

Vivekananda Halder Vs. State of West Bengal and ors.

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Court : Kolkata

Decided On : Aug-05-2009

Judge : Dipankar Datta, J.

Acts : [Industrial Employment Standing Orders Act, 1946](#) - Section 10, 10(2) and 10(3); ;Indian Penal Code

Appeal No. : W.P. No. 7265 (W) of 2008 and CAN No. 7781 of 2008 and CAN No. 7855 of 2008

Appellant : Vivekananda Halder

Respondent : State of West Bengal and ors.

Advocate for Def. : M.C. Bhattacharya, Adv.

Advocate for Pet/Ap. : Arun Kumar Maiti and ;Kaberi Sengupta, Adv.

Disposition : Petition allowed

Judgement :

ORDER

It has been learnt that some employees of the Law & claims Department are attending as defence counsel of the charge-sheeted employees while departmental proceeding starts. Appointment of such employees of L & C Department as Defence counsel is not at all ethical in the eye of law because

there is enough scope for them to have access to the notes, records and other documents of departmental proceeding initiated by department including manipulation of official record.

In the light of above, it is hereby ordered that hence forth any employee posted in law and claim Deptt. will not be eligible to act as defence counsel of the charged employee. Nor such employee posted in law & claims Deptt. will render any help directly or even indirectly, to any charged employee as it would be against all ethics.

The charged employee may, however, appoint any employee as defence counsel except any one posted in L & C Department since the appointment of a defence counsel from among staff is the conversion as prevalent in CTC. Further it is also hereby ordered that the employee who will act as defence counsel of charged employee should have to take prior formal leave from the respective heads of Department for the purpose, since his normal office work would be hampered in that case. But, in the case of any unit president/secretary at CTC's recognized union, such leave need not be taken. But under no circumstances, any employees, posted in L & C Deptt. would be eligible to stand defence counsel even if he is unit secretary/president of any recognized union.

This order will take immediate effect and shall be strictly complied. Thanking you
Yours faithfully,

sd/

(P.K. Chattopadhyay)

C.C. Chairman

All Deptt. Head/offices

ORS/LAW/OS/L&Co.;

9. The defence assistant of the petitioner Sri De is employed in the Law and Claims Department of the company and, therefore, in terms of the aforesaid order, he could no longer participate in the enquiry as the petitioner's defence assistant.

This fact was communicated to the petitioner by the Inquiring Authority by his writing dated 18.3.2008. While fixing 28.3.2008 as the next date, the petitioner was given the opportunity to appoint a fresh/new defence assistant and request in this behalf was advised to be sent within 20.3.2008. Immediately thereafter, the petitioner raised an objection vide letter dated 24.3.2008. Since copy of the order dated 6.3.2008 was not enclosed with the letter of the Inquiring Authority dated 18.3.2008, the petitioner asked for supply of the same before the Inquiring Authority on 25.3.2008 while he submitted a prayer for adjournment. A copy of the order dated 6.3.2008 was handed over to him. On his request, the hearing was adjourned.

10. The Inquiring Authority thereafter by its letter dated 28.3.2008 informed the petitioner that his prayer for adjourning the hearing till such time his representation before the Managing Director is disposed of stood rejected and 22.4.2008 was fixed as the next date of hearing.

11. It was on 22.4.2008 that the present petition was filed before this Court challenging the charge-sheet as well as the order dated 6.3.2008. The petitioner on the said date informed the Inquiring Authority the fact of presentation of this petition. The Inquiring Authority did not proceed with the enquiry and adjourned hearing observing that the date of next hearing would be intimated later on.

12. This petition was taken up for consideration by a learned Judge of this Court soon thereafter. By order dated 29.4.2008, while calling for affidavits, liberty was granted to the respondents to proceed with the inquiry in accordance with rules and to pass order in respect of the same but they were restrained from giving effect thereto without the Court's approval.

13. It is not in dispute that in terms of liberty granted by this Court, the inquiry has been conducted whereupon the Inquiring Authority returned finding that the charges against the petitioner stood established. The Disciplinary Authority has also accepted the findings of the Inquiring Authority and has decided to impose upon the petitioner a penalty of 'withholding increments for two years' in pursuance of the company's Amended Standing Orders. Order to this effect has been passed by the Managing Director of the company with the rider that the said order,

however, would not be given effect to until leave is obtained from this Court.

14. While the company has taken out an application being CAN No. 7781 of 2008 praying for leave to give effect to the final order passed by the Disciplinary Authority, the petitioner has taken out CAN 7855 of 2008 praying for quashing and/or setting aside the purported inquiry proceeding including the finding arrived at by the Inquiring Authority and the second show cause notice dated 25.6.2008 issued against the petitioner.

15. The applications have been heard along with the writ petition finally and would be governed by this common judgment and order. Mr. Maiti, learned Counsel appearing for the petitioner, has urged three points viz.

i) Appointment of Inquiring Authority simultaneously with issuance of charge-sheet is in the teeth of the decision of the Apex Court reported in AIR 2001 SC 343 (State of Punjab v. V.K. Khanna and Ors.) and, therefore, proceedings on the basis of such charge- sheet is a nullity;

ii) Expressions used in the charge-sheet reflect closed mind of the Disciplinary Authority even at the inception of disciplinary proceeding which is opposed to rules of natural justice and fairplay; and

iii) Order dated 6.3.2008 issued by the Managing Director restraining employees of the company attached to Law and Claim Department amounts to modification of the Amended Standing Orders regulating conditions of service of employees, framed in accordance with the provisions contained in the [Industrial Employment Standing Orders Act, 1946](#) (hereafter the Act). Such modification could not have been introduced without complying with the requirement for modification as spelt out in the Act and is, therefore, bad.

16. Elaborating his third point, he submitted that the Amended Standing Orders applicable to the company and the employees alike cannot be altered by an executive order and any alteration/modification thereof must be made in accordance with the provisions contained in the Act. The action of the Managing Director offends the statutory provisions. The inquiry that was conducted without

allowing the petitioner to be assisted by Sri De has worked out immense prejudice to him in that he was deprived of reasonable opportunity to defend himself for which the Court may direct the respondents not to give any further effect to the inquiry proceeding and to direct the company to conduct inquiry afresh with Sri De as the defence assistant of the petitioner.

17. He also argued that malafide is the foundation of the order dated 6.3.2008. The said order was issued only with the view to prevent Sri De from assisting delinquent employees in domestic enquiries. No other employee attached to the Law and Claims Department has ever assisted any delinquent employee and, therefore, this Court ought to set aside the order also on such ground.

18. Mr. Bhattacharya, learned Counsel appearing for the company countered the first point of Mr. Maiti by submitting that the decision in V.K. Khanna (supra) would have no application on facts and in the circumstances of the present case. He invited the attention of this Court to a show-cause notice dated 20.8.2007 issued by the Disciplinary Authority of the petitioner. Referring to the acts of the petitioner mentioned therein, the petitioner was called upon to show cause as to why disciplinary action shall not be taken against him. By his reply dated 28.8.2007 the petitioner had showed cause. According to Mr. Bhattacharya, the charge-sheet was issued by the Disciplinary Authority only after reaching a satisfaction that cause shown by the petitioner in response to the notice dated 20.8.2007 was not satisfactory. The Disciplinary Authority having satisfied himself that an enquiry was warranted on facts and in the circumstances had issued the charge-sheet and, therefore, did not commit any error in appointing an Inquiring Authority simultaneously with issuance thereof.

19. Quite apart, it was vehemently contended by him that the petitioner in the writ petition did not disclose the fact that notice to show-cause dated 20.8.2007 was issued, in response where to he had duly showed cause by letter dated 28.8.2007. The petitioner, it was submitted, had suppressed facts with a view to mislead this Court and, therefore, on the ground that he had not approached the Court with clean hands the writ petition ought to be dismissed without considering any of the points on merits.

20. So far as the second point raised by Mr. Maiti is concerned, he submitted that the same was also without merit. Bias of the Disciplinary Authority, as contended, is not at all reflected and the petitioner, according to him, in a desperate bid to stall the disciplinary proceeding initiated against him has taken recourse to frivolous objections. He placed reliance on an unreported decision of a learned Judge of this Court dated 17.12.2008 rendered on W.P. No. 7593 (W) of 2008 (Prabir Kumar Kundu v. The State of West Bengal and Ors.) in support of his submission that the objection raised by the petitioner ought to be overruled. Regarding legality, validity and/or propriety of the order dated 6.3.2008 issued by the Managing Director of the company, he contended that the same was a perfectly valid order. The order was issued in administrative interest and, therefore, ought not to be faulted. According to him, the order dated 6.3.2008 does not amount to a change or modification of the Amended Standing Orders. In support of his submission, a decision of a learned Judge of this Court dated 7.7.2009 on W.P. No. 10759 (W) of 2009 was relied on, whereby the Court repelled the challenge of another employee of the company in respect of the order dated 6.3.2008. The reasoning given by the learned Judge for upholding the legality, validity and/or propriety of the order dated 6.3.2008 is reproduced below:

Clause 13 of the Standing Orders clothes the delinquent with the right that he may by prior arrangement opt to be represented by a fellow-employee. Clause 13 does not however authorise the delinquent to take assistance of any employee of the company. The company, for adequate reasons, has made a classification as to the class of employees whose assistance can be taken for the purpose of representation in the domestic proceeding. The classification is backed by adequate reasons and it is not possible to find any fault with that. Experience shows that the apprehension expressed in the executive order is well-founded. I am, as such, of the opinion that the order dated 6th March, 2008, is a perfectly justified order.

21. A number of judgments were cited by him to contend that the disciplinary proceeding being the subject matter of challenge does not suffer from any infirmity warranting interference. It was, accordingly, urged that there was no merit in the writ petition and the same was liable to be dismissed. This Court has heard

learned Counsel for the parties and considered the decisions cited on either side.

22. The objection regarding issuance of charge-sheet, in the considered view of this Court, is not well-founded. In the present case admittedly a notice dated 20.8.2007 was issued by the Disciplinary Authority calling upon the petitioner to show cause why disciplinary action should not be taken against him. The acts of misdemeanour of the petitioner attracting provisions of the company's Amended Standing Orders were referred to therein. It appears from the reply dated 28.8.2007 filed by the petitioner that he duly understood the accusations levelled against him and replied thereto point by point. Certain legal points were also raised by him with regard to propriety of the Disciplinary Authority in issuing such show-cause notice. Having regard to the fact that commencement of disciplinary proceeding against the petitioner was preceded by a notice to show- cause and reply thereto was furnished by him, the necessary implication is that the reply was not found to be satisfactory and thus the need arose to inquire into the charges framed for unearthing the truth. In such circumstances, the ratio of the decision in V.K. Khanna (*supra*) would not apply.

23. This Court is, therefore, convinced that in appointing an Inquiring Authority simultaneously with issuance of charge-sheet, the Disciplinary Authority of the petitioner did not violate either the Amended Standing Orders or any judicial pronouncement.

24. So far as the objection taken by Mr. Bhattacharya to the effect that the petitioner has suppressed material facts relating to issuance of the show-cause notice and reply thereto and the writ petition is liable to be dismissed on this ground alone is concerned, this Court is unable to concur with him that for such suppression the entire writ petition ought to fail. Although it is true that the petitioner did not disclose issuance of show-cause notice and reply thereto furnished by him prior to commencement of disciplinary proceeding in the body of the petition, reference of the same is found in his reply to the charge-sheet which is one of the annexures to the writ petition. It is thus not a case of total suppression since the annexures to the writ petition form a part thereof. If there are several grounds of challenge to an impugned action and in respect of one of

those suppression is proved, that may not by itself preclude the Court from hearing the applicant on the other points if full and fair disclosure of all facts in support thereof is made. This Court is, therefore, not inclined to accept the objection of Mr. Bhattacharya and proceeds to consider the next point urged by Mr. Maiti.

25. He has urged that expressions used in the charge-sheet reflect the closed mind of the Disciplinary Authority and that proceeding has been initiated only to complete a formality in law.

26. It is settled law that the real purpose of initiating a disciplinary proceeding is to inquire as to whether the facts *prima facie* ascertained against a delinquent officer are correct or not. The purpose cannot be to cause a secret inquiry against him and to form a positive and firm view about his complicity in the alleged misconduct and thereafter to give him an opportunity to dispel the conclusion already drawn against him.

27. Charges framed must be clear and must not suffer from any ambiguity or vagueness. If the charge is not expressed in clear and certain terms, then the delinquent likely to be misled and suffer prejudice for the vagueness in the charge-sheet, not knowing the case he has to meet.

28. This Court has considered the charge-sheet issued in the present case. The expressions used therein are not such that the same may give rise to an apprehension in the mind of the petitioner that his guilt has been pre-judged. The Disciplinary Authority has with sufficient degree of clarity expressed the alleged acts of misdemeanour of the petitioner, which require investigation by conducting an inquiry. Had the charge-sheet not been clear and certain, the Disciplinary Authority would run the risk of being charged with issuance of a charge-sheet that is vague, indefinite or unspecific. Whether or not a disciplinary authority has a closed and pre-judged mind at the inception of disciplinary proceeding cannot really be comprehended only by having a look at the expressions used in the charge-sheet. Disciplinary proceedings may be held to have been initiated with closed and pre-judged mind if from the attending circumstances such a conclusion can reasonably be drawn even though there is a proliferation of expression in the charge-sheet like 'alleged acts', 'prima facie guilty', 'tentative view', etc. and the

charge-sheet appears to be perfectly worded, whereas proceedings initiated absolutely bonafide, may not be interdicted despite definite expressions in the charge-sheet which might give an impression in the mind of the delinquent that nothing remains to be decided and that the same has been initiated only to complete a formality in law, unless surrounding circumstances are such that the Court is convinced that there has been deflection of justice. A charge-sheet has to be construed in a reasonable manner and too much legalism cannot be expected of a domestic enquiry. If apart from the inappropriately worded charge-sheet there is no other incriminating circumstance having the effect of vitiating the proceedings, it would be prudent exercise of judicial discretion not to interfere.

29. In criminal proceedings while a charge is framed by a Court, it often uses the expression, by naming the person accused of the offence, that on or about a certain date and at a certain time and place he committed an overt act mentioned therein and he thereby 'committed an offence punishable' by a particular section of the Indian Penal Code or other penal statute, which the Court has taken cognizance. This, per se, cannot lead to the conclusion that the Court has already held him to be guilty of the offence with which he is charged and about which he was called upon to answer the charge. It would be reading too much of a technicality in the charge itself, unless and until the conduct of the disciplinary authority is otherwise biased so as to rule out the possibility of a fair departmental proceeding at all and the delinquent facing the charge is otherwise prejudiced.

30. This view finds support from the decision of the learned Judge in Prabir Kumar Kundu (supra) relied on by Mr. Bhattacharya.

31. On a wholesome appreciation of the facts brought on record, this Court is of the clear view that the impugned charge-sheet does not merit interdiction on the ground as contended by Mr. Maiti.

32. Now, the third and final ground of challenge is taken up for consideration. The allegation that the order dated 6.3.2008 has been issued malafide has not impressed this Court. To substantiate the ground of malafide, the petitioner was required to implead the Managing Director of the company by name. It is settled law that unless a party against whom malafide has been alleged is impleaded in

his personal capacity, the Court may not decide the issue. This Court, accordingly, repels the challenge of the petitioner only on this ground. However, for deciding the final point, this Court has duly considered the decision dated 7.7.2008 rendered on W.P. 10759 (W) of 2009 referred to above. The learned Judge considered the object and purpose of issuance of the order dated 6.3.2008 and upheld the same for reasons recorded. This Court is ad idem with the learned Judge that the object for which the order dated 6.3.2008 was issued is in no manner unreasonable or arbitrary. However, the point raised by Mr. Maiti that the order dated 6.3.2008 amounts to modification of the Amended Standing Orders of the company and that such modification could not have been brought about except in accordance with the provisions of the Act appears to have passed sub silentio and, therefore, this Court is of the further considered view that the decision dated 7.7.2009, though rendered by a coordinate Bench, does not constitute a binding precedent. This Court is thus unable to uphold the order dated 6.3.2008 for reasons assigned in the said judicial order dated 7.7.2009.

33. To appreciate the contention of Mr. Maiti, one has to look into the relevant provision of the Amended Standing Orders a change in respect whereof was sought to be brought about by the order dated 6.3.2008. Clause 13 of the Amended Standing Orders, insofar as the same is relevant for a decision on this petition, is extracted below:

He may by prior arrangement opt to be represented by a fellow employee

34. The said provision does not make any classification as to the class of employees whose assistance could be taken for the purpose of representation in a disciplinary proceeding. As has been found by the learned Judge, the order dated 6.3.2008 does make such classification. Question is whether such classification could be introduced by an administrative order of the Managing Director of the company except in the manner prescribed by the relevant statute i.e. the Act.

35. The introductory portion of the Amended Standing Orders reads thus:

The Company and employees engaged in its various departments are subject to the following Standing Orders regulating conditions of service, in accordance with

the provisions in the [Industrial Employment Standing Orders Act, 1946](#).

36. The concluding clause i.e. 19 relating to amendments provides as follows:

The Company may from time to time amend these Orders in accordance with the provisions of the Industrial Employment (Standing Orders) Act, 1946, or any amendment thereof.

37. The Act in Section 10 provides for duration and modification of standing orders. Sub-section (2) thereof empowers, inter alia, an employer to apply to the Certifying Officer to have the standing orders modified. Once such an application is received by the Certifying Officer, the provisions preceding it would apply as they apply to the certification of the first standing orders (see Sub-section 3). In terms of Clause 13 of the Amended Standing Orders of the company as it stood before 6.3.2008, a delinquent employee had the opportunity of taking the assistance of any co-employee attached to any department including the Law and Claims Department of the company. By the order dated 6.3.2008, the right to be assisted by an employee attached to the Law and Claims Department of the company has been curtailed. Legality and/or propriety of the order dated 6.3.2008 cannot be upheld only by looking at the laudable object and purpose behind issuance thereof, it has also to be found out as to whether the provisions of the Act have been duly complied with or not while introducing it for enforcement.

38. This Court is, therefore, constrained to hold that in issuing the order dated 6.3.2008 whereby a modification of Clause 13 of the Amended Standing Orders was sought to be introduced insofar as representation in disciplinary proceeding is concerned without taking recourse to provisions of the Act is illegal, unauthorised and invalid.

39. The company in its affidavit-in-opposition has refrained from dealing with the averments made by the petitioner in respect of invalidity, impropriety and/or illegality of the order dated 6.3.2008. It appears that the company has been labouring under an impression that the writ petition was admitted on a limited point i.e. the first point urged by Mr. Maiti. However, it does not appear from perusal of the order dated 29.4.2008 passed by the Court that the writ petition was admitted

on a limited point and that the petitioner has relinquished his claim in respect of the other points. The company appears to have misinterpreted the order of Court and thus restrained itself from contending in support of the order dated 6.3.2008 on a wrong impression. However, for reasons indicated before, this Court has found the order dated 6.3.2008 not to be in consonance with the Act.

40. The order dated 6.3.2008, accordingly, stands set aside. The petitioner having been deprived of the service of Sri De as defence assistant, he was not afforded reasonable opportunity to defend himself in the inquiry. The consequence is that the inquiry proceeding conducted immediately after issuance of the order dated 6.3.2008 is inoperative and of no effect.

41. The company shall be at liberty to conduct de novo inquiry providing the petitioner the assistance of Sri De. In the alternative, the company shall also be at liberty to take recourse to the provisions of the Act for having modification of the standing orders applicable to it and its employees in relation to conditions of service and, thereafter, to proceed against the petitioner strictly in accordance with law.

42. The writ petition stands allowed to the extent mentioned above, without any order for costs.

43. In view of the aforesaid order, the applications also stand disposed of without any separate order being passed in respect thereof.

44. Urgent photostat certified copy of this judgment, if applied for, be furnished to the applicant within 4 days from date of putting in requisites therefor.