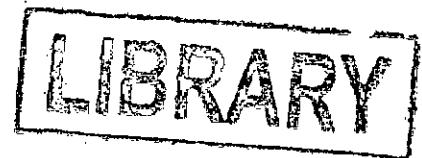


CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA

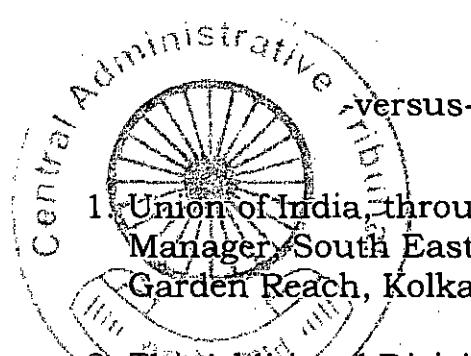


OA. 350/151/2017

Present :Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Shri Asutosh Biswas, son of late Naran Biswas as C.L. M. II now reverted as to TPM-B and working under SMR-BCK in South Eastern Railway, presently dismissed from service, residing at Village- Khairulla-Chak, Post Office- Vidyasagar University, District- Paschim Medinipore.

.....Applicant.



versus-

1. Union of India, through the General Manager, South Eastern Railway, Garden Reach, Kolkata- 700 043.
2. The Additional Divisional Railway Manager (RA), South Eastern Railway, Kharagpur, District- Paschim Medinipore, Pin- 721 301.
3. The Senior Divisional Operation Manager (AA), South Eastern Railway, Kharagpur, District- Paschim Medinipore, Pin- 721 301.
4. The Divisional Operation Manager (M), South Eastern Railway, Kharagpur, District- Paschim Medinipore, Pin- 721 301.
5. Senior Divisional Personnel Officer, South Eastern Railway, Kharagpur, District- Paschim Medinipore, Pin- 721 301.

.....Respondents.

For the Applicant : Mr. A. P. Deb, Counsel

For the Respondents : Mr. A. Mitra, Counsel

Heard on : 08.07.2019

Date of order: 9.8.19

ORDER

Per Ms. Bidisha Banerjee, JM:

This is the 4th journey of the applicant to this Tribunal after OA. 938/2012, OA. 1673/2015 and OA. 1742/2015, which were disposed of in his favour. In this OA the applicant has sought for following reliefs:

- "8(a) To rescind and/or quash the order of the Reversionary Authority being No. GM/57/Staff/10/AB-2 dated 10.11.2016 issued by Reversionary Authority/Additional Divisional Railway Manager (RA), South Eastern Railway, Kharagpur.
- (b) To rescind and/or quash the order of the Appellate Authority being No. GM/57/Staff/10/AB-2 dated 09.10.2015 issued by Appellate Authority/Senior Divisional Operation Manager (AA), South Eastern Railway, Kharagpur.
- (c) To rescind and/or quash the Show Cause Notice No. GM/57/Staff/10/AB-2 dated 14.09.2015 issued by Appellate Authority/Senior Divisional Operation Manager (AA), South Eastern Railway, Kharagpur.
- (d) To rescind and/or quash the order of the Disciplinary Authority being No. GM/57/Staff/10/AB-2 dated 18.03.2011 issued by Disciplinary Authority/The Divisional Operation Manager (M), South Eastern Railway, Kharagpur.
- (e) To rescind and/or quash the Charge Sheet No. GM/57/Staff/10/AB-2 dated 07/11.05.2015 issued by Divisional Operation Manager (M), South Eastern Railway, Kharagpur.
- (f) To pass an order upon the Respondent authority to reinstate applicant from the date of dismissal and to pay salary and arrears and to pay all consequential benefits inclusive of fixation of pay and seniority, as if nothing had happened.
- (g) Costs or incidental to and arising out of this application.

(h) Any other order or orders as your Lordships may deem fit and proper by way of moulding the reliefs."

2. We heard ld. Counsel for both sides and perused the materials on record.

3. The admitted facts which could be culled out from the pleadings of the parties are as under:

By an order dated 18.03.2011 the Disciplinary Authority imposed upon the applicant a punishment of reversion to his former post of TPM-BB with initial pay while the appellate authority enhanced the punishment to that of dismissal vide the orders were challenged in his cryptic order dated 14.6.2011 (A-5) which reads:

"Your appeal dated 27.5.11 against punishment Notice No. GM/57/Staff/10/AB-2 dtd. 18.3.11 "Reverted to former post (TPM/B) with initial pay with immediate effect until fit by the competent authority to be restored to the higher post of CLM-II."

I have gone through your appeal along with the other details in file and it is concluded that you have not brought out any new information that may warrant review of the punishment imposed.

The charges as framed are serious in nature. So, the punishment imposed by the DA stand Good."

The orders were challenged in OA. 938/12 which was disposed of on 14.7.15 with a direction upon the Appellate Authority, quashing his order to issue fresh order in accordance with Rule 22 RS (D&A) Rules. The consequent action of Appellate Authority was issuance of show cause, dated 14.9.15 as to why the penalty shall not be enhanced to that of dismissal, which shocked the applicant.

The same two letters on 20.09.15m 01.10.2015 the penalty was enhanced by Appellate Authority to dismissal.

The back ground of the proceedings could be gathered from the order passed in OA. 1742/2015 on 30.05.2016, the order records the following:

"2. The brief facts of the case are as under.

2.1 The applicant was appointed in group 'D' cadre in South Eastern Railway (SER) on 09.06.1992. After gaining departmental promotion, on 28.10.2005 he was placed in the grade of TPM-B having pay scale, Rs.2650-4000. While he was posted under Yard Master, Nimpura, a major penalty 3 (OA-1742/2015) charge-sheet vide Annexure A-I dated 07.05.2012 was issued to him, which contained the following charges:

"ARTICLE -I

That the said Sri Asutosh Biswas CLM-II while functioning as CLM at NTY is alleged to have neglecting his duty in that after accepting promotion as CLM-H at NTY he failed to perform the duty with higher responsibility due to poor working knowledge.

He also threatens of vigilance cases and misbehaves with the superiors and co-workers.

ARTICLE -II

He absconded from duty on 05.5.10 from 5.00 hrs while working at East Cabin/NTY and used unparliamentary language and physically assaulted Sri G.C. Panda, Dy. CYM/NTY on duty on 04/5/10.

Charges: Absconded from duty, misbehaviour & manhandle.

Thus, by the above cited act Sri Asutosh Biswas, CLM II/NTY failed to maintain devotion to duty and acted in a manner unbecoming of a Railway servant contravening Rule 3.1 (i), (ii), (iii) of the Railway Services Conduct Rules, 1965 rendering him liable for disciplinary action being taken against him in terms of Railway Servants (D&A) Rules, 1968 as amended from time to time."

2.2 An Enquiry Officer (EO) was appointed. The applicant participated in the enquiry. The EO submitted his Annexure A-2 report on 14.02.2011, in which the charges of absconding and manhandling were found to be proved against the applicant.

2.3 Acting on the EO's report, the Disciplinary Authority (DA), i.e., Divisional Operation Manager (M), SER, Kharagpur, vide his Annexure A-3 order dated 18.08.2011, reverted him to his earlier post of TPB-B with initial pay of Rs.7160/(when the Annexure A-3 punishment order was passed by the DA the applicant, after getting promotion, was holding the post of CLM-II/NTY).

2.4 Aggrieved by the order of the DA, the applicant filed his Annexure A-4 appeal dated 27.05.2011 before the departmental Appellate Authority (AA), i.e., Senior Divisional Operating Manager, SER, Kharagpur, who turned down the appeal but did not pass any speaking order in terms of Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968.

2.5 The applicant approached this Tribunal in OA 938/2012 challenging the orders of the DA and AA. The said OA was disposed of on 14.07.2015 and the case was remanded to the AA with a direction to pass a speaking order.

The operative part of the order reads as under:

"Since the order passed is not in accordance with the above, we quash the same and remand the matter back to the said authority i.e., Sr. Divisional Operation Manager, S.E. Railway, Kharagpur to issue a fresh order on appeal in terms of Rule 22 of RS (D&A) Rules within a period of two months from the date of communication of this order."

2.6 Pursuant to the direction of the Tribunal, the AA issued Annexure A-6 Show Cause Notice (SCN) to the applicant proposing enhancement of the punishment. The contents of the SCN read as under:

"In compliance of the order of Hon'ble CAT-Cal dated: 14.07.2015 on the OA no.938 of 2012 and in consequence of quashing the earlier order of Appellate Authority dated: 14.06.2011 the undersigned has gone through the entire D&A case file including the Punishment imposed by DOM(M)/KGP vide Punishment Notice No.GM/57/Staff/10/AB/10/AB-2 dated: 18.03.2011 and the appeal preferred by you against the punishment. The Punishment imposed by DA is inadequate and not sufficient/commensurate with the gravity of the offence.

Hence, you are to Show Cause as to why the punishment as imposed by DA, i.e., as a measure of punishment you are reverted to your former post-(TPM-B)-with initial pay Rs. 7160/- in the pay band Rs.5200-20,000+GP1800 with immediate effect until you are found fit by the competent authority to be restored to the higher post of CLMIL" will not be enhanced for the misconduct.

Your explanation should reach to the undersigned within 7 (seven) days from the date of receipt of this Show Cause Notice."

2.7 The applicant replied to the ibid SCN vide Annexure A-6 letter dated 23.09.2015. After considering the reply of the applicant, the AA finally passed the impugned Annexure A-7 order dated 09.10.2015, dismissing the applicant from service. The operative part of the order reads as under:

"Being Appellate Authority, I therefore, find the CO is guilty of the charges of grave misconduct in violation of Railway Services (Conduct) Rules, 1966 Rule 3.1 (ii)&(iii), and in view of justice and overall interest of railway operations, decide that the CO Sri Asutosh Biswas be Dismissed from Railway Service with immediate effect without any compassionate allowance."

4. The learned counsel for the applicant highlighting the issues raised in the OA and the rejoinder, submitted that the Appellate Authority (AA in short) has exceeded its powers and without any justification, has enhanced the punishment, dismissing the applicant from service. He further submitted that the AA has taken extraneous aspects into consideration, which were not part of the charge-sheet and that the said authority failed to state reasons for which the applicant deserved the punishment of dismissal. It was also submitted that the DA had passed the punishment order dated 18.3.2011 considering the joint report of 45 Heads dated 07.05.2010 and terming the same as ~~serious issue~~ ^{Administrative}, but failed to note that no such specific charge has been made against the applicant in the charge-sheet. Concluding his arguments, the learned counsel stated that the applicant has been punished by the DA and AA without any justification, as such the OA may be allowed.

5. Per contra, learned counsel for the respondents submitted that the applicant has approached this Tribunal in the instant OA, challenging the orders passed by the DA and AA but without exhausting all the departmental remedies.

6. We have considered the arguments put-forth by the learned counsel for the parties and perused the pleadings and documents annexed thereto. We are in agreement with the learned counsel for the respondents that the applicant has approached this Tribunal without exhausting of the available departmental remedy.

8

The said OA was disposed of without entering into the merits with a direction upon the applicant to "file a revision petition before the Revisionary Authority within a period of 15 days from the date of its receipt and a direction upon the Revisionary Authority to dispose of the revision petition, if filed by the applicant, within a period of three months thereafter."

In obedience to the said order, the applicant preferred a revision petition to the Additional Divisional Railway Manager, S. E. Railway, Kharagpur revisionary authority. The Revisionary Authority vide order dated 10.11.2016 upheld the punishment imposed by the Appellate Authority i.e. dismissal from railway service without any compassionate allowance. The grounds of challenge as made out by the applicant thereto are as under:

- (i) That the Revisionary Authority failed to appreciate that prior to enhancement of punishment the pre-requisite is to Show Cause and accord reasonable opportunity to make representation.
- (ii) That the Revisionary Authority ought to have considered that before the Appellate Authority enhanced the punishment acting as a quasi-judicial authority, it is incumbent upon it to record reasons as to why the penalty imposed by the Disciplinary Authority was less and thereafter the grounds or tentative reasons recorded in the Show Cause Notice and to be communicated in order to be defended in consonance with the principles of natural justice and more particularly the rule of *audia alteram partem*.
- (iii) That the Revisionary Authority ought to have considered that if no reasons are given, it would construe that there is no justification for enhancing punishment by the same Appellate Authority who had earlier upheld the punishment of the Disciplinary Authority on the same appeal dated 27.05.2011.

4. Mr. C. Sinha, Ld. Counsel for applicant would submit that although the Show Cause notice was issued prior to enhancement of penalty order by the Appellate Authority, no reason was furnished as to why he decided to enhance the punishment and therefore, the applicant was deprived of reasonable opportunity to have his say on the justification or on the reason for such proposed enhancement.

Ld. Counsel, at hearing would also draw our attention to the penalty order dated 18.03.2011 which records the following:

.....I have gone through the entire case file, enquiry report and your final representation dt. 033.11 in connection with the charge memorandum of even Ino. Dated 7/11.5.10 for failure to perform duty with higher responsibility due to poor working knowledge, absconded from duty on 5.5.10 and used unparliamentary language and physical assault to Dy. CYM/NTY etc.

A joint appeal also submitted by your coworkers (45 heads) to Sr. DOM/KGP through CTM/NTY dtd. 7.5.10 where they expressed their unwillingness to work with you for your notorious and disturbing activity. It is a very serious issue.

As per report of Inquiry Officer, "Absconding from duty and manhandling are substantiated." The statement of Sri K. K. Shit - ESD working at NTY dtd. 4/5.5.10 and 28.9.10 and Sri S. Kundu-TPM 'A' / NTY dtd. 20.11.10 etc. proved your fault.

I find that you are guilty in this case. You are unable to perform the duties of CLM II. You had stated it several times before your supervisor and also given written statement about the facts which I found in the D&A case file.

As a measure of punishment you are reverted to your former post (TPM 'B') with initial pay Rs. 7160/- In the pay band Rs. 5200-20.200 +GP 1800 with immediate effect until you are found fit by the competent authority to be restored to the higher post of CLM-II.

Ld. Counsel would argue that the Disciplinary Authority having considered the same allegations as "grave", imposed penalty of reversion, while on the same allegation appellate authority has imposed a "dismissal" from service.

5. The Appellate Authority in the penalty order of dismissal from service has observed as under:

“.....After going through the appeal of the CO, it is observed that,

- (i) It is evident on record that the procedure laid down under Rule 6 has been followed where Principal of natural justice has been adhered to and all reasonable opportunity has been given to the CO to defend his case.
- (ii) Being a staff related to the train operation and safety, absconding from duty is a very serious offence.

Sri K. K. Shit- Electric Shunting Driver has stated during the cross examination of enquiry proceedings that Sri Biswas manhandled Sri Parida- Dy. CYM as well as used un-parliamentary words.

- (iii) Sri Parida was directed by Town Thana and admitted in Sub-Divisional Hospital, Kharagpur for treatment of injury in his eye. Both the officials of Town Thana, Kharagpur and Sub-Divisional Hospital Kharagpur can not be false and baseless, and are supported by documents.
- (iv) Three eye witnesses have come up with their statements, where by:-
 - (a) Sri K. K. Shit-ESD on duty, who was the staff witnessing the incident.
 - (b) Sri M.K. Dey-SM-NTY on duty made a diary entry of absconded from duty by Sri Biswas.
 - (c) Sri S. Kundu-TPM-A/NTY has given witness of absconded from duty by Sri Biswas.

The memo issued by Town Thana, Kharagpur for medical assistance and medical documents issued by Sub Divisional Hospital Kharagpur clearly proves that Sri G. C. parida was manhandled on 05.05.10.

After taking into account all the relevant aspects of the case and also ongoing through the records, it appears that this case does not deserve any special favourable consideration, rather it is felt that the conduct of CO and the charges levelled therefore are indeed grave with all possible impact on safety and operations of Railways.

The CO can not be given a more favourable considerations in view of his past service records, where, he has twice been charge sheeted with Major penalty for absconding from duty and also for misbehaviour with his supervisors. It appears, he is habituated to such activity.

The CO had been given reasonable opportunity to bring out any new facts or reasons before passing the orders. The CO had asked for 10 days time, which has also since elapsed. It is

therefore, presumed the CO has no representation to make against the Show Cause Notice dated 14.09.2015.

Being Appellate Authority, I therefore, find the CO is guilty of the charges of grave misconduct in violation of Railway Services (Conduct) Rules 1966 Rule 3.1 (ii) & (iii), and in view of justice and overall interest of railway operations, decide that the CO Sri Asutosh Biswas be Dismissed from Railway Service with immediate effect without any compassionate allowance."

It was argued that, the Appellate Authority enhanced punishment taking into consideration extraneous factors, like "past service records" habituated to such activity" etc. Ld. Counsel for applicant would vociferously urge that the reason for enhancement on that score was not spelt out in the show cause notice, which omission violates the provision of Rule 22 sub rule (v) of RSDA Rules that reads as under:

"(v) no order imposing an enhanced penalty shall be made in any other case unless the appellant has been given a reasonable opportunity, as far as may be, in accordance with the provisions of Rule 11, of making a representation against such enhanced penalty.

5. Ld. Counsel for respondents would vehemently oppose the contention of the applicant that he did not deserve a gravest penalty of dismissal from service. Ld. Counsel would submit that the applicant not only manhandled one **Sri G. C. Parida** he was also inflicted injury due to which Sri Parida had to be admitted to a hospital and the incidence was also reported to the Police and that the applicant has made a wrong statement that no medical certificate was considered to come to a finding on his guilt.

6. To controvert the allegation, Id. Counsel for applicant would cite a decision rendered by Hon'ble Apex Court in **A. K. Nigam vs. State of Uttar Pradesh & Anr.** where the 3 judges Bench of Hon'ble Apex Court had observed as under:

"4. The legal position, as to the powers of the High Court to direct enhancement of punishment in a writ petition arising out of disciplinary action taken against an employee, stands concluded by the decisions of this Court, referred to above. In Pradeep Kumar case [Pradeep Kumar v. Union of India, (2005) 12 SCC 219], in a somewhat similar circumstances, a similar question had arisen for consideration before this Court. In that case too the High Court had found the punishment of reduction in pay and denial of increments awarded to the appellant to be inadequate, for the gravity of the misconduct. The High Court had accordingly remanded the matter back to the disciplinary authority to award the maximum punishment of dismissal from service which direction was then assailed before this Court on the ground that the High Court had no such power to direct enhancement of punishment either by itself or by remanding the matter to the disciplinary authority. An employee complaining against the punishment awarded to him could not, observed this Court, be placed in a worse-off position for coming to the Court.

5. The following passages from the judgment is in this regard are apposite: (Pradeep Kumar case [Pradeep Kumar v. Union of India, (2005) 12 SCC 219], SCC pp. 219-20, paras 3-4)

"3. According to the appellant, similar punishment was inflicted on the other two employees. Being aggrieved, all three employees filed separate writ petitions before the High Court. The writ petitions of the other two employees were merely dismissed as withdrawn. As far as the appellant was concerned, the High Court not only dismissed the writ petition but also directed the punishing authority to reconsider the punishment imposed in view of the observations of the High Court and held that the maximum penalty of dismissal from service ought to have been accorded. There was a further direction that the action taken against the appellant should be intimated to the Court as soon as possible.

4. Irrespective of the crime/offence with which the appellant may have been charged, it was not open to the High Court to have issued such a direction. The scope of judicial review did not allow the High Court to have interfered with the punishment imposed by the disciplinary authorities on the appellant. Besides, a writ petitioner cannot be put in a worse position by coming to court. The directions of the High Court are not sustainable and must be set aside. We are told by the learned counsel for the appellant that the respondent authority pursuant to the directions issued by the High Court initiated proceedings against the appellant for the purpose of imposing the penalty of dismissal from service. We have held that the direction of the High Court was wholly outside its jurisdiction. The appeals are thus allowed and the High Court's directions are set aside. The disciplinary enquiry initiated on the basis of the High Court's order is consequently also quashed. However, the writ petitions will stand dismissed. There is no order as to costs."

6. To the same effect is the decision in Ramesh Chander Singh case [Ramesh Chander Singh v. High Court of Allahabad, (2007) 4 SCC 247 : (2007) 2 SCC (Cri) 266] where too the question whether the High Court could interfere with the order of punishment in a matter where the employee challenged the punishment awarded to him in a writ petition, fell for consideration before this Court. The question was answered in the following words: (SCC p. 252, para 6)

"6. Based on the enquiry report, the appellant was served with a notice to show cause as to why his two increments should not be withheld with cumulative effect. The matter was placed before the Full Court on 20-11-1999 and the Full Court by its resolution imposed a major punishment of withholding two annual increments of the appellant with cumulative effect. The appellant filed a review application against the said punishment and the same was rejected. Thereupon, he filed a writ petition under Article 226 of the Constitution challenging the punishment imposed on him. By judgment dated 3-10-2005, the writ petition was dismissed and in the very same judgment the appellant was directed to show cause within three weeks from the date of the judgment as to why the High Court should not consider substitution of the punishment imposed, by removing him from service. Pursuant to the notice, the appellant appeared and presented his case before the Division Bench. By judgment dated 25-11-2005, the appellant was reduced to the rank next below, that is, Civil Judge (Senior Division). Both the judgments of the Division Bench are challenged before us."

7. We have, in the light of the above decisions, no hesitation in holding that the High Court had fallen in a palpable error in directing issuance of a show-cause notice to the appellant. The appellant could not, as observed earlier, be placed in a worse-off situation because of his having sought redress against the punishment awarded to him by the disciplinary authority which in the instant case is the High Court itself.

8. In the result, we allow this appeal and direct setting aside of that part of the order [Ashok Kumar Nigam v. State of U.P., 2012 SCC OnLine All 4210] passed by the High Court whereby the High Court had directed the issuing of show-cause notice to the appellant for award of a heavier punishment upon him. The fact that the appellant has since retired from service, is only an added feature why the direction of the High Court should be set aside. The parties are left to bear their own costs."

7. We would decipher that indeed the show cause notice to enhance the punishment order dated 14.09.2015 is bereft of any reason as to why penalty was sought to be enhanced from reversion to dismissal, it simply says that the punishment imposed by Disciplinary Authority is inadequate. It reads as under:

"The punishment imposed by DA is inadequate and not sufficient/commensurate with the gravity of the offence.

Hence, you are to show cause as to why the punishment as imposed by DA i.e. "As a measure of punishment you are reverted to your former post (TPM-B) with initial pay Rs. 7160/- In the pay band Rs. 5200-20,200+GP 1800 with immediate effect until you are found fit by the competent authority to be restored to the higher post of CLM II" will not be enhanced for the misconduct."

The applicant had duly replied to the notice on 23.09.2015 and 01.10.2015 to the Appellate Authority i.e. the Sr. Divisional Operation Manager asking for ground for enhancement of punishment yet without affording the opportunity to meet the allegations, the Sr. DOM enhanced the punishment. It is palpable that the authority enhanced the punishment without indicating the reason for enhancement in his notice and enhanced the punishment due to past conduct of the employee which opposes principles of fair play and natural justice.

Further more, and most importantly, once the earlier Sr. DOM, Azhar Shams, acting as Appellate Authority was satisfied that reversion was an adequate ~~penalty~~ ^{Administrative}, his successor in office, Vivek Kumar could not have turned ~~volte~~ face to enhance the penalty on the ground that ~~penalty of reversion was not adequate~~. He had no authority to review the order of earlier Sr. DOM. He had to restrict himself only to comment on the adequacy of penalty imposed by Disciplinary Authority and retain it or reduce it. The order dated 9.10.15 is palpably illegal. Therefore, the order dated 09.10.2015 and consequent order dated 10.11.2016 of Revisionary Authority upholding such illegal enhancement of penalty, deserves to be quashed.

8. Having considered the implication of the Judgment of **A. K. Nigam (supra)** as enumerated above, we quash the order of dismissal passed by the Appellate Authority as well as Revisionary Authority and remand back the matter to the Appellate Authority to issue a fresh order in accordance with law, within 2 months.

Interregnum between dismissal and fresh order shall be decided in accordance with law.

(Dr. Nandita Chatterjee)
Member (A)

(Bidisha Banerjee)
Member (J)

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