
(1967) 04 CAL CK 0026
In the Calcutta High Court
Case No : Civil Rule No. 710 (W) of 1963

Amal Kumar Sanyal

APPELLANT

Vs

Divisional Operating Superintendent

RESPONDENT

Date of Decision : 04-04-1967

Acts Referred:

Constitution of India, 1950 — Article 309, 311(2)
Government of India Act, 1935 — Section 240(3)

Citation : (1968) 1 ILR (Cal) 509

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Noni Coomar Chakravartti and Alok Kumar Dhar, for the Appellant; Bhabesh Narayan Bose, for the Respondent

Judgement

D. Basu, J.—This Rule is directed against the charge-sheet at Ann. A, the show-cause notice at Ann. M and the order of removal at Ann. O to the petition.

2. The Petitioner was appointed as Asstt. Station Master on probation in the year 1958 and thereafter confirmed in that post in 1962. There was a derailment at Raniganj, station at about 1.15 hours on May 5, 1963. That day, the Petitioner joined at 00.10 hours and took over his duties from Asstt. Station Master K.K. Bose, who was on duty till then. There was an inquiry at the spot held by five officers that very day and by their joint note they held the Petitioner along with K.K. Bose and the guard N.K. Chakravarty liable for the derailment.

3. On May 30, 1963, the charge-sheet at Ann. A was issued by Respondent No. 1, calling upon the Petitioner to submit his explanation within 7 days of service thereof. On June 3, the Petitioner asked for certain facilities for getting ready for the inquiry proposed, but that request was turned down, and on June 11, 1963, before the Petitioner could submit his explanation, the Petitioner was informed that a Board of Inquiry had been constituted to hold the departmental inquiry and that the Board would have its sitting at Raniganj on June 24, 1963. On June 12, 1963, the Petitioner repeated his request for the facilities and asked for

production of certain documents at the inquiry. On June 13, 1963, a fresh notice of inquiry, modifying the constitution of the Board of Inquiry was issued (Ann. G). Overruling various contentions of the Petitioner the Board submitted its inquiry report (Ann. K), holding the Petitioner guilty of the charges.

4. Upon a perusal of the said report and agreeing with the findings (Ann. L) Respondent No. 1 issued the show-cause notice at Ann. M directing the Petitioner to show cause why he should not be removed from service. The Petitioner's explanation to that notice dated September 5, 1963, is stated to have been received by Respondent No. 1 at 16.00 hours on September G, 1963, and that very day the order of removal at Ann. O was issued by Respondent No. 1.

5. The charge-sheet as well as the two other impugned orders have been challenged by the Petitioner as ultra vires and illegal. Affidavit-in-opposition on behalf of the Respondents has been filed by Respondent No. 2 who had acted as the chairman of the Board of Inquiry.

6. The first complaint of the Petitioner, directed against the charge-sheet, is that it did not indicate the specific rules, the violation of which constituted the "offence" with which the Petitioner was charged.

7. The charge-sheet gave sufficient particulars as to why the Petitioner was being held responsible for the derailment, as required by Rule 1709 of the Railway Establishment Code, read with App. II which prescribes a form for the drawing up of charges. The Petitioner, however, relies on "subsidiary instruction" (ii), which is printed below Rule 1709 in the publication, Eastern Railway Discipline and Appeal Rules for non-gazetted Railway servants.

8. But the Petitioner has failed to point out any statutory authority behind these "subsidiary instructions". The preface to the publication says that these instructions have been "issued by the Railway Board and this Administration" "for the guidance of all concerned". It has not been shown that these instructions have been issued in exercise of the rule-making power vested in the Board and the General Manager by Rules 1578 of the Railway Establishment Code. Paragraph 5 of the preface says that changes in the instructions may be introduced by merely issuing "correction slips". In the result, it cannot but be concluded that the subsidiary instructions are merely administrative instructions issued by the authorities to assist the subordinate officials in applying the rules contained in the Discipline and Appeal Rules. In para. 12 of the petition it is stated that after receipt of the charge-sheet, and again on June 12, 1963, the Petitioner asked for certain facilities, but it does not appear that the Petitioner at this stage complained that he could not meet the charges in the absence of reference to the Railway rules which had been violated by him.

9. Thus, there has been neither contravention of any statutory rules nor any prejudice caused to the Petitioner by not mentioning the specific rules in the charge-sheet which was otherwise full and self-explanatory. This contention must, therefore, be rejected.

10. The next attack levelled against the charge-sheet is that it is invalid because it has not been issued by the "appointing authority" as defined in Rule 1702(i) of the Code.

11. Rule 1709 says that the charges may be framed by the "disciplinary authority". This expression, as defined in Rule 1702(ii), means the "appointing authority", when the penalty to be awarded is "removal", with this exception that "in relation to the issue of chargesheets etc. under Rules 1709-1712 and 1716" it would mean "any authority competent to impose any of the penalties specified in Rule 1707".

12. In the instant case, both the charge-sheet and the order of removal were issued by the same officer, namely, the Divisional Operating Superintendent (Safety), who describes himself as the "disciplinary authority". He is Respondent No. 1. In the petition, however, it was not pleaded that he was not competent to issue the charge-sheet or to impose the penalty. This contention, raised at the hearing, cannot be entertained.

13. For the same reason no relief can be founded on the other point urged at the hearing as to the official who would be the "appointing authority" where a person was appointed on probation by one officer and later confirmed by another.

14. As regards the proceedings before the Board of Inquiry the following points have been pressed on behalf of the Petitioner:

(i) The rules contained in the Railway Establishment Code, having been framed under Article 309 of the Constitution, the proceedings are liable to be invalidated in case of contravention of any of the mandatory provisions of these rules.

15. The Petitioner contends that there has been a violation of Rule 1712(2), in the matter of offering him the assistance of a "defence helper". The rule says:

The accused Railway servant may present his case with the assistance of any other Railway servant employed on the same Railway...on which he is working.

16. The words "subject to the approval of the Inquiring Authority", which occurred at the end of the above sub-rule, have been deleted by an amendment on November 17, 1962 (S.L. 5164). Similar words, at the end of the note appended to the sub-rule have also been omitted by the same amendment. It is thus clear that the Inquiring Authority has no discretion in the matter of the Petitioner's right to nominate any other Railway servant on the same Railway as his "defence helper" remembering that he is not entitled to the assistance of any professional lawyer.

17. Annexure B contains the letter dated May 30, 1963, written to the Petitioner by Respondent No. 1 in the matter of his nominating "defence helper". It has been rightly contended on behalf of the Petitioner that this letter has imposed two conditions which are absent in the rule itself and which fettered the unfettered option given to the Petitioner by the rule in this behalf.

18. The first condition imposed by this letter is that the Petitioner was to submit not one name but a panel of three names in order of priority. However salutary the object of this condition may be, it leaves open to the Administration a room for selection from amongst the persons nominated by the Petitioner. The rule does not ask the Petitioner to submit a list of more than one name. It may be that the person nominated by the Petitioner is eventually unable to act; in such a contingency the Administration may possibly ask the Petitioner to nominate another. But the Administration cannot have a choice to select from amongst the nominees of the Petitioner after sounding their inclinations. Any such choice would prevent the Petitioner from real and effective assistance from a helper which is assured by the rule.

19. The second condition is that the persons nominated by the Petitioner would be allowed to act as the Petitioner's helper only if they "are spared by their offices if they are Railway employees". This is patently an illegal condition. Using this condition it would be open to the Administration to reject a nominee whom they consider undesirable. There is no reason why the Administration should not consider it their duty to spare an employee who has been nominated by the delinquent in the interests of a proper defence of the delinquent in a quasi-criminal proceeding. Otherwise the object of Rule 1712(2) would be defeated. It has been held by this Court in *Ram Subhak Ojha Vs. The Commissioner of Police and Others*, , *Sailendra v. State of West Bengal* (1963) 6 F.L.R. 26 (34), that where the defence witnesses are employees of the prosecuting department, it should be the duty of the department authorities to produce them at the hearing. This principle should apply with greater force in the matter of a defence helper as regards which a statutory right is given to the Petitioner by Rule 1712(2).

20. It has been pointed out to me on behalf of the Respondents that para. 1 of App. IIA to the Discipline Rules speaks of the delinquent being called upon to submit a panel of three names. This appendix, however, refers to Rules 1709 and 1711 of the Code as its authority, and not Rule 1712. Reference to this appendix is to be found in the subsidiary instructions under Rule 1709 which requires a letter to be issued with the charge-sheet, or immediately thereafter, giving the delinquent advice as to how he should proceed. In my opinion, Rule 1712 does not confer any authority to supplement or modify it by making the appendix, and the relevant portion in the appendix is inconsistent with Rule 1712.

21. In my opinion, the condition imposed by the Administration was ultra vires Rule 1712(2).

22. In fact also, the Petitioner has been denied a reasonable opportunity in the matter of engaging a defence helper of his choice in the instant case. By his application dated June 12, 1963, the Petitioner nominated one Sri H.S. Chatterjee as his defence helper, but by the letter at Ann. I to the petition, the Administration rejected that request on the simple ground that he could not be spared, and the Petitioner was asked to submit other names, failing which he was to go without a defence helper. His prayer for leave to secure a defence

helper of his choice from elsewhere, after obtaining their consent, had been rejected (Ann. W to the counter-affidavit and Ann. J to the petition). In para. 20 of the petition it is stated that, in these circumstances, the Petitioner was obliged to nominate one S.C. Bhattacharjee. I agree with the observation of Banerjee J. in *Gopal Chandra v. General Manager* (1964) C.L.J. 1 (9) that

The facility for appointment of a defence helper is not a matter of form but of substance.

That facility has been denied in this case.

23. It was argued by Mr. Bose for the Respondents that there was nothing in Rule 1712(2) to indicate that the "defence helper" must be a man of the Petitioner's choice. The simple answer to this is that if the intention of the rule were otherwise, it would have provided that the defence helper would be a person nominated by the Administration. In fact, the intention that the defence helper should be a man of the Petitioner's choice has been made clear by the amendment of Rule 1712(2) in 1962, which has been referred to by me earlier. A corresponding amendment of the App. IIA should have been made in 1962, but the omission to do that cannot enable the appendix to override the provision of Rule 1712(2) or to defeat the amendment thereof in exercise of the rule-making power. In case of a conflict between the rule and the appendix the former should prevail. The power to reject a nominee of the Petitioner could be exercised by the Inquiring Authority before the amendment in exercise of his power of "approval" which has since been deleted. When the rule-making authority has deliberately omitted the relevant words, it is evident that they do not desire to keep in the hands of the Administration any discretion in the matter and that the interests of a proper conduct of the disciplinary proceedings according to the principles of fairness and natural justice should override the convenience of the Administration.

24. The Respondents did not pay any heed to the plea taken by the Petitioner in his "defence note" dated August 21, 1963, that he had not been allowed to have a "defence helper" of his choice.

25. There has thus been a violation of Rule 1712(2) as well as a denial of "reasonable opportunity" under Article 311(2) to vitiate the disciplinary proceedings.

26. The next complaint made by the Petitioner, as contained in his "defence note" reproduced in paras. 22 and 24(e), is that "out of the three witnesses asked for by your Petitioner, two were not produced at the inquiry".

27. In his petition dated August 2, 1963 (Ann. J) the Petitioner asked the chairman of the Inquiry Committee to produce three witnesses on his behalf-- A.K. Banerjee, S.K. Chatterjee and M.K. Chatterjee. S.K. Chatterjee was produced and examined on behalf of the Petitioner. A.K. Banerjee was also produced, but he refused to make any statement (para. 22 of the petition) as he

was not on duty at the time of the derailment (vide Ann. X to the counter-affidavit and para. 18 thereof). Hence, the Petitioner can have no grievance as regards Banerjee. As regards M.K. Chatterjee, however, it is stated in the counter-affidavit that his evidence was not considered relevant as he had "nothing to do with the accident", and that is why the prayer for production of this witness was refused.

28. In a trial in Court, though a Defendant or accused has no absolute right to cite anybody as witness as he likes and to compel his attendance, the Court has no discretion, subject to statutory exceptions, to refuse to summon any person whose evidence appears to be relevant. That the position of a delinquent at a departmental proceeding is similar has been established in various decisions of this Court in *A.R.S. Choudhury Vs. The Union of India (UOI) and Others*, , *Sailendra v. State of West Bengal Supra*. The observation relied upon by Mr. Chakravarty in *Sailendra v. State of West Bengal* is that

it is not for the enquiring officer to pick and choose witnesses on behalf of the delinquent,

provided their evidence was relevant. In para. 22 of the petition it is categorically asserted that Sri M.K. Chatterjee, who was another Asstt. Station Master of the same station Raniganj, was a relevant witness as he

could have established the system of working as laid down in the Station Working Rules...and also to the extent of responsibility of A.S.M. in connection with shunting.

The answer to this statement in para, 18 of the counter-affidavit and in Ann. X thereto is obviously inadequate. A person may not have anything to do with the accident in question, but he may be a competent witness to explain the working rules the breach of which is alleged in the inquiry report to constitute the offence with which the Petitioner was charged. In this case the share of responsibility of the Asstt. Station Master was the point for investigation at the disciplinary inquiry and, certainly, another Station Master employed at the same station was a competent and relevant witness at the inquiry.

29. In my opinion, the refusal to allow M.K. Chatterjee to be examined on behalf of the Petitioner was unwarranted and has prejudiced the Petitioner, and the inquiry proceedings are liable to be struck down on this ground.

30. The Petitioner has a similar grievance as to non-production of documents.

31. Apart from the decisions of this Court, cited earlier, there is the authority of the Supreme Court in *State of M.P. v. Chintaman AIR 1961 S.C. 1623 (1629)* that the withholding of documents which are relevant to the defence constitutes a violation of Article 311(2).

32. It is, therefore, to be examined whether the documents referred to by the Petitioner in this behalf were relevant for his defence.

33. In his letter dated June 12, 1963, at Ann. F, the Petitioner stated that he was unable to submit his explanation to the charges unless the 12 items of documents specified in para. 11 of that letter were available to him. He prayed for supplying "certified copies" of these documents. In reply to this request Respondent No. 1 stated that "certified copies of these documents cannot be given to you", but he was permitted to inspect the documents at his office on any convenient day (Ann. I). This was in accord with the requirements of Rule 1711 of the Code.

34. The grievance of the Petitioner, as contained in para. 19 of the petition, is that when he called at the office of Respondent No. 1 for the purpose of inspection as directed, the Respondent withheld from the Petitioner's inspection 7 of the 12 items asked for by him. In paras. 14-15 of the counter-affidavit it is stated when the Petitioner attended the Respondent's office on June 18, 1963, all the documents asked for by the Petitioner were offered to his inspection. As to the item relating to the report of the fact-finding investigation, it is stated in the counter-affidavit that there was no "report" other than a "joint note" which was supplied to the Petitioner along with the charge-sheet.

35. It has been rightly contended on behalf of the Respondents that in his defence note or in any other petition before the Inquiry Committee the Petitioner did not make any grievance as to withholding any document from his inspection and, above all, since the allegation of withholding has been denied in the counter-affidavit and the Petitioner has not submitted any further affidavit-in-reply, the objection of the Petitioner on this score cannot be entertained.

36. The next complaint of the Petitioner is that, as would appear from Ann. K (p. 37 of the petition), at the disciplinary proceedings in question, a joint inquiry was held against the Petitioner along with guard N.K. Chakravarty, who was under the disciplinary authority of an officer other than Respondent No. 1, and that, accordingly, the joint trial was ultra vires inasmuch as no order of the competent authority as required by Rule 1718 of the Code was obtained to sanction such joint inquiry.

37. On behalf of the Respondents it is admitted that there was no such order as referred to in Rule 1718 but contended that--

(a) Rule 1718 does not exhaustively deal with the subject of joint inquiry and that, under the general provisions of the Code, a joint inquiry was permissible.

(b) Rule 1718 is not applicable where the co-accused are all Railway servants.

38. (a) It is not possible to agree with the first contention, because Rule 1709 which starts the disciplinary proceedings by the issue of charges speaks of "a Railway servant" for whose punishment under Rule 1708 the inquiry is to be held. It is that "Railway servant" who is referred to in the following Rules 1710, 1711 and 1712. The detailed procedure for inquiry is laid down in Rule 1712 and this rule gives no inkling that the inquiry may be held as to charges brought

against several Railway servants jointly. It is because of the absence of any provision for joint trial in any of the preceding rules that specific provision had to be made in Rule 1718 and, therefore, if any joint trial does not come within the terms of Rule 1718, it must be held as not permissible under the Code, which is a statutory code dealing with disciplinary proceedings against Railway servants.

(b) Sub-rule (1) of Rule 1718 says:

Where a Railway servant/servants and other Government servant/servants are concerned in any case, the President or other authorities competent to impose the penalty of dismissal from service such Government/Railway servants may make order/joint order directing that disciplinary action against all of them may be taken in a common proceeding.

39. Mr. Bose for the Respondents lays emphasis on the conjunction "and" and says that the rule applied only when a Railway servant or servants are jointly implicated in a case with non-Railway Government servants. This contention is, however, belied by the subsidiary instructions appended to the rule:

Joint order by Competent Authorities will be necessary when an order is required to be passed by an authority lower than the President and/or when the Railway servants belong to different department/branch under different appointing authority.

The same procedure will also be followed when a Railway servant is involved in a case in which the conduct of another Government servant is also under investigation.

40. I am constrained to say that the drafting of both the rules and the subsidiary instructions are clumsy and the sooner better talents are employed to improve them the better it is in the interests of the Administration itself, not to speak of the employees. Though the subsidiary instructions may not have statutory force to override the provisions of the rule, they show what the rule-making authority itself understood the rule to mean, viz., that it applied not only where Railway and non-Railway Government servants were jointly involved in a case, but also where Railway servants belonging to different branches under different appointing authorities. It must be said that this is the only sensible interpretation of the rule if its object is to be fulfilled. When the punishing authorities of several delinquents, whose joint trial is sought, are different, there would be a confusion if the several appointing authorities go in their own way; hence, in order to bring them under joint trial the order of an authority superior to the several appointing authorities is required to provide for a common inquiry into the charges brought against the delinquents involved in the same case. The situation calling for such order of a superior authority is the same whether the co-delinquents belong to different departments of the Railway itself or whether they belong to the Railway and another Government department.

41. As I read Sub-rule (1) of Rule 1718, the obliques used at different places of

the sub-rule make the sub-rule capable of bearing an interpretation as stated above. As Ann. K says, the several delinquents in the case before me were admittedly placed under different punishing authorities.

42. Hence, the order of a superior authority under Rule 1718 was required to put them under joint inquiry. The proceedings must be struck down in the absence of such order.

43. More serious is the complaint of the Petitioner with respect to the "Accident Bulletin" issued on June 13, 1963, by Respondent No. 4, the Divisional Superintendent at Asansol, who admittedly is the appellate authority prescribed by the rules for hearing appeals against an order of removal. By this bulletin, issued during the pendency of the disciplinary proceedings against the Petitioner and his co-delinquents, the appellate authority had stated that the cause of the accident was "careless working by the station staff", that "guard N.K. Chakravarty and A.S.M.s A.K. Sanyal and K.K. Bose have been held responsible for careless working" and that "DS/HWH has been asked to take necessary action against the guard of BWN. Action against the A.S.M.s are being taken".

44. Evidently the language of the bulletin is quite unguarded and it may reasonably give the impression to a reader that the authorities have held the Petitioner guilty of the charge of careless working and that action was being taken for his punishment. It might have been innocuous if the bulletin had simply stated that the disciplinary proceedings had been ordered or were pending. It is common place to point out that no employee can be held guilty of any charges brought against him unless the charges have been established at the inquiry held for the purpose and until then the competent authorities must keep their minds open; and this has been reiterated by the Supreme Court on occasions more than one in *Khem Chand Vs. The Union of India (UOI)* and *Others*, , *Hukum Chand Malhotra Vs. Union of India (UOI)*, , *State of Assam and Another Vs. Bimal Kumar Pandit*, , *State of Andhra Pradesh Vs. Sree Rama Rao*, . In view of the fact that the bulletin was issued by the appellate authority there is every likelihood of the Inquiry Committee or the punishing authority being biased by the statements made in the bulletin. There has thus been a denial of natural justice and a fresh proceeding should be directed.

45. The above finding also disposes of the preliminary objection taken in the counter-affidavit that the petition is not maintainable without exhausting the statutory remedy of appeal. If the appellate authority had already expressed his views as above, it was fruitless for the Petitioner to approach him for relief.

46. In view of my findings the punishment cannot be sustained and fresh disciplinary proceedings should be held by the Respondents if they want to proceed against the Petitioner. Though I have rejected the pleas raised by the Petitioner which are levelled against the charges, I would direct that before starting the proceedings afresh the charge-sheet at Ann. A should be suitably amended to delete "the list of penalties" appended at its end and the

corresponding recitals at the end of para. 1 which ask the Petitioner to show cause "why he should not be punished with the penalty specified in item 8...", for the following reason:

47. In several High Court decisions the view had been taken that there was no irregularity in issuing a combined charge-sheet which asked the delinquent not only to show cause why he should not be held guilty of the charges drawn up, but also why the proposed punishment should not be awarded against him. This view, with respect, overlooked the observations of the Privy Council in I.M. Lall's case L.R. (1948) 75 I.A. 225 (242) that the proceeding u/s 240(3) of the Government of India Act, 1935, to which Article 311(2) of the Constitution corresponds, consisted of two stages--the inquiry stage and the punishment stage. In that case, together with the charges served, the Government servant was asked to show cause "why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce...." The Judicial Committee held that there was no question of proposing a. punishment "until a definite conclusion has been come to on the charges, and the actual punishment to follow is provisionally determined". In Khem Chand Vs. The Union of India (UOI)and Others, and in Hukum Chand Malhotra Vs. Union of India (UOI), this reasoning in I.M. Lall's case L.R. (1948) 75 I.A. 225 (242) was elaborated by the Supreme Court to hold that there was no question of the delinquent to show cause against any punishment for, nor for the punishing authority to propose any punishment at all until the delinquent was held guilty of the charges as a result of the inquiry held. The two stages are explained also in Bimal Kumar's case Supra, p. 1614.

48. The above statement of the law has been made clear by the amendment of Article 311(2) by the Constitution (Fifteenth Amendment) Act, 1963, which came into force on October 6, 1963. In order to avoid further trouble, I would, therefore, direct an amendment of the charges, as suggested earlier, before proceeding afresh with the disciplinary proceeding, if at all.

49. In the result, the Rule is made absolute, but without any order as to costs. Let the impugned orders at Anns. M and O be cancelled, with liberty to the Respondents to proceed afresh with the disciplinary proceedings according to law, after making the necessary amendments of the charge-sheet at Ann. A as suggested herein in respect of the mention of the proposed penalty in the charge-sheet.