

(2011) 09 DEL CK 0446

In the Delhi High Court

Case No : Writ Petition (Civil) No. 5653 of 2007

Pratap Singh

APPELLANT

Vs

Northern Railway

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 311
Criminal Procedure Code, 1973 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 161
Railway Servants (Discipline and Appeal) Rules, 1968 — Rule 9

Citation : (2011) 8 AD 26 : (2011) 183 DLT 129

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : A.P. Nagrath and Mukesh Kumar, for the Appellant; Kumar Rajesh Singh, for the Respondent

Final Decision : Disposed Off

Judgement

Sudershan Kumar Misra, J.—The Petitioner Pratap Singh, has invoked the writ jurisdiction of this Court under Articles 226 & 227 of the Constitution of India impugning the Award dated 24th August, 2006, whereby the action of the Respondent, Northern Railway, terminating The Petitioner's service was upheld.

2. The Petitioner had been working as a clerk under Signal Inspector (D) Laskar of Moradabad division of the Respondent since 25th December, 1986. One Ram Prakash, who was working as Khalasi in the said division, wanted to take a loan. He therefore gave a loan form to The Petitioner for filing it up, and for verifying the service particulars. The Petitioner allegedly demanded a bribe of Rs. 50 from Ram Prakash for filling up and forwarding that loan form. Ram Prakash reported the matter to the CBI, following which the CBI laid a trap on 3rd October, 1988. On that day, Ram Prakash gave the bribe money to The Petitioner and then gave a signal to the CBI party. The CBI party then raided and recovered the bribe money from the possession of The Petitioner. The Petitioner was, thereafter, served with a charge sheet dated 3rd March, 1989, wherein it was alleged that

he had demanded and accepted a bribe of Rs. 50/- from Ram Prakash. A Departmental Inquiry was conducted against The Petitioner under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968 and the Enquiry Officer held that the charges against The Petitioner had been proved. Ultimately, the Disciplinary Authority imposed a penalty of removal from service vide order dated 17th June, 1992. The Petitioner appealed against the said order, but his appeal was rejected by order dated 16th November, 1994.

3. Before the Labour Court, The Petitioner's case, inter alia, was that the Enquiry Officer had conducted his proceedings in breach of the principles of natural justice by not recording the reasons for his findings. It was also his case that it was not his duty to fill in the loan application form of the said Ram Prakash because he was only a clerk; and that he did not have the power to sanction the alleged loan. Significantly, he also contended that the order punishing him, which was passed on 17th June, 1992, is based on extraneous matters, because his past record was also taken into account while imposing punishment. According to him, if the Disciplinary Authority intended to also consider his previous service record while deciding the question of punishment, it ought to have afforded him adequate opportunity to defend himself on that aspect of the matter also. Since this was not done, the punishment awarded was bad in law. He also contended that the circumstances of the case did not warrant the extreme punishment of removal from service.

4. The Respondent contended that the Enquiry Officer had given full opportunity to the workman to explain the evidence and the charges levelled against him. That the charges framed were fully proved; "...and it was for the Disciplinary Authority to keep in mind the past record of the workman while deciding on the punishment to be imposed...". On examining his past record, the Disciplinary Authority found that The Petitioner misconducted himself on a number of occasions in the past also. According to the Respondent, the punishment of removal from service was therefore, "in continuation and keeping in view of past record of unsatisfactory service and dismissal earlier in November, 1985, which necessitate harsh punishment viz. removal from service." It was also contended that the penalty of removal from service was a lesser penalty than that of dismissal from service.

5. The Tribunal has held that The Petitioner was given ample opportunity to cross examine the witness of the Respondent management and had also been asked to produce his own defence, therefore, the enquiry was proper and The Petitioner was not entitled to any relief.

6. Before this Court, counsel for The Petitioner contends that the report of the Enquiry Officer is vitiated as the Enquiry Officer had rejected the statement of all the defence witnesses, who said that the raid was a sham and the raiding party itself stuffed the money in The Petitioner's pocket, by concluding that they were, "cooked" Petitioner's, and an afterthought, as none of them had raised an alarm or reported the matter to GRP/RPF. He impugns this finding of the Enquiry Officer

on the ground that the said witnesses were not duty bound to raise any alarm or to lodge reports. I do not agree, it is within the purview of the Enquiry Officer to take into consideration the normal reaction of persons when confronted with certain situations. If the witnesses depose to the happening of certain events which are shocking and alarming, it is, but natural that those who are witnessing such an event would raise an alarm. For instance, if a grave offence were to be committed in the presence or within the knowledge of somebody, in the normal course, that person could be expected to either raise an alarm or to report the matter, even though he is not duty bound to do either of these two things. Therefore, such a conclusion arrived at by the Enquiry Officer is merely with a view to test the credibility and veracity of the witnesses and nothing more, and, to my mind, this conclusion was within the scope of his jurisdiction.

7. Counsel also impugns the reasoning adopted by the Enquiry Officer to reject the plea of The Petitioner that the raiding party pushed the money into his pocket. According to the Enquiry Officer, since the money had been coated with powder, anybody handling that money would have had some residue on their fingers which becomes discernable on the hands when washed in water. He, therefore, took the view that it was always open to The Petitioner to have asked the raiding party to wash their fingers in water. Counsel for The Petitioner contends that this approach adopted by the Enquiry Officer is strange and should not be accepted, especially since there is no other corroborating evidence before the Enquiry Officer.

8. I am afraid there is no law which says that if there is no other witness then it must be presumed that nothing had been recovered by the raiding party. The fact remains that if the raiding party was guilty of such a high handed and improbable conduct, it would have been apparent even to other witnesses who were present there since this incident, admittedly, took place in a canteen and there could have been no dearth of independent witnesses to prove it. It is clear that the currency notes made their way into the pocket of The Petitioner, and, admittedly, the notes were recovered from his pocket. There is substance in the conclusion of the Enquiry Officer that if The Petitioner had not handled the money, which was allegedly thrust into his pocket by the raiding party, he should have asked them to wash their fingers in water. Admittedly, he did not file any report or complaint in this behalf contemporaneously. Under the circumstances, to my mind, the highest case of The Petitioner can be that the recovery by the raiding party should have been treated with caution in the absence of any independent witness to testify about the recovery, but it cannot be rejected altogether.

9. Another ground on which The Petitioner challenges his termination is that the charge sheet issued to him was based entirely on the information provided by the CBI, even though, before the Special CBI Court at Dehradun, the CBI had submitted the same report stating that there is no evidence against The Petitioner for making out a prima facie case that would oblige The Petitioner to

face trial. The Petitioner, therefore, submits that under such circumstances, the department should not have initiated the enquiry.

10. It is settled law that it is always open to the department to initiate proceedings during the pendency of criminal proceedings with regard to the same subject matter, it is also settled law that the standard of proof which is required for a prosecution to succeed in a criminal trial, which would result in penal consequences, is quite different from the standard by which departmental enquiry is to be conducted. It is important to understand the reasons why the CBI decided not to proceed in the matter.

11. An examination of the final report submitted by the CBI u/s 173 Code of Criminal Procedure filed before the Court of the Special Judge, CBI, Dehradun on 4th June, 2008, as well as the overall circumstances, shows that the CBI had submitted that it would not be possible to substantiate the allegation "beyond reasonable doubt. Towards this conclusion, a number of reasons were given. One of them, inter alia, was that the seal which was placed on the exhibits, such as hand washes etc., was broken during the departmental proceedings. Consequently, these exhibits would lose their authenticity and reliability. Admittedly, the seals came to be broken not because of any malafide or undue interference, but in a manner and for a purpose that can be explained during departmental proceedings. This would, nevertheless, cast "a shadow of doubt" on the case of the prosecuting agency. Furthermore, a fresh investigation was ordered by the Court of Special Judge, CBI on 16th October, 1999 because the case diaries in that case had been damaged by white ants. Moreover, the independent witnesses, during their re-examination, had stated that almost 20 years had passed since the incident happened and hence they were not in a position to recollect the facts accurately. It was largely because of these reasons that the CBI decided not to pursue the case and sought closure.

12. Another factor pointed out by counsel for The Petitioner was that although the complainant, Ram Prakash, had stated that The Petitioner had demanded bribe from him on 18th September, 1988, he lodged a complaint before the CBI only on 2nd October, 1988. According to the counsel, this delay was unreasonable and was not explained by the complainant. Ex facie, I do not consider this to be an unreasonable delay.

13. Counsel further states that the loan application form which was seized during the trap proceedings was not completely filled and it only had the signatures of the complainant. He contends that although the form was recovered from The Petitioner during the trap proceedings, there is no record to specify that the form was received by The Petitioner from the complainant himself, and, it could not be ruled out that this form had reached The Petitioner through "proper office channel".

14. Although these are also the reasons which prompted the CBI to close the case, however, as far as the latter are concerned, I do not see how this weakens

the case of the CBI. Considering the circumstances of the complainant, who is a mere khalasi, to have mustered the courage to go to the CBI and lodge a complaint is not a simple and easy thing. The filing of the case by the complainant before the CBI after two weeks of demand for a bribe cannot be taken up as an unreasonably long period. The allegation is that the accused was demanding a bribe from the complainant, "for filling up and forwarding the form for loan", which the complainant wanted. The pertinent fact, therefore, is that The Petitioner had control over the relevant form. It is not inconceivable that the incomplete form had been signed in advance by the complainant and given to The Petitioner to be completed by him with a view to ensuring that the same is in order. It was always open to The Petitioner, being the officer concerned, to fill in all the particular details after discussing the same with the complainant. This is all the more so when the allegation is that The Petitioner had assured the complainant that if he paid him Rs. 50, The Petitioner would ensure that his form was properly filled and forwarded. In this connection, it is also relevant that The Petitioner admittedly had possession of that form, and if the form was not properly filled, why was he still holding that form. The only reason for holding that form could be that he was waiting for some further developments.

15. However, there may be some substance in the other reasons given by the CBI for not continuing with the prosecution, which have also been noted above, such as the fact that the seals were broken, the witnesses were not inclined to depose after 20 years, etc. This is, therefore, not a case where prosecution was not taken forward because there was no evidence whatsoever and that the accused was completely innocent, rather, the only reason why it was not taken forward was that the prosecuting agency was not sanguine about securing a conviction keeping in mind the standard of proof that is required in criminal trials. To my mind, such an action would certainly not debar an administrative enquiry and departmental proceedings.

16. Counsel for The Petitioner relies on the judgment of the Supreme Court in G.M. Tank Vs. State of Gujarat and Another, , for the proposition that if the departmental enquiry and the criminal proceedings are based on identical and similar set of facts and evidence, same witnesses are examined in criminal case and the criminal court "honourably" acquitted the employee; finding to the contrary recorded during the departmental enquiry would be unfair and oppressive and any dismissal order issued under such circumstances could not have been sustained.

17. In this case, however, there was no trial and hence there can be no question of the criminal court, "honourably", acquitting the accused. Counsel, however, insists that a case where the CBI decides not to proceed with the matter stands on a much better footing than a case where the delinquent officer has, in fact, been tried by the criminal court and honourably acquitted, and consequently, benefit of the ratio of this judgment should be given to The Petitioner also. I do not agree. There is a vast difference between a case where a man suffers a full

criminal trial and is then acquitted, "honourably", and a case where the prosecuting agency files a report in the court seeking to close the case, not because, in its opinion, the accused is an innocent man against whom there is not an iota of evidence, but because it is not confident of securing a conviction. To my mind, the two situations cannot be equated.

18. Another ground of challenge adopted by the counsel for The Petitioner is that the Tribunal had passed the impugned order without any application of mind. In this regard, he states that the Tribunal had merely reproduced the averments of The Petitioner made in the statement of claim verbatim, and had, thereafter, proceeded to reproduce the stand of the management verbatim, which was followed by its decision without any reasons. Counsel further submits that non-application of mind by the Tribunal becomes clear on reading the Award, wherein it was stated that, "it was a case of bribe of Rs. 50/-, so the CBI did not lodge FIR." He contends that the CBI had not only lodged an FIR, but had also filed a case in the Court of Special Judge, Anti Corruption, CBI u/s 161, Indian Penal Code, where the Judge had closed the case on filing of closure report by the CBI.

19. Counsel for The Petitioner also submits that the Tribunal had failed to examine, inter alia, the allegation of The Petitioner that the management had taken into consideration his past record whilst deciding his case. It has been the case of The Petitioner throughout that the order of punishment, dated 17th June, 1992, is based on extraneous matter. This is demonstrated by the following portion of that order;

...it has also been seen from the records that Shri Pratap Singh was dismissed earlier also for misconduct in November, 1985

According to The Petitioner, he did not get an opportunity to meet this new and extra charge. Counsel further points out that it is the management's own case that the punishment meted out to The Petitioner, "was in view of his past working record....", and, therefore, indisputably, in relation to the current allegation, his previous record was also considered by the management before deciding his punishment. The management, in the written statement as well as in their evidence by way of affidavit submitted before the Tribunal, and again in its counter affidavit, had categorically accepted that the past record of service of The Petitioner was taken into consideration while passing orders of removal from service. According to counsel, this could not have been done without framing an appropriate charge incorporating this aspect and affording The Petitioner adequate opportunity to meet it. He further submits that as a matter of fact, the previous dismissal of November, 1985, was set aside, and The Petitioner was taken back on duty and since then he had been serving satisfactorily for 7 years.

20. Therefore, the only thing that must be examined in this matter is the scope of jurisdiction of the Disciplinary Authority when the question of awarding punishment arises, i.e. the scope of its power when it has to decide the quantum of punishment. Admittedly, there is a range of punishments that can be imposed

once the delinquent official is found guilty. While deciding the quantum of punishment, several factors like the gravity of the offence, the circumstances in which the offence was committed, etc. are to be considered. Now, the question for consideration is whether the Disciplinary Authority, at the same time, can also examine his past record for the purpose of determining the quantum of punishment.

21. The case of The Petitioner, therefore, is that his past record was taken into consideration whilst awarding the punishment of removal from service and since he was not put on notice regarding this fact, that order cannot be sustained. Counsel for The Petitioner relies on the decision of a Constitution Bench of the Supreme Court in, *State of Mysore Vs. K. Manche Gowda*, , for the proposition that if the proposed punishment is mainly based on the previous record, then, the notice to the employee must disclose this. However, the case of *The State of Mysore*(supra) can be distinguished from the instant case because here, there was no recommendation with regard to the punishment that ought to be imposed on The Petitioner. The report was confined only to the charges that had been framed. It was only thereafter that the competent authority, whilst making up its mind with regard to the punishment to be awarded, has taken into account the past record of The Petitioner. So, this is not a case where the Disciplinary Authority proposed to impose a harsher punishment than what had been recommended, as was the case in *The State of Mysore* (supra).

22. Counsel further submits that the Supreme Court, in the case of *Khem Chand Vs. The Union of India (UOI) and Others*, wherein the importance of giving a reasonable opportunity to the government servant to show that he does not merit the punishment proposed to be meted out to him was emphasized. Further, in the case of *Gopalrao v. State* AIR 1954 Nag 90, at pages 91 and 92, the fact that the previous record of the government servant was taken into consideration in awarding punishment, without bringing this fact to his notice, and without giving him a reasonable opportunity in that regard, was held sufficient to vitiate the order.

23. Further, the Supreme Court, in para 7 of *The State of Mysore* (supra) also held that "if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation." Again, in para 8 thereof, the Supreme Court held as follows:

...nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same.

24. A perusal of the same shows that while it is open to the Disciplinary Authority to take into consideration the past conduct of the delinquent officer, what is

necessary is that a reasonable opportunity should be given to the concerned officer so that he may be in a position to meet the same if he so desires. Counsel for The Petitioner, however, contends that this opportunity was not given.

25. The basic protection to an employee under Article 311 of the Constitution of India, or any other relevant statute with regard to a government servant, is that before any order punishing him is passed, he must be given a proper opportunity of meeting all the allegations against him. Naturally, therefore, if a punishment is sought to be imposed taking into consideration not only the finding of the inquiry officer on the charge framed qua the complaint in question, but also his past conduct; then, the fact that the employer intends to keep in mind his past conduct must also be brought home to the employee, either as a separate article constituting one of the charges on the basis of which the inquiry is instituted, or even later on, but before a final decision is taken by the Disciplinary Authority before whom the recommendations of the inquiry officer are placed. Admittedly, in the impugned award, the learned Labour Court failed to deal with this aspect of the matter. The Labour Court did not go into the question whether, under the circumstances, the management was justified in considering the past conduct of The Petitioner while deciding the quantum of punishment.

26. In the present case, admittedly, the past conduct of The Petitioner did not form part of the charge-sheet. The Petitioner was also not informed that in arriving at its decision, the Disciplinary Authority is also likely to take into account his past conduct. Thereafter, the findings of the inquiry committee went up to the Disciplinary Authority; and the Disciplinary Authority was obliged to apply its mind to them, even at that juncture, it was open to the Disciplinary Authority to inform The Petitioner that it also intended to examine his past conduct and to give him an opportunity to have his say before arriving at a conclusion. The Disciplinary Authority, however, did not do any such thing.

27. In his appeal against the decision of the Disciplinary Authority, The Petitioner had raised the ground that he had no notice of the fact that his past conduct would also be taken into consideration against him and that, therefore, that ought not to have been taken into account at all. In the alternative, it was also contended that on facts, his past conduct was explainable, and the so called earlier dismissal from service was, in fact, set aside and he was reinstated in service. However, the Appellate Authority also failed to consider this aspect of the matter.

28. Before the Labour Court also, The Petitioner pointed out that the alleged punishment, which was stated to have been imposed on him earlier, and which had influenced the mind of the Disciplinary Authority, had, in fact, been set aside and The Petitioner was taken back on duty. and that he had served satisfactorily for seven years thereafter. Counsel contends that the Labour Court had not dealt with this issue at all.

29. Counsel for The Petitioner has also referred to a decision of the Supreme

Court in *Indu Bhushan Dwivedi v. State of Jharkhand and Anr.* in Civil Appeal No. 4888/2010 decided on 5th July, 2010, in particular, paragraph 11, 12, 13, 17 & 18 thereof. In para 18 of this judgement, the Supreme Court observed as follows:

When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the employee aware of the specific imputations of misconduct but also disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the ground of the violation of the rule of *audi alteram partem*. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty bound to act in consonance with the rules of natural justice

30. The question of consideration of past conduct was, *inter alia*, also considered by the Supreme Court in *Mohd. Yunus Khan Vs. State of U.P. and Others*, where it was stated as follows:

34.....If the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment." It was also concluded therein that, "37.....past conduct of an employee should not generally be taken into account to substantiate the quantum of punishment without bringing it to the notice of the delinquent employee.

31. I also note that in the case of *Mohd. Yunus Khan (supra)*, whilst concluding that the order of punishment is null and void and therefore, cannot be given effect to; keeping in mind the fact that the Appellant had already reached the age of superannuation and in order to meet the ends of justice, the Court was of the view that it would suffice if the Appellant is paid 50% of the wages from the date of removal from service till the date of reaching the age of superannuation. It was also directed that retiral benefits in accordance with law be made available to the Appellant.

32. Under the circumstances and in view of the fact that the Disciplinary Authority had clearly taken into consideration past conduct of The Petitioner whilst deciding the quantum of punishment without bringing this aspect to the notice of The Petitioner, the petition deserves to be allowed. Consequently, the impugned order of the Tribunal, as well as the orders of the Disciplinary Authority dated 17th June, 1992 and the Appellate Authority dated 16th November, 1994 are all quashed and set aside. Since The Petitioner has already reached the age of superannuation; and in the light of the approach adopted by the Supreme Court in *Mohd. Yunus Khan (supra)*, The Petitioner shall be paid 50% of the wages from the date of his removal from service till the date when he would

have reached the age of superannuation. The retiral benefits, in accordance with law, from the date he would have retired in the normal course if the impugned orders had not been issued, which have remained unpaid, and which may become due and payable as a consequence of this judgment, shall also be computed by the Respondent in terms of the relevant rules and paid to him by the Respondent within three months from today.

33. The petition is disposed off in the above terms. CM Appln. No. 2059/2010 in WP(C) No. 5653/2007

34. In view of the judgment passed in Writ Petition (C) No. 5653/2007, this application does not survive and the same is disposed off as such.