
(2015) 04 BOM CK 0195
In the Bombay High Court
Case No : Writ Petition No. 1540 of 2008

Gour Chandra Dutta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 20-04-2015

Acts Referred:

Citation : (2015) 5 ABR 827 : (2015) 4 ALLMR 620 : (2015) 4 MhLj 127

Hon'ble Judges : Anoop V. Mohta, J;K.R. Shriram, J

Bench : Division Bench

Advocate : Suresh Kumar, Advocates for the Respondent

Judgement

K.R. Shriram, J.

1. The petitioner, a central railway employee, following a disciplinary inquiry, was penalized with compulsorily retirement with 67% pensionary benefits. The appeal filed by the petitioner was dismissed, against which the petitioner approached the Central Administrative Tribunal which also dismissed the application. The petitioner therefore, has approached this court seeking issuance of a writ of certiorari, writ of mandamus or any other appropriate writ, order or direction with other reliefs against the respondents.

2 On or about 27.12.1978 the petitioner was initially appointed as a Junior clerk in the Central Railway, Mumbai. The petitioner was later, in the normal course, promoted to the post of Senior clerk, then Head clerk and subsequently as Office Superintendent GR-II.

3. On or about 26.6.2006, it is the case of the petitioner that respondent no.4, under whom the petitioner was posted, allegedly misbehaved with the petitioner because of which the petitioner lodged a police complaint on 28.6.2006. In fact the petitioner also lodged a private complaint in the court of Metropolitan Magistrate, 35th Court, Mumbai. We need not go into the merits or the status of those matters to decide this petition. Nor are we making any comment thereon.

4. On 28.6.2000 respondent no.4 issued an order of suspension to the petitioner and on 17.7.2000 the petitioner was served with a charge-sheet. Two specific charges were alleged.

Charge No. 1 was that the petitioner grossly misbehaved with respondent no.4 on 28.6.2000 by abusing the respondent no.4 in a very vulgar language and threatening to kill him;

Charge No. 2 was that the petitioner made alterations in the attendance muster with a view to cover up his coming to office late on 26th, 27th and 28th June 2000.

And by his above acts of omission and commission, the petitioner failed to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a railway servant and thereby violated the provisions of Rule 3.1 (I), 3.1 (II) and 3.1 (III) of the Railway Servants (Discipline and Appeal) Rules 1968.

5. In the charge-sheet the respondents have also listed the documents relied upon by them in support of the charges levelled and 3 witnesses viz. respondent no.4, one Mr. Varinder Kumar, DOM (COG) Mumbai Division and one N.P. Singh, RPF Constable No. 1422. From reading the charge-sheet it does not appear that the respondents have conducted any preliminary inquiry before issuing the charge-sheet though they have relied upon a police complaint filed by respondent no.4 on 28.6.2000. This appears to be the kick off point. As the reply of the petitioner to the charge-sheet was not found to be satisfactory, the respondents appointed one Shri Panfer as inquiry officer. He was later changed and replaced with one Mr. Rajesh Patil. The inquiry officer Mr. Patil, by a report dated 3.10.2002, held the applicant guilty. Following this, the disciplinary authority by a finding dated 9.7.2003 agreed with the findings of the inquiry officer and held the petitioner guilty of the charges leveled against him and imposed punishment of compulsory retirement with 67% pensionary benefits. We will revert to this finding of the disciplinary authority a little later based on which we come to a conclusion that there has been miscarriage of justice in the case of the petitioner.

6. The petitioner preferred an appeal against the said order which was also dismissed. So also the revision petition filed by the petitioner against the order of the appellate authority. It came to be dismissed on 25.4.2005. Against that order the petitioner preferred Original Application No. 314 of 2005 before the Central Administrative Tribunal, Bombay Bench, Mumbai. The Central Administrative Tribunal by an order dated 30.1.2008 dismissed the Original Application and that is the order which is impugned in the present petition.

7. In the meantime, in April-2002 during which time the petitioner was under suspension, the subsistence allowance of the petitioner came to be reduced from 50% to 25% on the ground that the petitioner was delaying the inquiry. The petitioner filed a Writ Petition No. 308 of 2002 in this court for enhancement of

the subsistence allowance which came to be allowed by this court and the subsistence allowance was increased to 75%. The High Court also directed the respondents to complete the inquiry within 3 months from 3.4.2002. The time to complete inquiry was extended upto 9.10.2002 and finally the inquiry officer conducted the inquiry ex-parte on 27th, 28th and 29th September 2002 and closed the same.

8. It is to be noted that though the High Court had, by an order dated 3.4.2002, directed the respondents to complete the inquiry within 3 months, and extension was obtained by the respondents on 9.7.2002. On 25.9.2002, over 5 1/2 months later i.e., on 25.9.2002 the inquiry officer fixed the date of inquiry after 2 days i.e., 27.9.2002 on the ground that as per the High Court's order the inquiry has to be completed before 9.10.2002. The inquiry officer, on 25.9.2002 sent intimation of inquiry and pass to the petitioner's ARE (Assisting Railway Employee) who was staying at Delhi knowing very well that the intimation and pass would not reach before 27.9.2002. In view thereof the petitioner submitted a representation on 27.9.2002 to the Reviewing Authority with a copy to the inquiry officer as well as to the Disciplinary authority pointing out that it was impossible for the ARE who was at Delhi to attend the inquiry on 27.9.2002 and that too by giving just 2 days short notice which established bias. Despite this, the inquiry officer conducted ex-parte inquiry on 27th, 28th and 29th September 2002.

9. The intimation of the date of inquiry and pass reached the ARE of the petitioner at Delhi on 27.9.2002 but as the ARE was not available at Delhi on that date, he reached Mumbai on 1.10.2002. On 3.10.2002 the petitioner and the ARE approached the Disciplinary authority with a request to reopen the inquiry and allow them to participate but it was not granted and on 3.10.2002, the inquiry officer finalized the inquiry report which was served on the petitioner on 22.10.2002. On 9.7.2003 the disciplinary authority imposed penalty of compulsory retirement with 67% pensionary benefits.

10. In the order that is impugned, the learned Central Administrative Tribunal has not considered or dealt with any of the points raised by the petitioner in the petition. The Central Administrative Tribunal has only reproduced the facts and concluded its order by simply reaffirming the findings of the lower authorities. Paragraph-15, 16 and 17 read as under :-

"15. The appeal was, thus, dismissed and the applicant preferred a revision petition dated 27.12.2003 before the competent authority. The revisional authority had once again considered the whole matter in depth and confirmed the order passed by the disciplinary authority and upheld by the appellate authority. The revisional authority had also given a personal hearing to the applicant on 15.04.2005 as per the direction of Hon'ble High Court in Writ Petition no.16131/2005 which was forwarded by one advocate, Shri T.J. Pandian, along with his letter dated 12.04.2005 to the respondents. In the revision petition under Rule 24(2) of Railway Servants (Discipline and Appeal) Rules,

1968, the revisional authority, who is of the rank of General Manager, has held as under :-

"I have gone through entire records of the case, the files relating to the enquiry, DA's order and orders passed on appeal. I am of the opinion that CE has adopted dilatory tactics from the beginning and he had nothing to produce the charges leveled against him. During the personal hearing held on 18.04.2005, CE could not bring any convincing point in his defence for taking lenient view.

By taking overall view of the case, taking into consideration the serious nature of misconduct, I find that the punishment imposed upon CE by DA and on appeal confirmed by AA is just and adequate. Therefore, I have decided to confirm the penalty of "Compulsory Retirement with 67% pensionary benefits."

16. We have, thus, no hesitation in holding that all the impugned orders are passed after due application of mind by the respondents and there is no legal infirmity or illegality attached to the same.

17. In view of the above said discussion of law and facts, the O.A. Is bereft of any merit and the same is hereby dismissed. No order as to costs."

11. In view of the same, we have no hesitation in quashing and setting aside the impugned order.

12. When we consider the manner in which inquiry was conducted and the penalty of compulsory retirement with 67% retirement benefits is passed, the principal question that arises is whether the impugned action is violative of principles of natural justice or not. The aim of the rule of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

13. In the speaking order dated 9.7.2003 passed by the Disciplinary Authority, while imposing the penalty on the petitioner, it is stated as under :-

"I also note that the IO had advised you on 25/9/02 of the hearing to be held on 27/9/02 that you had also acknowledged on 25/9/02. Intimation had also been sent to the ARE at the address given by you, an address that later turned out to be incorrect. It is therefore, apparent that you never intended the notice to reach your ARE and would have later claimed relief on the technicality that the intimation to ARE had been sent at a wrong address. Notwithstanding the above, as per Railway Board's instructions vide letter No.E(D&A)90.RG.6.106 dated 3/10/90, the responsibility to ensure attendance of the ARE lies with you and therefore, the proceedings of 27/9/02 onwards cannot be faulted on this ground."

14. The disciplinary authority however, is totally silent about the representation and explanation given by the petitioner and the ARE. The ARE, in his communication dated 2.10.2002 has informed the disciplinary authority that the intimation and privilege pass instructing him to attend the inquiry on 27.9.2002, 28.9.2002 and 30.9.2002 was delivered at his address only on 27.9.2002 at about 17.00 hrs. and he was not at home at that time. Therefore, he could reach

Mumbai only on 1.10.2002 by Swaraj Express that reaches Mumbai in the evening. He has also stated that sufficient advance notice ought to have been given to enable him to attend and by not giving sufficient notice, it was violative of the rules of natural justice because the party has been deprived of an opportunity of adducing of evidence, deprived of the opportunity of the evidence of the opponent being recorded in his presence and has also been deprived of the opportunity to cross-examine the witness on whose evidence the respondent relied upon. The disciplinary authority has simply disregarded this point by stating that the responsibility to ensure attendance of the ARE on 27.9.2002 was with the petitioner and the respondent could not be faulted. The responsibility to ensure the ARE attended for the personal hearing would be certainly that of the petitioner but the condition precedent to that is that the respondent should have given sufficient notice to the petitioner so that the petitioner would have ensured that the ARE attended. The order dated 9.7.2003 of the disciplinary authority is silent about the representation of the ARE. It also shows that the observation of the disciplinary authority that the petitioner gave a wrong address of the ARE to ensure that the notice never reached ARE etc. are baseless and per se incorrect. This shows that the respondents were biased against the petitioner and were determined to crucify the petitioner. It was a pre-determined action. On this ground alone the entire inquiry stands vitiated and is required to be set aside.

15. Moreover, in the charge-sheet issued to the petitioner, the respondent has relied upon the FIR lodged by respondent no.4 but when the petitioner requested the respondents for taking the FIR that he had lodged against respondent no.4 as defence document, the same was disallowed on the ground that the same did not pertain to the incident in question and was not relevant to the charge. This is another instance of violating the principles of natural justice. We say this because the petitioner as well as respondent no.4 had levelled charges against each other. A sensible and unbiased inquiry officer would have considered the versions of both the parties, documents of both the parties and then come to a conclusion. The complaint made by the petitioner against respondent no.4 should also have been a material factor while deciding the quantum of punishment. In our view, it would have been certainly very material because assuming the charges levelled against the petitioner of abusing respondent no.4 is correct, the inquiry officer should have certainly considered the reason why the petitioner behaved like that. When we asked the counsel for the respondents as to what was the reason for the petitioner and others to have come into room and abused respondent no.4, the counsel was unable to answer.

16. The respondents also relied upon the evidence of one N.P. Singh, RPF constable. The petitioner asked for the diary entry of the RPF constable witness which was not provided. Not providing copies of the diary entry is an illegal way of dealing with a departmental enquiry of this nature and violates the Railway servants (Discipline and Appeal) Rules itself.

Further, the admitted position was that the said N.P. Singh has not identified the

petitioner. He was supposed to have been the eye witness to the incident. It is also stated in the speaking order dated 9.7.2003 of the Disciplinary Authority that "It is however correct that Shri N.P. Singh has not definitely identified you. But then, it was not expected of Shri N.P. Singh to identify the person. His evidence however proves that the incident did occur."

In our view, this is not enough to fix the blame on the petitioner.

17. As regards the other witness Shri Varinder Kumar, in the order dated 9.7.2003 of the disciplinary authority, it is stated as under :-

"You have stated that PW Shri Varinder Kumar has not named you in his deposition in the DAR cases against 3 other staff facing similar charges. However, going by your narration of the deposition, Shri Varinder Kumar has also not definitely said that you were not present. In all probability, you were not referred to because the inquiry did not relate to charge against you. On the contrary, Shri Varinder Kumar, in his deposition in this case, has explicitly stated that, Shri Dutta was in the chamber of DOM/Cog and was shouting and using vulgar language against Shri Bhoobhate and threatening to kill him when he comes out of his chamber."

We have sighted a copy of the statement of Varinder Kumar dated 28.11.2000 which reads as under :-

"CENTRAL RAILWAY

Divisional Office, Operating Branch CSTM

28th NOV. 2000

On 26/8/2000 at about 12.00 hrs. I heard some noises while sitting in my chamber and rushed out and saw that about 12-13 persons had entered the chamber of DOM (Cog) Mr.U.V. Bobhate and were shouting at him. Mr.S.D. Eklahare, Typist working in our office was also one of the person. DOM (COG) was threatened with life and abusive language was used against him.

(VARINDER KUMAR) DOM (GOODS) CSTM"

There is no mention about the petitioner.

18. The petitioner admittedly was pursuing all available remedies by filing representations and even by filing Writ petition No. 308 of 2002. The inquiry officer was also changed. Therefore, the observation that the petitioner was unnecessarily delaying or raising flimsy objection are also unacceptable. The respondents without considering the representation concluded the inquiry.

19. As regards the 2nd charge, reliance has been placed by the Disciplinary Authority on the deposition of respondent no.4. In view of what is stated above, the inquiry officer did not give an opportunity to the petitioner to lead evidence to present his version and cross-examine anybody.

20. The Appellate Authority also accepted the method in which the inquiry was conducted, the inquiry report and the findings of the disciplinary authority. The inquiry conducted itself being bad in law, the subsequent orders, also passed by the Appellate/Revisional Authority also is bad. The whole action of the respondents, therefore, is vitiated.

21. The courts have always insisted that the authority must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice. Natural justice implies fairness, reasonableness, equity and equality and this must be followed while taking any decision adversely affecting the rights of a private individual. It is a pervasive fact of secular law where a spiritual touch enlivens administration and adjudication to make fairness a creed of life.

22. From the findings of the disciplinary authority we smell bias, an operative prejudice towards the petitioner. It may have been conscious or unconscious. But there is operative prejudice as a result of a pre-disposition or pre-determination to decide the petitioner's case in a particular manner, so much that the disciplinary authority did not view the matter with an open mind. Otherwise the disciplinary authority would not have stated what he has as regards the absence of ARE or approved of the inquiry officer holding an ex-parte hearing.

23. We therefore find that the respondents have not followed the basic concept of the principle of natural justice- audi alteram partem- giving an opportunity to the petitioner to effectively defend himself. It is also called the Rule of Fair Hearing. Corollary deduced from this rule is "qui aliquid statuerit, parte inaudita altera aequum liat dixerit, hand aequum facerit" (he who shall decide anything without the other side having been heard although he may have said what is right will not have done what is right). This principle was expressed by Lord Hewart when he said "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. [R. Vs. Sussex Justices, Ex P. McCarthy (1924) 1 KB 256, 259.

We do not find justice had been done to the petitioner.

24. In the circumstances, the manner in which the inquiry was conducted is grossly violative of the principles of natural justice and requires to be set aside and is hereby set aside. Rule therefore, made absolute.

25. On 16.3.2015 the petitioner informed the court that he was suffering from 3rd stage of lung cancer and also tendered a copy of the Final Histopathology Report issued by the TATA Memorial Centre. During the hearing the petitioner was candid enough to say that he was not in a position to go back to work in view of his delicate health condition.

26. As we are setting aside the impugned order on the ground of violation of the principles of natural justice, we have not gone into the merits of the matter as such. Noting the physical condition and ailment of the petitioner we feel no

purpose will be served in remanding the matter back for re-hearing. Almost 15 years have also elapsed since the contentious incident.

27. The order we are inclined to pass also covers the aspect of compensation for the loss the petitioner has suffered in view of the compulsory retirement. Admittedly, the petitioner did not work during this period and has expressed inability in future also and thereby accepting voluntary retirement. In the present circumstances of the case, we are also unable to conclude that the petitioner was restrained from continuing his services on account of mala fide exercise of powers. Hence we do not think it is appropriate to order back payment of wages to the petitioner.

28. The entitlement of all other retirement benefits, including continuity of service need to be retained and provided to the petitioner in accordance with law by granting 100% retirement benefits as against the restricted 67%. This would also cover the compensation part in lieu of back wages. Therefore, we are inclined to hold that the petitioner is entitled to 100% retirement benefits from the date of compulsory retirement.

29. In the circumstances, having set aside the inquiry report, taking into account the petitioner's health condition and inability to continue to work and the overall view of the matter, we are inclined to pass the following order.

ORDER

(1) The petitioner is entitled to 100% of pensionary benefits from the date he has been compulsorily retired;

(2) The petitioner's pension and other benefits including continuity of service should be calculated on the basis as to what he would have been entitled to and received, had he not been compulsorily retired;

(3) The respondents may adjust the amount paid by them till date to the petitioner as pension and pay the difference. On the differential amount payable upto date, the petitioner should also be paid interest @ 8% p.a until payment.

30. In view of delicate health condition of the petitioner, the respondents are directed to complete the calculations and pay the amount as directed above, on or before 15.6.2015.

No costs.