
(2014) 05 CAL CK 0034
In the Calcutta High Court
Case No : W.P. No. 397 of 2014

Krishna Shipping Agency

APPELLANT

Vs

Commr. of Cus. (Airport and Admn.)

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2014) 306 ELT 352

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Pranab Dutta and Biswajit Mukherjee, Advocate for the Appellant; R. Bharadwaj and Santa Mitra, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Harish Tandon, J.—The Court : The order-in-original dated 23rd of April, 2014 passed by the Commissioner of Customs (Airport and Administration), Customs House, Kolkata under Regulation 22 of the Customs House Agents Licensing Regulations, 2004 is assailed by the petitioner in this writ petition primarily on the ground of violation of principles of natural justice and non-adherence of the procedure required by the disciplinary authority while disagreeing with the enquiry report. The authority granted a licence to the petitioner to the act as customs house agents under the Regulation 9 of the aforesaid regulation. The Commissioner of Customs subsequently suspended the said licence on one or more grounds incorporated in Regulation 13 of the said regulation and an enquiry office was appointed who conduct the enquiry and in his report he found the petitioner not guilty of violating of any of the conditions enshrined under Regulation 13 of the said Act. In terms of Regulation 22(5) of the said regulation enquiry report was submitted to the Commissioner of Customs who is a disciplinary authority. It is not in dispute that before proceeding with the disciplinary proceedings the report of the enquiry officer was submitted and/or furnished to the petitioner. By the impugned order the disciplinary authority did

not agree with the findings of the enquiry officer and proceeded to impose the penalty in the form of revocation of licence.

2. It is not in dispute that the disciplinary authority did not communicate to the petitioner the reasons for disagreement with the enquiry report as such disagreement sees the light of the day in the impugned order. According to the petitioner the disciplinary authority should not have acted by giving surprise to the petitioner for disagreement without letting him know the points of the disagreement so that the petitioner would be in a position to controvert the points of disagreement and is further made aware of the points required to be met in the disciplinary proceedings, indisputably the disciplinary authority did not communicate the points of disagreement to the petitioner before passing the impugned order and, therefore, did not afford an opportunity to the petitioner to put his defence against the points of disagreement.

3. Reliance can be conveniently made upon a decision of the Supreme Court in the case of Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, wherein it is held that where an enquiry officer submitted a report and held that the delinquent officer is not guilty, the disciplinary authority, if proposes to differ with the conclusion arrived by the enquiry officer, should afford an opportunity of hearing to the petitioner indicating the points of differences before proceeding with the disciplinary proceeding.

4. The above observation can be aptly quoted as under:--

"17. These observations are clearly in tune with the observations in Bimal Kunuir Pandit case quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the enquiry officer had given an adverse finding, as per Karunakar case the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the enquiry officer. It will not stand to reason that when the finding in favour of a delinquent officer is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decided against the delinquency officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In the departmental proceedings what is of ultimate importance is the finding of the disciplinary authority.

18. Under Regulation 6 the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case.

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its finding. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, required the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer. "

[emphasis supplied]

5. In the case of *Yoginath D. Bagde Vs. State of Maharashtra and Another*, it is held that where the rule is silent relating to the procedure to be adopted where the disciplinary authority proposes to differ with the conclusion of the enquiry officer, an opportunity of hearing should have been given to the delinquent and the points of difference should also be communicated before proceeding further with the disciplinary proceedings, in these words:--

"28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. Where the enquiring authority has found the delinquent officer guilty of the charges framed

against him and the disciplinary authority agrees with those findings, there would arise no difficulty. So also, if the enquiring authority has held the charges proved, but the disciplinary authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the finding of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view. The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with. "

[emphasis supplied].

6. Though the regulation is silent about the procedure to be adopted by the

disciplinary authority when proposes to differ with the finding of the enquiry officer, a further opportunity of hearing and communication of the point of difference is in-built mechanism within the principles of natural justice and any violation or infraction and/or non-adherence thereof would entail the action of the disciplinary authority unsustainable. Admittedly, Regulation 22 of the Regulations, 2004 is silent about such procedure but does not vest the power upon the disciplinary authority in proceeding as per his own whims without following the procedures as laid down in the above noted reports by the Supreme Court. The disciplinary authority proposes to differ from the finding of the enquiry officer on the material and evidences adduced before the enquiry officer, in such contingency it is inevitable that the petitioner would not be informed of the point of differences before being found guilty by the disciplinary authority. Affording an opportunity of hearing is not an idle formality or an expression to be used to cover up the lacuna, but a meaningful and/or actual opportunity of hearing should have been provided which necessarily implies the service of the notice indicate the points of difference from the enquiry report and the contemplation to impose the penalty under the said regulations.

7. This Court, therefore, finds that such course of action is absent in the present case and the authority have, therefore, acted in gross violation of the principles of natural justice.

8. So far as another point taken by the respondent that this Court should not have entertained the writ petition because of the existence of an alternative remedy by way of statutory appeal is concerned, such point does not appear to this Court to be justified in view of clear pronouncement of the Supreme Court in the case of *Institute of Chartered Accountants of India Vs. L.K. Ratna and Others*, as follows:--

"17. It is then urged by learned counsel for the appellant that the provision of an appeal u/s 22A of the Act is a complete safeguard against any insufficiency in the original proceeding before the Council, and it is not mandatory that the member should be heard by the Council before it proceeds to record its finding. Section 22A of the Act entitles a member to prefer an appeal to the High Court against an order of the Council imposing a penalty u/s 21(4) of the Act. It is pointed out that no limitation has been imposed on the scope of the appeal, and that an appellant is entitled to urge before the High Court every ground which was available to him before the Council. Any insufficiency, it is said, can be cured by resort to such appeal. Learned counsel apparently has in mind the view taken in some cases that an appeal provides an adequate remedy for a defect in procedure during the original proceeding. Some of those cases as mentioned in Sir William Wade's erudite and classic work on Administrative Law 5th Edn. But as that learned author observes (at p. 487), "in principle there ought to be an observance of natural justice equally at both stages", and

"If natural justice is violated at the first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed

by appeal, the procedure is reduced to unfair trial followed by fair trial." And he makes reference to the observations of Megarry, J. in *Leary v. National Union of Vehicle Builders*. Treating with another aspect of the point, that learned Judge said :

"If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate body, this has the result of depriving the member of his right of appeal from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? Even if the appeal is treated as a hearing *de novo*, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be a powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body."

The view taken by Megarry, J. was followed by the Ontario High Court in Canada in *Re Cardinal and Board of Commissioners of Police of City of Cornwall*. The Supreme Court of New Zealand was similarly inclined in *Wislang v. Medical Practitioners Disciplinary Committee*, and so was the Court of Appeal of New Zealand in *Reid v. Rowley*.

18. But perhaps another way of looking at the matter lies in examining the consequences of the initial order as soon as it is passed. There are cases where an order may cause serious injury as soon as it is made, an injury not capable of being entirely erased when the error is corrected on subsequent appeal. For instance, as in the present case, where a member of a highly respected and publicly trusted profession is found guilty of misconduct and suffers penalty, the damage to his professional reputation can be immediate and far-reaching. "Not all the King's horses and all the King's men" can ever salvage the situation completely, notwithstanding the widest scope provided to an appeal. To many a man, his professional reputation is his most valuable possession. It affects his standing and dignity among his fellow members in the profession, and guarantees the esteem of his clientele. It is often the carefully garnered fruit of a long period of scrupulous, conscientious and diligent industry. It is the portrait of his professional honour. In a world said to be notorious for its blase attitude towards the noble values of an earlier generation, a man's professional reputation is still his most sensitive pride. In such a case, after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of

property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding."

9. As the order-in-original impugned in this writ petition have been passed in gross violation of principles of natural justice, it does not get cured by an appellate court by affording of fullest opportunity to the petitioner to canvass all the points which were available to him before the disciplinary authority or is available before the appellate authority. The unfair trial does not get corrected and/or rectified by providing an opportunity of hearing before the appellate authority. Therefore, this Court does not agree with the submission of the department that the writ petition should be thrown on the ground of alternative remedy.

10. To sum up, this Court finds that the order impugned in this writ petition cannot be sustained and is hereby quashed and set aside.

11. The disciplinary authority is directed to serve a notice on the petitioner indicating the point of difference to the findings of the enquiry report which necessarily implies that the mentioning of the documents in arriving at the points of differences and shall further afford an opportunity to the petitioner to submit his representation. Thereafter, the disciplinary authority shall proceed to decide the matter after giving an opportunity of hearing to the petitioner.

12. This order shall not be construed to have any impact on the merit of the disciplinary proceedings as this Court has no occasion to go into it and have set aside the impugned order on the ground of violation of principles of natural justice.

13. In the supplementary affidavit the petitioner have enclosed a circular issued by the Deputy Commissioner of Customs communicating the revocation of licence of the petitioner by the disciplinary authority in the impugned order. Since the order impugned is set aside the said circular being dependent thereupon cannot stand independently and shall be treated to have revoked and/or withdrawn.

14. With these observations the writ petition is disposed of. No costs. All parties to act on the basis of the communication made by the respective counsels.