

(1954) 03 CAL CK 0029
In the Calcutta High Court
Case No : Civil Rule No. 3060 of 1953

Nagendra Kumar Roy, Assistant Executive Engineer	APPELLANT
Vs	
Commrs. for the Port of Calcutta and Others	RESPONDENT

Date of Decision : 08-03-1954

Acts Referred:

Calcutta Port Act, 1890 — Section 31, 32(1), 34
Constitution of India, 1950 — Article 226, 311

Citation : AIR 1955 Cal 56 : 58 CWN 527

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Amaresh Ch. Roy and Hemesh Chandra Sen, for the Appellant; H.N. Sanyal and Bijan Behari Mitter, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—The facts in this case are shortly as follows:

The Commissioners for the Port of Calcutta is a body corporate, created by the Calcutta Port Act (B. A. No. 3 of 1890). The petitioner was appointed in 1937, as an Assistant Executive Engineer. To be accurate, he commenced in an officiating post and was confirmed therein sometimes in August 1951, Certain allegations of corruption having been made against the petitioner, Mr. Malkani, the Deputy Chief Engineer, held a preliminary enquiry. On 24-11-1951, the Chairman directed that the charges should be formally enquired into by a Committee composed of Mr. Madan the Chief Engineer, Mr. Iyer the Deputy Chief Accountant and Mr. Bose the Executive Engineer. This Committee held a preliminary enquiry and made a report to the Chairman. On 29-12-1951, the petitioner received a letter from the Chief Engineer (annexure 2 of the petition) which commenced as follows:

"Dear Sir,

In accordance with letter No. 2883/334 Genl. dated 24-11-1951 from the

Secretary, copy enclosed for your information, a Committee composed of Sri N. R. Iyer, Deputy Chief Accountant, Sri H. C. Bose, Executive Engineer, South and the undersigned was set up to enquire into certain allegations made against you. The committee has held a preliminary enquiry, the findings of which have been duly reported to the Chairman. I am now directed by the Chairman to call upon you to furnish written explanation with regard to the following".

Then followed a list of six charges. The petitioner was informed that most of the relevant papers, documents, registers etc., were with the Chief Engineer and could be inspected by the petitioner at any time.

2. It must be observed that the preliminary. enquiry by Mr. Malkani, as well as by the Committee set-up by the Chairman, were ex parte.

3. The petitioner gave a written explanation to the charges. It is stated in the affidavit in opposition affirmed by the Secretary to the Commissioners for the Port of Calcutta, that the petitioner appeared before the Committee, made both verbal and written representations and also produced documents in support of his case. According to the petitioner, however, he was given no opportunity to appear or make any verbal representations before the Committee. He gave a written explanation to the charges, and thereafter the Committee by letters put various questionnaires to him and he answered them in writing. The petitioner, however, did not intimate to the Committee that he wanted to appear personally at any hearing or to call witnesses, at least no such communication is mentioned in the pleadings or the annexures thereto.

4. It appears that the Committee reported to the Chairman who asked for sanction from the Commissioners to dispense with the services of the petitioner. This sanction was granted by the Commissioners at a meeting held on 20-7-1953, "subject to sanction of Government". The Government has sanctioned the same.

5. On 21-7-1953, the Chief Engineer informed the petitioner (annexure 5 to the petition) that the Commissioners had sanctioned, (subject to sanction of Government) that his services were to be dispensed with, with a month's pay in lieu of notice, and that he was, therefore, put off duty with effect from 22-7-1953. In this letter, there is nothing mentioned about the charges or the results of the enquiry. The letter does not mention that the petitioner was being dismissed or removed from service for any default on his part, nor that it was being done by way of punishment.

6. This rule was issued on 9-9-1953, calling upon the respondent to show cause why a writ In the nature of certiorari or mandamus or prohibition should not issue, in respect of the termination of the petitioner's services with the respondent.

7. Before I deal with the argument advanced on behalf of the petitioner, it will be necessary to deal with certain other facts.

8. The Commissioners for the Port of Calcutta is a body corporate which was brought into existence by the Calcutta Port Act (B. A. 3 of 1890). Under that Act, Section 31 conferred the power upon the Commissioners in a meeting to frame rules upon certain matters mentioned therein. Section 31, however, did not grant power to frame rules regarding the appointment or dismissal of employees. u/s 30, the Commissioners at a meeting were empowered to prepare and sanction a schedule of the staff of officers and servants required. Section 32, laid down as to who would be competent to appoint or dismiss officers and servants. Section 33 laid down inter alia that the power of dispensing with the service of an officer or servant, otherwise than by reason of such officer or servant's own misconduct, shall be exercised by the Commissioners in a meeting.

In December 1921, the Commissioners in meeting decided to adopt the fundamental rules applicable to Civil Servants, except certain rules therein which are not material for our purposes. It appears that notwithstanding this adoption of the fundamental rules, certain "Further conditions of service" were drawn up and at the time of appointment, each employee was made to stipulate that these further conditions would be binding. One of the conditions was as follows:

1. The services of any employee may be terminated with a month's notice or a month's pay in lieu of notice in any case, and without notice in case of misconduct".

9. On 10-1-1938, the petitioner signed the necessary declaration in the service register, which inter alia contained the following: "I have read the further conditions of service of which a copy has been handed to me and I hereby subscribe to them."

10. These "further conditions of service" were not passed by the Commissioners at a meeting, prior to 24-8-1945. On that date, certain conditions, called "Revised conditions" were passed by the Commissioners at a meeting. These revised conditions were more or less similar to the "further conditions" as already prevailing. One of the revised conditions was that the services of any officer or servant could be terminated with a month's notice or a month's pay in lieu of notice in any case, and without notice in case of misconduct.

11. In 1951, Section 31. which empowers the Commissioners to make rules was amended by incorporating Sub-section (i) which enlarged such powers and granted the power to the Commissioners to frame rules

"(i) for regulating the recruitment, promotion, conduct, discipline, punishment and any other matter relating to the terms and conditions of service applicable to the employees of the Commissioners or their rights and privileges not covered by any of the foregoing clauses."

Section 33 has been wholly repealed and omitted from the Act.

12. I now come to the argument advanced by Mr. Roy, on behalf of the petitioner. He argues that his client has been dismissed wrongly because there was an

enquiry behind his back and he had no reasonable opportunity of defending himself. I pointed out that Article 311 did not apply because the petitioner was not a civil servant of the Government. Mr. Roy, while admitting that it did not apply in terms, tried to argue that the position was the same because the Commissioners had adopted the fundamental rules. I do not see, however, how that makes any difference. Anyone may adopt the fundamental rules, that is to say, agree to abide by similar rules, but that cannot make the employees "civil servants" or attract the provisions of Article 311.

Next Mr. Roy argues that the fundamental rules having been adopted, became part of the statute under which the respondents were constituted, and they cannot be permitted to depart from such rules. As stated above, Section 31 of the old Act contained no provision for making rules as regards appointment and dismissal. Hence, the adoption of the fundamental rules, could not affect the position, since neither was there the power to make such rules nor adopt such rules. There being no rules, the ordinary powers of employers and employee were there and if the employers and employee agreed that they would be guided by a set of rules or service conditions, there was nothing to prevent it, but it did not make them statutory rules or statutory conditions of service. Looked at from this point of view, the "further conditions of service" were as much valid as the fundamental rules and were a part of the petitioner's contract of service.

The only thing that can be said is that u/s 33 (as it then stood) an officer could not be discharged (except for his own misconduct) except by the Commissioners in a meeting. That, however, specified the body which could discharge, and not the terms governing such discharge. In my opinion, there was no bar to the petitioner subscribing to the "further conditions of service", and they were binding upon him. It is next argued that even if they were binding upon him before the repeal of 1951, they are no longer binding because of the present wording of Section 32 (1). The amended section reads as follows:

"Appointments, etc., by whom to be made -- (1) Subject to the provisions of the Schedule for the time being in force, sanctioned by the Commissioners u/s 30 and of the rules u/s 31 and also of the provisions of Section 34, the power of appointing, or dismissing or of disposing of any other question relating to the services of the employees of the Commissioners including the power of dispensing with the services of any such employee otherwise than by reason of the misconduct of such employee shall be exercised in the case of employees whose maximum monthly salary exclusive of allowances is less than one thousand rupees, by the Chairman or the Deputy Chairman, and in every other case, by the Commissioners in meeting".

Under the amended Section 34, every order made u/s 30 or Section 32, save in so far as it was in accordance with rules made u/s 31, requires the sanction of the Central Government, if it related to the Deputy Chairman or any employee drawing a salary of not less than a thousand rupees. In the previous Section 34, the wordings used were "previous sanction", and the marginal note was the

same. In the amended Section, the word "previous" has been dropped in the body of the section but retained in the marginal note.

13. Mr. Boy argues that the position after the amendment is that no one can be discharged or dismissed until rules to that effect had been framed u/s 31 (i). He also says that u/s 34, the previous sanction of the Central Government was necessary. I am unable to accept either of these arguments.

14. Section 32 only speaks about the persons who can make appointments or order discharge and their power is made "subject" to any rules framed u/s 31 (i). No such rules have yet been framed. The position cannot be that the employees cannot be appointed or discharged until rules are framed. The power to appoint and discharge was already there, and it continues until modified by any rules as may be framed in that behalf. It is difficult to specify the exact source of that power. Perhaps it is Section 30 read with Sections 32 and 34, and also the implied power of the Commissioners to do all such acts which are necessary to carry out the object of their incorporation. I am not prepared to hold that the Commissioners have neither the power to appoint employees or discharge them, until rules are framed since that would be the logical consequence of accepting the argument advanced by Mr. Boy.

It is, however, obvious that the sooner the Commissioners frame such rules the better it is for all parties concerned. Much of the controversy would have been obviated if adequate rules had been framed. Coming to Section 34, it is clear that the dropping of the word "previous" has been deliberate and the marginal note cannot govern the substantive provisions. In this case the sanction of the Central Government has been obtained, although at a point of time later than the actual discharge.

15. Finally, Mr. Roy argues that the rules of natural Justice have been violated. He says that the preliminary enquiries were made ex parte and his client had been confronted, not with charges but with "findings". He also argues that in the subsequent enquiry, his client did not have a reasonable opportunity of defending himself. The reasonable opportunity in this case not being based on statutory rules, must be guided by the ordinary rules of natural justice, and I do not see any violation of it. Even under Article 311, a preliminary enquiry ex parte to frame the charges, would not necessarily be had. The question would be whether the employee had every reasonable opportunity of meeting the charges which were framed. The rules of natural justice, however, do not require that the proceedings must be conducted in the same way as a judicial trial.

The employee must be given an adequate opportunity of placing his case, and of meeting any charges made against him. He was given ample opportunities and he availed himself of it. He gave lengthy explanations, and was afforded access to all relevant documents. He never asked for an opportunity of personally addressing the enquiry Committee or of calling any witnesses. Nothing has been placed before me to show that the Committee heard any witnesses whom the

petitioner was unable to cross-examine, or looked at any documents which the petitioner did not have access to. In my opinion, the rules of natural justice were not violated. Mr. Roy drew my attention to an unreported decision of Ameer Ali J. -- "H. A. Murtough v. Commrs. for the Port of Calcutta", Suit No. 1339 of 1933, D/- 22-1-1935 (Cal) (A). In that case, it was assumed that the terms of service were as entered in the service register. The learned Judge said:

"Before dealing with the point I might say at once that I find that the plaintiff's contract was determinable as indicated, that is to say, upon notice plus one month's salary, and that he has received that salary. That I do not think is disputed".

16. The action was a suit for damages for breach of the contract of service and the principal questions raised were the competence of the authority dismissing the plaintiff to do so and the time bar contained in Section 142, Calcutta Port Act. The suit was dismissed. I do not see how this case helps the petitioner or assists me in deciding any of the points raised here. If the petitioner accepts the fact that his service is subject to the contract contained in the endorsement which he signed in his service register and is subject, therefore, to the "further conditions of service", that is an end of his case. But even if any point is left, it would be a case of a breach of contract and an application for mandamus or certiorari would not lie. Prohibition is wholly inappropriate as there is no question of an inferior tribunal. The petitioner's proper remedy in that event would be a suit for damages for wrongful dismissal.

17. For the reasons stated, this application fails and must be dismissed. The rule is discharged. As it involves the interpretation of the law which is not entirely free from complication I make no order as to costs.