

(1993) 07 GUJ CK 0004
In the Gujarat High Court

Case No : Special Civil Application No's. 2167 and 2170 of 1984

Kailash Chand Pathak

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-07-1993

Acts Referred:

Railway Protection Force Rules, 1959 — Rule 41, 44(10), 44(9)

Citation : (1994) 1 GLR 702

Hon'ble Judges : K.J. Vaidya, J

Bench : Single Bench

Judgement

Vaidya, J.—The grievance voiced by the petitioners in these two writ petitions is two-fold viz. (i) "Whether any delinquent employee of the Railway can be removed and/or dismissed from service without taking into consideration the self defence pleaded by him repudiating the allegations levelled against him in the Charge-sheet?" and (ii) Quite incidentally enough, the off-shoot of the said grievance is the second question - as to "what indeed is the meaning of the word "considered" appearing in sub-rule (9) of Rule 44 of the Railway Protection Force Rules, 1959?"

2. Few relevant facts as far as they are necessary to understand and set at resolve the aforesaid two grievances, it may briefly be stated that two petitioners - namely, Kailash Chand Pathak and Prabhat Sinh, who were serving as Rakshaks in the Railway Protection Force were served with the charge-sheet dated 18-11-1981 alleging that on 13-5-1981 not only they absented from their respective duty at the gate of Sabarmati Engineering Works at Ahmedabad but both of them were also found clandestinely carrying iron rivets and the scrap materials (the railway property) in a bag placed on the carrier of their bicycles. the Inquiry Officer thereafter holding that the said allegations were true submitted a report to the Disciplinary Authority, who in his turn issued show cause notice to them, and ultimately removed them from their service by an Order dated 17-8-1982. These orders of removal were challenged before the

Deputy Chief Security Officer, Western Railway, Bombay, which in turn came to be rejected by the Order dated 25-2-1983. Thereafter, both the petitioners submitted a mercy petition to the Chief Security Officer on 21-4-1983. However, as the same was not responded to, the petitioners were ultimately constrained to approach this Court by way of the present two writ petitions inter alia praying for quashing and setting aside the impugned orders of removal from service and also to reinstate them, with all service benefits, including the back wages.

3. Mr. I. S. Supehia, the learned Advocate for the petitioners though has raised several conditions in the memo of the petitions, has ultimately chosen to confine himself to only one point, viz. that since the Disciplinary Authority, while passing the impugned order of removal has not taken into consideration the defence of the petitioners, the same was ex-facie illegal and thus deserves to be quashed and set aside. Making good this contention, Mr. Supehia has relied upon Sub-rules (9) and (10) of Rule 44 of the Railway Protection Force Rules, 1959, which reads as under :

"44. Procedure for imposing major penalties; (1) xxx xxx xxx (2) xxx xxx xxx (3) xxx xxx xxx (4) xxx xxx xxx (5) xxx xxx xxx (6) xxx xxx xxx (7) xxx xxx xxx (8) xxx xxx xxx (9) The Disciplinary Authority shall, if it is not the Inquiry Authority to consider the record of the inquiry and record its findings on each charge.

10. (1) If the Disciplinary Authority having regard to its findings on the charges, is of the opinion that any of the penalties specified in clauses (e) to (h) of Rule 41 should be imposed, it shall pass appropriate orders in the case.

(2) If it is of opinion that any of the penalties specified in clauses (a) to (d) of Rule 41 should be imposed, it shall -

(a) furnish the member so charged with a copy of the report of the Inquiring Authority and, where the Disciplinary Authority is not the Inquiring Authority, a statement of its findings together with brief reasons for disagreement, if any, with the findings of the Inquiring Authority.

(b) give him a notice stating the action proposed to be taken in regard to him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed action, and

(c) consider the representation, if any, made by the member so charged in response to the notice under clause (b) and determine what penalty, if any, should be imposed on the member so charged, and pass appropriate orders on the case".

Mr. Supehia on the basis of the above rules further submitted that had indeed the Disciplinary Authority followed Sub-rule (9), then the misfortune of removal to which the petitioners have become victim, would not have fallen upon them. According to Mr. Supehia, by virtue of Sub-rule (9), the Disciplinary Authority was expected rather to put it more emphatically, rather bound to "consider" the entire record of the inquiry and to record findings on each charge. Mr. Supehia

further submitted that in the above context, if this Court looks at the impugned order, it is very clear that the Disciplinary Authority has not "considered" the record. Mr. Supehia submitted that he was saying so because the "record" means not only what constitutes the charge and the statement of allegations against the delinquents, but the same also very much includes the defence version. Making good this submission, Mr. Supehia has invited attention of this court to the relevant portion of the impugned orders wherein it is not disputed by Mr. J. C. Sheth, the learned Advocate for the respondents that the defence version has not at all been taken into consideration. Mr. Supehia submitted that in view of the clear provision under the Rules and undisputed facts, the impugned orders suffer from the patent vice of non-application of mind, and therefore to the said extent, the same deserves to be quashed and set aside. Mr. Supehia further submitted that not only the word "considered" has a definite dictionary meaning but the same has also been explained by the Supreme Court in the case of *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, wherein in para 21, it has been observed as under :

"..... The word "consider" has been used in contradistinction to the word "determine". The rule making authority deliberately used the word "consider" and not "determine" because the word "determine" has a much wider scope. The word "consider" merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all the aspects, the pros and cons of the matter and hearing the aggrieved person. Such an inquiry would be a summary inquiry to be held by the disciplinary authority after hearing the delinquent employee. It is not at all necessary for the disciplinary authority to order a fresh departmental inquiry which is dispensed with under Rule 4 of the Rules of 1968 which incorporates the principle contained in Art. 311(2) proviso (a). This provision confers power on the disciplinary authority to decide whether in the facts and circumstances of a particular case what penalty, if at all, should be imposed on the delinquent employee. It is obvious that in considering this matter the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which is misconduct is likely to have on the administration and other extenuating circumstances or redeeming features if any present in the case and so on and so forth..."

4. Countering the above, Mr. J. C. Sheth, the learned Advocate for the respondents submitted that merely because the defence version is not reflected in the impugned order, it cannot be said that the same has not been taken into consideration. Mr. Sheth further submitted that as a matter of fact, when the Disciplinary Authority stated that he agreed with the findings of the Enquiry

Officer holding the charges proved against the petitioners, it must be presumed that he has taken into consideration the version of the petitioners as well. Not only that but at the time when the impugned order came to be passed, the entire file was before the said authority, and therefore, it is indeed not proper to allege that the Disciplinary Authority has not considered the defence version. Mr. Sheth further submitted that the orders passed in the departmental proceedings are more or less administrative orders, and in that view of the matter, they may not be as ideal and perfect as the one ordinarily passed by the Courts of law. Such departmental orders are always brief, and, therefore, on the basis of such technical objections to set at naught the order of removal would indeed be quite illogical, and, therefore, out of question.

5. Now having heard the learned Advocates for the respective parties at length, this Court at the outset, would like to state that the submission made by Mr. Supehia has a considerable force, and, therefore, the same deserves to be accepted. Mr. Supehia has indeed made out a clear case of contravention of Sub-rule (9) of Rule 44 of the Railway Rules. In fact, it has not been and indeed cannot be disputed that the Disciplinary Authority has not taken into consideration the defence put up at the earliest before the Inquiry Officer which is not only a part of the record, but the same is a circumstance which while taking a major and ultimate decision of issuing the notice in the matter of the proposed penalty goes to the very root of it to be ignored. In fact, the submission of Mr. Sheth is far from being satisfactory. Mr. Sheth has clearly overlooked the word "consider" appearing in sub-rule (9) of Rule 44 of the Railway Rules, which contains a mandatory direction to the Disciplinary Authority to consider the record of the inquiry, and record its findings on each charge. It certainly cannot be disputed that the defence version of the petitioners is a part and parcel of the record, and yet at the same time, the fact also remains that throughout the length and breadth of the impugned order, there is not even a whisper to indicate that the same has been "considered". On perusing the record, it appears that the petitioner - Kailash Chand and produced five defence witnesses, while the petitioner - Prabhat Singh had produced two defence witnesses. This fact is not disputed by Mr. Sheth. Under the circumstances, keeping in mind the aforesaid Supreme Court decision rendered in case of Divisional Personnel Officer, Southern Railway (supra), and the provisions contained in Sub-rule (9) of Rule 44 of the Railway Rules, this Court has no difficulty in holding that the impugned orders of removal to the said extent is ex facie illegal, and hence, the same deserves to be quashed and set aside. In fact, at the fact putable facts and legal position arising therefrom, Mr. Sheth was ultimately unable to carry his point any further.

6. In the result, both these petitions are allowed. The impugned order of removal dated 17-8-1982 removing the petitioners from service is hereby quashed and set aside. The respondents are directed to reinstate the petitioners in service within three months from the date of receipt of this Judgment. As regards the petitioners' prayer for the back wages, the respondents are directed to call upon

the petitioners to furnish information regarding their gainful employment elsewhere, if any, and if it is found that they were gainfully employed and have earned particular amount, then the back wages may be adjusted accordingly, by deducting the amount so earned by them. After deducting the said amount whatever petitioners within six months from the date of receipt of this judgment. Rule made absolute.