

(2003) 09 CAL CK 0058
In the Calcutta High Court
Case No : FMA No. 1869 of 2001

Union of India (UOI) and Others

APPELLANT

Vs

Mahendra Prasad Dubey

RESPONDENT

Date of Decision : 30-09-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Railway Protection Force Rules, 1959 — Rule 44(10), 44(8), 44(9)

Citation : (2004) 1 CHN 44

Hon'ble Judges : Ashok Kumar Mathur, C.J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Kazi Md. Ali and Monoranjan Basu, for the Appellant;Achin Majumder, K.D. Das and Moupiya De, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—On July 7, 1986 a goods train namely K. P. Dock Special was passing through Naila Railway Station at about 21.08 hours. The train stopped for 14 minutes in absence of a green signal. The train was escorted by two security personnel namely one Sri B.K. Naik and one B. K. Singh. At that point of time the respondent being a R. P. F. constable was posted on the platform of the said railway station. The said train was carrying pig iron. Due to the stoppage of 14 minutes there had been a theft at the said railway station committed by two miscreants who were later on apprehended by the police authority along with the seized goods. According to the respondent when he was resting in his house next morning, he heard hue and cry, raised by the local people. He came out of his residence and found that the said accused persons were carrying pig iron in a handcart. The accused persons were arrested and brought to the railway police station. According to the respondents as per his statements made on December 2, 1986 he arrested the accused persons and brought them to the police station.

2. The respondent was chargesheeted for negligence in his duty as he failed to prevent and detect the theft of pig iron in course of his duty. The respondent was

served with a chargesheet on April 24, 1987. By a letter dated May 1, 1987 the respondent asked for copies of several documents as according to him those documents were needed to give reply to the chargesheet. The respondent thereafter by his letter dated June 2, 1987 gave his clarification to his superior authority and thereafter submitted his defence on September 26, 1987 appearing at pages 52-57 of the paper book. By the said written defence the respondent dealt with the charges brought against him on merits and did not raise any objection with regard to non-furnishing of the documents or with regard to procedural lapses, if any, committed on the part of the management.

3. Before the enquiry officer the appellant authority called 5 witnesses to support the charge while the respondent called those two guards namely Sri B.K. Naik and Sri B. K. Singh who escorted the said train on the relevant date. The enquiry officer after analyzing the evidence adduced by the respective witnesses came to a conclusion that the charges were proved. In the said enquiry report, appearing at pages 59-67 of the paper book, the enquiry officer recorded that copies of all the documents and exhibits were given to the delinquent.

4. By an order dated October 8, 1987, the disciplinary authority agreed with the finding of the enquiry officer and held the respondent guilty of the charges framed against him. The second show cause notice was issued on the same date, asking the respondent to show cause as to what penalty should be imposed on him. The respondent replied to the second show cause notice by his letter dated October 25, 1987. In the said reply he pleaded not guilty of the charges brought against him as according to him the charges were not proved against him. The disciplinary authority after considering the reply submitted by the respondent passed an order of removal from service vide order dated November 3, 1987. The respondent refused to accept service of the said order of removal and instead moved this Court on November 11, 1987 challenging the second show cause notice and the enquiry report. In the writ petition the respondent deliberately concealed the fact that the order of removal had already been passed by the respondent authority.

5. This Court initially passed an order to the effect that in case the order of removal had been passed the same should not be served upon the respondent. The writ petition was finally heard by the learned Single Judge. After hearing the submission on behalf of the respondent the learned Single Judge by his order dated March 16, 1986 allowed the writ petition ex parte by quashing the second show cause notice and directed payment of back wages. Hence, this appeal.

6. On perusal of the order of the learned Single Judge it appears that despite directions for affidavits having been given the appellant authority neither filed any opposition nor appeared before His Lordship. Hence, His Lordship had no other alternative but to dispose of the writ petition on the basis of the allegations made by the writ petitioner in his writ petition. It, however, appears that even before, the learned Single Judge at the time of final hearing the petitioner did not disclose the fact that the order of removal had already been passed. The order of

removal was brought on record by the appellant by way of a supplementary affidavit affirmed on September 22, 2003.

7. It was contended on behalf of the appellant that all reasonable opportunities were given to the respondent to defend himself in the disciplinary proceeding. The entire proceeding was conducted strictly adhering to the relevant rules being Railway Protection Force Rules, 1959 (hereinafter referred to as the said Rules, 1959). It was further contended on behalf of the appellant that the respondent without exhausting his remedy of appeal, was not entitled to maintain the writ petition before the learned Single Judge, as there was no procedural infirmity, which could entitle the respondent to approach this Court by way of writ proceeding. Lastly, it was contended that the respondent deliberately concealed the fact that the final order of removal from service had already been passed before initiation of the writ proceeding.

8. The appellant produced the exhibits, copies of the records of the entire disciplinary proceedings, before us.

9. On perusal of the records it appears to us that the respondent himself made a statement before the appellant on December 2, 1986 to the effect that the accused persons were apprehended by the local people and ultimately he arrested them and brought them to the Railway Police Station along with the seized goods. It further appears from the records that the said statement of the appellant so recorded in writing were corroborated by the written confessions made by the accused persons after they were arrested by the police authority. The chargesheet was accordingly issued. The appellant asked for copies of some documents. Subsequently he gave reply to the chargesheet on merits without making any grievance for alleged non-supply of relevant documents. The enquiry officer gave adequate opportunity to the parties including the appellant. They produced their respective evidence. The respondent produced two witnesses being the security personnel guarding the said train. Both the said witnesses categorically stated that they did not find the respondent on the platform while the train was stopped at the concerned railway station although the respondent was on duty at the relevant time.

10. The enquiry officer ultimately found the respondent guilty of the charges. The disciplinary authority agreed with the finding of the enquiry officer and issued a show cause notice with regard to punishment it was categorically stated in the second show cause notice that such finding of the disciplinary authority was "provisional". The respondent replied to the second show cause notice and ultimately suffered an order of removal from service.

11. Mr, Achin Mazumdar, learned Counsel appearing for the respondent supported the order under appeal on five grounds:

(i) The enquiry officer relied on the statements of the accused persons who were not produced by the prosecution and as such the appellant was deprived of his opportunity to cross-examine those persons. Similarly, the guard of the said train

was not produced by the prosecution, who was a relevant witness in this regard.

(ii) The enquiry officer did not apply his mind, as he had not considered the defence submitted by the appellant as required under rule 44(8) of the said Rules of 1959.

(iii) The disciplinary authority acted in a close mind and the said second show cause notice was issued with a close mind by the disciplinary authority in violation of Rules 44(9) and (10) of the said Rules of 1959.

(iv) The charge proved before the enquiry officer was at variance with the original charge.

(v) The copies of the documents were not given at the appropriate time. The copy of the preliminary report was not given. No list of documents and/or witnesses was attached with the chargesheet.

12. Let us now deal with the contentions raised by the respondents in seriatim.

13. First Ground:--According to the respondent since the enquiry officer relied on the statement of the accused persons who were apprehended with the seized goods, it was incumbent upon the respondent authority to produce those two persons to prove the said statements as well as to make themselves available for cross-examination by the respondent. Similarly, the guard of the said train was not produced despite request made by the appellant and as such the appellant did not bring vital witness. Hence, the enquiry proceeding and the report made thereon were vitiated by illegality. In support of such contention the respondent cited the following four decisions:--

(1) 1972 S L R 355 (Union of India v. Sardar Bahadur)

(2) Ministry of Finance and Another Vs. S.B. Ramesh,

(3) Kuldeep Singh Vs. The Commissioner of Police and Others,

(4) C.D. Singh alias Chandra Dip Singh Vs. Union of India and Others,

14. Citing the aforesaid decisions Mr. Majumdar for the respondent contended that when the best witness was withheld and not produced by the prosecution the enquiry was vitiated by illegality. For abstract proposition of law the aforesaid decisions are relevant for consideration. It is well settled principles of law enunciated in the aforesaid decisions of the Apex Court and this Court to the effect that the prosecution should produce witnesses whose statements are relied on so that the enquiry officer can arrive at a proper conclusion. At the same time the delinquent is also able to justify his defence through the said witnesses. Once the statements of the accused persons were relied on, per se their absence could have vitiated the entire proceeding and the result. The fact in the instant case was somehow different. From the records produced before us we could examine the statements of the said two accused persons. We also examined the statement of the appellant so recorded in writing. The said statements of the

accused persons and the statements of the appellant were identical. Since the facts came out from the accused persons in the said confessions were corroborated by the appellant in his written statement dated December 2, 1996 there was nothing further to be proved. Similarly, the said two accused persons were not at all relevant for the purpose of cross-examination. Had there been no such statement on behalf of the appellant the case would have been otherwise. The statement of the appellant dated December 2, 1986 in our view is the complete answer to the first ground raised by the learned Counsel appearing for the respondent.

15. Second Ground:-- It was contended on behalf of the respondent that the enquiry officer did not apply his mind while arriving at a conclusion and thereby violated the principle and/or procedural(sic) laid down under Rule 44(8) of the said Rules of 1959. Elaborating this submission Mr. Majumdar contended that there was no finding of the enquiry officer on each of the charges and the reasons therefor. From the chargesheet it would appear that there was only one composite charge brought against the appellant to the effect that he had committed serious misconduct and negligence of his duty. We have perused the enquiry report. We find that the enquiry officer considered each and every single piece of evidence and ultimately came to a conclusion that the charge brought against the respondent was proved. Since we are not sitting on appeal on the finding of the enquiry officer, we are unable to appreciate the contention raised by the respondent. In this regard the learned Counsel cited the Apex Court decision reported in Anil Kumar Vs. Presiding Officer and Others, to the effect that when there was non-application of mind by the enquiry officer and when the defence was not considered by the enquiry officer the said report was liable to be quashed and set aside. Rule 44(8) inter alia stipulates that reason should be recorded on findings of the enquiry officer on the charge. As we have just now observed that that had been a recorded finding backed up by reasons by the enquiry officer in his report, one cannot say that there was non-application of mind or that the defence of the delinquent was not considered. Hence the second ground being not tenable is also rejected.

16. Third Ground:--It was contended on behalf of the respondent that the second show cause notice was issued in a close mind and as such was liable to be quashed and/or set aside. Reliance was placed in this regard on the Apex Court decision in Yoginath D. Bagde Vs. State of Maharashtra and Another, . It appears from the order of the disciplinary authority appearing at pages 70-71 of the paper book that the disciplinary authority recorded that it was proved beyond doubt that the delinquent failed in the performance of his duty and as such delinquent was held guilty of the charge. On the same date a show cause notice was issued to the delinquent on the quantum of punishment. Rules 44(9) and (10) of the said Rules of 1959 being relevant herein is quoted below:--

"(9) The disciplinary authority shall, if it is not the inquiring authority, consider the record of the inquiry and record its findings on each charge.

(10) (1) If the disciplinary authority, having regard to its findings on the charges, is of the opinion that any of the penalties specified in Clauses (e) to (h) of Rule 41 should be imposed, it shall pass appropriate orders in the case.

(2) If it is of opinion that any of the penalties specified in Clauses (a) to (d) of Rule 41 should be imposed, it shall--

(a) furnish the member so charged with a copy of the report of the inquiring authority and, where the disciplinary authority is not the inquiring authority, a statement of its findings together with brief reasons for disagreement, if any, with the findings of the inquiring authority.

(b) give him a notice stating the action proposed to be taken in regard to him and calling upon him to submit within; a specified time such representation as he may wish to make against the proposed action; and

(c) consider the representation, if any, made by the member so charged in response to the notice under Clause (b) and determine what penalty, if any, should be imposed on the member so charged, and pass appropriate orders on the case."

17. From the said Rules it appears that it was the duty of the disciplinary authority to record its finding on each charge when he was not the enquiring authority.

18. Similarly after recording its finding if he proposes to impose major punishment he would furnish a copy of the enquiry report and a statement of his findings so that the delinquent gets a chance to show cause on the issue of punishment. It is true that the identical rules were letter(sic) on struck down by the Apex Court. The Apex Court in the case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., observed that the second show cause notice along with the copy of the enquiry report was must before imposing penalty. This was a case of 1986. The concept of supply of copy of the enquiry report and service of second show cause notice enunciated in Union of India and others Vs. Mohd. Ramzan Khan, was made prospective by Apex Court in Karunakar's case, (supra). The concerned authority conducted the proceeding strictly in accordance with the concerned rules. It is true that the disciplinary authority recorded its final conclusion on the issue of holding the respondent guilty of the charges. However, on the same date the second show cause notice was issued wherein it was stated that such finding was "provisional". In any event the appellant replied to the second show cause notice in detail and pleaded him not guilty of the charges. In such circumstances quashing the second show cause notice at this distance of time on the said ground alone would not be a proper justice.

19. Fourth Ground:-- It was contended that the charge so proved by the enquiry as recorded in the enquiry report was at variance with the original charge. We have examined the charge as well as the finding of the enquiry officer as well as the disciplinary authority and we are unable to appreciate the issue raised by the

learned counsel appearing for the respondent. The one and only charge was misconduct and negligence of duty, which was elaborately discussed by the enquiry officer as well as by the disciplinary authority while recording their finding. Hence, such contention of the respondent on that score is rejected. Since we have held that there was no variance of the charge the decisions cited by the learned counsel on this score are not discussed.

20. Fifth Ground:-- After the chargesheet was issued the respondent asked for several documents by his letter dated May 1, 1987. In the enquiry report the enquiry officer categorically recorded that copies of all the documents and/ or exhibits were duly given to the delinquent. We also find from the defence submitted by the respondent either on June 2, 1987 or on September 26, 1987 that the respondent did not have any grievance at all on that score. Hence, such contention at the belated stage was nothing but an afterthought and as such is rejected. It was also contended on behalf of the respondent that no copy of the preliminary report was given to the delinquent. We fail to understand as to the relevance of the said preliminary report, if any, in the present proceeding after the statement of the respondent recorded in writing dated December 2, 1986. In any event since we have just now observed that the enquiry officer after analyzing the defence in detail came to a final conclusion after giving adequate opportunity to the delinquent to defend himself in the proceeding such contention of the respondent being not tenable is rejected.

21. Hence, from the aforesaid facts it is clear that none of the contentions raised by the respondent was tenable. Moreover the respondent is guilty of suppression of material facts by not disclosing the order of removal or at least the factum of passing of the order of removal. We are satisfied that the proceedings were conducted by giving sufficient opportunity to the delinquent to defend himself in the proceedings. We would have intervened on the third ground to the effect that the disciplinary authority while issuing the show cause notice came to a final conclusion to the effect that the delinquent was held guilty of charges. However, after weighing this as against other facts and circumstances as discussed hereinbefore we are convinced that such lacuna, if any, had not caused any prejudice to the delinquent.

22. We, therefore, hold that the learned Judge erred in allowing the writ petition on the basis of the submission made on behalf of the respondent. Hence, the order under appeal is quashed and set aside. The writ petition is also dismissed.

23. This order would however not preclude the respondent from preferring an appeal from the order of removal in accordance with the relevant rules. In case, such appeal is filed by 29th November, 2003 the appellant authority would dispose of the same on merits in accordance with law.

24. In any event the appellant is directed to pay all terminal benefits to the respondent after deducting the amount, if any, paid by way of interim arrangement. Such payment must be made to the respondent within a period of

two months from date. In case the respondent prefers an appeal in terms of the liberty given herein the terminal payment would be without prejudice to his rights and contentions in the appeal.

25. The appeal is disposed of accordingly.

26. There would be no order as to costs.

27. Urgent xerox certified copy would be given to the parties, if applied for.

Ashok Kumar Mathur, C.J.

28. I agree.