SUPREME COURT OF INDIA

Union of India

Vs.

Bishamber Das Dogra

C.A.No.7087 of 2002

(Dr. Mukundakam Sharma and Dr. B.S. Chauhan JJ.)

26.05.2009

JUDGEMENT

Dr. B.S. Chauhan, J.

1. This Appeal has been filed against the Judgment and Order of the Division Bench of the Calcutta High Court dated 31st January, 2002 in FMAT No. 1370 of 1992 by which it affirmed the judgment and order dated 16th July, 1991 of the learned Single Judge passed in Civil Order No.3885 W of 1987 setting aside the order of punishment of removal awarded by the Disciplinary Authority to the respondent employee.

2. The facts and circumstances giving rise to this appeal are that respondent joined the service as Security guard in Central Industrial Security Force (CISF) in August, 1980. He remained absent from duty without seeking permission or leave, thus, vide order dated 12th August, 1984, he was awarded the entry of censure for the same. Respondent was again punished for remaining absent from duty for three days vide Order dated 22 nd July, 1985 withholding one annual increment for two years. The respondent again absented himself from duty from 31st August, 1985 to 8th September, 1985 i.e. for six days for which vide Order dated 5th September, 1985, he was imposed the punishment of withholding of one annual increment for three years. The respondent again deserted the LINE for the period from 6.3.1986 to 16.3.1986 i.e. 10 days for which he was issued a Show Cause Notice under Rule 34 of CISF Rules on 22/24.3.1986. The said notice could not be served upon him as the respondent again deserted the LINE for a period of 50 days, from 21.3.1986 to 10.5.1986 and joined the service on 11th May, 1986. Therefore, he could be served the show- cause notice dated 22/24.3.1986 on 15th May, 1986. The respondent submitted his reply to the show cause notice. However, as it was not found satisfactory, a regular departmental enquiry was initiated against him. During the pendency of the enquiry, the respondent again deserted the LINE for 11 days from 6.6.1986 to 16.6.1986. The Enquiry Officer concluded the enquiry and submitted the report which was accepted by the Disciplinary Authority who vide order dated 17.6.1986 imposed the punishment of removal from service. While passing the punishment Order, the Disciplinary authority also took into consideration the past conduct of the respondent.

3. Being aggrieved, the respondent preferred the Statutory Appeal which was dismissed by the Appellate Authority vide order dated 19.10.1986 observing that the respondent had not completed six years in service but had deserted the LINE five times. Thus no lenient view was permissible.

4. Being aggrieved, the respondent-employee preferred the revision before the Statutory Authority. However, during the pendency of the said revision, he filed Writ Petition No. 3885 of 1987 before the Calcutta High Court. The learned Single Judge vide Judgment and Order dated 16.7.1991 allowed the writ petition, quashing the order of punishment on the ground that the copy of the enquiry report was not furnished and the respondent employee was not given the opportunity to file the objections to the same.

More so, his past conduct could not have been taken into consideration while imposing the punishment.

5. Aggrieved, the present appellants filed F.M.A.T. No. 1370 of 1992 before the Calcutta High Court which was dismissed by the Division Bench by Judgment and Order dated 31st January, 2002.

Hence, this appeal.

6. Shri SWA Qadri, learned counsel appearing for the appellants has submitted that the respondent employee remained absent from duty without any justification or leave for more than five times within a short span of less than six years in service. Even during the pendency of the enquiry, he remained absent two times; firstly for 50 days and secondly for 11 days. Thus, the enquiry could not be concluded expeditiously. It is not necessary that in every case, non furnishing the copy of the enquiry report to the delinquent employee is always fatal. It is necessary for such employee to establish that non-furnishing of the copy of the enquiry report has caused prejudice to him. More so, the delinquent employee had been repeatedly absenting himself without any justification time and again. There could be no prohibition for taking into consideration his past conduct while imposing the punishment, for the reason, that it merely fortifies the reasons to impose the punishment. Punishment order was passed in 1986, a period of about 23 years has lapsed. The order of the High Court if enforced, would be a reward for deserting the LINE time and again by a member of the disciplined force. Therefore, the appeal deserves to be allowed.

7. On the contrary, Shri D.K. Garg, learned counsel appearing for the respondent employee has submitted that as there has been violation of the principles of natural justice while holding the enquiry, the judgments and orders passed by the High Court do not require any interference. The past conduct of the respondent employee could not be taken into consideration while imposing the punishment as it becomes violative of the principles of natural justice. Therefore, the appeal is liable to be dismissed.

8. We have considered the rival submission made by the learned counsel for the parties and perused the record. In view of the submission made by learned counsel for the parties, only two questions arise for our consideration:

> "(1) Whether the delinquent employee is not supposed to establish de-facto prejudice in case the enquiry report is not supplied to him before awarding punishment?
>
> (2) Whether the order of punishment would be vitiated if the Disciplinary Authority takes into consideration the past conduct of the delinquent employee for the purpose of punishment?"

9. In fact both these issues relate to the observance of the principles of natural justice as the delinquent employee may not get an opportunity to make the representation against the findings of fact recorded by the Enquiry Officer against him and also for the proposed punishment by the disciplinary authority. Principles of natural justice cannot be put into a strait-jacket formulate and its observance would depend upon the fact situation of each case.

> "Therefore, the application of the principles of natural justice has to be understood with reference to the relevant facts and circumstances of a particular case."

10. In *Chairman, Board of Mining Examination and Chief Inspector of Mines & Anr. v. Ramjee*[1] this Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. In *Dr. Umrao Singh Choudhary v. State of Madhya Pradesh & Anr.*[2] this Court held that the principles of natural justice do not supplant the law, but supplement the law. In Syndicate Bank & Ors. v. Venaktesh Gururao Kurati[3] it was held:

> "To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of principles of natural justice."

11. It is settled legal position that an order is required to be examined on the touchstone of doctrine of prejudice. A Constitution Bench of this Court in *Managing Director, ECIL v. B. Karunakar*[4], considered the issue at length and after taking into consideration its earlier judgment in *Union of India v. Mohd. Ramzan Khan*[5] came to the conclusion that furnishing the copy of the enquiry report and consideration of the employee's reply to the same by the disciplinary authority constitute an integral part of the enquiry. The second stage follows the enquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. Thus, it is the right of the employee to get the opportunity to make a representation against the findings in the enquiry report.

However, the Court further held that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. The Court further observed as under:

"They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case.

Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice. .... It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

(Emphasis added)

12. In *Haryana Financial Corporation v. Kailash Chandra Ahuja*[6] this Court applied the law laid down in B. Karunakar case (supra) and observed as under:

"It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non- supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside." (Emphasis added).

13. In *State Bank of Patiala v. S.K. Sharma*[7] this Court emphasized on the application of doctrine of prejudice and held that unless it is established that non-furnishing the copy of the enquiry report to the delinquent employee has caused prejudice to him, the Court shall not interfere with the order of punishment for the reason that in such an eventuality setting aside the order may not be in the interest of justice rather it may be tantamount to negation thereof. This court held as under:- "Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise." (Emphasis added).

14. Similar view had been reiterated in *S.K. Singh v. Central Bank of India & Ors.*[8], *State of U.P. v. Harendra Arora & Anr.*[9].

15. In *Aligarh Muslim University v. Mansoor Ali Khan*[10], this Court considered the judgment in *M.C. Mehta v. Union of India & Ors.*[11] wherein it has been held that an order passed in violation of natural justice need not be set aside in exercise of the writ jurisdiction unless it is shown that non- observance has caused prejudice to the person concerned for the reason that quashing the order may revive another order which itself is illegal or unjustified. This Court also considered the judgment in *S.L. Kapoor v. Jagmohan*[12] wherein it has been held that in a peculiar circumstance observance of the principles of natural justice may merely be an empty formality as if no other conclusion may be possible on admitted or indisputable facts. In such a fact-situation, the order does not require to be quashed if passed in violation of natural justice. The Court came to the conclusion that a person complaining non-observance of the principles of natural justice must satisfy that some real prejudice has been caused to him for the reason that there is no such thing as a merely technical infringement of natural justice.

16. Thus, in view of the above, we are of the considered opinion that in case the enquiry report had not been made available to the delinquent employee it would not ipso facto vitiate the disciplinary proceedings as it would depend upon the facts and circumstances of the case and the delinquent employee has to establish that real prejudice has been caused to him by not furnishing the enquiry report to him.

17. This Court in *State of Assam v. Bimal Kumar*[13] considered the issue as to whether while imposing the punishment it is permissible to take into consideration the past conduct of an employee if it is not so mentioned in the second show cause notice. The Court observed that while issuing second show cause notice, the disciplinary authority naturally has to come to a tentative or provisional conclusion about the guilt of the charged employee as well as about the punishment which would meet the requirement of justice in his case, and it is only after reaching conclusions in both these matters provisionally that the disciplinary authority issues the second notice. The delinquent employee is entitled to show cause not only against the action proposed to be taken against him but also against the validity or correctness of the findings recorded by the Enquiry Officer and provisionally accepted by the disciplinary authority. Thus, it enables the delinquent to cover the whole ground and to plead that no case had been made out against him for taking any disciplinary action and then to urge that if he fails in substantiating his innocence, the action proposed to be taken against him is either unduly severe or not called for.

18. In *State of Mysore v. Manche Gowda*[14] this Court held that the disciplinary authority should inform the delinquent employee that it is likely to take into consideration the past conduct of the employee while imposing the punishment unless the proved charge against the delinquent is so grave that it may independently warrant the proposed punishment. Though his previous record may not be subject matter of the charge at the first instance.

19. In *India Marine Service (P) Ltd. v. Their Workmen*[15] this Court while considering the similar issue held as under:

> "It is true that the last sentence suggests that the past record of Bose has also been taken into consideration. But it does not follow from this that that was the effective reason for dismissing him. The Managing Director having arrived at the conclusion that Bose's services must be terminated in the interest of discipline, he added one sentence to give additional weight to the decision already arrived at. Upon this view, it would follow that the Tribunal was not competent to go behind the finding of the Managing Director and consider for itself the evidence adduced before him. The order of the Tribunal quashing the dismissal of Bose and directing his re-instatement is, therefore, set aside as being contrary to law." (Emphasis added)

20. Similarly in *Director General, RPF v. Ch. Sai Babu*[16] this Court held as under:

> "Normally, the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works." (Emphasis added)

21. In *Bharat Forge Co. Ltd. v. Uttam Manohar Nakate*[17] this Court reiterated the similar view observing as under :

> "In the facts and circumstances of the case and having regard to the past conduct of the respondent as also his conduct during the domestic enquiry proceedings, we cannot say that the quantum of punishment imposed upon the respondent was wholly disproportionate to his act of misconduct or otherwise arbitrary." (Emphasis added)

22. In *Govt. of A.P. & Ors. v. Mohd. Taher Ali*[18] this Court rejected the contention that unless the past conduct is a part of charge-sheet, it cannot be taken into consideration while imposing the punishment observing that "there can be no hard and fast rule that merely because the earlier misconduct has not been mentioned in the charge sheet it cannot be taken into consideration by the punishing authority. Consideration of the earlier misconduct is often necessary only to reinforce the opinion of the said authority."

23. In fact in this case the argument had been advanced that if the disciplinary authority wanted to consider the past service record of the employee, it should be a part of charge-sheet. Though in K. Manche Gowda (supra), this Court said that it should be so indicated in the second show cause notice only for the purpose of imposing punishment. Thus it is not necessary that it should be a part of the charge sheet.

24. In *Colour-Chem Ltd. v. A.L. Alaspurkar & Ors.*[19] this Court considered the statutory rules which itself provided as what can be taken into consideration while imposing the punishment and it also referred to the consideration of the past record of the employee.

25. In view of the above, it is evident that it is desirable that delinquent employee may be informed by the disciplinary authority that his past conduct would be taken into consideration while imposing the punishment. But in case of misconduct of grave nature or indiscipline, even in absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record of the employee for adding the weight to the decision of imposing the punishment if the facts of the case so require.

26. It is settled legal preposition that habitual absenteeism means gross violation of discipline [vide *Burn & Co. Ltd. v. Wormess*[20] *and L&T Komatsu Ltd. v. N. Udayakumar*[21]].

27. The instant case is required to be examined in the light of aforesaid settled legal prepositions. Admittedly, the respondent employee has not completed the service of six years and had been imposed punishment three times for remaining absent from duty.

> On the fourth occasion when he remained absent for 10 days without leave, the disciplinary proceedings were initiated against him.

28. The show cause notice could not be served upon him for the reason that he again deserted the LINE and returned back after 50 days. Therefore the disciplinary proceedings could not be concluded expeditiously. The respondent submitted the reply to the show cause notice and the material on record reveal that during the pendency of the enquiry he further deserted the LINE for 10 days.

> "There is nothing on record to show any explanation for such repeated misconduct or absenteeism. The Court/Tribunal must keep in mind that such indiscipline is intolerable so far as the disciplined force is concerned. The respondent was a guard in CISF. No attempt had ever been made at any stage by the respondent-employee to explain as to what prejudice has been caused to him by non-furnishing of the enquiry report. Nor he ever submitted that such a course has resulted in failure of justice.
>
> More so, the respondent employee had never denied at any stage that he had not been punished three times before initiation of the disciplinary proceedings and deserted the LINE twice even after issuance of the show cause notice in the instant case. No explanation could be furnished by the respondent-employee as under what circumstances he has not even consider it proper to submit the application for leave. Rather, the respondent thought that he had a right to desert the LINE at his sweet will. It was a case of gross violation of discipline. Appeal filed by the respondent employee was decided by the Statutory Appellate Authority giving cogent reasons. The facts of the case did not present special features warranting any interference by the Court in limited exercise of its powers of judicial review. In such a fact situation, we are of the

view that the High Court should not have interfered with the punishment order passed by the disciplinary authority on such technicalities."

29. In view of the above, the appeal succeeds and is allowed. The impugned judgment and order of the Division Bench of the High Court dated 31.1.2002 in FMAT No.1370 of 1992 and judgment and order dated 16.7.1991 of the learned Single Judge passed in Civil Order No.3885 W of 1987 are hereby set aside and the order of punishment imposed by the statutory authority is hereby restored.

No costs.

[1]*AIR 1977 SC 965* [2]*(1994) 4 SCC 328* [3]*JT (2006) 2 SC 73* [4]*(1993) 4 SCC 727*
[5]*AIR 1991 SC 471* [6]*(2008) 9 SCC 31* [7]*(1996) 3 SCC 364* [8]*(1996) 6 SCC 415*
[9]*AIR 2001 SC 2315* [10]*(2000) 7 SCC 529* [11]*(1999) 6 SCC 237* [12]*AIR 1981 SC 136*
[13]*AIR 1963 SC 1612* [14]*AIR 1964 SC 506* [15]*(1963) 3 SCR 575* [16]*(2003) 4 SCC 331*
[17]*(2005) 2 SCC 489* [18]*(2007) 8 SCC 656* [19]*AIR 1998 SC 948* [20]*AIR 1959 SC 529*
[21]*(2008) 1 SCC 224)*