
(2013) 08 CAL CK 0063
In the Calcutta High Court
Case No : Writ Petition No. 20262 (W) of 2013

Monotosh Kanti Das

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 16-08-2013

Acts Referred:

Citation : (2013) 4 CALLT 71 : (2014) 141 FLR 141

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Achin Kumar Majumdar, for the Appellant; Ashim Kumar Ganguly, for the Respondent

Final Decision : Partly Allowed

Judgement

Dipankar Datta, J.—A cook employed in the Railway Protection Force (hereafter the Force) and posted at Dankuni, is the petitioner before this Court. He has been facing disciplinary proceedings drawn up under Rule 153 of the Railway Protection Force Rules (hereafter the Rules) on the charge of abstaining from duty during two separate periods in 2012 without authority or intimation to his controlling authority. The challenge in this writ petition is to the charge sheet dated January 22, 2013 (Annexure P-1) and the order dated April 22, 2013 (Annexure P-6) conveying to the petitioner the decision of his disciplinary authority in disposing of a representation dated March 14, 2013. By such representation, the petitioner had prayed for permission to be assisted in the enquiry by a member of the Force not posted in the same division or the battalion where the proceeding is pending because none from his division or battalion agreed to assist him in the enquiry as his "friend". Citing Rule 153.8 of the Rules, the disciplinary authority rejected the petitioner's request.

2. Insofar as the charge-sheet is concerned, the challenge is based on the ground that the disciplinary authority decided to proceed with the enquiry without waiting for the petitioner's response to the charge. According to Mr. Majumdar, learned advocate for the petitioner, the disciplinary authority was

required to apply his mind on perusal of the response of the petitioner before deciding on the issue as to whether an enquiry is necessary or not. No opportunity having been given to the petitioner to respond and the disciplinary authority having made up his mind to hold an enquiry into the petitioner's conduct irrespective of the merits of his response, Mr. Majumdar has contended that this is a serious flaw in the proceeding for which interference at this stage is necessary. 4. While I was in seisin of W.P. No. 3065 (W) of 2009 (Purushottam Dubey v. Union of India), a similar contention concerning a member of the Force had been raised by Mr. Majumdar relying on three decisions of an Hon''ble Division Bench of this Court (i) dated November 10, 2008 on M.A.T. No. 580 of 2008 (Union of India v. Sri Dilip Kumar Palit), (ii) dated November 10, 2008 on M.A.T. No. 429 of 2008 (Union of India v. Ram Parwesh Dubey & Anr.) and (iii) dated November 17, 2008 on M.A.T. No. 530 of 2008 (Union of India v. Champa Das & Anr.). The decision of the Supreme Court in State of Punjab Vs. V.K. Khanna and Others, was relied on by the Hon''ble Division Benches comprising of the same learned judges to hold that appointment of an enquiry officer simultaneously with issuance of charge sheet and asking the delinquent member of the Force to submit his reply to the charge sheet to the enquiry officer, without waiting for his reply in respect of the accusations levelled, is demonstrative of a pre-judged mind. In my judgment dated April 7, 2009, since reported in (2010) CAL LT 197 (HC), I had recorded reasons in support of my opinion that the decisions of the Hon''ble Division Bench did not lay down correct law. In paragraph 53, I had the occasion to observe as follows:

53. Considering the RPF Act and the RPF Rules, I am of the firm opinion that attempt to apply the law laid down in V.K. Khanna (supra) requiring the disciplinary authority to consider the reply to the charges before it appoints an inquiring authority/Enquiry Officer ought to be made in consonance with the mandate of the statute applicable in a particular case and not in ignorance thereof. Whether or not a decision to hold enquiry should be taken only after receipt of a reply to the charge sheet would really be dependent on the rules governing the procedure for holding enquiry and the Court, by a judicial fiat, may not introduce a procedure not ordained by the relevant rules to be followed by the disciplinary authority. Rewriting of rules by Court, it is again well settled, is not permissible. In such a case, and as has happened in the present case, the respondents though having acted perfectly in accordance with statutory rules find their action invalidated on the ground of acting in a manner contrary to principles of law decided by the Court.

4. However, being bound by the said decisions of the Hon''ble Division Benches, I had allowed the writ petition filed by Purushottam Dubey and quashed the charge sheet.

5. On May 6, 2010, the Supreme Court delivered its decision in South Bengal State Transport Corporation Vs. Ashok Kumar Ghosh and Others, . By the judgment and order under appeal, an Hon''ble Division Bench of this Court had

held that the appointment of an enquiry officer without considering the reply submitted by the delinquent employee speaks of bias and the punishment inflicted is in violation of the regulations. The Supreme Court in paragraphs 13 and 14 ruled as follows:

13. In our opinion, it may be open for a disciplinary authority to initiate the departmental proceedings on consideration of the reply of an employee but as an absolute proposition of law it cannot be said that before initiating the departmental enquiry or appointing an enquiry officer, reply of the delinquent employee is required to be obtained and considered unless it is the requirement of the rules. There may be cases where the charges are of such a nature that the disciplinary authority may not require any reply from the delinquent employee but straightaway initiate the departmental enquiry and appoint an enquiry officer.

14. In the present case the bus was checked by the flying squad of the appellant Corporation itself and in view of what has been found by it, the disciplinary authority while framing the charge had appointed the enquiry officer. We are of the opinion that mere appointment of an enquiry officer while framing the charge-sheet, even before considering the reply of the delinquent employee, does not reflect any bias.

6. The decision of the Supreme Court in Ashok Kumar Ghosh (supra) and the reasoning that I had assigned in Purushottam Dubey (supra) are a complete answer to the contention of Mr. Majumdar and I find no reason to hold that the charge sheet suffers from any of the vitiating factors based whereon interference could be warranted. The challenge to the chargesheet, accordingly, fails.

7. Turning to the second ground of challenge, it appears that the disciplinary authority found itself bound by Rule 153.8 of the Rules and rejected the petitioner's prayer. Question that arises for an answer here is, whether the approach of the disciplinary authority is sustainable in law.

8. Mr. Majumdar has contended that the petitioner did not leave any stone unturned to find out a friend" to assist him in the enquiry who is from the same division or battalion, but to his utter misfortune none agreed. It was in such peculiar circumstance that the petitioner had approached a member of the Force holding the rank of Sub-Inspector and posted in Metro Railway, and he had kindly consented to act as the petitioner's "friend". It is contended by Mr. Majumdar that the decision rejecting the petitioner's request is mechanical and in order to ensure fair opportunity to the petitioner in raising effective defence in the enquiry, the disciplinary authority ought to have allowed the request.

9. Answering Mr. Majumdar's contention, Mr. Ganguly, learned advocate for the respondents contended that no legal right of the petitioner has been infringed as a result of the impugned decision warranting interference. The disciplinary authority, according to him, could not travel beyond the four corners of the Rules and grant the petitioner permission to be assisted by a member of the Force who does not belong to the same division or battalion as that of the petitioner. The

decision of the Supreme Court in D.G. Railway Protection Force and Others Vs. K. Raghuram Babu, , was relied on by him to contend that Rule 153.8 has been held to be constitutionally valid. It was also contended by him that once it is accepted that the concerned rule gives a charge sheeted member of the Force a restricted right, it is not permissible for him to seek a relief that would be beyond the scope of the rule and also beyond the province of the disciplinary authority. He, accordingly, prayed for dismissal of the writ petition.

10. In reply, while not contesting that the Supreme Court in K. Raghuram Babu (supra) had declared Rule 153.8 to be intra vires, Mr. Majumdar urged that the Court did not have the occasion to consider the provisions of Rule 153.11 of the Rules. According to him, Rules 153.8 and 153.11 of the Rules make a deadly combination and its combined effect would result in a charge-sheeted member of the Force being deprived of reasonable and adequate opportunity of defence. He submitted that the Rules have to read in such manner that it advances the cause of justice rather than defeating it.

11. I have heard the parties.

12. In K. Raghuram Babu (supra), the propriety and/or correctness of the judgment and order of the Full Bench of the Andhra Pradesh High Court, reported in [(2001) 5 Andhra LT 543], which declared the last sentence of Rule 153.8 ultra vires, was under consideration of the Supreme Court. The Court having declared Rule 153.8 intra vires, I am bound by it and left with little option. It is of no significance if the Court did not consider this or that point or provision. I have to read Rule 153.8 in a manner that is consistent with the Supreme Court's interpretation thereof.

13. Rules 153.8 and 153.11 are quoted below, for facility of reference:

153.8 The enrolled member charged shall not be allowed to bring in a legal practitioner at the proceedings but he may be allowed to take the assistance of any other member of the Force hereinafter referred to as friend" where in the opinion of the Inquiry Officer may, at the request of the party charged, put his defence properly. Such friend" must be a serving member of the Force of or below the rank of Sub-Inspector for the time being posted in the same division or the battalion where the proceedings are pending and not acting as a "friend" in any other proceedings pending anywhere. Such "friend" shall, however, not be allowed to address the Inquiry Officer nor to cross examine the witness.

153.11 If the witnesses are government officers of a rank superior to the party charged, the Inquiry Officer may, at the request of the party charged, put the questions to such officer.

14. Reading Rule 153.8 at it stands, a charge sheeted member of the Force as of right may claim assistance of another member of the Force, of or below the rank of Sub-Inspector, posted in the same division or battalion where the disciplinary proceeding is pending and, a fortiori, there can be no doubt that the petitioner

cannot claim, as of right, such assistance of a "friend" that is not covered by Rule 153.8.

15. Does it follow that the disciplinary authority was right in rejecting the petitioner's request? I shall now proceed to consider the question.

16. Here, the petitioner is a cook. It would not be unreasonable to presume that he has limited knowledge or absolutely no knowledge of disciplinary proceedings. I wonder what his educational qualifications are. If Rule 153.8 is read to mean what it says, and the petitioner does not get the assistance of a "friend" of his choice and is left with no other option but to put questions himself in course of cross-examination to the listed witnesses who are all public servants holding high posts in their respective organisations, which in all likelihood he may not be able to put because of his inability, in my view it would be a virtual no contest or a walk-over, and only a matter of time for the enquiry officer to hold the petitioner guilty. I do not consider that Rule 153.8, in the circumstances, ought to be so read so as to sound the death knell for the petitioner. A different way of reading it is possible, not inconsistent with the dictum of the Supreme Court in *K. Raghuram Babu* (supra), and this is what I propose to do.

17. To read Rule 153.8 differently for advancing the cause of justice, I refer to a case by way of illustration. Take the situation of a charge-sheeted member of the Force, who has no training in respect of laws or legal procedures. In disciplinary proceedings initiated against him for commission of an act that amounts to gross misconduct, the prosecution prefers to obtain the services of a presenting officer who is legally trained to function as such. I need not burden this judgment by referring to those decisions of the Supreme Court holding that if the prosecution takes the services of a legally trained prosecutor to drive home the charges of misconduct levelled against the charge-sheeted employee, he could claim a right to be represented by a lawyer. If in such a situation the charge-sheeted member of the Force prays for permission to engage the services of a lawyer, can permission be refused relying on the decision in *K. Raghuram Babu* (supra)? I do not think so. The decision there has to be followed in normal or ordinary circumstances, but if the provision requires a different reading in keeping with the facts and circumstances that arise before the Court in a given case, it would be quite permissible for the Court to so read it without in any manner touching upon or tinkering with its basic purport.

18. In taking such view, I am inspired by the law laid down by the Supreme Court itself in *Mangilal Vs. State of Madhya Pradesh*, Relevant portion from paragraph 10 thereof reads as follows:

10. *** Even if a statute is silent and there are no positive words in the Act or the Rules made thereunder, there could be nothing wrong in spelling out the need to hear the parties whose rights and interest are likely to be affected by the orders that may be passed, and making it a requirement to follow a fair procedure before taking a decision, unless the statute provides otherwise. The

principles of natural justice must be read into unoccupied interstices of the statute, unless there is a clear mandate to the contrary. No form or procedure should ever be permitted to exclude the presentation of a litigant's defence or stand. Even in the absence of a provision in procedural laws, power inheres in every tribunal/Court of a judicial or quasi-judicial character, to adopt modalities necessary to achieve requirements of natural justice and fair play to ensure better and proper discharge of their duties. Procedure is mainly grounded on the principles of natural justice irrespective of the extent of its application by express provision in that regard in a given situation. It has always been a cherished principle. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice where substantial rights of parties are considerably affected. The application of natural justice becomes presumptive, unless found excluded by express words of statute or necessary intendment.***

19. There is no reason why the above dictum may not be applicable in a domestic enquiry. I am also persuaded to hold that in a case of the present nature where the charge sheeted member of the Force alleges that none from his division or battalion is willing to act as his friend, although he has no right to claim that he is entitled as of right to assistance of another member of the Force posted outside his division or battalion, the disciplinary authority upon receipt of a request in this behalf has the discretion to allow or not to allow such request. This requirement has to be read in Rule 153.8 to ensure that the charge-sheeted member of the Force receives a fair hearing. Also, to check arbitrary action, some reason ought to be recorded showing application of mind. A mechanical order that assistance as prayed for is rejected, not being covered by Rule 153.8, would be contrary to the rule of fairness and hence indefensible.

20. Kalindi and Others Vs. Tata Locomotive and Engineering Co. Ltd., , is the decision that I seek to rely on in support of my conclusion as recorded in the preceding paragraph. Kalindi and 13 (thirteen) other workmen were charge sheeted. Enquiry that was ordered into their alleged misconduct ultimately resulted in their dismissal from service. Applications u/s 33A of the Industrial Disputes Act were filed complaining of the action taken against them by the company, which were dismissed. An appeal against such order was carried to the Supreme Court. Common contention urged was that the enquiry was not a proper and a valid enquiry inasmuch as the workmen were not allowed to be represented at the said enquiry by a representative of the Jamshedpur Union to which they belonged. It was further urged that the concerned workmen should have been allowed reasonable assistance for examination and cross examination of witnesses and for ensuring that proper records were made of the proceedings. It was also contended that a representative of the workmen's union was best suited to give such assistance and in the absence of such assistance a fair hearing was denied. The rules governing the enquiry did not provide that the charge-sheeted employee would be entitled to the assistance of somebody else. The question which arose for consideration was "when the management of an

industry holds an enquiry into the charges against a workman for the purpose of deciding what action if any, should be taken against him, has the workman a right to be represented by a representative of his Union at the enquiry?" The Court while answering the question in the negative observed as under:

Accustomed as we are to the practice in the Courts of law to skilful handling of witnesses by lawyers specially trained in the art of examination and cross-examination of witnesses our first inclination is to think that a fair enquiry demands that the person accused of an act should have the assistance of some person, who even if not a lawyer may be accepted to examine and cross examine witnesses with a fair amount of skill. We have to remember, however, in the first place that these are not enquiries in a Court of law. It is necessary to remember also that in these enquiries, fairly simple questions of fact as to whether certain acts of misconduct were committed by a workman or not only fall to be considered and straightforward questioning which a person of fair intelligence and knowledge of conditions prevailing in the industry will be able to do will ordinarily help to elicit the truth. It may often happen that the accused workman will be best suited and fully able to cross-examine the witnesses who have spoken against him and to examine the witnesses in his favour.

The Court, ultimately, concluded that:

Our conclusion therefore is that a workman against whom an enquiry is being held by the management has no right to be represented at such enquiry by a representative of his Union; though of course an employer in his discretion can and may allow his employee to avail himself of such assistance

(underlining for emphasis by me)

21. Rule 153.8 does not say that in no circumstances would a charge-sheeted member of the Force be allowed assistance of another member of the Force, who does not belong to the charge-sheeted member's division or battalion. In the absence of such prohibition, I hold that the order impugned rejecting the petitioner's prayer simply citing Rule 153.8 is absolutely mechanical and not sustainable in law.

22. It would now be appropriate to consider the argument advanced by Mr. Majumdar referring to Rule 153.11. I do not read the said rule as restricting the charge sheeted member of the Force to put questions to his superiors in course of cross-examination. It would come to the picture if only for embarrassment or for some other compelling reason the charge sheeted member finds it difficult to put questions to the witnesses, who might happen to be his superiors. In such eventuality, the charge-sheeted member may request the enquiry officer to put the questions that he wishes to pose to the witnesses and the enquiry officer is empowered to do so. If the enquiry officer declines the request, the charge sheeted member may proceed to put the questions to the witnesses. The provision is an enabling one and cannot be read as restricting one's right to put questions.

23. Although not specifically prayed for, a point has been raised by Mr. Majumdar, by submitting that the inquiry officer holds a rank lower than that of some of the prosecution witnesses and, therefore, the petitioner cannot expect a fair inquiry. In support of such submission, a decision of a learned Single Judge of this Court dated April 4, 2012 while disposing of W.P. 6148 (W) of 2012 (Utpal Kumar Biswas v. Union of India & Ors.) has been relied on. He has also brought to my notice the fact that such order of the learned Single Judge has been upheld by an Hon''ble Division Bench of this Court by its order dated March 5, 2013 in M.A.T. No. 907 of 2012 (Union of India v. Utpal Kumar Biswas).

24. It appears from the order of the Hon''ble Division Bench that the principal witness on behalf of the prosecution likely to depose in the domestic inquiry had conducted a fact finding inquiry and that the inquiry officer, who had been appointed, was holding a rank junior to such witness. It is in those circumstances that the Hon''ble Division Bench upheld the order of the learned Single Judge holding that the order was just and fair and one which was passed with a view to holding of a fair and impartial inquiry.

25. Coming to the facts of the present case, it appears that the list of witnesses contains names of four gentlemen of whom one is an Inspector, two are Medical Officers and the other is an Office Superintendent. The inquiry officer deputed to hold inquiry against the petitioner is of the rank of Inspector. It has not been brought to my notice that any of the witnesses held a fact finding inquiry prior to the charges being drawn up against the petitioner and in view thereof, the decision of the Hon''ble Division Bench in Union of India & Ors. v. Utpal Kumar Biswas (supra) has no application in the facts and circumstances of the present case.

26. Even otherwise, there is no material, far less to speak of sufficient material, before me to hold that merely because the inquiry officer is an Inspector, he would not be in a position to assess the evidence to be tendered by the witnesses, which was one of the grounds for which the learned single judge by the order dated April 4, 2012 in Utpal Kumar Biswas & v. Union of India & Ors. (supra) directed change of inquiry officer. A change could be claimed if the inquiry officer demonstrates a partial and unfair attitude to the detriment of the charged member of the Force. On the basis of the materials on record, I do not find the approach of the inquiry officer to be such so as to hold that his appointment and continuance is likely to deflect justice. The prayer of the petitioner for change of inquiry officer stands rejected.

27. In the result, the writ petition succeeds only in part. The order of the disciplinary authority refusing the petitioner's request as contained in his representation dated March 14, 2013 is set aside. The disciplinary authority shall reconsider the petitioner's request in the light of the observations contained herein. If the request is again declined, a reasoned order shall be passed. Only upon disposal of the representation of the petitioner in terms of this order, the enquiry against him shall resume. There shall be no order for costs.

Urgent photostat certified copy of this order, if applied for, shall be furnished to the applicant at an early date.