

(1991) 08 PAT CK 0016
In the Patna High Court
Case No : C.W.J.C. No. 1788/1988

Jibachh Jha

APPELLANT

Vs

Bihar State Road Transport Corpn. and Others

RESPONDENT

Date of Decision : 27-08-1991

Acts Referred:

Citation : (1991) 08 PAT CK 0016

Final Decision : Dismissed

Judgement

S.N. Jha, J.—The petitioner, who was in employment of the Bihar State Road Transport Corporation (in short "the Corporation") as Conductor, was dismissed from service in a departmental proceeding. He has challenged the order of dismissal dated July 26, 1984 passed by the Chief of Administration of the said Corporation, as also the order passed by the Chairman-cum-Managing Director, dated December 16, 1986, on his representation against the said order of dismissal. Copies of the aforesaid two orders have been marked as Annexures 2 and 1, respectively, to the writ petition.

2. A departmental proceeding was instituted on the basis of certain charges as contained in Annexure 9 alleging that on March 19, 1983, bus No. BHQ 708, of which he was the Conductor, was checked by the Central Squad and 23 passengers were found travelling without tickets out of 39 passengers. It was also alleged that he had realised fare from 15 such unbooked passengers without issuing tickets to them. The Inquiry Officer submitted his report on April 24, 1984 holding that the second charge, namely, pre-realisation of fare from 15 unbooked passengers had not been proved. However, according to Inquiry Officer the first charge was proved. On consideration of the report and the other materials, the disciplinary authority, namely, Chief of Administration, passed the aforesaid order of dismissal stating, inter alia therein that the petitioner had earlier been found to have committed the same kind of misconduct/irregularity on 22 occasions and for that he had been suspended and punished on several occasions.

3. It would not be out of place to mention here that, on account of the fact that the proceeding relating to some industrial dispute concerning the Corporation and its employees was pending before the Industrial Tribunal, an application was made before the Tribunal for approval of the order of dismissal, as required by the proviso to Clause (b) of Section 33(2) of the Industrial Disputes Act (in short "the Act"). The Tribunal took evidence of parties, in which the petitioner participated by examining, cross-examining witnesses, and finally by order dated December 8, 1984 it approved the aforesaid order of dismissal. It is relevant to mention here that these facts have not been stated at all in the writ petition and, accordingly, no prayer also has been made for quashing of the said order of the Tribunal dated December 8, 1984. These facts have come on records in the counter-affidavit filed on behalf of the Corporation.

4. Mr. Tara Kant Jha, learned counsel for the petitioner, has questioned the correctness of the impugned orders on two-fold ground. He has submitted that the report of the Inquiry Officer, which has been relied upon by the Disciplinary Authority was not made available to the petitioner depriving him of the opportunity of making a representation against the findings as contained therein. Reliance in this connection has been placed on a decision of the Supreme Court in *Union of India and others Vs. Mohd. Ramzan Khan*, . He has also submitted that the Disciplinary Authority has erred in passing the order of dismissal taking into account the past antecedents of the petitioner without giving any opportunity to explain the same. In support of this contention, reliance has been placed on two decisions of the Supreme Court in the cases of *State of Mysore Vs. K. Manche Gowda*, and *Binny Ltd. Vs. Their Workmen*, . Learned counsel alternatively submitted that, in any view, the order of dismissal was disproportionate to the nature of the charges and, therefore, this Court should at least interfere with the quantum of punishment as has been done recently by the Supreme Court in the case of *V.R. Katarki v. State of Karnataka* (1992 I LLJ 622). Mr. Jha also, while dealing with the contention raised in the counter-affidavit that the order of dismissal having merged in the order of the Industrial Tribunal, in the absence of any relief seeking quashing of the said order of the Industrial Tribunal, this Court cannot grant any relief to the petitioner, submitted that if the initial order of dismissal suffers from inherent infirmity, the fact that the Tribunal later approved the said order is of no consequence and it was not necessary for the petitioner to have challenged the said order of the Tribunal in this writ application.

5. Mr. K.P. Verma, appearing on behalf of the respondent-Corporation, has reiterated the plea that no relief can be granted to the petitioner unless the order of the Tribunal is quashed and since such a prayer has not been made, even belatedly, the writ petition is fit to be dismissed on this ground alone. In this connection, learned counsel also submitted that, as held by the Supreme Court in the case of *Remington Rand of India Limited Vs. Thiru R. Jambulingam*, , the petitioner had an alternative remedy by way of raising an industrial dispute and seeking reference to the Industrial Court u/s 10 of the Act. Learned counsel on

the basis of the relevant Standing Orders and the Standing Circulars of the Corporation (Annexure-A to the counter-affidavit) submitted that the order of dismissal is quite legal and justified. He submitted that the contentions raised on behalf of the petitioner regarding non-supply of the enquiry report as well as not giving any opportunity to explain the past antecedent of the petitioner does not vitiate the impugned order on the facts and in the circumstances of the case.

6. I shall first deal with the contentions raised on behalf of the learned counsel for the petitioner. In the case of Md. Ramzan Khan (supra), the Supreme Court, while dealing with the question of supplying copy of the enquiry report in the context of the 42nd Amendment of the Constitution dispensing with the necessity of giving second show-cause notice in terms of Article 311(2) of the Constitution has, no doubt, held that notwithstanding the said constitutional amendment, by way of compliance of the rule of natural justice, copy of the enquiry report should be made available to the delinquent, one of the reasons being that sometimes that Inquiry Officer, while recording his finding on the charges, also recommends a particular punishment, which may be said to influence the mind of the Disciplinary Authority. (It has been stated in the said decision (Union of India and others Vs. Mohd. Ramzan Khan, :

"In a quasi-judicial matter, if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected."

It would, however, appear that whether in terms of Clause (2) of Article 311 of the Constitution as it stood prior to the 42nd Amendment, or as a rule of natural justice, the underlying object behind making available copy of the enquiry report is to enable the delinquent either to make a representation against the proposed punishment or to prefer a proper and effective appeal, revision, representation or memorial (by whatever name it is called) before the superior authority challenging the order of punishment. Similarly, need or desirability to give an opportunity to the delinquent to explain his past antecedents, if they are proposed to be taken into consideration by the Disciplinary Authority is also for the purpose of enabling him to make a representation against the proposed punishment. As has been held by the Supreme Court in K. Manche Gowda's case (supra):-

"If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the Government...what the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on

him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers....."

7. The proposition of law laid down in the aforesaid case as also in the case of Binny Limited (supra) is well-settled. However, the question for consideration is whether the principle enunciated above can be applied to the facts of the instant case or not. In this connection it would be appropriate to refer to Clause 22 of the Certified Standing Orders framed under the Industrial Employment (Standing Orders) Act, 1946 laying down the service conditions of the employees in the employment of the Corporation. Sub-clause (i) provides that "Subject to the provisions of the Circulars/Orders that may be issued from time to time an employee found guilty of misconduct may be punished in one or more of the following ways". One of the punishments prescribed under item No. (8) is discharge or dismissal from service. Sub-clause (ii) is relevant for our purpose and, therefore, may be quoted in extenso:-

"(ii) In awarding punishments the Chairman /Managing Director/Divisional Manager/ Works Manager/Regional Works Manager/ or any other competent authority may take into account the gravity of the misconduct, previous records, if any, of the employee and any other extenuating or aggravating circumstances that may exist."

It would, thus, appear from Clause 22 that while awarding any punishment to an employee, who has been found guilty of misconduct, the competent authority may take into account not only the gravity of the misconduct but also the previous records, if any, of the employees and any other extenuating or aggravating circumstances that may exist against him. It is said in order to avoid the possibility or any chance of disproportionate punishments being awarded against the different classes of employees for different categories of misconduct, the Corporation has prescribed the quantum of punishment of varying propositions depending on the nature i.e. gravity of the charge (s) and also the fact as to whether the misconduct in question has been committed for the first time or whether in the past also he had committed such misconduct. In other words, for the first "offence", as it has been called in the said guideline, the punishment for a particular type of charge or misconduct is less severe than the punishment prescribed for the same misconduct in the second instance and in the third instance. To illustrate, it has been provided that for the offence of carrying unbooked passengers, if it is first of its kind, the Conductor can be awarded the punishment of censure, if the number of unbooked passengers is up to 10% of the total number of passengers in the vehicle at the time of checking. However, the punishment prescribed for the second such "offence" is warning and fine of the amount as mentioned therein. Likewise, if the number of

unbooked passengers is more than 10% but does not exceed 25% of the total number of passengers, a different punishment is prescribed but if it exceeds 25%, a more severe punishment is prescribed. If it is the second instance of carrying more than 10% but less than 25%, a still more severe punishment up to dismissal has been prescribed. Thus, depending on the gravity of charges and previous punishment, details whereof have been given in the guideline, which is in the form of a chart, punishments of varying proportions have been prescribed. As would appear from Clause (c) of the said guideline (Appendix-A) in case of third offence of carrying unbooked passengers, the punishment prescribed is dismissal in all cases. It has been stated that the aforesaid guidelines have been laid down in consultation with the representatives of the employees i.e. the Union and they are deemed to be supplemental to the certified Standing Orders in view of the very language of Sub-clause (i) of Clause 22 which says "Subject to the provisions of Circulars/Orders that may be issued from time to time", as noticed above. There can be no doubt that these Certified Standing Orders have statutory force, and are binding on the parties. The entire gamut of service conditions of the employees is governed by the provisions of the Certified Standing Orders, as may be applicable to a particular establishment. It would, thus, appear that in the Certified Orders, read with the, Standing Circulars, which are said to be supplemental and, in fact, part of the certified standing orders, having regard to the language of Clause (1) as quoted above, themselves prescribe the punishment, there is little discretion left for the disciplinary authority in the matter and, thus, there is little scope for argument that the delinquent is entitled to a copy of the enquiry report or to be informed that the disciplinary authority is going to take into consideration his past antecedents also. I have already stated above that the underlying idea or the need for making available a copy of the enquiry report or making him aware that past antecedents will also be considered, is to give him an opportunity to make representation against the proposed punishment, but if the punishment, which is to be awarded for a particular offence, has already been prescribed by the terms of the Standing Order, there is hardly any scope for making grievance that the petitioner was entitled to be informed of the proposed punishment (of dismissal) in view of his past antecedents. It has already been noticed above that the stand of the Corporation is that the petitioner was guilty for committing the aforesaid misconduct, namely, of carrying unbooked passengers on 22 previous occasions and had also been punished on various occasions. That being the position, in view of the specific guidelines prescribing the punishment of dismissal "in all cases" where the offence is third of its kind, I do not find as to how any prejudice can be said to have been caused to the petitioner. As has been held by the Supreme Court in *Manche Gowda's case* (supra), the rationale behind informing the delinquent of the fact that the disciplinary authority was going to consider his past records, was to give an opportunity to submit an explanation. In view of the express provisions contained in the certified Standing Order read with the Standing Circular (Annexure-A) the petitioner cannot press into service the ratio of the aforementioned decisions, which have been relied upon by his counsel in

this Court.

8. It may also be stated in this connection that the plea regarding nonsupply of the enquiry report has been taken for the first time in the third supplementary affidavit, which has been filed by the petitioner during course of final hearing of this case. The order of the Chairman-cum-Managing Director (Annexure-1) does not show that any such plea had been taken before him, nor any such averment has been made in the writ petition or any of the previous supplementary affidavits. A question of fact cannot be raised for the first time in the writ petition, and that also in the course of final hearing. Besides, as I have indicated above, the idea behind giving a copy of the enquiry report is to make an effective representation either before the disciplinary authority or before the appellate authority. I have already dealt with in the preceding paragraph that non-supply of enquiry report in view of the terms of the Standing Order does not cause any prejudice to the petitioner. The very fact that he preferred a representation before the Chairman-cum-Managing Director without any demur shows that he did not consider it necessary to have a copy of the enquiry report for the purpose of enabling him to make a proper and effective representation before the appellate authority. No averment has been made that at any stage he had asked for a copy of the enquiry report. On such facts it is difficult to apply the ratio of the aforementioned decision of the Supreme Court to the aid of the petitioner and to hold that any prejudice has been caused to him on that account. Rules of natural justice, as is well-known, are not like strait-jacket formulae which can be applied uniformly in all cases. Their application depends on the facts of the case, the test being whether any prejudice has been caused to the person concerned so that he may not complain, at a later stage, that he has not been fairly treated. Accordingly, in my view, the contentions raised by learned counsel for the petitioner are devoid of any substance.

9. I shall now consider the plea taken by the Corporation that no relief can be granted in regard to the quashing of the order of dismissal in the absence of any challenge to the aforementioned order of approval made by the Industrial Tribunal dated December 8, 1984. Section 33 of the Industrial Disputes Act, Inter alia, provides that during pendency of any conciliation proceeding . or any other proceeding before the Labour Court of Industrial Tribunal etc., no employer shall alter the conditions of service of employment applicable to them before the commencement of such proceeding. Sub-section (2) thereof provides that during the pendency of any such proceeding in respect of any industrial dispute, the employer may in accordance with the Standing Orders or where there are no such Standing Orders, in accordance with the terms of the contract, discharge or punish, whether by dismissal or otherwise, the workman for any misconduct connected with the dispute. In order to appreciate the stand it is appropriate to quote the proviso appended to Clause (b) of Sub-section (2), which reads as follows:

"Provided that no such workman shall be discharged, or dismissed, unless he has

been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

It would, thus, appear that any order of dismissal or other punishment is subject to approval by the Industrial Tribunal or the Labour Court or any other authority wherever the proceeding is pending. It has not been disputed by the learned counsel for the petitioner that an application had been duly made by the Corporation before the Industrial Tribunal for according its approval to the order of dismissal dated July 26, 1984. Learned counsel for the Corporation has submitted that the petitioner had fully participated in the aforesaid proceeding by examining/cross-examining the witnesses and the order of approval was passed in his presence. Learned counsel for the petitioner was not in a position to deny this fact. Having regard to the express language of Section 33(2)(b) along with its proviso, it is manifest that the order of dismissal or any of order of other punishment passed by the management cannot be said to be effective unless it is approved by the Industrial Tribunal or the Labour Court, as the case may be. In other words, in the absence of any approval, the order of dismissal does not take effect. Once approval is granted, the order of dismissal merges and becomes part of it. Therefore, the order of approval really amounts to the effective order of dismissal. That having not been challenged, it is difficult to grant any relief to the petitioner, as prayed for in this application. As a matter of fact, suppression of this material fact that the impugned order of dismissal had been approved by the competent authority in a judicial proceeding after proper enquiry is suppression of such a material fact, which goes to root of the matter and may justify dismissal of the writ petition on this ground of suppression veri suggestio falsi. However, it is not necessary to take that view in the instant case. But the fact remains that the impugned order of dismissal had already been approved or confirmed in a judicial proceeding way back on December 8, 1984. This writ petition has been filed in this Court on March 23, 1988 and even if the period is reckoned from the date of order of Chairman-cum-Managing Director passed on December 16, 1986 the writ petition has been filed after lapse of one year and three months.

10. The last submission of Mr. Tara Kant Jha that the quantum of punishment is excessive and disproportionate to the nature of charges is nothing but a cry of desperation. It has no substance either on facts or in law. As has been noticed above, the petitioner had indulged and committed the same misconduct on 22 occasions earlier. This fact looms large on the merits of this contention. Besides, it has repeatedly been held by the Supreme Court that the High Court in exercise of its writ jurisdiction under Article 226 has no jurisdiction to interfere with the quantum of punishment. The decision of the Supreme Court in V.R. Katarki's case (supra) relied upon by the learned counsel itself reiterates the same proposition in paragraph 6 of the judgment. In Union of India (UOI) Vs. Parma Nanda, Supreme Court held that where the order of punishment has been passed after holding enquiry the quantum of punishment cannot be interfered with

unless it is mala fide in nature. Paragraph 27 of the judgment in the aforesaid case may be usefully noticed in this connection: (pp-64-65):

"We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Inquiry Officer or competent authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of Legislature or rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty, unless it is mala fides, is certainly not a matter for the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter."

The only other exception, besides mala fide that has been carved out for the purpose of interference with the order of punishment is where the penalty has been imposed without holding any enquiry under Clause (a) of the second proviso of Article 311(2) of the Constitution. Obviously, the instant case does not come in this category, nor any allegation of mala fide has been made against the disciplinary authority. In this view of the matter, it is difficult to interfere with the quantum of punishment, particularly after the same has been approved by the Industrial Tribunal in a judicial proceeding, which order has already become final.

11. For the reasons stated above, I find no merit in this application and the same is, accordingly, dismissed but without any order as to costs.

Dharampal Sinha, J.

12. I agree.