
(2008) 03 CAL CK 0061
In the Calcutta High Court
Case No : W.P.S.T. 654 of 2007

Uttam Pal

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 17-03-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : 112 CWN 628 : (2008) 2 ILR (Cal) 818

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

Bench : Division Bench

Advocate : M.K. Das, Subharata Das, Ananya Das and Gautam Lahiri, for the Appellant; Kallol Basu, for State, for the Respondent

Judgement

1. This application is directed against the impugned judgment and order of the State Administrative Tribunal dated 10th of April 2007 by which the Petitioner's challenge against the impugned order of dismissal passed by the Disciplinary Authority followed by appellate authority, failed.

2. The fact of the case, leading to filing of the instant application, is stated hereunder:

3. The applicant before us was a police constable in the West Bengal State Police and at the relevant point of time, when he was charge sheeted, the applicant was posted at Rural Out Post at Gantra under Chapra Police Station within the district of Nadia (in short R.O.P.).

4. On or about 1st of August 2000, the applicant was charge sheeted on four counts; the summary of which is as follows:

(i) He abused, his In-charge of the above R.O.P., Bhanu Mondal, with filthy languages and with dire consequences in authoritative voice;

(ii) The applicant reported duty on the 11th of August 1999 at the same R.O.P. in a drunken condition and damaged window glass, etc.;

(iii) On the 11th October 1999, under the influence of liquor, the applicant damaged ceiling fan, television set, etc., of the said R.O.P. and threw them outside the window in presence of other Constables;

(iv) From 14th of October 1999 he was found absent from his duty without any permission or leave. On 19th October 1999 at 14-15 hours he resumed his duty but did not submit any written explanation for such unauthorized absence in spite of notice being served.

5. Administration concerned, however, did not proceed with the charges without appointing any enquiry officer. The Superintendent of Police concerned, appointed an enquiry officer to go into the charges. Almost simultaneously, the applicant was placed under suspension so he challenged the aforesaid disciplinary proceedings, including the charge sheet.

6. It is submitted by Mr. Das, Learned Counsel for the Petitioner, that his client, on earlier occasion, by filing O.S. 379 of 2002, challenged the disciplinary proceedings and the order of suspension. However, during pendency of the earlier application, the disciplinary proceedings was concluded by the enquiry officer, by filing a report of the enquiry and the order of punishment was passed. Subsequent event, during pendency of the above application, was brought by filing supplementary affidavit. Those facts, however, did not find any corroboration from the narration of facts recorded by the learned Tribunal in the earlier judgment and order dated 10th March 2003. Whatever might be the factual position with regard to the subject matter of challenge at the initial stage, the judgment and order and the reasons contained therein really matter as regard consideration of legal implication.

7. It appears that the learned Tribunal had taken up the matter at the earlier stage and found that there were neither any procedural lapses nor any violation of natural justice in concluding the departmental proceedings. It was held by the learned Tribunal that the suspension order was justified. From the earlier judgment and order of the learned Tribunal it is clear that the order of punishment was neither scrutinized nor examined as to its Legality and validity. But it was observed that no appeal was preferred against the final order of punishment, as permissible under the Departmental Rules.

8. Against the aforesaid judgment and order, the applicant approached this Court with an application, being W.P.S.T. 442 of 2003. This Court, without interfering with the impugned judgment and order, disposed of this application by an order dated 15th July 2003. While disposing, this Court recorded that the applicant challenged the departmental proceedings before the learned Tribunal at the stage of second show cause notice and the final order of dismissal had been passed as no stay had been granted by the learned Tribunal restraining the authority from passing such order. On that ground the order of dismissal does not become per se illegal or defective because against the order dated 16th of April 2007, passed by the Superintendent of Police, Nadia, the Petitioner had a statutory remedy by

way of preferring an appeal. Without filing the said appeal, the proceedings before the learned Tribunal was pursued and ultimately the learned Tribunal dismissed the same.

9. Their Lordships, by the said order, came to finding that the Petitioner should exhaust the statutory remedy first. It may be that by that time the time for filing the appeal had expired. Even then, having regard to the facts and circumstances of the case, Their Lordships permitted the Petitioner to file an appeal before the Appellate Authority within a period of four weeks from date along with a copy of that order. The Appellate Authority was directed to decide the appeal on merits without insisting on the question of limitation, if any. Direction was given to the Appellate Authority to dispose of the appeal by passing a reasoned order within a period of two months from the date of receiving the appeal after giving opportunity to the Petitioner of being heard. Their Lordships thereafter-made it clear that the merit of the proceedings or the dismissal order which had been challenged before them had not been gone into by them.

10. The applicant, thereafter, preferred departmental appeal and the appellate authority affirmed final order of the disciplinary authority of dismissal.

11. The applicant, thereafter, filed another application, being O.A. 1196 of 2003 on which the judgment and order impugned has been passed.

12. Mr. Das, while impugning the judgment and order, submits that there is no evidence to prove alleged misconduct save and except the testimony of PW-1, Bhanu Mondal, the then In-charge of R.O.P. Other witnesses have disproved the case made out by the administration. If the evidence of PW-1 is read carefully then it will appear that his testimony cannot be believed at all as he is a partisan witness, being a complainant. We are of the view that just because he was a complainant, his evidence cannot be brushed aside. In a domestic proceedings and for that matter in legal proceedings the judging factor is quality and not the quantity of evidence. One competent witness is lawful to prove the allegation and if hundreds and thousands of witnesses are not able to prove the case, it is good enough to record conclusion with the evidence of the only one competent witness.

13. Mr. Das, therefore, urges that there has been violation of natural justice in a different form by not evaluating the evidence of the witness, put forward by his client, namely, DW-1; thereby his client has suffered. As far as this point is concerned, as rightly pointed out by Mr. Kallol Basu, learned Counsel for the State, no such case has been made out either before the learned Tribunal or before us that his client has suffered prejudice because of failure in complying with the principle of natural justice by not evaluating evidence of DW-1. Mere statement from the Bar cannot improve the case of a litigant, particularly, on fact but not on law. Suffering of prejudice is an essential question of fact and this factual issue ought to have been raised by the Petitioner alone and not by the learned lawyers. Had such fact been raised earlier, this Court obviously would have followed the law and in that case legal issues whether raised or not would

have been considered by this Court. Therefore, this point does not deserve any consideration of this Court as the same was not raised earlier before the learned Tribunal.

14. Mr. Kallol Basu submits that this application is hit by the principles of res judicata. At the first place, the point is very interesting. This point was taken note of by the learned Tribunal, though, no decision had been arrived at and the State Respondent has not filed any cross objection against such failure of rendering decision on the point of res judicata. Until the State is aggrieved by the aforesaid failure of not deciding the question of res judicata, this Court is unable rather not obliged under the law to decide the said question. But it is not an appeal Court in real sense and it is a Constitutional Court exercising power of judicial review under Articles 226 and 227 of the Constitution and when it is found that the learned Tribunal failed to decide one point, obviously, the Court in exercise of its superintending power, can look into the same and there is no embargo put under law. The point of res judicata, in our view, is applicable when there is an issue which crystallizes on assertion followed by denial of set of fact and then decision of the Tribunal on that issue.

15. This point of res judicata is pressed basing on two judgments, namely, earlier judgment of the learned Tribunal and the judgment by this Court passed earlier. We have already narrated sum and substance of the order of learned Tribunal hereinbefore in extenso with the order of this Court. We have examined carefully and found on earlier occasion, that legality and validity of the order of punishment was never examined either by the Tribunal or by this Court because both the for a were of the view that the final order of punishment was not appealed against by resorting to the alternative remedy of Departmental Appeal. Hence it is clear that there was no occasion for both the fora to decide the issue.

16. Learned Tribunal, of course, has observed that all the stages of procedural formalities were followed by the departmental proceeding. In our view, that was observed in the context of a situation when order of punishment was not challenged and appeal was not preferred. The Division Bench by the judgment had made it clear that the remedy of the Appellant was by way of departmental appeal.

17. Res judicata principle is applicable in a case when the issues are decided and settled finally and nothing remains to be decided by the Court. If the Court, after considering the facts and circumstances of a case keeps the debate and issues at large for decision then this cannot be said that the decision has reached its finality. Res judicata is thus applicable when a decision on issue reaches its finality and not before that. It is well settled by law that appeal is continuation of the original proceedings. When both the for a observed that appeal had to be filed and indeed it was filed, the decision rendered by the learned Tribunal or by this Court, though not expressly, cannot be said to be a final one to invoke the principle of res judicata. Debate was alive and still it is on. As such, contention based on the principle of res judicata fails and this case is absolutely misplaced

and we are unable to accept the contention of Mr. Basu.

18. Now, coming to the merit of the matter, it is said that it is a case of no evidence. We think, no evidence does not mean that there will not be even a single scrap of document or any word of testimony of any witness; it means and include where evidence is adduced to prove misconduct with the standard of preponderance of probabilities upon perusal of the testimony. We find that the enquiry officer, in a very casual and cursory manner, has recorded evidence of PW-1 and other P Ws for proving the misconduct. Normally, Court does not, in exercise of its power of judicial review, reevaluate or re-appreciate evidence, but when complaint is, on plain reading, that the misconduct cannot be said to have been proved, the Court cannot shut its eyes and will simply rely on the recording of the enquiry officer that "everything is alright". The Court has to examine the evidence and decide in this situation.

19. We have read the evidence adduced by the PW-1 and we can comfortably come to conclusion that except PW-1, all other witnesses have disapproved the case. Reading the evidence of PW-1, applying reasonable prudence, it is not possible to say that all the charges had been proved, as has been recorded by the enquiry officer or by the disciplinary authority. Indeed, regarding the first charge of misbehavior, in the cross examination PW-1, Bhanu Mondal, admitted that the applicant did not misbehave as when suggestion was put specifically, he has accepted the suggestion that he did not use filthy languages and again suggestion was accepted that the applicant did not misbehave earlier. But, reading the evidence of PW-1 and suggestions put by the delinquent, we find that unauthorized absence of the applicant for four days has been proved. The necessity of putting suggestion in any proceedings, when such procedure is adopted in the departmental proceedings, has been explained by this Court in a decision rendered in case of A.E.G. Carapiet Vs. A.Y. Derderian, In paragraph 10, the necessity of putting suggestion in any proceedings has been dealt with, which is quoted hereunder:

(10) The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witness in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiff's account on its entirety. Such failure leads to miscarriage of justice, first by springing surprise

upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

20. But in that judgment nowhere it is found that if the suggestion put is accepted by the witness of the opponent, what would be the legal consequences. It is claimed that if the suggestion of opponent is put and such suggestion is accepted by the witness then obviously it is a contradiction of his case by way of admission. It is settled law contradictory case can not be accepted. Therefore, allegation of misbehavior cannot be accepted and because of this contradiction, Court cannot brush aside the entire evidence altogether. The Court has to pick up the grains from the chaff, as, such evidence from its entirety, can be separated from the charges. In this case, it is possible to separate a portion of evidence as it is not interlinked. The allegation of influence of liquor during duty hours is not accepted because no corroborative evidence is there. Moreover, this happened previously and no action was taken and this has been clubbed together for this action. Had he been in a drunken state, he should not have been allowed to discharge duty and should have been asked to undergo medical examination to find out whether he had indeed consumed liquor before reporting for his duty. Allegation of breaking television set, etc., has not been seen by him and this is evident from his own evidence.

21. We have already indicated reasons for undertaking analysis of evidence. Ordinarily, we should not have done, it has been done because of the allegation made that the evidence does not prove the case against the applicant. We, therefore, find that out of four allegations, at the highest, allegation of unauthorized absence has been proved. Unauthorized absence, especially in disciplined forces, certainly is a serious offence, but we find from the evidence that sometimes some people are spared to go away without any written permission, We think that neither the appellate authority nor the disciplinary authority and even the enquiry officer did not look into this aspect and we also feel that punishment is disproportionate to the alleged misconduct as there is nothing recorded in the disciplinary proceedings to show that he was habitual absentee.

22. So, we cannot uphold the order of dismissal. However, appropriate order should be passed and that cannot be done by the Court and it is for the disciplinary authority to decide. The matter is remanded back to the disciplinary authority who will hear out the matter on the question of misconduct of unauthorized absence and pass appropriate punishment having regard to the past conduct in the matter. Before doing so, the applicant shall be heard, upon service of notice. The applicant will be reinstated in service first, for the time being, and then such decision is to be taken. However, the applicant shall not be entitled to full back wages on reinstatement and he will get only 40% of his salary during the period he remained as dismissed constable. Such decision shall

be taken by the disciplinary authority afresh as per the guidelines given above within three months from the date of communication of this order and pass a speaking order. Arrears of salary, on reinstatement, at the aforesaid rate shall be paid within a period of two months from the date of communication of this order.

23. The application stands disposed of. There will be no order as to costs.

24. Mr. Kallol Basu prays for stay of operation of the judgment and order. As prayed for, we grant stay for seven days from date.

25. Original record of this proceeding is returned back to Mr. Kallol Basu.

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