(1967) 08 CAL CK 0001

In the Calcutta High Court

Case No : Civil Rule No. 3042 (W) of 1966

Sripati Ranjan Biswas APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 29-08-1967

Acts Referred:

All India Services (Discipline and Appeal) Rules, 1955 — Rule 10, 11, 12
Central Civil Services (Classification, Control and Appeal) Rules, 1957 — Rule 23, 23(2), 30, 30(2)
Civil Services (Classification, Control and Appeal) Rules — Rule 57(1)
Constitution of India, 1950 — Article 226, 361

Citation : (1968) 2 ILR (Cal) 47

Hon'ble Judges : D. Basu, J

Bench : Single Bench

Advocate : Arun Kumar Dutt, Jalad Baran Pal and Amar Nath Dhole, for the Appellant; Amiya Kumar Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

D. Basu, J.—This Rule is directed against the order of dismissal passed against the Petitioner by the Collector of Customs at annex. C to the petition dated February 3, 1964, and the rejection of his appeal against the aforesaid order by the President on September 22, 1964 (vide annex. E to the petition.)

2. At the material time, the Petitioner was holding the post of an appraiser under the Customs Department, a Class II Gazetted post. On December 4, 1961, an order of suspension was made against him and it was on January 22, 1962, followed by the charge-sheet which contained three charges:

Charge I--Illegal gratification on specified dates.

Charge II--Possession of assets disproportionate to his disclosed income.

Charge III--Possession of land without sanction of appropriate authority.

3. A departmental inquiry being held, the Petitioner was initially held guilty of

charges II and III only. Agreeing with the findings of the inquiry officer on charges II and III the Collector issued the notice dated December 17, 1962, at annex. B to the petition calling upon the Petitioner to show cause why he should not be dismissed from service. The Petitioner thereupon moved this Court under Article 226 of the Constitution and obtained a Rule, which was eventually heard by Banerjee, J. who delivered judgment on July 15, 1963, to be found at pp. 138-147 of the Paper Book produced before me (pertaining to appeal from the said order of Banerjee, J.) The decision of Banerjee, J., in short, was that charge III was patently unsustainable inasmuch as the Rule requiring previous sanction of the superior authority for acquiring immovable property was brought to the notice of the Petitioner subsequent to the disputed purchase made by him. Charge III was, accordingly, quashed and the Collector of Customs was directed ''to reconsider the penalty'' to be awarded on the basis of the finding on charge II only. The reason for remitting the case for reconsideration of the penalty was thus expressed by his Lordship:

The Petitioner was penalised on being found guilty of two charges.... I do not know what penalty would have been imposed upon him...if he had been found guilty of charge No. II only.

4. On March 19, 1964, the Petitioner appealed to the Division Bench against the aforesaid judgment of Banerjee, J. alleging, inter alia, the illegality of charge II as well. In the meantime, the Collector of Customs, purporting to comply with the direction of Banerjee, J., made the impugned order on February 3, 1964, dismissing the Petitioner, solely on the basis of the finding of guilt of the Petitioner on charge II after issuing a fresh notice to show cause and after hearing the Petitioner personally on charge XI. The Petitioner then preferred appeal to the President of India under Rule 23 of the Central Services (Classification, Control and Appeal) Rules, 1957, against the order of dismissal passed by the Collector on February 3, 1964. On being apprised of this fact the Petitioner''s appeal to the Division Bench against the judgment of Banerjee, J. was adjourned sine die. After consulting the Union Public Service Commission, under Rule 30(2) of the said Rules, the President disposed of the appeal on September 22, 1964 (annex. E) rejecting the appeal, so that the order of dismissal was affirmed.

5. In the instant petition under Article 226 filed on November 25, 1966, the Petitioner has challenged the validity of the order of dismissal as well as the Appellate Order of the President on various grounds. It is opposed by a joint counter-affidavit on behalf of the Union of India (Respondent No. 1) and the Collector of Customs (Respondent No. 4).

6. The final order being the Appellate Order at annex. E, it is the validity of that order which is to be determined by this Court, even though the Petitioner has challenged the validity of the original order of dismissal made by the Collector (annex. C) as well. I would, however, point out that the only point urged against the original order, namely, that after the order made by Banerjee, J. the Collector

should have started the proceedings de novo has no substance, because the only direction upon the Collector issued by Banerjee, J. was that he should consider what penalty should be awarded in view of the fact that in place of two charges, the finding of guilt sustained by the Court was in respect of one charge only. Hence, there was no question of a de novo hearing on the charges. The attack on the original order, accordingly, fails.

7. As regards the Appellate Order, it may at once be stated that the procedure for disposal of the appeal being governed by statutory rules, namely, Rule 30 of the Central Civil Services (Classification, Control & Appeal) Rules, 1957, the order made by the Appellate Authority will be ultra vires and invalid if any of the conditions laid down by that rule is violated in any particular case. Three things are imperative in the matter of considering an appeal under Sub-rule (2) of Rule 30, namely, that the Appellate Authority must consider

(a) whether the procedure prescribed in these rules have been complied with in arriving at the order appealed against, so as to lead to a violation of the provisions of the Constitution or a failure of justice;

(b) whether the findings are justified;

(c) whether the penalty imposed is excessive, adequate or inadequate.

8. I am satisfied that in the instant case, the Appellate Authority did not attend to the last condition, namely, whether the penalty of dismissal was excessive or not, on the finding upon charge II.

9. The importance of proper compliance with this condition assumes magnitude in the instant case in view of the previous history of the case leading up to the appeal. As has been stated at the outset, the charge-sheet included three charges of which two were specific and capable of being proved by direct evidence, namely, illegal gratification on specified occasions and purchase of land without prior sanction, and charge II, the remaining one, could only be inferred from the other evidence and circumstances, namely, possession of assets disproportionate to the legitimate income of the delinquent. At the initial stage the inquiry officer found the delinquent guilty of both charges II and III, while the charge of illegal gratification could not be substantiated. The punishing authority, namely, the Collector of Customs, agreeing with the inquiry officer''s finding on charges II and III, provisionally proposed dismissal as the proper penalty. But this Court held that charge III was untenable, so that only the finding on charge II remained and the case was remitted to the punishing authority to reconsider whether he would award dismissal on charge II alone. It is common place to state that conviction and assessment of proper punishment are separate and independent considerations and a Tribunal or Court must apply its mind to both in order to avoid a travesty of justice or a return to the primitive law of maiming for any offence irrespective of its gravity. The punishing authority in the instant case maintained the order of dismissal on the finding on charge II alone (annex. C)

10. Upon the above circumstances it was incumbent upon the Appellate Authority to consider whether the drastic remedy of amputation was necessary when the specific charges failed and the only thing which remained was a general charge of misconduct, to be inferred from the volume of his assets as compared with the disclosed income. The Appellate Authority, of course, consulted the Union Public Service Commission before giving his decision. But it will be apparent from the report of the Commission at annex. E that though the Commission reviewed the entire evidence on charge II, and also commented upon regularity of the proceedings it did not make any statement as to the excessiveness or otherwise of the penalty awarded by the punishing authority. Hence, by accepting the advice of the Commission, the Appellate Authority cannot be held to have considered the question of excessiveness of the penalty. The question assumes further importance if the allegation made in para. 22 of the petition stands. There it was pointed out that in computing the legitimate earnings of the Petitioner the Commissioner took into account only 22 months instead of 45(sic) months. If this error be corrected, the earnings of the delinquent would come up to Rs. 8,729 instead of Rs. 5,992, as supposed by the Commission, and would thus reduce the gulf between the income and the assets in question. This Court is not concerned with the prospects of the Petitioner having a lighter punishment on account of such reduction. The question for my determination is whether the factor which was imperative for exercise of the statutory appellate power has been taken into consideration. If it has not been considered or if the statutory authority has not applied its mind to its consideration the resultant decision will fail, because it becomes ultra vires according to well-established decisions Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947) 2 A.E.R. 680, Fawcett Properties v. Buckinghum C.C. (1963) 2 A.E.R. 175 (H.L.), Jagannath Misra Vs. State of Orissa, and R. v. Paddington, Valuation Officer (1965) 2 A.E.R. 836 (842) C.A.

11. The failure of the original authority to specifically apply his mind to the question of excessiveness becomes graver where, as in the instant case, the case was remitted by the Court to apply his mind specifically and solely to the question of punishment which the delinquent merited on the finding on charge II alone.

12. Upon this finding alone, namely, the failure of the Appellate Authority to apply its mind to the statutory condition in Rule 30(2)(c) of the Central Civil Services (Classification, Control & Appeal) Rules, 1957, the Rule deserves being made absolute.

13. In view of the above conclusion, it is unnecessary for me to rest my judgment on the other ground pressed at the hearing that the Appellate Authority should have heard the oral arguments of the Petitioner before disposing of the appeal. I would, however, point out to a respectable body of cases, which have been referred to in para. 176(v) of my judgment in the case of Jyoti Prakash Mitter C.R. 1798(W) of 1966 decided by D. Basu, J. on Aug. 7 & 8,

1967 where it was held that, according to the principles of natural justice, there is no due performance of the quasi-judicial function of deciding an appeal by simply perusing the memorandum of appeal and that it would further require that a date and place of hearing of the appeal should be communicated to the Appellant and the Appellant should be allowed to submit his arguments on the appeal at such hearing. If this view be correct, it must have been a serious blunder on the part of the makers of the Rules of 1957 in question as well as other similar Rules to have vested the appellate power in the ''President'' instead of the ''Central Government'', It may be that the precedent for Rule 23(2)(ii) of the Rules, 1957, and like Rules have been framed by simply adapting the pre-Constitution precedent of the appellate power being vested in the Governor-General, as for instance, in Rule 57(1) of the Civil Services (Classification, Control & Appeal) Rules, 1930. But those who did this simple operation of substitution hardly realised what they were doing. Prior to the Constitution there was no chance of mandamus being issued against the Government for violation of a statutory condition in a service matter, inasmuch as it was definitely laid down by the Judicial Committee that the remedy, even for contravention of Rules having statutory force, in such cases, was departmental representation and nothing from a Court of law AIR 1937 27 (Privy Council) , AIR 1937 31 (Privy Council) . But it has been held by a number of decisions of the Supreme Court since The State of Uttar Pradesh and Others Vs. Babu Ram Upadhya, that the statutory rules relating to service of Government employees are judiciable and that, accordingly, mandamus lies to enforce them. Further, in view of the second proviso to Article 361 of the Constitution, the appropriate Government cannot resist a legal proceeding on the mere ground that the power in question has vested in the head of the State, i.e., the President or a Governor. For, the same reason, even certiorari will lie where the function so vested is quasi-judicial and any of the conditions to attract that writ vitiate a particular proceeding where a quasi-judicial function like that of appeal is vested in the President specifically. All this embarrassment could be avoided in such cases naming the ''Central Government'' instead of the ''President'' as has been done in some recent Rules, such as Rules 10-12 of the All India Services (Discipline & Appeal) Rules, 1955, leaving to the delinquent the opportunity of submitting a ''memorial'' to the President against the order of the Central Government. I hope, these observations of mine will receive due consideration from those who are entrusted with the making of such Rules.

14. In view of my findings as to non-compliance with Rule 30(2)(c) of the Central Civil Services (Classification, Control & Appeal) Rules, 1957, this Rule is made absolute but without any order as to costs. Let: Respondent No. 1 be restrained from giving any effect to the appellate order at annex. E to the petition (p. 26) with liberty to have the appeal determined afresh according to law.

