(1984) 07 CAL CK 0025

Calcutta High Court

Case No: C.R. No. 601 of 1981

Sushil Kumar Ganguly		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: July 18, 1984

Citation: 88 CWN 1078

Hon'ble Judges: S.K. Mukherjee, J

Bench: Single Bench

Advocate: S.C. Bose, Mahitosh Majumdar and Malay Kumar Chakravarti, for the Appellant;D.K. Sen and T.K. Pal, for the Respondent

Final Decision: Allowed

Judgement

Samir Kumar Mukherjee, J.

The subject matter of the present writ proceeding is an order of penalty, against the petitioner, of compulsory retirement, passed by the Collector of Customs on 6th January, 1981. The relevant facts succinctly stated are that the petitioner was an Examining Officer at the relevant time attached to the customs department; a disciplinary proceeding was initiated against the petitioner under the provisions of Central Civil Services (Classification, Control and Appeal) Rules, 1965, by a memorandum embodying two articles of charge, the first one in substance being that on 17.12.1978, the petitioner was found to be under the influence of intoxicating drink while discharging his official duties as Examiner at Dum Dum Air-port and the second one that he attempted to pilfer, on the same date at about 4 p.m., one silk shirt and one handkerchief from Registered Package No. 871 during the course of examination thereof and accordingly contravened the provisions of Rule 22 (b) of the Central Civil Services (Conduct Rules), 1964 and Sub-Rules (i) and (iii) of Rule 3(1) of the said Rules; the Enquiry Officer by his report, dated 27th September, 1980, found the petitioner guilty of the first article of charge only and the second article of charge was found not to have been properly established; the Collector of Customs, who was the punishing Authority, disagreed with the findings

of the Enquiry Officer and virtually exonerated the petitioner from the first article of charge but found him guilty of the second and passed the order of penalty of compulsory retirement as stated above.

2. On behalf of the petitioner, a number of points have been urged by Mr. S.C. Bose. It has been urged, in the first place, that the petitioner was deprived of reasonable opportunity by not being given the documents asked for, particularly, the preliminary reports, which were relied on by the punishing authority, while imposing the penalty of compulsory retirement. Secondly, it has been urged that refusal to supply the documents, invoking the exemption granted under the Rules on the ground of public interest, is malafide and or mechanical and is vitiated by complete lack of application of mind of the authority concerned. Thirdly, it has been urged that since there was a difference of opinion between the Disciplinary Authority and the Enquiring Authority an opportunity ought to have been given to the petitioner substantially in the form of a second show cause notice. Lastly, the propriety and validity of the order of penalty has been challenged on the ground, inter alia, that the findings on which such order of compulsory retirement is based are perverse.

3. Mr. D.K. Sen, appearing on behalf of the Respondents, has contested the propriety of the submissions made on behalf of the petitioner. According to Mr. Sen there has been no violation of the Rules but the same have been strictly followed; the documents which were required to be supplied had been supplied. The petitioner was not entitled to get copy of the preliminary reports asked for as those were no part of the enquiry and the Enquiry Officer was not relying on them nor were those in the list of documents, on which the Department proposed to rely. Non-supply of such documents cannot amount to violation of the principles of natural justice. In this connection, Mr. Sen has further contended that the principles of natural justice would operate only where there is no express or implied exclusion. According to Mr. Sen case, the petitioner can not canvas violation of the principles of natural justice either for non-supply of documents or for failure of the punishing Authority to offer the petitioner an opportunity of being heard for the second time against the punishment imposed, unless convince'' this Court that the same were warranted by the provisions of the Rules referred to above. Mr. Sen has contended that Rule 14 Sub-rule 13 of the Central Civil Services (Classification Control and Appeal) Rules empowers the Enquiry Officer to refuse to supply documents, claimed to be privileged documents in terms of the said Rule. In this particular case such privilege having been claimed by the Department, the petitioner cannot insist upon supply of the copies of such privileged documents. In developing the said submission, Mr. Sen has meticulously traced the growth of the principle of natural justice and the extent of its applicability as recognised by judicial pronouncements. In substance he has tried to establish that the principle of natural justice cannot supplant the law but can only supplement the same. It is within the exclusive jurisdiction of the Legislature to frame the law and the function of the Courts of law

is to interpret the law as it stands. The Courts are not empowered to using the legislative domain and legislate even if the Court finds that a particular provision of law is operating harshly. Legislative Enactments by their terms often exclude the application of the principles of natural justice such exclusion may be by express language or by implication. In this particular case, Mr. Sen has contended, the terms of Rule 14, by imposing obligation on the Disciplinary Authority to see that documents, specified in the said Rule are furnished to the delinquent employee, impliedly excluded the right of the employee to ask for other documents even if such deprivation is contrary to the principles of natural justice. Mr. Sen has relied upon the decision reported in Union of India (UOI) Vs. Col. J.N. Sinha and Another, where the claim of the delinquent Officer had been negatived on reasons which accordingly to him, directly apply to the present case. Lastly, Mr. Sen has contended that the evidence was properly considered by the Punishing Authority and even if there are some apparent errors in the findings of such authority, if the conclusion can be sustained on totality of evidence in spite of such errors, the writ Court should not interfere.

4. In course of hearing, in compliance with my desire,. relevant records were produced by Mr. Sen and the necessary extracts, relating tq claim of privilege about the documents, made by the department, were copied and handed over to me subsequentiy. In my view, the claim of privilege, made by the department, is not maintainable upon proper construction of the proviso to Rule 14 Sub-rule 13 of the Civil Services (CCA) Rules, 1965. From the language, in which such claim has been made, it appears that the departmental authorities misconceived their rights under the said proviso. It appears from the records, produced before me, that, apart from the reports dated 18.12.1978 copies of which were supplied, there were other reports, submitted by way of preliminary fact finding to enable the authorities to make up their mind to proceed with the disciplinary action against the petitioner. Indeed it appears from an endorsement dated 28.12.1978, that materials, collected up to that date, were not found to be sufficient and it was thought necessary that further materials should be collected in view of the seriousness of the offence. Accordingly, further efforts were made to find out facts and in fact, subsequent contents of the said file disclose that the collection of materials continued up to 12th of January 1979. With such collected materials and all the reports up to that date, the file was forwarded to the Collector, under an endorsement dated 7th of February, 1979, and as stated earlier, the necessary charge-sheet was issued under memo, dated 27th of March, 1979. In the circumstances, the question immediately comes up as to whether there has been denial of reasonable opportunity to the delinquent Officer in defending himself by refusing to grant him the copies of all the reports, which really constituted the preliminary fact finding investigation. No doubt it has been strenuously contended by Mr. Sen, appearing on behalf of the respondents, that the department was authorised to refuse to supply copies of the documents provided the conditions, laid down in Sub-rule 13 of Rule 14 of the

CCS(CCA) Rules, were satisfied. As stated earlier, the said Sub-rule empowers the department to refuse copies of the documents provided the custodian of the said documents is satisfied for reasons to be recorded by it in writing, that the production of all or any such document would be against public interest or security of the State. In the instant case, such conditions, in my view, have not been satisfied; the department refused to supply the copies except the reports, dated 18.12.1978, though admitting the existence of such documents, on the ground that no reference to such reports was made in the statement of allegations and, on the basis of such reasoning, privilege was claimed in public interest. It cannot be denied that the needed formation of opinion or satisfaction of the authority, enabling it to seek exemption under the said Sub-rule 13 of Rule 14, was not arrived at and the ground of public interest was taken mechanically under a misconception. Therefore, the refusal is not justified and there has been a violation of the principles of natural justice, particularly when it is considered that, even the fact finding authority itself was of the view without such reports, alleged offence had not been made out. Moreover, it further appears that the entire file, including the documents, regarding which exemption was claimed interms of Sub-rule 13 of Rule 14, had been placed before the Collector to enable him to frame the charges. In the circumstances, the possibility of the Collector being influenced by such reports cannot be ruled out and mere non-mentioning of such reports in the list of documents annexed to the charge-sheet does not in any way under-mine their effect on the framing of the charges.

5. It is laid down in the case of State of M.P, vs. Chintaman reported in AIR 1961 SC 1623 (Paras 6-10) that unjustifiable withholding of documents on the ground of the same being against public interest or security of the state, thereby depriving the delinquent of the opportunity to cross examine witnesses against him effectively, amounts to violation of Principles of Natural Justice. Reference may also be made to the case of Dola Gobinda vs. Union 1981 (II) LLC. 1461 (Paras 10 and 12) and that of A.K. Dutta vs. Union reported in 82 CWN 539. In this particular case, the very basic requirement of formation of an opinion about public interest is lacking. The reports withheld might have furnished important materials to the delinquent Officer to cross-examine the Prosecution witnesses on for dissuading the Collector from passing the impugned order of compulsory retirement. The right of cross-examination is certainly a very valuable right and forms an integral part of the basic principle of natural justice. In very rare cases it can be said that a delinquent would not be prejudiced by the non-supnly of such materials. Reference, in this connection, may be made to the case of State of Maharashtra Vs. Bhaishankar Avalram Joshi and Another, , and the case of Union of India (UOI) Vs. H.C. Goel, at Page 368. The principles of natural justice cannot be placed in a straight jacket but have to be modulated according to exigencies of particular cases. In the instant case, the very basic requirement of formation of opinion about Public interest is lacking and accordingly the withholding of the documents in question is unjustified

and constitutes flagrant breach of the principles of natural justice, particularly in view of the nature of the allegations, made against the delinquent.

6. On the merits also, the impugned order of compulsory retirement cannot stand. In the first place, for the reason that it does not fulfil the conditions of Sub-rule 2 of Rule 15 of the CCS (Classification Control and Appeal) Rules. The Disciplinary Authority has squarely disagreed with the findings of the Enquiry Officer and has reversed the same. While so doing, however, it has not recorded the reasons for such disagreement but has merely stated that the findings of the Enquiring Authority are not acceptable to it. (Vide in this connection Tara Chand Khatri Vs. Municipal Corporation of Delhi and Others,). No doubt it has tried to arrive at its own finding on appraisal of evidence but such findings again cannot be said to be findings, which a reasonable man could or should on the existing state of evidence, reach. Mr. Sen, of course, for the respondents, has emphatically urged that a Court of writ does not sit on appeal over the impugned order of compulsory retirement and, as such, has no power to reappraise evidence and to come to its own conclusion in substitution of the conclusion of the Disciplinary Authority. But, in my view, the principle, as recognized by different decisions of the Courts of law, is that the writ Court can certainly reappraise evidence and scan the same to find out if the conclusions, reached by the Disciplinary Authority, are reasonably based on such evidence. Such course of action finds support from the principle, laid down in AIR 1972 SC 2535 (State of Assam v. M.C. Kalita, Paras 6 to 8). In the present case, it appears that there are serious infirmities in the conclusions of the Disciplinary Authority in the guise of either absence of evidence or over-looking of evidence with the result that its conclusions are not those of a reasonable mind on the evidence on record. Some of such instances are stated herein below :
a) The packet 871 was found to be intact. The said condition of the packet was sought to be explained by stating that it was done under the direction of Assistant Superintendent Mr. Sarkar, however, Shri S.C. Sarkar, while deposing was absolutely silent about any such direction being given by him. In case this intact condition of the packet cannot be explained, the allegation of pilferage by the delinquent Officer becomes a myth.

(b) The only eye witness Shri Talukdar attempted to speak about removal of goods from packet - 871 though he could not say about the nature of the goods removed. Shri Chittaranjan Kun-du who claimed to have brought out one Shirt and one Handkerchief from the pocket of Shri Ganguly, the delinquent Oficer, could not recollect anything whatsoever about the incident during oral evidence though he could depict the incident in details in his written statement after about three weeks of the date of incident. This glaring inconsistency appears to have gone up-noticed by the Disciplinary Authority.

(c) During spot enquiry by Shri Chanda the allegation was regarding removal of one handkerchief only but, in written statement made after three weeks, removal of a

shirt was added.

(d) The Disciplinary Authority found that the only eye witness Shri Talukdar was hewing the delinquent Officer Mr. Ganguly and was sitting on a stool by his side though the same is directly contradicted by the statement of Mr. Talukdar to the effect that he was working as a helper to Shri Shyamapada Bose, Sorter. Shri Talukdar also admitted not to have reported anything immediately to Shri Syamapada Bose. The impact of his conduct and statement for the probability of his seeing the alleged removal cannot be overlooked as he is the only eye witness to the occurance. He also could not say what was actually taken out by the delinquent Officer.

(e) The Disciplinary Authority overlooked also the impact of the statement made by D.M. Chanda to the effect that Shri Ganguly, the delinquent Officer, had one handkerchief, resembling the one alleged to have been pilfered from packet-871.

7. In view of the above lacunae, in the findings of the Disciplinary Authority, I cannot but hold that such findings are perverse, being either based on no evidence or being contrary To evidence or being vitiated by non-consideration of relevant evidence with the result that his conclusions cannot be said to be conclusions of a reasonable mind. It is not a case of screening evidence for the purpose of determining its sufficiency or adequacy. The decisions in the cases of State of Andhra Pradesh and Others Vs. Chitra Venkata Rao, and Shew Bhagwan Goanka Vs. The Collector of Customs and Another, cited by Mr. Sen, do not affect or alter the position but do basically support the said approach. In this connection, I feel tempted to quote portions of paragraphs 19 and 24 of the decision in S.L. Kapoor Vs. Jagmohan and Others, .

8. Megarry J. Discussed the question in John V. Rees. (1970) 1 Ch 345. He said (at p. 402) :

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious", they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start". Those who take this view do not think, do themselves justice. As everybody who has anything to do with the law well knows the path of the law is strewn with examples of open and shut cases which, somehow, were not of unanswerable charges, which, in the event, were completely answered;.....of inexplicable conduct which was fully explained; of fixed and unalterable determinations that by discussion, suffered a change. Nor are those with any knowledge of human nature who cause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

24. The requirement that justice should be seen to be done has been regarded as general principle which in some cases can be satisfied only be the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C. J''s judgment in R. v. Home Secretary, Mr. P. Hessen ball, (1977) 1 WLR 766, 772, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as one of the rules generally accepted in the bundle of the rules making up natural justice.

It is the condition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. ***** In R. v. Thames Magistrates'' Court, ex, p. Holding (1974) 1 WLR 1371, the applicant obtained an order of certiorari to quash his convention by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had to defence to the charge.

"It is again absolutely basic to our system that justice must not only be done list must mainfestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say : ''well, even if the case had been properly conducted, the result would have been the same''. That is mixing up doing justice with seeing that justice is done (per Lord Widgery C.J. at p. 1375.

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed."

I hold, therefore, that the order of compulsory retirement, in the present case, based, as it is, on such perverse findings cannot stand.

In the result, I quash the impugned order of compulsory retirements and the entire Enquiry proceeding. Let a writ of Mandamus issue, commanding the respondents to forbear from giving any effect or further effect to and or taking any steps or further steps in pursuance or on the strength of the impugned order of compulsory retirement and to withdraw and rescind the same. A writ of certiorari be also issued, quashing the entire enquiry proceeding and the final order of compulsory retirement, passed by the Collector. I direct the respondents to reinstate the petitioner with all due benefits in accordance with law and to pay all pecuniary dues of the petitioner, treating him to be in service, up-to-date as expeditiously as possible.

The Rule is made absolute.

There will, however, be no order as to costs.