
(1976) 07 CAL CK 0018
In the Calcutta High Court
Case No : F.M.A. No. 1022 of 1974

Union of India (UOI)

APPELLANT

Vs

P.C. Choudhury

RESPONDENT

Date of Decision : 16-07-1976

Acts Referred:

Constitution of India, 1950 — Article 226(1), 309, 311(1)
Income Tax Act, 1961 — Section 127
Penal Code, 1860 (IPC) — Section 420
Railway Servants (Discipline and Appeal) Rules, 1968 — Rule 10, 11, 12, 13, 14

Citation : 80 CWN 946 : (1976) 2 ILR (Cal) 316

Hon'ble Judges : Sankar Prasad Mitra, C.J;S.K. Datta, J

Bench : Division Bench

Advocate : Sankardas Banerjee and Prasanta Kumar Ghosh, for the Appellant;Somnath Chatterjee and B. Choudhury, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Datta, J.—This is an appeal by the Union of India, the Divisional Superintendent, Eastern Railway, Howrah and the Secretary Ministry of Railways, against the judgment and order of Amiya Kumar Mookerji J. dated September 2, 1974. By the impugned judgment, the order of dismissal removing the Petitioners Respondents from service was quashed by a writ of certiorari. In the appeal, we are now concerned with the purported dismissal of the Respondent No. 1 from service and the appeal stands dismissed in respect of other Respondents.

2. The dismissal order removing the Respondent No. 1 from service was passed during the all-India strike of the Railway men in May 1974. By an order dated May 12, 1974, P.W. Impett, the Divisional Superintendent, Eastern Railway, Howrah, decided that in the attending circumstances it was not reasonably practicable to hold any enquiry against the Petitioner and some other Railway staff mentioned in the order as required under the Railway Servants (Discipline and Appeal) Rules, 1968. It was further decided therein in exercise of the powers

vested in the said authority under Rule 14(ii) of the said Rules that the Petitioner should be removed from service.

3. The order was challenged on various grounds by an application under Article 226(1) of the Constitution and in disposing the connected Rule issued thereon, the learned Judge made the Rule absolute following his judgment in *Jyoti Prasad Banerjee v. Chief Mechanical Engineer, Eastern Railway* 1975 (1) C.L.J. 75. On appeal, the contentions made on behalf of the Railways against the said judgment were accepted by us and by our judgment in *Chief Mechanical Engineer, Eastern Railway and Ors. v. Jyoti Prosad Banerjee* ILR 1975 (2) Cal. 237 : 1975 (2) C.L.J. 537 : 79 C.W.N. 709, we allowed the appeal and discharged the connected Rules.

4. In this appeal we are faced with similar circumstances. Mr. Somnath Chatterjee, learned Counsel appearing for the Respondent No. 1, contended that our decision in *Jyoti Prosad's* case ILR 1975 (2) Cal. 237 : 1975 (2) C.L.J. 537 : 79 C.W.N. 709 apart from other grounds is untenable particularly in view of the subsequent decisions of the Supreme Court. Relying on the decision in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, it was contended that it was incumbent on the disciplinary authority to hear the delinquent employee before his case was objectively considered and final action taken under Rule 14. According to the Appellants, no such principle relating to actions under Rule 14(ii) was laid down by the aforesaid decision. It is the admitted position that the delinquent employee before us was never heard when the order of his dismissal from service was passed.

5. Rule 14 of the said Rules considered in the above decision is as follows:

14. Special procedure in certain cases--notwithstanding anything contained in Rules 9 to 13.

(i) Where any penalty is imposed on a Railway servant on the ground of conduct which has led to his conviction on a criminal charge, or

(ii) where the Disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) where the President is satisfied that in the interest of the security of the State it is not expedient to hold an inquiry in the manner provided in these Rules;

the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit;

The decision is expressly confined to cases contemplated in Clause (i) and it is stated nowhere that such interpretation applies to cases under Clauses (ii) and (iii); of course the Court interpreted the common portion of the three cases governing cases (i), (ii) and (iii) of Rule 14. The Court observed.

The word "consider" merely connotes that there should be active application of

the mind by the Disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all aspects, the pros and cons of the matter after hearing the aggrieved party.... It is obvious that in considering this matter the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features if any present in the case and so on and so forth.

It may be that the conviction of an accused may be for a trivial offence as in the case of the Respondent T.R. Chellappan in Civil Appeal No. 1664 of 1974 where a stern warning or a fine would have been sufficient to meet the exigencies of service. It is possible that the delinquent employee may be found guilty of some technical offence, for instance, violation of the transport rules or the rules under the Motor Vehicles Act and so where no major penalty may be attracted. In other words, the position is that the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction....The statutory provision referred to above merely imports a rule of natural justice in enjoining that before taking final action in the matter, the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair play....

The Court also noticed that--

In none of the cases has the Disciplinary authority either considered the circumstances or heard the delinquent employees on the limited point as to the nature and extent of the penalty to be imposed if at all. On the other hand, in all these cases the Disciplinary authority has proceeded to pass the order of removal from service straightway on the basis of conviction of the delinquent employees by criminal Courts.

6. It may be mentioned here that the delinquent employees in three cases considered by the Court were released on probation, though they respectively committed offences of disorderly conduct, theft of Railway property and u/s 420 of the Indian Penal Code. The orders of the High Court quashing the orders dismissing the said employees straightway from service was affirmed.

7. The above decision does not, in our opinion, lay down a broad proposition that

in all cases of conviction on a criminal charge, the Disciplinary authority is required to hear the delinquent before passing the orders of removal from service. As has been laid down the authority, which is required to consider the circumstances of the case and make such orders as it deems fit, has to embark upon a summary inquiry and take into consideration all relevant circumstances and it is not obligatory for the authority to remove a delinquent employee from service as soon as there is a conviction on a criminal charge. While the authority will consider the circumstances and hear the delinquent in appropriate cases the decision does not lay down that as a universal rule in all cases the delinquent employee has to be given a hearing even if he is convicted by criminal Court of the offence of serious moral turpitude.

8. The contention that the decision applies to cases coming under cases envisaged in Clauses (ii) and (iii) may now be examined. In respect of cases coming under Clause (iii) where the President dispenses with an inquiry in the interest of the security of the State and the Disciplinary authority is required to consider the circumstances of the case for the purpose of imposing penalty, it seems to us that in such case there is no scope for giving the delinquent employee a hearing before a final order is passed. It is undoubtedly true that the Disciplinary authority is required to consider the circumstances and if there is no consideration of the circumstances attending or if there is non-application of mind by the authority or the order is otherwise perverse or biased or mala fide or based on extraneous matters or on misconception of the situation or law any final order passed, may be challengeable in a Court of law for scrutiny. But the said authority does not warrant the contention that as a proposition of universal application a final order must fail only if no opportunity of hearing was given to the delinquent employees in cases under Clauses (ii) and (iii) even though such order is free from any other infirmity. As it appears to us, the final order passed under Clause (ii) of Rule 14 in the case before us will not fail merely because no opportunity was afforded to the delinquent employee if there was a proper consideration of all attending circumstances and an appreciation of the position in law and on facts in proper perspective.

9. On a perusal, of the order of removal of the Respondent from service and on the materials on record it does not appear to us that the impugned order suffer from any such infirmity.

10. Mr. Chatterjee next relied on the decision in *Ajantha Industries and Others Vs. Central Board of Direct Taxes, New Delhi and Others*, . The Court was considering in that case whether the failure to record the reasons in the order which was communicated to the Appellants is violative of the principles of natural justice for which the order should be held to be invalid. Section 127 of the income tax Act, 1961, provides for giving to the Assessee a reasonable opportunity of being heard and also for recording reasons before a case is transferred from one income tax Officer to another by the Commissioner or the Board. In the impugned order of transfer of income tax cases of the Assessee

from Nellore to Hyderabad no reasons were recorded. The authorities sought to rely on the show-cause notices which recited "facility of investigation" as the reason for the proposed transfer, but the Court refused to read the reason in the notice as a part of the impugned order. In the case before the Supreme Court, the impugned order, as it appears, did not contain any reason and the Revenue relied on the notice which mentioned the reason as being the reason recorded in the file which contention was not accepted, the recording of reasons in the order was held to be a mandatory direction under the law under Order 127(1). It was further held that non-communication thereof was not saved by showing that the reason existed in the file which, as we have seen, was only in the show-cause notice and no reason in the order was communicated to the Assessee as in absence thereof in the order it was not possible to do.

11. In the cases before us, the reasons for dispensing with the inquiry was in fact recorded in the relevant order although it was not communicated to the delinquent employee. Further, unlike the provisions in the income tax Act, no right is given to such employee to show cause against the dispensing with the inquiry. Non-communication of the reasons for dispensing with the inquiry for the time being when reasons are in fact recorded in the order, will not, in our opinion, vitiate the impugned order for removal from service. Such reasons have come to light in the course of hearing of the matters in Court. In the case before the Supreme Court, if the Revenue could produce or serve thereafter on the Assessee the order containing the reasons for transfer of his case, such order, we think would not have been declared invalid merely because it was served or disclosed late. In this case, the only relevant order in the file did not contain any reasons for transfer which is not the case before us.

12. Mr. Chatterjee next contended that the order dispensing with the inquiry or the order of removal was not passed by the competent authority. The relevant Rules are the Railway Servants (Discipline and Appeal) Rules, 1968, made by the President in exercise of the powers conferred by the proviso to Article 309 of the Constitution. Under Rule 7 the authorities to impose penalties mentioned in the Rule. Under schedule II, Clause (9) in respect of dismissal from service the Disciplinary authority is the appointing authority or any other higher authority. The "appointing authority" has been provided in Rule 2 of the said Rules which is as follows:

2. Definitions: (1) In these Rules, unless the context otherwise requires,

(a) appointing authority in relation to a Railway servant means--

(i) The authority empowered to make appointments to the service of which the Railway servant is for the time being a member or to the grade of the service in which the Railway servant is for the time being included, or

(ii) The authority empowered to make appointments to the post which the Railway servant for the time being holds, or

(iii) The authority which appointed the Railway servant to such service grade or post, as the case may be, or

(iv) Where the Railway servant having been a permanent member of any other service or having substantively held any other permanent posts, has been in continuous employment under the Ministry of Railways, the authority which appointed him to that service or to any grade in that service or to that post, whichever authority is the highest authority.

13. In this case, the departmental enquiry was dispensed with by P. W. Impett, Divisional Superintendent, Howrah, who also passed the order removing the Respondent No. 1 from service and all these could be done by the Disciplinary authority as the appointing authority. The Appellants have produced a synopsis of the service particulars of the Respondent No. 1, a class III staff, which is as follows:

Capacity Date of appointment Appointing authority

(1) Trainee chageman 27.10.56 District Electrical Engineer, Lilluah.

(2) Electrical chageman after completion of training grade Rs. 200-300 (Pc) 27.10.57 Chief Electrical Engineer, Calcutta.

(3) Promoted as electrical chageman Gr. 335-425 (AS) 27.7.61 Chief Personnel Officer, Calcutta.

(4) Promoted to electrical foreman "B" Grade 370-475. 11.8.66 Deputy Chief Electrical Engineer (R), E. Railway, Calcutta.

(5) Put on to officiate as junior instructor, Gar shed, Howrah. 4.6.72 Deputy Chief Electrical Engineer (TR), E. Railway.

14. Mr. Banerjee submitted that P. W. Impett at the material time was the Divisional Superintendent, an officer in Senior Administrative Grade, in one of the posts of the Additional Chief Operating Superintendent, transferred to Howrah. It was stated in the supplementary affidavit of September 5, 1975, verified by G.B. Singh, the Divisional Personnel Officer, Eastern Railway, on behalf of the Appellants that the post of Deputy Chief Electrical Engineer (R) was lower in rank than that of Divisional Superintendent. By serial No. 5642, Circular No. E 308/0/4 dated April 9, 1964, the General Manager delegated powers to make substantive appointments of all Class III staff to officers in the junior administrative rank and above. A copy of serial No. 7449 dated April 4, 1970, issued by the Chief Personnel Manager, Eastern Railway, was also produced. This recited the General Manager's decision delegating exercise of powers under Rule 14(II) of the Rules on the Heads of Departments and Divisional Superintendents only. For the Respondent holding for the time being the post of Junior Instructor, Howrah, the Divisional Superintendent, Eastern Railway, Howrah, was the competent appointing authority. The Divisional Superintendent, it was submitted, accordingly, was competent to pass the impugned orders as the Disciplinary

authority being the appointing authority.

15. Mr. Chatterjee, on the other hand, submitted that the delinquent in course of his career was at one time appointed in Class III service by the Chief Electrical Engineer who is the highest authority of all the appointing authorities described in the chart set out earlier. Accordingly, in view of the provisions of the clause "which ever is the highest authority" in Rule 2, which applies to all the authorities mentioned in the four cases therein, the Chief Electrical Engineer, who was the highest authority amongst them, would only be competent to remove the Respondent from service. Mr. Chatterjee also referred to the following circular of the Railway Board which is set out below:

Serial No. 5256, Circular No. E 308/0 dated the 7th May 1963.

Sub: Discipline and Appeal Rules--"Appointing authority" in relation to a Railway servant.

The following copy of Railway Board's letter is published for information and guidance.

Copy of Railway Board's letter No. E (D and A) 63/RG/6-8 dated 27th April 1963, addressed to General Manager, All-India Railways and others.

Sub: Discipline and Appeal Rules--Appointing authority in relation to a Railway servant.

A case has come to the notice of the Board which reveals that the definition of the term "Appointing authority" was not correctly understood by the concerned Railway Administration in spite of the clear definition given in Rule 1702(i)-RI read with Rule 1705-RI. In this case, a Railway servant was initially appointed by a Senior Scale Officer. Subsequently, he was promoted to a higher post by a Head of Department. While working in the higher post, the Railway servant was dismissed from service for serious misconduct by a Senior Scale Officer. The dismissed Railway servant filed a writ petition in the Mysore High Court and the High Court quashed the order of dismissal on the ground that it had been made by an authority subordinate to the authority who had appointed the Petitioner to the post from which he was dismissed and thus contravened the provision of Article 311(1) of the Constitution.

With a view to avoiding a recurrence of such cases, the Board desire that it should be impressed upon all concerned officers that the "Appointing Authority" should be determined under Rules 1702(i) and 1705-RI whichever is the highest authority.

16. It may be mentioned that Rule 1705(i) of the Indian Railway Establishment Code, vol. I, is in pari materia with Rule 2 of the said Rules.

17. It was, further, submitted that the Chief Electrical Engineer was declared to be one of the Heads of the Departments under appen. XXXVIII, Rule 2202(9) of the Railway Establishment Code, vol. I. But the Divisional Superintendent, P.W.

Impett, was posted as one of the Additional Chief Operating Superintendents and even if in the same grade he was not one of the Heads of the Departments, accordingly, such Divisional Superintendent posted as the Additional Chief Operating Superintendent was not an authority higher than or even equal to the Chief Electrical Engineer.

18. Mr. Banerjee submitted that the post of the Divisional Superintendents was equivalent to the rank of Additional Heads of Departments relying on the Supplementary affidavit of G.B. Singh affirmed on September 24, 1975, where the above position is said to be true to the deponent's knowledge. No office order or rule in support was produced before us and accordingly, we are unable to hold that the District Superintendent or the Additional Chief Operating Superintendent is also one of the Heads of the Department; on the contrary Rule 2(d) of the Rules refers only to Rule 2202(9) of the Railway Establishment Code, vol. II, for Heads of the Department, which does not provide the Additional Chief Operating Superintendent, as one of the Heads of the Department. Further, the serials 5642 or 7749 cannot modify or amend the provisions of the Railway Servants (Discipline and Appeal) Rules, 1968, framed by the President in exercise of the powers conferred by proviso to Article 309 of the Constitution.

19. It now remains to be considered if the clause "whichever authority is the highest authority" applies to all cases of Clause (a) of Sub-rule (i) of Rule 2. Mr. Banerjee relied on Sub-clause (ii) contending that it connotes the only authority empowered to make the appointment to the post which the Railway servant for the time being holds as the appointing authority. The other Clause (i) connotes such authority to be the authority which makes appointment to the service (here Class III) or the grade. The Sub-clause (iii) connotes such authority to be any authority which makes appointments to such service, grade or post. The sub-clause refers to a permanent servant of the Railways holding an employment in the Ministry. In this context the sub-clause "whichever authority is the highest authority" applies with all force to all the Sub-clauses (i), (ii), (iii) and (iv) thereby providing that of the authorities making appointments of Railway servant to the service, grade or post, the highest authority among them shall be the appointing authority. Unless this was the position, there is no sense in making the appointing authority to be one who makes appointments to the service or grade or post for the time being held by the Railway servant providing further that the highest of such authorities shall be the authority for disciplinary proceeding. In this view of the matter, the Chief Electrical Engineer would be the proper appointing authority as being the highest authority of the authorities appointing delinquent to the service, grade or post for the time being held by him to issue orders dispensing with the inquiry and ultimately the order of removal from service. The impugned order dispensing with the inquiry and the removal from service of the Respondent No. 1 by an authority below the highest of such authorities, the Chief Electrical Engineer must, accordingly, be held to be unsustainable.

20. The appeal, accordingly, fails and is dismissed. There will be no order for costs in the circumstances. All interim orders if any are vacated.

Sankar Prasad Mitra C.J.

21. I agree.