
(2007) 09 CAL CK 0078
In the Calcutta High Court
Case No : F.M.A. No. 348 of 2008

Maitrayee Ghosh

APPELLANT

Vs

Kolkata Port Trust and Others

RESPONDENT

Date of Decision : 18-09-2007

Acts Referred:

Calcutta Port Trust Employees (Classification, Control and Appeal) Regulations, 1987 — Regulation 20(2)

Citation : (2008) 2 CHN 85 : (2008) 116 FLR 432

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Kalidas Mukherjee, J

Bench : Division Bench

Advocate : Asoke Banerjee and Sarojit Sen, for the Appellant; Joydeep Kar and Asok Kumar Jana, for the Respondent

Final Decision : Allowed

Judgement

Pranab Kumar Chattopadhyay, J.—This appeal is at the instance of the writ petitioner against the judgment and order passed by the learned Single Judge dismissing the said writ petition.

2. The appellant/writ petitioner is a Doctor and was appointed as Medical Officer of the Haldia Dock Complex Unit of the Kolkata Port Trust initially on temporary basis pursuant to the letter of appointment dated 23rd October, 1998. The said temporary appointment of the writ petitioner was subsequently confirmed by the office order dated 30th July, 2001 issued by the Manager, (P&IB) being the respondent No. 6 herein.

3. The relevant facts leading to the filing of the present appeal are as follows:

The appellant took leave from 27th August, 2001 to 8th September, 2001 for accompanying her ailing-in-laws to C.M.C., Vellore. The said leave was duly sanctioned by the competent authority, namely, the Medical Superintendent. Thereafter by the letter dated 29th August, 2001, the said appellant informed the Deputy Chairman, Haldia Dock Complex about the sudden illness of her

husband and further informed that for the aforesaid reason she would rush to Dubai on an emergency basis. By the subsequent written communication dated 9th September, 2001, the appellant expressed her inability to join the duties as her husband was required to undergo an operation and prayed for extension of leave. The aforesaid written communication of the appellant dated 9th September, 2001 is set out hereunder:

To Date: September 09, 2001 The Deputy Chairman, Haldia Dock Complex, Haldia

Through: Proper Channel

Respected Sir,

This is in follow up to my letter dated 29.08.01. As my husband has to undergo an operation, I am unable to join my duties at present. I shall be extremely grateful, if you allow me extension of leave. I shall communicate as soon as my husband recovers.

Thanking you,

I remain,

Yours faithfully,

So/- (Dr. Maitrayee Ghosh) M.O., Port Hospital, HDC.

4. The Medical Superintendent thereafter by the written communication dated 27th September, 2001 asked the writ petitioner to voluntarily submit resignation at the earliest convenience since the absence of the said writ petitioner caused tremendous hardship to her colleagues in the Intensive Care Unit. The said Medical Superintendent also apprised the writ petitioner about the extreme displeasure of the Deputy Chairman, Haldia Dock Complex, in view of the alleged irresponsible conduct of the said writ petitioner as a Doctor of the Port Hospital. The appellant/writ petitioner, however, by the letter dated 16th October, 2001 requested the Medical Superintendent to grant some more time for the purpose of sorting out her problem.

5. Thereafter, Deputy Chairman, Haldia Dock Complex being the disciplinary authority of the writ petitioner issued chargesheet and forwarded the same to the said writ petitioner along with the Memorandum dated 31st January, 2002. The statement of imputation of misconduct in support of the article of charges was also enclosed along with the said Memorandum. The writ petitioner by the letter dated 24th February, 2002 acknowledged the receipt of the aforesaid memorandum dated 31st January, 2002 along with the enclosures and requested the said Deputy Chairman to grant further two months time for returning her to duties. Curiously enough, the said writ petitioner did not deny the charges mentioned in the chargesheet issued to her.

6. Ultimately, Enquiry Officer was appointed to enquire into the charges levelled

against the appellant herein and the said Enquiry Officer sent a notice to the writ petitioner proposing to hold enquiry on 28th June, 2002. The appellant/writ petitioner after receiving the aforesaid notice of the Enquiry Officer requested him to recommend for granting extraordinary leave. The Enquiry Officer, however, informed the appellant/writ petitioner that he has no power to recommend for said extraordinary leave. The appellant thereafter made several correspondences with the Enquiry Officer and the Deputy Chairman with the request to consider her case sympathetically.

7. The Enquiry Officer by the order dated 27th September, 2002 granted another opportunity to the appellant to appear before him in order to participate in the departmental proceeding. It was also mentioned in the said order that the enquiry would be conducted ex parte in the event of absence of the said appellant and failure to forward documentary evidence in support of her claim of pregnancy and medical unfitness. The appellant, however, sent a letter to the Medical Superintendent on 18th October, 2002 requesting him to recommend for extraordinary leave upto 3rd November, 2002 and thereafter to sanction admissible maternity leave.

8. Considering the medical certificate forwarded by the appellant herein, Enquiry Officer cancelled the proposed hearing decided to be held on 24th October, 2002. The appellant gave birth to a child on 22th October, 2002. By the written communication dated 30th December, 2002, said appellant requested the Enquiry Officer to intimate when she would be allowed to join her duty. The Enquiry Officer passed an order on 21st January, 2003 proposing to hold enquiry on 7th February, 2003. It was also specifically mentioned in the said order that the said appellant was granted last opportunity to appear at the enquiry along with her Assistant Officer and it was further mentioned that in case of non-appearance of the said appellant at the time of hearing, the enquiry would be conducted ex parte.

9. The Manager (P. & I.R.) Division, Haldia Dock Complex, Kolkata Port Trust by another written communication dated 28th January, 2003 informed the appellant/writ petitioner that she would be allowed to resume her duties without prejudice to the departmental action and, therefore, requested the appellant herein to report to the Medical Superintendent for resumption of duties immediately. The text of the said letter dated 28th January, 2003 is set out hereunder:

No. Disc/643/307 Dated: 28.01.2003 Dr. Maitreyee Ghosh, Medical Officer, Medical Division.

Thro: the Medical Supdt.

Reference your application dated 30.12.02 wherein you have requested for resumption of duties.

2. The matter has been considered by the Dy. Chairman, the Disciplinary Authority. It has been directed that you may be allowed to resume duties without

prejudice to the departmental action which has been initiated against you.

3. You are therefore, requested to report to the Medical Superintendent for resumption of duties immediately.

Sd/- (H.S. Banerjee) Manager (P&IR)-I/C.

10. In spite of receiving the aforesaid communication dated 28th January, 2003, appellant herein by the letter dated 12th March, 2003 requested the Manager (P & I.R.) Division to allow some more time before resuming the duties. The aforesaid letter dated March 12, 2003 is set out hereunder:

Mr. H.S. Banerjee Date: March 12, 2003 Manager (P & LR.) I/C, Haldia Dock Complex, Haldia.

Fax No.: 0091 3224 63152

Ref.: Your letter dated 28.01.2003.

Sir,

I have received your above letter after returning to my husband's place, which was re-directed to me by my father from Kolkata. During my stay in Kolkata I was waiting for the reply to my letter (request) dated 30.12.2002. As it did not receive any reply from the authority to my request, I came back to my husband's place.

I wish to join my duty. As I have a small baby with me, I pray to your goodself to kindly allow me some time to arrange necessary things before resuming my duties.

I shall be grateful, if my above request is granted.

With thanks and regards,

Sd/- Dr. Maitrayee Ghosh (Paul) Medical Officer, Medical Division Haldia Dock Complex.

11. The Enquiry Officer, however, held the proceeding ex parte on 7th February, 2003 and submitted the enquiry report on 20th March, 2003 wherein the said Enquiry Officer specifically held that the charge of unauthorised absence of the concerned employee namely, the appellant herein from the duties since 10th September, 2001 without any prior permission or intimation has been established. The disciplinary authority thereafter passed an order on 19th May, 2003 imposing the penalty of removal from the service on the appellant herein with immediate effect. The appellant filed a departmental appeal against the aforesaid order passed by the disciplinary authority imposing the penalty of removal from the service. The said appeal of the appellant herein was ultimately rejected by the appellate authority, namely, the Chairman of the Calcutta Port Trust and the said order of rejection passed by the appellate authority was communicated by the Assistant Manager to the appellant herein by the written

communication dated 3rd February, 2004. The appellant thereafter filed the writ petition which was ultimately dismissed by the learned Single Judge by the judgment and order under appeal dated 6th March, 2006.

12. While dismissing the aforesaid writ petition, learned Single Judge specifically observed that the respondent herein was extremely kind to the writ petitioner although the said writ petitioner did not deserve such treatment. The learned Single Judge specifically held that the punishment imposed on the appellant herein was absolutely appropriate to the charges brought against her.

13. Mr. Asoke Banerjee, learned Senior Counsel representing the appellant submits that the documentary evidence as produced by the Management witness clearly disproved the charges brought against the said appellant. Mr. Banerjee further submits that the appellant by the letter dated 29th August, 2001 gave prior intimation to the superior authority about the ailments of her husband and her proposed visit to Dubai under emergent circumstances. Mr. Banerjee also submits that by the subsequent letter dated 9th September, 2001, the said appellant not only expressed her inability to join the duties at that time, but also requested for granting extension of leave. It has been specifically urged on behalf of the appellant that the charge as framed against the said appellant could not be established in view of the submission of the aforesaid two letters by the appellant herein and production of the same before the Enquiry Officer at the time of holding the enquiry proceedings.

14. In the aforesaid circumstances, learned Senior Counsel of the appellant submits that the findings of the Enquiry Officer are arbitrary and perverse. The learned Senior Counsel of the appellant without prejudice to the aforesaid submissions also submits that the said appellant merely overstayed after expiry of the sanctioned leave under compelling circumstances and, therefore, the punishment of removal from service for the aforesaid overstayed is shockingly disproportionate to the gravity of the alleged misconduct which should shock the judicial conscience. Mr. Banerjee referred to and relied on the following decisions of the Supreme Court in support of his arguments:

- 1) B.C. Chaturvedi Vs. Union of India and others, ;
- 2) Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and Another, .

15. The learned Counsel of the appellant further submits that the order passed by the appellate authority is wholly unreasoned and non-speaking one and the same was passed in clear violation of Regulation 20(2)(b) & (c) of Kolkata Port Trust Employees (Classification, Control and Appeal) Regulations, 1987.

16. Mr. Joydeep Kar, learned Counsel of the respondents, however, submits that the appellant herein did not make out any case for judicial review. According to Mr. Kar, there is sufficient evidence to support the conclusion of the inquiring authority and this Court should not review the evidence in order to arrive at a different independent finding. Mr. Kar further submits that there is no ambiguity

in the charges levelled against the appellant as mentioned in the chargesheet. According to Mr. Kar, the charge of unauthorised absence levelled against the appellant has been established in the enquiry proceeding and, therefore, disciplinary authority was justified in imposing the penalty of removal from the service on the appellant herein.

17. Considering the rival contentions of the parties, we are of the opinion that this Court should at first decide whether the charge levelled against the appellant herein was established before the inquiring authority.

18. The Article of charge framed against the appellant and the statement of imputations of misconduct in support of the said article of charge are set out hereunder:

Statement of Article of charge framed against

Dr. Maitreyee Ghosh, Medical Officer,

Medical Division, Haldia Dock Complex

Article of Charge - I

That Dr. Maitreyee Ghosh, Medical Officer, Medical Division, Haldia Dock Complex is charged with gross misconduct inasmuch as she has been reported to be absenting from duties unauthorisedly since 09.09.2001 without any intimation or prior permission whatsoever.

The above act of the said Dr. Ghosh if proved, will amount to unauthorised absence from duties for a prolonged period, implicating desertion from service, which is a gross misconduct.

Statement of imputations of misconduct in support of the

Article of charge framed against Dr. Maitreyee Ghosh,

Medical Officer. Medical Division, Haldia Dock Complex

Article of Charge - I

It has been reported by Medical Supdt. (I/C), Medical Division, that Dr. Maitreyee Ghosh, Medical Officer, Medical Division was granted leave from 27.08.2001 to 8.9.2001 and after that she has been absenting unauthorisedly since 09.09.2001. Dr. Ghosh vide letter dated 29.08.2001 and 09.09.2001 had informed that as her husband would undergo an operation she was unable to resume duty and had left for UAE on emergency basis. The Medical Supdt. (I/C, Medical Division, vide letter No. Med/070/579 dated 27.09.2001 had discouraged that conduct on the part of the said Dr. Ghosh. Even after the above correspondence, the said Dr. Ghosh had failed to resume her duties and has been absenting unauthorisedly since 09.09.2001.

Hence the charge.

19. Scrutinising the article of charge we find that the appellant herein has been charged with gross misconduct as she has been reported to be absenting from duties unauthorisedly since 9th September, 2001 without any intimation or prior permission whatsoever and it has also been mentioned in the article of charge that if the aforesaid act of the appellant is proved then the same will amount to unauthorised absence from duties for a prolonged period implicating desertion from service, which is a gross misconduct.

20. On examination of the available materials on record we also find that immediately after expiry of the sanctioned leave the said appellant by the written communication dated September, 9, 2001 informed the Deputy Chairman, Haldia Dock Complex about her inability to join the duties as her husband would undergo an operation. Upon receipt of the aforesaid communication, Deputy Chairman did not issue any instruction to the appellant herein and on the contrary the Medical Superintendent by the written communication dated 27th September, 2001 apprised the appellant about the displeasure of the said Deputy Chairman and asked her to submit resignation voluntarily. The appellant herein upon receiving the aforesaid communication of the Medical Superintendent sent another written communication apprising the said Medical Superintendent about the emergency situation prevailing at that point of time and requested him to grant some more time. Ultimately, on 31st January, 2002, Deputy Chairman, Haldia Dock Complex issued the aforesaid chargesheet to the appellant.

21. In view of the correspondences exchanged between the appellant and the respondent authorities and specially considering the text of the letter dated 9th September, 2001 written to the Deputy Chairman by the appellant herein, it cannot be said that the appellant had been absenting from duties since 9th September, 2001 without any intimation as has been mentioned in the article of charge. In the chargesheet it has also been specifically mentioned that the alleged act of misconduct of the appellant, if proved, would amount to unauthorised absence from duties implicating desertion from service, which is a gross misconduct.

22. We fail to understand how in the present case, charge of desertion from service can be mentioned ignoring the facts that the appellant all along requested the respondent authorities particularly, the Deputy Chairman, Haldia Dock Complex and the Medical Superintendent to grant leave and/or to extend leave on and from 9th September, 2001.

23. Desertion from service must be a voluntary act on the part of the concerned employee and in order to draw any inference in this regard, intention of the concerned employee should be taken into consideration. In the facts and surrounding circumstances of the present case, it is impossible to arrive at the conclusion that there has been a voluntary relinquishment on the part of the employee concerned and, therefore, no charge can be framed against the appellant implicating desertion from service. In view of the specific intimation given by the appellant regarding her absence on and from 9th September, 2001

as mentioned hereinbefore, it cannot be also said that the appellant herein had been absenting from duties since 9th September, 2001 without any intimation.

24. In view of the aforesaid circumstances, we find that the charge as framed contains superfluous allegation. The inquiring authority also upon ignoring the written intimations given by the appellant herein mentioning the reasons for her absence and specially the letter dated 9th September, 2001 written by the said appellant to the Deputy Chairman, Haldia Dock Complex should not have come to the conclusion that the charge of absence from duties unauthorisedly without any intimation has been established.

25. For the aforementioned reasons, we hold that the findings of the inquiring authority are arbitrary and perverse since the charge as framed could not be established and was not established on the basis of the evidence and materials on record.

26. On one hand, it has been alleged that the appellant had been absenting from duties unauthorisedly without any intimation and at the same time, it has also been alleged that the said absence was without prior permission. In the event, prior permission is obtained, it ceases to be absenting from duties unauthorisedly. Therefore, charge as framed cannot be sustained.

27. Mr. Kar, learned Counsel of the respondents urged before this Court that the charges mentioned in the chargesheet and the statement of allegations accompanying the charges forms part of a single document and should be read together. Mr. Kar also relied on a decision of the Supreme Court in the case of State of Andhra Pradesh Vs. Sree Rama Rao, . We are also of the opinion that the article of charge and the statement of imputations of misconduct in support of the articles of charge forms part of a single document and must be read together. Therefore, in the present case, if the chargesheet and the statement of imputations of misconduct are read together then the ingredient relating to the charge of unauthorised absence cannot be ruled out.

28. Failure of the disciplinary authority to frame the charges properly in the present case cannot exonerate the appellant herein. The prolonged absence from duty in absence of sanctioned leave is an act of indiscipline which is also an act of misconduct, but the same is not grave enough to justify the penalty of removal from service in the circumstances of the case.

29. When an employee applies for leave and the same is granted then the concerned employee is under an obligation to return to duty on expiry of the period of sanctioned leave. We are, however, of the opinion that absenting from duties by reason of overstaying would amount to misconduct for which the concerned employee cannot avoid penal consequences.

30. Scrutinising the order passed by the appellate authority, we also find that the same is an unreasoned order. The appellate authority is required to apply its mind to the respective findings of the inquiring authority and the decisions of the

disciplinary authority. In the present case, the appeal preferred by the appellant has been rejected by the appellate authority without communicating any reason in support of such rejection.

31. In any event, the penalty of removal from service on the appellant herein is shockingly disproportionate in view of the facts that the said appellant admittedly, sent intimation regarding her absence from duties immediately after expiry of the sanctioned leave and all through expressed her desire to join the duties apart from the facts that the appellant herein had to rush abroad in an emergent situation arising out of the illness of her husband who had to undergo operation and the appellant also became unwell on account of her pregnancy which prevented her from undertaking air travel for the purpose of returning to the country and to join duties.

32. In the aforesaid circumstances, we are unable to approve the order passed by the disciplinary authority imposing the penalty of removal from service on the appellant herein and, therefore, we set aside and quash the order of punishment as imposed by the disciplinary authority on the appellant herein as mentioned in the order dated 16th May, 2003. The order passed by the appellate authority as communicated by the Assistant Manager by the written communication dated 3rd February, 2004 affirming the decision of the disciplinary authority, therefore, cannot be sustained and the same is also quashed.

33. The concerned disciplinary authority of the appellant herein is directed to reconsider the matter relating to imposition of penalty on the appellant herein in the light of the observations mentioned hereinabove and pass appropriate order of punishment without imposing the penalty of dismissal or removal from service on the appellant herein. Considering the conduct of the appellant herein, we are not inclined to pass any order directing the respondent authorities to pay any amount towards the back wages.

34. This appeal thus stands allowed. There will, however, be no order as to costs.

Let urgent xerox certified copy of this judgment and order, if applied for, be given to the learned Advocates of the parties on usual undertaking.

Kalidas Mukherjee, J.

I agree.