
(1995) 01 CAL CK 0002
In the Calcutta High Court
Case No : C.O. No. 11729 (W) of 1979

Probhat Chandra Ghosh

APPELLANT

Vs

Damodar Valley Corporation and Others

RESPONDENT

Date of Decision : 05-01-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 33A, 35, 4
Constitution of India, 1950 — Article 226

Citation : 99 CWN 346

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : Amar Nath Dole and Prasun Ghosh, for the Appellant; Amulya Mukherjee, for the Respondent

Judgement

Shyamal Kumar Sen, J.—In the instant writ petition, the petitioner has challenged the order dated 10th December, 1975 passed by the General Manager and Secretary, Damodar Valley Corporation in exercise of the powers conferred on him by Memo No. WG-81/55-2048 dated 14.3.60 in terms of Clause (ii) and (iv) of Regulation 96 of D.V.C. Service Regulation. The said order inter alia provides :

a) The existing pay of Shri Ghosh shall be reduced by the equivalent on one increment, in his present time scale with effect from 1st January, 1976.

b) No increment shall accrue to him during the next three years from 1.1.1976 with cumulative effect.

c) During this period of three years he shall not be considered for any promotion.

Regulation 96 of D.V.C. Service Regulation runs as follows :

Regulation 96 : The following penalties may for good and sufficient reasons and as hereinafter provided, be imposed on an employees of the Corporation, namely

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- (i) Censure;
- (ii) Withholding of increment or promotion:
- (iii) Recovery from pay of the whole or part of any pecuniary loss caused to the Corporation by negligence or breach of order;
- (iv) Reduction to a lower class of post or to a lower time scale, or to a lower stage in time scale;
- (v) Compulsory retirement of employee in permanent employment
- (vi) Removal from the service of the Corporation, which shall not be a disqualification for future employment.
- (vii) Dismissal from the service of the Corporation which shall ordinarily be a disqualification for future employment.

2. For the purpose of true appreciation of the question involved in the instant writ petition, it is necessary to consider the facts which are, inter alia, stated hereinafter :

a) On 17.12.63 the petitioner was appointed as Assistant Engineer (Electrical) by the D.V.C. and was posted at Maithan. Thereafter he was promoted to the post of Executive Engineer (Operation & Maintenance) and was posted in the office of the Chief Engineer (Operation & Maintenance) D.V.C.

b) On 1.6.68 the General Superintendent (Central Load Dispatch) D.V.C. Maithan addressed a letter to the Controller of Purchase and Stores D.V.C. Calcutta stating that the cables offered by M/s. Asian Cables against item No. 1 and 2 are also acceptable to them on the basis of the sample sent by them. But whether order for item Nos. 1 and 2 also can be placed on M/s. Asian Cables is a matter to be decided by the Calcutta Office. It was also stated that besides the offer of M/s. Asian Cables, offers of following tenderers are also technically acceptable to them on the basis of samples received.

1) M/s. Radio & Electrical Mfg. Co. for item Nos. 1,2 and 3.

2) M/s. Premier Cables for items 2 and 3.

3) M/s. Power Cables for items 1,2 and 3 provided those are of standard conductor.

c) On 10.7.68 the General Superintendent, Central Load Dispatch D.V.C. Calcutta on the subject of D.V.C. Flexible Central Cable, asking him whether orders for item Nos. 1 and 2 have been placed or not. It was stated that if M/s. Power Cables have not confirmed that their cables are of standard conductors, order should go to the next lower bidder amongst those whose offers have been technically accepted.

d) The Director of Personnel, D.V.C. issued a charge-sheet against the petitioner

on the allegation that during July 1968 while he was looking after the purchase of certain goods and materials on behalf of the Corporation he has committed gross misconduct in placing the order to M/s. Asian Cables Corporation whose rates were higher than that of other tenderers, which caused heavy loss to the Corporation. He was asked to show cause why disciplinary action should not be taken against him under Regulation 96 of the D.V.C. Service Regulations.

e) On 20.3.71 the petitioner gave a reply to the said charge sheet denying the allegations against him.

f) On 3.8.71 the Dy. Superintendent of Police, Central Bureau of Investigation S.P.E. Division Calcutta intimated the Dy. Chief Electrical Engineer (C & M) D.V.C. Maithan Dam that henceforth the case would be presented by Sri H.N. Paul, Inspector of the said Branch.

g) On 20.3.75 the General Manager and Secretary of D.V.C. issued a second show cause notice stating why he should not be dismissed from service, under Regulation 96(vii) of the D.V.C. Service Regulation. The same was coupled with enquiry report.

h) On 1.9.75 the petitioner submitted his reply to the second show cause notice.

i) On 10.12.75 by an order of the General Manager and Secretary of D.V.C, penalties were imposed in terms of Clauses (ii) and (iv) of Regulation 96 of D.V.C. Service Regulation.

a) existing pay shall be reduced by the equivalent of one increment in the present time scale w.e.f. 1.1.76.

b) No increment shall accrue to him during the next three years from 1.1.76 with cumulative effect.

c) during this period of three years he shall not be considered for any promotion.

j) On 26.2.76 the petitioner was allowed to cross the efficiency bar and was designated as Executive Engineer w.e.f. 1.8.72.

k) On 14.3.60 by Memo No. WG-81/55-2048 Administrative and Financial, powers of the General Manager and Secretary were determined.

l) On 8.8.78 the petitioner made a demand for justice.

m) On 11.8.87 he was promoted to the post of Superintending Engineer.

3. It has been contended on behalf of the petitioner that Regulation 96(ii) provides for withholding of increments or promotion, which is a substantive piece of legislation. There is no provision for withholding increment with cumulative effect; so imposition of such penalty is wholly illegal and without jurisdiction being not warranted under the Regulation and as such the same is liable to be set aside.

4. It has also been submitted by the learned Advocate on behalf of the petitioner that the General Manager and Secretary of the Corporation has no authority to issue penal order or to issue show cause notice upon the employee whose pay scales exceeds Rs. 600/- and the respondent/Corporation has not delegated any such power in this case to the General Manager and Secretary, to pass any penal order. It is on record that the salary of the petitioner was above Rs. 600/- and as such, the General Manager and Secretary could not have any authority to issue such penal order withholding increment with cumulative effect. The order dated 10th December, 1975 therefore, was issued in clear violation of the Rules of the Corporation. The said order, therefore, was issued without any authority of law and as such, is liable to be set aside.

5. Mr. Dhole, the learned Advocate for the petitioner has relied upon the judgment and the decision in the case of Food Corporation of India vs. State of West Bengal and Ors. while interpreting Rule 8(ii) of the West Bengal Services (Classification, Control and Appeal) Rules, 1971 it was held by R.C. Borooah, J. (as he then was) that it is not permissible to pass an order withholding increment with cumulative effect. Sub-Rule (ii) of the said Rules provides "withholding of increment or promotion." Nowhere in Rule 8 there is such a penalty as withholding increment with cumulative effect. That withholding of increment simplifier and withholding of increment with cumulative effect had different meanings and implications would be apparent on a reference to Rule 16(A) of the Central Civil Services (Classification and Control) Rules, 1965 which provide both for withholding of increment of pay for a period exceeding three years of withholding of earned pay with cumulative effect for any period. As such, it was held that the Regional Manager by imposing the penalty of stoppage of five increments with cumulative effect had different meanings and implications would be apparent on a reference to Rule 16(A) of the Central Civil Services (Classification and Control) Rules, 1965 which provide both for withholding of increment of pay for a period exceeding three years of withholding of earned pay with cumulative effect for any period. As such, it was held that the Regional Manager by imposing the penalty of stoppage of five increments with cumulative effect on- the petitioner acted beyond the powers given to him by the West Bengal Rules. As such the said order was set aside.

6. The learned Advocate for the respondent on the other hand contended that Regulation 98 of the D.V.C. Service Regulation provides for withholding of increments with cumulative effect for any period and as such the said penal order is valid.

7. Regulation 98(1) of D.V.C. Service Regulation runs as follows :

Regulation 98(1) : No order imposing any of the penalties specified in Clauses 9i) to (iii) of Regulation 96 shall be passed except after -

(a) the employee has been informed in writing of the proposal to take action against him and of the allegations on which action is proposed to be taken and

has been given an opportunity of making any representation he may wish to make;

(b) Such representation, if any, has been taken into consideration by the authority competent to impose the penalty.

Provided that, if in any case, upon consideration of the representation if any, made by an employee under Clauses (a) and (b), the authority competent to impose the penalty proposes to withhold increments of pay which is likely to affect adversely the amount of pension payable to such employee or to withhold increments of pay for a period exceeding three years or to withhold increments of pay with cumulative effect for any period, an enquiry shall be held, in the manner provided in Sub-Regulation (2) before an order imposing such penalty is passed.

8. Considering the facts and circumstances of the case, it appears to me that the provision contained in Regulation 98(1) lays down the procedure as to how the particular kind of penalties referred to in 96(i) to (iii) will be imposed. So it is a procedural law which cannot override and/or impose any kind of penalty which has not been referred to the substantive Regulation 96. Be that as it may, Regulation 98(a) provides that the employee should be informed in writing of the proposal to take action against him. It appears from the show cause notice dated 20.8.75 marked as Annexure "D" to the writ petition to the following effect

You are, therefore, required to show cause within 15 days from the date of issue of this notice why you shall not be dismissed from the service of the Corporation under Regulation 96(vii) of the DVC Service Regulations. If no reply is received from you within the period stipulated above, it shall be presumed that you have nothing to state in your defence and orders shall be passed according to the DVC Service Regulations.

A.K.M. Hasan. 20.8.75. General Manager & Secretary. Damodar Vally Corporation. Memo No. VIG-11/69-1552. August 20. 1975

9. It appears from the said show cause notice that the petitioner was asked to show cause why he should not be "dismissed" which is a kind of punishment under Regulation 96(vii). The Regulation 98(1) relates to the kind of penalties as referred to Regulation 96(i) to (iii). So this show cause notice was not issued in strict compliance with provision of 98(1) (a) and as such the imposition of penalty following the said procedure as prescribed in the said regulation cannot be said to be proper and valid.

10. The Regulation 96(ii) provides "withholding of increment of promotion." The word "or" is used here as disjunctive and not conjunctive. It is the intention of the legislature to impose one kind of penalty instead of two kinds of penalty simultaneously which is a clear departure from the Regulation. So the said order according to the learned Advocate of the petitioner cannot be said to be sustainable in law, as both the penalties have been imposed in the instant case.

11. In my view, the contention of the learned Advocate for the petitioner cannot be said to be without any substance. That apart the General Manager and Secretary of D.V.C. not being the disciplinary authority is not at all competent to issue the impugned penal order dated 10.12.1975 marked -as Annexure "F" of the writ petition.

12. At the relevant time of imposition of penalty, the petitioner was Junior Executive Engineer-A-Class-1 Officer and his scale of pay was Rs. 700-40-1100/-.

13. In view of the admitted position the Corporation being the disciplinary authority is competent to impose the penalty and not the General Manager and Secretary who is not even empowered by the Memo No. WG-81/55-2048 dated 14.3.60 which clearly shows that the General Manager and Secretary has not been given such power as it appears from Clause (xi) of Annexure "F" of the writ petition.

14. The learned. Advocate for the petitioner has relied upon the judgment and decision in the case of Manihar Singh Vs. Superintendent of Police and Others, In the aforesaid decision, it has been held that the framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. All these steps are required to be taken by the disciplinary authority and not by a delegate of that authority. In the absence of a statutory provision permitting expressly or impliedly delegation of disciplinary powers, an authority other than the disciplinary authority has clearly no power to frame, on its own initiative, charges against a civil servant and hold an enquiry into them.

15. It also appears that Regulation 98(2)(h) of the Regulation provides that the Disciplinary Authority shall, if it is not the enquiring authority, consider the record of the enquiry and record his finding on each charge. In the instant case the enquiry was held by the Additional Chief Engineer (O & M) systems and the second show cause notice and final order was passed by the General Manager and Secretary, the disciplinary authority has not at all recorded his own finding and dittoed the finding of the enquiry officer.

16. It is settled law that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all and all other modes of performance are necessarily forbidden as being violative of fundamental principles of natural justice, in this connection, reliance was placed on the decision in the case of Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, In the aforesaid decision the question involved was that, if the Divisional Engineer was empowered under Rule 422 of the Telegraph Rules to disconnect any subscriber in the event of any emergency with or without notice. It would be proper for the General Manager, Telephones, to pass such orders of disconnection purporting to act under Rules 422. The Supreme Court in this connection observed in paragraphs 15 and 16 as follows:

Rule 422 empowers the Divisional Engineer to disconnect any subscriber in the

event of any emergency with or without notice. The existence of "any emergency" to the satisfaction of the Divisional Engineer, appears to be a necessary prerequisite to the exercise of the power under this rule. It is significant that while Section 5 speaks of the occurrence of a "public emergency" satisfaction with, regard to the existence of which is to be recorded by the appropriate authority mentioned in that Section. Rule 422 purports to empower the Divisional Engineer to take action there under in the event of "any emergency". The scope of the words "any emergency" in Rule 422 is apparently wider than the expression "public emergency" used in Section 5. It follows that the satisfaction in regard to the existence of "any emergency" under Rule 422 is to be of the Divisional Engineer. He has to arrive at such satisfaction rationally on relevant material which may include any certificate or report of the appropriate Government as to the occurrence of a "public emergency". The requirement of recording such satisfaction by the Divisional Engineer, with reasons therefore, is implicit in the Rule. That will be a minimal safeguard against arbitrary exercise of this drastic power. In this connection, it will not be out of place to mention here, that Sub-Section (2) of Section 5 which made the Certificate of the Central/State Government conclusive proof as to the existence of a "public emergency" stood deleted and replaced by a different provision, at the time when the impugned action was taken in this case. That is an additional reason for holding that it was the Divisional Engineer who had existence of an Emergency, before taking action under Rule 422.

17. Having heard the counsel on both sides we are of opinion, that the impugned order suffers at least from one apparent defect of jurisdiction. The Supreme Court further held that where a power is required to be exercised by a certain authority in a certain way. it should be exercised in that manner or not at all and all other modes of performance are necessarily forbidden. The Supreme Court further observed that it is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided will be violative of the fundamental principles of natural justice.

18. The contention of the respondents is that there is provision for appeal and as such, the writ Court should not interfere. It is well settled that if the order impugned was made without authority of law and infringe the principle of natural justice, the same amounts to miscarriage of justice. In my view, the writ petition is maintainable. Reliance was placed in this connection to the case of Hindusthan Pilkington Glass Works Ltd. V. Superintendent Central Excise Asansol & Ors. reported in 1977(2) C.I.J. 408 . In the aforesaid decision, the question involved was if the writ petition is maintainable without an appeal under the Statute and at the hearing of the rule, a preliminary objection as to the maintainability of the writ petition was taken. It has been contended that the statute provides for a forum of appeal u/s 35 of the Central Excise and salt. Act 1944 and as such the writ petition is not maintainable. It was however held that in assessing the value of petitioner's goods for the purpose determining the excise duty u/s 4 of the Central Excise and salt Act, 1944, the Superintendent Central Excise had acted

as an authority exercising quasi-judicial functions. Such determination by him might prejudicially affect the petitioner's right. In the Act itself there is no provision for affording any personal hearing to persons interested before making orders on such assessments. So far as the present cases are concerned, the petitioner claimed certain deductions from the assessable value of the goods but such claims for deduction were disallowed by the authority concerned without assigning any reason in that respect, although the petitioner sought for an opportunity to make a proper representation of its case before the impugned orders were made by the authority concerned. The petitioner also made out a case that it also requested the authority concerned to let him know the reasons as to why its claims for deduction had been disallowed, but such requests of the petitioner had not been acceded to. In other words, the petitioner did not get any opportunity of making any representation as prayed for nor was the petitioner informed of the reasons for disallowing its claims for deductions as made at any stage of the proceeding. Be that as it may, in the circumstances of the case, incumbent upon the Central Excise Authorities to afford an opportunity of being heard before any such assessment order was made by the authority concerned. That has not been done in this case, hence it appears that the principles of natural justice had been violated in this case. The breach of the principles of natural justice is itself a miscarriage of justice which cannot be cured by preferring an appeal as provided in the statute itself. That being so it cannot be said that the petitioner's present applications under Article 226 of the Constitution would not be maintainable on the plea that a remedy by way of appeal has been provided in the statute itself. That apart, where it is found that the assessable value of the products has been determined and the assessment has been made on such value as determined without any authority of law, then it cannot be said that the present writ applications are not maintainable. Accordingly, the preliminary objection is not tenable in the circumstances of the case. In this connection, I may also take note of the judgment and decision in the case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, In the aforesaid decision the petitioner filed writ petition instead of availing of statutory remedy, the High Court entertained petition and heard the case on merits. It was also held that the petition cannot thereafter be rejected on the ground that satisfactory remedy was not availed of. In the aforesaid decision, it was held by the Supreme Court to the following effect:

It is true that a petition to revise the order could be moved before the Commissioner of Income Tax. But Hirday Narayan moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narayan could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold, that because a revision application could have been moved for an order correcting the order of the income tax officer u/s 35 but was not moved, the High Court would be justified in dismissing as not maintainable the petition,

which was entertained and was heard on the merits.

19. In the instant case, it may also be noted that the imposition of penalty admittedly took place in the year 1975 that is nearly 20 years back. The writ petition is pending since 1979 the affidavits have been filed. The question of alternative remedy was not suggested at the early stage. It will not be proper to relegate the petitioner to the alternative forum, as the petitioner will be superannuated from his service on attaining the age of 58 years on and from 28th February, 1995.

20. The main contention of the respondents appears to be that pursuant to the Circular General Manager was empowered to exercise all administrative and financial powers. The petitioner's pay scale admittedly was below Rs. 600/- at the relevant time. It appears to me that the said contention cannot have any basis since it has been already been noted that the Regulation 96 clearly prohibits the withholding of increment with cumulative effect and as already noted the procedure of show cause has also not been followed.

21. The learned Advocate for the respondents also relied upon the judgment and the decision in the case of N. Chandra v. D.V.C. and Ors. reported in 76 CWN 61 wherein it has been held that the writ Court has no jurisdiction to sit over the propriety or otherwise of administrative decision taken by the concerned authority and the Court also has no jurisdiction to question the wisdom of the authority in coming to a bonafide decision.

22. In my view, the aforesaid decision cannot have any application to the facts of the instant case. It is quite true that the Writ Court cannot sit in appeal over the decision of concerned authority but it is also well settled that the Writ Court can interfere in matters if the impugned orders are passed contrary to the relevant regulation or statute or without jurisdiction or in violation of the principles of natural justice. Accordingly, in my view, the writ petitioner should succeed in the instant case. The rule is accordingly made absolute. The impugned order withholding increment with cumulative effect will stand set aside and quashed and the petitioner will be entitled to all pecuniary benefits in accordance with law.

The writ petition, is accordingly disposed of.

There will be no order as to costs.