

(2008) 07 CAL CK 0010
In the Calcutta High Court
Case No : W.P.C.T. No. 383 of 2005

Tapan Kumar Kundu

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-07-2008

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 313

Citation : (2008) 4 CALLT 38 : (2009) 120 FLR 427

Hon'ble Judges : Prasenjit Mandal, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Saptangshu Basu, Ayan Banerjee and Ananya Das, for the Appellant; Asit Kumar Banerjee and Tapendra Mallick, for the Respondent

Judgement

1. This application is directed against the judgment and order of the learned Central Administrative Tribunal dated 13th April 2005 whereby and whereunder the order of removal of the applicant from service has been upheld.

2. The fact of the case for which the present proceedings was initiated is stated hereunder:

The applicant, at the relevant time, was a Guard and he was booked for discharging his duty as Guard on board the passenger train No. 18 NB and 17 NB from Bandel to Naihati and back. On or about 25th November 1998, he was charge sheeted under the Disciplinary Appeal Rules 1968 on the allegation of misconduct; summary of which is stated hereunder:

On 13th November 1998, while he was booked to discharge his duty as Guard to board the passenger train No. 18 NB and 17 NB, he was not found on duty in the guard's cabin at Hooghly Ghat Station and in his place two unauthorised non-railwaymen, namely one Gobind Chandra Ghosh and one Toushik Khan, were in the Guard's cabin and performing the Guard's job. Therefore, two sets of charges were levelled against him; firstly he abandoned his duty when he was

booked for discharging duty as Guard of passenger train and secondly, he allowed two unauthorized non-railwaymen as Guards in the said train.

3. The applicant replied to the said charges briefly denying the aforesaid charges but without making any specific case for defence. Being dissatisfied with the explanation, enquiry officer was appointed and it is found from the records that some witnesses were also examined. The applicant was examined by the enquiry officer though applicant did not cite any witness. After the enquiry, the enquiry officer submitted a report concluding that the applicant was guilty. We reproduce the verbatim of the conclusion of such report as under:

Conclusion:

In my opinion Sri T.K. Kundu, Sr. Goods Guard/Bandel is responsible for leaving Guard's Cab without any intimation to Motorman rather the train left Naihati. On his return when he found the train had left Naihati (without Guard) he failed to take immediate action by issuing memo to Platform Station Master/Naihati or intimating to Control for necessary action, rather he crossed "Ganga" in a Ferry and returned to Bandel. This is not correct as a responsible Railway man.

As such, Sri T.K. Kundu, Sr. Goods Guard/Bandel is responsible for leaving his "Cab" at Naihati for any purpose is objectionable. He violated the Rule GR & SR 4.60.

4. It appears from the report of the enquiry officer; he has gone by the answers given by the applicant to the questions put by him.

5. The disciplinary authority, on receipt of the said report, however, did not agree with the enquiry officer's finding fully and he had added very strong words of his own, probably in order to impose punishment.

6. It is submitted and stated that before recording differences, either partly or wholly, the disciplinary authority did not serve any notice upon the applicant to make further representation nor any second show cause notice was issued as to why punishment should not be imposed. It appears from the order of the disciplinary authority, regarding part disagreement; he has straightway imposed punishment of removal.

7. On appeal being preferred, the appellate authority, without discussing any point taken by the applicant, has decided the matter summarily. The appellate authority did not come to the rescue of the applicant.

8. Challenging the aforesaid orders of the enquiry proceedings, an application was filed before the learned Tribunal which also ended unsuccessfully. Learned Tribunal did not find any fault in the procedure at all. Learned Tribunal recorded that there was no reason to serve any further notice of hearing before disagreement as, in fact, there was no difference with the conclusion arrived at by the enquiry officer with that of the disciplinary authority.

9. Mr. Basu, learned Counsel appearing for the applicant, submits that if the

charges are looked into in relation to the Rules, it will appear that no charge of misconduct could be levelled, therefore, the charge sheet should have been dropped. He further submits that the report of the enquiry officer is not based on any evidence and nothing has been discussed. Disciplinary authority, without giving any chance, whatsoever, has apparently differed and imposed punishment without giving any chance for the second time, as, the Disciplinary Appeal Rule provides for service of notice before imposition of punishment. Mr. Basu further submits that when the report of the enquiry officer has been differed, either partly or wholly, an opportunity of hearing should have been given. In support of his submission he has drawn our attention to a Supreme Court decision reported in (2004) 13 SCC 797.

10. Mr. Banerjee, learned Counsel for the respondent, submits, it is true, evidence is there on record which shows that the applicant was found to be missing from Guard's cabin and the person who had detected had deposed. Moreover, the applicant had also admitted before the enquiry officer as well as at the time of joint enquiry report. When there is an admission, question of fact finding or discussion of any evidence did not arise. According to Mr. Banerjee, in substance disciplinary authority has not differed with the findings of the enquiry officer as it had found the applicant guilty as well. Disciplinary authority has merely added few words to supplement the report of the enquiry officer and hence the order of punishment is quite justified.

11. We have heard the rival contentions of the parties and we have examined the record, deposition, charge sheet and the report of the enquiry officer. We find, the concluding part of the report of the enquiry officer has already been reproduced, that without discussing any evidence, whatsoever, adduced from either side, the enquiry officer has straightway come to the conclusion that the applicant is guilty of the charges. He has not discussed who has proved which portion of the misconduct although in the charge sheet we find three witnesses were there. In the record we find deposition of some witnesses. Whose evidence has been accepted by the enquiry officer has not been spelt out at all. It appears that he has gone by the admission said to have been made by the applicant at the time of putting questions by the enquiry officer to the applicant. According to us, the enquiry officer should not have noted the answers given by the applicant to the questions put by him at the conclusion of the enquiry. This procedure, in our view, perhaps, is akin to the examination of the accused u/s 313 of the Code of Criminal Procedure and the answers given u/s 313 of the Code of Criminal Procedure is never treated as evidence. Here, treating the same analogy, we are of the view that the answers given by the applicant should not have been treated as evidence when he has not volunteered himself to be examined as a witness on his own. Now, going by his reply, he had nothing to prove but to maintain silence. When charges have been denied and enquiry was decided to be held; it ought to have been proved by evidence of the standard of preponderance of probability by the witness concerned.

12. From the record we find evidence of the witnesses; whether they are relevant or not are not to be examined by us since we do not have any jurisdiction to do so at this stage and in case of difference, partly or wholly, it is written the domain of the disciplinary authority and enquiry officer to do so. It appears that the disciplinary authority has not even considered the question of proportion with regard to punishment. The appellate authority had done it mechanically but in different version without adverting to the point raised by the applicant in his appeal in great details. We fail to understand why their mind was not changed by the representation made by the applicant. At least both the authorities should have given reasons referring to the evidence on record. That has not been done.

13. We are very sorry to note, the learned Tribunal has also failed to follow the procedural error. Disciplinary Rules have been provided to safeguard against illegal victimization in the name of disciplinary proceedings. Procedural safeguard is also a part of the principle of natural justice. We, therefore, hold, neither punishment has been imposed nor the applicant has been held guilty with due process of law, as required under Disciplinary Rules, 1968. It is clear that order of removal has been passed; namely, right of livelihood has been taken away without due process of law and thereby the order of removal for the time being has been passed in violation of Article 21 of the Constitution of India. It is now settled position of law, right to live includes right to livelihood. However, the department will be at liberty to proceed afresh from the stage of conclusion of evidence.

14. We, therefore, direct the disciplinary authority to appoint an independent competent person, other than the person who was earlier appointed, as an enquiry officer who will proceed afresh from the stage of the evidence being recorded, taking into consideration the materials and evidence already on record, without being influenced or swayed by any of the earlier orders or observations either of the departmental proceedings or of the learned Tribunal. No new things should be brought. Entire exercise shall be completed within a period of three months from the date of communication of this order; failing which the charge sheet will be treated to be withdrawn and this will be treated to be a closed chapter.

15. Since we have set aside the order of removal passed by both the authorities as well as by learned Tribunal, applicant should be reinstated in service with 40% (forty percent) back wages to be paid to the applicant. However, after holding fresh enquiry, if it is found that lesser punishment is imposed then the applicant will be entitled to make representation for payment of balance 60% of back wages to the authorities concerned who shall consider the same in accordance with law.

16. The application is disposed of.

17. There will be no order as to costs.

18. Urgent xerox certified copy, if applied for, be supplied to the parties on priority basis.