
(2009) 08 AHC CK 0222
In the Allahabad High Court

Raj Kumar Mishra

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 18-08-2009

Acts Referred:

Constitution of India, 1950 — Article 309, 311

Citation : (2009) 08 AHC CK 0222

Hon'ble Judges : Rakesh Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rakesh Sharma, J.—Heard learned Counsel for the parties.

2. The petitioner, Raj Kumar Mishra, who was dismissed from the post of Constable, while working in the Railway Protection Force, Northern Railway, has approached this Court by filing the present writ petition assailing the order of dismissal from services dated 30.5.1995 passed by the Senior Divisional Security Commissioner/ RPF, Northern Railway, Allahabad. The petitioner has also assailed the other orders dated 1.8.1996 and 24.12.1997, passed by the appellate and the revisional authorities, rejecting his appeal and the revision submitted by him.

3. It emerges from the record that at the relevant time, that is, on 7.12.1994, Constable Raj Kumar Mishra, the petitioner, was detailed to escort some wagons/ FSLR of Train No. 3008 Down Express from Fatehpur to Allahabad. It has been alleged that the seal of the wagons was opened by the thieves between Fatehpur-Allahabad section of the Railway route and 17 packages were stolen. For this incident, the petitioner was chargeshheeted on 27.1.1995. Three charges were levelled against him, firstly, that on 7.12.94, the petitioner was on escort duty of FSLR of Train No. 3008 Down Express and between Fatehpur to Allahabad Section, he failed to prevent theft of 17 packages from FSLR No. ER 6731 between Syedsarawan and Manohargang stations and failed to caught the thieves, secondly, on 7/8/December, 1994, on arrival of the Train No. 3008 Down

Express at Allahabad, the petitioner had failed to detect that the seal of FSLR No. ER 6731 were defective and had obtained wrong remarks from the Guard of the Train and thirdly the petitioner, on 8th December, 1994, on his return, has not scribed any detail in G.D. about the incident and detention of the Train enroute. The enquiry was entrusted to Sri T.S. Tiwari, TPF 54 SFG to enquire into the charges levelled against the petitioner. Lateron Sri V.S. Tiwari was nominated as the Enquiry Officer to conduct the departmental trial. After completing the enquiry, the Enquiry Officer had submitted the enquiry report/findings on 4.5.1995.

4. It is noteworthy that the Enquiry Officer did not find the Charge No. 1 proved against the petitioner. However, the Charge Nos. 2 and 3 levelled against the petitioner, regarding failure to detect the defect in seal and obtaining wrong remarks from the Guard, Incharge of the Train and not mentioning any entry in the G.D. regarding detention of the Train enroute, were found proved. The Punishing authority, on the basis of the enquiry report had ordered for the punishment of dismissal from service with immediate effect vide order dated 30.5.1995.

5. The petitioner has submitted, in his defence, and before this Court that he was deputed to escort FSLR of Train No. 3008 Down Express between Fatehpur to Allahabad section and he was not responsible for not detecting defect in the seal or theft in FSLR ER No. 6731. The responsibility of theft ought not to have been fastened on the petitioner. He was innocent of the charges levelled against him. The petitioner had obtained the remarks from the Guard after apprising the status of the wagons, escort duty of which has been entrusted to him in the Train. The petitioner had obtained "Seal Intact Remarks" for both the FSLRs from the Guard on arrival at Allahabad. Similar remarks were also obtained by Nayak Mohd. Ayub at Allahabad Station. The petitioner had discharged his duties bonafidely and honestly. Since main charge against the petitioner was not found proved, the Punishing authority ought not to have awarded a major penalty of dismissal from service against him.

6. The petitioner has further pleaded that the FSLR No. ER 3301, MSLR No. ER 6731 and RSLR No. ER 7973 were attached in the abovesaid Train on 7.12.1994, one after other. FSLR No. ER 6731 was shown as Middle Second Luggage Van. Learned Counsel for the petitioner submitted that the other Constables on duty were spared, while the petitioner was picked up and chosen for punishment.

7. It has been submitted by the learned Counsel for the petitioner that the petitioner was not afforded proper opportunity of hearing. He was not supplied with the documents, that is, the statements of witnesses recorded at the time of preliminary enquiry. He was denied opportunity to adduce his evidence in support of his defence. In fact, the petitioner, was exonerated of the main charge by the Enquiry Officer. The two charges were of minor nature, like, status of the seals on the wagon for which the petitioner was not responsible as he had already obtained "Seal Intact Certificate" from the Guard of the Train. The

Punishing authority had found all the charges proved and had ordered for dismissal of the petitioner from service. The Punishing authority ought to have given opportunity of hearing or had issued a show cause notice before awarding major penalty on the basis of its own findings. In the present case, the Punishing authority had not concurred with the findings recorded by the Enquiry Officer. If he has formed a different opinion, he must have recorded reasons and would have confronted the petitioner by issuing a show cause notice or affording the petitioner an opportunity of hearing as to why he had not agreed with the findings of the Enquiry Officer and of the opinion to dismiss the petitioner from service even on the basis of two minor charges. The Disciplinary authority had passed the order of punishment violating Rules, 153, 154 and 155 of the Railway Protection Force Act, 1957. His appeal and revision were dismissed without application of mind. Considering the nature of the charges, the punishment of dismissal from service was too excessive and harsh.

8. Learned Counsel for the petitioner has placed reliance on the judgment of the Hon'ble Apex Court as reported in *Yoginath D. Bagde Vs. State of Maharashtra and Another*, and the judgment of a Division Bench of this Court reported in (2002) 1 UPLBEC 596 *Jagdish Prasad Yadav v. State of U.P. and Ors.* in support of his submissions.

9. Learned Standing Counsel, appearing for the Union of India, has opposed the writ petition on the ground that the petitioner had committed a serious misconduct. While working as a Constable in the Railway Protection Force in Company No. 47 at Fatehpur, the petitioner was posted on escort duty on 7.12.1994 in Train No. 3008 DN Express from Fatehpur to Allahabad to look after F/SLR. In SLR No. 6731, 71 packages were booked and loaded alongwith Cartoons from Kanpur at 20:37 hrs. on 7.12.1994 and reached at Fatehpur at 2142 hrs, where petitioner was posted for safety of F/SLR. He checked all seals of SLRs and took over the charge. Train started from Fatehpur, but stopped for two minutes at Fazullahpur, 6 minutes at Athsarai and 7 minutes at Manauri due to signal and reached at Allahabad at 00:5 hrs. Petitioner failed to check defective seals at Allahabad and obtained wrong remarks from the Guard in his seal book as seals were intact. On return duty, on 8.12.1994, he did not make any report in G.D. about detention of train or anything about the incident and concealed the facts. Train reached at Mirzapur from Allahabad where it was found that seal of F/SLR No. ER 6731 was broken and the same was hanging on its Kunda. Due to shortage of time it could not be resealed. Defect of seal was detected at Mughalsarai where it was resealed. After unloading the packages at Howarah, only 54 packages were found and rest 17 packages were found short. On the same day, 245 leather belts and one Cartoon were recovered. Thus, the petitioner failed to prevent theft. Assistant Security Commissioner/RPF/Allahabad issued a charge-sheet against the petitioner. In departmental enquiry, the petitioner was found guilty of the charges and he was dismissed from service by the Senior Divisional Security Commissioner/RPF/Allahabad. Thereafter, the petitioner submitted appeal to Additional Chief Security Commissioner/RPF/

Northern Railway, Baroda House, New Delhi. The appeal submitted by the petitioner was dismissed by passing a reasoned and speaking order. Against the appellate order, the petitioner preferred a revision to the Chief Security Commissioner/RPF/Northern Railway, Baroda House, New Delhi, which too was dismissed. Learned Standing Counsel for the Union of India has further submitted that the departmental enquiry was conducted in accordance with the relevant Service Rules. Principles of natural justice were followed and the petitioner was allowed to put-forth his case effectively at every stage of the departmental trial.

10. I have heard learned Counsel for the parties and perused the materials on record including the chargesheet, reply to the chargesheet, findings of the Enquiry Officer, order passed by the Punishing authority and the opinion recorded by the Disciplinary Authority after considering the Enquiry Officer's report.

11. A perusal of the record reveals that the petitioner was exonerated of the main charge that on 7.12.1994, while he was detailed to escort aforementioned wagons of 3008 Down Express from Fatehpur to Allahabad, 17 packages were stolen and he had failed to prevent this theft and caught the thieves. The Enquiry Officer did not find this charge proved. The petitioner was declared innocent of this charge.

12. As far as the charge regarding failure to detect defect in seal is concerned, the petitioner has pleaded that he had obtained "Intact Seal Certificate" from the Guard of the said Train. It is interesting to note that neither the Enquiry Officer nor the Punishing Authority had expressed any doubt on the Certificate issued by the Guard. The Guard of the said Train was not examined or permitted to be cross examined by the petitioner as to under what circumstances, he had issued said Certificate. Further, if an "Seal Intact Certificate" was issued by the Guard of the Train, could it not be presumed that the seals were in order when the Train moved from Allahabad for onward journey and, thus, how the petitioner, who was not entrusted with the escort duty of the wagons after Allahabad, seals of which were broken on the way thereafter, could be held guilty or responsible for the said charge.

13. The third charge appears to be a trivial one. Taking the Charge Nos. 2 and 3 proved, it was incumbent upon the Punishing authority to have recorded reasons as to why and on what basis, he did not agree with the findings recorded by the Enquiry Officer in respect of main charge, that is, Charge No. 1.

14. A perusal of the dismissal order, dated 30.5.1995, shows that the Punishing authority had made his own assessment that all the charges levelled against the petitioner were, in fact, proved and as all the charges were of serious nature, the punishment of dismissal from services deserves to be passed against the petitioner. Only in two or three sentences such an opinion and conclusion ought not to have been recorded (vide Paragraph-6 of the impugned dismissal order dated 30.5.1995).

15. Law is well settled that if the Punishing authority disagrees with the findings recorded by the Enquiry Officer regarding a charge or some of the charges, he must record his own reasons as to how and why the charge or charges, according to him, were found proved. He has to evaluate the subject matter of charge and evidences cited in the Enquiry report. It was also incumbent upon him to have issued a show cause notice to the delinquent employee as to why he was in disagreement with the findings of the Enquiry Officer. He ought to have issued a show cause notice to the delinquent employee, that is, the petitioner to indicate to him the reasons of his disagreement. The Punishing authority must have taken into account version of the delinquent employee, the petitioner, before arriving at a conclusion to dismiss him from service.

16. It is noteworthy that in the instant case, the main charge, that is, first charge levelled against the petitioner, was not found proved by the Enquiry Officer, while the Punishing authority by a bald finding has recorded that he finds all the three charges proved against the petitioner-delinquent employee.

17. The Hon"ble Apex Court, while taking note of its earlier judgment has held in Paragraph 28 of the judgment rendered in the case of Yoginath D Bagde v. State of Maharashtra (supra) that "Opportunity of hearing may either be provided specifically by rules made under Article 309 of the Constitution or the Disciplinary Authority may, of its own, provide such an opportunity. Where rules are silent on this aspect and Disciplinary Authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the Inquiring Authority that the charges were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the Inquiring Authority's report is provided, principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the Inquiring Authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded."

18. A Division Bench of this Court in the case of Jagdish Prasad Yadav v. State of U.P. and Ors. (supra) following the decision of the Hon"ble Apex Court in the case of Yoginath D Bagde v. State of Maharashtra has held that "In Yoginath D Bagde v. State of Maharashtra and Anr. (1997) 7 Scc 739, their Lordships of the Supreme Court had again an occasion to consider the said question and while considering the question, their Lordships took note of the case of Punjab National Bank and Ors. (supra), Kunj Behari Mishra (supra), State of Assam v. Bimal Kumar Pandi AIR 1993 SC 1612 , Institute of Chartered Accountants of India Vs. L.K. Ratna and Others, , Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., , and Ram Kishan Vs. Union of India and others, , and held that the delinquent employee has the right of hearing not only during the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the later, namely the disciplinary authority forms a

tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed, removed or reduced in rank except after a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent upto the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution."

19. The impugned order of dismissal dated 30.5.1995 does not stand on the test as provided in the aforementioned judgment and several other pronouncements of the Hon'ble Apex Court as well as of this Court. In the light of the law laid down by the Hon'ble Apex Court in a catena of decisions and even otherwise also the two proved charges are not of such nature on the basis of which a Constable having 15 years of satisfactory service in the Railway Protection Force could be dismissed or removed from service. The order of punishment, that is, dismissal from services does not commensurate with the two charges, which were found proved against the petitioner, and as such the punishment of dismissal from service, passed against the petitioner, appears to be too excessive and harsh.

20. The petitioner's case finds strength from the judgments rendered by the Hon'ble Apex Court in the case of Yoginath D Bagde v. State of Maharashtra (supra) and the judgment of this Court in the case of Jagdish Prasad v. State of U.P. and Ors. (supra).

21. In view of the discussions made above, this Court is of the view that the petitioner ought not to have been dismissed from services vide impugned order dated 30.5.1995. His Appeal and Revisions had been rejected without application of mind and taking into account the illegalities and infirmities committed while passing the impugned order dated 30.5.1995. Accordingly, the writ petition succeeds and is allowed. The impugned orders dated 30.5.1995 passed by the Senior Divisional Security Commissioner/ RPF, Northern Railway, Allahabad,

1.8.1996 and 24.12.1997, passed by the appellate and the revisional authorities, rejecting appeal and the revision are quashed. The petitioner shall be immediately reinstated in the service and shall be entitled for all the consequential benefits. However, it may be open for the appropriate authority to pass a fresh order, if it deems it fit and proper in the circumstances of the case, in accordance with law, but no order of punishment of dismissal or removal from service or reduction in rank shall be passed against the petitioner on the basis of aforementioned two proved charges.