(2005) 09 AHC CK 0235

Allahabad High Court

Case No: Special Appeal No. 1084 of 2005

Union of India (UOI), North Central Railway, The Additional Chief Security Commissioner, Railway Protection Force, North Central Railway and The Senior Divisional Security Commissioner, Railway Protection Force, North Central Railway	APPELLANT
Vs	
Virendra Prasad Dubey	RESPONDENT

Date of Decision: Sept. 26, 2005

Acts Referred:

- Railway Protection Force Rules, 1987 - Rule 148.2, 84

Citation: (2005) 6 AWC 5848 : (2006) 108 FLR 69 : (2006) 2 JCR 40

Hon'ble Judges: Ajoy Nath Ray, C.J; Ashok Bhushan, J

Bench: Division Bench

Advocate: Govind Saran, for the Appellant; R.K. Tiwari, for the Respondent

Final Decision: Allowed

Judgement

Ajoy Nath Ray, C.J. and Ashok Bhushan, J.
The appeal is summarily disposed of.

2. This appeal has been preferred by the Railway authorities against the judgment and order of the Hon''ble Single Judge dated 18th July, 2005 whereby the respondent''s writ petition was allowed.

3. The complaint was made against the authorities by the writ petitioner which was in respect of an order of compulsory retirement passed against the petitioner by way of punishment. The impugned orders are dated 6th October, 1994, 31st July,

1995 and 22nd July, 1995.

4. Before we go into findings arrived at by the Hon''ble Single Judge, exact facts of the case should be recounted.

5. The writ petitioner was on sick list from 19th August, 1992 to 4 January, 1993 when he was being treated at the Railway hospital at his place of service as an outdoor patient. This means that he was not staying in the hospital but visiting the hospital.

6. On 5th January, 1993 on the writ petitioner''s own request as has been told to us by Mr. Saxena appearing for the writ petitioner, he was put out of the sick list although the hospital did not issue a fitness certificate on the same date. What happened was that the writ petitioner decided on his own that he was not getting well for a long time and therefore, he should have alternative treatment. He did not involve his superior authorities in his decision. He simply took the decision one day i.e. 5th of January, 1993 and came out of his quarters and went back home. According to him he was being treated by one Dr. A.K. Mehta at Ballia from 6th January, 1993 upto 20th August, 1994. Then his case is that he was referred by Dr. A.K. Mehta to Dr. D. Rai of District Hospital, Ballia where he was under treatment from 20th August, 1994 to 30th October, 1994.

7. Meanwhile disciplinary proceedings started and the impugned orders were successive passed.

8. The second of the points found by the learned Single Judge in favour of the writ petitioner is takenup by us first. His Lordship found that the punishment was disproportionate to the alleged misconduct of unauthorised absence and as such his Lordship has referred the matter back to the departmental authorities.

9. Whether punishment can be pronounced by the writ court, as disproportionate to the charges or not, is a mixed question of law and facts. In any event/the law is that the writ court must be able to pronounce the disproportionate nature of the punishment as the only possible Conclusion, if two conclusions are possible the writ Court will not sit in appeal. This is the clear law.

10. A case was given on behalf of the writ petitioner by Mr. Saxena being the case of Shri Bhagwan Lal Arya Vs. Commissioner of Police Delhi and Others, where the Supreme Court reached the punishment conclusion of There was being clearly disproportionate absence without leave in that case also and the employee had alleged his own illness too. In paragraph 11 of the said judgment they mentioned period of unauthorised absence is from 7.10.1994 to 15.12.1994.

11. In another case which was not cited at the Bar but is being given by the Court is the case of State of U.P. and others Vs. Ashok Kumar Singh and anothers, . The finding of the High Court that the punishment was disproportionate, was set aside by the Supreme Court. The Supreme Court disapproved the observation of the High Court that the constable''s absence from duty without leave would not amount to

such a grave charge.

12. We do not enter into the details of facts in these two cases of the Supreme Court because that would distract the Court''s attention from the facts of this case before us which has to be assessed on its own strength and, merit. If punishment is disproportionate the writ Court has to set aside such punishment that is the settled law. That such disproportionate nature of punishment has to be made out by the writ petitioner beyond all doubt and dispute is also the settled law. Let us apply these principles here.

13. The writ petitioner was absent for about twenty months. The exact nature of his sickness has not come up in the papers except that he was complaining of pain in the spine. He was sending medical certificate of his private doctors from his home at Ballia. He again surfaced at the place of work only when the disciplinary proceedings were producing adverse orders one after other. He went away to Ballia on 5.1.1993 on his own decision and had allegedy got further treatment from January, 1993 to October, 1994. He treated himself as his own master and did what he thought was right and necessary for himself without in any manner submitting himself to any jurisdiction, authority, opinion or advice of any of his superior officers. He did just as he pleased and as he thought best himself for 21 months.

14. Whether he was justified in doing so or not, whether such justification extenuated the circumstances so as to relieve him from the region of major punishment were the matters for the authorities to decide. The facts are not such where imposition of major punishment has to be pronounced by the writ Court necessarily as a disproportionate and harsh exercise of disciplinary authority. If the writ Court cannot say so/it cannot touch the punishment by way of sitting in appeal. As such with the greatest of respect, the learned Single Judge went wrong and we are of the opinion that the punishment cannot be necessarily and unhesitatingly as branded as disproportionate, without any two [sic] or that the orders,[sic] be set aside for that reason.

15. The other point dealt with by the learned Single Judge is a point of law and is comparatively easily dealt with. There were three rules applicable to the writ petitioner which dealt with compulsory retirement. One was Rule 84 of the Railway Protection Force Rules, 1987 which permits compulsory retirement at any age if there is a sleep fall in the competence of the employee or there is such fall in his efficiency or effectiveness.

16. This rule is to be utilised when punishment is not feasible; punishment by way of compulsory retirement is dealt with under Rule 148 2 (c) where it is stated to be a major punishment. Of course, although it is a major punishment it is a lesser punishment than dismissal which would adversely affect the employee with regard to payment of all type benefits. The other rule applicable to the employee was Rule 56 (J) of the Fundamental Rules which permits compulsory retirement in the public

interest provided the employee was employed, before the age of thirty five years and provided that he has (crossed the age of fifty at the time of compulsory retirement.

17. Rule 2. of the Fundamental Rules is as follows :-

"F.R. 2. The fundamental Rules apply, subject to the provisions of Rule 3 to all Government servants whose pay is debitable to Civil Estimates and to any other class of Government servants too which the President may, by general or special order, declare them to be applicable."

18. We are of the opinion that the writ petitioner was a railway employee and the railways being a Union of India under taking, the employee is to be treated as a Government servant within the meaning of said fundamental Rule 2; as such Rule 56 (j) would also apply.

19. The learned Single Judge held that because Rule 56 (j) of the Fundamental Rules permits compulsory retirement only after the age of fifty, that fundamental rule has to be read in the Rule 148.2 (c) of the Railway Protection Force Rules, 1987 and therefore, the imposition of compulsory retirement prior to the writ petitioner attaining the age of fifty, was without jurisdiction.

20. We respectfully disagree. If Rule 56 (J) is to be equated to any rule of the Railway Protection Force Rules then it should be Rule 84 where compulsory retirement is imposed not by way of punishment but otherwise. When several rules apply, then those should be read harmoniously and together if that is possible. It is quite possible to read Rule 148.2(e) of the Railway Protection force Rules, 1987 and Rule 56 (j) of the Fundamental Rules harmoniously and together. These operate in different fields and do not come in contact with each other. One has a field of operation in the area of punishment and another has a field of operation in the other area known as the area of the golden hand shake.

21. In these circumstances reading a serious limitation into the Railway Protection Force Rules, Rule 148.2 (e) was not justified. Such limitation would seriously interfere with the flexibility of the rule. As such we are again, with respect in disagreement of Hon''ble Single Judge. The writ petitioner accordingly has no points left in his favour and his writ petition has to be dismissed. It is hereby so done. The appeal is allowed. The order under appeal is set aside.

22. There is no order as to costs.