
(1995) 01 PAT CK 0039

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 6957 of 1993

Manoj Kumar Sah

APPELLANT

Vs

Bihar State Road Transport Corporation and Others

RESPONDENT

Date of Decision : 18-01-1995

Acts Referred:

Citation : (1995) 01 PAT CK 0039

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This writ application has been filed challenging, inter alia, a disciplinary proceeding initiated against the Petitioner on the allegation that while working as a Conductor on bus No. BHI 5737 of Bhagalpur Depot plying from Bhagalpur to Jasidih Express service, it was found that out of total 58 passengers boarded on the bus, five passengers were found un-booked by the Checking Squad. In the disciplinary proceeding, the inquiring authority held the Petitioner not guilty and gave him the benefit of doubt.

2. The defence of the Petitioner, inter alia, was that those passengers were the local ruffians and that was a very troubled area and in spite of demand, those persons did not pay the price of the ticket. Ultimately the checking squad obtained the price of the same from there persons.

3. Be that as it may, the disciplinary authority while passing the order of dismissal dated 4th May, 1989 disagreed with the findings of the inquiring officer and passed an order discharging the Petitioner from service with immediate effect. The said order of discharge is nothing but an order of dismissal. The said action of the Management of the Corporation was sent for approval u/s 33(2)(b) of the Industrial Disputes Act, 1947 to the Industrial Tribunal, Patna and by order dated 30th April, 1993 passed by the Presiding Officer, Industrial Tribunal, Patna, the said action of the Management of the Bihar State Road Transport Corporation was approved. It Is settled position in law that an approval granted u/s 33(2)(b) of the Industrial Disputes Act, 1947 will not be deemed to be an adjudication of merits of the action taken by the management.

4. Learned Counsel for the Petitioner has assailed the order of discharge on the basis of the Industrial Employment (Standing Orders) Act, 1946 which admittedly governs the relationship between the parties. Clause 22 of the said Order provides for imposition of punishment for misconduct. The said clause is set out below:

22. (i) Subject to the provisions of 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:

(1) Warning or Censure.

(2) Fine.

(3) Withholding of increment of promotion.

(4) Recovery from pay/wages of the whole or part of any pecuniary loss caused to the Corporation.

(5) Forfeiture of wages during the period of suspension.

(6) Demotion and/or reduction in grade.

(7) Removal from service.

(8) Discharge or dismissal from service.

(ii) In awarding punishments the Chairman/Managing Director/Divisional Manager/Work 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 other extenuating or aggravating circumstances that may exist.

5. Relying on the said Clause 22 read with the Circular Appendix-A attached to the said provision, learned Counsel for the Petitioner submits that in case of unbooked passengers the order of punishment has been categorised in the said Circular and draws the attention of the Court to item No. 18 of the said Circular which is set out below:

"18. Conductor. Carrying unbooked passengers (a) 1st Offence (a) (i) No. of unbooked passengers upon 10 per cent of the total No. of passengers in the vehicle at the time of check up. Proceedings. (a) (i) Censure in the service book.

(ii) No. of unbooked passengers more than 10 per cent and upto 25 per cent of the total No. of passengers in the vehicle at the time of checking. Proceedings.

(ii) A censure and fine not below Rs. 10 and not exceeding Rs. 25 according to twice the value of tickets of unbooked passengers.

(iii) No. of unbooked passengers more than 25 per cent of the total No. of passengers in the vehicle at the time of checking. Proceedings and suspension.

(iii) Dismissal.

i (b) 2nd- Offence (i) having a previous punishment under (a)(i) and carrying unbooked passengers up to 10 per cent of the total number of passengers in the vehicle at the time of checking. Proceedings. (b) (i) A warning and a fine according to four times of the value of the tickets of un-booked passengers but not below Rs. 20.

(ii) Having a previous punishment under (a) (ii) and carrying unbooked passengers upto 10 per cent of the total number of passengers in the vehicle at the time of checking. Proceedings. (ii) A final warning and fine according to five times of the value of tickets of unbooked passengers but not below Rs. 25.

(iii) Having a previous punishment under (a) (i) and carrying unbooked passengers exceeding 10 percent of the total number of passengers in the vehicle at the time of checking. Proceedings. (iii) A final warning and fine according to six times of the value of tickets of unbooked passengers but not below Rs. 30.

(iv) Having a previous punishment under (a) (ii) and carrying un-booked passengers exceeding 10 per cent out of the total number of passengers- in the vehicle at the time of checking. Proceedings and suspension. (iv) Dismissal.

(c) 3rd Offence (c) Proceedings and suspension in all cases. (c) Dismissal in all cases.

If he has not committed any offence and has an un-blemished record of service for 2 years intervening between the second and 3rd offence, then he will begin from the beginning. In other words, the 3rd offence will be treated as first offence.

6. Relying on the said Circular, learned Counsel for the Petitioner states that in this case five unbooked passengers out of 58 passengers comes to about ten per cent of the total number of passengers in the vehicle at the time of checking and thus in that case the punishment, according to the said circular, should be recording of Censure in the Petitioner's service book. Only in case of more than 25 per cent of unbooked passengers of the total passengers in the vehicle, the punishment of dismissal can be passed. Even in the case of second offence where the number of un-booked passengers is 10 per cent of the total number of passengers in the vehicle, the punishment to be awarded is a warning and a fine according to four times of the value of the tickets of un-booked passengers but not below Rs. 20/-. The submission of the learned Counsel for the Petitioner is that as the authority purporting to pass the order of punishment have acted in violation of the statutory provision which governs relationship between the parties, he can come to this Court under Article 226 of the Constitution of India and need not to exhaust the statutory remedy of appeal provided under the said Standing Order. The reason is that the impugned order of dismissal is not an order within the meaning of the Industrial Employment (Standing Orders) Act, 1946. As such the said order is wholly without jurisdiction and can be assailed in the writ jurisdiction.

7. Learned Counsel appearing in support of the Petitioner further states that with reference to the past conduct, which has been considered by the punishing authority, he was not given any opportunity. Further more, the Petitioner in paragraph 4 of the writ petition has asserted that even though he was a casual labourer in 1984, on the basis of good work done by him, in March, 1988 he was appointed as a Conductor on regular basis which shows that there is nothing against him with respect to his past conduct. He further asserts that this factual position has not been denied by the Corporation in the counter affidavit filed before this Court.

8. Learned Counsel for the Respondents, however, states that the instant writ application is not maintainable inasmuch as the Petitioner has not filed an appeal under Clause 25 of the said Standing Order nor has he raised any Industrial dispute u/s 2A of the Industrial Disputes Act and as such this Court should dismiss this writ application.

9. The power, jurisdiction and competence of the disciplinary authority to pass a dismissal order is derived from the provisions of the said Standing Order. The said power is not un-fettered one but is controlled by various provisions of the said Standing Order. Clause 22 of the said Standing Order is one such provision which controls and guides the power of the authority concerned to impose punishment on the employees of the said Corporation. The said clause must be read with the aforesaid Circular.

10. It is, therefore, clear that the disciplinary authority, while passing the order of punishment in exercise of its power under Clause 22 of the said Standing Order, cannot ignore the provisions of the said Circular but in the instant case the impugned order of dismissal has no reference to the said Circular. As a matter of fact, the impugned order (Annexure-3), to my mind has been passed in a manner which is contrary to Clause 22 read with the said Circular inasmuch as for the admitted offence of the Petitioner, a penalty of dismissal cannot be passed.

11. It is far too fundamental a proposition to require any authority, namely, that when an authority acting in discharge of power conferred on it under the statutory instrument, in this case the Standing Order, acts in violation of the very same statutory instrument from which he derives his power, such action of the authority concerned can be called an action without jurisdiction. The impugned, order of dismissal is therefore without jurisdiction.

12. It is well settled that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion of the Court and is not a rule of law. In the celebrated decision of the Supreme Court in the case of The State of Uttar Pradesh Vs. Mohammad Nooh, , it has been held at page 606 that "this rule requiring the exhaustion of statutory remedies before the writ is granted is a rule of policy, convenience and discretion rather than a rule of law". Again at page 609 of the said report, the Supreme Court has been pleased to observe as

follows:

Where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior Court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the superior Court's sense of fair play, the superior Court may, we think, quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to Anr. inferior Court or tribunal was available and recourse was not had to it.

(emphasis supplied)

The Apex Court further emphasised the following position at page 609 itself:

This would be so all the more if the tribunals holding the original trial and the tribunals hearing the appeal or revision were merely departmental tribunals composed of persons belonging to the departmental hierarchy without adequate legal training and background and whose glaring lapses occasionally come to our notice.

13. In Anr. Constitution Bench judgment of the Supreme Court in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, while delivering the majority judgment, Justice K.C. Dasgupta was pleased to observe as follows in paragraph 27 at page 380:

The High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or direction to prevent such consequences.

14. There is Anr. judgment of the Supreme Court in the case of M.G. Abrol Vs. Shantilal Chhotlal and Co., in which in paragraph 15 it was held as follows:

The existence of an effective remedy does not oust the jurisdiction of the High Court, but it is only one of the circumstances that the Court should take into consideration in exercising its discretionary jurisdiction under Article 226 of the Constitution. In this case, the High Court thought fit to exercise its jurisdiction under Article 226 of the Constitution and we do not see any exceptional circumstances to interfere with its discretion.

15. The second objection about raising of industrial dispute is wholly misconceived inasmuch as the provision of Section 33(2)(b) of the Industrial Disputes Act was resorted to only because of the fact that there was a

conciliation proceeding pending before the tribunal at the time of dismissing the Petitioner. In normal case, after the order of dismissal is passed, the same is not meant for approval before the Industrial Tribunal u/s 33(2)(b) of the Industrial Disputes Act. It is, therefore, open to the delinquent employee to file an appeal under Clause 25 of the said Standing Order and in an appropriate case to approach the Hon'ble High Court under Article 226 of the Constitution of India. But in the instant case, on the reasons aforesaid, I hold that the writ application without filing of appeal under Clause 25 of the Standing Order, is maintainable.

16. I, therefore, set aside the order dated 4th May, 1989 (Annexure-3) passed by the Additional Managing Director of the Respondent Corporation. As a consequence hereof, the subsequent order dated 30th April, 1993 passed by the Presiding Officer, industrial Tribunal, Patna (Annexure-5) is of no consequence and the same is also set aside. In view of the fact that the order dated 4th May, 1989 (Annexure-3) has been set aside, the subsequent order dated 9th November, 1989 (Annexure-4) communicating the aforesaid order is also set aside, the Respondents are directed to reinstate the Petitioner in service within a period of seven days from the date of receipt/production of a copy of this order before them, the Respondents are also directed to pay 50 per cent of the back wages of the Petitioner from the date of his dismissal till the date of his reinstatement.

17. This writ application is accordingly allowed. There will be no order as to cost.