

Kalipada Das Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: June 22, 2009

Acts Referred: Evidence Act, 1872 " Section 137, 138

Hon'ble Judges: Pratap Kumar Ray, J; Pranab Kumar Deb, J

Bench: Division Bench

Advocate: S.B. Mukherjee and Mr. Bidyut Baran Biswas, for the Appellant; Ashok Sarkar and Mr. Subrata Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Pratap Kumar Ray, J.

Assailing the order dated 12th January, 2009 passed in O.A. 690 of 2004 by the West Bengal Administrative

Tribunal, this writ application has been filed. By the impugned order, the learned Tribunal rejected the original application by not interfering with the

punishment imposed by the disciplinary authority, which subsequently was confirmed by the appellate authority dismissing the delinquent from

service. The impugned order reads such:

We have heard both the sides in connection with this application of Kalipada Das whereby the petitioner has challenged his punishment in the form

of dismissal from service after conclusion of the departmental proceeding. We have examined the charge framed against the petitioner and also the

enquiry report and we have examined the order of the disciplinary authority and also the order of the appellate authority. On hearing of both the

sides, we, however, do not find anything to call in question in the either enquiry proceeding or in the order of the disciplinary authority and the

appellate authority. Accordingly, we do not interfere with the order of punishment.

The petition stands dismissed.

2. Learned advocate for the writ petitioner had assailed the said order including the decision of the appellate authority mainly on two points -

1. that the relevant documents as relied upon to conclude the departmental proceeding were not supplied with;

2. that in the list of witnesses annexed in the charge memo, there was mentioning of only names of three witnesses, but the enquiring officer

examined in total six witnesses including those three without any prior notice.

3. To appreciate the point as raised, we have to consider the factual matrix as decided by the enquiring officer, the disciplinary authority as well as

the appellate authority. The charge memo was issued initiating a departmental proceeding on the allegation of cheating of Rs. 40,000/- to the

complainant, an widow on the false assurance of providing job to her son. The charge reads such:

Charge

You, Constable-14652 Kalipada Das of Alipore police South and South Suburban Division, Calcutta are charged with gross misconduct and

dereliction of duty unbecoming of a member of police force in that:

You assured one Smt. Indumati Dey (68 Years) w/o Late Abinash Chandra Dey of Jaigachi, post office and police station Habra, District 24-

Parganas (N) that you would secure jobs ""of her three sons in the Indian Railway and received a sum of Rs. 40,000/- in cash from her. You further

claimed through a letter a sum of Rs. 5,000/- for Manick Lal Dey and a sum of Rs. 2000/- for Jaharlal Dey for their eye examination for which

Smt. Dey sold their shop and her jewelleries in order to pay as per your demand. However, in the meantime, her two sons, namely, (1) Manick

Lal Dey and (2) Jaharlal Dey expired for want of proper treatment. On the basis of the complaint you were placed under suspension w.e.f.

26.6.98 p.m.

Hence, you are directed to submit your explanation in writing within 15 days from the date of receipt of the charge-sheet, whether you plead guilty

to the charges or any part thereof or want an open enquiry.

4. In the statement of allegations and list of documents, the details mentioned, which reads such:

Proceeding No. 143

Dated 11.9.98.

drawn up against Constable - 14652 Kalipada Das of Alipore P.S. South and South Suburban Division.

Statement of Allegation

Constable - 14652 Kalipada Das assured one Smt. Indumati Dey (68 years) w/o - Late Abinash Chandra Dey of Jaigachi, Post and Police

Station Habra, District 24-Parganas (N) that he would secure jobs of her three sons in Indian Railway and received a sum of Rs. 40,000/- in cash

from her. He further claimed through a letter a sum of Rs. 5,000/- for Malick Lal Dey and a sum of Rs. 2,000/- for Jaharlal Dey for their eye

examination, for which, Smt Dey sold their shop and her jewelleries in order to pay as per his demand. However, in the meantime her two sons

namely (1) Manick Lal Dey and (2) Jaharlal Dey expired for want of proper treatment.

List of Witnesses

1) B. K. Chakraborty, O/C, Alipore P. S.

2) S.I. A. Rakshit of Alipore P.S.

3) Sri Sambhu Nath Mitra, S/o. Late Haripada Mitra, Village - Teghoria, P.O: Dadipur, P.S: Khardah, District: North 24-Parganas and other

witnesses, if required.

List of documents

1) Complaint letter of Mohan Chandra Dey dated 26.02.98.

2) Letter of Kalipada Das dated 08.06.92.

3) Western Railway Medical Memo No.28290 dated 24.02.92.

4) Western Railway Medical Memo No. 857 dated 4.8.92.

5) Eastern Railway Medical Memo No. 505840 dated 5.6.92.

6) Report of S.I. A. Rakshit of Alipore P.S.

7) Report of S. Chakraborty, A/C. Alipore P.S.

8) Report of P. S. Chakraborty, A.C. (III), S.D. and other documents, if required.

Deputy Commissioner of Police,

South and South Suburban Division, Calcutta.

5. The delinquent replied the charge as issued against him in the departmental proceeding. The reply to the charge reads such:

To

The Deputy Commissioner of Police,

South and South Suburban Division,

Calcutta-700016.

(Through Proper Channel)

Sub: Written Explanation in/c/w Proceeding No.143 dated 11.9.98 drawn up against my name.

Sir,

I reply to the charged leveled against me in the above mentioned-proceeding drawn up against me I beg to submit most respectfully the following

facts for your kind perusal and sympathetic consideration that:

I deny and dispute the charge in the instant proceeding save and except what are matters of records. I deny that I assured one Smt. Indumati Dey

(68) w/o late Abinash Chandra Dey that I would secure jobs of her three sons in Railway and also deny that I received a sum of Rs. 40,000/- in

cash from her. Perhaps somebody insisted her to lodge a complaint against me for enmity and village political rivalry.

In the abovementioned context I pray before your honour would graciously be pleased to pass an order so that I may be exonerated from the

charge and for this act of kindness I shall remain ever grateful to you.

Date: 14.10.78

Yours faithfully,

Sd/- Constable 14652 of

Sec.VI, Alipore P. S.

6. In the reply admittedly no allegation was made about non-service of the list of documents. The departmental proceeding was finalised by

examining the witnesses including the three witnesses, whose names appeared in the charge memo. The additional new witnesses were examined

by the enquiring officer in presence of the delinquent and the delinquent declined to cross-examine the two new witnesses, but cross-examined

another one. The complainant and the widow both were examined. There was no cross-examination despite the opportunity given. The

complainant an widow who was assured to provide a job in her deposition categorically contended the factual matrix of the issue by giving the

details of the payments made to the delinquent, who assured a job to her son. Indumati Dey, was P.W.1 who deposed against the delinquent

detailing the factual matrix of the case, but the delinquent declined to cross-examine Indumati. P.W.2 Sambhu Nath Mitra, who was cross-

examined by the delinquent. P.W.3 Mohan Chandra Dey, who lodged the complaint, deposed but delinquent declined to cross-examine Sri Dey.

Sri Dey detailed the factual matrix about the payments which was corroborated with the deposition of P.W.1. The other witnesses were the police

personnels of the concerned police station wherein the complaint was lodged. The vital witnesses who appeared in the departmental proceeding

were P.W.1 and P.W.3. They deposed against the delinquent, but the delinquent declined to cross-examine them. It is a settled legal position that

if some body declines to cross-examine, all rights arising out of the said issue stands waived, on application of Section 137 and 138 of Evidence

Act. The judgment on that score passed by Rajasthan High Court in the case of Shyam Singh v. D.I.G. of Police, Central Reserve Police, Ajmeer,

reported in AIR 1965 Rajasthan P. 140 (D.B.) has a persuasive value.

7. Enquiry report was filed and served. Thereafter, the disciplinary authority on the basis of the enquiry report passed an order of dismissal from

service. Show cause to the reply of proposed punishment was also issued. The delinquent moved the Administrative Tribunal assailing that order

issued by the disciplinary authority along with other original application assailing the departmental proceeding which were registered as Case No.

OA 6385/99 and case No. OA 4654/99 respectively and both were heard analogously. By the common judgment dated 30th May, 2001 the

Administrative Tribunal dismissed the original applications. Before the Tribunal the point was raised about breach of providing reasonable

opportunity to defend the case including the opportunity to cross-examine the witnesses and non-supply of necessary documents including initiation

of departmental proceeding belatedly. The Tribunal discussed those points and did not interfere with the order by holding that apart from the delay

of initiation of departmental proceeding, other factors were satisfied, viz., reasonable opportunity to defend by supply of documents and

opportunity to cross-examine the witnesses. The Tribunal rejected those applications with those findings, but granted liberty to approach the

appellate authority as the delinquent did "not exhaust that forum. The judgment reads such:

WEST BENGAL ADMINISTRATIVE TRIBUNAL

BIKASH BHAWAN, SALT LAKE CITY,

KOLKATA - 700 091

Case No. OA-6385/99

AND

Case No. OA-4654/99

Shri Kalipada Das Applicant.

v.

State of West Bengal and Ors. Respondents.

Mr. D. K. Chakraborty for the Petitioner

Mr. A. L. Basu for the Respondent

The date of delivery of Judgment is 30.05.2001.

JUDGMENT

Apart from the fact that the complaint has been lodged after a lapse of seven years, other factors are not in favour of the applicant. Reasonable

opportunity to defend his case including opportunity to cross-examine the witnesses has been given; necessary documents have been supplied and

allegation of unsigned and unauthenticated documents is not made out.

However, the applicant has not preferred an appeal to the appellate authority against the order of his dismissal. This application is dismissed with

liberty to the petitioner to exhaust the avenue open to him.

Supply plain copy duly countersigned by the Deputy Registrar or any authorised officer to the parties.

This judgment and order will govern both the cases being Nos. OA-6385/99 and OA-4654/99 filed by the same applicant.

Sd/- R. K. Mazumder.

Chairman

Sd/- S. K. Ghosh

Member(A)

8. The findings of the Tribunal that reasonable opportunity to cross-examine was provided and necessary documents were supplied, accordingly

were crystallised by the judicial order of the Tribunal which was not challenged in any writ application by the delinquent.

9. An appeal was preferred to the Commissioner of Police, Kolkata Police wherein, however, those points were urged again about non supply of

documents and non-providing the opportunity to cross-examine along with other points as made in the memo of appeal. The appellate authority

considered the matter and passed a decision on 23rd December, 2002 rejecting the appeal and confirming the decision taken by the disciplinary

authority. The order of the appellate authority reads such:

Appellate order passed by Jt. C.P.(AP), Kolkata in connection with proceedings No. 143 dated 11.09.98 was drawn up against Constable -

14652, Kalipada Das of SD & SSD,

Kolkata.

Proceedings No.143 dated 11.09.98 was drawn up against Const/14652, Kalipada Das of SD & SSD, Kolkata for gross misconduct

unbecoming of a member of discipline force in that:

The charged constable assured one Smt. Indumati Dey (68) Lt. Abinash Ch. Dey of Jaigachi, P.O. + P.S. - Habra, Dist. 24 Pts.(N) that he would

provide jobs with her three sons in the Indian Railway. Thus allowing he received a sum of Rs. 40,000/- in cash from her. The C.O. through a

letter further claimed a sum of Rs. 5,000/- for Manicklal Dey and a sum of Rs. 2,000/- for Jaharlal Dey for their eye examination for which Smt.

Dey had to sell their shop and her jewellery order to pay as per his subsequent demand. However, in the meantime her two sons namely i)

Maniklal Dey, ii) Jaharlal Dey expired for want of proper treatment. On the basis of the complaint he was placed under suspension w.e.f.

26.06.98.

Shri P. Banerjee, A.C., S.D. was appointed a E.O. on 11.9.98 and he has requested to submit his finding at an early date. Accordingly Shri P.

Banerjee enquired into the instant proceedings and submitted his findings on 15.3.99 holding him guilty as the charges against him were fully proved

beyond any shadow of doubt.

After going through the findings charge-sheet, statement of allegation and other concerned paper of the proceedings, D.C., SD & SSD, Kolkata

passed the final order dismissing the Constable from service w.e.f. 16.07.99 (vide SD Order No. 795 dated 16.7.99).

Being aggrieved the C.O. moved an application being O.A. No. 6385/99 and O.A. No. 4654/99 before Hon"ble SAT challenging his dismissal

without preferring an appeal before the Appellate Authority. After hearing the matter the Hon"ble SAT passed an order dated 30.05.2002 that the

applicant had not preferred an appeal to the appellate authority against the order of his dismissal. The Tribunal dismissed the application with

liberty to the applicant to exhaust the open to him.

The applicant accordingly preferred an appeal before me for considering his case by re-instating him in service.

I have gone through the entire proceedings file, findings, charge-sheet, statement of allegation and other registered documents of proceedings. After

careful consideration of various aspects and due application of judicial mind as well as natural justice in view, I have taken into consideration the

charges leveled against him. The charges appear to be so grievous in nature that the continuance of such police person in the department will malign

the image of entire Kolkata Police Force.

Considering the pros and cons, the facts and circumstances of the case, I agree with the final order passed by the then D.C., S.D. &

SSD.,Kolkata and find no reason to differ. Hence, his case is considered and rejected. The final order dismissing the C.O. is confirmed.

Sd/- Jt. Commissioner of Police (AP),

Kolkata.

23/12.

10. It is true that the appellate authority did not answer the grievances as raised about non-supply of documents and non-providing the opportunity

to cross-examine the witnesses as urged in appeal, but in our view, there is no necessity to address that issue as already by the decision dated 30th

May, 2001 passed by the learned Tribunal in case No. OA. 6385/99 read with case No. OA 4654/99 those points were decided finally and

adjudication made therein since was not disturbed by a Superior Court, those findings were binding to the appellate authority. Hence, even if no

answer was given on those points, the decision of the appellate authority cannot be said to be illegal or perverse.

11. Assailing the decision of the appellate authority and the order of the disciplinary authority dismissing the delinquent from service another original

application was filed, registered as OA 690/04 which stood dismissed on 12th January, 2009, which is the subject-matter of challenge in this writ

application. The order of West Bengal Administrative Tribunal dated 12th January, 2009 reads such:

We have heard both the sides in connection with this application of Kalipada Das whereby the petitioner has challenged his punishment in the form

of dismissal from service after conclusion of the departmental proceeding. We have examined the charge framed against the petitioner and also the

enquiry report and we have examined the order of the disciplinary authority and also the order of the appellate authority. On hearing of both the

sides, we, however, do not find anything to call in question in the either enquiry proceeding or in the order of the disciplinary authority and the

appellate authority. Accordingly, we do not interfere with the order of punishment.

The petition stands dismissed.

12. Having regard to the factual matrix of the case and perusing the records as produced before us, it appears that the delinquent did not cross-

examine P.W. 1 and 3, who are the main witnesses deposed against him about taking money on the assurance of providing job. Since the

delinquent writ petitioner declined to cross-examine, he had no right further to assail anything. Besides such, as the delinquent got the opportunity

to cross-examine and no objection was filed when the witnesses were examined on the ground that in the charge memo their names were not

mentioned, the point as raised that the delinquent was surprised when those witnesses were examined, has no legal value. It is settled law that the

enquiring officer may call for any witness for examination to probe the charge, but the only rider that proper opportunity should be given to the

delinquent to that effect by providing intimation to that effect. In the instant case, it is true that no earlier intimation was given, but in the order sheet

it was mentioned in presence of the delinquent that those witnesses should be examined. Besides such, the delinquent/writ petitioner did not

oppose such by filing any application and did not pray for adjournment of the examination-in-chief of the witnesses concerned.

13. Having regard to such, the point as raised, has no legal basis. The judgment as relied upon being the case U.P.S.R.T.C. and Others Vs. Ram

Chandra Yadav, is against the petitioner in view of observation and finding in view of observation and finding in para 4 thereof, which reads such:

Rules of natural justice are not embodied rules. The question whether in a given case the principles have been violated or not has to be found out

on consideration as to whether the procedure adopted by the appropriate authority is in accordance with law or not, and further whether the

delinquent knew what charges he was going to meet. In other words, what is required to be examined is whether the delinquent knew the nature of

accusation, whether he has been given an opportunity to state his case and whether the Tribunal (sic departmental authority concerned) has acted

in good faith. If these requirements are satisfied then it cannot be said that the principle of natural justice has been violated. In the case in hand, it is

not disputed that the witnesses were examined on 18th February. The names of those witnesses had already been intimated to the delinquent on an

earlier occasion, but they could not be examined on an earlier occasion, and on the date they were examined, some other witnesses names were

there in the list to be examined. In our opinion, this would not constitute a violation of the principle of natural justice, and the High Court was totally

in error in interfering with the conclusion of the departmental authority on the ground that there has been violation of the principle of natural justice.

In the aforesaid premises, the impugned judgment of the learned single Judge of the Allahabad High Court is set aside and the appeal is allowed.

14. In that case the delinquent prayed for adjournment of a witness whose name did not appear in the witness list on that date but he was

produced for examination and without allowing adjournment as prayed for, the enquiring officer examined the witness. The Court held that in that

case that as delinquent got opportunities to cross-examine, so no prejudice was caused, to set aside the order impugned. In the instant case the

factual scenario is completely different; as such, the said judgment has no applicability. It is a settled decision that ratio decidendi of a judgment has

a binding effect and to identify the ratio decidendi, the factual point involved in the case and the legal points applied thereto are relevant. It is a

settled legal position that even a change of a single word on factual matrix in a particular case may be considered as a different one and any

judgment on different fact cannot be considered as a binding precedent. Reliance is placed to the judgment passed in the case of Regional

Manager v. Pawan Kumar Dubey, reported in AIR 1976 SC 1776. The judgment of the three Judges Bench wherein the Court held in paragraph-

7 "" it is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some

conclusions based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusion

in two cases even when the same principles are applied in each case of similar facts"".

15. The Constitution Bench considered the binding effect of a precedent and ratio decidendi in the case of State of Punjab Vs. Baldev Singh, . In

paragraph 43 the Court held to this effect:

A decision is the authority for what it decides and not that everything said therein constitute a precedent. The Court are obliged to employ, an

intelligent technique in the use of precedent bearing it in mind that a decision of the Court takes its colour from the question involved in the case from

which it was rendered"".

16. The same view was reiterated by the Apex Court earlier in the case Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd.,

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17. One additional or different fact may make a world of difference in between the two cases and in adjudication of any point, the same has been

considered by the Apex Court in the language - "circumstantial flexibility" in the case Bharat Petroleum Corporation Ltd. and Another Vs. N.R.

Vairamani and Another, wherein at paragraph 11 the Court identified the point by accepting the views expressed in the case of Pawan Kumar

Dubey (supra).

18. Even in the case of Sarva Shramik Sanghatana (K.V), Mumbai Vs. State of Maharashtra and Others, , the Apex Court applied the same

views as expressed in the case Pawan Kumar Dubey and N. R. Vairamani (supra).

19. In the instant case it appears that P.W.1 and 3's names did not appear in the charge memo but prior to fixation of the date of examination the

enquiring officer disclosed their names and issued summons for their appearance in presence of the delinquent and subsequently when they were

examined, delinquent without filing any objection of their examination and praying any adjournment, participated and declined to cross-examine

them. Hence no case of prejudice is made out to quash the order of disciplinary authority.

20. Having regard to the factual matrix of the case, the judgment relied upon by the writ petitioner has no binding effect as there is a gulf of

difference between the factual matrix as considered by the Apex Court in that case wherein the delinquent had prayed for adjournment in respect

of surprise witness, but it was refused and enquiry proceeding concluded. Herein those factual matrix were absent. Hence the said judgment as

relied has no applicability in this case.

21. The point accordingly as raised stands rejected.

22. So far as the other point is concerned about non-supply of documents, it appears that initially when the charge memo was served, the

delinquent in his reply did not urge this point about non-service of this documents. Furthermore, from the original records as produced by the

respondents, it appears that the delinquent/writ petitioner accepted the charge memo on proper signature in both pages wherein the names of

witnesses and list of documents were mentioned. Furthermore, before the Tribunal this point was urged, as already discussed and the Tribunal

rejected the contention which reached its finality by the judicial decision. The observation and findings of the Tribunal as already quoted above

crystallised the rights and liabilities of the parties. We have perused the records and considering all the facts, we are of the view that this point

about non-supply of documents is not also legally sustainable. Furthermore, from the deposition it appears that those documents were exhibited

and marked in presence of the delinquent and he got the chance of cross-examination. He did not raise any objection even at that time. As such

this point is also not legally sustainable for our consideration to set aside the order of dismissal by exercising our power of judicial review. The

scope of judicial review assailing any punishment in the departmental proceeding in the writ jurisdiction is very very limited. Our jurisdiction is not

an appellate jurisdiction to re-appreciate the evidentiary value. Judicial review is only to consider whether natural justice principle was duly

complied with and all the procedural steps to decide the departmental proceeding was completed properly. This point has been highlighted in the

case B.C. Chaturvedi Vs. Union of India and others, . Para-12 of the said judgment is relevant, which reads such:

Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to

ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of

the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the

inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on

some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion.

But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein,

apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is

entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate

authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the

authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules

prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion

or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and

mould the relief so as to make it appropriate to the facts of each case.

23. Considering those aspects, accordingly we are of the view that there is no case made out for judicial review to interfere with the findings of the

disciplinary authority as well as the appellate authority. The writ application accordingly stands dismissed on merit. No order as to costs.