
(2003) 01 GAU CK 0052
In the Gauhati High Court
Case No : W.A. No. 49 of 2000

Saroj Bhattacharyya

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-01-2003

Acts Referred:

Railway Protection Force Rules, 1987 — Rule 153.8

Citation : (2003) 3 GLR 77 : (2003) 2 GLT 72

Hon'ble Judges : P.P. Naolekar, C.J.;Ranjan Gogoi, J

Bench : Division Bench

Advocate : A.K. Bhattacharyya, G.K. Bhattacharyya and B. Chakraborty, for the Appellant; B.K. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J

1. The appellant, at the relevant point of time, was working as a Havildar in the Railway Protection Force. On 16.1.1992, the appellant was granted sick leave for a week until 23.1.1992. As the appellant did not report for duty after the expiry of the leave granted to him, the name of the appellant was removed from the sick list. On 23.1.1992 itself the appellant submitted a medical certificate from a private medical practitioner with regard to his illness. Thereafter by orders dated 6.3.1992 and 23.4.1992, the appellant was asked to report to the Railway Doctor. The appellant, however, did not carry out the aforesaid orders of the authority and continued to remain unauthorisedly absent from duty with effect from 23.01.1992. Accordingly, a chargesheet dated 13/14.07.1992 was issued levelling the following charge against the appellant :

"Gross neglect of duty and violation of orders is that Sri S.K. Bhattacharjee, Hav/ Fire/GHY has been remaining absent from duty at his own accord without any authority w.e.f 13.1.1992 violating the orders for reporting to the Railway Medical Authority."

As no response was forthcoming to the charge levelled against the appellant, an ex parte enquiry was held in respect of the charge in question and on the basis of the findings recorded by the Enquiry Officer, the disciplinary authority thought it proper to impose the punishment of dismissal from service on the appellant (writ petitioner). The appellant filed an appeal before the appropriate authority and in the said appeal, for the first time, it was stated that during the period of sick leave granted to the appellant, he was under the treatment of one Dr. P. P. Roy, a private medical practitioner and on the advice of the said doctor, he had proceeded to Calcutta for better treatment on 9.3.1992. According to the appellant (writ petitioner) immediately on his arrival at Calcutta on the next day, i.e., on 10.3.1992, he was arrested in connection with a case under the Narcotic Drugs and Psychotropic Substances Act and he continued to remain in jail custody until 16.11.1992 on which date he was released on bail. The appellate authority, on consideration of the statements made in the memo of appeal by the appellant, found that the conduct of the enquiry ex parte against the appellant, in the facts and circumstances noted above, was in violation of the principles of natural justice and as reasonable opportunity was not afforded to the appellant to defend himself in the enquiry, the order of dismissal deserved to be set aside and the matter remanded for a de novo enquiry. On the basis of the aforesaid order passed by the appellate authority, a de novo enquiry was initiated and the same was concluded by the Enquiry Officer. On the basis of the findings arrived at in the enquiry, by order dated 9.8.1994 the appellant was found guilty of the charges levelled. Consequently the punishment of removal from service was imposed. Aggrieved, the appellant (writ petitioner) had instituted the writ proceedings, out of which the present Writ Appeal has arisen.

2. The learned Single Judge after considering the cases of the respective parties found that there was no explanation whatsoever forthcoming on the part of the appellant for his absence from duty unauthorisedly with effect from 23.1.1992 till the date of his arrest, i.e., 10.3.1992 and the said unauthorised absence being virtually admitted, the writ petition deserved to be dismissed. The learned Single Judge also considered the question of proportionality of the punishment imposed and for the reason recorded in the impugned order held the present case not to be appropriate for interference with the quantum of punishment imposed.

3. Mr. AK Bhattacharyya, learned senior counsel arguing the case of the appellant, has advanced two primary grounds in support of the challenge made in the present appeal. Learned counsel has argued that the charges against the appellant is of unauthorised absence from duty from 23.1.1992 till the date of the charge Memo, i.e., 13/14.7.1992. As from 10.3.1992 onwards the appellant was admittedly in police custody, and the said fact having been taken due note of by the appellate authority while remanding the case for de novo enquiry, in the course of such de novo enquiry, the charge against the appellant ought to have been re-framed and the same not having been done, the enquiry as a whole stands vitiated.

It is next argued by the learned counsel appearing on behalf of the appellant that under Rule 153.8 of the Railway Protection Force Rules, 1987, the delinquent employee has a right to take the assistance of any member of the force to defend himself in the enquiry. It is argued that the said right of the appellant has been breached in the present case as he was not made aware of the same either by the disciplinary authority or by the enquiry officer. Learned counsel has argued that there is a mandatory duty cast on the disciplinary authority/enquiry officer to apprise the delinquent employee of such right and any breach of the same would vitiate the conduct of the enquiry. Reliance in this regard has been placed on two decisions of the Apex Court in the cases of C.L. Subramaniam Vs. Collector of Customs, Cochin, and Bhagat Ram Vs. State of Himachal Pradesh and Others, Reliance has also been placed on a judgment of Division Bench of this court reported in Kirit Kumar Somalal Jani Vs. Regional Provident Fund Commissioner and Another, Lastly, it has been argued by the learned counsel for the appellant that the materials on record amply demonstrate that the unauthorised absence of the appellant from duty, even if the same is held to be proved, would be for the period from 23.1.1992 to 10.3.1992 and that the appellant had a justifiable reason for such unauthorised absence. The appellant was advised to proceed to Calcutta for better treatment of his illness and the appellant had a right to obtain treatment of a doctor of his choice. On the aforesaid basis, it is argued that even assuming the charge to be proved, unauthorised absence for the period in question, in the light of the reasons furnished by the delinquent employee, ex facie demonstrates that the punishment of removal from service to be shockingly disproportionate thereby calling for necessary intervention of this Court.

4. Mr. B.K. Sharma, learned senior counsel appearing on behalf of the Respondents while controverting the submissions advanced on behalf of the appellant, has argued that a new plea, which is essentially a question of fact, i.e., whether the writ appellant was informed of his right to take the assistance of any other member of the force to defend himself in the enquiry, is being raised for the first time in the appeal. As the said defence is essentially based on the existence of a question of fact, the same ought not to be allowed by this Court. Learned counsel has further argued that even assuming that such right of the appellant was breached, the same would not ipso facto vitiate the enquiry. The real test, according to the learned counsel, would be one of prejudice caused to the delinquent employee and in the facts of the present case no prejudice can be said to have been caused as the writ appellant had taken an active part in the enquiry held against him and had led material evidence in support of his defence. Coming to the question of quantum of punishment imposed, learned counsel for the Respondents has argued that under the rules in force, the punishment imposed, i.e., removal from service, is contemplated if the charge levelled is found to be established and therefore no interference would be called for. Reliance in this regard has been placed on a Division Bench judgment in the case of Union of India and Ors. v. Mithilesh Singh reported in (2000) 3 GLT 62.

The rival submissions advanced on behalf of the parties on the aforesaid second question raised in the appeal have been duly considered.

5. Insofar as the first argument advanced on behalf of the appellant is concerned, as the charge levelled against the appellant is of unauthorised absence from duty with effect from 23.12.1992 and it is the appellant's own case that he was detained on police custody with effect from 10.3.1992, it is our considered view that the appellant ought to have furnished his explanation for his alleged unauthorised absence from 23.1.1992 upto the date of his arrest, i.e., 10.3.1992 and thereafter ought to have pleaded his detention in police custody as the reason for his absence for the period subsequent to 10.3.1992. Admittedly, the same was not done by the appellant. In the facts of the present case, it is our considered view that the charges levelled against the appellant are sufficiently clear and unambiguous leaving no room for doubt in what has been alleged against the appellant. Merely because for a part of the period of the alleged unauthorised absence, the appellant was detained in police custody, cannot, in our considered view, affect the validity of the chargesheet ; nor can the requirement of submitting a fresh chargesheet be read in the facts of the present case. The first argument as advanced by the learned counsel for the appellant therefore, has to fail.

Under Rule 153.8 of the Railway Protection Force Rules, 1987, the charged Member of the Force has the liberty to take the assistance of any other member of the force to enable him to defend himself properly in the enquiry held. The argument advanced on behalf of the appellant is that even if the delinquent/charged employee does not put in a request for such assistance, it is the mandatory duty of the enquiry officer to inform the charged employee of his "right" and any breach thereof would vitiate the enquiry. The decision of the Apex Court in the case of CL Subramaniam v. The Collector of Customs, Cochin (supra), reliance on which has been placed, is not an authority for the proposition advanced on behalf of the appellant. The aforesaid decision turns on its own facts and in the said case, the Apex Court held that when a trained prosecutor was appointed as a presenting officer, the request for appointment of a legal practitioner made by the charge officer should have been acceded to. The second aspect of the case was with regard to the conduct of the enquiry officer in not intimating in time the person named by the charged officer to assist him in the enquiry, so as to enable the said person to appear in the enquiry. As in the facts of that case the person named by the charged officer was intimated at a very late stage and consequently he could not assist the charged officer, the Apex Court held that reasonable opportunity was denied to the charged officer. We fail to see how the aforesaid case assists the appellant in support of the proposition put forward.

6. The next case relied upon by the learned counsel for the appellant, i.e. Bhagat Ram Vs. State of Himachal Pradesh and Others, may now be considered. In the said case, the request on behalf of the charged officer for a defence assistant

was made midway in the course of the enquiry. The same was allowed from the stage at which such request was made on the ground that no request was addressed by the charged officer at any earlier point of time. The Apex Court, on those facts, took the view that the approach of the disciplinary authority was too technical and what should have been allowed is re-examination of the witnesses already examined in course of the enquiry. In the aforesaid case, the Apex Court also laid down that the ultimate test would really be one of prejudice and if on a scrutiny of the materials, the Court is satisfied that prejudice has been caused to be charged officer due to absence of a defence assistant, the proceedings of the enquiry must be held to be vitiated. In view of the law laid down by the Apex Court in the case of *Bhagat Ram v. State of Himachal Pradesh* (supra) that prejudice must be shown due to absence of a defence assistant, we fail to see how the above case can be understood to be an authority for the proposition that if the charged officer is not informed of his right to have the services of a defence assistant and if no defence assistant is appointed to assist the charged officer, the enquiry as a whole must necessarily fall through. It has also been held by this court in the case of *Kirit Kumar Somalal Jani Vs. Regional Provident Fund Commissioner and Another*, reliance on which has been placed by the learned counsel for the appellant, that the ultimate test would be one of prejudice.

7. In the instant case, the report of the enquiry officer submitted pursuant to the de novo enquiry held against the appellant would go to show that the appellant had actively participated at all stages of the enquiry and had examined witnesses in support of his case including the private medical practitioner Dr. P.P. Roy. Documentary evidence in the form of certificates issued by the doctors were also exhibited by the appellant in course of the enquiry. The writ appellant did not express any handicap in the conduct of the enquiry either before the enquiry officer or before the disciplinary authority. No such difficulty was expressed even before the appellate authority. It is only in course of the present writ appeal that the said point has been raised and that too by way of an amendment to the pleadings in the appeal. Even if we are to construe the basic fact, i.e., that the appellant was not made known of his right to take the help of a defence assistant and no such defence assistant was appointed to assist the appellant in his defence in the enquiry, in favour of the appellant, we are unable to persuade ourselves that any prejudice was caused to the writ appellant in the conduct of the enquiry in the totality of the facts and circumstances of the case, as noticed herein above.

8. This would bring us to the question of quantum of punishment imposed on the writ appellant. This Court in the case of *Union of India and Ors. v. Mithilesh Singh* (2000) 3 GLT 62, has held that when punishment of dismissal removal from service for various acts and omission have been laid down in the Railway Protection Force Rules, the question of disproportionate punishment would not arise if on proof of a particular act, the penalty prescribed by the Rules is imposed. We, therefore, see no good ground to interfere with the quantum of

punishment imposed. That apart, it cannot be lost sight of that the appellant is a member of a disciplined force and what should be the quantum of punishment imposed, having regard to the guilt of the delinquent employee, is primarily for the departmental authority to consider and decide. It would be highly inappropriate for the Writ Court to sit in appeal over such a decision as the decision of the authority in such matters is invariably founded on the need to uphold the discipline that is integral to a disciplined force.

9. For the aforesaid reasons, the appeal has to fail. It is accordingly dismissed. However, having regard to the facts and circumstances of the case, there shall be no order as to costs.