(2007) 03 CAL CK 0001

Calcutta High Court

Case No: RVW No. 021 of 2006 in WPCT No. 028 of 2006

Abdul Salam		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: March 30, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 8, 141
- Constitution of India, 1950 - Article 215, 226

Citation: (2007) 3 CHN 519

Hon'ble Judges: Sanjib Banerjee, J; Pranab Kumar Deb, J

Bench: Division Bench

Advocate: Haradhan Banerjee, P.P. Mukherjee and K. Vijay Kumar, for the Appellant; Ashok Banerjee and A.S. Zinu, for the Respondent

Final Decision: Dismissed

Judgement

Sanjib Banerjee, J.

The writ petitioner, now in review, desires a second, and bigger, bite of the cherry. Matters urged in course of the writ proceedings, or those that ought to have been urged then, or those that are claimed to have been urged but were not noticed, have been sought to be agitated afresh.

2. The petitioner, a policeman who has been disciplined for his absence without justifiable cause, seeks to reopen the writ petition on three counts, though the merits of the entire matter have been put forth. It is suggested that the order under review did not notice the three major grounds taken in challenging the order of the Central Administrative Tribunal: that the chargesheet issued was vague in that it indicated the beginning of the period of absence but did not disclose the end date; that the notice issued by disciplinary-authority required the petitioner only to deal with the quantum of punishment proposed to be inflicted on him and not the report of the Inquiry Officer; and, that despite the Tribunal and this Court having found

some justification meriting further inquiry into a part of the period of the petitioner''s absence, the quantum of punishment has not been reduced consequent thereupon.

3. In course of addressing such matters, we have been reminded of the power that inheres in every Court, particularly in a Court of Record, to correct any mistake in its order if such mistake results in manifest miscarriage of justice. Unimpeachable authorities have been cited in support of the contention that if matters were urged but were not noticed in the order, it is only that Court to which a party has to return and not carry the matters unnoticed to the appellate forum. Non-consideration of material germane to the issues raised, we are reminded, amount to error apparent on the face of the record.

4. It is not necessary to lay down the entire factual basis on which the writ petition was founded or those that have been asserted all over again in the present proceedings. The ancillary points urged now appear in the pleadings and if the petition is found wanting on the three major planks put forward, the ancillary points pale into insignificance. But lest the petitioner''s arguments again go unnoticed, it is wise to set out the basis on which review of the order of September 8, 2006 is sought. These, according to learned Counsel for the petitioner, are best found at paragraph 13 of the reply filed herein:

(a) The order under review failed to discuss the ground urged that the chargesheet was vague in that it recorded the beginning of the period of unexplained absence but did not indicate the time till which such absence continued. That such ground was taken and urged would be evident from the previous order of June 28, 2006 passed in the same writ proceedings.

(b) For a period of two weeks beginning April 13, 1999, the petitioner had been granted medical rest; yet the petitioner was charged with unauthorized absence from April 13, 1999. Again such matter was urged as will appear from the earlier order of June 28, 2006, but not referred to in the impugned order.

(c) Several medical certificates relied upon by the petitioner had been seized in connection with a probe by the Central Bureau of Investigation. It is because of such reason that some of the certificates were not on record and despite the Court noticing such matter in the order of June 28, 2006, the final order found no place for such issue.

(d) The disciplinary authority did not afford the petitioner any chance of challenging the finding of "break in service" and acted in violation of the principles of natural justice. This major argument was not alluded to in the impugned order.

(e) The petitioner''s application for regularization of leave had not been disposed of and till such application was disposed of, proceedings for unexplained absence could not be drawn up against him. This touched upon the jurisdiction of the

disciplinary authority and ought to have been dealt with when urged.

(f) The order of the disciplinary authority betrayed a sense of being preconceived as it was, inter alia, founded on the petitioner having allegedly avoided to comply with an order transferring him to Car Nicobar. Such matter did not find place in the notice issued by the disciplinary authority and the writ petition should have been considered in the light of this argument.

5. Despite the summary of the grounds urged in these proceedings not containing two of the major arguments put forth at the final hearing, it is necessary to deal with the three principal planks on which the plea for review has ultimately been based. But to put the matter in perspective, it calls for the notice issued by the disciplinary authority to be appreciated:

A copy of the Inquiry Report submitted by the officer appointed to inquire into the charge against S.I. Abdul Salam is enclosed.

On careful consideration of the Inquiry Report and after giving serious thought to the material brought on record, the undersigned finds no reason to disagree with the conclusion arrived at by the Inquiry Officer. The undersigned, therefore,'' holds that the charge of unauthorised absence committed from duty from 13.4.1999 to 13.01.2002 on the pretext of prolonged illness, without producing any valid medical certificates and disobeying the lawful instructions of his Senior Officers that he should appear before the Medical Board of G. B. Pant Hospital, Port Blair, for securing a second medical opinion, stands proved beyond any reasonable doubt as concluded by the Inquiry Officer in his findings.

The undersigned, therefore, tentatively agreeing with the Inquiry Officer in his findings proposes to reduce S.I. Abdul Salam in his time scale of pay by five stages for a period of five years and to treat the entire period of unauthorised absence as leave with loss of pay for his proven act of grave misconduct, wilful disobedience and dereliction of duty.

S.I. Abdul Salam (charged officer) is, therefore, given an opportunity to show cause within 15 days from the date of receipt of this memorandum as to why the proposed punishment, based on the findings of departmental enquiry, should not be inflicted upon him. If no written reply, in this regard, is submitted within the stipulated period, it shall be presumed that the charged officer has nothing to say in his defence and the case would be decided ex parte, on merits.

Receipt of this memorandum, together with its enclosures, should be acknowledged by S.I. Abdul Salam.

6. That the charge levelled against the petitioner was vague as it was allegedly open-ended as to the period of unauthorized absence, is without basis and will appear from the second paragraph of the notice. The order under review in its opening paragraph considered the punishment for the period April 13, 1999 to

February 7, 2001 and it was not necessary for the charge of vagueness on such count being specifically referred to when the same appeared to be unsustainable in the face of the record. But more on the vagueness of the charge, later.

7. The second, and more serious, ground put forward is found in the third paragraph of the notice. It is suggested that the disciplinary authority in "tentatively agreeing" with the findings of the inquiry officer, the notice precluded any discussion as to the propriety of the report or any challenge as to the findings contained therein. The third paragraph of the notice, it is submitted, merely called for an explanation as to why the punishment as contemplated should not be imposed; that the notice did not afford the petitioner a chance to question the report. Several authorities were cited in furtherance of the two-stage principle. It is claimed that a charged employee was first to be given a change to challenge the basis of the factual finding and thereafter afforded an opportunity to question the quantum of punishment proposed to be meted out to him. Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., , Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, Punjab National Bank v. Kunj Behari Misra were placed in furtherance of such contention.

8. In the Karunakar case, a Constitution Bench explained the two-stage process in disciplinary proceedings. The following passage from that judgment, that has been quoted in many later judgments, was relied upon:

It will thus be seen that where the Inquiry Officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence. Inquiry Officer''s report and the delinquent employee''s reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second state is not even reached. The employee''s right to receive the report is thus, a part of the reasonable opportunity of defending himself in the first stage of the inquiry. If this right is denied to him, he is in effect denied the right to defend himself and to prove his innocence in the disciplinary proceedings.

9. That judgment was rendered upon considering the effect of the Forty-second Amendment and it was found that although on account of such amendment, it was no longer necessary to issue further notice to the delinquent employee to show cause against the punishment proposed and, therefore, to furnish a copy of the inquiry officer''s report along with notice to make representation against the penalty, whenever the inquiry officer was other than the disciplinary authority and the report of the inquiry officer held the employee guilty of any of the charges with proposal for any punishment or not, the employee was entitled to a copy thereof so that he may make a representation against it to the disciplinary authority. It was held that such report if not furnished, would amount to violation of the rules of the

natural justice. Such principle was made applicable to employees in all establishments whether Government or non-Government, public or private.

10. In the later decision in the Kunj Behari Misra case, the Karunakar case was referred to in detail, though the principle issue involved was somewhat different from the Karunakar case. The Supreme Court was faced with the situation where the inquiry officer had absolved one of the employees and the other was held guilty of only one charge that he did not sign the relevant register, but exonerated him of the remaining five charges. The disciplinary authority disagreed with the report of the inquiry officer and proceeded to find that some of the charges against the employee stood established on the basis of the materials on record. The procedure to be followed in such cases came to be laid down upon the following question being raised:

When the Inquiry Officer, during the course of disciplinary proceedings, comes to a conclusion that all or some of the charges alleging misconduct against an official are not proved then can the disciplinary authority differ from that and give a contrary finding without affording any opportunity to the delinquent officer.

11. That question was answered with reference to earlier Supreme Court judgments, including the Karunakar case, in the following words:

17. These observations are clearly in tune with the observations in Bimal Pandit case quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the enquiry officer had given an adverse finding, as per Karunakar case the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the enquiry officer. It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusion, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority.

18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer''s report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case.

12. Counsel for the delinquent employee in the present case asserts that the rules as aforesaid were breached and that the disciplinary authority had, at the time of issuing the notice to the employee, somewhat made up its mind as to the acceptability of the inquiry report. The choice of words in the third paragraph of the notice in September 17, 2002 would lead to such an inescapable conclusion and the notice really required the notice to limit his submission as to the quantum of punishment proposed. This, according to the delinquent employee, vitiated the entire proceedings and nullified whatever followed.

13. Such matter need not have detained us upon noticing the opening sentence of the writing of September 17, 2002, but needs to be gone into as the argument is that in failing to record and deal with such ground, there is an error apparent on the face of the order under review. Let the notice first be tested as to what it was understood to mean by the notice. The first reply of the petitioner of October 7, 2002 complained of a biased and unfair inquiry. Following three paragraphs of grounds made out therefore, the following submission was made in such first reply:

I submit that earlier inquiry be accordingly quashed and a fresh inquiry ordered to facilitate fair and just conduct of departmental investigation into the charges alleged against me.

14. Apart from the obvious expert legal assistance that the petitioner appears to have had the benefit of from the earliest stage, it is evident that he perceived the notice of September 17, 2002 to be an invitation to challenge the inquiry report that was forwarded to him. Challenge he did, and awaited the result thereof.

15. Next, it requires to be seen as to how the disciplinary authority, not being the inquiry officer, dealt with the challenge. By a writing of November 11, 2002, the disciplinary authority held thus:

I have carefully gone through the representation dated 07.10.2002 submitted by S.I. Abdul Salam (Charged Officer) in response to this office show-cause notice issued to him vide this office Memorandum No. IGP/DE-3/2001-2002/315 dated 17.09.2002. I have also perused the relevant departmental proceeding file and the inquiry report submitted by the inquiry officer as well. I find that despite sufficient and reasonable opportunity given, S.I. Abdul Salam (charged officer) refused to participate in the enquiry. In such circumstances, the enquiry officer had no other option than to proceed with the inquiry in his absence. The ex parte enquiry conducted is in accordance with the statutory requirements.

The contention of S.I; Abdul Salarn that the enquiry was conducted when a biased atmosphere was prevailing and therefore, the enquiry conducted against him is not fair and just, is not tenable because he has neither cited any specific valid reasons nor produced any documentary evidence in support of such contention. The plea of S.I. Abdul Salam for.quashing the enquiry already held and ordering a fresh enquiry is devoid of any force/merit and, hence, rejected.

S.I. Abdul Salam is, however given one more chance to submit his written reply to aforesaid show-cause notice. His written reply, based on the findings of the inquiry officer, should be submitted within seven days from the date of receipt of this memorandum, if he so desires.

16. Rather than making out the detailed reply sought by the disciplinary authority, the employee preferred sundry excuses to gain some more time by a letter of November 19, 2002. He claimed that "due to some unforeseen and inescapable situation including the Roza I could not prepare a comprehensive representation based on the findings of the inquiry officer." He again tried to justify the challenge to the inquiry conducted against him notwithstanding such preliminary challenge having earlier been repelled by the disciplinary authority. He concluded that letter by the following words:

However, I reiterate that the above submissions are not based on the findings of the Inquiry Officer. If the matter is not closed holding that the charge has not been proved or a ''de novo'' inquiry is not ordered. I may kindly be granted a further time of 15 days from the date of communicating the extension of time, for making an appropriate submission based on the findings of the Inquiry Officer.

17. It would have been understandable for the disciplinary authority to have been at the end of its tether and taken the employee''s letter of November 19, 2002 to be his comprehensive response to the notice of September 17, 2002. Yet, the disciplinary authority showed more patience; by a letter of November 24, 2002 it extended the time for the employee to furnish the reply till December 15, 2002. So much for the

violation of the principles of natural justice and a preconceived mind, that is the basis on which the petitioner founded a ground for challenging the disciplinary proceedings.

18. An eight page, 14-paragraph reply followed, peppered with reference to diverse Supreme Court and other judgments. The substance of the reply was to counter the findings contained in the inquiry report.

19. The petitioner merely amuses himself by making the charge that the procedure followed in his case was at variance with the two-stage process laid down in the Karunakar case and the principle recognized in the Kunj Behari Misra case. The inquiry officer''s report was made available to him; he contemporaneously understood the notice of September 17, 2002 to be an invitation to challenge such report; he challenged the foundation of such report as if on a demurrer; then challenged the merits of the findings against him; and, awaited the result of his efforts. The only criticism that may be made of this stage of the proceedings is the latitude which was given to the delinquent.

20. The other major limb on which the review petition is pegged is that despite the period of unexplained absence being reduced, the quantum of punishment has been left unaltered. This appears to be more a ground in appeal that a ground in review. The order signs off on the following lines:

We, therefore, set aside the order passed by the CAT, being order dated 28th December, 2005 to the extent of punishment sustained by the writ petitioner for the period 13lh April, 1999 till 28th December, 1999. We further direct that the concerned authorities shall hold de novo enquiry for this period, to adjudicate the issue.

The writ petition succeeds to the extent indicated above. However, there will be no order as to costs.

21. Implicit in the above is the conscious decision to not interfere with the punishment inflicted notwithstanding setting aside the finding as to the period of absence from April 13, 1999 to December 28, 1999. There is no apparent mistake committed. Their Lordships were alive to the fact that the punishment inflicted was not being reduced. As to whether this was correct or not, does not fall within the scope of these proceedings. It is a matter just like interest not being provided; it would be deemed to have been considered and rejected.

22. As an offshoot of the direction contained in the penultimate paragraph of the order under review, a notice has been issued for a de novo enquiry into the period of absence excluded by that order. The petitioner cites such notice and the interpretation of that part of the order to suggest that it was a mistake and that it requires to be modified. The interpretation of the order by an authority is hardly a matter that can be urged in seeking review. If such interpretation is absurd, as the

petitioner claims, that cannot have any impact on the order. Their Lordships required a de novo inquiry to be made and the propriety of such direction cannot be gone into in review.

23. The petitioner has left no matter to chance. The principles governing review have been reiterated. Shankar K. Mandal and Others Vs. State of Bihar and Others, has been placed to assert that arguments made but not recorded need to be corrected by way of a review and not an appeal. Indian Charge Chrome Ltd. and Another Vs. Union of India (UOI) and Others, has been relied upon for the proposition that non-consideration of contentions amounts to error apparent on the face of the order. 2006(1) WBLR SC 76 has been cited for the proposition that every Court of plenary jurisdiction has the power to correct errors to prevent miscarriage of justice. That was the case were material documents had not been looked into. 2000(1) Supreme 1 has been pressed into service to refer to Article 215 of the Constitution which requires the High Court as a Court of Record to maintain the purity of its records. AIR 1954 SC 526 has been quoted for the principle that review would lie if a material issue that had been urged had not been dealt with. The petitioner has also referred to Order 47 Rule 8 of the CPC to suggest that in the event the order under review is not modified immediately, the Court has the power to direct a rehearing. Lest the principles recognized by the CPC be not applied in proceedings arising under Article 226 of the Constitution by reason of Section 141 of the Code K. Venkatachala Bhat and Another Vs. Krishna Nayak (D) by Lrs. and Others, has been placed for the proposition that fundamental principles of the Code would apply nonetheless.

24. In addition J.A. Naiksatam Vs. Prothonotary and Senior Master, High Court of Bombay and Others, and The Government of Andhra Pradesh and Others Vs. A. Venkata Rayudu, have been cited. In the first of these two cases a complaint was filed against two senior translators of the Bombay High Court alleging that they had demanded illegal gratification from the complainant Advocate. In the departmental proceedings, the inquiry officer found the employees not guilty and placed his report before the disciplinary authority. The disciplinary authority disagreed with the findings of the inquiry officer and came to the conclusion that the employees were guilty of having demanded illegal gratification. A copy of the tentative decision of the disciplinary authority was made over to the employees and they were required to show cause why the report of the inquiry officer should be accepted. The explanation proffered by the employee did not find favour with the disciplinary authority and a second notice ensued asking them why they should not be dismissed from service. A further explanation followed which was not found to be acceptable and resulted in the removal of the employees from service. Separate writ petitions filed by the two employees were rejected by the Bombay High Court. The Advocate General, however, conceded that a review on the question of the penalty imposed may be filed by the employees. Such review was rejected by the Acting Chief Justice of the Court and a second set of writ petitions followed, meeting the

same fate as the first. The appeals therefrom were dismissed by the Supreme Court upon finding that the principles as laid down in the Kunj Behari Misra case had been followed. There is, however, a passage that, though not placed by the parties before us, appears apposite:

7...Counsel further contended that from the tentative decision it could be spelt out that the disciplinary authority had already taken a final decision in the matter and the details have been given therein and the opportunity which was given to the appellant was only an exercise in futility. We are not inclined to accept this contention. It is true that the disciplinary authority gave its reasons for disagreement with the report of the enquiry officer and the appellants had given their full-fledged explanation and if at all the disciplinary authority gave detailed tentative decision before seeking explanation from the appellants, it enabled them to give an effective representation and the principles of natural justice were fully complied with and it cannot be said that the appellants were not being heard in the matter.

25. In the present case, much was made by the petitioner of the words "tentatively agreeing with the Inquiry Officer" used by the disciplinary authority in the notice of September 17, 2002. As in the passage from the report of the Supreme Court judgment quoted above, merely indicating that the disciplinary authority tentatively agreed with the report of the inquiry officer does not betray a closed mind. Indeed, it is a necessary first step. For, if the disciplinary authority disagrees with the report and the findings against the employee, the matter need proceed no further.

26. The other Supreme Court judgment The Government of Andhra Pradesh and Others Vs. A. Venkata Rayudu, , was relied upon for the proposition that a vague chargesheet would render the entire disciplinary proceedings bad. In that case the first charge, and one ultimately held to have been proved against the employee, related to violation of orders issued by the Govermnent. But in the proceedings, the dates or numbers of the Government orders (GO) were not mentioned, nor were such GOs placed before the inquiry officer or copies thereof made over to the employee. Surely, the facts in our case are completely different. At the time the chargesheet was issued to the petitioner on February 8, 2001, he continued to remain absent. Whether the chargesheet contained the words "till date" or not, the chargesheet could not have been for a period beyond its date. The words "till date" are implied and it would be absurd to suggest otherwise.

27. As to the other, and lesser, points urged in the petitioner''s attempt to reopen the entire matter, it would be best to remember the scope of the writ petition. This Court was not sitting in appeal over the Tribunal''s order, this Court was undertaking an exercise to look into the decision making process rather than looking to correct the judgment itself. The scope of the writ petition, as recorded in the order under review, was "confined to correct errors of law or procedural errors, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice."

28. Only one of the ancillary point pressed needs to be specifically mentioned: that pendency of a representation for regularization of leave was a bar to disciplinary proceedings being initiated for unexplained absence. There is nothing in the rules that appears to be an embargo as suggested. In any event, neither did the Tribunal find that as a sustainable ground for challenge nor did the order under review find any jurisdictional error having being committed.

29. The petition fails and the petitioner ought ordinarily to have been made accountable for such misadventure. However, considering the nature of the punishment he has already, though justly, suffered, we do not burden him with costs.

30. The order having been made, it may be useful to spell out our approach to this matter. As in the case of review of orders passed while this Court is in circuit to these islands, a review petition may appear before another Bench, than the one which passed the original order. Attempts are made in such cases to urge grounds that had not been urged earlier and to suggest that other contentions raised had not been noticed. Since in such cases, the Bench taking up the review does not have the benefit of having originally heard the matter, a more onerous duty is required to be discharged. It is possible that the same set of facts and contentions that had been negated, whether directly or by necessary implication, may find favour with the Bench taking up the review. It is not, in our understanding, for the Bench taking up the review to supplement its reason or judgment for the one that has been passed even if the Bench hearing the review feels that a different order could have been passed unless the preconditions for review are strictly met, and the grounds urged call for review. What appears to an error judgment cannot be corrected as if in appeal, by a Bench of co-ordinate jurisdiction.

31. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with all requisite formalities.

Pranab Kumar Deb, J.

32. I agree.