

(2013) 04 DEL CK 0116

In the Delhi High Court

Case No : Writ Petition (C) 6943 of 2012

Delhi Transport Corporation

APPELLANT

Vs

Mithan Lal

RESPONDENT

Date of Decision : 12-04-2013

Acts Referred:

Constitution of India, 1950 — Article 311(2)

Citation : (2013) 200 DLT 72 : (2013) 138 FLR 419 : (2013) LabIC 2296 : (2013) LLR 995

Hon'ble Judges : Pratibha Rani, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Manisha Tyagi, for the Appellant; C. Bheemanna, for the Respondent

Judgement

Pradeep Nandrajog, J.—Having served the Indian Army but being dismissed from service upon being convicted at a Court Martial and sentenced to undergo imprisonment for 5 months on November 04, 1972, the respondent was lucky to find employment as a driver with DTC on April 07, 1980. On night shift duty he drove a bus from Janakpuri to ISBT on route No. 82 to reach the destination, ISBT before dawn broke at 3:10 hrs. A passenger named Pratap Singh Morya dozed off and this irritated the respondent because the bus had to be de-boarded by all passengers at the point of destination. A quarrel ensued at which it is alleged that respondent manhandled said Pratap Singh Morya whose spectacles got broken and he claims to have lost Rs. 650/-. His complaint was investigated by way of a preliminary inquiry at which the respondent participated. Pratap Singh Morya stood by his complaint resulting in petitioner being charge sheeted on June 12, 1995. At the disciplinary inquiry Pratap Singh Morya was examined on September 04, 1995; he was also cross examined. But soon thereafter he submitted a letter on October 09, 1999 in which he recorded that he withdrew the complaint.

2. The Inquiry Officer held respondent guilty and ignored the letter dated August 09, 1995 opining the same to be procured. Supplying the report of the Inquiry

Officer to the respondent and considering his response penalty of removal from service was inflicted which was challenged by the respondent by way of a writ petition which was disposed of requiring respondent to exhaust departmental statutory remedy of appeal, which upon being exhausted and rejected led respondent to file a writ petition challenging the penalty imposed which was transferred to the Central Administrative Tribunal and was disposed of on October 04, 2010 setting aside the order passed by the Appellate Authority due to it being non-reasoned requiring a reasoned order to be passed which order of the Tribunal came to be challenged before this Court without success by the petitioner requiring the Appellate Authority to pass a reasoned decision.

3. The reasoned decision by the Appellate Authority was to uphold the penalty resulting in OA No. 199/2012 being filed by the respondent challenging the penalty imposed and upheld. Vide impugned order the Tribunal has held that in view of the fact that the Disciplinary Authority as also the Appellate Authority has referred to past 14 adverse entries, in view of the decision of the Supreme Court reported as *Indu Bhushan Dwivedi Vs. State of Jharkhand and Another*, the orders were vitiated. The matter has been remanded for the Disciplinary Authority to take a fresh decision and levy a penalty other than dismissal or removal from service.

4. Challenge by the respondent to the merits of the indictment has failed.

5. DTC is aggrieved by the direction to reconsider penalty to be levied and to levy a penalty other than that of dismissal or removal from service.

6. It has to be kept in mind that the charge against the respondent was of assaulting a passenger.

7. Learned counsel for the respondent had cited the decision reported as *State of M.P. and Others Vs. Hazarilal*, to urge that to dismiss an employee for having slapped somebody would be disproportionate.

8. The decision cited would reveal that Hazari Lal had slapped an individual in a private altercation. A Government servant has a personal life and if in this personal affairs he slaps somebody, albeit a wrong warranting disciplinary action, principles of reasonableness would require it to be taken into account that the wrong was not in the discharge of duties. But when a Government servant is on duty and assaults (not slaps) a person who is seeking the benefit of Government service, the wrong would be a serious wrong.

9. It was then urged that the complainant had withdrawn the complaint, but it overlooks the fact that it was after the complainant stood by the complaint at the inquiry, and we concur with the view taken by the Inquiry Officer that the letter withdrawing the complaint may be procured. In any case, after evidence is recorded and a witness deposes, it is irrelevant that the witness withdraws the complaint.

10. The last plea based on the decision of the Supreme Court in *Indu Bhushan*

Dwivedi's case, of the respondent which has merited approval by the Tribunal, needs a close look by us of the law declared in Indu Bhushan Dwivedi's case.

11. That while imposing penalty the Disciplinary Authority can consider the past conduct if specifically made known in the charge sheet is an undisputed power of the Disciplinary Authority. But what happens if while issuing the charge sheet it is not indicated to the charged employee that his past conduct would be considered. As noted above, the respondent placed strong emphasis upon the latest decision on the subject by the Supreme Court, reported as Indu Bhushan Dwivedi Vs. State of Jharkhand and Another,

12. A survey of case law on the point would reveal that whereas on one end of the spectrum we have the decisions by the Supreme Court holding that the past conduct of a charged officer can be relied upon by the competent authority to impose punishment only when it was made a specific charge in the charge sheet issued to the delinquent, on the other end of the spectrum is the decision of the Supreme Court reported as The Govt. of A.P. and Others Vs. Mohd. Taher Ali, where it was held that there can be no hard and fast rule that merely because the earlier misconduct has not been mentioned in the charge-sheet it cannot be taken into consideration while imposing punishment upon the delinquent by the Disciplinary Authority.

13. A perusal of the decisions of the Supreme Court, including the decision in Indu Bhushan's case (supra), relied upon by the respondent, holding that the past conduct of a charged officer can be relied upon by the Disciplinary Authority to impose punishment only when it was made a specific charge in the charge sheet issued to the delinquent officer would show that the said decisions are based upon the decision of the Constitutional Bench of the Supreme Court reported as State of Mysore Vs. K. Manche Gowda,

14. Article 311(2) of the Constitution of India as it originally stood enacted, read as under:-

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this clause shall not apply - (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity.

15. The Constitution (Fifteenth Amendment) Act, 1963 amended Article 311(2) as under:-

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty process, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply - (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity.

16. The Constitution (Forty-Second Amendment) Act, 1976 further amended Article 311(2) as under:-

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed that after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply-

a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his criminal on a criminal charge; or

(b) where an authority empowered to dismiss or remove or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give that person an opportunity.

17. Article 311(2) of the Constitution of India as it originally stood enacted prescribed that every government servant must have a reasonable opportunity of showing cause against the penalty proposed to be imposed against him. By virtue of the Constitution (Fifteenth Amendment) Act, 1963, Article 311(2) prescribed that every government servant must have a reasonable opportunity of:- (i) be heard at an enquiry conducted against him; and (ii) be granted an opportunity to make a representation against the penalty proposed to be imposed upon him after enquiry was conducted.

18. It would be relevant to note that the interpretation afforded to both, i.e. the original and the amended Article 311(2), by judicial decisions was that Article 311(2) envisaged the issuance of show cause notice(s) to the government servant by the concerned authority at two stages: (i) before the commencement of an enquiry apprising the government servant of the charges framed against him; and (ii) after the conclusion of the enquiry apprising the government of the penalty proposed to be inflicted upon him.

19. Article 311(2) was, as noted above, amended by the Constitution (Forty-Second Amendment) Act, 1976. By virtue of which amendment, the requirement of giving an opportunity to the government servant of making a representation against the penalty proposed to be imposed upon him was done away with. In other words, the requirement of giving notice to the government servant after conclusion of the enquiry apprising him of the penalty proposed to be inflicted upon him was done away with. The only requirement was to supply him with a copy of the report of the Inquiry Officer for his response.

20. In *Manche Gowda's case* (supra), the Supreme Court was dealing with Article 311(2) of the Constitution of India as it originally stood enacted, which prescribed that every government servant must have a reasonable opportunity of showing cause against the penalty proposed to be imposed against him. The facts before the Supreme Court were that the charged officer was not made aware that his past misconduct would be considered on the subject of penalty, and as per the report of the Inquiry Officer the penalty proposed was of reduction in rank, but the actual penalty imposed was one of dismissal from service. While holding as aforesaid, the Supreme Court observed:-

It is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

xxx

Before we close, it would be necessary to make one point clear. It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made a specific charge in the first stage of enquiry itself and, if it not so done, it cannot be relied after the enquiry is closed

and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done in two stages.

21. It is clearly discernible from the above that the observations made by the Supreme Court in *Manche Gowda's* case (supra) that the past record of a Government servant should be made a specific charge if it is intended to be relied upon for imposing a punishment is based upon the premise that Article 311(2) of the Constitution of India envisages the issuance of show cause notice(s) to the government servant by the concerned authority at 2 stages: (i) before the commencement of an enquiry apprising the government servant of the charges framed against him; and (ii) after the conclusion of the enquiry apprising the government servant of the penalty proposed to be inflicted upon him.

22. As a necessary corollary to the aforesaid, the observation made by the Supreme Court in *Manche Gowda's* case (supra) would have no application post amendment to Article 311(2) of the Constitution of India after the Constitution (42nd) Amendment Act 1976 where the requirement of giving notice to the government servant after conclusion of the inquiry apprising him of the penalty to be imposed was done away with.

23. Thus, post Constitution (42nd) Amendment Act 1976, the law as declared in *Mohd. Tahir Ali's* case (supra) would be the correct view.

24. It may be true that observations by the Supreme Court in *Indu Bhushan's* case (supra) appear to be to the contrary, but it needs to be highlighted that in said decision, the Supreme Court has held so more on the facts of the case before it rather than as a statement of law. The facts of the case were that the appellant, a Sub Divisional Judicial Magistrate was absolved of the grievous charge of having consumed alcohol, but since, while under suspension, had left the headquarters without the permission of the Registrar General of the High Court and had used somewhat intemperate language while making his comments with reference to the memorandum issued by the High Court, penalty of removal from service was inflicted by the High Court by considering un-communicated adverse remarks in his ACRs.

25. The Supreme Court observed that for the misdemeanour of leaving the headquarter while under suspension and using somewhat inappropriate language while responding to a communication sent from the High Court could not warrant the penalty imposed and highlighted that it was the un-communicated adverse ACRs which had resulted in the penalty being imposed and thus, on said facts, held that it assumed importance that neither were the adverse ACRs communicated nor reliance thereon was made known to the appellant. The penalty was quashed holding that prejudice was caused to the appellant.

26. In other words prejudice caused on the peculiar facts in *Indu Bhushan's* case led the Supreme Court to hold that *Indu Bhushan's* past conduct could not be

considered without affording an opportunity to make submissions thereto. For the wrong done by the respondent of assaulting a passenger who slept in the bus and breaking the spectacles of the passenger we find the penalty imposed to be adequate and thus dispose of the writ petition quashing the impugned decision dated May 25, 2012 and as a consequence we dismiss OA No. 199/2012 filed by the respondent.