

A.F.R
RESERVED

Court No. - 2

Case :- SPECIAL APPEAL No. - 408 of 2021

Appellant :- Gaya Prasad Yadav

Respondent :- State Of U.P.Thru.Prin.Secy.Home Lucknow And Anther

Counsel for Appellant :- Mohd. Shujauddin Waris

Counsel for Respondent :- C.S.C.

Hon'ble Devendra Kumar Upadhyaya,J.

Hon'ble Shree Prakash Singh,J.

1. Heard Sri Amit Bose, learned Senior Advocate, assisted by Sri Mohd. Shujauddin Waris for the appellant-petitioner and the learned State Counsel representing the State-respondents.

2. We have also perused the record available before us on this Special Appeal.

3. By means of this Special Appeal instituted under Chapter VIII Rule 5 of the Rules of the Court, challenge has been made by the appellant-petitioner to a judgment and order dated 11.08.2021, passed by the learned Single Judge in Writ Petition No.7483(SS) of 2019 whereby the writ petition has been dismissed and the order dated 01.11.2018 reiterating the order of dismissal of the appellant-petitioner has been affirmed.

4. The appellant-petitioner was recruited as Constable of Armed Police in the establishment of the Uttar Pradesh Police. On certain charges relating to obtaining employment on the basis of certain allegedly forged education certificates, he was dismissed from service by means of an order dated 20.06.2009, passed by the Superintendent of Police, Sultanpur. The said order of dismissal was challenged by the appellant-petitioner by filing Writ Petition No.5847(SS) of 2009, which was allowed by this Court by means

of order dated 11.09.2013 whereby the order of dismissal passed by the Superintendent of Police, Sultanpur dated 20.06.2009 was set aside with the direction that the appellant-petitioner will be reinstated in service. While allowing the Writ Petition No.5847(SS) of 2009, this Court further observed that it will be open to the Superintendent of Police, Ambedkar Nagar to take action in accordance with law.

5. In compliance of the aforesaid order dated 11.09.2013, passed by this Court, the appellant-petitioner was reinstated by means of order dated 31.01.2014, passed by the Superintendent of Police, Ambedkar Nagar, however, the departmental proceedings were further carried against the appellant-petitioner and he was again dismissed from service by means of order dated 04.07.2014, passed by the Superintendent of Police, Ambedkar Nagar. By means of another order passed on the same day i.e. 04.07.2014, the representation of the appellant-petitioner regarding payment of back wages was also rejected.

6. Both the aforesaid two orders dated 04.07.2014 whereby the appellant-petitioner was dismissed from service and his claim for payment of back wages was rejected became the subject matter of the Writ Petition No.5703(SS) of 2014 which was decided by the learned Single Judge of this Court by means of an order dated 13.03.2018. By the said order, the order of dismissal dated 04.07.2014 was set aside with the further stipulation therein that the Superintendent of Police, Ambedkar Nagar shall pass a fresh order in accordance with law. The reason indicated in the order dated 13.03.2018, passed by this Court while quashing the order of punishment of dismissal was that the order of punishment of dismissal which was challenged did not refer to the show cause notice and the reply submitted by the appellant-petitioner to the

said show cause notice and accordingly it was held that the appellant-petitioner was denied opportunity of hearing.

7. The appellant-petitioner, in the meantime, attained the age of superannuation on 31.05.2015. In compliance of the order dated 13.03.2018, passed by this Court in Writ Petition No. 5703(SS) of 2014, a show cause notice was given to the appellant-petitioner on 22.05.2018 to which he submitted his reply by means of his letter dated 23.07.2018. The Superintendent of Police, Ambedkar Nagar thereafter passed the order dated 01.11.2018 who reiterated the earlier order of dismissal and further stated that it will not be lawful to reinstate the appellant-petitioner in service. It is this order dated 01.11.2018 which was challenged by the appellant-petitioner by instituting the proceedings of Writ Petition No.7483(SS) of 2019, which has been dismissed by means of judgment and order dated 11.08.2021, which is under challenge herein.

8. Learned Senior Advocate, Sri Bose impeaching the judgment and order passed by the learned Single Judge has vehemently argued that since the appellant-petitioner had attained the age of superannuation on 31.05.2015, as such in terms of the provisions contained in Article 351-A of the Civil Service Regulations (herein after referred to as "CSR"), it is the Governor who had the authority to take action which could be confined only to the nature of action permissible and given in the said provision, that is to say, curtailment or withholding the pension or recovery therefrom.

9. It has further been argued on behalf of the appellant-petitioner that once the appellant-petitioner attained the age of superannuation and retired on 31.05.2015, for all purposes, relationship between the appellant-petitioner and the State authorities so far as the employment is concerned, got severed and hence, having regard to the provision contained in Article 351-A of

the CSR, the appellant-petitioner could not have been inflicted with the punishment of dismissal from service with retrospective date.

10. Sri Bose, learned Senior Advocate has, thus, argued that the issue raised in the writ petition has not been addressed by the learned Single Judge while passing the judgment and order dated 11.08.2021, inasmuch as that the learned Single Judge went to examine the issue as to whether after the appellant-petitioner attained the age of superannuation, any sanction to continue with the departmental proceedings, from the Governor as per the requirement of Article 351-A of the CSR was required or not. It has thus been argued that this issue neither arose nor was argued before the learned Single Judge. Submission further is that, as a matter of fact, in view of law laid down by Hon'ble Supreme Court in the case of **State of U.P. and others Vs. Harihar Bholenath, reported in (2006) 13 Supreme Court Cases 460**, the said issue is well settled according to which in case the departmental proceedings are instituted against the government servant prior to the government servant attains the age of superannuation and retires then in that eventuality, no sanction of the Governor is required for continuance of the departmental proceedings in terms of Article 351-A of the CSR.

11. Sri Bose has further argued that the issue raised before the learned Single Judge was that once the government servant retires and departmental proceedings were already instituted against him prior to his retirement, it is not that any sanction for continuance of the disciplinary proceedings is required; rather in such a situation, it is only the Governor who can take certain action permissible under Article 351-A of the CSR. According to him, the only action permissible against a retired government servant on conclusion of

the departmental enquiry is withholding or withdrawing the pension or any part of it for permanently or for a specified period and ordering for recovery from the pension of the whole or part of it.

12. It has, thus, been argued on behalf of the appellant-petitioner that in the instant case, the punishment of order of dismissal has been passed by the Superintendent of Police and not by the Governor (i.e. the State Government in accordance with the Rules of Business), that too, retrospectively, as such the order of dismissal is not sustainable, however, learned Single Judge has, thus, erred in law in upholding the dismissal of the appellant-petitioner.

13. On the other hand, learned State Counsel defending the judgment and order under appeal passed by the learned Single Judge, has submitted that in view of the law laid down by the Hon'ble Supreme Court in the case of **Chairman-Cum-Managing Director, Mahanadi Coalfields Limited Vs. Rabindranath Choubey, reported in AIR 2020 Supreme Court 2978**, it is permissible for the Disciplinary Authority to impose punishment of dismissal after conclusion of disciplinary proceedings, in a situation where such disciplinary proceedings were initiated against the employee concerned before he had attained the age of superannuation and retired. In this view, submission of learned State Counsel is that the judgment and order under appeal herein passed by the learned Single Judge does not require any interference in this Special Appeal, which is liable to be dismissed.

14. We have taken into consideration the rival submissions made by the learned counsel representing the respective parties and have also gone through the records available before us.

15. The issue which emerges for our consideration and reflection

in this case is as to whether in view of the provisions contained in Article 351-A of the CSR, it was open to the State-respondents to have inflicted punishment of dismissal from service upon the appellant-petitioner once he had retired which is other than the action permissible under Article 351-A of the CSR. In other words, the issue is as to whether the order of dismissal could have been passed by the Superintendent of Police, Ambedkar Nagar after the appellant-petitioner had retired on attaining the age of superannuation. The other issue which needs our consideration is as to whether the order of dismissal of appellant-petitioner could have been passed with retrospective date considering the provisions of Article 351-A of the CSR and the provisions contained in U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991.

16. Article 351-A of the CSR is extracted herein under :

“351–A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or Negligence, during his service, including service rendered on re-employment after retirement;

Provided that—

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment—

(i) shall not be instituted save with the sanction of the Governor,

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding, and

(iii) shall be conducted by such authority and in such

place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

Explanation—For the purposes of this article—

(a) Departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from and earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted :

(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court”.

17. A bare perusal of the afore-quoted provision of Article 351-A of the CSR shows that once the government servant retires, it is the Governor who has the right of withholding or withdrawing the pension or any part of it, permanently or for a specified period. The Governor under the said provision has also the right of recovery from the pension of the whole or part of any pecuniary loss caused to the Government, if the employee is found in departmental or judicial proceedings to have caused pecuniary loss to Government by misconduct or negligence during his service or he has been found guilty of gross misconduct.

18. It is, thus, clear that after retirement, withholding or withdrawing a pension and ordering the recovery from pension is

permissible to be caused only by the Governor i.e. the State Government in terms of the Rules of Business, not only in case such employee is found causing pecuniary loss to the Government by his misconduct or negligence but also in a cases when the employee concerned is found guilty of grave misconduct.

19. The provision of first proviso appended to Article 351-A of the CSR clearly prohibits institution of departmental proceedings except with the sanction of Governor if such proceedings were not instituted while the employee was on duty either before retirement or during re-employment. Thus, Article 351-A of CSR puts a prohibition of initiating the departmental proceedings in a case of retired government servant, however, such proceedings are permissible to be instituted with the sanction of Governor, that too, in respect of an event which took place not more than four years before institution of such proceedings. The provision further provides that departmental enquiry in such an event shall be conducted by such authority and at such place as the Governor may direct and in accordance with the procedure applicable.

20. Accordingly, we are of the considered opinion that in the instant case, since the departmental proceedings were already instituted against the appellant-petitioner prior to his retirement on attaining the age of superannuation, no sanction under Article 351-A of the CSR was required to be taken from the Governor. This view is fully supported by the judgment of Hon'ble Supreme Court in the case of **Harihar Bholenath (supra)**. To this extent we do not find any error in the judgment of learned Single Judge which is under appeal herein.

21. In terms of the provisions contained in Article 351-A of the CSR, it is the Governor who reserves to himself the right of withholding or withdrawing a pension or any part of it and right of

ordering the recovery from a pension. Opening words of Article 351-A, namely, **'The Governor reserves to himself the right'** are very important to be noticed. The use of this phrase would mean that no one else has a right including Disciplinary Authority or Appointing Authority to withdraw or withhold pension and ordering recovery from pension in respect of government servant who has retired on attaining the age of superannuation. In this view, the action, if any, against a government servant, who has retired, is permissible to be taken only by the Governor and no one else.

22. Having observed as above, what we further need to reflect upon is the issue as to whether the order of punishment of dismissal from service can be passed in case of the appellant-petitioner who had already retired much prior to the date on which the order under challenge before the learned Single Judge i.e. order dated 01.11.2018 was passed.

23. Learned State Counsel has laid great emphasis on the law laid down by Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)**. The judgment in the case of **Rabindranath Choubey (supra)** has been rendered by a Bench of three Hon'ble Judges of Hon'ble Supreme Court. The majority view in the said judgment was expressed by Hon'ble Mr. Justice M.R. Shah with Hon'ble Mr. Justice Arun Mishra. The majority view expressed in the said case based on consideration of the relevant rules applicable for conducting the disciplinary proceedings in respect of employee concerned. The employee in the said case was employed with Mahanadi Coalfields Limited which had framed Conduct, Discipline and Appeal Rules, 1978. Rule 27 of the said Rules mentions the authority where employer has the power to impose punishment including punishment of

dismissal. Rule 34.2 of the said Rules provides that disciplinary proceedings, if instituted while the employee was in service before his retirement, shall be deemed to be proceeding even after the final retirement of the employee and shall be continued and concluded as if the employee had continued in service.

24. Rule 34.2 of the Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** as extracted by the Hon'ble Supreme Court in the said judgment, is as follows :

“34.2. Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his reemployment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.”

25. From a perusal of Rule 34.2 of Conduct, Discipline and Appeal Rules as discussed in the case of **Rabindranath Choubey (supra)**, it is clear that the said rule creates a legal fiction to the effect that if disciplinary proceedings are instituted prior to retirement of the employee concerned, such disciplinary proceedings shall not only be deemed to be proceedings even after retirement, but also that such proceedings shall be continued in the same manner, if the employee had continued in service. Thus, considering the wording of Rule 34.2 of Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** it is seen that in the organization concerned where the employee was working, even after retirement the employee is deemed to be in continued in service even if he retires.

26. The majority view in the case of **Rabindranath Choubey (supra)**, thus, having regard to the provision contained in Rule 34.2 of the Conduct, Discipline and Appeal Rules applicable to the

employee in the said case, has given a finding that on conclusion of such disciplinary proceedings any of the penalties provided under the Rule can be imposed by the authority concerned including the order of dismissal.

27. Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)** has taken into consideration the law laid down by the Division Bench of Hon'ble Supreme Court in the case of **UCO Bank and others, Vs. Prabhakar Sadashiv Karvade, reported in (2018) 14 Supreme Court Cases 98**, wherein it has clearly been held that even though a departmental enquiry instituted against an officer/employee before his retirement can continue even after his retirement, none of the substantive penalties, which include dismissal from service, can be imposed on the officer/employee after his retirement on attaining the age of superannuation. Hon'ble Supreme Court in the said case has observed that master and servant relationship between the employee and the Bank comes to an end for all practical purposes on the date the employee concerned is superannuated and further that departmental enquiry initiated against the employee before his retirement could be continued only for a limited purpose for determining whether or not he is entitled for pensionary benefits and gratuity. Hon'ble Supreme Court in the said case has clearly observed that an order of dismissal or removal from service can be passed only when an employee is in service and further that if the person is not in employment, the question of terminating his services ordinarily would not arise unless there exists a specific rule in that behalf.

28. However, so far as the case of **Rabindranath Choubey (supra)** is concerned, it is relevant to note that the Conduct, Discipline and Appeal Rules applicable to the employee in the said

case created a legal fiction by specifically providing that in case the departmental proceedings were instituted prior to retirement of an employee concerned, such proceedings shall be deemed to be continued and shall be concluded by the authority by which such proceedings were commenced in the same manner as if the employee had continued in service.

29. While deducing the ratio in the case of **Rabindranath Choubey (supra)**, we cannot lose sight of the provisions of the Rules, specifically Rule 34.2 of the Conduct, Discipline and Appeal Rules applicable in the said case. Thus, if we read the case of **Rabindranath Choubey (supra)** and the case of **Prabhakar Sadashiv Karvade(supra)** together, the principle of law, in our considered opinion, which emerges, is that once the employee retires on attaining the age of superannuation, punishment of dismissal or removal from service cannot be inflicted for the reason that if the person is not in employment, the question of terminating his services would not arise, unless there exists a specific rule in that behalf.

30. What we notice in the judgment in the case of **Rabindranath Choubey (supra)**, which has heavily been relied upon by the learned State Counsel, opposing the instant special appeal, is that a specific rule under the Conduct, Discipline and Appeal Rules provided in the said case that the employee will be deemed to continue in service even after retirement. In fact, the language of Rule 34.2 of the Conduct, Discipline and Appeal Rules in the case of **Rabindranath Choubey (supra)** is very relevant to cull the ratio laid down therein. According to Rule 34.2 of the Conduct, Discipline and Appeal Rules as discussed in the case of **Rabindranath Choubey (supra)**, in a situation where the disciplinary proceedings were instituted while the employee was in

service, such disciplinary proceedings shall be deemed to be proceeding and shall be continued and concluded by the authority which had commenced such proceedings in the same manner as if the employee had continued in service. It is in the light of the said Rule that Hon'ble Supreme Court in the case of **Rabindranath Choubey (subra)** has observed that on conclusion of the disciplinary proceedings, the penalty of dismissal could be imposed under the Conduct, Discipline and Appeal Rules applicable to the said case.

31. The question, therefore, in this case to be considered as to whether any such rule, as discussed in the case of **Rabindranath Choubey(supra)** by the Hon'ble Supreme Court exists in the Conduct, Discipline and Appeal Rules governing the appellant-petitioner.

32. The State Government in exercise of its powers vested in it under the Police Act, 1861 has framed "*The U.P. Police Officers of the Subordinate Ranks(Punishment and Appeal) Rules, 1991*". The Rules are statutory in nature. Two types of punishment are provided in Rule 4, according to which major penalties include (i) dismissal from service, (ii) removal from service and, (iii) reduction in rank including reduction to a lower-scale or to a lower stage in a time scale whereas minor penalties include (i) withholding of promotion, (ii) fine not exceeding one month's pay, (iii) withholding of increment, including stoppage at an efficiency bar and, (iv) Censure. The procedure for award of punishment is provided in Rule 14.

33. Rule 14(1) provides for the procedure for major penalty, according to which the proceedings are to be conducted in accordance with the procedure laid down in appendix-I appended to the Rules. Rule 14(2) states that minor penalty may be imposed

after informing the Police Officer in writing of the action to be proposed to be taken against him and what imputation of the act or omission on which action is proposed to be taken after giving him reasonable opportunity of making representation.

34. In U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 there is no provision akin to the provision of 34.2 of the Discipline and Appeal Rules, as discussed in the case of **Rabindranath Choubey (supra)**. Even the Civil Service Regulations does not contain any such rule or provision which may permit passing of order of dismissal or for that matter any other penalty in case the employee has retired. Learned State Counsel has also not been able to place any such rule before us.

35. In absence of any rule, which permits imposition of punishment of dismissal after retirement or which deems the employee-employer relationship to be continued even after retirement for the purposes of disciplinary proceedings, in our opinion, the judgment of Hon'ble Supreme Court in the case of **Rabindranath Choubey (supra)** does not have any application in this case. Accordingly the reliance placed by the learned State Counsel on the said judgment is misplaced. As already observed above, Hon'ble Supreme Court in the case of **Prabhakar Sadashiv Karvade (supra)** has clearly held that penalty of dismissal cannot be imposed on an officer/employee after his retirement after attaining the age of superannuation unless there exists a specific rule in that behalf. If the disciplinary enquiry is instituted prior to retirement of the employee concerned, the same will continue by operation of Article 351A of Civil Service Regulations as held by Hon'ble Supreme Court in the case of **Harihar Bholenath (supra)**. However, in such a case if the employee is found to be guilty of grave misconduct or is found

to have caused pecuniary loss to the Government, it is the Governor who can take action as provided in Article 351-A of the Civil Service Regulations.

36. Admittedly, in the instant case the proceedings were instituted prior to retirement of the appellant-petitioner, however, prior to passing of the order dated 01.11.2018 reiterating the order of dismissal, he had already retired on 31.05.2015 on his attaining the age of superannuation and accordingly after 31.05.2015 the employee-employer relationship had already got severed and thus only action permissible against him is in terms of the provisions contained in Article 351A of Civil Service Regulations.

37. Learned Single Judge while passing the judgment and order under appeal has not addressed the aforesaid issues, though these issues were contended not only in the writ petition but even in the reply submitted by the appellant-petitioner to the show cause notice dated 22.05.2018. Learned Single Judge while passing the judgment and order under appeal appears to have lost sight of the aforesaid aspects of the matter and accordingly, in our opinion, the judgment rendered by the learned Single Judge is not tenable.

38. Resultantly, the special appeal is **allowed**. The judgment and order dated 11.08.2021 passed by the learned Single Judge in Writ Petition No.7483 (S/S) of 2019 is hereby set aside. The order dated 01.11.2018 passed by the Superintendent of Police, Ambedkar Nagar is also set aside.

39. However, it will be open to the respondents to take action in terms of the provisions contained in Article 351-A of Civil Service Regulations and in case decision to take such action is taken, the process thereof shall be completed within three months from today.

Order Date :- 23.9.2022

Sanjay