

(1965) 06 CAL CK 0033
In the Calcutta High Court

Ram Prabesh Driver

APPELLANT

Vs

General Manager, Eastern Railway and Another

RESPONDENT

Date of Decision : 01-06-1965

Acts Referred:

Constitution of India, 1950 — Article 226, 309
Government of India Act, 1935 — Section 241

Citation : 70 CWN 390 : (1967) 1 LLJ 311

Hon'ble Judges : Laik, J;A.C. Gupta, J

Bench : Division Bench

Judgement

Laik, J.—This appeal is directed against an order of our learned brother Sinha, J., dismissing: the application of the appellant, in which it was prayed that the order of his removal from the railway service should be quashed and be set aside by a writ in the nature of a mandamus or by other appropriate writs.

2. The long account of the relevant facts shortly is : On 5 November 1938, the appellant entered the railway service. In the year 1955, he was acting as an engine-driver. On 18 May of the said year, he, at his own request, got himself transferred from Barkakhana to Asansol. He gave a written declaration that he would not require railway quarters at Asansol. It is stated that while at Asansol, the appellant forcibly occupied a room in the quarters, meant for another person. As he refused to vacate, even after repeated requests a chargesheet was issued on 10 January 1956 on the appellant, which, however, was dropped, when on 31 June 1956, he was allotted a room in the railway quarters. But the appellant was not satisfied. Dispute arose between him and one Sri Bar-baro, the Assistant Mechanical Engineer, stationed at Asansol, over the occupation of the quarters by the appellant. Thereupon, the railway authorities decided to transfer him back to Barkakhana, on which the Loco Foreman, Barkakhana, wrote a letter to the Loco Foreman, Asaneol, on 13 (20) September 1956 to inform the appellant that at present there was no quarter available at Barkakhana. His transfer at that stage was, therefore, kept in abeyance. On 17 September 1956, the Divisional Personnel Officer, Asansol, directed the appellant to obtain an application for pass

on transfer. On the appellant's representation against the order of his transfer to Barkakhana, the Divisional Superintendent, Asansol, directed him to carry out the orders immediately. He was further directed to submit his application for passes on transfer at once. On 24 October 1956, the appellant interviewed the Divisional Personnel Officer, who again advised him to put in an application for transfer passes to Barkakhana with immediate effect. He was reminded that he should carry out his orders. He was further told that if he did not put in his application for transfer of passes within the next three or four days, severe disciplinary action would be taken against him for disobedience of his orders. The appellant, however, did not put in any application for his transfer passes to Barkakhana but on 6 November 1956 he saw Sri Barbaro who recorded the interview which was to the effect that the appellant told him that he would not go on transfer, even at the cost of his job. The matter was discussed by Sri Barbaro with the Divisional Superintendent who instructed him that since this was the appellant's attitude, he should be placed under suspension and a chargesheet under item 6, viz., "removal from service" should be given, with regard to his disobedience of orders and Insolence. On 9 November 1956, the chargesheet was Issued. It was handed over on 15 November. The charge was in substance that the appellant had refused to carry out the orders in spite of repeated requests forgetting himself transferred to Barkakhana and refused to vacate his quarters at Asansol, thereby disobeying the orders of his superiors. The further charge was that he behaved with Sri Barbaro in an insolent manner and "these actions amount to serious misconduct and disobedience of orders." On 30 November 1956, the appellant showed cause to the same. It was stated inter alia that he nurtured an ambition to educate his children but the proper facility was lacking at Barkakhana. As he could not pursue his studies for want of proper opportunities, he is now keen to fulfil his ambition by imparting education to his children at Asansol. He further stated that he tolerated various inconveniences and difficulties at Asansol by looking at the faces of his children and for their studies. He stated about the differential treatment meted out by Sri Barbaro (an Anglo-Indian) to the other Anglo-Indian drivers. According to the appellant the same treatment was not meted out to him by Sri Barbaro, he being a Harijan, down-trodden in the society. He denied that he refused to carry out or disobey the orders. As the appellant was feeling helpless, he prayed for reconsideration of the order of his transfer.

3. On 30 November 1956, the Divisional Superintendent, Asansol, directed a departmental enquiry to be held by the Assistant Mechanical Engineer. The appellant was informed of the same. The enquiry was adjourned to 27 December 1956. As the appellant reported sick, the same had to be postponed on 5 January 1957 and also thereafter, at his request. Ultimately the enquiry was fixed to be held on 25 January 1957. On the said date, the appellant wanted to have it again postponed. A suggestion by the defence counsel was put by way of an application to the chairman, enquiry committee, to put the appellant to his duty with immediate effect and postpone the enquiry till such time Sri Barbaro

comes back from leave, as he is the main complainant; more so, as the appellant has also complaints against Sri Barbaro. The evidence of Sri Bar-baro being not considered necessary, the enquiring officer proceeded with the enquiry on the said date, i.e., on 25 January. The appellant gave evidence and he was cross-examined. On being questioned as to why he did not obey the orders and carry out the instructions, his answers were, " I did nothing about this"; "I did not apply for any passes as I got no opportunity to do the same" and he further told that he was prepared to apply for passes to go to Barkakhana leaving his family at Asansol, provided his family members are allowed to remain in the quarters he was now occupying and that he was only ready to carry out the orders on promotion. Lastly in answer to question 8 as to whether he still persists in his refusal to carry out the orders of transfer unconditionally, the answer was " I refuse to carry out the orders unless the conditions I lay down above, are fulfilled." Thereafter, the enquiry committee, inter alia found on evidence that the appellant was responsible " for deliberate disobedience of orders and misconduct."

4. In the report of the enquiry committee, it was noted that the appellant's reply to the chargesheet was more in the nature of an appeal than answer to the charge. The fact of his persistence in his refusal to carry out the orders was also noticed. A show-cause notice was thereafter issued to the appellant on 16 February 1957 by the Divisional Mechanical Engineer. As this was done through mistake, the same was cancelled. A fresh show-cause notice was issued by the Divisional Superintendent on 2 April 1957. On 10 April 1957, the appellant submitted his explanation. It was considered by the Divisional Superintendent. On 27 April 1957, the appellant was removed from service as a disciplinary measure. Thereafter the rule was issued which was ultimately discharged by Sinha, J., against which the instant appeal has been preferred.

5. Before Justice Sri Sinha, only three grounds appear to have been urged. The first ground was that the whole proceeding is mala fide because the appellant had incurred the wrath of Sri Barbaro who had caused this removal order to be passed by the Divisional Superintendent. Justice Sri Sinha did not believe the story of mala fide and held that in any event there was no evidence of mala fide. The second ground was that the appellant did not commit such an offence as to warrant his dismissal. Justice Sri Sinha did not accept the said contention also, and held that the disciplinary action was amply justified from the facts of the case. The last ground was that the show-cause notice was issued by the Divisional Mechanical Engineer who was not the punishing authority, on which Justice Sri Sinha, held, that the Divisional Mechanical Engineer was acting under the orders of the Divisional Superintendent who is admittedly the punishing authority.

6. Before us, Sri Nani Coomar Chakrabarti, the learned advocate in support of the appeal, contended that the procedure of enquiry laid down In paragraph or Rule 1707 in Section II of Chap. XVII, namely, Discipline and Appeal Rules (for

non-gazetted staff) of the Indian Railway Establishment Code, Vol. I (second reprint), published in the year 1951, has not been followed and therefore the whole enquiry is bad ; and consequently the order of removal, passed on such an enquiry, is fit to be quashed and set aside by an appropriate writ. He develops his argument by submitting three main points:

(a) the reasonable opportunity of the defence by the appellant, was denied by the Railway Administration in the way of not producing Sri Barbaro at the enquiry, whose non-production has vitiated the whole enquiry,

(b) as the chargesheet or the first show-cause notice has not been issued by the punishing or the dismissing authority, the whole enquiry is without jurisdiction ; and lastly,

(c) the enquiry report does not contain the recommendation of the officer and as such the order of removal based on such report without having any recommendation is wrong and fit to be set aside. Two short submissions on the points of mala fide and serious misconduct were also made.

7. Paragraph 1707 of the Railway Establishment Code reads as follows:

1707. Procedure for dismissal-When a railway servant is charged with an offence the maximum penalty for which is dismissal, the procedure for holding an enquiry shall be as follows:

(a) A chargesheet shall be presented to the railway servant detailing the charge or charges against him and calling upon him to show-cause why he should not be dismissed or removed from service or punished with any of the lesser penalties specified in Rule 1702. He shall be required to submit a written explanation by a fixed date, which shall ordinarily allow him an interval of seven clear days from the date he receives the chargesheet. If the railway servant is illiterate or semi-literate, the charge-sheet shall be read out and explained to him by a gazetted officer or a selected senior non-gazetted railway servant, who shall record railway servant's explanation.

(b) The chargesheet with the explanation furnished by the railway servant shall be considered by the officer competent under these rules to pass an order of dismissal who, unless he takes steps for holding a departmental enquiry, shall, thereupon, pass such orders as he thinks fit.

(c) If the railway servant asks to be heard in person or if the officer competent to pass an order of dismissal considers that the railway servant should be examined in person he shall cause a departmental enquiry to be held. The railway servant if he so desires, may be accompanied by another railway servant and the officer or the committee of enquiry shall give the railway servant all reasonable facilities for the conduct of his defence including the cross-examination of witnesses.

(d) At such an enquiry a definite charge in writing shall be framed and explained to the railway servant in respect of each offence which has not been admitted by

him, and the evidence in support of it, as well as his defence, along with any evidence which he may adduce in defence, shall be recorded in his presence:

Provided that for special reasons to be recorded in writing, the officer or the committee of Inquiry may refuse to call any witness suggested by the railway servant and may decide that the evidence of any witness should be taken and recorded otherwise than in the presence of the railway servant.

(e) The result of the departmental inquiry, with the recommendation of the officer or the committee holding the inquiry, shall be placed before the officer competent under the rules in this section to pass an order of dismissal, who shall thereupon pass such orders as he thinks fit.

(f) Notwithstanding anything contained in the foregoing clauses of this rule, no formal inquiry is necessary when the order of dismissal is passed on the strength of facts or conclusions arrived at by a judicial trial or trial by Court-Martial or when the accused is absconding.

8. Turning to the first contention now, I am of opinion that Sri Barbaro might have been a relevant witness if the appellant would have been removed, only on the ground of his insolence to Sri Barbaro. In that event, Sri Barbaro or the other persons in whose presence the appellant was stated to have become insolent, should have been produced by the Railway Administration in support of the said charge. Sri Bhabesh Narayan Bose, the learned advocate on behalf of the respondent-railway, with his usual frankness and in my view, rightly concedes, that the charge of insolence to Sri Barbaro was not and could not be brought home against the appellant in the facts of this case. But as insolence is not the main charge, Sri Bose submits, and in my judgment rightly, that intentional and repeated disobedience by the appellant of the orders of his superiors would itself amount to a serious misconduct, for which the appellant was removed from service. In my view, non-production of Sri Barbaro in such circumstances as witness, during the enquiry, has not vitiated the enquiry proceeding.

9. Such contention is not accepted by Sinha, J., either in the case of Krishna Gopal Bose v. Director of Telegraphs 60 C.W.N. 692 or in the case of A.R.S. Choudhury Vs. The Union of India (UOI) and Others, . The unreported judgment of Justice Sri P. B. Mukharji, dated 11 September 1963, in Jyotirmoy Samanta v. Eastern Railway Civil Revision Cases Nos. 781 (W) and 882 (W), both of the year 1961 does not also go against the view I have taken. The observation to the effect that the enquiry officer should not pick and choose evidence appearing in the decision of Banerjee, J., in the case of Sailen Bose v. State of West Bengal 1963 I L.L.J. 708 cited by Sri Chakrabarti does not fit in with the instant case, as no question of choice of evidence arises in this case. Banerjee, J., even after the said observation, has ultimately affirmed the views of Sinha, J., expressed in the cases of Krishna Gopal Bose [60 C.W.N. 692] (vide supra) and A.R.S. Chowdhuri 1957-I L.L.J. 494 (vide supra).

10. The next citation by Sri Chakrabarti on the point is a decision of the

Rajasthan High Court in the case of Ramanand Vs. Divisional Mechanical Engineer, Northern Railway and Another, . Interpretation of a different rule was made in the said decision and not of the proviso to the said Para. 1707 (d) of the Railway Establishment Code, with which we are concerned in the instant case. I may observe that the learned advocates on both sides in the Instant case could not find out the reference from the book of Sri Sanjeeva Row as referred to at p. 267 in the said Rajasthan decision.

11. There is, therefore, in my Judgment no denial of reasonable opportunity to the appellant by the Railway Administration. The first submission of Sri Chakrabarti falls.

12. This takes us to the second submission, viz., as to whether the non-issue of the chargesheet or the first show-cause notice by the punishing or the dismissing authority makes the enquiry bad. In my view it is not necessary that the chargesheet or the first show-cause notice must be issued by the punishing or the dismissing authority in all cases. In my view, if it had the approval or the authority of the dismissing officer it would be sufficient. It is Immaterial that the chargesheet is actually issued in the name or under the signature of Divisional Mechanical Engineer in this case. H. K. Bose, J. (as his lordship then was), after interpreting the Railway Establishment Code along with the Security Force Rules in the case of Gandhari Singh v. Union of India Civil Revision No. 1660 of 1956 (unreported) held on 10 June 1957 to the same effect. It is argued that Sinha, J., in the case of Krishna Gopal Bose [60 C.W.N. 692] (vide supra), held that the chargesheet by the dismissing authority was not at all necessary but it should be realized that his lordship Sinha, J., in his subsequent decision in the case of A.R.S. Chowdhuri 1957-I L.L.J. 494 (vide supra) explained his earlier decision to mean that it would be sufficient if the chargesheet is authorized by the dismissing authority.

13. A grievance is made, that Annexure C to the affidavit-in-opposition at p. 62 of the paper book, which has been referred to by Justice Sri Sinha as the chargesheet, is not really the show-cause notice but a note passed by Sri Barbaro regarding certain facts. It is argued that the judgment is bad for such confusion. Even if the note (Ex, C) is not taken as a chargesheet, it would appear that the Divisional Mechanical Engineer was authorized to issue the first show-cause notice by the Divisional Superintendent who was admittedly the punishing authority. The said fact was not denied in the affidavit-in-reply. There is really no such confusion as would affect the merits. The view taken by a Division Bench of this Court (S. K. Sen and N. K. Sen, JJ.) on 8 April 1960 in the unreported decision in the case of Amiya Kumar Banerjee v. Union of India (Appeal from Appellate Decree No. 939 of 1956, might be looked at.

14. The point as to the issue of the charge-sheet, as in the instant case, has not been directly raised before the Supreme Court in the case of S. Kapur Singh Vs. Union of India (UOI), and is, therefore, not of much assistance. Moreover it was a case of a member of the Indian Civil Service where the President was deemed

to be the punishing authority. It appears from the short narration of facts there, that the East Punjab Government had served the chargesheet in that case and not the President. Civil Services (Classification, Control and Appeal) Rules came up for consideration. There the Governor had absolute discretion, which is not so in the case on hand, viz., the provisions of the Railway Establishment Code.

15. If we also compare the current Discipline and Appeal Rules for Non-gazetted Railway Servants, in force from 1 August 1961, corrected and modified up to 30 September 1962 (though the same does not apply to the Instant case), disciplinary authority has now been defined and it has been made clear that the chargesheet should be issued by the said authority. (See in this connexion Appendix II, form of the chargesheet, where it has been provided that the disciplinary authority should sign.)

16. The second submission of Sri Chakrabartti fails.

17. On the third point, namely, as to the question of recommendation, Sub-para (e) of rule or Para. 1707 which has been quoted earlier, provides inter alia that

the result of the departmental enquiry with the recommendation of the officer or the committee shall be placed before the officer ...

It is submitted by the learned advocate for the appellant that as there is no recommendation by the officer in the enquiry report, the order for removal based on the said report is bad and should be set aside. Sri Bose, on the other hand, contended that the recommendation part in the said rule is a useless formality. There is nothing here to recommend. If the report of the enquiry goes against the appellant, the only consequence would be removal from service, being item 6 in the chargesheet, referred to in the report.

18. In my view, Sri Bose cannot put his case BO high. It cannot be doubted that recommendation is a necessary part of the report but in the facts of the instant case the report itself has been the recommendation. Moreover, it has caused no prejudice to the appellant, due to the absence of specific express recommendation. The last point also fails.

19. The interpretation appearing in the unreported judgment of Sinha, J., dated 21 November 1960, in the case of Bejoy Kumar Mondal v. Union of India Civil Revision No. 88 of 1960 in holding that a recommendation has no legal force, is, with respect not warranted by Sub-section (e) to section or Rule 1707 of the Railway Establishment Code, Bose, J., held in the case of Taraprasanna Bhanja Vs. Union of India (UOI) and Others, that the rules in the Railway Establishment Code have statutory force. It is better to remember that the rules contained in the Railway Code of 1940 have been made by the Governor-General in Council under Sub-section (2) of Section 241 of the Government of India Act, 1935, in supersession of all the preexisting rules. After the reprint of the code in 1945, another edition with additions and alterations came out in the year 1951. The name of the code was also changed to Indian Railway Establishment Code, in

consequence of the financial integration of the Indian State Railways and of the Constitution of India having come into effect in 1950. The code was further revised to incorporate all amendments up to 31 March 1959 and was thereafter issued by the President in exercise of the powers conferred on him by the proviso to Article 309 of the Constitution of India. It is too late now to say that Para. 1707 of the Railway Establishment Code has no statutory force.

20. Out of the two short submissions, of the learned advocate for the appellant, the first one is, that the order of removal is mala fide. The story of the appellant that the whole proceeding is mala fide was not believed by Sinha, J., and we affirm the said finding. There is neither any definite charge of mala fides nor any evidence of mala fides. The statement in Para. 7 of the petition falls short of such allegation. Even if an allegation of mala fide, may with difficulty, be spelt out against Sri Barbaro, not a whisper of such allegation is made against the Divisional Superintendent, who is the dismissing authority and who has passed the final order. The second short submission is that there is no finding of serious misconduct to entail the appellant's removal from service. Misconduct depends upon degrees of neglect or refusal, action or inaction in a particular case. That there was disobedience to carry out the orders cannot be disputed. This amounts to a serious misconduct. It was held in similar circumstances by Bose, J., on 28 November 1956 in Sachinda Kumar Chakrabarti v. District Traffic Superintendent, North-eastern Railway Civil Rule No. 2634 of 1955 (unreported). Item 4 in the chargesheet in the instant case refers to serious misconduct, where all the actions of the appellant taken together were stated to have amounted to misconduct. These two short submissions are also without substance.

21. Sri Bose rightly submits that the appellant came after giving a clear undertaking on 19 April 1955 that he would not require or press for quarters at Asansol but he did just the reverse. Procedurally it would also have been proper, as submitted by Sri Bose, that the appellant should have first preferred an appeal against the order of removal before moving this Court under Article 226 of the Constitution. This disposes of all the points raised by both sides.

22. For these reasons the appeal has no merits and it should be dismissed but without any order as to costs.

23. The appellant, however, was in service for a good length of time. Though there was disobedience of orders, the appellant was more actuated with motive for imparting education to his children. He perhaps honestly thought that he had justifiable grounds to retain possession of the quarters. It seems to us that the punishment, namely, removal from service is somewhat disproportionate to the extent of his guilt and it merits reconsideration. If the railway authorities are approached by the appellant we hope that they would favourably consider his case.

A.C. Gupta, J.

24. I agree.