(2013) 10 CAL CK 0036

Calcutta High Court

Case No: Writ Petition No. 5444 (W) of 2010

Md. Mustafa		APPELLANT
	Vs	
The Kolkata Port Trust and Others		RESPONDENT

Date of Decision: Oct. 8, 2013

Citation: (2014) LabIC 395 : (2013) 4 LLJ 759

Hon'ble Judges: Sambuddha Chakrabarti, J

Bench: Single Bench

Advocate: Rabilal Moitra, Mr. Taimur Hossain and Ms. Sibani Bhagat, for the Appellant;Saptansu Basu, Saugata Bhattacharyya and Mr. Biswarup Bhattacharya, Advocates for the K.P.T., for the Respondent

Final Decision: Allowed

Judgement

Sambuddha Chakrabarti, J.

The moot question that has cropped up for consideration in this writ petition is the parenthood of the writ petitioner, i.e., whether he is the son of late Md. Idris who was an employee of the respondent No. 1 organization. The petitioner has although claimed himself as the son of late Md. Idris who was an employee of the Kolkata Port Trust. His father''s family consisted of himself, his predeceased wife and the writ petitioner. After the death of Md. Idris the petitioner filed an application for settling the dues as well as for an employment on compassionate ground. The petitioner states that the Port Trust authorities requested the District Magistrate and the Police authorities of Bhagalpore to ascertain the particulars of the petitioner and after getting the report and confirming the credentials the authorities registered the name of the petitioner for the death-in-harness category. Ultimately he was appointed an A category porter on July 10, 1991.

2. About 16 years later the disciplinary authority had placed the petitioner under suspension. This was followed by a Memorandum of Charge which inter alia alleged that the petitioner secured employment by impersonating him as the son of late

Md. Idris and thus he exhibited lack of integrity. This in turn was followed by a departmental enquiry.

3. The very specific case of the petitioner is that during the enquiry that followed he had asked for certain documents. The enquiry officer in turn asked for the same from the Chief Vigilance Officer who had intimated the enquiry officer that of the several documents asked for by the petitioner two could not be provided as they were secret in nature and production of some of them were turned down as having no relevance. The petitioner is aggrieved that the relevant documents were not supplied to him.

4. The enquiry officer submitted his report in the month of July, 2008 wherein after discussing the evidence and other facts the enquiry officer held "considering all the above points I find Jb Md Mustafa unable to prove his claim to be the son of Idris. This means, he obtained the job on a compassionate ground wrongly claiming to be a son of Idris and impersonating himself as such."

5. The petitioner gave his observations on the enquiry report. By a final order dated October 29, 2008 the respondents authorities had dismissed him from service with immediate effect.

6. As per the Kolkata Port Trust (Employees Classification, Control and Appeal) Regulations, 1987 the petitioner preferred an appeal against the said order of dismissal before the Deputy Manager of the Port Trust. By a non-speaking order, dated June 23, 2009, the appellate authority had affirmed the order of dismissal. The order of dismissal as well as that passed by the appellate authority affirming the same have been the subject-matter of challenge in the writ petition.

7. On behalf of the respondents the Traffic Manager had affirmed an affidavit denying the allegations made in the writ petition. The stand taken by the respondents inter alia is that late Md. Idris who was an employee of the respondent No. 1 did not submit any family declaration. The petitioner was given compassionate appointment on the basis of the documents supplied by him. The authorities had placed the petitioner under suspension based on the vigilance report. The District Officer, Bhagalpore vide letter dated April 18, 2006 forwarded the report of the Superintendent of Police, Bhagalpore along with enclosures and a copy of the same was given to the petitioner along with the charge-sheet. Subsequently the petitioner did not raise the issue of not providing him with the copies of the documents mentioned at serial Nos. 3 to 4 nor did he register any grievance during the enquiry proceedings. The answering respondents have denied all the allegations made by the petitioner in the writ petition and have prayed for the dismissal of the petition.

8. In the affidavit-in-reply to the said affidavit-in-opposition the petitioner has reiterated the statements made in the writ petition. In particular he has denied the allegations made in paragraph 7 of the opposition and very specifically says that no copy of the report of the Superintendent of Police, Bhagalpore was supplied to him

by the disciplinary authority. He has also taken a specific point that when he had asked for certain documents mentioned in serial Nos. 3 and 4 from the enquiry officer the Vigilance Officer wrote to the enquiry officer refusing to supply those documents on the ground of their being secret in nature. He has reiterated his stand that the enquiry officer had proceeded with a closed mind. He has taken another point that during the enquiry he was sent to the Vigilance Officer for recording his statement. He was an illiterate person and he never said that he had only one sister and there was no contradiction between the earlier statement and the statements made subsequently.

9. In spite of direction of this court to produce the records in the original, particularly those documents which were denied to the petitioner by the respondents, they did not produce the vigilance report before the year 1991. Mr. Saugata Bhattacharya, the learned advocate for the petitioner had taken the point that they were not traceable. On being asked to affirm an affidavit only to that effect Mr. Bhattacharya on one point or the other had refused to file the affidavit before the summer vacation. The ground he mentioned for not filing the affidavit were not convincing and unsustainable on the face of it.

10. A bare reading of the report of the enquiry officer which has been affirmed by the disciplinary authority suggests that the enquiry officer had although applied a wrong test while trying to find out the fault of the petitioner. In fact the statement of imputation of misconduct alleged against the petitioner referred to the documents they would like to rely on and straight away concluded that from the police verification report it was revealed that the petitioner was not at all the son of late Md. Idris. In other words, the police inquiry report which was supposed to be proved at the enquiry was considered as sacrosanct and conclusion was drawn on the basis thereof. The enquiry officer while considering the evidence on record had held that the statement made by the writ petitioner contained many lacunae. The enquiry officer recorded that the petitioner was employed after normal scrutiny. The petitioner has alleged that a vigilance enquiry was conducted and he wanted the record to be produced that has not been produced at the enquiry. The enquiry officer also did not embark himself into discussing the nature of enquiry conducted by the respondents and the result thereof before the petitioner had been appointed.

11. Mr. Moitra, the learned senior counsel for the petitioner has a point to make. The application of the petitioner was not accepted on its face value. They were subjected to some scrutiny and enquiry. It may be mentioned that it had taken about 10 years for the respondents to offer employment to the petitioner. It can only be expected that the respondents during the interregnum period had taken all possible care to ascertain about the identity of the petitioner.

12. This is, however, not to suggest that an enquiry once initiated by an employer must be considered unalterable for all times to come. But if on the basis of an

enquiry a person is appointed to the satisfaction of the employer then in any subsequent proceeding on an identical issue the earlier enquiry becomes relevant and an employee who is facing the charge of impersonation has every right to ask for the document. It is surprising why the respondents did not forward this complaint to the petitioner. The answer given by the respondents that they were secret in nature does not appear to be a convincing one. Why should an enquiry conducted against an employee be considered secret in nature when that employee was facing the prospect of being imposed the highest penalty in service latter. It may be mentioned that in the teeth of this unambiguous allegation by the petitioner that those documents were not given to him on one plea or the other the respondents made only evasive denial. The petitioner''s further assertion in the affidavit-in-reply has not been even countered by the respondents in their supplementary affidavit. Thus we may accept the position that the respondents had held back a very vital document from the petitioner and the court is intended to draw an inference adverse to the respondents that had that document been produced it would have gone against the respondents themselves.

13. It is not clear why the enquiry officer thought that the writ petitioner would be the most appropriate person to dispel the misgivings arising out of the complaints received by them. But it appears that the enquiry officer without even considering the fact that it is not for the petitioner to prove his innocence had placed the wrong onus on him and concluded that he was unable to claim to be the son of late Md. Idris. This is a clear case of wrong placement of onus at the door of a delinquent employee. In this enquiry which was in the nature of a quasi judicial proceeding the prosecution had the sole responsibility to prove the charge and it could not be shifted at the doors of the employee himself. It is not for the petitioner to disprove the charges brought against him. It was for the prosecution to prove the charges levelled against the petitioner and in case there was any grey area the enquiry officer was required to note that and give the benefit of doubt in favour of the petitioner.

14. On the contrary, it is seen that the defence was assigned the double role of defending the case as well as required to disprove the charges against him. The mind of the enquiry officer gleams quite repeatedly from the enquiry report. He observed at a place that: "But this does not mean that Mustafa''s case has any footing." and ultimately held that the petitioner had failed to prove that he was the son of late Md. Idris. Coupled with what has been said before it cannot be held that the case against the petitioner had been properly proved. Although it is a settled principle of law that in a writ proceeding the evidence adduced at the enquiry cannot be examined minutely nor can the writ court assess the same it is equally true that a finding if it is not based on the preponderance of evidence or if the conclusion has been reached erroneously and without complying with the principles of law or if the finding is perverse, a writ court may always interfere in the matter. Applying that test it does not appear that the conclusion reached by the enquiry

officer was based on the sound principles of reception of evidence or the evidence adduced at number of the charges against the petitioner.

15. It cannot be lost sight of that the first complaint received by the respondents was way back in the year 1998. They had taken about ten years to proceed against the petitioner. The inordinate time taken in initiating the disciplinary proceeding must have been consumed by the collection of evidence and this has not been explained anywhere by the prosecution.

16. In the imputation of charges levelled against the petitioner a conclusion was reached that the report of the Bhagalpore Police Station had proved that the petitioner was not the son of late Md. Idris. What is very surprising in this context is that based on the complaint received in this connection the matter was taken up for an investigation by the vigilance department. The investigation report was referred to in various documents. It has been mentioned that the matter was referred to the Superintendent of Police, Bhagalpore and the District Magistrate, Bhagalpore and since no reply was received an employee of the respondent No. 1 was deputed to visit the place and on his return he has submitted an report. The said report contains the statement of 14 villagers and also a photocopy of the police report of the concerned police station. The investigation report of the vigilance department has referred to the report of the concerned Superintendent of Police and concluded that these reports may be considered as an authentic document and as per the said report the petitioner cannot be considered as a son of late Md. Idris.

17. Apart from the fact that this report had clearly reflected the mental makeup of the respondents arrived even before the petitioner was placed under suspension. The larger fact remains that the report of the Superintendent of Police was never placed at the enquiry and was never property proved.

18. A bare reading of the report of the enquiry officer shows that the case against the petitioner had not been proved by the prosecution. The evidence of the witnesses and the documents produced by the management could in no way throw any light on the charges framed against the petitioner. The reasons for finding that the petitioner exhibited lack of integrity seems to be the failure of the petitioner to prove his claim that he was the son of late Md. Idris. While discarding the evidence on the side of the defence the enquiry officer made certain observations which do not appear to have any relevance bearing on the facts of the case.

19. The enquiry officer held that the statement of the writ petitioner had many lacunae and in order to demolish the effect of the statements made by the petitioner certain issues were raised which are entirely irrelevant. For example, the petitioner had never been to the Port Trust Hospital for treatment, whether the father of the petitioner carried the P.T.O., the acceptability of the EPIC form etc. It does not appear from the said report that the enquiry officer had discussed anything about the evidence produced by the prosecution to prove the charge

against the petitioner. Whether the evidence produced by the petitioner in defence of his case could be accepted as sufficient to disprove the charge was all that the enquiry officer was concerned with. In the absence of any positive evidence and any finding arrived thereon the report of the enquiry officer holding the writ petitioner guilty of the charges must be held to be unsustainable.

20. The disciplinary authority also by the order dated October 29, 2008 failed to advert himself to the objections taken by the writ petitioner to the said enquiry report. On the contrary the disciplinary authority had held that the petitioner in his representation "did not submit any new evidence to establish his credentials as the son of late Md. Idris or for that matter against the enquiry officer to establish his claim."

21. This observation by the disciplinary authority at once brings out that the respondents had although applied wrong tests while disposing of the disciplinary proceeding. The said authority failed to appreciate that it was simply not permissible nor was it the duty of the writ petitioner to adduce any fresh evidence at the stage of submitting his observations on the report of the enquiry officer.

22. The petitioner had also been found to be not a truthful witness for his statement at the enquiry on May 8, 2008 inasmuch as his statement that he had only one sister in the marriage between his parents contradicted his earlier statement dated Marcy 28, 2000 recorded at the vigilance office wherein the petitioner is said to have stated that he had no brother and sister. From this the disciplinary authority concluded that the petitioner''s deposition at the enquiry was an afterthought to prove himself as the son of late Md. Idris. This conclusion drawn from the two statements made by the petitioner is abrupt and has no legal basis. That apart before relying on the statement said to have been made by an accused person about either years ago in connection with some enquiry the said person is required to be contradicted by the earlier statement. The respondents not having done that it was clearly beyond the established legal parameters for the respondents to rely on the same.

23. It appears that the prosecution had although placed the wrong onus on the petitioner to disprove the allegation brought against him. The petitioner was found guilty mainly on the finding that he had failed to prove himself innocent. This will be clear from the enquiry report itself. The enquiry officer held that the petitioner''s statement contained lacunae.

24. Another drawback of the charged employee, as found by the enquiry officer, was the dearth of documents or he had no documentary evidence in his favour. The entire report is replete with such sentences from which it is clear that the enquiry officer placed the onus on the charged employee. Observations like "but that assumption does not help Mustafa''s cause" or "but this does not mean Mustafa''s case has any footing" or "the defence witnesses have a poor knowledge of Idris and his family members" unmistakably lead to only one conclusion that the prosecution

had accepted that it was for the charged employee to prove that he was innocent. This is clearly against the principles of law followed in a disciplinary authority.

25. The learned senior advocate for the respondents submitted that since the writ petitioner was charge-sheeted on the ground of impersonation the onus of proof lay on the petitioner that he was the son of late Md. Idris. In support of their contention the respondents have referred to the case of Orissa Mining Corporation and another Vs. Ananda Chandra Prusty, wherein the Supreme Court had held that there was nothing as an absolute burden of prove, always lying upon the department in a disciplinary proceeding. The burden of proof depended upon the nature of the incident and the nature of charges. In a given case the burden may be shifted to the delinquent officer depending upon his explanation. With reference to the facts of that case the Supreme Court further held that the allegation was that the charged officer made certain false notings on account of which loans were disbursed to certain ineligible persons. Since the employee''s case was that those notings were based upon certain documents it was for the employee to establish his case. But this judgment cannot be applied to the facts of the present case. It is quite obvious from the judgment that in the special circumstances of the explanation given by the charged employee that the Supreme Court held that the onus to prove the explanation lay on the employee. But in this case this question hardly crops up. It is a settled principle of law that the burden of proof shifts according to circumstances upon different parties. But in an offence involving a criminal charge of such a grave magnitude the basic onus on the prosecution never shifts and the prosecution cannot be relieved of its duty by shifting the entire onus upon the writ petitioner.

26. Mr. Moitra, the learned senior counsel appearing for the petitioner, has made a grievance that in spite of the petitioner''s wanting copies of certain documents they were not supplied and as a result thereof the petitioner was sufficiently prejudiced in the matter of his defence. He has particularly referred to the vigilance reports of before and after the year 1991. This two documents were denied to the petitioner on the ground of their secrecy. It has already been mentioned that when the court had directed the respondents to produce those documents the respondents did neither produce them nor were willing to affirm an affidavit in time. But the records which were produced before the court contained a communication dated May 8, 2013 written to the Chief Vigilance Officer wherefrom it appears that the earlier request by the petitioner were denied to him from the vigilance department "on the plea of they being secret document". The use of the word ''on the plea'' is very significant.

27. Apart from these two documents some other documents were denied to the petitioner as they were not relevant. It is strange that the respondents, i.e., the prosecuting authority had decided the relevancy of the documents which the petitioner wanted to use.

28. The learned advocate for the respondents have relied on the case of Pandit D. Aher Vs. State of Maharashtra, for a proposition that a copy of the documents which has not been relied upon is not required to be supplied to a delinquent officer. But this judgment was delivered in the context of non-supplying the copy of the enquiry report. The petitioner here had asked for those copies long before the question of reliance on them by the management at the enquiry arose.

29. The documents which the petitioner had asked for most certainly were relevant from his point of view for the purpose of building up his defence. It is an admitted position that late Md. Idris died in the year 1978. After making his application for appointment on compassionate ground the petitioner had to wait for many years. There was vigilance investigation. The Port Trust had even requested the District Magistrate, Bhagalpore as well as the police authorities of the said district for verification of the particulars given by the petitioner. And after a thorough enquiry the official authorities from Bhagalpore had given their report to the Port Trust authorities. The Port Trust authorities must have issued the appointment letter after being satisfied about the petitioner''s credentials and, therefore, the reports collected by the respondents at that point of time must have satisfied the authorities before they issued the appointment letter.

30. Quite naturally the petitioner wanted the production of those documents because the contents therein were likely to help him in making his defence. By denying these documents "on the plea" of secrecy the respondents had deprived the petitioner a reasonable opportunity to contest the enquiry. This must in turn be deemed to be a denial of opportunity and a violation of the principles of natural justice. That apart I fail to understand why those two vigilance reports should be treated as secret at all. Subsequent vigilance reports have been produced. There was no reason for them to treat the earlier reports as secret and to deny access to them to the petitioner.

31. The respondents have taken a further point that the delinquent employee seeking a particular document is required to plead relevancy thereof and how he would be prejudiced if the document is not supplied to him. In support of this the respondents have relied on the case of State of Tamil Nadu Vs. Thiru K.V. Perumal and others, and State of Punjab and Another Vs. Hari Singh, wherein the Supreme Court had held that it was the duty of the charged employee to point out how each and every document was relevant to the charges or to the enquiry being held against him or how their non-supply had prejudiced his case. It is not entirely correct that the petitioner had not mentioned it in the writ petition. He has taken this as a ground of challenge and has also been pleaded in the petition. Moreover, unless he got access to these documents he could not establish their relevance. The petitioner has made a grievance that the copies of the relevant documents were not supplied to him.

32. Thus I find that the non-supply of the vigilance reports had significantly prejudiced the petitioner in the defence of his case.

33. A very vital aspect of the case had been overlooked by the prosecution. It is a settled principle of law that when a question of the present nature, i.e., relationship between two persons, crops up for consideration what is relevant to consider is the opinion expressed by persons who knew them. In the case of Chandu Lal Agarwalla, Karta of joint family and of firm named Hanutram Lekram Agarwalla and Another Vs. Bibi Khatemonnessa and Others, a division bench of this court had held that with reference to Section 50 of the Evidence Act:

The person whose opinion is made evidence by the section must be shown to have ''special means of knowledge on the subject.'' So evidence under this section can come in only when the following requirements are fulfilled: 1. The person whose opinion is sought to be given in evidence must be proved to have special means of knowledge on the subject. 2. (a) The opinion alone is evidence; (b) the opinion as expressed by conduct only is evidence; or, in other words, (I) conduct only can be given in evidence; (ii) from the conduct given in evidence the Court is to see whether it is the result of any opinion held by the person. 3. The opinion which is relevant must be the one as to the existence of the relationship; (I) as has been pointed out above, the negative opinion - or the opinion as to the non-existence of the relationship may not be relevant under this section. But the question does not fall to be decided in the present case.

34. It is surprising that in spite of the fact that the respondents authorities had sent different employees to Bhagalpore and had collected information about the facts of the case they had not produced any single witness from the locality which was the native place of the petitioner or late Md. Idris. Moreover, it appears from the supplementary affidavit used by the respondents that the vigilance officer of the respondents authorities had requested the District Magistrate of Bhagalpore to furnish certain information and the District Magistrate, Bhagalpore had sent his reply annexing thereto the police verification report submitted by the Superintendent of Police of the concerned area and these were used as evidence by the disciplinary authority in support of their case. Strangely enough at the enquiry none appeared to prove those documents. Therefore, the mere presentation of those documents could not be taken as substitute their proof and the respondents were not entitled to rely on those documents without they being proved at the enquiry.

35. It appears from the charge-sheet that the prosecution had accepted the official reports. It has already been seen in the article of charge that it was specifically mentioned that the police report revealed that the petitioner was not the son of late Md. Idris. Thus the conclusion was reached from before.

36. Mr. Saugata Bhattacharya, the learned advocate for the respondents, had submitted that in the disciplinary proceeding strict adherence to the rule of evidence is not required and he has referred to the case of Lalit Popli Vs. Canara Bank and Another, reported in AIR 2003 SC 1795. It is a very well settled principle that the Evidence Act with all its technicalities does not apply to a disciplinary proceeding. But this is equally true that the basic principle of the law of evidence apply to any disciplinary proceeding with all the exactitudes.

37. It is also a settled principle of law as decided in various judgments including Lalit Popli (Supra) that while exercising jurisdiction under Article 226 of the Constitution of India the High Court does not act as an appellate authority and its jurisdiction is Circumscribed by the limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of the principles of natural justice. Keeping this limitation in mind and applying the parameters contained therein the order impugned must be held to be not sustainable in law and passed in violation of the principles of natural justice. The order passed by the authority being such as no man of ordinary prudence would arrive at on the basis of the materials placed before it must be held to be a perverse one.

38. The impugned order is set aside and quashed. The writ petition is allowed.

39. There shall, however, be no order as to costs. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.