
(2017) 03 CAL CK 0115

In the Calcutta High Court

Case No : APO 147 of 2001 with W.P. No. 778 of 1992

Balmer Lawrei & Co. Ltd.

APPELLANT

Vs

Partho Sarothi Banerjee

RESPONDENT

Date of Decision : 30-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 2 CLR 200

Hon'ble Judges : Nishita Mhatre, ACJ. and Tapabrata Chakraborty, J.

Bench : Division Bench

Advocate : Mr. Vipul Kundalia, Mr. K. Shah, Advocates, for the Appellant; Mr. Atish Dipankar Roy, Mr. Soumyajit Mishra, Advocates, for the Respondent

Final Decision : Disposed off

Judgement

Tapabrata Chakraborty, J.—The instant appeal has been preferred challenging a judgment dated 27th March, 2001 passed by the learned Single Judge in Matter No.778 of 1992.

2. Shorn of unnecessary details the facts are that the writ petitioner/respondent herein joined the services of the appellant in the month of October, 1978 as a Trade Apprentice and on and from 2nd September, 1988 he was promoted to the post of Assistant Cashier and was confirmed in the said post on and from 1st April, 1990. In the midst thereof, by a letter dated 15th March, 1990 certain allegations were levelled against him regarding late deposit of money to which he immediately replied on 20th March, 1990 giving all details and thereafter on 27th March, 1990 he was issued a caution letter by the Assistant Manager (Cargo) on 27th March, 1990. Surprisingly thereafter a charge sheet was issued against the respondent on 13th December, 1990 and by the said memorandum itself he was placed under suspension. He replied to the charge sheet on 31st December, 1990 denying all the charges and thereafter an enquiry was held and completed on 27th March, 1991 but no enquiry report was furnished to him. Instead by a memorandum dated 3rd July, 1991 the Executive Director (D) dismissed him

from service finding him guilty of all the charges. Thereafter on 8th August, 1991 the respondent filed an application for review but the same was also dismissed on 14th November, 1991 and the respondent's date of dismissal was recorded to be 14th November, 1991. Thereafter by a cheque dated 11th December, 1991 the withheld amount of subsistence allowance from July, 1991 to 14th November, 1991 was paid to the respondent. Challenging the entire disciplinary proceeding including the charge sheet and the order of dismissal, the respondent preferred the writ petition which was disposed of by the judgment impugned in the present appeal observing, inter alia, that due to non-supply of the enquiry report, the proceeding has been vitiated and that the writ petitioner is entitled to have the order of the disciplinary authority set aside on the said ground alone and that the order of dismissal has been passed in violation of the principle of natural justice. In course of hearing of the writ petition a point was raised on behalf of the appellant regarding maintainability of the writ petition by placing reliance upon a judgment delivered by a coordinate bench. The learned Single Judge could not agree with the view of the coordinate bench and referred the matter to a larger bench to answer an issue as to whether Balmer Lawrie & Company Limited is a "State" within the meaning of Article 12 of the Constitution of India. The matter was placed before a Division Bench and in view of a difference of opinion between the learned Judges on the said bench, the matter was referred to a third learned Judge, who ultimately decided that the appellant is an "authority" by an order dated 24th December, 2002. Thereafter an appeal was preferred before the Hon'ble Supreme Court by the appellant company and initially an interim order was passed on 4th August, 2003 staying further proceedings consequent upon the judgment under challenge. The said appeal was decided by a judgment delivered on 20th February, 2013 holding, inter alia, that the appellant company is an "authority" under Article 12 of the Constitution of India and is amenable to writ jurisdiction of the High Court. Subsequent thereto, the respondent preferred an application for clarification and an application for contempt and by an order dated 28th April, 2014 the contempt application was dismissed observing that it shall be open to the respondent to agitate the issue before the High Court. The matter thereafter came up for hearing before this bench on 22nd August, 2016 and on 2nd November, 2016 a supplementary affidavit was filed by the respondent stating, inter alia, that the appellant illegally withheld a part of subsistence allowance and also did not disburse any amount in favour of the respondent towards provident fund and gratuity. The appellant filed an affidavit-in-opposition to the said supplementary affidavit stating, inter alia, that a cheque dated 22nd July, 2005 of an amount of Rs.88,677/- was issued in favour of the respondent on account of his provident fund dues and that thereafter a residual amount of Rs.1884/- was also paid to the respondent. In paragraph 14 of the said opposition the appellant also indicated the dues payable to the respondent upon adjustment of the loan availed by him.

3. Mr. Vipul Kundalia, learned advocate appearing for the appellant submits that the Hon'ble Supreme Court while dismissing the respondent's contempt

application on 28th April, 2014 filed in connection with Civil Appeal No.421 of 2004 observed, inter alia, that by the judgment dated 27th March, 2001 the High Court had not finally adjudicated upon the rights of the parties. In view of the said order the respondent cannot claim any benefit of the observations made in the judgement impugned. However, the appellant is ready and willing to handover the enquiry report to the respondent and to complete the disciplinary proceeding within a time bound period.

4. He further submits that the appellant could not have handed over a copy of the enquiry report to the respondent in view of subsistence of an interim order passed on 14th August, 2003 staying further proceedings consequent upon the judgment under appeal till the disposal of the Civil Appeal No.421 of 2004 on 20th February, 2013. The respondent also did not take any steps to vacate or modify the interim order passed in the said appeal on 14th August, 2003.

5. He further argues that the respondent himself in course of the enquiry proceedings accepted the charges under Regulation 26(v) and 26(ix) of the Conduct Discipline & Review Rules for Officers (hereinafter referred to as the said Rules). The remaining charges under Regulation 26(i), Regulation 26(xviii) and Regulation 26(xxi) stood established against the respondent and on the basis of such proved charges, the punishment of dismissal from service as imposed upon the respondent cannot be construed to be disproportionate. The nature and quantum of punishment to be imposed on the basis of the proved charges is the prerogative of the disciplinary authority and Courts while exercising power of judicial review do not sit as the appellate authority. In support of such contention reliance has been placed upon a judgment delivered in the case of Chief Executive Officer, Krishna District Cooperative Central Bank Limited and Another v. K. Hanumantha Rao and Another, reported in (2017) 2 SCC 528.

6. He further submits that the enquiry stood concluded in the month of March, 1991 and at that juncture the issue as regards supply of enquiry report to an employee facing a disciplinary proceeding did not attain finality. The said issue as decided in the case of Union of India and Others v. Mohd. Ramzan Khan, reported in (1991) 1 SCC 588 on 20th November, 1990 was further considered and ultimately upheld by a larger bench through the judgment dated 1st October, 1993 delivered in the case of Managing Director, ECIL, Hyderabad and Others v. B. Karunakar and Others, reported in (1993) 4 SCC 727 and as such non-furnishing of the enquiry report to the respondent after conclusion of the enquiry in the month of March, 1991, cannot be construed to be an illegality.

7. According to him non-supply of the enquiry report has not prejudiced the respondent in any manner. The respondent accepted two charges and the remaining charges were proved against him not on the basis of mere suspicion but on the basis of valid evidence on record which could not be rebutted by the respondent in course of the enquiry proceeding.

8. Drawing the attention of this Court to the enquiry report, Mr. Atish Dipankar

Roy, learned advocate appearing for the respondent submits that in clause D(e), the enquiry officer arrived at a specific finding that the respondent "did not eventually embezzle/runaway with any office cash and hence the company has suffered for interest loss besides the strain in relationship/mutual trust etc. and not loss of principal money as such". In the backdrop of such a categoric finding that the respondent did not embezzle/runaway with any office cash, the enquiry officer could not have held that the charge under Regulation 26(i) of the said Regulations stands proved against the respondent.

9. He further submits that by a letter dated 15th March, 1990, the respondent was asked to explain the delay which allegedly occasioned towards deposition of cash for the period from 10th April, 1989 till 19th March, 1990. The respondent replied to such allegation by a letter dated 31st December, 1990 and upon consideration of the same the respondent was cautioned by a letter dated 27th March, 1990. Surprisingly thereafter the said issue was again incorporated in the charge sheet dated 11th December, 1990 and the respondent was penalised. Such action on the part of the appellant is not sustainable in law.

10. He further submits that as demanded by the appellant, the respondent had to deposit the entire amount allegedly found to be short. Such fact stands admitted by the appellant as would be explicit from the enquiry report. On the basis thereof, the enquiry officer arrived at a categoric finding that the respondent did not embezzle the said amount. In the enquiry report there is also an erroneous recording to the effect that the appellant had accepted the alleged charges under Regulation 26(v) and Regulation 26(ix) inasmuch as no document could be produced by the appellant to that effect. Had the respondent availed an opportunity to reply to the enquiry report, such fact could have been placed before the disciplinary authority. It would be explicit from the order of punishment that the same is a mere reiteration of the observations made in the enquiry report and is a cryptic one. The respondent took such grounds of challenge in the review application but the same were also not considered and his review application was also dismissed by a cryptic order altering the date of dismissal from 3rd July, 1991 to 14th November, 1991.

11. Heard the learned advocates appearing for the respective parties and considered the materials on record.

12. Had the enquiry report been supplied to the respondent, he could have agitated the said issue before the disciplinary authority. Today, it is well-nigh impossible for this Court to appreciate as to what would have been the fate of the disciplinary proceeding in the event the respondent had been served a copy of the enquiry report at the said juncture granting him opportunity to reply to the same. Due to long pendency of the litigation, today the respondent is faced with a fate accompli which works to his extreme prejudice. Furthermore, the appellant has not been able to justify its action towards non-supply of the enquiry report. The argument that the law towards supply of the enquiry report was not settled at the time the enquiry was concluded is absolutely fallacious. There is no

dispute as regards the proposition of law laid down in the case of Chief Executive Officer, Krishna District Cooperative Central Bank Limited and Another (Supra), however, the same is distinguishable on facts.

13. However, for the long pendency of the litigation and continuance of an interim order in the appeal before the Hon"ble Supreme Court till its disposal, the appellant also cannot be blamed for not having supplied the enquiry report after delivery of the judgment dated 27th March, 2001. A perusal of the supplementary affidavit filed by the respondent reveals that for the period from 2006 to 2011 he used to attend a lawyer's chamber and earned a very meagre amount. He also engaged himself in a trade of dress materials without any success in the same. Due to the peculiar facts and circumstances involved in the lis, the litigation has continued for a period of more than 25 years. Neither the appellant nor the respondent can be directly held responsible for the efflux of time. Had the matter attained finality in the year 2001 itself, the appellant could have been directed to handover a copy of the enquiry report and to decide the proceeding afresh from the said stage. However, today, as the respondent is due to attain his age of superannuation on 9th April, 2017, it would be iniquitous to direct the respondent to contest a proceeding from the stage of supply of the enquiry report. In the said conspectus of facts, we are of the opinion that the equities need to be balanced among the parties.

14. This Court is conscious of the proposition that in the ordinary course, the matter is required to be remitted back to the authorities for fresh enquiry from the stage of reply to the enquiry report but in the instant case as the respondent has almost reached the age of superannuation, he cannot be subjected to the agonies of any further protracted process. The facts on record reveal that the respondent has already suffered adequate penalty due to long pendency of the litigation and that no further purpose would be served by applying the penal sword upon a deadwood and taking into consideration the misconduct alleged, the respondent should not be deprived of his terminal benefits which is the only source of his livelihood, more so when there is no charge of lack of integrity.

15. A perusal of the enquiry report, copies of which have been handed over to the respondent and had been produced before this Court, reveals that the respondent had not been found to have embezzled any money of the appellant. The enquiry officer has held that due to late deposit of cash the appellant had suffered loss of interest. A negligent action cannot be construed to be equivalent to an act of fraud and as such the imposition of the severest of punishment upon the respondent is harsh and disproportionate. The respondent at present is aged about 60 years and is having a family and the punishment as imposed is the highest punishment and the same severely affects the livelihood of the respondent and his family.

16. Accordingly, justice would be subserved by modifying the penalty of dismissal as imposed upon the respondent to a lesser punishment. The order of dismissal dated 13th December, 1990 and the order passed in review dated 14th

November, 1991 are, accordingly, set aside and the appellant is directed to impose a punishment of reduction to a lower salary slab. The appellant shall reinstate the respondent with continuity in service.

17. There can be no precise formula nor any "cast iron rule" for grant of back wages. In the instant case, the proceedings were initiated by a charge-sheet dated 13th December, 1990 and the order of dismissal was passed on 3rd July, 1991. The litigation pertaining to the disciplinary proceedings had continued since then till date for a period of more than 25 years. However, the respondent earned some money during the period from 2006 to 2011. In our opinion, a balance would be maintained and the interest of justice would be subserved through issuance of a direction upon the respondents to disburse 50% of the back wages together with all consequential benefits to the respondent. Accordingly, the respondents are directed to disburse the said amount through 4 equal monthly instalments, first of which should be paid within a period of 8 weeks from the date of communication of this order.

18. It is left to the appellant to decide as to whether it would allow the respondent to join his duties for the period from date till the scheduled date of superannuation. However, the appellant shall pay full salary to the respondent for the said period. The appellant shall disburse all retiral benefits in favour of the respondent within a period of 8 weeks from the date of communication of this order.

19. With the above observations and directions the appeal is disposed of.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

Later

Learned Counsel for the appellant seeks stay of the impugned judgment. For the reasons mentioned in the judgment stay is refused.