

**UTTARAKHAND PUBLIC SERVICES TRIBUNAL DEHRADUN
BENCH AT NAINITAL**

Claim Petition No. 06/N.B./2012

Mahesh Mitra, S/o Sri Late Ramswaroop,
R/o Village Fina, P. O. Fina, District Bijnaur (U.P.)

..... Petitioner

Versus

1. State of Uttarakhand through Principal Secretary,
Transport Department, Dehradun.
2. Uttarakhand Transport Corporation, through it Managing Director.
3. Chairman, Uttarakhand Transport Corporation,
117, Indira Nagar, Dehradun.
4. Divisional Manager (Operation), Kumaon Region,
Nainital.

..... Respondents.

Coram: **Hon'ble Justice J. C. S. Rawat**

..... **Chairman**

&

Hon'ble U. D. Chaube

..... **Member (A)**

Present: Sri A. N. Sharma, Advocate for the petitioner.
Sri V. P. Devrani, A.P.O. for the respondent no. 1.
Mrs. Seema Sah, Advocate for the respondent nos. 2
to 4.

JUDGMENT

Date: - 26-09-2013

Justice J.C.S. Rawat (Oral)

The claim petitioner has filed this claim petition for seeking the following relief:-

“In view of the facts and circumstances mentioned in paragraph no. 4 of the claim petition, the applicant most respectfully prays that this Hon’ble Tribunal may graciously be pleased to :-

(i) To quash the order of punishment removing the petitioner from service passed by Divisional Manager, Uttarakhand Transport Corporation Kumaon Region, Nainital vide order dated 13.6.2008, the appellate order passed by General Manager (ADM) vide order dated 26.5.2010 (Annexure No. 2 rejecting the appeal of the petitioner), and the revisional order passed by the Chairman Uttarakhand Transport Corporation, Dehradun rejecting the revision of the petitioner vide order dated 29.7.2011 (Annexure No. 3 to this claim petition).

(ii) To reinstate the applicant/petitioner with all consequential benefits (Pay and Allowances, and seniority etc.) from the date of his unlawful removal from service till the date of his reinstatement i.e till the date the applicant/petitioner has attained his age of superannuation.

(iii) To award the cost of the petition in favour of the applicant as against the respondent.

(iv) To award any other relief in favour of the applicant which this Hon’ble Tribunal may deem fit and proper in these circumstances of this case”

2. The brief facts of the case are that the petitioner had been working as Conductor in Uttarakhand Transport Corporation. He remained absent from the duties w.e.f. 25.3.2006 to 13.4.2006 (20 days), 20.5.2006 to 1.6.2006 (13 days) and 5.6.2006 to 14.6.2006 (10 days) a total absence without leave

of 43 days. The disciplinary authority started the departmental enquiry against the petitioner for the aforesaid unauthorized absence from the duties. The Assistant General Manager, Uttarakhand Parivahan Nigam, Kathgodam was appointed as an enquiry officer who conducted the entire enquiry and submitted his report holding the petitioner guilty for remaining absent without leave for the aforesaid dates. Thereafter, departmental authority Divisional Manager, Uttarakhand Transport Corporation sent a notice to the delinquent employee/petitioner alongwith the copy of the report and it asked him to explain within 15 days from the date of receipt of the said notice. The copy of the enquiry report was also sent to the petitioner alongwith the notice. The departmental authority after considering the reply of the petitioner as well as the report of the enquiry officer passed the impugned order of dismissal of the petitioner from service on 13.6.2008. Feeling aggrieved by the said order, the petitioner preferred an appeal before the appellate authority which was dismissed by him on 24.5.2010. Thereafter, he preferred a revision petition before the Chairman, Uttarakhand Transport Corporation and that was also rejected on 19.7.2011. Feeling aggrieved by the said order, he preferred this claim petition. The petitioner has alleged that he was not given a reasonable opportunity to be heard during the course of enquiry. As such, all proceedings of the enquiry are liable to be vitiated. It was also alleged in the claim petition that the petitioner duly informed the officers of the respondents about his ailment by phone as well as by post and he had submitted his sufficient explanation for his absence by the said application. He further alleged that domestic enquiry was a sham enquiry and punishment to remove the petitioner from service was already pre-determined. The allegations contained in the charge-sheet against the petitioner are false, unfounded and misleading contrary to the facts on record. The petitioner never willfully remained absent from the duties and

he was prevented to attend his duties on the aforesaid alleged dates on account of his illness. Neither the enquiry officer nor the departmental authority considered the ailment as course of his absence during the course of enquiry or at the time of passing impugned removal order.

3. The respondents have filed their counter affidavit alleging therein that the petitioner has been given sufficient opportunity to defend himself in the enquiry by the inquiry officer and a show cause notice was also given alongwith copy of the report by the departmental authority and he could not submit his satisfactory explanation so he was removed from the services. The respondents have further alleged that there were two charge-sheets against the petitioner. The petitioner has alleged in its petition that the enquiry date for hearing was fixed on 26.6.2008 by Assistant General Manager, Rudrapur on 11.6.2008, but the order of punishment impugned in this petition was passed on 13.6.2008 well before the date of hearing fixed in the so-called enquiry. The said contention is totally untenable. As a matter of fact due to clerical mistake a number of the another charge-sheet was inadvertently mentioned in the impugned order and the petitioner is not liable to get the undue advantage and benefit of clerical mistake. At this stage, it would be relevant to mention that the said fact has not been specifically controverted in the rejoinder affidavit by the petitioner. At the last, the respondents prayed that the claim petition of the petitioner be dismissed.

4. We have heard the learned counsel for the parties and perused the records.

5. The first contention raised by the learned counsel for the petitioner is that the impugned order reveals that the petitioner was removed from

service and his period of absence was regularized and he was deprived of the wages for the said period; as such, the petitioner cannot be dismissed from the services. The learned counsel for the petitioner further contended that the petitioner has been awarded two punishments which is not permissible in law; petitioner's period of absence has been regularized by way of granting the leave without pay and second punishment thereafter has been given for such absence removal from the services which amounts to two punishments for one period and the impugned order is also liable to be set aside on the said ground.

6. Learned A.P.O. appearing for the State for the respondents refuted the contentions. We are unable to accept the aforesaid contention as period of the unauthorized absence was not condoned by the authority, but the same was simply shown as regularized for the purpose of maintaining of a correct record. उत्तर प्रदेश राज्य सड़क परिवहन निगम कर्मचारी (अधिकारियों से भिन्न) सेवा नियमावली, 1981 (referred to as "Service Rules, 1981") provides in Rule-63, the punishment which may be awarded to a delinquent. Leave without pay is not a punishment in the said rule. Major and minor penalty prescribed in the above Service Rules, 1981 makes it clear that sanctioning leave without pay is not the punishment prescribed. Thus, it cannot be held that two punishments have been awarded to the petitioner. The doctrine of double jeopardy has been provided in Article 20 (2) of the Constitution of India; it has no application in the event of there being only one punishment awarded to the petitioner under the rules on charges being proved during the course of disciplinary enquiry. Similar controversy came before the Hon'ble Supreme Court in the case of State of U.P. and others vs. Madhav Prasad Sharma in the year 2011, the Bench comprising Hon'ble P. Sadashivam (as he then was) now Hon'ble C.J.I. and Hon'ble Justice Dr. B. S. Chauhan. The Hon'ble Apex Court held in this case as under:-

*“Appellate Court and the High Court had taken the view that in case unauthorized absence from duty had been regularized by treating the period of absence as leave without pay, the charge of misconduct did not survive. However, without examining the correctness of the said legal proposition, this court allowed the appeal on other issues. As the said judgment gave an impression that this Court had laid down the law that once unauthorized absence has been regularized, the misconduct would not survive. The matter was referred to the larger bench in **Maan Singh’s case (2003) 3 SCC 464** wherein this Court clarified that the earlier judgment in *Bakshish Singh (supra)* did not affirm the said legal proposition and after following the judgment of this court in *State of M.P. v. Hari Har Gopal & amp; Ors., (1969) 3 SLR 274 (SC)* disposed of the case clarifying that this court in *Bakshish Singh (spura)* dealt with only on the issue of remand by the High Court as well as by the Ist Appellate Court to the punishing 13.”*

A similar controversy was also cropped up before the Hon’ble Supreme Court of **India in the case of Om Prakash v. State of Punjab (2013) 2 SCC (L & S) 253** which runs as under:-

“ 10. The next contention that is raised is that the period of absence of the appellant having been regularized, the aforesaid charge of unauthorized absence would fall through and, therefore, the order of punishment is required to be set aside and quashed. We are unable to accept the aforesaid contention as period of the unauthorized absence was not condoned by the authority but the same was simply shown as regularized for the purpose of maintaining a correct record.

*11. A similar issue came to be raised in this Court several times. In *State of M.P. v. Harihar Gopal* this Court noticed that the delinquent officer in failing to report for duty and remaining absent without obtaining leave had*

acted in a manner irresponsibly and unjustifiably; that, on the finding of the enquiry officer, the charge was proved that he remained absent without obtaining leave in advance; that the order granting leave was made after the order terminating the employment and it was made only for the purpose of maintaining a correct record of the duration of service and adjustment of leave due to the delinquent officer and for regularising his absence from duty. This Court in the said decision held that it could not be accepted that the authority after terminating the employment of the delinquent officer intended to pass an order invalidating that earlier order by sanctioning leave so that he was to be deemed not to have remained absent from duty without leave duly granted.

12. *Our attention is also drawn to the decision of this Court in Maan Singh v. Union of India wherein a similar situation and proposition has been reiterated by this Court. There are a number of decisions of this Court where it has been held that if the departmental authorities, after passing the order of punishment, passes an order for maintaining a correct record of the service of the delinquent officer and also for adjustment of leave due to the delinquent officer, the said action cannot be treated as an action condoning the lapse and the misconduct of the delinquent officer.”*

And a similar controversy was also cropped up before the Hon’ble Apex Court in the case of Union of India vs. Datta Linga Toshawad (2005) 13 SCC 709. Thus, we are fortified to negate the contention of the learned counsel for the petitioner.

7. The learned counsel for the petitioner further contended that the petitioner has not been afforded the reasonable opportunity during the enquiry. He further contended that the petitioner was served with the memo of the charges by the departmental authority and he submitted his reply against the said charge-sheet; thereafter the departmental authority

appointed Assistant General Manager, Uttarakhand Parivahan Nigam as enquiry officer on 18-9-2007. He further contented that thereafter the petitioner was never served the notice of the date and the statement of witnesses were recorded in absence of the petitioner. He further contended that the whole enquiry was conducted against the petitioner without giving him an opportunity to cross-examine the witnesses and to adduce the witnesses in his defence. The enquiry officer proceeded with the enquiry without knowledge of the petitioner. As such entire enquiry proceedings are liable to be vitiated. The learned counsel for the respondents refuted the contentions.

8. It is settled principle of law that the disciplinary authority has the power and jurisdiction to enquire into the misconduct by himself or by his delegate and to impose penalty to prove misconduct of the delinquent. It is a condition precedent that the charge-sheet and the statement of the witnesses in support thereof and the record need to be supplied to the delinquent. The record if bulky and the delinquent would have an opportunity for inspection and to have copies thereof at his expenses, be given as per the rules. If the reply is submitted against the charge-sheet, it is duty of the departmental authority if he himself is enquiring into the misconduct or it is being conducted by his delegate; to inform the delinquent for calling witnesses and to cross-examine of the witnesses by way of a notice; so that he can make his defence before the competent authority. After the satisfaction of the enquiry officer that delinquent has been served sufficiently can proceed with the enquiry and to examine the witnesses in the case. If the delinquent is present pursuant to the notice he shall have a right to cross-examine the witnesses and it is also a right of the delinquent after the completion of witnesses of the department to examine himself as witness or he can call other witnesses in rebuttal. The actual

service of the notice of the date of enquiry is essential upon the delinquent. It is also settled principle of law that Evidence Act has no application to the enquiry conducted during the disciplinary proceedings. The evidence adduced should not be in strictly inconformity with the Indian Evidence Act, though the essential principles of fair play provided in the Indian Evidence Act are applicable. What was meant by 'evidence' in the proviso to Article 311 (2) is the totality of the material collected during the enquiry including the report of the enquiry officer forming part of the material. The material provided to the departmental authority includes the statement of the witnesses recorded by the enquiry officer. The statement of the witnesses is not complete if the delinquent has not been served notice to appear or cross-examine the witnesses or if it was sent but it was never served upon the delinquent. The evidence (statement of the witness) can only be recorded after proper information to the delinquent.

9. In the present case, charge-sheet for the unauthorized absence of the petitioner was served upon the petitioner and he submitted his reply on 3-10-2006. Meanwhile, the enquiry officer was appointed by the departmental authority on 18-9-2007. The reply of the delinquent was received within the stipulated period so it seems that the enquiry officer was appointed on the aforesaid date after the reply of the charge-sheet. The enquiry officer fixed 26-10-2007 for the evidence of the department and he summoned the witnesses of the department and a notice was also sent through the department to the petitioner. The original file of the department with regard to this case has also been summoned from the department by this court. This notice does not seem to have been served upon the petitioner. The date of 26-10-2007 was also postponed by the enquiry officer and he fixed the next date on 20-11-2007 and a letter was sent to the petitioner to that effect through his controlling officer for the aforesaid date

for his appearance in the enquiry. The petitioner was not served on the said date and the matter seems to have been adjourned for 13-12-2007 and again an intimation was also sent to the petitioner for the date and he was directed to appear on the aforesaid date before the enquiry officer. The record reveals that neither the notices were served upon the petitioner nor he appeared before the enquiry officer. The enquiry officer again adjourned the matter and fixed 05-01-2008 for the evidence of the departmental witnesses and information to that effect was also sent to the petitioner to appear on the said date. The said letter was sent to the Senior Station Incharge, Haldwani, the Senior Station Incharge, Haldwani returned the notice to the enquiry officer with the remark that the petitioner had been on medical leave/leave of absence so the notice was not served for the said date. The enquiry officer in spite of petitioner being unserved recorded the statement of Sri C. S. Lohani and Sri Chandra Pal Singh on 5-1-2008 in the absence of the petitioner. Thus, it is revealed from the record that till 5-1-2008 no service could have been affected upon the petitioner by the inquiry officer and the statement of the witnesses as indicated above were recorded by enquiry officer without intimation to the petitioner. The learned counsel for the respondents could not demonstrate that there was service of the notice about the enquiry till 5-1-2008. Thus, the petitioner was not given a proper opportunity to defend himself till 5-1-2008. Thereafter, a date for remaining evidence was fixed for 28-1-2008 and registered letter was sent to the petitioner. The said letter was received to the petitioner before the due date. The acknowledgement of the said letter is on record containing the signature of the petitioner, but he did not turn up on 28-1-2008 and again matter was adjourned and it was fixed for 28-2-2008 and a letter to the above effect to remain present on 28-2-2008 was also sent by the registered post to the petitioner and the said letter came back with the remark from the Postal Department that the addressee was not available at

the address mentioned and had gone out for his treatment. On the said date, the enquiry officer recorded the statement of Sri R. C. Bhatt and Sri Chandra Pal Singh. If the petitioner was not present on 28-1-2008, the inquiry officer could have recorded the statement of Sri R. C. Bhatt and Sri Chandra Pal Singh proceeding ex-parte against the petitioner and it would have a lawful step for the enquiry officer to record the statement of witnesses in his absence on 28-1-2008. But the inquiry officer instead of proceeding ex-parte postponed the enquiry and a further date fixed and again a notice was sent for 28-2-2008 which was not served upon the petitioner and the statement of Sri R. C. Bhatt and Sri Chandra Pal Singh was recorded in the absence of the petitioner. Thus, the enquiry had not been conducted in accordance with law and the proper opportunity has not been given to the petitioner. As such, the enquiry is liable to be vitiated on this ground alone.

10. In view of the above, we hold that the petitioner has not been given proper opportunity to defend himself; as such, entire enquiry proceedings are liable to be vitiated from the stage of the enquiry. The departmental authority had also based his finding against the delinquent on the enquiry report and evidence taken by the enquiry officer. As such entire proceedings before the enquiry officer to remove the petitioner are liable to be quashed. The impugned order dated 13-06-2008 passed by the Divisional Manager, Uttarakhand Transport Corporation, Nainital, the appellate order dated 24-05-2010 passed by the General Manager (Administration) Uttarakhand Transport Corporation, Dehradun and the order of revision dated 29-07-2011 passed by the Revisional Authority, Chairman, Uttarakhand Transport Corporation, Dehradun are liable to be quashed. The matter is liable to be sent back to the departmental authority to proceed further, if he desires so against the petitioner on the basis of

charge-sheet from the stage, when he delegated the matter to the enquiry officer. The respondent is directed to reinstate the petitioner if not retired with the liberty to respondent to proceed, by placing employee under suspension or otherwise. The question whether the petitioner would be entitled to the back wages and other benefits from the date of his removal to the date of his reinstatement or retirement it would be decided by the departmental authority after the completion of the departmental enquiry according to law.

11. The petition is allowed accordingly. No order as to costs.

Sd/-

U. D. Chaube
Member (A)

Sd/-

Justice J.C.S. Rawat
Chairman

Date: 26-09-2013

B. K.