred a claim petition before this Tribunal and the Tribunal vide its order dated 6.10.2006 (Annexure-5 to the claim petition) partly allowed the petition and the punishment order dated 23.4.1999 and the consequential orders thereafter were quashed and it was directed that the petitioner would be reinstated into service within two months from the date of the presentation of copy of the order before the respondents. The order was quashed on the ground that the punishment was disproportionate to the alleged misconduct as well as it was also directed to the respondents, while passing the fresh order of punishment, the previous conduct, which has not been included in the charge sheet, should be ignored. Ultimately, the Ld. Tribunal directed the respondents that the petitioner would be entitled for back wages from 23.4.1999 subject to the final order in enquiry, to be payable after final decision of the disciplinary authority. The said order of the Tribunal was challenged before the Division Bench of the Hon'ble High Court at Nainital, which was affirmed by the Hon'ble Court on 15.12.2009.

3. Consequent upon the order of the Hon'ble High Court as well as of the Tribunal, the petitioner was reinstated on 3.3.2010 and thereafter the petitioner was awarded the penalty of adverse entry on 20.5.2010. Thereafter, a show cause notice was also issued on 21.5.2010 to the petitioner as to why the amount of the salary and wages for the period 23.4.1999 to 3.3.2010 be not paid to him on the basis of no work no pay. Consequent upon the said notice, on 11.6.2010 the Respondent No. 2 passed an order that the petitioner would not receive any salary or wages from the date 23.4.1999 to 3.3.2010 under Fundamental

Rule 54 (1) & (2). Thereafter, the petitioner has preferred this claim petition.

4. The petitioner has further alleged that the Tribunal vide its order dated 6.10.2006 has directed that the petitioner would be entitled for the back wages from 23.4.1999 subject to the final order of enquiry to be payable after the decision of the disciplinary authority. In utter violation of the order of the Tribunal, which was affirmed by the Hon'ble High Court, the petitioner was deprived of the back wages as well as the salary for the period for which there was a clear direction of the Hon'ble Courts. The petitioner has further alleged that he is entitled to the said back wages as directed by the Hon'ble Court.

5. The respondents have stated in their written statement that the petitioner was reinstated in the service under the orders of the Court and the amount of back wages was directed to be paid subject to the final decision of the enquiry. The competent authority has passed the order under Fundamental Rule 54 (1) & (2) to deprive him of his salaries and wages and the said rule provides that the respondents had the power to deprive him of the said benefits. It is further alleged that the petition is premature and the statutory remedies have not been exhausted as provided under the statute.

6. We have heard learned counsel for the parties and perused the record.

7. Ld. Counsel for the petitioner contended that the punishment order passed by the then S.P., Pauri in the previous chain of litigation was set aside by the Ld. Tribunal and it was directed that the petitioner be paid the back wages from the date of the dismissal to the date of reinstatement after the decision of the enquiry and it was further directed that the said amount would be payable to the petitioner. Ld. Counsel for the petitioner further contended that the Hon'ble Court has already directed that the said amount should be paid after the enquiry. The punishing authority has no right to invoke the jurisdiction under the Fundamental Rule 54 (1 & (2) and 54 (A) of the Financial Hand Book. He has cited the Fundamental Rule 54 (A) (3) (5) in support of his contention. Ld. Counsel for the petitioner further contended that the petitioner was previously awarded the punishment of dismissal from service, which was set aside by the Court and thereafter he was reinstated and he was again punished by way of an

adverse entry. Thus, he was not found unfit to be retained in the service by providing the lesser punishment and he continued to be in the service after the conclusion of the enquiry. He further contended that the petitioner's misconduct was only up to the extent of minor punishment in which his services would not have been dispensed with, but the employer had forced him to leave the job and remain out of service, though in law he was entitled to be retained in service.

8. Ld. A.P.O. appeared on behalf of respondents and refuted the contention of the petitioner and contended that the dismissal order was only set aside on the ground that the punishment was disproportionate and it did not commensurate with the misconduct committed by the petitioner. He further contended that the Tribunal has directed that after the conclusion of the enquiry, the back wages would be paid to the petitioner subject to the enquiry and he pointed out that the Court has held in Para-9 of the judgment that there was no enquiry pending and only the punishment order has to be passed by the punishing authority; as such the Court has passed the order ignoring the actual interpretation of law. He further contended that the petitioner had not exhausted all the remedies , as such the petition is not maintainable. Ld. A.P.O. further contended that the competent authority was competent to pass the order under the Fundamental Rule 54 (1) & (2) [during arguments it was stated that under Fundamental Rule 54 (A) (3) & (5)].

9. At the outset we would like to mention that the impugned order depriving the petitioner from the back wages has been passed under the Fundamental Rule 54 (1) & (2). Both the counsel have relied during the arguments that it should have been passed under Fundamental Rule 54 (A) (3).

10. Now we have to first analyze that as to whether the Tribunal has given any direction for the payment of the back wages from 23.4.1999 or not. We would like to quote the order under reference as under:-

"The petition is allowed partly. Punishment order dated 23.4.1999 and appellate order dated 6.8.1999 are hereby quashed. The petitioner shall be reinstated within two months from the date copy of this order is served on respondents. Final order in the enquiry shall

be passed within three months from the date, petitioner joins his duties. Petitioner shall be entitled for back wages from 23.4.1999, subject to final order in the enquiry, to be payable after final decision of disciplinary authority. No order as to cost."

11. The Hon'ble High Court in writ petition, against the said judgment, on 15.12.2009 held that there is no illegality, infirmity or perversity in the judgment and order dated 6.10.2006 passed by the Tribunal. Therefore, the judgment dated 6.10.2006 passed by the Tribunal was affirmed. Now it is clear from the perusal of the above quoted judgment that the Tribunal has already ordered that the petitioner would be entitled for the back wages from 23.4.1999 subject to the final order in the enquiry to be payable after the decision of the disciplinary authority. Thus, this Court unless & until that order would have been set aside, cannot go beyond that order. This Court cannot see the perversity or illegality in the order which has been affirmed by the Hon'ble High Court. The contention of the Ld. counsel that the Court, while observing in Para-10 that the punishing authority has to pass only a fresh speaking order on the basis of the enquiry report dated 5.4.1999, is inconsistent with the above direction of the payment of back wages is not correct. Hon'ble Apex Court in the case of Managing Director, Ecil Vs. B. Karunakar 1993 SCC (L&S)1184 has held that, the right to receive the enquiry officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. The two rights came to be confused with each other because as the law stood prior to the forty Second Amendment of the Constitution, the two rights arose simultaneously only at the stage when a notice to show cause against the proposed penalty was issued. If the disciplinary authority after considering the enquiry officer's report had dropped the proceedings or had decided to impose a penalty other than that of dismissal, removal or reduction in rank, there was no occasion for issuance of the notice to show cause against the proposed penalty. In that case the employee had neither the right to receive the report and represent against the finding of guilt nor the right to show cause against the proposed penalty. The right to receive the report and to represent against the findings recorded in it was thus

inextricably connected with the acceptance of the report by the disciplinary authority and the nature of the penalty proposed.

12. When any complaint is received against a Civil servant it is at the discretion of the punishing authority to conduct the preliminary enquiry in which the delinquent employee has no right to participate. If the punishing authority is satisfied , a regular departmental enquiry is necessary. The punishing authority will frame the charges against the delinquent official. Thereafter, the punishing authority will conduct the enquiry by himself or will appoint an enquiry officer. The enquiry officer, after recording and collecting the evidence of both side, submits the findings to the punishing authority. From framing charges to the submissions of the enquiry report, is the first stage of the departmental enquiry. The second stage of the departmental enquiry has been divided into two parts in view of the above judgment delivered in Managing Director, Ecil Vs. B. Karunakar (supra). The first part of the second stage of departmental enquiry is the enquiry report, conducted by a delegate of the punishing authority and consideration of the objection of the delinquent employee on the said report by the punishing authority and second part of the second stage of departmental enquiry is the punishment which is to be inflicted upon the delinquent . It is clear from the above 42nd Constitutional amendment held in the year 1976 that only the enquiry report is to be provided to the delinquent employee and reply thereof is required to be disposed of. It is not necessary that the delinquent should be given an opportunity against the proposed punishment, thereafter to pass the final order of punishment. Thus, up to the conclusion of the enquiry by way of punishment to the delinquent is the second stage of departmental enquiry. Thus, the argument of the Ld. Counsel for the State is misconceived and as such we do not find any force in the said contention of the Ld. A.P.O.. It is also well settled principle of law, there is also a misconception that wherever reinstatement is directed, continuity of service and consequential benefits should follow as a matter of course. Whenever the Court/ Tribunal directs reinstatement, the Court should apply its judicial mind to the facts & circumstances whether the continuity of service with the consequential benefits should also be directed. At the same time the principle of No Work

No Pay cannot be accepted as a rule of thumb. There are exceptions where the Courts have granted monetary benefits also. It is true that Tritie of law articulated in many decisions by the Hon'ble Apex Court reflected a legal proposition that the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in the recent past the Hon'ble Apex Court, has shifted the legal proposition. But in the case in hand the Tribunal while issuing the direction for the payment has considered this aspect and this matter has gone up to the Hon'ble High Court where a thorough scrutiny of the judgment has been made. The previous judgment of the Tribunal has held that he is entitled to get the back wages. The Hon'ble High Court has not disturbed the finding of the Tribunal, as such this finding has attained finality. So this Court is bound by the dictum of this Court. We cannot go beyond the findings of this Court.

Whereas Fundamental Rule 54 (1) (2) has been relied in the impugned order which is as under:-

54 (1) जब कोई सरकारी सेवक, जिसे पदच्युत कर दिया गया, हटा दिया गया अथवा अनिवार्यतः सेवा निवृत कर दिया गया हो, अपील या पुनर्विलोकन के परिणामस्वरूप पुनः पदस्थ किया जाये अथवा इस प्रकार पुनः पदस्थ किया गया होता यदि वह निलम्बनाधीन रहते हुये या न रहते हुये अधिवर्षिता पर सेवा निवृत्त न होता, तो पुनः पदस्थ किये जाने का आदेश देने वाला सक्षम प्राधिकारीः–

(क) सरकारी सेवक का कार्य से अनुपस्थिति रहने को अवधि के लिये, जिसके अन्तर्गत, यथा स्थिति उसके पदच्युत किये जाने, हटाये जाने अथवा, अनिवार्यतः सेवानिवृत्ति किये जाने क पूर्व की निलम्बन अवधि भी है, उसे दिये जाने वाले वेतन और भत्तों और

(ख) उक्त अवधि को कर्त्तव्यार्थ व्यतीत की गयी अवधि मानी जाये या नहीं, के सम्बन्ध में विचार करेगा और विशिष्ट आदेश देगा।

(2) यदि पुनः पदस्थ किये जाने का आदेश देने वाले सक्षम प्राधिकारी की यह राय हो कि ऐसा सरकारी सेवक, जिसे पदच्युत किया गया , हटाया गया अथवा अनिर्वायतः सेवानिवृत्त किया गया, पूर्णत ःदोषमुक्त कर दिया गया है, तो सरकारी सेवक को उप नियम (6) के उपबन्धों के अधीन रहते हुये, पूरा वेतन तथा भत्ता दिया जायेगा जिसके लिये वह हकदार होता, यदि वह

पदच्युत न किया गया, हटाया न गया अथवा अनिर्वायतः सेवानिवृत्त न किया गया होता या, यथास्थिति , ऐसी पदच्युति , हठाये जाने अथवा अनिवार्यतः सेवानिवृत्त किये जाने के पूर्व निलम्बित न किया गया होताः

परन्तु जहां यदि ऐसे प्राधिकारी की यह राय हो कि सरकारी सेवक के विरूद्ध संस्थित कार्यवाहियों की समाप्ति में प्रत्यक्षतः सरकारी सेवक के कारण विलम्ब हुआ है वहां वह सरकारी सेवक को अपना अभ्यावेदन देने का अवसर देने के पश्चात् और उसके द्वारा प्रस्तुत अभ्यावेदन पर यदि कोई हो विचार करने के पश्चात् उन कारणों से जो अभिलिखत किये जायेगें, यह निर्देश दे सकता है कि सरकार सेवक को उपनियम (7) के उपबन्धों के अधीन रहते हुए ऐसी विलम्ब अवधि के लिये ऐसे वेतन तथा भत्ते की उतनी राशि (जो सम्पूर्ण राशि न हो) दी जायेगी जितनी वह अवधारित करें।

13. Ld. Counsel for the petitioner has relied upon the Rule 54 (A) (3), (4) & (5) of the Fundamental Rules which reads as under:-

(3) यदि सरकारी सेवक का पदच्युत किया जाना, हटाया जाना अथवा अनिवार्यतः सेवा निवृत्त किया जाना न्यायालय द्वारा गुणवगुण के आधार पर अपास्त कर दिया जाये तो पदच्युत किए जाने , हटाये जाने अथवा अनवार्यतः सेवानिवृत्त किये जाने के पूर्व को निलम्बन अवधि सहित यथास्थिति , पदच्युत किये जाने, हटाये जाने अथवा अनिवार्यतः सेवानिवृत्त किये जाने के दिनांक और पुनः पदस्थ किये जाने के दिनांक के बीच अविध को सभी प्रयोजनों के लिए कर्त्तव्यार्थ माना जायेगा और उसे इस अवधि के लिए पूरा वेतन तथा भत्ता दिया जायेगा जिसके लिये वह हकदार होता यदि वह पदच्युत न किया गया होता ,हटाया न गया होता अथवा अनिवार्यतः सेवानिवृत्त न किया गया होता या, यथास्थिति , इस प्रकार पदच्युत किये जाने , हटाये जाने या अनिर्वायतः सेवानिवृत्त किये जाने के पूर्व निलम्बित न किया गया होता।

(4) उपनियम (2) उपनियम(3) के अधीन भत्तों का भुगतान उन सभी शर्तों के अधीन होगा जिनके अन्तर्गत ऐसे भत्ते अनुमन्य हो।

(5) सरकारी सेवक को उसके पुनः पदस्थ होने पर, इस नियम के अधीन किए जाने वाले भुगतान की कोई राशि उसके द्वारा पदच्युत किये जाने, हटाये जाने अथवा अनिवार्यतः सेवानिवृत्त किये जाने के दिनांक और पुनः पदस्थ किये जाने के बीच की अवधि में सेवायोजन से अर्जित राशि के प्रति समायोजित की जायेगी। यदि इस नियम के अधीन अनुमन्य परिलब्धियां अन्यत्र सेवायोजन के दौरान अर्जित राशि के बराबर हों, अथवा उसके कम हों तो सरकारी सेवक को कुछ भी नहीं दिया जायेगा।

14. The power conferred under Rule 54 (1) & (2) is subject to Rule 54 (A) (3) (4) & (5). The Tribunal has already set aside the order of the

punishing authority by which he was dismissed from service. While passing the order, Respondents were directed vide order dated 6.10.2006 that the petitioner would be entitled for the back wages from 23.4.1999 subject to the final order of the enquiry, to be payable after the decision of the disciplinary authority. Thus, there was no option before the punishing authority to grant the back wages to the petitioner. The punishing authority has exercised the discretion by not allowing him the back wages, which is in utter violation of the Tribunal's order dated 6.10.2006 which has been affirmed by the Hon'ble High Court. The punishing authority would have considered not only provisions of Fundamental Rule 54 (1) & (2) but he should have considered the Fundamental Rule 54 (A) (3) also. Thus, we have no option but to hold that the impugned order is totally ultra virus to the judgment of the Tribunal.

15. Whereas the question of not exhausting of the statutory remedies are concerned, the petitioner has filed the copy of the grounds of appeal, which has been filed on 14.8.2010; thereafter two reminders have been issued but no order has been passed. If the petition has been admitted, the Court cannot direct the petitioner at the stage of final hearing to go and get the decision of appeal and then to file the petition before this Court. It will be too harsh to the petitioner if the appeal is not decided, he would be dragged from pillar to post only to get the decision of the appeal. It is well settled tritie of law that the impugned order, show cause notice as well as the final order depriving him of the salary is void ab-initio. In such cases Court can assume the jurisdiction even the statutory remedies have not been availed.

16. Ld. A.P.O. further contended that the petitioner has filed this claim petition as a matter of fact he should have preferred an execution application before this Court to implement the judgment of the Tribunal passed on 6.10.2006. Ld. Counsel for the petitioner refuted the contention . It is apparent from the perusal of the record that the order to pay the back wages was directed by the Tribunal, meanwhile overriding the order of the Tribunal, the punishing authority issued a show cause notice to deprive him of back wages and took shelter of Rule 54 (1) & (2) of Fundamental Rules and passed the final order. It

was mandatory on the part of the petitioner to get the order of punishing authority set aside as to get the way to implement the judgment of the Tribunal as well as of the Hon'ble High Court. So simple execution application would not have suffice the purpose because the impugned order unless & until is set aside, the execution could not have been done smoothly. In view of the above discussion that the petitioner is entitled to get the back wages from 23.4.1999 to 3.3.2010, show cause notice dated 21.5.2010 (Annexure-1), impugned order dated 20.5.2010 & 11.6.2010 (Annexure-2 & 4) are liable to be set aside.

17. Further we quash the Show cause notice dated 21.5.2010 (Annexure-1), impugned order dated 20.5.2010 & 11.6.2010 (Annexure-2 & 4) . The said amount be paid within four months from the date of presenting the copy of the order to the respondents. If the said amount is not paid within the stipulated period, an interest of 6% simple would be payable by the respondents to the petitioner on the back salary/ back wages. No order as to cost.

Sd/- Sd/-

(D.K.KOTIA) (JUSTICE J.C.S.RAWAT)
VICE CHAIRMAN (A) CHAIRMAN

DATE: NOVEMBER 22, 2013
DEHRADUN

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