

Arjun Kumar Biswas Vs. Union of India (Uoi) and ors.

Arjun Kumar Biswas Vs. Union of India (Uoi) and ors.

SooperKanoon Citation : sooperkanoon.com/867266

Court : Kolkata

Decided On : Mar-18-1994

Reported in : (1994)2CALLT173(HC)

Judge : Ajit Kumar Sengupta, J.

Acts : [Constitution of India](#) - Article 311(2)

Appeal No. : C.O. No. 854(W) of 1990

Appellant : Arjun Kumar Biswas

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : M.M. Mallick, Adv.

Advocate for Pet/Ap. : Kashi Kanta Maitra, ;Sadhan Kumar Halder and ;Bijan Kumar Biswas, Advs.

Judgement :

Ajit Kumar Sengupta, J.

1. The petitioner, who was a Constable in the Railway Protection Force of Eastern Railway, has challenged in this writ application the disciplinary proceeding culminating into the order of removal from service passed on 9th March, 1989. He has also challenged the appellate order dated 3rd January, 1990 rejecting the

appeal and the revision preferred by him. It may be mentioned that the petitioner was placed under suspension on 11th May, 1988 and the suspension was not revoked and continued till the order of removal from service was passed on 9j3.1989. The charge against the petitioner is as follows :-

'Charge-For gross neglect of duty in that while he Was detailed for T.A. and guarding Malkhana duly from October (sic) to 8-00 of 11.5.88 was found in deep sleep about 21 hours by HE/146C P. N. Sharma who in course of his round visited and checked hazat room and found the four accused persons had managed to run away by breaking open the door of hazat room'.

2. The Enquiry Officer was appointed by the Assistant Security Commissioner who enquired into the said charges. The findings of the Enquiry Officer, recorded in his report are as follows :-

'Reason of finding-As to the first part of the charges as having been found asleep on duty, it is well proved by P.W. 3 Sri P. N.. Sharma who stated that on his visit to HWP/Office at 2-30 hrs. he found the delinquent sleeping on bench inside telephone room and was awoken by HC/P. N. Sharma. He also made a diary to the effective Ext. VII. The more exclusive proof of the charge of found deep sleep is the self admission by the delinquent in his defence statement when he stated that it was fact that he was detailed for T.A. and Malkhana Guarding on 11.5.88 in HWP Office and in course of his duty he felt weak at 1-30 hrs and 2-30 and lay down in the telephone room and could not know when he slept. He was awoken by Sri P. N. Sharma at 2-30 hrs. Only then he came to know the accused persons had fled away from the Hazat, escape of the accused persons further confirmed that the delinquent was in deep sleep otherwise he would have prevented and detected it.

So as to the delinquent being charged with the responsibility of the escape of the 4 accused persons from the hapat the only P.W. to prove the charge is Sri H. Hambroom PW-II who held him responsible in his report vide (Ext-IV). In response to question 2 asked by the delinquent as to why he was held responsible for the escape of 4 accused persons when he was not detailed for accused guarding.

Sri M. Hanbrom replied and resorted to the point that hazat room was stated in MPF/Office building on 1st floor on PF-No. 16 and there is only one entrance gate (door) and T.A. on duty uses to perform duty from the entrance gate where there is position of telephone. He further stressed that there is no other ways to escape the accused person except through the said entrance gate. Had the delinquent remained alert he would have detected and prevented the escape of the accused persons.

Here it requires a special mention to be made that the delinquent was not detailed for accused guarding duty, hence the charge is not proved only on the point of the T.A. and Malkhana duty being the same place having only one entrance gate as that of the hazat where accused persons had been kept. His alertness would have certainly averted the mishap.

However the end of justice cannot, be met out until I am emphatic to say that the gravity of the charge cannot be the same with the delinquent A. K. Biswas on T.A. and Malkhana duty as, it should lie with the delinquent Ram Monorath who was specially and exclusively deputed for accused guarding, otherwise the assignment of 'specific duty' will be loosing its sense that the word 'exclusively' will loose the honour of its meaning

The only point the delinquent put forward in his defence is his feeling unwar on duty for which he produced a PMC of Dr. B. Sarkar dated 9.5.88 during proceeding enquiry which I do not think stand strong to support as it dates made to 9.5.88 and it was only after he felt better that he reported for duty otherwise he should have reported sick (PMC is DW Ext. I).'

3. After the enquiry report was submitted, the Assistant Security Commissioner passed an order on 6th March, 1989' to the following effect :-

'Perused the records of the case and the findings arrived at by the Enquiring Officer, Sri R. B. Singh, PC/MBG. The E.O. has/held the delinquent guilty of the charge. In the case against the delinquent 4 accused persons had escaped from the Post Hazat where the delinquent was on duty and this duty was performed by the delinquent in such a negligent manner that the accused persons got

opportunity to break open the hazat door and escaped. Although, there is no element of connivance on the part of the delinquent as found in the proceeding enquiry but the fact that the delinquent was completely negligent is apparent and requires no further elucidation. I agree with the findings drawn by the E.O. and hold the delinquent guilty of the charges levelled against him. The charges are of serious nature and they have been proved beyond any shadow of doubt. But I feel that the powers vested in me as ASC to inflict punishment in the interest of the justice against the delinquent Constable/5215 A. K. Biswas.

'The case, therefore is referred to DSC/HWH-I for final orders'.

4. Since under the Rule, the Assistant Security Commissioner was not empowered to impose a major punishment he referred the matter to the Divisional Security Commissioner for final order on the basis of the aforesaid finding made by him. The Divisional Security Commissioner, inter alia, passed the following order on 9th March, 1989 :

'I have gone through all the papers concerned very carefully and I am of the opinion that the charge has adequately been proved. This is a serious negligence on the part of the delinquent constable due to which 4 criminals escaped from the hazat. Therefore, I order that he is removed from service w.e.f. 10.3.89.

'His period of suspension from 13.5.88 to the date of removal is treated as on suspension only and no further payment shall be made for his period to him in addition to what he has already received.'

5. Though the petitioner preferred an appeal against the said order of removal the Chief Security Commissioner being the appellate authority passed an order disposing of the appeal preferred by the petitioner on the following terms :-

'The charges against the appellant were very serious as he fell asleep while on duty allowing an opportunity to the accused persons to run away which has been proved conclusively during the proceeding enquiry. All formalities have been observed and extant rules have been followed before passing final order. He has not put forward any cogent grounds in his appeal which merit consideration.

'I, therefore, find no reason to interfere with the order of the DSC/ Howrah (1). The appeal is rejected.'

6. Thereafter the petitioner preferred a revisional application before the Director General, R.P.F. The Director General observed as follows :-

'As the reviewing authority under Rule 219.1 of the RPF Rules 1987, the undersigned can interfere in the orders only if as a result of material irregularity, there has been an injustice or miscarriage of justice, or if fresh evidence is disclosed, which was not produced during the enquiry.

'On going through the petition and the papers contained in the proceedings file, I find that the petitioner has not drawn attention to any material irregularity in the conduct of the proceedings which caused gross miscarriage of justice. For example, in para 3 of his petition, he contends that the suspending authority has failed to mentioned reasons for suspension. This can be no ground for interfering with the orders. Further, he refers to Rule 143.5, according to which he contends that the issue of a charge-sheet under Rule 153.4. I fail to understand the argument of the petitioner as Rule 143.5 only enjoins that while under suspension, a member of the Force should be provided reasonable facilities to prepare the defence. The petitioner has not given any instances to show that he was not given reasonable facility for the preparation of his defence.

It is clear that there has been no materials irregularity in the conduct of the proceedings, and I find that based on' the evidence on record, the conclusions of the Enquiry Officer and the decision of the Disciplinary Authority-namly the Divisional Security Commissioner, are consistent with the evidence. The order of the Divisional Security Commissioner is fully justified. The gross negligence displayed by the petitioner in the performance of his duties resulting in the escape of criminals, whose apprehension itself is a very difficult proposition in the first instance, cannot be brooked. Therefore, in view of the undersigned the impugned order of the Divisional Security Commissioner is correct and the appellate authority also came to the right decision. The petition is, therefore, rejected'.

7. At the hearing, Mr. Kashi Kanta Maitra, learned Advocate, appearing for the petitioner has contended that in imposing the punishment the respondents have not taken into account the reasonableness of the rationality of the punishment and whether the facts and circumstances warrant such major punishment, that is, removal from service. He has relied on several decisions in support of his contention. He has also submitted that it would be apparent from the order passed by the Disciplinary Authority, that the Assistant Security Commissioner, Eastern Railway, RPF, Howrah, observed that 'it is a iron cast case' which must have influenced the respondent authority, the Divisional Security Commissioner who passed the order of removal. His contention is that the punishment cannot be sustained on the basis of the offence charged and if proved. He has drawn my attention to the report of the enquiry officer and also the findings of the different authorities on the appeal and revision which I have already set out hereinbefore.

8. Mr. M.M. Mallick, learned Advocate, appearing for the respondents, Railway Authorities, has however submitted that there is no procedural irregularity in this case. All extent rules and the formalities have been complied with before passing the final order. The authority having regard to the facts and circumstances of the case and having regard to the negligence on the part of the petitioner imposed the punishment of removal from service.

9. I have considered the facts and circumstances of the case and arguments advanced on behalf of the learned Advocates appearing for the parties.

10. The petitioner was only 34 years of age when the punishment was imposed upon him. There was no previous lapse on the part of the petitioner. He was appointed in the year 1979. The impugned proceeding was drawn against him in the year 1988i and during the 9 years of service there was no negligence of duty on the part of the petitioner. The disciplinary authority in imposing the punishment upon the young man of 34 years failed to consider the length of service of the petitioner. The only question is having regard to the lapse on the part of the petitioner, the punishment imposed upon him was justified or not.

11. My attention has been drawn to the decision of the House of Lords in the case of Council of Civil Service Unions and Ors. v. Minister for the Civil Service reported

in (1984)³ ALL ER 935 where Lord Diplock observed as follows :

'My Lords. I see no reason why simply because a decision-making power is derived from a common law and not a statutory source it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' [see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1947)² ALL ER 680, (1948)¹ KB 223]. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v. Bairstew* (1955)³ ALL ER 48, (1956) AC 14 of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by

the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'Procedural' impropriety rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.'

12. My attention has also been drawn to the decision of the Supreme Court in the case of *Shankar Das v. Union of India* reported in : (1985) ILLJ184SC where the Supreme Court quoted the observation of the learned Magistrate as follows :-

'Misfortune dodged the accused for about a year.....and it seems that ill was under the force of adverse circumstances that he held back the money in question Shankar Dass is a middle aged man and it is obvious that it was under compelling circumstances that he could not deposit the money in question in time. He is not a previous convict. Having regard to the circumstances of the case, I am of the opinion that he should be dealt with under the Probation of Offenders Act, 1958'.

13. Thereafter the Supreme Court proceeded to hold as follows :-

'It is to be lamented that despite these observations of the learned Magistrate the Government chose to dismiss the appellant in a huff without applying its mind to the penalty which could appropriately be imposed upon him in so far as his service carrer was concerned. Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the Government the power to dismiss a person from service 'on the ground of conduct which has led to his conviction on a criminal charge'. But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a Government servant who is convicted for parking his scooter in a non-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the

question of penalty since Clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical'.

14. Mr. Maitra, learned Advocate, appearing for the petitioner has also drawn my attention to the decision of the Supreme Court in the case of *Ranjit Thakur v. Union of India* reported in : 1988 CriLJ158 where the Supreme Court after quoting the observation of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* (supra) observed as follows :-

'Judicial review generally speaking, is not directed against a decision but is directed against the 'decision making process'. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself of conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review'.

15. The Supreme Court also considered in that case the decision of the Supreme Court in *Bhagat Ram v. State of Himachal Pradesh* reported in : (1983)ILLJ1SC where the Supreme Court held that 'It is equally true that the penalty imposed must be commensurate with the gravity of the mis-conduct and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution'.

16. In my view having regard to the facts and circumstances of the case, the service record of the petitioner for 9 years prior to the incident and the age of the petitioner the punishment appears to be strikingly disproportionate as to call for

and justify interference. It cannot be allowed to remain uncorrected in judicial review.

17. It may be mentioned that the charge against the petitioner was gross neglect of duty inasmuch as, he was found in deep sleep while he was detailed for T.A. and guarding Malkhana duty it was found that the four accused persons had managed to run away by breaking open the door of the Hazat room. The Enquiry Officer held that the petitioner was found guilty and there is no dispute to that. He also held that the petitioner was not , specially and exclusively deputed for accused guarding. Accordingly, the negligence could not extend to the escape of the prisoners so far as the petitioner is concerned but the Assistant Security Commissioner in his note dated 6th March, 1989 held that the delinquent performed the duty in such a negligent manner that the accused persons got opportunity to break open the door of the Hazat and escaped. But that was not the charge against him and the enquiry officer also did not find him guilty of the charge. Similar finding was arrived at by the Divisional Security Commissioner. He said that because of the negligence on the part of the petitioner four criminals escaped from the Hazat. On this ground also the findings of the authorities concerned cannot be sustained.

18. One other aspect of the matter was not considered by the respondents that the petitioner was feeling very weak and he could not keep watch and ultimately he fell asleep. This was a factor which could have been taken! into account. The finding of the enquiry officer is that if the petitioner was not felling well he should have reported sick.

19. Mr. Maitra, learned Advocate, has also submitted that there is apparent bias in the case, inasmuch as, the disciplinary authority could not impose a major punishment after holding that this is a 'iron cast case'.

20. It appears that the case was forwarded to the higher authority, the Divisional Security Commissioner, who considered the note of the disciplinary authority and imposed the punishment. The disciplinary authority has made observation in his note that since he has no power to impose major punishment, the matter was being referred to the Divisional Security Commissioner, The disciplinary authority

while forwarding the case to the higher authority has made observation in his note that the power vested in him to inflict punishment was not sufficient to decide the 'iron cast case' in the interest of justice.

21. Reliance has been placed on the case of Baldev Singh v. The Secretary to Government, Punjab Rehabilitation Department and Ors. reported in 1969 SLR 689 where the Division Bench of the Punjab and Haryana High Court held as follows :-

'There is, however, one matter which cannot be ignored in this case. An enquiry can only be ordered against a Government servant by an authority competent to take disciplinary action against him. In this case the enquiry was ordered by respondent No. 2, the Deputy Secretary, who was not the disciplinary authority so far as the appellant is concerned. If when the previous order of the removal of appellant was withdrawn, a fresh enquiry had been ordered by the disciplinary authority and on the basis of that action had proceeded, in the circumstances as they are in this case, there was no room for interference, but after the withdrawal of the previous order or removal of the appellant it was not appreciated that the ground of removal was that the action taken against the appellant was by an authority which was not the disciplinary authority and it was not realised that this basis covered the whole field of disciplinary action and not only the last order of removal of the appellant from service. So the mistake has prescribed in that on the basis of an enquiry ordered by an authority which was not the disciplinary authority so far as the appellant is concerned, action to remove him from service has again been taken though this time the order purports to have been made by the disciplinary authority. It is, however, based on something done by an authority which had no right to initiate any disciplinary proceedings against the appellant. It proceeds on the basis of a report of an Enquiry officer not appointed by the disciplinary authority and hence the order of removal of the appellant cannot be maintained'.

22. I do not know how punishment is being imposed; upon the petitioner in the interest of justice. The Assistant Security Commissioner held that due to negligence on the part of the petitioner 4, criminals had managed to escape from

the Post Hazat and the enquiry officer specifically found that another person was deputed for specific duty and he was deputed for T.A. and guarding Malkhana duty. He did not consider the charge so grave as in the case of other person, Sri Ram Monorath who was deputed exclusively for guarding the accused persons who fled away by breaking open the door of the Hazat. The negligence on the part of Ram Monorath could not be attributed to the petitioner. Ram Monorath was exclusively deputed for guarding the accused persons. There is no evidence before the Enquiry Officer or the appellate authority to come to a finding that because of negligence of the petitioner, the accused persons fled away.

23. Unless the enquiry report is submitted the disciplinary authority would not know what punishment should be imposed. In this case on the facts and circumstances and on the basis of the finding of the enquiry officer, when the Assistant Security Commissioner found that the major punishment is called for, he had to refer the case to the higher authority for imposition of punishment without making any definite finding. But in this case he made up his mind as to the guilt of the petitioner for the purpose of imposition of punishment and came to a finding that this case warranted higher punishment. Divisional Security Commissioner, the referred authority only dittoed what the Assistant Security Commissioner said.

24. Having regard to the facts and circumstances of this case, I am of the view that the punishment imposed in this case is irrational and not justified by the finding of the enquiry officer. It is disproportionate to the offence charged and proved. An opportunity ought to have been given to the young man to improve himself and continue in service. The order of removal from service means the loss of livelihood. The petitioner was also kept under suspension from 11th May, 1988 till the dismissal order was made. In that view of the matter this writ application is allowed. The order of removal from service is set aside. The order of the appellate authority and the revisional order are also set aside.

25. The only question is to what relief the petitioner entitled at this stage. The petitioner was under suspension from 11th May, 1988 till the date of removal from service that is, on 9.3.1989. The suspension shall stand revoked.

26. Let the petitioner be re-instated in the service within seven days from the date of communication of this order. The petitioner will be entitled to the arrear salary for the period from 11.5.1988 to 9.3.1989 after adjustment of the subsistence allowance already paid to the petitioner. The petitioner shall be treated as on duty for the entire period from the date of suspension till the date of reinstatement in terms of this order. The petitioner however will not be entitled to any back-wages from the date of dismissal till the date of re-instatement. He shall however be entitled to the salary from the month of April, 1994 upon notional fixation. In that view of the matter, no other punishment, major or minor, should be imposed upon the petitioner, inasmuch as, the deprivation of the monetary benefits for all these years would be a sufficient punishment so far as the petitioner is concerned. The salary of the petitioner shall be fixed notionally giving the increment and the revision of pay scale. Let the arrear salary be paid to the petitioner within eight weeks from the date of communication of this order.

There will be no order as to costs.

Let a plain copy of the operative portion of this order countersigned by the Assistant Registrar (Court) be given to the learned Advocates appearing for the parties on usual undertaking.

Let the xerox copy of the entire order be given to the learned Advocates for the parties on usual terms.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com