
(2015) 03 CAL CK 0043
In the Calcutta High Court
Case No : Writ Petition No. 18296 (W) of 2011

Kishor Behera

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Citation : (2015) 3 CALLT 349

Hon'ble Judges : Tapabrata Chakraborty, J.

Bench : Single Bench

Advocate : Partha Sarathi Bhattacharyya, Udaynarayan Betal, Abhijit Basu and Raju Bhattacharyya, for the Appellant; Tapas Kumar Chatterjee, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Tapabrata Chakraborty, J.—This writ application has been preferred by the petitioner challenging a disciplinary proceeding including the charge-sheet dated 31st December, 2009 issued by the respondent No. 5, the enquiry report communicated vide memorandum dated 12th May, 2010, the order of the disciplinary authority dated 17th June, 2010, the order of the appellate authority dated 30th September, 2010 and the order of the revisional authority dated 31st July, 2011.

2. The facts, in a nutshell, are that the petitioner was an employee of Central Industrial Security Force (hereinafter referred to as the C.I.S.F.) and when he was posted as a Constable at Haldia, he was served a charge-sheet dated 21st December, 2009 issued by the respondent No. 4. The petitioner thereafter participated in the enquiry in which five members of a surprise check team deposed on behalf of C.I.S.F. along with one Mr. K.K. Ghosh, Coy Commander. In the midst of such enquiry, the petitioner was supplied a copy of the presenting officer's brief vide memorandum dated 28th April, 2010 and subsequent thereto the enquiry report was communicated to the petitioner by a memorandum dated 12th May, 2010. The petitioner replied to the said enquiry report on 28th May,

2010 and subsequent thereto the petitioner was communicated the order of the disciplinary authority vide memorandum dated 17th June, 2010 imposing a punishment of removal from service upon. Aggrieved by the said order of punishment, the petitioner preferred a statutory appeal but by an order dated 30th September, 2010 the appeal was dismissed. Aggrieved thereby, the petitioner approached the revisional authority by a petition dated 24th November, 2010 and upon consideration of the same the petitioner's punishment was modified to compulsory retirement from service with 90% pensionary benefits from the date of removal from service.

3. Mr. Partha Sarathi Bhattacharyya learned advocate appearing for the petitioner submits that the disciplinary authority has passed the order of removal from service only on the basis of a suspicion to the effect that as an amount of Rs. 2,375/- was confiscated by the surprise check team from the jurisdiction of duty area of the petitioner and during his duty hours, the petitioner was guilty of gross misconduct, dereliction of duty which tantamounts to illegal collection of money for wrongful gain.

4. He further submits that in course of enquiry the petitioner wanted to examine the other Constables present on the date of the incident but such prayer was turned down by the enquiry officer on a purported plea that the said Constables are also being dealt with departmentally on identical set of charge and that the said Constables are biased against the employer (page 92 of WP). According to Mr. Bhattacharyya such denial of opportunity to the petitioner to produce the Constables as defence witnesses tantamounts to blatant violation of principles of natural justice.

5. Drawing the attention of this Court to the cross-examination of the witnesses at pages 68, 70, 77, 79, 82 and 90 of the writ application, Mr. Bhattacharyya submits that all the members of the surprise check team have, inter alia, stated that they did not check the petitioner and nothing was obtained from his possession and he was not found to have collected the confiscated amount from anybody and no complaint was received by the said team members to the effect that the petitioner had in any manner harassed anybody or did ask for money from any person.

6. He further submits that it is evident from the cross-examination of Mr. K.K. Ghosh (PW6) at page 80 of WP that the said team neither did make any G.D. entry nor did tell anybody to lodge any such complain. He further deposed that it is not possible for the duty personnel to enter inside the room adjacent to main gate leaving his duty point. In answer to a question as to who used the said room he stated that the same is used by various persons like employees, labourers, transporters, agents etc. for various purposes and that it is not possible for the duty personnel to restrict the said persons from using the said room unless it is kept under lock and key by the management.

7. Placing reliance upon the deposition of the PWs, Mr. Bhattacharyya submits

that applying the test of preponderance of probability the charge against the petitioner could not have been proved and the factum of confiscation of an amount of Rs. 2,375/- by the surprise check team cannot in any manner lead to formation of an opinion to the effect that the act, of collection of money which was confiscated, is attributable to the petitioner.

8. Drawing the attention of this Court to the enquiry report, he submits that the said report is absolutely perverse inasmuch as there is no evidence on record establishing any nexus of the alleged charge with the petitioner and the enquiry officer on one hand categorically observed that nothing objectionable was found from the possession of the petitioner but on the other hand the said officer made a remark to the effect that as the confiscation was made from the vicinity of his duty area, it does not absolve the petitioner from the charge. In the said report there is no finding to the effect that the petitioner has embezzled any amount or has illegally collected any money for his wrongful gain.

9. He further argues that the disciplinary authority could not have arrived at an abrupt conclusion that the confiscated amount was collected and accumulated by the petitioner through unfair means from the users of the GCB Main Gate, in the backdrop of the evidence tendered by the PWs to the effect that the room adjacent to GCB Main Gate, from which an amount of Rs. 1,275/- was recovered, is used by various persons like employees, labourers, transporters, agents etc. for various purposes and that it is not possible for the duty personnel to restrict the said persons from using the said room unless it is kept under lock and key by the management.

10. He further submits that the disciplinary authority has sought to negate the petitioner's specific contention that though after checking it is mandatory to incorporate an entry in the General Diary maintained in the unit by observing inter alia that as the checking party came from outside there was no need to make on such entry. Thus, the admitted fact that the checking members did not make any entry in the G.D. maintained for such purpose renders the entire surprise check to be suspicious.

11. Drawing the attention of this Court to the order passed by the appellate authority, Mr. Bhattacharyya submits that the contradictions in the deposition of the surprise check team members as categorically pointed out by the petitioner in the appeal petition, were not dealt with and by a long order of eleven pages the appellate authority has rejected the appeal through a statement made in paragraphs 6 and 7 therein to the effect that the charge against the petitioner stands proved on the basis of overwhelming evidence held on record but surprisingly the particulars of such evidence have not been indicated and that as such the said order being a cryptic one, is liable to be set aside.

12. According to him, the order of the revisional authority dated 31st July, 2011 does not reflect any independent application of mind and the order was passed without considering the challenge thrown by the petitioner against the order of

the disciplinary authority and the appellate authority. However, the said revisional authority taking a lenient view modified the order of removal to that of compulsory retirement.

13. In support of his arguments, Mr. Bhattacharyya has relied upon the following judgments:

- "a) S.K. Giri Vs. Home Secretary, Ministry of Home Affairs and others, .
- b) State of U.P. Vs. Raj Kishore, .
- c) Shyamnarain Sharma Vs. Union of India (UOI) and Others, .
- d) Roop Singh Negi Vs. Punjab National Bank and Others, .
- e) Praveen Bhatia Vs. Union of India (UOI) and Others, .
- f) The High Court of Judicature at Bombay, Through Its Registrar Vs. Shashikant S.Patil and Another, ."

14. Mr. Tapas Chatterjee, learned advocate appearing for the respondents submits that the petitioner was granted ample opportunity to contest the disciplinary proceeding and that there has been no violation of the principles of natural justice warranting interference of this Court.

15. According to him the fact that an amount of Rs. 2,375/- was recovered from the jurisdiction of GCB Main Gate has been proved and that there is no dispute as regards the fact that the petitioner was in duty under "A" Shift from 6 hours to 13 hours on 27th November, 2009 and on the rudiments of such admitted facts it stands established that there has been dereliction of duty on the part of the petitioner which tantamounts to illegal collection of money at the gate for wrongful gain.

16. He further submits that the order of the disciplinary authority and the order of the appellate authority are well reasoned and there has been no error in the decision making process, warranting interference of this Court.

17. Mr. Chatterjee has further argued that the revisional authority in consideration of the past services rendered by the petitioner has modified the order of removal to that of compulsory retirement from service with 90% pensionary benefits from the date of the petitioner's removal from service and as such the grievance of the petitioner as regards imposition of disproportionate punishment stands redressed.

18. On the issue of sufficiency of evidence, Mr. Chatterjee argues that as the money was confiscated from the duty area of the petitioner, the charge of illegal collection of money for wrongful gain stands proved and that as such the allegation of infirmities in the decision making process is unsustainable in law.

19. He further submits that the order of compulsory retirement has been passed in appreciation of the fact that the petitioner had been negligent in discharge of

his service and that the employer has the right to weed out illegal beneficiaries like the petitioner since his further presence in service would unnecessarily burden a discipline force.

20. In support of his arguments, Mr. Chatterjee has placed reliance upon the judgment delivered in the case of Rajendra Singh Verma (Dead) through L.Rs Vs. Lt. Governor of NCT of Delhi and Another, .

21. He has further argued that the question of relaxation of the order of compulsory retirement does not occasion inasmuch as it needs to be borne in mind that in a discipline force absolute integrity and honesty is required to be preserved and in the event such discipline is not maintained, the confidence of public would be impaired and that the petitioner, being a member of discipline force, is expected to be extremely cautious in his duties and having committed an offence, the petitioner cannot lament and seek sympathy from this Court.

22. I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

23. A close scrutiny of the charge-sheet would reveal that an amount of Rs. 1,100/- was confiscated from a bag out of 3 bags kept at Pedestrian Gate of GCB Main Gate and an amount of Rs. 1,275/- was recovered from a plastic gunny bag containing iron nut bolts kept in a room just adjacent to the GCB Main Gate on the basis of a surprise check conducted by a team of five officials and as the petitioner was in duty at GCB Main Gate at the time of such confiscation, the charge was framed to the effect that such confiscation from the jurisdiction of the GCB Main Gate duty area during the duty hours of the petitioner amounts to gross misconduct, dereliction of duty and tantamounts to illegal collection of money at the gate for wrongful gain.

24. The scrutiny of the evidence adduced on behalf of the prosecution reveals the following:

"a) PW2 (T.N. Bhui) stated in chief that he was instructed to watch and see what was happening in the gate and that nothing objectionable was found from the bag of Anupama Sahu and the petitioner herein and from the 3rd bag some money was found but the ownership of the said bag was denied by Upen Mandi. (Page 67 and 68 of WP).

b) All the PWs, in course of cross-examination have admitted that nothing objectionable was found from the possession of the petitioner and he was not even subjected to any physical checking and he was also not found to be collecting money from anybody.

c) PW3 (J.K. Samanta) (Pages 69 and 70 of WP) stated that the duty point of the petitioners was about 25 to 30 ft. away from the place where the bags were found.

d) PW5 (A.K. Mallick) stated that the distance between pedestrian gate and the

place where the bags were found was about 5 to 6 ft. and that no complain was lodged by anyone against the petitioner alleging collection of money (Pages 76 to 77 of WP).

e) PW6 (K.K. Ghosh) stated that the two places from which confiscation was made stand under the gate complex and it remains under the responsibility of the gate duty personnel and that the room adjacent to main gate from where some amount was confiscated is frequently used by others like transporters, casual labourers, employees, visitors, agents etc. (Pages 78 to 80 of WP).

f) PW4 (Arbind Kumar) reiterated that no complain was received against the petitioner as regards collection of money (Pages 82 and 83 of WP).

g) PW1 (B.K. Singh) stated that he was directed and instructed by DIG to watch and see as to whether the duty personnel detailed at GCB Main Gate are collecting money and keeping the same in Shift I/C room adjacent to the gate and the pedestrian gate and that nothing objectionable was found from the bag of the petitioner (Pages 89 to 91 of WP)."

25. From the charge-sheet and the evidence adduced, it is explicit that there was no recovery of any money from the petitioner and from his bag and that the confiscated amount of Rs. 1,275/- was found in a plastic gunny bag kept in a room adjacent to the GCB Main Gate which is in frequent use of transporters, employees, visitors, agents etc and that as such the alleged confiscation of the amount from a place, which is open to all, cannot in any manner lead to fixation of responsibility upon the petitioner and to hold him guilty of illegal collection of money for wrongful gain.

26. The Enquiry Officer was also of a tentative opinion to the effect that the confiscation of the amount "does not absolve him from the charge" which in the opinion of this Court cannot be construed to be a finding of guilty against the petitioner. Furthermore, an allegation of recovery and confiscation of an amount from a thoroughfare cannot be stretched to implicate the petitioner, when undisputedly there was no complain against the petitioner as regards collection of any money from transporters and drivers, for wrongful gain and that the PWs have deposed that no such money was found in possession of the petitioner.

27. A perusal of the order of the disciplinary authority (pages 147 to 154) reveals that there was no material on record towards fixation of any responsibility upon the petitioner as regards collection of money and that as such the finding of the disciplinary authority to the effect that "the confiscated amount was collected and accumulated by C.I.S.F. duty personnel deployed therein including the charge member by unfair means from the users of the GCB Main Gate like drivers, transporters, agents etc.", is absolutely perverse.

28. Furthermore, Mr. K.K. Ghosh (PW6), in course of his examination has categorically stated that the duty personnel cannot restrict the use of the concerned room by various persons like employees, labourers, transporters,

agents, sweepers etc. for various purposes and in the backdrop of such evidence the petitioner could not have been held to be guilty of the alleged charge.

29. The appellate authority has also proceeded with a preconceived notion to the effect that there was overwhelming evidence on record to hold the charge to have been proved and that there was no material irregularity and miscarriage of justice and that there are no mitigating circumstances to interfere with the order of penalty. Such finding of the appellate authority is perverse.

30. The revisional authority, however, considering the past record of the petitioner had modified the order of removal to an order of compulsory retirement. Had there been a proper consideration of the evidence on record, the revisional authority could not have come to the conclusion that the charge stands proved against the petitioner.

31. The judgment delivered in the case of Rajendra Singh Verma (Supra) as relied upon by the respondents is distinguishable on facts and furthermore under the rules applicable in the instant case compulsory retirement has been stipulated as a major penalty.

32. All the authorities have, thus, miserably failed to establish that the money, which was confiscated, was in fact collected by the petitioner and that as such the fixation of responsibility upon the petitioner is absolutely perverse. Furthermore, the surprise check team could not establish that the money that was confiscated was found in possession of the petitioner and that the said money was illegally collected by the petitioner for wrongful gain. There is absolutely no material on record drawing a nexus between the alleged misconduct of illegal collection of money and wrongful gain and the charged officer.

33. Having miserably failed to draw such nexus the respondents went to the extent of fixing the responsibility upon the petitioner on a purported plea to the effect that the places from which the money was recovered was within the jurisdiction of GCB Main Gate. Such allegation was sought to be fortified only on the basis of a casual statement made by Mr. K.K. Ghosh (PW6) to the effect that the places from where Rs. 1,100/- and Rs. 1,275/- were confiscated "stand under gate complex, it remains under the responsibility of the Gate duty personnel" but such statement is in continuity with a further remark of Mr. K.K. Ghosh, in answer to question No. 6, to the effect that the gate duty personnel have no control over the room adjacent to the main gate which is used by various other persons, slackens the weightage of such evidence. In this context it needs to be stated that a serious charge of illegal collection of money and wrongful gain is required to be proved to the hilt as it brings civil and criminal consequences upon the employee, who would be liable to suffer a severe penalty of removal from service and that as such a grave charge, quasi criminal in nature is required to be proved beyond any shadow of doubt and to the hilt and it cannot be proved on mere probabilities. The enquiry officer, the disciplinary

authority and the appellate authority have endeavoured to fix responsibility upon the petitioner pertaining to the confiscated amount by going to the extent of observing that though the money was recovered from a thoroughfare, the petitioner was responsible since the said places were within the jurisdiction of the petitioner's duty and that finding was based solely on the evidence adduced by Mr. K.K. Ghosh (PW6) (page 79).

34. In the backdrop of the said infirmities in the proceedings, the respondents could not have imposed the severe punishment of removal from service against the petitioner and such punishment is disproportionate to the charge framed against the petitioner.

35. Proportionality is concerned with the way in which the decision-maker ordered his priorities; the very essence of decision making consists surely in the attribution of relative importance to the factors in the case.

36. It is well-settled that the punishment or penalty to be imposed must be commensurate with the gravity of misconduct. The disciplinary authority while inflicting punishment must adhere to the doctrine of proportionality and cannot exercise the power in an arbitrary manner.

37. The decision to remove the petitioner from his service does not stand supported with cogent reasons and the charge has not been satisfactorily proved. In all fairness and propriety demands that when major disciplinary punishment is sought to be inflicted, which would tantamount to removal from service, there should be absolute fair play in action, without even a tinge of malafide motive. Sadly, this aspect of the matter is missing from the action taken by the authorities and the punishment imposed upon the petitioner is disproportionate to the charges alleged.

38. The petitioner at present is aged about 45 years and the punishment as imposed is a severe punishment and the same affects the livelihood of the petitioner and his family but the order impugned does not reflect consideration of the said factors.

39. Measure, magnitude and degree of misconduct needs to be taken into consideration to determine and to weigh the proportion. The imposition of punishment is subject to judicial intervention if the same is exercised in a manner which is out of proportion to the fault. If the award of punishment is grossly in excess of the allegations made, it cannot claim immunity and makes itself amenable for interference under the limited scope of judicial review. In the instant case, there has been no allegation to the effect that the employer has suffered any monetary loss and it has not been proved that the petitioner had collected the money which was confiscated by the surprise check team. Regard being had to the facts involved, the nature of post held by the petitioner and the conduct expected of him, I am of the opinion that the doctrine of proportionality is invocable in the instant case. On and from the date of initiation of the disciplinary proceeding, six years have been spent and in the event the matter is

remitted back to the disciplinary authority for passing a fresh order of punishment, a further delay would occasion.

40. For the reasons discussed above, I am of the opinion that the order of removal from service, as modified to compulsory retirement, needs to be interfered with.

41. Accordingly, the order of removal from service dated 17th June, 2010 passed by the disciplinary authority is set aside and the respondents are directed to reinstate the petitioner with all continuity of service forthwith, within a period of 4 weeks from the date of communication of this order.

42. The disciplinary authority is also directed to impose a suitable lesser punishment upon the petitioner in terms of Rule 34 of the C.I.S.F. Rules, 2001 except the penalties under Rule 34(I), Rule 34(II) and Rule 34(III) of the said C.I.S.F. Rules, 2001. The petitioner shall not be entitled to any back wages but all other consequential benefits will be available to the petitioner. In my opinion, the aforesaid punishment will be a sufficient corrective measure for the petitioner and will also meet the ends of justice, in the facts and circumstances of the present case.

43. With the above observations and directions, the writ application is disposed of.

44. There shall, however, be no order as to costs.

45. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.