
(2015) 05 CAL CK 0081
In the Calcutta High Court
Case No : Writ Petition No. 3064 (W) of 2009

Swapan Kumar Dasgupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 309
Official Secrets Act, 1923 — Section 5

Citation : (2015) 2 ESC 1189 : (2015) LabIC 2738

Hon'ble Judges : Tapabrata Chakraborty, J

Bench : Single Bench

Advocate : Achin Kumar Majumder and Pratik Majumder, for the Appellant;
Ashoke Kumar Chakraborty and Krishnadas Poddar, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Tapabrata Chakraborty, J—The subject matter of challenge in the instant writ application is a disciplinary proceeding initiated against the petitioner through a charge sheet dated 30th May, 2008 issued by the respondent No. 3.

2. The facts, in a nutshell, are that while working in the post of Assistant Security Commissioner, Railway Protection Force (hereinafter referred to as RPF), the petitioner was transferred to Eastern Railway and was posted as an Assistant Security Commissioner, RPF, Passenger Security, Eastern Railway, Kolkata. Subsequent thereto, the petitioner was served with a charge sheet dated 30th May, 2008 issued by the respondent No. 3 proposing to hold enquiry under Rule 9 of the Railway Servants (Discipline and Appeal) Rules (hereinafter referred to as RSDA Rules). Prior thereto when the petitioner was working in the post of Inspector under RPF, "I" Coy Garden Reach, an order dated 25th July, 2002 was issued by the Chief Security Commissioner, RPF, S.E. Railway transferring the control and supervision of the said RPF "I" Coy, Garden Reach to the Security Commissioner, RPF, S.E. Railways. Such action was challenged by the petitioner through an application under Article 226 of the Constitution of India being W.P.

No. 13909 (W) of 2002 and the said writ application was disposed of by an order dated 19th March, 2003 observing inter alia that so long the petitioner will remain in the post of "I" Coy, Garden Reach, the Security Commissioner, CBI, Garden Reach, namely, Sri B.B. Mishra will not be the disciplinary or controlling authority and any action taken by the said B.B. Mishra against the petitioner would be subject to the approval of the Deputy Chief Security Commissioner, RPF, S.E. Railway, Garden Reach.

3. Records reveal that in the instant writ application, an interim order was passed on 7th April, 2009, restraining the respondents from proceeding against the petitioner in respect of the first four articles of charge until further orders or until 15th September, 2009 whichever is earlier but liberty was granted to the respondents to proceed against the petitioner in respect of the fifth article of charge, in accordance with law. The said interim order was directed to continue for a period of 6 weeks after the reopening of the Court after the Puja Vacation by an order dated 17th September, 2009 and the same accordingly expired sometimes in the month of December, 2009.

4. A perusal of the writ application reveals that the disciplinary proceeding was challenged alleging inter alia that the respondent No. 3 had no jurisdiction to initiate the disciplinary proceeding against a superior officer like the petitioner in the absence of modification of Clause (b) of Rule 3(1) of the RSDA Rules. The said ground of challenge was turned down by the order dated 7th April, 2009 and upon a prima facie satisfaction to the effect that the charge of collusion was not sustainable as the respondents did not initiate any proceeding against the officers namely, Sri Baldev Raj and S.Z. Samuel, an interim order was granted restraining the respondents from proceeding with the first four articles of charge.

5. Records further reveal that pursuant to the liberty granted by this Court on 22nd January, 2013, the respondents filed a supplementary affidavit incorporating the documents to the effect that the disciplinary proceedings were initiated against the said Baldev Raj and S.Z. Samuel and in the said proceedings the Chief Vigilance Commissioner recommended imposition of punishment against the said officers for having acted in collusion with the petitioner herein but the final order of imposition of punishment is yet to be passed.

6. Mr. Majumder, learned senior Counsel appearing for the petitioner submits that the charges were stale, having been framed against the petitioner more than 6 years after the alleged incident and the said delay has also not been explained by the respondents and on the said ground itself the charge sheet is liable to be set aside. In support of such contention, Mr. Majumder has relied upon the judgments delivered in the case of M.V. Bijlani Vs. Union of India (UOI) and Others, AIR 2006 SC 3475 : (2006) 102 CLT 635 : (2006) 109 FLR 717 : (2006) 4 JT 469 : (2006) 2 LLJ 800 : (2006) 4 SCALE 146 : (2006) 5 SCC 88 : (2006) SCC(L&S) 919 : (2006) 3 SLJ 184 : (2006) AIRSCW 2096 : (2006) 3 Supreme 393 and in the case of P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board, AIR 2006 SC 207 : (2005) 4 CTC 403 : (2005) 7 JT 417 : (2005) 3 LLJ 527 : (2005)

SCC(L&S) 861 : (2005) 2 SCR 474 Supp : (2006) 1 SLJ 67 : (2005) AIRSCW 5690 : (2005) 5 Supreme 611 .

7. Mr. Majumder further submits that the disciplinary authority had always acted at the dictation of the higher authority and such conduct would be explicit from the fact that even after the enquiry officer declared the petitioner "Not Guilty" in respect of the fifth charge by a report dated 13th January, 2010, the disciplinary authority instead of concluding the said proceedings pertaining to the said charge, referred the same to the Director General, RPF, New Delhi for his advice and opinion. In support of such contention, Mr. Majumder has placed reliance upon the following judgments:

a) Nagaraj Shivarao Karjagi Vs. Syndicate Bank Head Office, Manipal and another, AIR 1991 SC 1507 : (1991) 63 FLR 133 : (1991) 2 JT 529 : (1992) 2 LLJ 149 : (1991) 1 SCALE 832 : (1991) 3 SCC 219 : (1991) 2 SCR 576 : (1991) 2 UJ 216 .

b) Union of India (UOI) and Others Vs. B.N. Jha, AIR 2003 SC 1416 : (2003) 97 FLR 1034 : (2003) 3 JT 201 : (2003) 3 SCALE 8 : (2003) 4 SCC 531 : (2003) 2 SCR 721 : (2003) 2 SLJ 395 : (2003) AIRSCW 1863 : (2003) AIRSCW 6581 : (2003) 2 Supreme 560 : (2003) 7 Supreme 516 .

c) Director (Inspection and Quality Control) Export Inspection Council of India and others vs. Kalyan Kumar Mitra and another, reported in 1987 (2) CLJ 344 (para 134).

8. In course of his argument, Mr. Majumder has drawn the attention of this Court to the observations made in the judgment delivered in the earlier writ application preferred by the petitioner being W.P. No. 13909 (W) of 2002. The said observations are as follows:

"After hearing the learned counsel for the parties and after going through the entire materials on record, I find substance in the contention of the petitioner that the attitude of the respondent No. 5 towards the petitioner does not reflect appropriate attitude of a superior officer towards a subordinate staff. There is no dispute that the petitioner is a very efficient and energetic officer as it would appear different certificates and recommendations issued by the superior authorities which are all annexed to the instant writ application. The respondents could not draw the attention of this Court to any incident showing that before obtaining the interim order staying the order of transfer, the petitioner was ever proceeded against for any misbehaviour or misconduct. The trouble started when he lodged complaint against the respondent No. 5."

9. He further submits that in April, 2006, the petitioner was promoted to the rank of Assistant Security Commissioner in Group A, junior scale and was posted as Assistant Security Commissioner/RPF-cum-Principal RPF Training Centre, Bandikui/North Western Railway, vide DG/RPF/Railway Board letter No. 2006/Sec. (E)/PM-2/1 dated 21st April, 2006 and that such promotion was given to the

petitioner, duly considering the past record of service of the petitioner as also after getting clearance from Railway Vigilance, as such the allegations of 2002 were also considered at the time of giving promotion to the petitioner in the higher rank.

10. In the backdrop of the unblemished service rendered by the petitioner and the observations made in the earlier judgment dated 19th March, 2003, Mr. Majumder submits that the alleged charges are unfounded and the same were framed only to victimise the petitioner. In support of such contention, he has placed reliance upon the following judgments:

a) Union of India and others vs. Md. Habibul Haque, reported in 1978 (1) SLR 748 (para 5).

b) Damodar Valley Corporation and Others Vs. Smt. Ballari Sarkar, 114 CWN 769 .

c) The State of Punjab vs. Dewan Chunilal, reported in 1970 SLR 375 (para 14).

11. He further argues that the respondents have proceeded with a preconceived notion that the petitioner is guilty of the charges and such conclusion as regards the guilt of the petitioner at the stage of issuance of the charge sheet, reflects the biased mind of the disciplinary authority and that as such the charge sheet is liable to be set aside. In support of such contention, reliance has been placed upon the judgment delivered in the case of ORYX Fisheries Private Limited Vs. Union of India (UOI) and Others, (2011) 266 ELT 422 : (2010) 12 JT 35 : (2010) 11 SCALE 554 : (2010) 13 SCC 427 : (2010) 10 UJ 5381 : (2010) AIRSCW 7105 .

12. He further submits that in the absence of any provision under the RSDA Rules, the respondents cannot continue with the disciplinary proceeding after superannuation of the petitioner and on the basis of the same the petitioner's terminal benefits cannot be withheld. In support of such contention, Mr. Majumder has placed relied upon the following judgments:

a) Chandra Singh Vs. State of Rajasthan and Another, AIR 2003 SC 2889 : (2003) 6 JT 20 : (2003) 5 SCALE 361 : (2003) 6 SCC 545 : (2003) SCC(L&S) 951 : (2003) 1 SCR 674 Supp : (2004) 1 SLJ 401 : (2003) 2 UJ 1325 : (2003) AIRSCW 3518 : (2003) 5 Supreme 128 .

b) State of Jharkhand and Others Vs. Jitendra Kumar Srivastava and Another, (2013) 9 AD 48 : AIR 2013 SC 3383 : (2014) 117 CLT 945 : (2013) 139 FLR 74 : (2013) 11 JT 351 : (2013) LabIC 3674 : (2013) 5 LLN 91 : (2013) 4 LLN 56 : (2013) 10 SCALE 310 : (2013) 12 SCC 210 : (2013) 4 SCT 429 : (2013) 114 SLJ 370 : (2013) AIRSCW 4749 : (2013) 6 Supreme 5 .

c) Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others, (2007) 112 FLR 196 : (2007) 1 JT 6 : (2007) 2 LLJ 206 : (2006) 11 SCALE 624 : (2007) 1 SCC(L&S) 584 : (2006) 8 SCR 1064 Supp .

d) D.V. Kapoor Vs. Union of India and others, AIR 1990 SC 1923 : (1991) 61 FLR

429 : (1990) 3 JT 403 : (1990) 2 SCALE 175 : (1990) 4 SCC 314 : (1990) 3 SCR 697 .

e) Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and Others, AIR 1999 SC 1841 : (1999) 88 CLT 564 : (1999) 82 FLR 143 : (1999) 3 JT 53 : (1999) 1 LLJ 1236 : (1999) 2 SCALE 545 : (1999) 3 SCC 666 : (1999) SCC(L&S) 804 : (1999) 2 SCR 354 : (1999) AIRSCW 1442 : (1999) 4 Supreme 9 .

f) Kamal Kumar Majumdar Vs. Union of India (UOI) and Others, (2008) 1 CHN 951 .

g) Unreported judgment of Hon"ble Mr. Justice Jayanta Kumar Biswas in the case of J.N. Sen Sarma vs. Union of India and others.

h) Dhairyasheel A. Jadhav vs. Maharashtra Agro Industrial Development Corporation Ltd. Mumbai, reported in 2010 (8) SLR 295 (paras 9, 10 & 12).

13. According to Mr. Majumder, the proceeding which was pending against the petitioner was not a proceeding under the provisions of Rule 9 of the Railway Services (Pension Rules), 1993 (hereinafter referred to as the Pension Rules) and that as such question of continuance of the proceeding under RSDA Rules, after retirement, does not occasion.

14. He further submits that the petitioner"s integrity has never been doubted and the misconduct alleged against the petitioner does not entail pecuniary loss and is also not a grave misconduct as defined under the provisions of Rule 8(5) (b) of the said Pension Rules, which runs as follows:

"grave mis-conduct", includes the communication or disclosure of any secret official code or password or any sketch plan, model, article, note, documents or information, such as is mentioned in section 5 of the Official Secrets Act, 1923 (19 of 1923) which was obtained while holding office under the Government so as to prejudicially affect the interests of the general public or security of the State.

15. Placing reliance upon the averments made in the affidavit-in-opposition, Mr. Ashoke Kumar Chakraborty, learned senior advocate appearing for the respondents submits that the writ application was a premature one inasmuch as simpliciter issuance of a charge-sheet initiating a disciplinary proceeding cannot be challenged at its threshold.

16. It has been contended by Mr. Chakraborty that the respondents could not proceed with the first four charges against the petitioner as there was an interim order passed by this Court on 7th April, 2009 and that in spite of the best efforts of the respondents, the writ application could not be listed for hearing soon after exchange of affidavits by the parties and having obtained an interim order the petitioner cannot urge that the respondents have neglected to conclude the disciplinary proceedings prior to superannuation of the petitioner.

17. He further submits that in respect of the fifth charge, the petitioner duly

participated in the proceeding and in the backdrop of such participation the petitioner cannot allege any jurisdictional error on the part of the respondents.

18. Mr. Chakraborty has strenuously argued that under the statutory rules the respondents can continue with the disciplinary proceeding even after the retirement of the petitioner since the petitioner is guilty of grave misconduct and negligence during the period of his service and in support of such contention reliance has been placed upon the provisions of Rules 9 and 10 of the Railway Services (Pension Rules), 1993 (hereinafter referred to as the said Pension Rules).

19. According to him, Rules 9 and 10 of the said Pension Rules have the blessings of Article 309 of the Constitution of India and that as such the said rules would have predominance over the provisions of the Payment of Gratuity Act, 1972 since it is well-settled that special law will prevail over the general law. In support of such contention, Mr. Chakraborty has placed reliance upon an unreported judgment delivered by this Court in the case of Union of India and Ors. Vs. Joydev Ghatak.

20. Placing reliance upon another unreported judgment delivered by the Hon'ble Supreme Court in the case of State of West Bengal and Ors. Vs. Pronab Chakraborty, Mr. Chakraborty submits that the issue involved in the said matter was as to whether the provisions of Rule 10 of the West Bengal Services (Classification, Control and Appeal) Rules, 1971 (hereinafter referred to as the CCA Rules) permits the employer to conclude a disciplinary proceeding, initiated prior to retirement of the employee concerned, even after the petitioner attains his superannuation and even when there is no allegation of any pecuniary loss against the employee. Upon consideration of the said issue the Hon'ble Apex Court was pleased to hold as follows:

"It is therefore apparent, that it is not only for pecuniary loss caused to the Government that proceedings can continue after the date of superannuation. An employee can be proceeded against, after the date of his retirement, on account of "grave misconduct or negligence?". Therefore, even in the absence of any pecuniary loss caused to the Government, it is open to the employer to continue the departmental proceedings after the employee has retired from Service. Obviously, if such grave misconduct or negligence, entails pecuniary loss to the Government, the loss can also be ordered to be recovered from the concerned employee. It was therefore not right for the High Court, while interpreting Rule 10(1) of the 1971 Rules to conclude, that proceedings after the date of superannuation could continue, only when the charges entailed pecuniary loss to the Government".

21. Drawing the attention of this Court to the interim order passed earlier on 7th April, 2009, Mr. Chakraborty submits that the ground on which the interim protection was granted restraining the respondents from proceeding against the petitioner in support of the first four charges is no longer sustainable inasmuch

as the charge of collusion amongst the petitioner and the said Sri Baldev Raj and S.Z. Samuel stands established as the respondents initiated disciplinary proceeding against the said persons and ultimately the vigilance department has suggested imposition of major penalty against the said persons. In support of such contention, Mr. Chakraborty draws the attention of this Court to the documents annexed to a supplementary affidavit filed by the respondents as per the leave granted by this Court.

22. Mr. Chakraborty has sought to fortify his contention that an employer can proceed against a delinquent even after his retirement by placing reliance upon the following judgments:

a) Deputy Registrar, Cooperative Societies, Faizabad Vs. Sachindra Nath Pandey and Others, (1995) 70 FLR 970 : (1995) 2 JT 407 : (1995) 1 LLJ 1069 : (1995) 1 SCALE 848 : (1995) 3 SCC 134 : (1995) 1 UJ 485 .

b) Ramesh Chandra Sharma Vs. Punjab National Bank and Another, (2007) 114 FLR 477 : (2007) 8 JT 588 : (2007) 3 LLJ 245 : (2007) 8 SCALE 240 : (2007) 9 SCC 15 : (2008) 1 SCC(L&S) 337 : (2007) 7 SCR 585 : (2008) 1 SLJ 272 .

23. In reply, Mr. Majumder, learned senior advocate appearing for the petitioner submits that the disciplinary proceeding which was initiated against the petitioner was under the RSDA Rules and not under the Pension Rules and Rule 6 of RSDA Rules does not contain any penalty to the effect that the petitioner's gratuity and pensionary benefits can be withheld and it also does not provide that a disciplinary proceeding initiated prior to retirement can be concluded even after the employer/employee relationship ceases.

24. I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

25. The undisputed facts which can be culled out from the pleadings and arguments made by the learned advocates appearing for the respective parties are that the charge sheet was issued with an allegation of collusion against the petitioner with Baldev Raj and S.Z. Samuel but no simultaneous proceedings were initiated against Baldev Raj and S.Z. Samuel. Such proceedings were initiated against Baldev Raj and S.Z. Samuel subsequent to the interim order and that the said proceedings have also not been concluded till date. In the midst thereof, the petitioner has been allowed to retire from his services on and from 31st August, 2012 and that even after expiry of the interim order in the year 2009, the respondents did not take any steps to complete the proceedings pertaining to the first four charges against the petitioner. The interim order was passed on 7th April, 2009 and the matter thereafter appeared on 11th April, 2011, 4th August, 2011, 25th July, 2012, 27th August, 2012, 22nd January, 2013, 22nd February, 2013, 27th February, 2013, 25th February, 2014 but on none of the said occasions prayer was made for extension of interim order.

26. In the backdrop of the said facts, the contention of Mr. Chakraborty to the

effect that the respondents could not proceed with the first four charges against the petitioner as there was an interim order passed by this Court on 7th April, 2009 is not acceptable. There is absolutely no explanation on record as to why the respondents did not conclude the disciplinary proceeding prior to retirement of the petitioner though it was well within their knowledge that there was a subsisting interim order in the writ application only till 6 weeks after reopening of the Court after the Puja Vacation in the year 2009. The efflux of time is thus solely attributable to the employer. The respondents cannot shift the burden upon the petitioner with an intent to cull out an explanation to the effect that for the petitioner's writ application and for the interim order passed in the same, the proceedings could not be concluded prior to retirement of the petitioner on 13th August, 2012.

27. Upon retirement the master and servant relationship ceases and the relationship exists only for the purpose of terminal benefits on the basis of the situation existing on the date of retirement and that the concluded terms of contract cannot be changed by the respondents unilaterally.

28. It is now a well settled principle of law that in a case where a disciplinary proceeding is pending when the employee attained the age of superannuation, the disciplinary proceeding will automatically come to an end. It is trite that a disciplinary proceeding cannot be allowed to continue after the employee retires. However, in the event of pecuniary loss and or grave misconduct, the authorities enjoy the right to continue with such proceeding initiated prior to superannuation of the employee concerned.

29. Rule 9 of the Pension Rules has no manner of application in the instant case since the disciplinary proceeding pending against the petitioner was not in terms of Rule 9 of the Pension Rules but in terms of the RSDA Rules. Apart from the provisions of Rule 9 of the Pension Rules, no rule has been brought to the notice of this Court providing for continuation of disciplinary proceeding despite permitting the employee concerned to retire unconditionally.

30. There is no allegation of any pecuniary loss and no charge sheet has been issued against the petitioner for recovery of any pecuniary loss which might have been caused to the Railways by an act of misconduct or negligence of the petitioner and that the petitioner was allowed to be superannuated from service with effect from 31st August, 2012 unconditionally that as such the judgment delivered in W.P. No. 8093 (W) of 2003, as relied upon by the petitioner, is squarely applicable to the facts of this case.

31. Upon application of the settled proposition of law in the facts of the instant case, I am of the opinion that the disciplinary proceeding has suffered a natural death, with the cessation of the employee/employer relationship and that after superannuation, the disciplinary proceeding does not subsist.

32. The judgment delivered in the case of Pronab Chakraborty (Supra) has no manner of application inasmuch as the charges alleged do not constitute any

misconduct defined under the said Pension Rules.

33. The order passed in the case of Joydev Ghatak (Supra) is also distinguishable on facts inasmuch as in the said matter the allegation was of illegal gratification and the employer handed over the case to CBI whereas in the instant case, the petitioner was allowed to retire unconditionally and there was no charge of lack of integrity or pecuniary loss against the petitioner.

34. The judgment delivered in the case of Deputy Registrar, Cooperative Societies, Faizabad (Supra) is also distinguishable on facts inasmuch as in the same, the allegation was of misappropriation and FIR was lodged for criminal breach of trust. Furthermore, the efflux of time was not solely attributable to the employer.

35. The judgment delivered in the case of Ramesh Chandra Sharma (supra) is also distinguishable inasmuch as in the said matter, the extant rules provided for continuance of departmental proceeding even after superannuation but in the instant case, there is no such provision under the rules on the basis of which the proceeding was initiated.

36. The failure towards conclusion of the proceedings is directly attributable to the respondents and such inaction on the part of the respondents is fatal. Thus, at this stage, it is necessary to draw the curtains and to put an end to the proceeding.

37. For the above reasons, the writ application is allowed and the respondents are directed to drop the disciplinary proceedings initiated against the petitioner through the charge sheet dated 30th May, 2008 and to release all consequential benefits to the petitioner, within a period of 8 weeks from the date of communication of this order.

38. The writ application is, accordingly, disposed of.

39. In the facts of the present case, there will be no order as to costs.

40. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.