

(1959) 07 GAU CK 0005
In the Gauhati High Court
Case No : Civil Rule No. 61 of 1959

Pashupati Banerjee

APPELLANT

Vs

Deputy Chief Engineer (North), North East Frontier Rly. and
Others

RESPONDENT

Date of Decision : 22-07-1959

Acts Referred:

Constitution of India, 1950 — Article 226, 311, 311(2)
Government of India Act, 1935 — Section 240(3)
Government of India Rules — Rule 638

Citation : (1959) 07 GAU CK 0005

Hon'ble Judges : C.P. Sinha, C.J.;H. Deka, J

Bench : Division Bench

Advocate : B.C. Ghose and N.M. Lahiri, for the Appellant; D.N. Medhi, Sr. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

C.P. Sinha, C.J.—This application under Article 226 of the Constitution raises a very important question as to the rights of the railway servant concerned under the provisions of Article 311 of the Constitution.

2. The facts in brief are that on 30-4-1958, there was derailment of 4 Down Link Express near Barsoi, and on 8-7-1958 a charge-sheet, dated 3-7-1958, was served upon the Petitioner who was the Assistant Permanent Way Inspector at Dalkhola (West Dinajpur) under the Permanent Way Inspector, Barsoi (District Purnea) in the Katiher district of the North East Frontier Railway. The accident had taken place near mile post No. 99 between Sudhani and Barsoi Junction.

The Petitioner showed cause to the charge-sheet on 14-7-1958 and thereafter on 3-9-1958 a departmental enquiry was ordered, and the enquiry was to be made by the District Traffic Superintendent and the District Engineer, Katihar. At the enquiry, an extraordinary procedure was adopted, namely, that without making any effort to prove the charges levelled against the Petitioner, the members of

the enquiry committee started putting question after question to the Petitioner and this kept the enquiry committee occupied for more than two days.

Thereafter the enquiry committee came to certain decisions against the Petitioner. Then the Petitioner was again asked to show cause as to why he should not be removed from service. This was the second notice. The Petitioner again showed cause and thereafter the Respondent No. 1, the Deputy Chief Engineer (North), North East Frontier Railway, Pandu, passed orders removing the Petitioner from service. This order was dated 18-10-1958 and it was received by the Petitioner on 27-10-1958.

This order of removal was passed without affording any opportunity to the Petitioner to substantiate his show cause petition against the second notice. Thereupon the Petitioner asked for copies of evidence and proceedings of enquiry to enable him to file an appeal, and, in fact, the Petitioner filed an appeal before the Chief Engineer, opposite party No. 2, on 24-12-1958. On receiving the memorandum of appeal, the appellate authority, by its order dated 11/12th March, 1959, summarily dismissed the appeal. After the appeal was dismissed, a criminal case was started against the Petitioner to force him to vacate the railway quarters which he was occupying. On these brief facts, the petition has been filed.

3. The charge-sheet which was initially served upon the Petitioner makes the following allegations (I am merely quoting the relevant portion from the charge-sheet.

You are hereby charged with Neglect of duty resulting in loss to the Railway Administration and danger to the lives of persons using the Railway, under 1708 RI of the Establishment Code, Volume I. The details of charges are stated overleaf....

On 30-4-1958, there was an accident in No. 4 Down Link Express between Sudhani and Barsoi Junction at 14.40 hours very near mile post 92, when 4 coaches got derailed.

You were responsible for the accident for your neglect of duty in failing to take steps in proper time to draw back rails and adjust creep even though you knew that the creep at the site of accident was considerable.

On this charge-sheet, the Petitioner showed cause, which is to be found in paragraph 9 of the petition, and, amongst other things, he stated as follows:

Sir, it is the practice of adjusting creep by rail drawing on the sanction of estimate and ELR (Extra Labour Requisites). In this case, the sanction was just received by the P.W.I. (Permanent Way Inspector). I had discussion about this with him before it was noticed. Sir, that a creep of 34" and the relative creep of 66" on a gradient of 1 in 50 on JNI section under PWI/NSA with closing tolerances and a 7" -- 0" creep under PWI/TKG in the year of 54 and 55 had not resulted in any accident or troubles. The creep measured 9" and 16" after the derailment of 4 Dn Link Express, with a few jammed joints are still lying in many

places in the section without any bad effect as yet....

This paragraph just quoted does not appear to be couched in proper language, but its meaning is said to be that -- (i) according to the practice, creeps are adjusted by rail drawing on the sanction of estimates and extra labour requisites, and that sanction was received by the Permanent Way Inspector, the immediate superior officer of the Petitioner, with whom he had discussion about it; (ii) that in spite of there having been a creep of 34" and the relative creep of 66" in 1950 on JNI section under Permanent Way Inspector, Hashimera, with closing tolerances, and a 7" -- 0" creep under Permanent Way Inspector, Thakurganj, in the years 1954 and 1955, they had not resulted in any accident or trouble; (iii) that even after the accident of the train in question on 30-4-1958, the creep was measured and it was found to be 9" and 16" after the derailment, with a few jammed joints still lying in many places in the section without any bad effect.

In other words, the Petitioner disputed the fact that the extent of the creep found in the railway lines at the place of the accident to be above 6" before the accident, could be responsible for the derailment. After he had shown cause, I have already mentioned that the enquiry committee started work without examining any witnesses in support of their case, namely, that the creep of 6" or more in the railway lines near mile 99 where the derailment took place, was responsible for the accident.

No witness in support of that case was at all examined, and the Petitioner who was in the position of an accused person straightway was put question after question by the enquiry committee, and upon this questioning and cross-questioning, the committee felt satisfied that the Petitioner was guilty of not having taken steps in time to repair the creep, and thereafter, as I have stated, notice was given to the Petitioner to show cause as to why he should not be removed from service. Thereafter again the Petitioner showed cause and, amongst other things, he mentioned that:

(a) it should have been held by the enquiry committee that the Petitioner was not liable for not adjusting the creep, as additional labour was wanted by the Petitioner from the Permanent Way Inspector, and he did all that he could by making a requisition for extra labour.

(b) That the Petitioner had been highly injured and prejudiced by the peculiar and unknown procedure adopted in the proceedings of the committee. The committee should have examined other witnesses and the staff of the Permanent Way Inspector Department, including the Permanent Way Inspector, and the Assistant Engineer concerned, and in the absence of any such examination of witnesses in the presence of the Petitioner, the whole proceeding of the enquiry committee had been materially irregular and defective, which vitiated the findings of the said committee.

(c) That the enquiry committee should have examined the papers and records of the Permanent Way Inspector who had been keeping the same under paras 206,

210, 606 and 614 of the Indian Railways Way and Works Manual, and the Petitioner has been highly prejudiced for not taking such examination thereof.

(d) That there is no evidence on the record to prove that the creep in question was liable for the alleged accident, and the enquiry committee did not investigate the said matter and it was not taken into consideration in their findings. That having no evidence and findings in support of the alleged reasons for the accident in No. 4 Down Link Express on 30-4-1958, the whole proceeding was illegal, arbitrary and capricious and, as such, the Petitioner is not liable to any punishment whatsoever.

(e) That no opportunity was given to the Petitioner to meet his defence as well as to challenge the prosecution by cross-examination, and no evidence for the prosecution was taken in presence of the Petitioner, nor such copy of the same on which the prosecution relied, was supplied to the Petitioner.

(f) That the Petitioner having been charged as a delinquent, is in the position of an accused and, as such, he should not have been compelled to give his statement in the way in which it has been done.

(g) Lastly, that during the months of March and April, 1958, the District Engineer inspected the Railway track by motor trolley over the section in question and that on 6-3-1958 the Chief Engineer inspected the said section by motor trolley and the Assistant Engineer inspected the tracks of the said section by trolley on 6-4-1958 and by train on 19-4-1958, and inspection of the same sections was done by the Permanent Way Inspector by trolley on 10-4-1958, and lastly by the District Engineer on the day of the accident, at about 10 A.M. These conclusively go to show that there could not have been such creep during that period as could have led to the accident, for, otherwise it would have surely drawn their attention and notice. So far as the Petitioner knows, and having at the relevant time no instructions from the Permanent Way Inspector and other officers, the Petitioner had no special instructions or orders from the aforesaid inspections regarding the creep in question.

4. After this show cause, the Petitioner received a notice imposing the penalty of removal from service with effect from 1-11-1958, as the explanation of the Petitioner was not accepted by the Deputy Chief Engineer (North), Pandu.

5. The learned Counsel Mr. Ghose for the Petitioner has submitted that upon the charge-sheet in this case, there were in effect two charges against the accused which he had to meet, namely, (i) that the derailment of the train in question on 30-4-1958 was due to the fact that there was creep of more than 6" in the track at the point, namely, at mile 99, and (ii) that this creep was not repaired due to the negligence of the Petitioner; and it is submitted that the enquiry was not conducted at all in accordance with law, and that no reasonable opportunity was offered to the Petitioner to refute the charges.

In this connection, our attention is drawn to the case of Khem Chand Vs. The

Union of India (UOI)and Others, where, after a very careful consideration of the provisions of Section 240(3) of the Government of India Act, 1935 (now embodied in Article 311(2) of the Constitution), their Lordships have laid down as to the necessary requisites under the provisions of Article 311(2) of the Constitution, and I desire to extract the following observations from their Lordships' judgment:

It is true that the provision does not in terms refer to different stages at which opportunity is to be given to the officer concerned. All that it says is that the Government servant must be given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. He must not only be given an opportunity, but such opportunity must be a reasonable one.

In order that the opportunity to show cause against the proposed action may be regarded as a reasonable one, it is quite obviously necessary that the Government servant should have the opportunity to say, if that be his case, that he has not been guilty of any misconduct to merit any punishment at all, and also that the particular punishment proposed to be given is much more drastic and severe than he deserves.

Both these pleas have a direct bearing on the question of punishment and may well be put forward in showing cause against the proposed punishment. If this is the correct meaning of the clause, as we think it is, what consequences follow?....

If the opportunity to show cause is to be a reasonable one, it is clear that he should be informed about the charge or charges levelled against him and the evidence by which it is sought to be established, for it is only then that he will be able to put forward his defence. If the purpose of this provision is to give the Government servant an opportunity to exonerate himself from the charge, and if this opportunity is to be a reasonable one, "he should be allowed to show that the evidence against him is not worthy of credence, or consideration, and that he can only do if he is given a chance to cross-examine the witnesses called against him, and to examine" himself or any other witness in support of his defence." (The important words have been underlined (here into) by me).

Then after having made these observations, their Lordships have summarised them as follows:

To summarise the reasonable opportunity envisaged by the provision under consideration includes:

- (a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;
- (b) on opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally,

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the Government servant, tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant.

6. In this case, I am sorry to say, that the enquiry committee did not at all comprehend the scope of the enquiry which had been entrusted to it. As I have said, the charge was that the derailment of the train was caused by the excessive creep in the rails at the particular point where the derailment took place, and that the Petitioner was responsible for not repairing the creep in time.

Therefore, it was necessary first to establish these charges by the evidence that might have been available, against the Petitioner. From the records and from the affidavit-in-reply made by the opposite party, it appears that there was an enquiry made by the Government Inspector of Railways, Calcutta, soon after the accident. From his enquiry report, which is on record, it appears further that he had examined a number of witnesses, including the present Petitioner, as also the Permanent Way Inspector, one Mr. D.V. Orr, and according to that Inspector's report, the derailment was caused because of the existence of excessive size of the creep.

This question, namely, whether the derailment was due to existence of excessive creep, was the most important factor in the case, and that should have been proved by proper evidence. Absolutely no effort was made on behalf of the opposite party to prove that the derailment was caused by the existence of excessive creep. For that purpose, they should have given their evidence and possibly they should have examined the Railway Inspector who had made a report to that effect, but that has not been done.

It appears that the enquiry committee took it for granted that the reasons for the derailment were as mentioned in the said report and that the report must be accepted and cannot be questioned. That was entirely a wrong standpoint. The Petitioner was insisting from the very beginning in his show cause petitions that the derailment could not have been caused by the existence of excessive creep in the rails and, therefore, that was a matter in issue and that matter could have been decided only upon evidence furnished by the Department.

Even the report of the Government Inspector of Railways, Calcutta, was never brought to the notice of the Petitioner, and we have no reason to suppose that the Petitioner had at any time before the enquiry or even after it any information about the result of the enquiry made by the said Calcutta, Inspector of Railways.

We say this for the reason that no reference is made to the enquiry or report in the application itself, but when this matter was raised in the affidavit-in-reply of the opposite party, the Petitioner filed a counter-affidavit to the effect that he had no information at all about the result of the enquiry made by the

Government Inspector of Railways to the effect that the derailment was due to existence of excessive creep which led to buckling of the track, and we have no reason to doubt the statement made in the counter-affidavit by the Petitioner. In our opinion, therefore, the cause for the derailment remains undetermined so far by the enquiry committee.

7. As regards the other question, on the materials we are not at all satisfied that it was the responsibility of the Petitioner to repair the creep and bring it to its normal size. Rule 638(f) of the book styled "Chapters of the Indian Railways Way and Works Manual, for the Use of Junior Permanent Way Inspectors", at page 638 of the book, runs as follows:

(f) Creep in excess of six inches shall not be permitted. Adjustments should be carried out as necessitated.

Consecutive jammed joints noticed at intervals at a mileage should be considered as an indication for creep adjustment. The work of creep adjustment should be carried out under protection of engineering signals by the Permanent Way Inspector who should take careful measurements of the expansion gaps as existing and choose the length to be dealt with in one operation....

As I have said, the title of the book shows that it is meant for the use of Junior Permanent Way Inspectors, and the sub-clause which I have just quoted shows that the work of creep adjustment should be carried out under protection of engineering signals by the Permanent Way Inspector. The case of the Petitioner is that he had informed the Permanent Way Inspector for indenting extra labour for the purpose of repairing the creep and that perhaps this extra labour was sanctioned, but the Petitioner was never supplied the extra labour and was never asked to do this job. In one of the questions put to the Petitioner by the enquiry committee it was said as follows:

Q. 25. (By defence counsel) -- Did you receive any instruction regarding attention required to be given near mile post 99 prior to the accident, from your superiors?

A. 25. -- No.

Note. -- PWI Shri Orr was confronted and he confirmed APWI's statement.

I must mention that the use of the expression "defence counsel" in Q. 25 above is misleading. The gentleman referred to as "defence counsel" did not belong to the profession but he was an employee under the Railway. At another place, the question put was

Did you furnish the details of creep in your sub-section giving mileages and extent of labour required for pulling back rails? If so, when?

The answer was:

Yes, the matter was discussed with the P.W.I. in March 1958, and I have told him

that extra labour may be arranged. Earlier I had, however, submitted the creep register to the PWI in March 1958.

From the record, it does not appear that the enquiry committee ever took the trouble of verifying the statement of the Petitioner as to whether or not he did submit the creep register to the permanent Way Inspector. Then again the Petitioner said, in answer to a question, namely, whether the Permanent Way Inspector had initialled the creep register or given any instruction to him, as follows:

The creep register was returned after a few days. But PWI had not initialled the creep register. PWI had told me verbally that he is arranging sanction of extra labour.

Again the question put to the Petitioner was "Did you feel the need to express to the PWI any urgency of the rail drawing work?", and the answer was:

Subsequent to the advice from PWI that sanction is being arranged, I did not feel any urgency, for the work.

All these do show that there were materials which could have shown that the Petitioner did all that he could, and, therefore, some evidence was needed on behalf of the Department to the effect that in spite of the fact that the Petitioner was, either under rules or practice, liable to do the repairing work without the intervention of the Permanent Way Inspector, he did not do so, and if the evidence was there, the enquiry committee was at liberty to find against the Petitioner.

We are not entitled to sit in judgment over the findings of the Tribunal or enquiry committee, but our intention in making these observations is only to show that reasonable opportunity, as interpreted by their Lordships of the Supreme Court in the afore-mentioned case, was not given to the Petitioner, and that the normal procedure, as indicated in that judgment, namely, that the case of the Department should be proved by witnesses or other evidence, was not followed in the present case.

Mr. Medhi the learned Counsel appearing on behalf of the opposite party also had to concede that after the Petitioner had shown cause to the second notice directing him to show cause why he should not be removed from service, the Department should have examined witnesses or recorded evidence in support of their case against the Petitioner.

8. In my judgment, therefore, the provisions of Article 311(2) of the Constitution, as interpreted by their Lordships of the Supreme Court have not been given effect to, and the result, therefore, is that no reasonable opportunity having been given to the Petitioner under Article 311 of the Constitution the order of his removal from service cannot possibly be sustained.

9. I have mentioned above that the Petitioner had filed a long memorandum of

appeal against the order of his removal from service to the appellate authority, but the appellate authority felt satisfied by merely saying the following:

I have carefully gone through the appeal of Shri P. Banerjee as well as the relevant papers connected therewith. I consider that the penalty imposed on him should stand. He may be replied accordingly.

As to how appeals have to be dealt with, is mentioned in Rule 1721 of the Indian Railways Establishment Code, Volume I, at page 1720, and the heading of the rule is "Duties of Appellate Authorities". This rule says:

The appellate authority shall consider -- (a) whether the facts on which the order was based have been established; (b) whether the facts established afford sufficient ground for taking action; and (c) whether the penalty imposed is adequate, inadequate or excessive.

From the cryptic order of the appellate authority which I have just quoted, none of these requirements appear to have been fulfilled. It is a matter of great importance not only to the Railway servant involved but to the prestige and sense of fairplay of the Railway Administration itself, that the appellate authority should give particular attention to the matters mentioned in the rule, and in the light of these, I decide the appeal.

Even if there had been no rules, I should have thought that the demand of natural justice was that the points raised in the memorandum of appeal should have been properly considered and due weight given by the appellate authority. The way in which the appellate authority has disposed of the appeal amounts to no consideration of the appeal at all.

10. Mr. Medhi made reference to the case of Indreswar Handique Vs. Union of India (UOI) and Others, but that case, in our opinion, is entirely different on facts. There is, however, one thing in that case which requires mentioning. In that case, the railway servant in question was proceeded against for incivility to some high railway official and a proceeding had been started against him.

That high official was examined by the enquiry committee and opportunity was given to the Petitioner in that case to cross-examine that witness; this was not done in the present case. There is some observation there in that case that according to the Petitioner of that case, some other persons should have been examined by the committee, but this Court held, on the facts of that case, that it was not necessary for those persons to be examined by the enquiry committee. As I said, that case bears no resemblance to the facts of the present case.

11. In the circumstances mentioned above, the petition must be allowed and the order of removal from service of the Petitioner must be quashed and is set aside, as also the order of the appellate authority confirming the decision of the opposite party No. 1, and it must be deemed that the Petitioner continued in service throughout.

12. The result is, as I have said, that the petition is allowed with costs; hearing fee Rs. 200/ -

Deka, J.

13. I agree.