

(1984) 09 CAL CK 0002**Calcutta High Court****Case No:** None

Tarini Mohan Dutta

APPELLANT

Vs

S.E. Cal. Central Elec. Circle and
Another

RESPONDENT

Date of Decision: Sept. 14, 1984**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 409, 477

Citation: 89 CWN 145**Hon'ble Judges:** S.K. Mukherjee, J**Bench:** Single Bench**Advocate:** B.K. Bose and R.K. Ghosal, for the Appellant; B.R. Ghosal and A.M. Biswas, for the Respondent**Judgement**

Samir Kumar Mookherjee, J.

The petitioner in this case has prayed for, inter alia, a writ of Mandamus, directing the respondents to cancel, rescind and/or withdraw the order of dismissal dated 24th June 1980 passed by Superintending Engineer, Calcutta Central Electric Circle under the GPWO. The said order of dismissal was passed in view of the order of conviction and sentence against the petitioner passed by the learned 4th Additional Special Judge, Calcutta in the criminal case, started against the petitioner on charges u/s 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act and Sections 409 and 477A of the Indian Penal Code. Against the said order of conviction and sentence, the petitioner preferred an appeal, being criminal appeal no. 90 of 1979, which was admitted on 6.3.1979 and ultimately allowed by the criminal Division Bench of the Court by its judgment dated 5th March, 1984. While allowing the said appeal, their Lordships, after considering a concession, made on behalf of the State, to the effect that none of the defence exhibits had been considered or referred to in the judgment of the learned Trial judge, stated, inter alia. In the circumstances we find it difficult to resist the prayer for retrial after due consideration of the defence

case in the light of the defence exhibits adduced at the trial. We have already indicated that the learned Judge, in this case, appears to have proceeded on the footing as if the appellant had admitted his guilt and that was possibly the reason why he appears not to have discussed even the prosecution case with such details as was required in a case like this, not to speak of the defence at all. Such being the position we find no other alternative but to send the case back for retrial to the Court below. The appeal is therefore, allowed. The order of conviction and sentence is set aside. The case be sent back to the court below for retrial. "After the said order of remand, the petitioner made a representation on 11th June, 1984 to the respondents demanding justice by withdrawal of the order of dismissal dated 24th June, 1980 and for payment of all arrears which were receivable by him prior to 24th June, 1980. That as no step had been taken by the respondents in compliance with the said representation of the petitioner, which was in the form of demand for justice, the present writ application has been moved after serving notice on the respondents. It is pertinent to note at this stage that the Respondents passed an ex parte order of dismissal on 30.4.1979, which was withdrawn on 2.11.1979 and on 9.10.1980, the petitioner was directed to make representation against the proposed penalty of removal from service. As the first ex parte order of dismissal had already been challenged by the petitioner in CR No. 5572 (W) 1979 and as the said proceeding had been pending, the petitioner expressed his inability to make the representation, asked for, and chose to pray for keeping the said memorandum, issued by the respondents, in abeyance till disposal of the writ proceeding as also the criminal appeal. The petitioner also reserved his right to make necessary representation in the matter, if occasion therefor arose in future. The respondents, however, without waiting any further, appear to have passed the impugned order of dismissal.

2. Mr. B. K. Ghose appearing for the petitioner, has contended that as the order of dismissal was passed only on the ground of conviction of the petitioner in the criminal case and since the order of conviction has been set aside the respondents are duty bound to consider the representation of the petitioner and to recall or rescind the order of dismissal as also to pay the petitioner all the arrears dues. In support of his contention Mr. Ghose has relied upon Rule 19 of the Central Civil Services (Clarification Control and Appeal) Rules as also copy of the office Memorandum issued by the Government of India, Ministry of Home Affairs dated 7th March, 1964. Mr. Ghose has contended that, at least, the respondents cannot disown their liability to consider the petitioner's representation in accordance with law and cannot sit over the same.

3. Mr. Biswa Ranjan Ghosal, appearing for the respondents, has filed an affidavit in opposition and has contended, inter alia that till the final acquittal of the petitioner in the trial after remand, the respondents are not called upon nor have the power to consider any representation by the petitioner for recalling of the order of dismissal passed by the respondents upon conviction of the petitioner by the Trial Court, as

mere remand is not equivalent to an order of acquittal. Mr. Ghosal has relied upon the Memoranda, issued by the Home Department in 1966 and 1975, which modified the effect of the memoranda of 1955 and 1964. In the submission of Mr. Ghosal, the writ application is liable to be dismissed, as the petitioner has no right to call upon the respondents to reconsider the case in the present facts and circumstances.

4. In the view I am taking, the points, urged by the respective parties, do not require consideration. Upon a proper construction of Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules, it appears to me that the Disciplinary Authority has been given the discretion to consider whether any penalty should be imposed in cases where the employee concerned has been convicted by a Criminal Court. Such imposition of penalty is not mandatory, and the Disciplinary Authority is free not to impose any penalty at all. In case the Disciplinary Authority decides on proper consideration of the relevant facts and circumstances, to impose any penalty, it is free to impose any type of penalty including an order of dismissal. Such consideration necessarily implies an active application of mind by the Disciplinary Authority after considering the entire circumstances of the case on an objective basis. Such consideration does require consideration of the conduct of the delinquent employee, the gravity of misconduct, committed by him, the effect and impact of such misconduct on the administration and extenuating circumstances or redeeming features, if any, present in the case and so forth. The facts, which require to be considered, cannot be stated exhaustively but will depend on the facts and circumstances of each particular case. A reasonable opportunity to the delinquent employee of being heard is an indispensable part or step in the matter of such consideration. The above position finds support from the decisions in the case of The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others . In the present case, it cannot be said that the refusal by the petitioner to make, the representation, asked for, on the ground of pendency of the writ proceeding, was unreasonable or unjust. It cannot be said also that the order of dismissal had been passed by the Disciplinary Authority after considering the relevant facts and circumstances objectively as is required to be done in law. At the same time, it cannot be overlooked that the petitioner has not challenged the order of dismissal on such ground nor did he plead proper reason for his inability to make the representation, asked for.

5. Accordingly, after giving due consideration to the relevant facts and circumstances and redeeming features of the present case, I feel that interest of justice requires and will be served by directing the authority to consider the petitioners representation, dated 11th June, 1984, which is Annexure "F" to the writ application in accordance with law. and after giving the petitioner an opportunity of being heard. If the Disciplinary Authority ultimately decides, after consideration of the circumstances, leading to the petitioner's conviction, including the effect of the decision of the Criminal Division Bench, remanding the matter for fresh trial, not to impose the penalty of removal but pass some order either of penalty or of

exoneration of the petitioner in the present case, it will also consider the reasonableness of conferring on the petitioner consequential service benefits, if any. The Disciplinary Authority also will be at liberty to maintain the order of dismissal, if, after such consideration, it decides to do so. It may be noted that no material has been placed before me to show that, before passing the order of dismissal, necessary consideration was made in compliance with the requirement of Rule 19, as stated hereinbefore. In the result, the application is allowed to the extent, indicated above, and a writ of mandamus would issue, commanding the respondents to consider the petitioners representation, dated 11.6.1984, in the light of the observation made above, and dispose of the same within three months from the date of this order, and pass final orders in terms thereof.

6. In the facts and circumstances of the case, the parties will bear their own costs. As prayed for by Mr. Ghosal, to enable him to comply with the order, let the certified copy, if applied for, be delivered as expeditiously as possible.