
(1995) 12 CAL CK 0005
In the Calcutta High Court
Case No : Civil Order No. 4095 (W) of 1994

A.K. Nsyogs

APPELLANT

Vs

Trustees of Port Trust and Others

RESPONDENT

Date of Decision : 19-12-1995

Acts Referred:

Calcutta Port Trust Employees (Classification, Control and Appeal) Regulations, 1987 — Regulation 8A(1)
Constitution of India, 1950 — Article 14, 21, 226, 311(2)

Citation : (1996) 1 ILR (Cal) 125

Hon'ble Judges : Arun Kumar Dutta, J

Bench : Single Bench

Advocate : Pranab Kumar Chatterjee and Gita Gupta, for the Appellant; H.K. Saha Roy, S.K. Sinha, P. Ghosh and S.N. Patra Bhatta, for the Respondent

Final Decision : Allowed

Judgement

Arun Kumar Dutta, J.—By this writ application the writ Petitioner A.K. Niogi (hereinafter referred to as Petitioner) has prayed the Court for issue of "a writ of mandamus directing the Respondents to rescind, recall and cancel the impugned order dated March 3, 1994 being annexure "G" to the petition", with a further direction upon the Respondents not to give effect or further effect to the said impugned Order dated March 3, 1994 and not to interfere with his services till his statement on superannuation at the age of 58 years, long with other relief?s prayed for therein, for the reasons stated and on the grounds made out therein.

2. A departmental proceedings was initiated against he Petitioner, Electrical Foreman, GRJ/NSD under the Mechanical Engineering Department, by the Deputy Chairman of the Calcutta Port Trust (for short C.P.I.), being the Disciplinary Authority, by an order dated October 17, 1992 on the following charge:

Shri Arup Kumar Niogi is charged with misconduct, inasmuch as while functioning as Electrical Foreman, GRJ/NSD under Mechanical Engineering Department he

failed to provide electric light in the adjoining area of New Traffic Building after sunset on 12th & 13th October, 1992 leaving the area completely dark which caused acute inconvenience and hardship to the staff and officers housed in New Traffic Building, particularly to those who are attached to Railway Control and Telephone Exchange which function round the clock.

Above act of Shri Arup Kumar Neogi, Electrical Foreman, GRJ/NSD amounts to serious misconduct.

3. An enquiry was held by the Enquiry Officer (for short E.O.) in which the Petitioner had duly participated. Evidence was laid before the E.O. The Enquiry Officer, after consideration of the evidence, oral and documentary, and papers produced before him, had come to the conclusion that the Charge against the Petitioner have not been established in the enquiry for the reasons stated in his report.

4. The Disciplinary Authority (for short D.A.), after considering the observations of the Enquiry Officer, deposition and other papers placed before him, had observed by passing the impugned order dated March 3, 1994, being annexure "G" to the writ application, the "the fact remains that the New Traffic Building remain in darkness for 2 days and the Electric Foreman ha taken the plea that he was unable to take any action a; he was not informed nor was advised by any one about the darkness in the New Traffic Building on the basic of which the Enquiring Officer concluded that the charges were not established. Shri A.K. Niogi was functioning as Electric Foreman, GRJ/NSD under the Mechanical Engineering Department and the New Traffic Building comes within his jurisdiction. Failure o" electricity for 2 days created a commotion and the issue was also discussed in the Co-ordination Meeting." He (D.A.) had further observed that the seriousness of failure was such that the issue had to be discussed in the Co-ordination Meeting. But Shri Niogi takes the plea that even though it occurred within his jurisdiction, he was not aware about this incident. The question arises whether the officer within whose jurisdiction such failure occurs should be informed in writing that a failure has occurred within his jurisdiction. In that case, what is the need of having such an officer ? He (D.A.) was thus convinced that the Petitioner had failed in his duties and considering the seriousness of his lapses he (D.A.) had ordered thereunder that the Petitioner may be compulsorily retired from service.

5. As rightly submitted by the Learned Advocate for the Petitioner during the hearing, the Disciplinary Authority had found the Petitioner guilty for (his) failure in the discharge of his duties for which he was not at ail charged. The Petitioner had been charged under the relevant Charge, appearing at page 19 of the records, that he had failed to provide electric light in the adjoining area of New Traffic Building after sunset on the relevant dates leaving the area completely dark. But the D.A. had observed in his aforesaid impugned order it the fact remains that the New Traffic Building (not i adjoining area thereof, as stated in the Chargesheet) remained in darkness for two days. As already located above,

the Petitioner under the relevant agree had been charged for having failed to provide iatric light in the adjoining area of New Traffic idling after sunset on the relevant dates leaving the a completely dark. But the Disciplinary Authority in aforesaid impugned order has held that there was lure of electricity for two days and the seriousness of lure was such that the issue had to be discussed in 3 Coordination Meeting. The Charge being, what it is, 3 Petitioner was charged for having failed to provide iatric light but he was held responsible by the sciplinary Authority in his impugned order for failure electricity for two days in the Building in question)ugh not so charged. It would further pretty clearly pear from the Charge that the Petitioner was charged In misconduct, in the circumstances stated therein their making clear in the concluding portion of the large that the act of the Petitioner, stated therein, counts to serious misconduct. Unhappily for the Respondents, the Disciplinary Authority had held in the including paragraph of his impugned order dated arch 3, 1994 that he was convinced that the Petitioner s failed in his duties, and considering the seriousness his lapses, he had ordered that he (Petitioner) may: compulsorily retired from services. With the Charge, as it is, the Petitioner, was clearly charged with conduct/serious misconduct. But he Disciplinary throaty curiously and amazingly had held him guilty r failure in his duties, in sad and startling departure in the charge of misconduct. Misconduct and failure perform duties cannot clearly be held to be anonymous. As things are, the Disciplinary Authority not appear to have applied his mind to the chargesheet, the evidence adduced during the enquiry, the report and findings of the Enquiry Officer while pass the impugned order. The impugned order passed by 1 Disciplinary Authority, on the face of the materials record, clearly appears to be perverse as such, e cannot be allowed to stand.

6. As observed by the Disciplinary Authority in aforesaid impugned order, "the Enquiring Officer at going through the depositions of the witness* documents and papers and assessment of divider came to the conclusion that the charge against Shri A Niogi was not found to be established in the enquire By his said impugned order he (D.A.) had come tr different finding. Regulation 8A(1)(i) of the Calcutta P. Trust Employees" (Classification, Control and Appt Regulations, 1987) (hereinafter referred to as "Regulations") provides that the Disciplinary Authority may reasons to be recorded by it in writing, remit the ca to Enquiring Authority for further enquiry and rep thereunder. Even though he (D.A.) did not agree w the findings of the Enquiry Officer, he (former) did r remit the case to the latter for further enquiry a report. Per contra, disagreeing with the findings of t Enquiring Authority he (D.A.) had held, on the evidence on record, that the Petitioner had failed! in his duties passing the impugned order dated March 3, 1994. would be pertinent, in this context, to refer Regulation 8A(1)(ii) of the aforesaid Regulations which rea as follows:

the Disciplinary Authority shall if it disagrees w the findings of the Enquiring Authority on any article of charge, record its reasons for such disagree me and record its own findings on such charge. If t evidence on records is sufficient for the purpose.

7. The said Regulation being, what it is, if the Disciplinary Authority disagrees with the findings of the Enquiring Authority on any article of Charge, it (D.A.) shall (obligatory) (i) record its reasons for such disagreement, and (ii) record its own findings on such charge, if the evidence on records is sufficient for the purpose.

8. A perusal of the impugned order dated March 3, 1994 passed by the Disciplinary Authority would at once indicate that it has neither recorded its reasons for disagreement with the findings of the Enquiring Authority, nor has it recorded its own findings on the relevant charge on the evidence on record. The impugned order would at once make clear that the Disciplinary Authority has not discussed the evidence on record and has neither recorded his own findings on the charge for which the Petitioner has been charged on the basis of the evidence on record. There is no finding by him that it was the duty of the Petitioner to provide electric light or electricity for which he was charged. There is no finding by him that it was the duty of the Petitioner to provide electric light or electricity for which he was charged. The conclusion arrived at by him in the concluding paragraph of his aforesaid Order that the Petitioner has failed in his duties does not, therefore, appear to be based on any premise.

9. The learned Advocate for the Petitioner had seriously assailed the quality of the impugned order passed by the Disciplinary Authority. The entire enquiry was conducted by the Enquiry Officer. It was he who had recorded the evidence and evaluated the same. He had also recorded reasons for having held that the Charge against the Petitioner has not been established. If this report was to be set aside, it could only have been done by pointing out the improprieties therein or that it was erroneous or perverse; but more importantly, by substituting that report with a better or sounder order.

Where the Disciplinary Authority is generally in agreement with the report, it is open to him to accept the report without stating precisely on what grounds he has accepted it, which position is well settled in law. The conflict of views arise in a situation where the Disciplinary Authority does not agree with the Enquiry report in which case it is obligatory on his part to substitute his report with an entirely new one setting out fresh, clear and cogent reasons why he does not agree with the earlier report, and more importantly, the reasons why he has recorded different findings. But the findings arrived at by the Disciplinary Authority in the instant case, on a perusal of the impugned order, clearly appears to be based merely on conjecture, guess or surprise, not based on any evidence; which is nothing short of opinion. There is no positive finding nor are the reasons set out in support of the conclusion arrived at by him in the impugned Order which could not, therefore, be said to be legally sustainable in so far as the recording of findings appear to be virtually unsubstantiated. The impugned Order is, accordingly, liable to fail on the ground of arbitrariness.

10. The Petitioner has stated with more than usual clarity in para. 11 of the writ application that he had received a letter dated March 9, 1994 from the Office of the Chief Mechanical Engineer, C.P.T., enclosing therewith a copy of the Enquiry

Report with the findings of the Enquiry Officer and the Order of the Disciplinary Authority dated March 3, 1994 and March 10, 1994. He (Petitioner) was not, therefore, given a copy of the report and the findings of the Enquiring Officer, and was neither provided with any opportunity of showing cause or making any representation against the penalty of compulsory retirement, as decided upon by the Disciplinary Authority, though he was found not guilty to the charge by the Enquiry Officer. The following obse-action of the Supreme Court in Union of India and others Vs. Mohd. Ramzan Khan, seems worth bearing in mind in lis context: "We make it clear that wherever there has been an Inquiry Officer and he has furnished a report to the disciplinary authority at the conclusion of the inquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and will also be entitled to make a representation against it, if he so desires, and non-furnishing of the report would amount to violation of rules of natural justice and make the final order liable to challenge hereafter."

11. The Supreme Court in Uttar Pradesh Government Vs. Sabir Hussain, has also held that non-supply of findings of the Enquiry Officer and his recommendation o the delinquent Officer is a denial of reasonable opportunity. The Supreme Court in Managing Director, ECIL, Hyderabad and Ors. v. B. Karunakar and Ors. (1993) S.C.C. (2 & 5) 1184, while affirming the law laid down in Ramzan Khan's case (Supra) lad further held that the same should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry Officer before the disciplinary authority records its findings on the charges levelled against him.

12. Their Lordships have further reiterated that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt c innocence of the employee with regard to the charge levelled against him. That right is a part of the

13. Since it is the right of the employee to have the" report to defend himself effectively and he would no know in advance whether the report is in his favour o against him, it will not be proper to construe his fallen to ask for the report, as the waiver of his right. Whether therefore, the employee asks for the report or not, the report has to be furnished to him.

14. To prevent injustice or miscarriage of justice a the threshold, the disciplinary authority should supply the copy of the report, consider objectively the records the evidence, the report and the explanation offered by the delinquent and make up his mind on proof of the charge or the nature of the penalty. The supply of the

copy of the report is, thus, a sine qua non for a valid fair, just and proper procedure for the delinquent to defend himself effectively and efficaciously.

15. The proceedings must be just, fair and reasonable and negation thereof offends . Article 14 and 21. The principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the internal which is the basis for the decision. The enquiry Court constitute fresh material which has great pervasive force or effect on the mind of the disciplinary Authority. The supply of the report, along with the final Order as in the instant case, is like a post-mortem intoxicate with putrefying order. The failure to supply by thereof to the delinquent would be unfair procedure offending not only Articles 14, 21 and 311(2) of the Constitution, but also, the principles of natural justice.

16. The Supreme Court in O.K. Yadav v. J.M.A. industries Ltd. 1993 L.LJ. 699 has held that it is well-settled that the got to life enshrined in Article 21 of the Constitution would include the right to livelihood. The order of termination insist with civil consequence of jeopardizing not only the worker's livelihood but also the career and livelihood of he dependants. Therefore, before taking any action of disgusting an end to the tenure of an employee, fair play inquires that a reasonable opportunity to put forth his ;as is given and domestic enquiry conducted complying with the principles of natural justice.

17. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority to act arbitrarily affecting the rights of the concerned person.

18. In view of the aforesaid observations of the Supreme Court the delinquent employee is entitled to a copy of report of Enquiry Officer and also to make rep sanitation against the report and findings of the Enquire Officer holding him (delinquent) guilty of all or any the charges before the Disciplinary Officer takes decision on the basis of the Enquiry report. In a case, here where the Enquiry Officer has held that Charge against the Petitioner has not been establish* and the Disciplinary Authority proposes to hold that Charge against him has been established, the delinquent would all the more be entitled to a copy of tr Report of the Enquiry Officer and his findings before the Disciplinary Authority takes a contrary decision, an would also be entitled, with stronger force, to make representation against the proposed finding of the Disciplinary Authority (to the contrary) so as to enable him (delinquent) to persuade/convince/satisfy the Disciplinary Authority that having regard to the report o the Enquiry Officer, his findings, and the evidence 01 record, the Charge/s cannot be held to have been established. The failure of the Disciplinary Authority to furnish the Petitioner with

a copy^ of the report of the Enquiry Officer and his findings before taking decision (to the contrary) by his impugned order dated March 3, 1994, and his (D.A."s) failure to offer opportunity to the Petitioner to make representation against his (D.A."s) proposed finding that the charge against him is established, contrary to the finding of the Enquiry Officer that the charge against him (Petitioner) has not been established, to my Judgment, amounts to denial of reasonable opportunity and violation of the rules of natural justice.

19. My aforesaid view finds support from the decisions of some other High Courts and the Supreme Court. In *K.N. Misra Vs. M.D., State Bank of India and Others*, learned Single Judge of Allahabad High Court had found that the punishing authority differing from the finding of the inquiry officer held the official guilty of the charges from which he was exonerated. No notice or opportunity was given to the delinquent officially by the punishing authority. The order of removal was set aside, holding the same to be violative of principles of natural justice and fair play. The order of dismissal can certainly be passed if he had differed from the report of the inquiry officer by giving an opportunity of hearing to the delinquent. A Division Bench of the Allahabad High Court in *Vakil Chand Jain Vs. Central Bank of India and Others*, has also held that where a Disciplinary Authority disagrees with the report of the Enquiry Officer it is incumbent upon him (former), if the charges on which the delinquent was exonerated by the Enquiring Officer, were to be used against him to give a warning to him: (delinquent) that he was going to use those charges. He should have apprised him on his own attitude and given him an adequate opportunity. If that opportunity is not given, the order "of the Disciplinary Authority cannot be upheld. A similar view had been taken by a learned single Judge of Andhra Pradesh High Court in *T. Vasudeva Rao v. The General Manager, Punjab National Bank, New Delhi and Ors.* 1990 (1) S.L.R.343 holding that it is well settled that the findings recorded by-Enquiry Officer is not binding on the disciplinary authority, and the disciplinary authority can disagree with the finding and record its own finding based on reasons but before exercising that right, the doctrine of fair play would require that an opportunity of representation should be given to the delinquent officer to show cause as to why the finding in favour of the delinquent officer should not be disturbed for the reasons given if the show cause notice calling upon an explanation, consider the same and then come to its own conclusion either agreeing or disagreeing with the stand taken by the delinquent officer, i am in complete agreement with the views so taken in the aforesaid decisions for the reasons already indicated above. Let alone the aforesaid decisions the Supreme Court in *Brij Nandan Kansal v. State of U.P. and Anr.* 1989 S.C.C. (L & S) 99 has also taken the similar view in the facts and circumstances of that case. And, the Supreme Court in *Narayan Misra v. State of Orissa* 1969 S.L.R. 657 has clearly hold that where the delinquent employee is acquitted of some charges and found guilty of other charges by the Enquiry Officer and the punishing authority differs from the findings of the Enquiry Officer and holds the delinquent employee guilty of charges from which he was exonerated by the Enquiry Officer (as in the

instant case), and no notice or opportunity is given to the delinquent employee about the attitude of the punishing authority, the order of removal passed by him is violative of natural justice and fair play and is liable to be set aside. In the instant case, such a procedure, admittedly, was not followed by the Disciplinary Authority and the impugned order of the Disciplinary Authority dated March 3, 1994 directing compulsory retirement of the Petitioner is liable to be set aside being violative of the principles of natural justice and fair play.

20. Realising the difficulty somewhat tardily the learned Advocate for the Respondents, by inviting my attention to Reg. 15 of the relevant Regulations, had sought to submit that an alternative remedy by way of appeal being available to the Petitioner, the writ application is liable to be rejected. He had referred to the decisions of the Supreme Court in S.A. Khan Vs. State of Haryana and others, wherein the Court had dismissed the writ petition on the ground that the remedy of appeal was available to the Petitioner. But the challenge there was only against the order of suspension and not against the entire Disciplinary Authorities. The facts therein do not seem to be applicable to the acts and circumstances herein. The learned Advocate or the Respondents had also referred to another decision of the Supreme Court in Union of India (UOI) Vs. T.R. Varma, wherein it has been held that it is well-settled That when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It has further been observed therein that it is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. And, where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds therefor. And, the Supreme Court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, has, clearly held in a case where the Petitioner had filed a writ petition instead of availing himself of statutory remedy and where the High Court had entertained the same and had given hearing on merits that the writ petition cannot be rejected on the ground that the statutory remedy was not availed of by the Petitioner. In the instant case as well the writ petition had already been entertained by this Court and the parties have also been given hearing at length on merits. That being so, the writ petition cannot clearly be rejected on the ground that the Petitioner had not availed himself of the remedy of appeal available to him under the relevant Regulations; more particularly, in the facts and circumstances of the instant matter, as amply and appallingly made clear above. That apart, the appellate authority under the relevant regulations would also be incompetent to enter into the question of violation of the principles of natural justice and fair play, raised herein.

21. In view of the discussions above, the writ Petitioner should clearly succeed, as it must. The impugned order dated March 3, 1994 passed by the Disciplinary Authority, being annexure "G" to the writ application, be hereby set aside. This

Order shall not, however, prevent the Disciplinary Authority from proceeding with the matter afresh from the stage of receipt of the report of the Enquiry Officer according to law after giving the writ Petitioner all reasonable opportunity of being heard before coming to a decision as to his guilt or innocence with reference to the Charge framed against him in the light of the observations hereinabove made. If it proposes to proceed further in the matter in terms of this Order, it shall conclude the proceedings, as early as possible, not later than six months from date, failing which the entire proceedings shall stand quashed.

22. In the facts and circumstances of the matter. I direct the parties to bear their respective costs of this hearing.