
(1965) 07 CAL CK 0003
In the Calcutta High Court

Union of India

APPELLANT

Vs

Sailendra Nath Banerjee

RESPONDENT

Date of Decision : 01-07-1965

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)
Government of India Act, 1935 — Section 240

Citation : 70 CWN 44

Hon'ble Judges : Bose, C.J;B.C. Mitra, J

Bench : Division Bench

Advocate : B.N. Bose, for the Appellant;A.K. Dutt and N.L. Pal, for the Respondent

Final Decision : Dismissed

Judgement

B.C. Mitra, J

1. This is an appeal from judgment and order of Mr. Justice J.P. Mitter, dated May 20, 1959, whereby a rule nisi issued by this Court, in a petition under Article 226 of the Constitution, was made absolute.

2. The respondent is a non-gazetted railway servant, holding a non-selection post in the Eastern Railway. He was appointed on November 1, 1930, by the Divisional Superintendent, Howrah, East Indian Railways, now known as Eastern Railway. He was made permanent in the post of Assistant Station Master on September 1, 1952, his grade pay being Rs. 60-4-120-5-170/-.

3. In 1952, the respondent who was then posted at Dhulian Ganges was transferred to Sahebganj. In accordance with the transfer order, he joined his duties at Sahebganj, but failed to vacate the quarters which he occupied at Dhulian Ganges. Thereupon a show cause notice dated September 15, 1952, incorporating therein the charges against the respondent, as also a list of penalties, was issued by the Divisional Personnel Officer. By this notice the respondent was called upon to show cause why the punishment specified in Item

3 of the list or a lesser penalty set out thereunder should not be imposed upon him. This Item 3 in the said list is: "withholding of increments or promotion including stoppage of efficiency bar." The respondent was allowed seven days from the date of receipt of the notice to give his explanation. A written explanation was furnished by the respondent, which however has not been included in the Paper Book, but the original was produced before us at the hearing of this appeal.

4. On June 10, 1953, the Divisional Personnel Officer, Howrah, passed an order, imposing a penalty on the respondent which is as follows:-

Re. Non-vacation of quarter at D.G.L.E.

Ref. Your explanation dated 9.11.52.

I have decided that you are responsible in the above case and have passed the following orders -

Your next increment is stopped for one year with cumulative effect. This will be treated as a serious offence for the purpose of special contribution to Provident Fund.

If you do not vacate the said quarter at D.G.L.E. within another fortnight further severe disciplinary action will be taken against you.

5. The respondent contends that the above order of penalty was not served upon him. Intimation about the penalty was for the first time given to him by a letter dated April 22, 1954 by the Divisional Superintendent, Howrah, by which the respondent was informed that the increment due to him on January 1, 1954 could not be granted, as the same had been stopped for one year for not vacating the quarter at D.G.L.E., in terms of the said order dated June 10, 1953. On April 25, 1956, the respondent wrote to the General Manager, Eastern Railway, that the punishment notice issued by the Divisional Superintendent, Howrah, was not received by him, and for that reason he was deprived of the right of appeal to the next higher authority against the punishment imposed upon him. On May 18, 1954, the respondent preferred an appeal against the order of punishment, to the Divisional Superintendent, Howrah. On July 22, 1954, the Divisional Superintendent disposed of the respondent's appeal by declining to interfere with the orders already passed. On May 19, 1956, the respondent preferred another appeal to the Divisional Superintendent, Eastern Railway, requesting reconsideration of the matter. On June 1, 1956, the Divisional Personnel Officer informed the respondent that the Divisional Superintendent had disposed of the second appeal by holding that the respondent's action in not vacating the quarter at Dhulian Ganges was an act of indiscipline, for which he had been correctly punished. It was also stated in this communication that the punishment order was duly communicated to the respondent by a letter dated July 22, 1954. The respondent was further informed that in further appeal lay in the matter, which should, therefore, be treated as

closed.

6. Not satisfied with the order communicated to him on June 1, 1956, the respondent again preferred an appeal to the General Manager, Eastern Railway on September 5, 1956, requesting a personal hearing and also that facility of pursuing the proceedings might be given to him. Being aggrieved by the orders made by the railway authorities the respondent moved a writ petition and on September 11, 1956, a rule nisi was issued by this Court which was made absolute as hereinbefore mentioned. This appeal is directed against the order making the rule absolute.

7. Mr. Bhabesh Narayan Bose, learned advocate for the appellants, contended that the trial Court had made the rule absolute only on the ground that the said show cause notice was unsatisfactory, because it contained a list of several penalties which might be imposed on the respondent. The view taken by the trial Court was that the respondent should have been given clear notice of the punishment proposed to be inflicted. Mr. Bose contended that the trial Court was wrong in making the rule absolute on the ground that the notice was unsatisfactory. He argued that the show cause notice dated September 15, 1952, was according to law, and the same was not tainted with any irregularity or illegality. By the said notice the respondent was given seven days' time to give his explanation and an explanation was given by him. The punishment was inflicted upon the respondent after taken into consideration his written explanation. It was further argued that the said notice could not be held to be invalid merely because a list of the different penalties, which might be imposed upon the respondent was set out thereunder.

8. In support of the above contention, Mr. Bose relied upon a decision of the Supreme Court in (1) *Hukum Chand Malhotra v. Union of India*, (1959) 1 SCA 346. That was a case of removal from service, the appellant's contention being that such removal had been made in contravention of Article 311(2) of the Constitution. In that case the show cause notice stated the three different kinds of punishment, which might be inflicted upon the employee and it was contended that the notice was bad on the ground that different kinds of punishments were stated therein. It was held that even if only the punishment of dismissal was mentioned in the notice, it would still be open to the punishing authority to impose any of the two lesser punishments, and no grievance could have been made either about the show cause notice or the actual punishment imposed. It was further held that the mention of three punishments in the show cause notice gave a better and fuller opportunity to show cause why none of the three punishments should be inflicted upon him. These observations of the Supreme Court, it is true, were made in a case where Article 311(2) was attracted. It is now well settled that in such cases two notices for the two different stages of enquiries must be given. But in so far as the question of validity of a notice in which different kinds of punishments had been mentioned, was considered by the Supreme Court, the observations of the Supreme Court, on the validity of the

notice in the appeal now before us, have in our view, a decisive hearing. The notice dated September 15, 1952, was condemned by the trial Court only on the ground that it did not inform the respondent of the exact punishment proposed.

9. Mr. Arun Kumar Dutt, learned advocate for the respondent, contended that the notice must be held to be bad because it was a combined notice, namely, a notice containing the charge as also the punishment proposed to be inflicted upon the respondent. Mr. Dutt also relied upon the above mentioned decision of the Supreme Court and contended that the Supreme Court had condemned a combined notice in a case where a punishment was proposed to be inflicted on an employee. We cannot accept this contention of Mr. Dutt, as the question of a combined notice was discussed by the Supreme Court in connection with the question of a second opportunity being given to the employee to show cause why a proposed penalty should not be inflicted. Then again, these observations were made in a case where Article 311(2) of the Constitution was attracted. In the appeal now before us two notices are not clearly called for or required, as in a case of dismissal, removal or reduction in rank. In our opinion, there was nothing wrong in the notice dated September 15, 1952, because the different kinds of penalties which might be imposed on the respondent, were set out in the notice itself. The trial Court, in our opinion, was not justified in making the rule absolute on the ground that the notice was unsatisfactory as intimation of the exact punishment proposed to be inflicted, was not given to the respondent.

10. Before parting with this contention of the appellant, notice should be taken of another Bench decision of this Court reported in (2) Sudhir Ranjan Halder Vs. State of West Bengal and Another, , relied upon by Mr. Dutt. That was a case of dismissal and the question considered was if the notice was in accordance with Section 240 of the Government of India Act, 1935. The decisions of the Supreme Court in *Hukum Chand Malhotra v. Union of India* (supra) and of the Judicial Committee (3) *High Commissioner for India v. I.M. Lall*, 75 IA 225 were followed. That being a case of suspension followed by an order of dismissal, I need say nothing more about that case.

11. Before proceeding to consider the next contention, I should refer to Rule 1712 in the Indian Railway Establishment Code, Vol. I, which provides that before any of the penalties is imposed as set out in Clauses (2) to (6) of Rule 1702, the employee shall be informed of the definite offence or failure on account of which it is proposed to impose the penalty, and called upon to show cause why that or any lesser penalty should not be imposed. The learned advocate for the appellant contended that the notice, far from being bad on the ground on which it was held to be bad by the trial Court, must be held to be a valid notice, as it was incumbent on the railway authorities to give notice to the respondent of the penalty proposed as also of any lesser penalties which might be imposed. It seems to us that the contention on behalf of the appellants is well-founded. The Rule mentioned above plainly requires the railway authorities to give notice not only of the penalty proposed, but also of the lesser penalties

which might be imposed. The notice cannot, therefore, be held to be bad merely because several penalties have been mentioned therein.

12. Mr. Dutt, however, contended that the penalty imposed on his client should be held to be bad, and should be quashed on a much stronger ground namely, that though the respondent was appointed by the Divisional Superintendent, Howrah, the order imposing penalty dated June 10, 1953, was passed not by the Divisional Superintendent, but by the Divisional Personnel Officer, Howrah. Under Rule 1705(b) in the Indian Railway Establishment Code, Vol. I, the penalty could be imposed only by a Divisional Superintendent or the authority competent to make a substantive appointment to the post held by the respondent. The penalty imposed is withholding of increments which is Item No. 4, in the list of penalties set out under Rule 1702. It was argued that Divisional Personnel Officer, who purported to make the order imposing the penalty had no jurisdiction to make the order which, therefore, is wholly illegal.

13. In order to appreciate this contention it is necessary to refer to Rule 1705(b) which is as follows :-

(b) The penalty specified in Item (4) of Rule 1702, viz., withholding of increments or promotion, or stoppage at an efficiency bar, shall not be imposed by an authority lower than a Divisional Superintendent, or the authority competent to make a substantive appointment to the post which the railway servant holds;

Relying upon this Rule, Mr. Dutt contended that the impugned order was not passed by the authority competent to pass the order. The Rule quoted above has nominated the authority who alone could, pass the impugned order.

14. Mr. Dutt further contended that in this case there was no doubt that the respondent was appointed by the Divisional Superintendent, Howrah. He also contended that there was no dispute that the impugned order was made by the Divisional Personnel Officer, Howrah. It was, therefore, argued that quite plainly the order was made in violation of the Rules in the Railway Establishment Code, which must be enforced. Mr. Dutt argued that this point has been specifically taken by the respondent in paragraph 19 of his petition in which it has been alleged that the Divisional Personnel Officer is subordinate to the Divisional Superintendent and the order having been made by the former, the same is illegal. This point has also been taken in Grounds II and IV set out under paragraph 28 of the petition. In paragraph 14 of the affidavit-in-opposition affirmed by Kamta Prosad Sharma on June 9, 1957, it has been admitted that the impugned order was made by the Divisional Personnel Officer, but it has been alleged that he was a senior scale officer and was, therefore, fully competent to impose the penalty. Mr. Dutt contended that the trial Court did not deal with this aspect of the respondent's contentions, but had disposed of the writ petition only on the ground that the notice was unsatisfactory, as the exact punishment proposed was not mentioned therein.

15. In support of the contention the learned advocate for the respondent referred to Appendix XXXII to the Indian Railway Establishment Code, Vol. II, in which the delegation of the power, and the authority to whom such power is delegated, has been set out. In Serial No. 7, which deals with power to withhold increments, the delegated authority is any authority which has power to make substantive appointment to the post which the railway servant holds. Relying upon this delegation, Mr. Dutt argued that the appointment of his client was made by the Divisional Superintendent and, therefore, that authority alone was competent to impose the penalty of withholding increments to which the respondent was entitled. It was argued that the admitted case of the appellant was that the order was not made by the Divisional Superintendent, but that the matter was transferred to the Divisional Personnel Officer who purported to make the impugned order. That being so, Mr. Dutt argued, the impugned order must be struck down.

16. Learned advocate for the appellant however contended that the impugned order had been validly made by the Divisional Personnel Officer, and there was no irregularity or illegality in the same. He argued that under Rule 1705(b) the penalty could be imposed by the Divisional Superintendent or any authority above him, and also by the authority competent to make a substantive appointment to the post which the respondent held. It was argued that the Divisional Personnel Officer, was an officer who was authorised to impose a penalty under the Rules. In support of this contention, Mr. Bose referred to the Discipline and Appeal Rules for Non-gazetted Staff which together with the Rules contained in Section II of Chapter XVII of the Indian Railway Establishment Code, Vol. I, and also subsidiary instructions, issued from time to time by the Railway Board, has been published. These Rules appear to have been printed and published for official use only. It was argued that S.R. 5(iii) dealt with the penalty of withholding increments or promotion, and it provided that for the purpose of this penalty, which has been specified in Rules 5(b) and (c), the General Manager had delegated to the officers mentioned therein, the power to make substantive appointment in all non-gazetted posts. Mr. Bose relied upon Clause (b) of SR 5(iii) which dealt with class IV staff of grades Rs. 160-220/- or Rs. 150-225/-. In case of these class IV employees, the authority to make substantive appointment under the delegated power is amongst others, senior scale officer. Relying upon S.R. 5(iii)(b), it was argued that the power to appoint, in case of persons holding the rank the respondent held, was delegated by the General Manager to senior scale officers. It was next argued that the Divisional Personnel Officers had been specified as senior scale officers, in the Indian Railway Establishment Code, Vol. I (revised edition, 1959). Appendix XIV in this revised edition deals with scales of pay for posts and services included in railway services - classes I and II. Item No. 18, deals with miscellaneous posts in Indian Railways. Under this term, Personnel Officers have been shown to be in the senior scale of the department to which the officer belongs. Relying upon this classification in the revised edition of the Indian Railway Establishment Code, Mr. Bose argued that the Divisional

Personnel Officer who made the impugned order, should be treated as a senior scale officer as contemplated by S.R. 5(iii)(b). It was argued that although the Divisional Personnel Officer was an authority subordinate to the Divisional Superintendent, under the relevant Rules mentioned above, he had the jurisdiction to make the order which, therefore, cannot be assailed.

17. Dealing with this aspect of the appellant's contention the learned advocate for the respondent, however, firstly contended that the no reliance should be placed on S.R. 5(iii)(b). This Rule, it was argued, had not been incorporated in the Railway Establishment Code itself, which alone contains the Rules under which the jurisdiction to impose penalties is exercised by the railway authorities. The Rules published along with the Discipline and Appeal Rules and Subsidiary Instructions are for office use only and cannot, therefore, be treated as valid Rules on the same footing as the Rules incorporated in the Railway Establishment Code. There is good deal of force in this contention of Mr. Dutt. S.R. 5(iii)(b) on which Mr. Bose relied in support of the validity of the impugned order, has not been incorporated in the Railway Establishment Code, which contains elaborate provisions for all matters connected with the discipline, punishment and appeals arising from employment in the railways.

18. There is, however, and more serious infirmity in the contention advanced by Mr. Bose, S.R. 5(iii) quite plainly indicates that for the purpose of Rules 5(b) and (c), the General Manager has made the delegations set out thereunder. Rule 5(b) deals with the penalties specified in Item (4) of Rule 2 viz., withholding of increments or promotion. It is plain, therefore, that the delegation purported to have been made under S.R. 5(iii), has not been made for the purpose of making a substantive appointment. This delegation appears to have been made only for the limited purpose of imposing the penalties specified in Rule 5(b). That being so, this purported delegation is contrary to the terms of Rule 1705(b) of the Indian Railway Establishment Code, which provides that the penalty of withholding of increments or promotion or stoppage at an efficiency bar, shall not be imposed by an authority lower in rank than a Divisional Superintendent or the authority competent to make a substantive appointment to the post which the respondent held. The said purported delegation is also contrary to Item No. 7 of Appendix XXXII of Vol. II of the Indian Railway Establishment Code. In this Appendix is set out delegations made by the President with reference to Rule 2003(5) of the Indian railway Establishment Code. That Rule defines competent authority to mean the President or any authority to which such power is delegated in Appendix XXXII. The purported delegation by the General Manager under S.R. 5(iii), therefore, is not only contrary to a substantive Rule in the Railway Establishment Code, but also to the delegations made by the President in exercise of the power of delegation conferred upon him by Rule 2003(5) of the Indian Railway Establishment Code. This purported delegation, therefore, under S.R. 5(iii) is of no assistance to the appellants, and cannot be called in aid by the learned advocate for the appellants to uphold the impugned order.

19. The General Manager derives his authority and jurisdiction to delegate the powers to impose penalty to authorities subordinate to him under Rule 1704(ii) of the Railway Establishment Code. In exercise of this power, the purported delegation under S.R. 5(iii) has been made. Under this delegation the power to impose the penalty was delegated to senior scale officers, but under Rule 1705(b) of the Railway Establishment Code and by the delegation made by the President in the said Appendix XXXII, the penalty could be imposed only by an authority not lower in rank than a Divisional Superintendent or an authority which had the power to make a substantive appointment to the post which the railway servant holds. The purported delegation, therefore, under S.R. 5(iii) can be upheld if, and only, if there was a delegation of power to make the appointment, but as the delegation had not been made for that purpose, but only for the purpose of Rules 5(b) and (c) which deal with punishments, the impugned order cannot be held to be valid as it was made by the Divisional Personnel Officer, even though he was a senior scale officer. It is significant that the purported delegation by S.R. 5(iii) has not been incorporated in Appendix XXXII of the Railway Establishment Code, Vol. II. As I have noticed earlier, Item No. 7 of this Appendix deals with the question of imposing the punishments of withholding increments, and the authority specified therein is the authority which has the power to make substantive appointment to the post. If it was intended that senior scale officers should be treated as having the authority to make the substantive appointments to the posts, but for the purpose of imposing punishments only, such provision should have been incorporated in the said Rule 1705(b) and the said Item No. 7 of Appendix XXXII to the Railway Establishment Code, Vol. II. But that has not been done. The effect of S.R. 5(iii) is that senior scale officers are to be treated as having the power to make appointments in the grade Rs. 160-200/- or Rs. 150-225/-, only for the purpose of imposing penalties, although in fact they have no such power. If that is the position, and the learned advocate for the appellants contends that it is so, the impugned order cannot be upheld as the delegation made under S.R. 5(iii), is quite plainly contrary to the terms of the Rule in the Railway Establishment Code itself and also in the said Appendix thereto. For these reasons the contentions of the learned advocate for the appellants regarding the validity of the impugned order, made by the Divisional Personnel Officer, must be rejected.

20. The learned advocate for the respondent, however, raised another contention, namely, that the appeal preferred by his client against the impugned order was not lawfully disposed of, in compliance with Rule 1721 of the Rules in the Indian Railway Establishment Code, Vol. I. In support of this contention, he relied upon a decision reported in AIR (1960) Ass 51. In view, however, of our findings on the question of the validity of the impugned order, it is not necessary for us to express any opinion on this aspect of Mr. Dutt's contention and we, therefore, refrain from doing so.

For the reasons mentioned above, the judgment of the trial Court except so far as the rule has been made absolute is set aside. The order, however, making the

rule absolute is upheld, but only on the grounds mentioned in this judgment. In the result, the appeal is dismissed with costs, hearing fee assessed at 5 G.ms. the respondent will be entitled to the costs of the trial Court also, the hearing fee is assessed at 5 G.gms.

Bose, C.J.

21. I agree.