

**BEFORE THE UTTARAKHAND PUBLIC SERVICES
TRIBUNAL, DEHRADUN**

Present: Sri V.K. Maheshwari

----- Vice Chairman (J)

&

Sri D.K. Kotia

----- Vice Chairman (A)

CLAIM PETITION NO. 06/DB/2013

Dr. Shambhu Saran Mishra, S/o Late Pt. Ram Janam Mishra,
R/o Prakash Vihar, Lane No. 6, House No. 106, Dharampur,
Dehradun

.....Petitioner

VERSUS

1. State of Uttarakhand through Principal Secretary & Commissioner, Forest & Rural Development (Horticulture),
2. Secretary, Department of Horticulture and Sericulture, Civil Secretariat, Dehradun,
3. Under-Secretary, Department of Horticulture & Sericulture, Section-2, Civil Secretariat, Dehradun.

.....Respondents

Present: Sri Shashank Pandey, &
Sri Nishant Chaturvedi, Counsel
for the petitioner

Sri Umesh Dhaundiyal, A.P.O.
for the respondents

JUDGMENT**DATE: AUGUST 12, 2014****DELIVERED BY SRI V.K. MAHESHWARI**

1. In this petition, the petitioner Dr. Sambhu Saran Mishra has challenged the impugned order of punishment dated 25.07.2011 passed by the concerned Secretary, Govt. Of Uttarakhand by which parts from a censure entry in his character roll, increment due in July, 2011 has been stopped. The petitioner has further challenged the order passed on departmental appeal dated 15.1.2013.

2. The facts in brief are that the petitioner after his selection through Public Service Commission to the post of Bhesaj Expert, Cooperative Department, U.P. was posted at Ranikhet, District Almora and was later on, promoted to the post of Chief Pharmaceutical Expert vide order dated 22.8.1995. Later on, the post of Chief Pharmaceutical Expert was transferred to the Horticulture Department.

3. The petitioner was placed under suspension on 05.09.2009 on the ground of several charges of delinquency, which was assailed before High Court and the suspension of the petitioner was found unwarranted by the Hon'ble High Court, therefore, the suspension was revoked, but a charge sheet was served upon the petitioner by the disciplinary authority on 25.9.2009, which was properly replied by the petitioner, but the enquiry officer appointed by the disciplinary authority found the petitioner

guilty on several charges and submitted the report. Thereafter, the disciplinary authority agreeing with the report, the disciplinary authority awarded the impugned punishment vide order dated 25.7.20011. The petitioner had thereafter, preferred review on 19.10.2011, but the review petition was dismissed treating it to be an appeal and stated inter-alia that departmental appeal lies only before the next authority higher in rank in the hierarchy of the disciplinary authority. Thereafter, the petitioner made a detailed petition of appeal on 27.12.2011, but no decision was taken on that appeal. Feeling aggrieved by the inaction on the part of the respondents, the petitioner had preferred a claim petition bearing no. 75/2012 before this Tribunal, which was disposed of with a direction to the respondents to decide the appeal of the petitioner, if any, pending before the authority as expeditiously as possible, preferably within a period of two months from the date of copy of the order is produced before them. In pursuance of this order, the departmental appeal of the petitioner is allegedly dismissed vide order dated 15.1.2013 solely on the ground of it is being barred by period of limitation. Thereafter, the petitioner has preferred this claim petition. The petitioner has challenged the impugned order as well as appellate order on the following grounds:

- i. That proper opportunity of making defence was not provided to the petitioner as Sri Shankar Gopal Bhattacharya, Sri Madan Mandal and Bank Manager were shown to be witnesses in the charge sheet and petitioner had a right to cross-examine these witnesses during the course of the enquiry. Despite

several requests by the petitioner, the opportunity of cross-examination was not afforded to the petitioner. The petitioner had also requested repeatedly to furnish the copies of certain documents, but none of the documents were supplied to the petitioner,

ii. That the petitioner has been awarded minor as well as major punishments, which is not permissible in the eye of law,

iii. That the entire enquiry proceeding has been conducted in utter disregard to the principles of natural justice,

iv. That the witnesses, who were examined in the preliminary enquiry, were not examined in the final enquiry. Therefore, their evidence could not be taken into consideration,

Hence, the petitioner has prayed for setting aside the impugned order of punishment as well as order passed on his appeal.

4. The petition has been challenged on behalf of the respondents and it has been stated that the departmental proceedings were initiated on the ground of serious allegations against the petitioner. It is further stated that the witnesses named by the petitioner were summoned for cross-examination and the Bank Manager had also appeared for cross-examination, but Mr. Madan Mandal was unable to attend the court because of his illness. Therefore, he had submitted an affidavit in support of his statement. Moreover, Sri Shankar Gopal Bhattacharya had also submitted an affidavit in support of his version. It is also

pertinent to mention that the petitioner refused to cross-examine the Bank Manager. It is further stated that the copies of relevant documents were furnished to the petitioner on 02.12.2010, therefore, the contention for non-supply of the copies is baseless. It is further stated that a preliminary enquiry is not a final enquiry and during the preliminary enquiry, the enquiry officer had only taken a written reply of the employee against whom an administrative persons were duly initiated and at this stage only a written reply is required and opportunity for cross-examination to any witness is not available to the delinquent employee. Therefore, no principle of natural justice was violated.

5. It is further stated that the enquiry officer had submitted his report based on cogent reasons, therefore, the impugned penalty was awarded.

6. It is further contended that the departmental appeal preferred by the petitioner was processed and opinion of law department was sought and after due deliberation, the appeal was disposed of after approval of the appellate authority. It is further stated that the review petition preferred by the petitioner could not be treated as an appeal under any of the provisions of Uttarakhand Govt. Servants (Discipline & Appeal) Rules, 2003. Therefore, the review petition was dismissed. The grievance of the petitioner is that the appellate authority should have counted the period of limitation of appeal after the dismissal of the review petition, which is not correct. Therefore, in view of the facts and circumstances present in the present petition, the

petitioner is not entitled for any kind of relief and petitioner is liable to be dismissed.

7. No rejoinder affidavit is filed on behalf of the petitioner.

8. We have heard both the parties at length and perused the material available on record carefully. Apart from it, the original file of departmental enquiry has also been submitted on behalf of the respondents. We have also carefully gone through the original file also.

9. One of the most important aspect of the matter is that departmental appeal preferred by the petitioner has not been decided in appropriate manner. It is a settled principle of service jurisprudence that in case of any departmental action, the right of departmental appeal is a valuable, indefensible and indispensable right of a public servant. This right cannot be taken up lightly. It is also said that the appeal is the continuation of the proceedings. Thus unless the appeal is decided in the proper manner it cannot be said that the proceedings have been conducted judiciously. In case, the right of appeal of any public servant is taken up lightly or was deprived of this right, the order passed in the departmental proceedings cannot be held justified. In the present case the impugned order was passed by the Secretary and the appeal lies before the Principal Secretary. A petition preferred for review was not treated as the appeal and was dismissed. Thereafter the petitioner preferred appeal. In the present case it transpires from the record that

the petitioner had preferred a claim petition before this Tribunal, which was numbered as Claim petition no. 75/2012 and the said claim petition was disposed of with the following order:

“Heard learned counsel for the parties.

The grievance of the petitioner is that his appeal under Rule 11 of Uttaranchal Govt. Servant (Discipline & Appeal) Rules 2003 against the order No. 289/XVO(2)/11/8(9) 2009 dated 25.7.2011 has not been decided by the respondents inspite of repeated reminders. The said appeal was preferred by the petitioner on 27.12.2011.

In view of the above, the claim petition is disposed of with the direction to the respondents to decide the abovesaid appeal of the petitioner, if any, pending before them as expeditiously as possible preferably within two months from the date copy of this order is produced before them.”

10. In pursuance of this direction of the Tribunal, the departmental appeal was processed and disposed of by the respondents, but in a very cursory manner. In this regard, the enquiry record submitted on behalf of the respondents reveals that before the order of the Tribunal, the appeal had already been processed and which was processed by the Under Secretary, who prepared the following Note:-

“उक्त के क्रम में अवगत कराना है कि डा0 मिश्रा द्वारा अपने अनुरोध पत्र दिनांक 12.10.2011 (प/ख) द्वारा अपील की गई, जो सक्षम स्तर पर न होने के कारण उत्तराखण्ड सरकारी सेवक (अनुशासन एवं अपील) नियमावली 2003 के नियम 11 (1) (प/ग) के अनुसार शासन के पत्र दिनांक 28 नवम्बर, 2011 (प/घ) द्वारा डा0 मिश्रा को इस आशय पूर्व में सूचित किया जा चुका है तथा उनके द्वारा पुनः अपने पत्र दिनांक 27.12.2011 (प/च) के माध्यम से उक्त पारित दण्डादेश के विरुद्ध द्वितीय अपील

अगले उच्चतर प्राधिकारी, प्रमुख सचिव, ग्राम्य विकास आयुक्त, को 90 दिन बाद की गयी है, जो कि (अनुशासन एवं अपील) नियमावली 2003 के नियम 11(4) के अनुसार 90 दिन बाद की गयी अपील को सरसरी तौर पर खारिज किये जाने का प्राविधान है।

तदनुसार कृपया सहमति की दशा में पत्रावली प्रमुख सचिव, वन एवं ग्राम्य विकास आयुक्त, महोदया को सन्दर्भित करना चाहें।”

After this Note, the matter was referred to the Principal Secretary, Law and the following advice was given by the law department:

“कृपया उल्लिखित टीपों का अवलोकन करना चाहें, जिसमें प्रशासकीय विभाग ने अंश 'क' पर न्याय विभाग से परामर्श का अनुरोध किया है।

2. उत्तराखण्ड सरकारी सेवक (अनुशासन एवं अपील) नियमावली ,2003 के उपबन्ध अन्तर्गत विलम्बित अपील को सरकारी तौर पर खारिज किये जाने का प्रशासकीय विभाग का अभिमत कदाचित नियम एवं विधिसंगत है।

3. कृपया सहमत होने पर प्रशासकीय विभाग को परामर्शित करना चाहें।”

Thereafter, there is a signature of the Principal Secretary, Law, concerned Minister and concerned Secretary and Principal Secretary, but we could not find any order, which was passed by the appellate authority, who in the present case appears to be the Principal Secretary concerned. Thereafter, a fresh note was prepared by the Under Secretary itself stating that the public servant be informed accordingly. Later on, the advocate appearing on behalf of the petitioner had sought information from the department and he was informed that the departmental appeal has been dismissed. A copy of that intimation has also been filed on behalf of the petitioner which is at Annexure No. A-2 of this claim petition is dated 15.1.2013, which reads as under:-

“ प्रेषक,
कवीन्द्र सिंह,
अनु सचिव,
उत्तराखण्ड शासन।

सेवा में,

श्री शंशाक पाण्डे,
वकील, दि लॉ कम्पनो (सेवा एवं संवैधानिक मामले)
150, पंडितवाड़ी, फेस -2
देहरादून।

उद्यान एवं रेशम अनुभाग -2 देहरादून/दिनांक 15 जनवरी, 2013
विषय - डा0 शम्भू शरण मिश्रा द्वारा उत्तराखण्ड राज्य एवं अन्य के विरुद्ध
लोक सेवा अधिकरण उत्तराखण्ड, देहरादून में योजित क्लेम पिटिशन
सं0-75/2012 के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक आपके पत्र दिनांक 21.12.2012 के सम्बन्ध में अवगत कराना है कि श्री शम्भू शरण मिश्रा, प्रमुख भेषज विशेषज्ञ, भेषज विकास इकाई, देहरादून के पद पर लोक सेवा आयोग के चयन के उपरान्त नियुक्त किये गये थे। इस सन्दर्भ में श्री मिश्रा द्वारा की गयी अनियमितताओं के लिए मा0 आयोग द्वारा प्रकरण का भली-भांति परीक्षण किये जाने के पश्चात् अपने अभिमत/ परामर्श द्वारा शासन के प्रस्तावित दण्ड “परिनिन्दा प्रविष्टि तथा अन्तिम वेतन वृद्धि जो जुलाई, 2011 में देय है को रोका जाना” पर अपनी सहमति प्रदान की गयी। उक्त के क्रम में शासन के पत्र सं0-289/XVI-2/11/8(9)/2009 दिनांक 25 जुलाई, 2011 के द्वारा श्री मिश्रा को निर्देशित किया गया।

तदक्रम में श्री मिश्रा द्वारा प्रमुख सचिव, एफ0आर0डी0सी0 के कार्यालय में दिनांक 27 दिसम्बर 2011 को अपील योजित की गयी। ज्ञातव्य है कि उत्तराखण्ड सरकारी सेवक (अनुशासन एवं अपील नियमावली -2003 के नियम -11(4) के अनुसार 90 दिन के बाद की गयी अपील को सरसरी तौर पर खारिज किये जाने का प्राविधान है। अतः श्री मिश्रा द्वारा शासनादेश दिनांक 25 जुलाई 2011 के विरुद्ध अपील 90 दिन के बाद योजित किये जाने के कारण तथा इस प्रकरण पर न्याय विभाग के परामर्श के पश्चात् अपील खारिज किये जाने पर सहमति प्रदान की गयी है।

भवदीय
(कवीन्द्र सिंह)
अनु सचिव।

संख्या- /Xvi-2/8(9)/09, तददिनांक।
प्रतिलिपि-

1 चेयरमैन, लोक सेवा अधिकरण उत्तराखण्ड देहरादून के पत्र दिनांक 12 दिसम्बर, 2012 के क्रम में सूचनार्थ प्रेषित।

आज्ञा से,

(कवीन्द्र सिंह)
अनु सचिव।”

11. Now, the question is whether the letter dated 15.1.2013 can be treated as an order passed on appeal or it is simply a communication regarding the decision taken on the appeal of the petitioner. We are of the considered view that the Annexure A-2 is simply a communication addressed to the learned counsel for the petitioner and it cannot, in any way, be treated as an order passed on the departmental appeal of the petitioner and as we have said earlier, we could not find any order of the concerned appellate authority, which could be considered as an appellate order. It seems that opinion furnished by the law department that appeal had been preferred beyond the period of limitation, so it can be dismissed on this ground alone, has been treated as the decision on appeal. This course adopted by the appellate authority is highly improper. The authority to hear an appeal is in personam and cannot be delegated in any manner which has been done in the present case and the proceedings of appeal have been dealt by the other Officers of the department and there is no order under the signature of the appellate authority. Moreover, in case of, the appeal was time barred, it was mandatory for the appellate authority to afford an opportunity of hearing to the petitioner on the point of delay occurred in filing of this appeal and then to take any decision. It is also not done. The record reveals that no such opportunity has been afforded to the petitioner. Therefore, we reach to the conclusion that in the present case, the

departmental appeal has not been disposed of in legal and proper manner. Unless, the appellate authority decide the matter, it is not proper for us to consider the point or contentions raised on behalf of the petitioner in the departmental proceedings, so we think it proper to direct the respondents to dispose of the departmental appeal after providing opportunity of hearing to the petitioner. At the same time, we are also conscious of the fact that the petitioner is already retired and the allegations are of serious in nature. Therefore, it seems proper that a further direction be issued that the departmental appeal be decided within a period of three months from the date of production of copy of this order before the appellate authority by the petitioner. The petition deserves to be disposed of in the aforesaid manner.

ORDER

The respondents are directed to decide the departmental appeal preferred by the petitioner in accordance with the procedure and observation made in the body of the judgment within a period of three months from the date of the copy of this judgment is produced before the appellate authority by the petitioner. The petition is disposed of accordingly. No order as to costs.

Sd/-

D.K.KOTIA
VICE CHAIRMAN (A)

Sd/-

V.K.MAHESHWARI
VICE CHAIRMAN (J)

DATE: AUGUST 12, 2014
DEHRADUN

KNP