
(1968) 06 CAL CK 0033
In the Calcutta High Court

Anil Kumar Mitra

APPELLANT

Vs

Commissioners for Port of and Others

RESPONDENT

Date of Decision : 21-06-1968

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 323

Citation : 73 CWN 153 : (1969) 2 LLJ 232

Hon'ble Judges : S.C. Ghose, J;Arun K. Mukherjee, J

Bench : Division Bench

Judgement

S.C.Ghose, J.—This appeal is directed against the judgment and order dated 21 July 1966, passed by B.C. Mitra, J., discharging the rule nisi and dismissing the application of the appellant-petitioner for inter alia issue of a writ of mandamus or any other appropriate writ for quashing a notice dated 7 March 1964, terminating the service of the appellant under the respondents.

2. On 1 September 1914, the appellant-petitioner was appointed a clerk in the A.R.P. Unit under the respondents. On 1 April 1946 the appellant petitioner was transferred to the Traffic Department of the respondents as a shed clerk. The service of the appellant-petitioner was confirmed on 1 August 1947.

3. The facts leading to the application before the trial Court were as follows.

4. The Commissioners for the Port of Calcutta is a body corporate established by the Calcutta Port Act (Bengal Article 3 of 1890) entrusted with the powers and duties set out in the said Act in respect of the Port of Calcutta.

5. u/s 31 of the said Act the Commissioners for the Port of Calcutta have power to frame rules in meeting, inter alia, for regulating the period of service of the employees of the Commissioners subject to the approval of the Central Government in accordance with the provisions of Sub-section (3) of Section 31 of the said Act. In meetings held on 12 December 1921, 29 May 1939 and 29 March 1954, the Commissioners for the Port of Calcutta framed and adopted fundamental and supplementary rules regulating the conditions of service of the

employees of the Commissioners. The said fundamental and supplementary rules were confirmed and approved by the Central Government in accordance with the provisions of Sub-section (3) of Section 31 of the said Act.

6. By virtue of Fundamental Rule 56 adopted as mentioned above an employee of the category of the appellant-petitioner of the Commissioners for the Port of Calcutta is entitled to continue in service until the age of superannuation, i.e., 58 years.

7. At a meeting held on 10 September 1945 the Commissioners for the Port of Calcutta framed and adopted rules known as "Further conditions of service." The said Commissioners also adopted and framed rules at their meetings of 24 September 1945 and 23 August 1948. Although the said rules were acted upon by the said Commissioners the same were not approved by the Central Government in accordance with the provisions of Sub-section (3) of Section 31 of the said Act. In the premises the said rules failed to have any effect and were not binding as statutory rules upon the employees of the Commissioners for the Port of Calcutta including the appellant-petitioner.

8. Copy of the said rules of 1945 were served upon the appellant-petitioner on 17 September 1948. The appellant-petitioner subscribed to the same by affixing his signature.

9. Subsequently at a meeting on 22 June 1959, the Commissioners adopted a fresh set of rules which were approved by the Central Government. The said rules have been annexed to the petition and marked with the letter "A."

10. By a letter bearing No. E/TM, dated 7 March 1964, respondent 2, Deputy Chairman of the Port of Calcutta, terminated the service of the appellant petitioner with immediate effect and offered a month's salary to the appellant-petitioner in lieu of notice. Thereupon the appellant moved the said application.

11. Upon the appellant's application, a rule nisi was issued directing the respondents to show cause as to why a writ of mandamus would not issue for quashing the said notice dated 7 March 1964. The said rule was ultimately heard and discharged, as mentioned above, by the aforesaid judgment and order dated 21 July 1966. Hence, this appeal against the said judgment and order.

12. In the appeal before us Sri A.P. Sarkar, the learned advocate, contended:

(1) Under Fundamental Rule 56 the appellant-petitioner was entitled to continue in service under the respondents until he attained the age of 58 years. In the premises the notice dated 7 March 1954, terminating the service of the appellant, amounted to punishment and/or infliction of penalty upon the appellant by dismissal and the same having been done without giving any opportunity to the appellant to show cause against the said punishment, principles of natural justice had been violated and as such the said notice dated 7 March 1964 is bad and should be quashed.

(2) The rules of 1959 framed and adopted by the Commissioners for the Port of Calcutta were not applicable to the appellant inasmuch as the appellant was appointed long prior to the adoption or framing of the said rules, although the said rules contain a provision for terminating the service of an employee by giving one month's notice or without notice by paying one month's salary in lieu of notice. The said rules also confer power upon the Commissioners for the Port of Calcutta to dismiss an employee summarily without notice in case of misconduct.

(3) The rules of 1945, although invalid as rules u/s 31 of the Calcutta Port Act, cannot be taken to be the terms and conditions of an agreement governing the contract of service between the appellant and the Commissioners for the Port of Calcutta.

13. We shall deal with the last point of Sri Sarkar first. With regard to the rules of 1945, the pleadings of the parties are as follows:

In the petition, the appellant stated--

6. That the Commissioners under their Resolution No. 1900 of 10 September 1945 adopted a set of rules known as "Further conditions of service" relating to the conditions of service of their employees. These rules, hereinafter referred to as the said rules of 1915, together with other rules incorporated under Resolution No. 2109 of 24 September 1945 and Resolution No. 1214 of 23 August 1948, had in practice been acted upon by the Commissioners although the same had not been approved by the Government under Sub-section (3) of Section 31 of the said Act, and to that extent the said rules of 1945 having no statutory force, were not valid and binding upon the employees of the Commissioners.

7. That a copy of the said rules of 1945 was served upon the petitioner on 17 September 1948 to which the petitioner subscribed by affixing his signature.

14. In the affidavit-in-opposition the respondents stated:

8, With reference to Para. 6 of the petition, I do not admit that the rules of 1945 were not valid or binding upon the employees of the Commissioners as alleged or at all. Whether the said rules have statutory force or not, the petitioner, having subscribed to the said rules and agreed to be bound by It, cannot be heard to say that he is not bound thereby. In any case, the said rules of 1945 were part of the contract of service of the petitioner. The relevant Clause I of the 1945 rules also known as "Further conditions of service" is set out hereunder:

The services of any officer or servant may be terminated with a month's notice or a month's pay in lieu of notice in any case and without notice in case of misconduct. For the purpose of this and the following conditions a "month" shall mean the period which runs from any date in any month of the English calendar to the afternoon of the day preceding the same date of the following month of the calendar ; provided that the periods from 30 or 31 January to the afternoon

of 28 February or in a leap year 29 February shall each be taken as a "month".

15. I crave leave to refer to the "Further conditions of service" (1945) as amended from time to time at the time of hearing.

9. The statements in Para. 7 of the petition are admitted. I, however, say that the validity and binding effect of the rules framed by the Commissioners under powers conferred by Section 31 of the said Act, including rules governing conditions of service of employees, do not depend upon the service thereof upon the employees concerned or their subscribing thereto.

16. In the affidavit-in-reply the appellant stated:

5. In regard to Para. 8 of the said affidavit I repeat and reiterate the statements contained in Para. 6 of the petition, and deny that rules of 1945 were part of the contract to my service or that I was bound by the said rules of 1945 for having subscribed to the said rules of 1945 which, in any event, do not have any statutory force. Save as aforesaid I deny the allegations made in Para. 8 of the said affidavit.

6. In regard to Para. 9 of the said affidavit, I deny the allegations made therein, and state that the rules governing conditions of service of employees must be served upon the employees concerned and/or subscribed thereto by the said employees to have validity and binding effect.

17. Thus it is the case of the appellant that the Commissioners acted upon the said rules of 1945. A copy of the rules was served upon the appellant and appellant-petitioner subscribed thereto. It is the case of the Commissioners for the Port of Calcutta that the said rules of 1945, although invalid as rules for want of approval of the Central Government, were and are valid and binding upon the parties as terms and conditions of the contract of service between the appellant and the Commissioners. In the case of Patit Paban Bose Vs. The Commissioners for the Port of Calcutta, decided by a Division Bench of this Court consisting of Chakravartti, C.J., and K.C. Das Gupta, J., the said Rules of 1945 came to be considered. It was held:

...if the Commissioners had power to appoint persons under them, which they undoubtedly had, they would necessarily have to appoint them on some terms or other and, therefore, they had power to include among the terms of appointment the further conditions of service which, upon being accepted by the appointees, would become binding on them.... The further conditions of service, not being conditions, having the force of statutory rules, could not apply to all employees generally and of their own force; but the Commissioners could include them in the contract of service with individual employees....

18. In the aforesaid case, it was held by Chakravartti, C.J., delivering the judgment of the Division Bench, that although the said "farther conditions of service" framed in 1945 u/s 31(1) of the Calcutta Port Act did not have the effect of statutory rules for want of approval by the Central Government, the same

having been accepted by the appellant in the said case, were binding upon the appellant as terms and conditions of the contract of service between the appellant in the said case and the respondent-Commissioners. Because of the following rule, amongst others, in the said "further conditions of service" adopted in 1945, the appellant was not entitled to the opportunity to show cause against the termination of his service under the said rule. The said condition is as follows, to wit:

The services of any officer or servant may be terminated with a month's notice or a month's pay in lieu of notice in any case and without notice in the case of misconduct....

19. In the instant case, the appellant-petitioner himself has stated in the petition that the "further conditions of service," i.e., the rules of 1945, were acted upon by the Commissioners, copy of the said rules was served upon him and he subscribed thereto. In our view, although the word "subscribe" may have different meaning in different context, the said word "subscribe" means "to give assent to." We have no doubt in our mind that the appellant, when the copy of the said "further conditions of service" was served upon him and he subscribed to the same, understood and agreed that the said "further conditions of service" would govern the contract of employment between himself and the Commissioners. The facts of the instant case, in our opinion, are similar to those of the aforesaid case of *Patit Paban Bose Vs. The Commissioners for the Port of Calcutta*, with regard to the service of the said "further conditions of service" upon and acceptance of the same by the employee by subscribing thereon. We respectfully agree with the conclusion arrived at by the learned Judges deciding the said case of *Patit Paban Bose Vs. The Commissioners for the Port of Calcutta*, . We also held that by reason of the aforesaid facts the said "further conditions of service" became part of the terms and conditions of service of the employee and the Commissioners, In the instant case, as well.

20. In view of the said decision of the said Division Bench in *Patit Paban Bose Vs. The Commissioners for the Port of Calcutta*, , we are unable to accept the contention of Sri Sarkar that terms of service in the case of an employee or servant of the Commissioners for the Port of Calcutta must always be governed by rules framed u/s 31(1) of the Calcutta Port Act to which approval of the Central Government has been accorded. We are also unable to accept the contention that in a case where there is no valid rule there can be no contractual terms and conditions of the said service as urged by Sri Sarkar.

21. In view of our finding above we are of the opinion that the service of the appellant was governed by Fundamental Rules including Fundamental Rule 56, subject to the modification of the said rules by the aforesaid "further conditions of service." True Fundamental Rule 56 confers a right upon the appellant to continue to be in service until the age of superannuation, i.e., 58 years; but the said rule stands modified by the aforesaid condition which is a part of the terms and conditions of the employment of the appellant. The said term provides that

the "service of any officer or servant may be terminated with a month's notice or a month's pay in lieu of notice in any case and without notice in the case of misconduct"" Therefore the service of the appellant could be terminated under this rule which has been done by the Bald notice, dated 7 March 1964. That was a part of the contract between the parties. The said contract was not subject to or qualified by any other provision contained either in a statute or statutory in a rule.

22. Ordinarily an employee is entitled to continue in service until he attains 58 years, but the employer, i.e., the Commissioners for the Port of Calcutta, are also entitled to terminate the contract of employment under the aforesaid term even prior to the employee's attaining the age of 58 years by serving one month's notice or paying one month's salary in lieu of notice or summarily without notice in case of misconduct of such employee. The instant case, therefore, is the termination of service of the appellant by virtue of a special term of the contract of service. The appellant had not been removed or dismissed from service by way of punishment or for misconduct. Thus, in our opinion, there could not be any question of violation of any principle of natural justice or of any constitutional guarantee. Sri Sarkar relied on the case of Calcutta Dock Labour Board Vs. Jaffar Imam and Others, and submitted that the ratio decidendi in the said case applies with equal force to the instant one and the service of the appellant could not be terminated without complying with or observing the principles of natural justice. Sri Sarkar relied on the following passage at p. 116 of the said report:

...In cases where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise its powers without due regard to the principles of natural justice....

23. Sri Sarkar cited the case of Commissioners for the Port of Calcutta and Another Vs. Baleswar Singh, . In the said case Sinha, C.J., quoted the following passage from the judgment delivered by Gajendragadkar, C.J., of the Supreme Court in the aforesaid case of Calcutta Dock Labour Board Vs. Jaffar Imam and Others, :

...If...the appellant wanted to take disciplinary action against them on the ground that they were guilty of misconduct, it was absolutely essential that the appellant should have held a proper enquiry. At this enquiry, reasonable opportunity should have been given to the respondents to show cause and before reaching its conclusion, the appellant was bound to lead evidence against the respondents, give them a reasonable chance to test the said evidence, allow them liberty to lead evidence in defence, and then come to a decision of its own. Such an enquiry is prescribed by the requirements of natural justice and an obligation to hold such an enquiry is also imposed on the appellant by Clause 36(3) of the scheme of 1957 and 01. 45 (6) of the scheme of 1956.

After quoting the aforesaid observations Sinha, C.J., observed as follows:

We are, however powerless in this matter and must follow the law as declared by the Supreme Court. We must, therefore, hold that if it was a case of there being no rules at all. or in the case of Rule 18 of the Central Civil Services (Classification, Control and Appeal) Rules not being applicable, it was incumbent on the appellant to follow the rules of natural justice which has not been done in this case.

24. To appreciate the observations of the Supreme Court as well as of the Division Bench in the said case of Commissioners for the Port of Calcutta and Another Vs. Baleswar Singh, it is necessary that the facts of the said two cases have to be considered. To me it appears that the observations of the Supreme Court as well as of the Division Bench of this Court were made in the background of the facts of the said cases. In the said case of Calcutta Dock Labour Board Vs. Jaffar Imam and Others, and the connected appeals the Dock Labour Board commenced disciplinary proceedings against the respondents who were registered dock workers and who had been detained by the Commissioner of Police under the provisions of the Preventive Detention Act, 1950, and had been subsequently released. No specific charge was given or alleged or framed as against the said respondents. No evidence was taken in the enquiry. The appellants acted upon mere suspicion that the respondents were guilty of committing acts prejudicial to the maintenance of public order. Upon the aforesaid suspicion only, without any proper enquiry in the disciplinary proceedings, the services of the respondents were terminated. In the aforesaid background the Supreme Court observed as follows at P. 116:

There can be no doubt that when the appellant purports to exercise its authority to terminate the employment of its employees such as the respondents in the present case, it is exercising authority and power of a quasi-judicial character. In cases where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise its powers without due regard to the principles of natural justice. The nature or the character of the proceedings which such a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, has been recently considered by this Court in several cases?vide Associated Cement Companies Ltd. Vs. P.N. Sharma and Another, and Shri Bhagwan and Another Vs. Ram Chand and Another, , and it has been held that in ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be followed or not, the tests laid down by Lord Reid in Ridge v. Baldwin ILR 1964 A.C. 40 are relevant. In view of these decisions, Sri Sen has not disputed this position and we think rightly.

25. The second sentence in the said para graph relied on by Sarkar has to be read, in our view, in the context of the entirety of the said paragraph as well as in the background of the facts and circumstances of the said case. The learned

Chief Justice also observed at p. 117 of the said judgment as follows to wit:

Even in regard to its employees who may have been detained under the Act, if after their release, the appellant wanted to take disciplinary action against them on the ground that they were guilty of misconduct, it was absolutely essential that the appellant should have held a proper enquiry. At this enquiry, reasonable opportunity should have been given to the respondents to show cause and before reaching its conclusion, the appellant was bound to lead evidence against the respondents, give them a reasonable chance to test the said evidence, allow them liberty to lead evidence in defence, and then come to a decision of its own. Such an enquiry is prescribed by the requirements of natural justice and an obligation to hold such an enquiry is also imposed on the appellant by Clause 36(3) of the scheme of 1951 and Clause 45(6) of the scheme of 1956. It appears that in the present enquiry the respondents were not given notice of any specific allegations made against them, and the record clearly shows that no evidence was led in the enquiry at all. It is only the detention orders that were apparently produced and it is on the detention orders alone that the whole proceedings rest and the impugned orders are founded. That being so, we feel no hesitation in holding that the Court of appeal was perfectly right in setting aside the respective orders passed by the two learned single Judges when they dismissed the three writ petitions filed by the respondents.

26. Thus it will be seen that the aforesaid observations were made in a case where an enquiry was purported to have been held in the exercise of disciplinary jurisdiction of the master against the alleged misconduct of the employee. At the said enquiry no specific allegations or charges were made against the employee. No evidence was adduced save and except the detention orders passed against the employee. The employee, as a matter of fact, was not given any opportunity whatsoever to defend himself. Order of dismissal was passed as and by way of punishment. In the said context or background of events the Supreme Court made the aforesaid observations.

27. In the case of Commissioners for the Port of Calcutta and Another Vs. Baleswar Singh, the respondent, Baleswar, was a sub gunner under the Commissioners for the Port of Calcutta and was convicted under Sections 147 and 323 of the Indian Penal Code, I.e., he was held guilty of rioting and voluntarily causing hurt. He was sentenced to a fine of Rs. 30 u/s 147, Indian Penal Code, in default to undergo rigorous imprisonment for three weeks and a fine of Rs. 30 u/s 323, Indian Penal Code, in default to undergo rigorous imprisonment for three weeks. Baleswar was suspended on 28 March 1963. On 9 April 1963 Baleswar was served with an order passed by Traffic Manager removing him from his service under Commissioners for the Port of Calcutta. The said order recited the aforesaid conviction of Baleswar and stated:

A. And whereas it is considered that the conduct of the said Baleswar that had led to his conviction is such as to render his further retention in service undesirable, Now, therefore, the Deputy Chairman directs that the said Baleswar

Singh, sub-gunner, should be removed from service.

Baleswar was not even given any notice to show cause against the proposed removal from service.

28. Thus in the said case of Baleswar Singh Vs. Commisioners for the Port of Calcutta and Others, , the employer was exercising the right of removal or dismissal from the service of an employee on the ground of misconduct. In the said case the Commissioners for the Port of Calcutta took disciplinary action against the employee. Therefore, the facts of the said case were similar to that of Calcutta Dock Labour Board and Ors. v. Jaffar Imam and Ors. 1955 II L.L.J. 112 (vide supra).

29. In the instant case, the facts are entirely different. The master never removed or dismissed the appellant for misconduct in the exercise of disciplinary jurisdiction. The master, I.e., the Commissioners for the Port of Calcutta, terminated the service of the appellant in accordance with the provisions of a term of the contract of service. We are of the view that in the instant ca9e the Commissioners for the Port of Calcutta never acted in any quasi-judicial capacity and so were not obliged to observe the principles of natural justice.

30. Thus, in our opinion, there is no substance in the first contention of Sri Sarkar. The next question that falls to be determined is whether the rules adopted by the Commissioners for the Port of Calcutta in 1959, set out at p. 9 of the paper book govern the service of the parties in the instant case. According to Sri Sarkar, these rules which were adopted in 1959 are not of retrospective effect and cannot have the effect of taking away the vested right of the appellant to continue in service until 58 years. Rule (1) adopted in 1959 is the same as Rule (1) of "further conditions of service" adopted in 1945. The said rule has been quoted in the earlier part of the judgment. The case of Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., , relied on by Sri Sarkar, held that Rule 149(3) of the Railway Establish ment Code was inconsistent with the provisions of Article 311. In the instant case, there is no statutory provision or constitutional guarantee confronted with which the said terms of the contract of service now adopted as Rule (1) of 1959 rules would become null and void.

31. Sri Sarkar also relied on the case of Buckingham and Carnatic Co., Ltd. v. Venkatayya and Anr. 196 II L.L.J. 638, for the proposition that the rules subsequent to the commencement of the employment would not be binding upon the employee. Sri Sarkar also relied on the case of Lakshmi Narayan Singh and Ors. v. Corporation of City of Nagpur AIR 1959 Nag. 206. That case was decided on the basis that there was no statutory rule governing the conditions of service of the teachers in the primary school of the Corporation of Nagpur nor any term in the contract of service of the said teachers to oblige the said teachers to carry out additional duties. That case, to our mind, does not help Sri Sarkar. Sri Sarkar also relied on the case of S. PL. Narayanan Chettiar Vs. M. AR. Annamalai Chettiar, . In the instant case, the power to frame rules regulating the period of

service of the employees has been conferred by Section 31(1)(d) of the Calcutta Port Act. The said section provides as follows:

The Commissioners in meeting shall from time to time frame rules :

(a) ***

(b) ***

(c) ***

(d) For regulating the period of service of all such employees.

32. It is urged by Sri Mitra, the learned Counsel for the Commissioners, that at the time when the employee was employed the employee knew that the master, i.e., the Commissioners for the Port of Calcutta, had power under the Calcutta Port Act to frame rules from time to time for regulating the period of his service. Sri Mitra relied on the case of Bihar Mines Ltd. Vs. Union of India (UOI), . In the view that we have taken of this case it is not necessary for us to come to a finding as to whether the rules adopted in 1959 are binding on the appellant. We do not decide the said question as It is unnecessary for us to do so.

33. For the reasons stated above this appeal must fail and is dismissed. The judgment and order of B.C. Mitra, J., is confirmed. In the facts and circumstances of the case, we do not make any order as to costs.

Arun K. Mukherjee, J.

34. I agree.