

# SUPREME COURT OF INDIA

A. Savariar

Vs.

The Secretary, Tamil Nadu Public Service Commission

C.A.Nos.1078-1079 of 2013

(G.S. Singhvi and H.L. Gokhale JJ.)

15.02.2013

## JUDGMENT

### **G. S. SINGHVI, J.**

1. These appeals are directed against judgments dated 28.2.2008 and 4.2.2010 of the Full Bench and the Division Bench respectively of the Madras High Court whereby the appellant's challenge to the order of the learned Single Judge was negated and his dismissal from service was upheld.

2. The appellant joined service under the Tamil Nadu Public Service Commission (for short, 'the Commission') as Junior Assistant w.e.f. 1.9.1973. While he was posted in 'P' Section of the Commission, which deals with the appointment of Invigilators and Chief Invigilators for various examinations, the Commission issued Notification dated 8.8.1989 for holding competitive examination for direct recruitment of Assistant Surgeons. The main written examination was conducted on 17.2.1990 and 18.2.1990. Shri Syed Abdul Kareem, who was appointed as Chief Invigilator at Bharathiar Government Arts College for Women, North Madras, examination centre, met the Superintendent of Section 'P' on 15.2.1990 and requested him to appoint some other person as Chief Invigilator by saying that he was suffering from heart ailment. When the Superintendent expressed his inability to accede to his request, Shri Syed Abdul Kareem asked for the list of persons who were to assist him. Thereupon, he was given a list of 19 persons. Some of the persons named in the list informed the Chief Invigilator on telephone that they were unable to assist him. Therefore, he again contacted the Superintendent of 'P' Section for appointment of substitute Invigilators. The

Superintendent then asked the appellant to post five persons to assist the Chief Invigilator. The latter supplied the list of five persons including S/Shri Asir (School Assistant), Khader Baig (Officer Assistant) and R. Mahalingam to Syed Abdul Kareem to work as substitute Invigilators.

3. In the examination held on 17.2.1990, some (six) question papers of the afternoon examination were found mixed up with the morning question papers. When the candidates pointed out this discrepancy, the Chief Invigilator immediately instructed to take back the question papers of the afternoon examination and issue the question papers meant for morning examination. This incident was reported in the newspapers. The Commission took serious view of the matter and on the basis of preliminary investigation done by the concerned officers, departmental proceedings were initiated against the appellant under Rule 17(b) of the Tamil Nadu Civil Services (Classification, Control and Appeal) Rules (for short, 'the Rules') on the following charges:

“(1) That Thiru. A.Savariar, Assistant, 'P' Section who was in charge of appointment of Chief Invigilators and Invigilators for the conduct of Main Written Examination relating to the post of Assistant Surgeon in the Tamil Nadu Medical Service for the year 1989-90 had served appointment order to Thiru. R. Mahalingam, who was on leave, to act as an Invigilator at Bharathiar Arts College for Women, Madras without obtaining the orders of the Officer in charge of the Section.

(2) That, he has unauthorisedly issued orders of appointment as Invigilator to one Thiru Asir, School Assistant, Government Training School, Madras for Assistant Surgeon examination held on 17.02.1990 and 18.02.1990 at Bharathiar Arts College for Women, North Madras though his name was not included in the list furnished by the Collector of Madras.

(3) That, he deputed by orally instructing Thiru. Khader Baig, Office Assistant of Commission's Office to the Examination hall unauthorisedly.

(4) That, he has produced in the Court while filing a petition for anticipatory bail the office note requiring him and certain other staff to attend office on 17.02.1990 without the knowledge of the office. It is highly irregular to produce an official record in the Court without the sanction of the competent authority.

(5) That, he unauthorisedly went to the examination hall without any reason or orders by neglecting his office work for which he obtained permission to work on the holiday (i.e., 17.02.1990).

(6) That, he has arrogated to himself the powers of an officer and has functioned in a highhanded manner.”

4. The appellant filed reply dated 22.6.1990 and denied the allegations leveled against him. He claimed that substitute Invigilators were appointed in accordance with the rules and in view of the request made by the Chief Invigilator, the Superintendent ‘P’ Section had instructed him to do so.

5. The Enquiry Officer appointed by the Commission submitted report dated 31.12.1990 with the finding that Charges No.1, 2, 4 and 6 have been proved against the appellant. The Controller of Examinations, who was holding charge of the post of the Secretary accepted the enquiry report and sent a copy thereof to the appellant to enable him to make representation against the findings recorded by the Enquiry Officer. The appellant filed detailed submissions dated 4.2.1991 and reiterated that he had not committed any misconduct. The Controller of Examinations rejected the appellant’s reply and dismissed him from service vide order dated 25.3.1991, the operative portion of which reads as under: “I have carefully and thoroughly examined the charges framed against the individual, the explanation given by the individual, the report of the enquiry officer and the defence statements of the individuals. The charges are really grave in nature. The Enquiry officer has held all charges excepting charges 2 and 5 as proved beyond doubt and charges 3 and 5 as not pressed. The delinquent has acted in a high handed manner arrogating to himself the powers of his superiors. He has had the audacity to produce certain documents from the office to the court unauthorisedly. Such acts constitute misdemeanor and misconduct of the worst order and there cannot be any doubt that allowing such people to continue in service will highly jeopardize the proper discharge of duties of the Public Service Commission as enshrined in the Constitution. The public interest has not only suffered by such misconduct, but serious attempts have been made to cut at the very roots of the integrity of the Commission as a whole. Hence, there appears no scope to show any sympathy on the individual and any leniency shown to the individual will only amount to abetting with such undesirable staff in their misconduct and ran indiscipline. I entirely agree with the findings of the Enquiry officer. I hold charges 1,2,4 and 6 and as proved and charges 3, 5 as not pressed. For the proved charges, Thiru A. Savariar, Assistant is dismissed from service from 25.3.1991 afternoon.”

(reproduced from the SLP paper book)

6. The departmental appeal filed by the appellant was dismissed by the Chairman of the Commission. The Chairman first adverted to the procedure followed for appointment of Invigilators and held that the appellant's action of appointing substitute Invigilators was unauthorized. He then considered the record and agreed with the Controller of Examinations that the appellant was guilty of misconduct and four charges were rightly found proved against him.

7. Writ Petition No.18836/1994 filed by the appellant for quashing the orders passed by the Disciplinary and the Appellate Authorities was dismissed by the learned Single Judge. He observed that non-examination of the Chief Invigilator, the Section Superintendent and the concerned Under Secretary was inconsequential; that the enquiry was held in accordance with the prescribed procedure and that the principle of proportionality cannot be invoked in the appellant's case simply because he had unblemished service of 17 years. The learned Single Judge further held that the Controller of Examinations was competent to exercise the power of the disciplinary authority.

8. The writ appeal filed by the appellant was referred to the larger bench because coordinate benches of the High Court had expressed conflicting views on the question of competence of the person holding charge of the higher post to exercise the power and discharge the functions of that post. The Full Bench answered that question in the following words:

“Under such circumstances, unless contrary intention is expressed by the Government either by way of a statutory provision or by way of an executive instruction, a Government servant who holds the post as in-charge has got power to discharge the statutory functions and responsibilities of the said post.

Besides since already this issue has been covered by the judgment of the Honourable Apex Court reported in 1996 A.I.R. S.C. 1729 as referred above, we are of the opinion, the view of the Division reported in 1997 Writ L.R. 33 (C.Baskaran v. The District Collector, Trichy) rendered in W.A.No.1054 of 1983 is not a correct law. Consequently, we hold that an officer-in-charge of a post has got power to discharge the powers and statutory functions of the said post.

Consequently, as far as the point of reference is concerned, we hold that the Officer who is holding the post in-charge has got power to discharge the powers and statutory functions of the said post.”

9. Thereafter, the matter was placed before the Division Bench, which held that the order of punishment was not vitiated due to violation of the rules of natural justice. The Division Bench observed that the appellant had been given opportunity to inspect the record, copies of the depositions recorded at the oral enquiry were supplied to him and he was allowed to file further statement of defence before the Enquiry Officer and held that there was no violation of the procedure prescribed under the Rules.

10. We have heard learned counsel for the parties. The scope of judicial review in matters involving challenge to the disciplinary action taken by the employer is very limited. The Courts are primarily concerned with the question whether the enquiry has been held by the competent authority in accordance with the prescribed procedure and whether the rules of natural justice have been followed. The Court can also consider whether there was some tangible evidence for proving the charge against the delinquent and such evidence reasonably supports the conclusions recorded by the competent authority. If the Court comes to the conclusion that the enquiry was held in consonance with the prescribed procedure and the rules of natural justice and the conclusion recorded by the disciplinary authority is supported by some tangible evidence, then there is no scope for interference with the discretion exercised by the disciplinary authority to impose the particular punishment except when the same is found to be wholly disproportionate to the misconduct found proved or shocks the conscience of the Court.

11. In the light of the above, it is to be seen whether the appellant’s dismissal from service was legally correct and the High Court rightly declined to interfere with the orders passed by the punishing authority and the Appellate Authority.

12. Rule 8 of the Rules specifies various penalties including dismissal from service which can be imposed on a member of the Civil Service of the State or a person holding Civil Post under the State. Rule 17(b), which contains the procedure for holding inquiry reads as under: “17.(a) xxx xxx xxx

(b) (i) Without prejudice to the provisions of the Public Servants' Inquiries Act, 1850, (Central Act XXXVII of 1850), in every case where it is

proposed to impose on a member of a service or on a person holding a Civil Post under the State any of the penalties specified in items (iv), (vi), (vii) and (viii) in rule 8, the grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged, together with a statement of the allegation, on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time to put in a written statement of his defence and to state whether he desires an oral inquiry or to be heard in person or both. An oral inquiry shall be held if such an inquiry is desired by the person charged or is directed by the authority concerned. Even if a person charged has waived an oral inquiry, such inquiry shall be held by the authority concerned in respect of charges which are not admitted by the person charged and which can be proved only through the evidence of witnesses. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing, refuse to call a witness. "Whether or not the person charged desired or had an oral inquiry, he shall be heard in person at any stage if he so desires before passing of final orders. A report of the inquiry or personal hearing (as the case may be) shall be prepared by the authority holding the inquiry or personal hearing whether or not such authority is competent to impose the penalty. Such report shall contain a sufficient record of the evidence, if any, and a statement of the findings and the grounds thereof".

"Whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry ceases to exercise jurisdiction therein, and is succeeded by another inquiring authority which has, and which exercises such jurisdiction, the inquiring authority so succeeding may act on the evidence so recorded by its predecessor or partly recorded by its predecessor and partly recorded by itself:

Provided that if the succeeding inquiring authority is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, it may recall examine, cross-examine and re-examine any such witnesses as hereinbefore provided,"

(ii) After the inquiry or personal hearing referred to in clause (i) has been completed, the authority competent to impose the penalty specified in that clause, is of the opinion, on the basis of the evidence adduced during the inquiry, that any of the penalties specified therein should be imposed on the Government Servant it shall make an order imposing such penalty and it shall not be necessary to give the person charged any opportunity of making representation on the penalty proposed to be imposed:

xxx xxx xxx”

13. An analysis of the above reproduced rule makes it clear that holding of an oral inquiry is sine qua non for recording a finding by the inquiring authority and the report of inquiry must contain sufficient record of evidence and a statement of the findings together with grounds thereof.

14. The substratum of the main allegation leveled against the appellant was that he had unauthorisedly issued order of appointment to R. Mahalingam, who was on leave, to act as an Invigilator at Bharathiar Arts College for Women and appointed Asir and Khader Baig as substitute Invigilators despite the fact that their names were not included in the list furnished by the Collector of Madras. The two other allegations leveled against the appellant were that he had unauthorisedly produced office note dated 17.2.1990 in the Court and went to the examination hall by neglecting his office work.

15. On behalf of the Commission oral evidence is said to have been adduced to substantiate the allegations leveled against the appellant but neither the report of the Enquiry Officer nor the orders passed by the Controller of Examinations or the Chairman of the Commission make a mention of that evidence and none of them relied upon the same for recording a finding that the appellant had arrogated to himself the powers of his superiors and unauthorisedly appointed Invigilators. As a matter of fact, Enquiry Officer simply referred to the statement of the appellant, analysed the same and concluded that Charges No. 1, 2, 4 and 6 have been proved against him. It is thus evident that the inquiry report was not prepared in consonance with Rule 17(b)(i) of the Rules.

16. The Controller of Examinations went a step further and recorded a finding that the actions of the appellant had resulted in compromising the integrity of the Commission as a whole. The concerned officer did so despite the fact that the appellant had not been charged with the allegation that he had by his

action/omission compromised with the integrity of the Commission and no evidence was produced to substantiate the same. The Appellate Authority, i.e., the Chairman recorded detailed reasons but the order passed by him also does not make reference to the evidence produced for proving the charges leveled against the appellant.

17. The learned Single Judge and the Division Bench of the High Court failed to notice the aforesaid fatal flaw in the orders passed by the Controller of Examinations and the Chairman and decided the matter by assuming that even though the Commission had not adduced any tangible evidence to prove the charges against the appellant, the same stood proved because of the weakness of his defence.

18. In *Delhi Cloth and General Mills Company v. Ludh Budh Singh* (1972) 1 SCC 595, this Court held that it is the primary duty of the person making the allegations to establish the same by producing evidence and not for the delinquent to produce negative evidence to prove his innocence.

19. In *Roop Singh Negi v. Punjab National Bank* (2009) 2 SCC 570, this Court considered the question whether mere production of the document by the department is sufficient for holding the employee guilty and observed:

“Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the enquiry officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. The appellant being an employee of the Bank, the said confession should

have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the enquiry officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.”

20. De hors the above conclusion, we are satisfied that the punishment of dismissal imposed on the appellant is legally unsustainable. The Controller of Examinations and the Chairman of the Commission did not consider the impact of the alleged unauthorized action of the appellant in nominating/deputing substitute Invigilators at the particular examination centre. One can appreciate the Commission’s concern about mixing of the question papers of afternoon examination with the question papers of morning examination, but in the absence of any evidence to show that ‘P’ Section of the Commission, where the appellant was posted, had anything to do with the question papers or that he had custody of the question papers, the Commission was not at all justified in holding him guilty of the incident which occurred at the examination centre. Indeed, it is nobody’s case that the appellant was, in any way, responsible for mixing of the question papers. Therefore, the findings recorded by the Inquiry Officer and the two Authorities that the appellant was guilty of serious misconduct cannot be sustained.

21. The learned Single Judge and the Division Bench failed to take cognizance of the fact that the branch in which the appellant was working was not concerned with custody of the question papers and he is not shown to have handled the bundles of the question papers at the examination centre. Therefore, the gravity of the misconduct found proved against the appellant, viz., nomination/deputation of the Invigilators at the particular examination centre was not such which could influence any person of reasonable prudence to impose the extreme penalty of dismissal from service.

22. In view of the above discussion, we may have remitted the case to the Commission for reconsideration of the entire matter but, keeping in view the fact that the appellant has already retired from service and he had put in unblemished service of 17 years, we do not consider it proper to adopt that course.

23. In the result, the appeals are allowed, the order of punishment passed by the Controller of Examinations and the appellate order passed by the Chairman of the Commission are quashed and it is declared that the appellant shall be entitled to all

consequential benefits including the arrears of salary for the period during which he was kept out of employment. He shall also be entitled to the retiral benefits, which may be admissible to him under the relevant service rules. The concerned authority of the Commission is directed to pay the salary, allowances, etc., to the appellant within 4 months from the date of production of copy of this judgment.

24. While disposing of these appeals, we make it clear that this Court has not expressed any opinion on the correctness or otherwise of order dated 28.2.2008 passed by the Full Bench of the High Court and the question whether a person, who holds higher post as in-charge in addition to his substantive post is entitled to exercise the powers of that post is left open to be decided in an appropriate case.