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Court : Kolkata

Decided On : Sep-10-2009

Judge : Dipankar Datta, J.

Appeal No. : C.O. No. 11309 (W) of 1994 and CAN No. 5289 of 2009

Appellant : Arvind Kumar Ojha

Respondent : Eastern Coalfields Ltd. and ors.

Advocate for Def. : A.K. Banerjee and ;Subimal Mukherjee, Advs.

Advocate for Pet/Ap. : Kalyan Bandopadhyay and ;Mintu Kumar Goswami, Advs.

Disposition : Petition dismissed

Judgement :

Dipankar Datta, J.

1. This is a writ petition that merits dismissal solely on the ground of gross suppression of material facts. But I do not propose to do that. I have considered the writ petition on its merits. Even then, I do not find any justification to exercise writ powers in favour of the petitioner.

2. The petitioner was rendered 'land loser' as a consequence of acquisition of land by Eastern Coalfields Limited (hereafter ECL). In pursuance of a scheme

introduced by ECL for appointing 'land losers', the petitioner was appointed to a post in the clerical cadre at its Jhanjra Project. Appointment letter was issued on 18.9.1984 pursuant whereto the petitioner joined on 6.3.1985. It is claimed in the petition that the petitioner had submitted an application on 1.10.1993 with a prayer for granting leave on medical ground. He was suffering from ulcer and undergoing treatment under Dr. N.K. Nandi of Andal More, Ukhra Road who had advised him complete bed rest. The application had been sent by certificate of posting. The petitioner was completely bed ridden during the period 1.10.1993 to 5.4.1994. Dr. Nandi issued a certificate to this effect on 6.4.1994, which he submitted at the time of joining on 6.4.1994. But he was not allowed to join by the respondents. He was made to run from pillar to post for the purpose of obtaining an order for joining but excepting false hope, nothing fructified.

3. The petitioner in course of time came to learn on enquiry that a letter terminating his service with effect from 2.6.1994 was issued and it was sent to his native place at District Balia for which he had not been allowed to join. The termination has been questioned in the present petition alleging that no disciplinary proceeding was initiated against him and the entire action was in clear breach of principles of natural justice. It contains the following prayers:

i) To do and to proceed in accordance with law;

ii) To forbid from giving any effect to or further effect to the order of termination of service of this petitioner, if any, passed affecting the interest of this petitioner;

iii) To allow the petitioner to join in service forthwith;

iv) To forbid from giving any effect or further effect to any proceeding and or order affecting the interest of this petitioner;

v) Any other order or orders be passed, writ or writs do issue for the purpose of giving conscionable justice to the case and or pass such other order or orders as to your Lordships may deem fit and proper.

4. The petition was moved before a learned Judge of this Court on 21.9.1994.

5. Hearing was adjourned till reopening of Court after Puja vacation to enable the petitioner file a supplementary affidavit in the meantime. Availing of the leave granted by order dated 21.9.1994, the petitioner affirmed a supplementary affidavit on 8.11.1994 seeking incorporation of the following prayers in the writ petition:

B) A writ Certiorari do issue commanding the respondents to transmit all records relating to the present proceeding for the purpose of quashing the order of termination of service of this petitioner and also for the purpose of allowing the Petitioner to join in service.

C) A Rule NISI in terms of Prayer (A) & (B) above.

D) Interim order directing the respondents to allow the petitioner to join in service to the post of Clerical Cadre at Jhanjra Area of 1/2, Incline Colliery, P.O. Doudaha, Dist. Burdwan, West Bengal under the control of Respondents Nos. 4 and 5 by further directing the respondents authority not to give any effect to and/or any further effect to the purported order for termination of service of this Petitioner pending the disposal of this Rule.

E) Any other order or orders be passed, writ or writs do issue for the purpose of giving conscionable justice to the case and/or pass such other order or orders as to Your Lordship may deem fit and proper. An for this, your petitioner as in duty bound shall ever pray.

6. The petition, thereafter, was listed for consideration on 20.3.1995 before another learned Judge of this Court. Affidavit-in-opposition dated 30.1.1995, filed on behalf of ECL and the other respondents, was directed to be retained with the record. The petitioner was granted liberty to file reply thereto by two weeks. The petition was directed to stand over for two weeks.

7. The petitioner affirmed his reply to the said affidavit-in-opposition on 7.4.1995. That apart, a supplementary affidavit dated 27.6.1995 was also filed by him.

8. In the affidavit-in-opposition, the respondents averred that the petitioner was duly served with a charge sheet to which he had replied. Though he had admitted the charge against him, a domestic enquiry was conducted in which he had

participated without demur. After recording evidence led by the prosecution and hearing the petitioner, the Enquiry Officer prepared a report of enquiry holding him guilty of the charge. The enquiry report was, thereafter, sent to the petitioner's native place. However, the registered envelope could not be delivered to the petitioner and the same was returned back to the respondents without being served. The disciplinary authority of the petitioner thereafter proceeded to issue an order of dismissal from service dated 31.5.1994. It was specifically contended therein that the petitioner being guilty of suppressing material facts was not entitled to any relief from the Court of Writ.

9. The charge-sheet against the petitioner dated 26.1./1.2.1994 was issued by the Manager, Jhanjra Area. It was alleged therein that the petitioner had been absenting continuously from duty since 1.10.1993 and still continuing without permission/satisfactory cause for more than 10 days. The said act constitutes misconduct under Clause 17(1)(n) of the Model Standing Orders applicable to him. He was, accordingly, asked to show cause within 48 hours as to why disciplinary action would not be taken against him.

10. Annexure 'B' to the affidavit-in-opposition is the purported reply dated 8.4.1994 of the petitioner to the charge sheet. It reads as follows:

sub: reply your letter, no : AGT/JNR/1&2/P/CS-94

Respected sir,

I beg to draw your kind attention to the fact that I was unable to perform my duty due to my serious illness at my home. As to doctor's advice, I was to take bed rest very badly for long period since my serious illness at my residence. Moreover, I had no strength in my body and any person to inform you about my illness at that time.

Under the above circumstances, I pray to you that you would be kind enough to excuse me for my long absence due to my sudden illness and allow me to join my duty as usual.

11. That the petitioner had replied to the charge-sheet has been averred in paragraph 9 of the affidavit-in-opposition. The petitioner has dealt with contents thereof in paragraph 10 of his reply. I do not find any statement therein that the petitioner never replied to the charge sheet. However, it is his specific case that his reply to the charge-sheet was manufactured with a back date by the authority concerned and since the same was not sent to the proper address, the purported charge-sheet was never served upon him. In paragraph 12 of the reply, he has however denied that he had submitted any reply to the charge-sheet. In paragraph 13 of the reply, serious allegations have been levelled by the petitioner to the following effect:

The copy of the reply being Annexure 'B' to the said Affidavit has been interpolated by the Senior Officer, Mr. A.V. Parija whose handwriting is there and I was insisted to sign on the said paper seeking to allow me to join in service but upper part of the letter was interpolated behind my back. The number and date of my said letter was not mentioned in the purported letter. The purported letter seeking joining to duties was as usual. The said Parija has interpolated in his own hand-writing by stating reply letter No. as mentioned in the said letter. Therefore, the respondents/authorities are guilty of forgery and interpolation by stating that the purported charge sheet was served upon myself. It is denied that enquiry officer who enquired into the charges brought charges against me. It is also denied that the enquiry officer was appointed to conduct the enquiry and/or the petitioner participated in the enquiry. It is also denied that it would be evident from the reports of the enquiry proceedings that the petitioner has failed to sustainable his case of suffering sickness on and from 1.10.1993. It is also denied that the enquiry officer submitted his reports holding that the petitioner is guilty of the charges brought against me. Copies of the enquiry proceedings and reports of the enquiry officer have been prepared to punish me and the evidence so record is appearing in the Annexure. The Officer recorded in the statement told me that some statements are required to be recorded for the purpose of allowing me to join in the post and as such representation was made before me and in good faith I signed some papers forwarded by the Sr. Personnel Officer and on reposing faith upon the Sr. Personnel Officer, I signed on the blank papers supplied by the said officer and my signature was taken on the blank sheet by the said officer on

representation to me that, for the purpose of joining, some order from the superior is needed and, therefore, the signature of the writ petitioner is required and on such belief, I signed the papers on 06.04.1994. In fact, no such proceeding was initiated nor I signed the papers on understanding that I participated in the departmental proceeding. Therefore, I shall not be bound by those documents. The copy of the enquiry proceeding and the report of the enquiry officer was not served upon myself at any material point of time. It is also denied that the General Manager, Jhanjra Area has decided to issue a show-cause notice asking me to explain as to why stringent disciplinary action would not be taken against me for such misconducts. The copy of the letter dated 10.05.1994 was not served upon me.

12. If such contention of the petitioner is to be accepted, the petition raises a disputed question of fact that cannot be effectively investigated by a Court of Writ on the basis of affidavit evidence. This is another ground on which the petition is liable to fail.

13. However, I do not propose to rest my decision on this ground either. There are other weighty reasons for which the petition is liable to be dismissed.

14. Mr. Bandopadhyay, learned senior counsel appearing for the petitioner contended that he was not sufficiently educated and therefore may have been remiss in properly instructing the Advocate-on-record originally engaged by him.

15. Now that he had obtained a change and had narrated full facts to the present Advocate-on-record, he had applied for amendment of the writ application by filing CAN No. 5289 of 2009 wherein all the points regarding invalidity of the disciplinary proceeding have been raised and for the purpose of rendering substantive justice, I ought to consider the merits of the points urged in the amendment application.

16. Despite vehement objection raised by Mr. Banerjee, learned Counsel appearing for ECL and the other respondents, I have allowed Mr. Bandopadhyay to argue the case of the petitioner on merits keeping in view the points taken in the amendment application.

17. First, he urged that on the basis of the allegation contained in the charge-sheet it cannot be contended with any degree of conviction that the petitioner had committed misconduct. The petitioner was charged with remaining absent without permission/satisfactory cause. Assuming for the sake of argument that the petitioner was absenting without permission, the same was not without sufficient cause. The petitioner had been suffering for long and on the date he intended to resume duty, he had even submitted medical certificate from his attending physician. He being prevented by sufficient cause from attending duty, the act complained of did not amount to misconduct.

18. Secondly, by inviting my attention to the enquiry proceedings, he submitted that before the prosecution had presented its case, the petitioner was cross-examined by the management representative. Such a procedure was unheard of in domestic enquiry. It is for the management to present its case by tendering witnesses for oral evidence and by placing documentary evidence relied on by it. It is only after the management closes its case that the petitioner could have been called upon to present his case and if he had deposed in his defence, could the question of cross-examination arise. The Enquiry Officer having allowed the proceeding to be continued in a fashion unheard of in law, the entire proceeding was rendered vitiated and the Court ought to interdict in the interest of justice. Reliance in this connection was placed on the decision in State of Uttranchal v. Kharak Singh reported in : (2008) 8 SCC 236.

19. Thirdly, it was submitted by him that the proceedings of enquiry annexed to the affidavit-in-opposition, marked Annexure 'C', reflect a course of action which is not generally followed in respect of a domestic enquiry. The documents contain particulars of the names of the persons present at the enquiry, the venue and time of enquiry, the history of the case, the statement of the petitioner, his deposition while being cross-examined by the management representative, the statement of the management representative, his cross-examination by the petitioner and the findings of the Enquiry Officer bearing the signature of the petitioner on all pages. Such action of the Enquiry Officer, according to him, is not otherwise explainable. In view of the petitioner's allegation that he had been made to sign on certain blank papers while he was pressing for resumption of duty, it is crystal clear that

those blank papers had been utilised for the purpose of writing the proceedings of enquiry without the petitioner's participation. Illegality being writ large, he urged that the proceeding should be set aside.

20. Finally, it was contended that past attendance record of the petitioner had been taken into consideration by the Enquiry Officer as well as the disciplinary authority while holding the petitioner guilty of habitual absence from duty although no charge had been framed against him in this behalf. Since the petitioner had no occasion to place his version in respect thereof, he had been condemned unheard.

21. Based on the aforesaid submissions, he prayed for quashing of the proceedings and reinstatement of the petitioner in service.

22. None of the contentions urged on behalf of the petitioner has impressed this Court for granting any relief to him.

23. Once the petitioner has departed from the stand originally taken by filing an application for amendment wherein the process of decision making leading to termination of service has now been questioned citing incurable defects in the enquiry proceedings as noticed above, he cannot cling on to points taken in the writ petition and the affidavit-in-reply. Practically, the petitioner by filing the application for amendment of the petition has conceded that domestic enquiry was conducted upon issuance of charge-sheet and that he participated in such enquiry. The consequence of the stand taken in the amendment application is that the allegations regarding non-service of charge-sheet and non-holding of enquiry (levelled in the writ petition) and interpolation and forgery by Mr. Parija and preparation of documents by the Enquiry Officer to punish the petitioner (levelled in paragraph 13 of the affidavit-in-reply extracted supra) do not survive in the absence of such allegations in such application.

24. I shall deal with the second contention raised by Mr. Bandopadhayay first. It is his contention based on the decision of Kharak Singh (supra) that in a domestic enquiry, it is invariably the prosecution that must lead evidence first and it is only upon completion thereof that the defence ought to be called upon to lead

evidence. Paragraph 15 of the decision having been relied on, is quoted below:

15. From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject- matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the enquiry officer. If the said position becomes known after the appointment of the enquiry officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to leadevidence against the workman/delinquent charged and give an opportunityto him to cross-examine the witnesses of the employer. Only thereafter, theworkman/delinquent be asked whether he wants to lead any evidence andasked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it isincumbent on the part of the disciplinary/punishing authority to supply acopy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

25. The earlier decisions of the Apex Court that were noticed in Kharak Singh (supra) are those in Associated Cement Co. Ltd. v. Workmen reported in : 1963 (2) LLJ 396, Managing Director, ECIL v. B. Karunakar reported in : (1993) 4 SCC 727, Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd. reported in : (1999) 2 SCC 21, Syndicate Bank v. Venkatesh Gururao Kurati reported in : (2006) 3 SCC 150 and A.N. D'Silva v. Union of India reported in : AIR 1962 SC 1130. The principles laid down, viewed in the light of the decisions cited, are unexceptionable.

26. However, two decisions of the Apex Court do not appear to have been placed before the Hon'ble Bench wherein permissibility of a different approach which could be adopted by the prosecution i.e. calling upon the charged employee to

state what he had to say in view of admission of charge by him in his reply or where the accusation is based on record was approved.

27. In Employers of Firestone Tyre & Rubber Co. (Private) Ltd. v. The Workmen reported in : AIR 1968 SC 236, the Court had ruled as follows:

9. This leaves over the contention that before examining the witnesses Subramaniam was subjected to a cross-examination. This was said to offendthe principles of natural justice and reliance was placed on Tata Oil Mills Company Ltd. v. Its Workmen 1963 II LLJ 78 (SC); Sir Enamel & Stamping Works Ltd. v. Their Workmen : 1963-2 Lab LJ 367 : AIR 1963 SC 1914; Meenglas Tea Estate v. Its Workmen : 1963-2 Lab LJ 392 : AIR 1963 SC 1719; and Associated Cement Companies v. Their Workmen : 1963-2 Lab LJ 396 (SC). These cases no doubt lay down that before a delinquent is asked anything, all the evidence against him must be led. This cannot be aninvariable rule in all cases. The situation is different where the accusation is based on a matter of record or the facts are admitted. In such a case it may be permissible to draw the attention of the delinquent to the evidence on the record which goes against him and which if he cannot satisfactorily explainmust lead to a conclusion of guilt. In certain cases it may even be fair to the delinquent to take his version first so that the enquiry may cover the point ofdifference and the witnesses may be questioned properly on the aspect ofthe case suggested by him. It is all a question of justice and fairplay. If the second procedure leads to a just decision of the disputed points and is fairerto the delinquent than the ordinary procedure of examining evidence againsthim first, no exception can be taken to it. It is, however, wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over but the failure to question him in this way does not ipsofacto vitiate the enquiry unless prejudice is caused. It is only when the persons enquired against seems to have been held at a disadvantage or has objected to such a course that the enquiry may be said to be vitiated. It must, however, be emphasised that in all cases in which the facts in controversy are disputed the procedure ordinarily to be followed is the one laid down bythis Court in the cited cases. The procedure of examining the delinquent firstmay be adopted in a clear case only. As illustration we may mention onesuch case which was recently before us. There a bank clerk had allowedoverdrafts to

customers much beyond the limits sanctioned by the bank. The clerk had no authority to do so. Before the enquiry commenced he admittedhis fault and asked to be excused. He was questioned first to find out if therewere any extenuating circumstances before the formal evidence was led tocomplete the picture of his guilt. We held that the enquiry did not offend any principles of natural justice and was proper (See Central Bank of India Ltd. v. Karunamoy Banerjee, : Civil Appeal No. 440 of 1966, D/- 18-8-1967 : AIR 1968 SC 266. In Karunamoy Banerjee (supra), the Court had observed as follows:

19. We must, however, emphasize that the rules of natural justice, as laiddown by this Court, will have to be observed, in the conduct of a domestic enquiry against a workman. If the allegations are denied by the workman, itis needless to state that the burden of proving the truth of those allegations will be on the management; and the witnesses called by the management, must be allowed to be cross-examined by the workman, and the latter mustalso be given an opportunity to examine himself and adduce any other evidence that he might choose in support of his plea. But, if the workmanadmits his guilt to insist upon the management to let in evidence about theallegations, will, in our opinion, only be an empty formality. In such a case, itwill be open to the management to examine the workman himself, even inthe first instance, so as to enable him to offer any explanation for his conduct or to place before the management any circumstances which will go tomitigate the gravity of the offence. But, even then, the examination of theworkman, under such circumstances, should not savour of an inquisition. If, after the examination of the workman, the management chooses to examine any witnesses, the workman must be given a reasonable opportunity tocross-examine those witnesses and also to adduce any other evidence thathe may choose.

28. I have neither been shown nor do I know of any decision of the Apex Court holding that Firestone (supra) and Karunamoy Banerjee (supra) cases do not lay down the correct law. Law, therefore, seems to be well settled that in a given case, where a charged employee admits his guilt or where the accusation is based on a matter of record, it would well-nigh be open to the prosecution to call upon the charged employee to offer explanation in respect of his conduct forming subject matter of disciplinary proceeding and this course, without anything more, cannot

be said to offend principles of natural justice or fairplay.

29. The petitioner, in the present case, admitted the charge against him. In view thereof if the Enquiry Officer had asked him to state his defence first, there appears to be no reason to fault the approach adopted by him on the authority of the ratio of Firestone (supra) and Karunamoy Banerjee (supra). Principles laid down in paragraph 15 of Kharak Singh (supra) are general principles. Those are also laid down in Tata Oil Mills Company Ltd (supra), Sur Enamel (supra), Meenglass Tea Estate (supra) and Associated Cement (supra) which were noticed in Firestone (supra). But in Karunamoy Banerjee (supra) an exception was carved out which was amplified in Firestone (supra). The Hon'ble Bench in Kharak Singh (supra) did not have the occasion to consider these two authorities, and, therefore the authority cited would have no application in the present case. The contention thus stands overruled.

30. The first contention is equally without merit. At the enquiry, the petitioner claimed that due to his ailments he was not in a position to move and, therefore, could not inform his employer regarding his absence. According to him, he had presented a medical certificate at the time he intended to resume duty on 6.4.1994. However, since no other document regarding his treatment was produced, it has not been accepted by the Enquiry Officer as worthy of providing support to the petitioner. The question of reliability or sufficiency of evidence is not a matter to be examined in judicial review proceedings. There being no explanation in support of the petitioner's absence from duty without intimation and without permission, the finding returned by the Enquiry Officer, since accepted by the disciplinary authority, that he remained absent without sufficient cause is a plausible one not meriting interference in writ jurisdiction.

31. Although the enquiry proceeding, as conducted by the Enquiry Officer, is a bit unusual, I have failed to appreciate as to how by such procedure the petitioner can be said to have been prejudiced. The contention ought to fail on the simple ground that allegations contained in paragraph 13 of the affidavit-inreply are no longer credit-worthy in view of their absence in the amendment application. It is, therefore, impossible for me to accept that the proceedings were written on papers

bearing the petitioner's signature obtained under duress.

32. The final contention raised by Mr. Bandopadhyay, though has some force, is not sufficient to tilt the scales in favour of the petitioner. Admittedly, the petitioner was not told beforehand that his past attendance record would be looked into before imposition of punishment. To this extent the enquiry report is perverse. However, the enquiry report being in two parts is severable. Consideration of past attendance record, even if it is severed from the report, the charge of unauthorized absence remains untouched. The decision of the disciplinary authority to dismiss the petitioner is not shockingly disproportionate warranting interference since it can well be sustained on the basis of the charge proved at the enquiry against him.

33. Although not argued by Mr. Bandopadhyay, it appears that a point has been taken in the application for amendment that the petitioner did not receive copy of the enquiry report. It is true that despite direction Mr. Bannerjee could not place before this Court documentary evidence to establish that enquiry report despatched to the petitioner was returned by the postal department unserved, yet, having regard to absence of prejudice suffered by him due to non-furnishing of the same, the disciplinary proceeding cannot be held to be vitiated.

34. For the reasons discussed above, the writ petition fails and stands dismissed without, however, any order for costs. The application for amendment consequently stands disposed of.

35. Urgent photostat certified copy of this judgment and order shall be furnished to the applicant as early as possible but positively within four days from putting in requisites therefor.