

(2004) 12 CAL CK 0036
In the Calcutta High Court
Case No : Writ Petition No. 7822 (W) of 1998

Debabrata Sarkar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-12-2004

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2005) 2 CALLT 445 : (1998) 1 CALLT 19 : (2005) 107 FLR 311

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Kalyan Bandhopadhyaya, Dipankar Dutta, Biswaroop Bhattacharjee and Arjun Roy, for the Appellant; Arijit Banerjee, for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The writ petitioner is aggrieved by the penalty imposed on him in the disciplinary proceeding, which was initiated by the respondents by issuing the charge sheet dated May 30th 1997.

2. The enquiry officer recorded the findings that allegations made against the petitioner were proved. The disciplinary authority imposed the penalty of dismissal from service by his order dated April 3rd, 1998.

3. Advocate for the parties have argued at length and they have cited to me a large number of decisions. I should not be thought of disrespectful to the authorities for not dealing with them, which I am not doing for the reason that, in my judgment, on the admitted facts and accepted principles of law, the penalty imposed, and the findings of the enquiry officer, cannot be sustained.

4. Allegations made in the charge sheet, I agree with advocate for the petitioner, were vague in nature. I am, however, unable to accept his contention that the charge sheet was issued with a closed mind. The allegations were nothing more than mere allegations, and there is no reason to read them for finding absence of open mindedness of the disciplinary authority in taking the decision to issue the charge sheet for initiating the proceeding.

5. In my view, the plea of vagueness of allegations in the charge sheet in a disciplinary proceeding should ordinarily not be a sufficient ground for quashing the charge sheet. The employee has, however, a right to ask the disciplinary authority to remove the vagueness and clarify the charges. If the disciplinary authority refused to remove the vagueness, a right accrues to the employee to approach the appropriate Court of law for challenging the charge sheet.

6. To my mind, once the employee decides to participate in the enquiry, the presumption will be that he understood the charges and decided to waive his right to challenge the charge sheet on the ground of vagueness. I would say that after his participation in the proceeding before the enquiry officer, he should not be permitted to challenge the charge sheet on the plea of vagueness in the allegations.

7. Similar is the position regarding the plea of bias or of initiation of the proceeding with a closed mind. Once the employee decides to participate in the enquiry, and proceeds to get the final order in the proceeding, to my mind, he should not be permitted to challenge the charge sheet on the plea that the proceeding was initiated by the disciplinary authority with a closed mind or that he was biased. Such pleas are to be raised and brought to Court at the earliest available opportunity.

8. For these reasons, at this distance of time, I am not inclined to entertain the challenge thrown by the petitioner to the charge sheet on the basis whereof the proceeding was concluded, and the disciplinary authority passed the final order.

9. Before I proceed further, I think, I should point out one very important aspect of the case. Advocate for the respondents has raised the objection that the respondent association being not a state within the meaning of Article 12 of the Constitution of India, the writ petition is not maintainable. I find that this question should not detain me even for a moment for the simple reason that it was decided at the earlier stage of this writ petition, and it was held that the association is amenable to writ jurisdiction. In the appeal preferred by the respondents they did not get any interim order of stay. Being conscious of the situation, advocates for the parties have wanted me to proceed with the final hearing of the writ petition. So I do not find any reason to examine the question afresh.

10. Advocate for the respondents has also argued that since the issues have arisen out of a private contract of service, in view of the division bench decision of this Court in *Anupam Ghosh v. Union of India*, reported at (1991) 1 Cal LT 300, this writ petition is not maintainable. I am unable to agree with him. Here the issues involved in the writ petition have not arisen out of breach of any terms and conditions of contract of service. The proceeding was initiated according to rules of the respondent association, and as is known it is quasi-judicial in nature. Hence I am of the view that the writ petition is maintainable.

11. The enquiry proceeding, in my view, cannot be sustained for the simple

reason that witnesses in support of the charges were not examined, and instead written statements prepared by them, even not before the enquiry officer, were taken on record by the enquiry officer. The admitted position is that the witnesses who submitted their written statements were not made available to the petitioner for cross-examination.

12. There is, however, a dispute regarding one fact, and it is that according to the enquiry officer at the scheduled date of enquiry the petitioner willfully stayed away, while the case of the petitioner is that as usual he was waiting in the nearby room, but was never called by the enquiry officer for participating in the day's proceeding. I think it will not be proper at all for me to make an attempt to decide this disputed question of fact. On the materials on record it is also not possible for me to give a decision regarding the claims and counter claims made by the parties in connection with the proceeding of the day in question.

13. I am, however, inclined to interfere in the matter for the simple reason that admittedly the petitioner did not get an opportunity to cross-examine the witnesses who submitted prepared written statements in support of the charges. It is also the admitted position that the presenting officer appointed by the disciplinary authority also submitted his prepared written statement before the enquiry officer as a witness in support of the charge. I have to hesitation in my mind in saying that the procedure followed by the enquiry officer was totally unfair.

14. All these aspects were pointed out by the petitioner to the disciplinary authority when he was given the opportunity to submit his representation in response to the second show cause notice. I find that all these important aspects were simply ignored by the disciplinary authority, and he instead decided to agree with the findings of guilt recorded by the enquiry officer, and to punish the petitioner with dismissed from service. In my view, the decision of the disciplinary authority is liable to be set aside: first, for his overlooking all these serious irregularities in the enquiry held; and secondly, for the reason that his decision is based on an enquiry which cannot be sustained.

15. Advocate for the respondents argues that the relevant rules gave the petitioner a remedy of appeal, but without availing of such remedy he chose to approach the writ Court. I must say that at this distance of time I do not see any reason why I should entertain the plea of availability of alternative remedy to the petitioner. It is known that such a plea has to be raised at the threshold, and admittedly in this case the plea was not raised when the writ petition was admitted, and even when the question of its maintainability was decided. Hence I find no reason to say that for availability of alternative remedy the petitioner should not be permitted to get a decision from the writ Court regarding validity of the proceeding initiated against him, and of the final order passed in it.

16. For these reasons I am of the view that the writ petition should be allowed in part with liberty to the respondents to proceed afresh, if they are so advised.

Accordingly I pass the following order:

"The final order passed by the disciplinary authority dated April 3rd 1998 and the findings of the enquiry officer recorded in his report dated October 6th 1997 are hereby set aside. The respondents will be at liberty to proceed with the charge sheet by holding a fresh enquiry. If the respondents decide to proceed afresh, then they shall give reasonable opportunity to the petitioner to cross-examine the witnesses to be examined in support of the charges and also to adduce his evidence in defence. If the respondents do not take a decision for proceeding afresh in the matter within a period of three weeks from the date of receipt of a copy of this judgment and order, then it shall be presumed that they do not intend to proceed afresh, and in that case they shall give the petitioner all the benefits to which he will be entitled. If the respondents take the decision to hold a fresh enquiry, then such enquiry shall be concluded by passing the final order within a period of sixteen weeks from the date of receipt of a copy of this judgment and order by the respondents".

17. Till the respondents take the decision in the matter in terms of this judgment and order, and also till the proceeding is concluded, if a fresh enquiry is held, the petitioner shall be treated as under suspension, and he shall be paid subsistence allowance in accordance with the relevant rules, and in the absence of any rules, to the extent of his full salary and allowances to which he would have been entitled had he remained in service.

18. Since the order whereby the service of the petitioner was terminated has been set aside by me, he is entitled to back wages in ordinary course; but since I have granted liberty to the respondents to proceed in the matter by holding a fresh enquiry, I am of the view that at the present moment he should be paid subsistence allowance to which he would be entitled in law. Hence it is ordered that from the date of termination he will be entitled to subsistence allowance and all arrears of such allowance shall be paid to him forthwith, and in any case within a period of three weeks from the date of receipt of a copy of this judgment and order by the respondents.

19. In the facts and circumstances of the case, I am not inclined to make any order for costs in favour of the petitioner. Hence there will be no order for costs in the writ petition.

20. Advocate for the respondents has pointed out a practical difficulty in conducting the fresh enquiry through the standing committee mentioned in the rules. He submits that no standing committee is functioning and it is also not possible to constitute one. The situation has been appreciated by advocate for the petitioner. Both the advocates have suggested that Mr. Bhaskar Mitra, an advocate of this Court (incidentally present in Court) may be engaged as the enquiry officer. I think, as a special case, and for the ends of justice, I should accept the suggestion made by the advocates for the parties. Mr. Mitra has signified his consent to his engagement as the enquiry officer in the matter.

Hence I hereby order that if the respondents decide to proceed in the matter afresh on the basis of the liberty granted by me, then the enquiry officer for the purpose will be Mr. Bhaskar Mitra, an advocate of this Court. The respondents shall communicate the decision to Mr. Mitra within four weeks from the date of receipt of a copy of this judgment and order by them. It goes without saying that the respondents shall decide the remuneration part of the enquiry officer, and I hope that they will take a reasonable decision. Needless to say that the respondents shall provide Mr. Mitra with stenographers and other necessary assistance.

Xerox copy of this judgment and order duly countersigned by the Assistant Registrar (Court) shall be given to the advocates for the parties, on usual undertakings.

Urgent certified xerox copy of this judgment and order shall be supplied to the parties, if applied for.