Shyamapada Bauri Vs Eastern Coalfields Ltd. and Others

Court: Calcutta High Court

Date of Decision: Oct. 16, 2007

Citation: 112 CWN 639

Hon'ble Judges: Pranab Kumar Chattopadhyay, J; Kalidas Mukherjee, J

Bench: Division Bench

Advocate: Nirmalendu Ganguly and Subhayu Banerjee, for the Appellant;R.N. Mazumder, Susanta Pal, P. Basu and N. Roy, for the Respondent

Judgement

Kalidas Mukherjee, J.
The instant appeal has been preferred at the instance of the appellant/writ petitioner challenging the order dated 06-

02-2007 passed by the learned Single Judge in writ petition bearing W.P. No. 15435 (W) of 2006. The appellant/writ petitioner, an employee in

the post of Under Ground Loader in the respondent No. 1 i.e. Eastern Coalfields Ltd., was served with charge sheet dated 24-09-2005 and

disciplinary proceedings were initiated against him alleging that he was unauthorisedly absenting himself from duty from 5th September, 2005. The

enquiry proceedings were held and after examining the witnesses, the inquiry officer concluded the same upon recording his finding that the charge

had been established. Thereafter second show cause notice dated 03/07-11-2005 was issued, to which the appellant submitted a reply with the

prayer for permission to join his duty and further stating that he did not attend his duty from 05-09-2005 to 09-10-2005 due to right leg fracture.

He further stated in the reply to the second show cause notice that this type of mistake would not recur in future. The respondent disciplinary

authority on perusal of the second show cause notice, passed the order of termination dated 07-01-2006. Being aggrieved by the said order of

termination, the appellant herein filed the writ petition bearing W. P. No. 15435 (W) of 2006. The learned Single Judge while dismissing the writ

petition observed that on the facts of the case he was unable to hold that the finding of the enquiry officer was perverse. It was also observed by

the learned Single Judge that while considering the question of punishment, the disciplinary authority was quite empowered to consider the past

conduct of the petitioner. The learned Single Judge was unable to agree with the counsel of the writ petitioner that the punishment imposed was

disproportionate to the gravity of proven misconduct.

2. Mr. Nirmalendu Ganguly, the learned counsel appearing on behalf of the appellant has submitted that in the charge sheet there was no mention

of the alleged habitual absenteeism and the charge sheet was only issued for unauthorised absence with effect from 05.09.2005. It is contended

that during the enquiry proceeding P. W. 2 admitted that the appellant went to the hospital for his illness wherefrom he was referred to C. H. Kalia

(Central Hospital Kalia). It is also contended by the learned Counsel appearing on behalf of the appellant that in the second show cause notice

there was no reference to the earlier proceedings and punishment awarded on each such occasion regarding the alleged habitual absenteeism and,

as such, the punishment of termination of service was shockingly disproportionate, especially when there was no mention of habitual absenteeism in

the charge sheet. Learned Counsel has referred to and relied on a decision reported in (2005) 1 WBLR (Cal) 92 (Eastern Coalfields Ltd. vs.

Indradeo Yadav & Ors.).

3. Mr. R. N. Mazumdar, learned counsel appearing on behalf of the respondent has submitted that in the past the appellant remained absent for

considerable period for which proceedings were drawn up on several occasions and punishment was awarded on each such occasion, but, inspite

of that the appellant did not mend himself and again remained absent with effect from 05.09.2005 for which a proceeding was drawn up and upon

conclusion of the enquiry, the disciplinary authority passed the order of termination of service considering the past conduct in view of the standing

order No. 28.7. The learned counsel for the respondent submitted that the total period of absence in the present occasion was for 22 days. Mr.

Mazumdar has referred to and relied on the decisions reported in 2003(2) CHN 567 para 17 (General Manager, Eastern Coalfields Ltd. & Anr.

vs. Rajender Singh @ Rajendra Singh & Ors.) and The Management of Madras Fertilisers Ltd., Manali, Madras Vs. The Presiding Officer,

Additional Labour Court, Madras, Kuppuswami (Died) and M. Kannammal, .

4. In the instant case, the charge sheet dated 23-09-2005 was issued to the concerned employee on the alleged misconduct under para 26.29 of

the standing order of the Coal Mine Industry as he was absenting himself from duty without leave or prior permission from competent authority

from 05.09.2005. The xerox copies of the papers relating to the disciplinary proceedings have been submitted from which it would appear that

P.W. 2 CH. Roychowdhury, compounder, stated that Shyamapada Bouri, under ground loader, came to the dispensary on 10-09-2005 for his

pain on right leg ankle and the Doctor referred him to C. H. Kalia on 10-09-2005. The cross-examination of each witness was declined by the

charge sheeted workman. The enquiry officer after conducting the enquiry, gave his findings after recording that charge sheeted workman could not

attend his duty due to pain in the right ankle on and from 05-09-2005 as stated by the said workman. It is also in the report of the enquiry officer

that the charge sheeted workman was under treatment at Kasta of a private doctor from 05-09-2005 and came to the Colliery dispensary on 10-

09-2005. The said doctor prescribed some medicines and referred him to C. H. Kalia. The enquiry officer, however, recorded that the charge

sheeted workman did not go to CH. Kalia for his treatment and did not produce any prescription regarding his treatment. It is also the finding of

the enquiry officer that the charge sheeted workman did not inform the management of his whereabouts and considering the facts and

circumstances, the enquiry officer observed that the charge of unauthorised absence was established.

5. From the papers relating to the enquiry proceedings it is found that Dr. Haripada Bouri issued a certificate on 06-09-2005 to the effect that Shri

Shyamapada Bouri of village Kasta was suffering from fracture of the ankle and was under his treatment since 05-09-2005 and advised him to

take rest. A second show cause notice was, however, issued on 3/7-11-2005. The appellant herein submitted a reply dated 11-11-2005 to the

respondent authority against the second show cause notice, wherein he stated that he could not attend duty from 05-09-2005 to 09-10-2005 due

to his right leg fracture and prayed for permission to join his duty on the specific assurance that this type of mistake would not recur in future. It has

also been mentioned therein that the papers relating to medical treatment were already submitted in the office. Upon receipt of the said reply to the

said second show cause notice, the disciplinary authority awarded punishment of termination of service with immediate effect vide letter dated 07-

01-2006.

6. While awarding the punishment of termination of service, the authority took into consideration the past records of the concerned employee

under the standing order No. 28.7 regarding the earlier proceedings.

7. It is well settled that punishment should be awarded having regard to the charge framed in the charge sheet. In the instant case it has been

alleged in the charge sheet dated 23.09.2005 that the concerned employee remained absent with effect from 05.09.2005. In the charge sheet there

is no charge of habitual absenteeism or any reference to the earlier proceedings and punishment awarded on those occasions. It is only under the

standing order No. 28.7, the respondent authority took into consideration the past conduct of the employee concerned and awarded the

punishment of termination of service. The learned counsel appearing on behalf of the respondent has pointed out that in the second show cause

notice it was mentioned that the writ petitioner was absent on so many occasions in the past which was not challenged by him.

8. The standing order No. 28.7 is quoted hereunder.

28.7. In awarding the punishment gravity of the misconduct, previous record of the workman and any other extenuating or aggravating

circumstances that may exist shall be taken into account. A copy of the order passed by the disciplinary authority, shall be supplied to the

workman concerned.

Learned Counsel for the respondent has referred to and relied on the decisions reported in 2003(2) CHN 567 (Supra) and The Management of

Madras Fertilisers Ltd., Manali, Madras Vs. The Presiding Officer, Additional Labour Court, Madras, Kuppuswami (Died) and M. Kannammal,

In the case of General Manager, Eastern Coalfields Ltd. & Anr. vs. Rajender Singh @ Rajendra Singh & Ors., it was held that a charge of

habitual absence can be founded only on the basis of previous cases of unauthorised absence. The observation of Their Lordships is set out here

under :

17..... In our considered view the reasons cannot be accepted, because a charge of habitual absence can be founded only on the basis of

previous cases of unauthorized absence.....

But in the instant case, no such charge of habitual absence was framed although standing order No. 26.23 specifically deals with habitual absence.

The standing order No. 26.23 is quoted hereunder :

''26.23. Habitual low attendance or habitual absence from duty without sufficient cause.''

We are, therefore, of the considered view that the ratio of the aforesaid decision is not applicable in the facts of the instant case.

Mr. R. N. Mazumdar, learned counsel for the respondent has referred to and relied on the decision reported in The Management of Madras

Fertilisers Ltd., Manali, Madras Vs. The Presiding Officer, Additional Labour Court, Madras, Kuppuswami (Died) and M. Kannammal, .

The observation of Their Lordships is set out hereunder :

5.....Consideration of the past record of service has very much gone into the mind of the management on the question of punishment, and the

employee had been denied the opportunity to make his say. and offer his explanation on this question. As to how far the employee would have

succeeded in persuading the management to view the matter leniently and not to indulge in imposing the extreme penalty of dismissal from service,

we cannot by ourselves gauge. When we view this question from the above angle, we cannot take exception to the opinion expressed by the

learned Single Judge that when there was an omission on the part of the management to put the employee on notice of the move on the part of the

management to take into consideration the past record of service of the employee in the matter of imposition of the punishment, there was a

violation of the principles of natural justice and the same error had crept into the thinking on the part of the Labour Court. The vitiating factor was

the denial of opportunity to the employee to explain the past record of service at the appropriate time. That has nullified the resultant action.

Thereafter the matter has to be viewed untainted by the past record of service. This vitiating factor will not stand mollified by affording on

opportunity at the subsequent stage. This has been duly taken note of by the learned Single Judge, and in our view, the learned Single Judge rightly

eschewed the past record of service of the employee in the matter of consideration of the punishment to be imposed.

It is, therefore, clear from the aforesaid decision that in the matter of considering the past record at the time of imposing punishment, opportunity to

explain the past records should be given to the employee concerned at the appropriate stage and giving such opportunity at subsequent stage will

not cure the defect. In the instant case it is only in the second show cause notice reference had been made to the past records of absence from

duty. We are, therefore, of the considered view that the ratio of the aforesaid decision is not applicable in the facts of the instant case.

9. In the termination order it was mentioned that keeping in view the gravity of the charge levelled against the concerned employee, the order of

termination was passed with immediate effect. It is clear that there is no charge of habitual absenteeism as per charge sheet. The charge of

remaining absent for a particular period i.e. with effect from 05-09-2005 as per the charge sheet should be the basis of the order of termination

passed by the respondent authority. In other words, while awarding punishment, the disciplinary authority should consider the charges levelled

against the concerned employee. We are, therefore, of the considered view that the past conduct of alleged habitual absenteeism cannot be taken

into consideration while awarding punishment in the instant case because of non-mentioning of habitual absenteeism in the charge sheet. It is true

that the past conduct, can be taken into consideration under the provisions of standing order No. 28.7, but, while taking into consideration the past

conduct the authority concerned cannot travel beyond the scope of the charge sheet and denying the opportunity to the employee concerned to

explain the past record of service. While taking into consideration the past conduct under the aforesaid standing order, the authority cannot

consider a matter, which in effect, would amount to adding a new charge or altering the charge levelled against the employee concerned.

10. Nothing has been specifically mentioned in the termination order nor in the second show cause notice about the earlier proceedings and

punishment awarded on each such occasion or the alleged habitual absenteeism. Habitual absenteeism is a specific charge, the conspicuous

absence of which in the charge sheet, cannot entitle the authority within the purview of standing order 28.7 to award the capital punishment in the

form of termination of service as was done in the present case.

11. In the decision reported in Union of India (UOI) and Others Vs. Dwarka Prasad Tiwari, the observation of the Hon"ble Apex Court is set out

hereunder:.

16..... In the normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary

authority or the Appellate Authority to reconsider the penalty imposed.

The observation of the Hon"ble Apex Court in the decision reported in Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and

Another, is quoted hereunder :

6. A perusal of the above judgments clearly shows that a court sitting in appeal against a punishment imposed in the disciplinary proceedings will

not normally substitute its own conclusion on penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority

shocks the conscience of the court, then the court would appropriately mould the relief either by directing the disciplinary/ appropriate authority to

reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent

reasons in support thereof. It is also clear from the abovenoted judgments of this Court, if the punishment imposed by the disciplinary authority is

totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.

12. It has not been disputed by the Enquiry Officer that the appellant herein could not attend the duty due to his right ankle pain on and from 5th

September, 2005 and he was under the treatment of a private doctor at Kasta and subsequently, also came to the Colliery Hospital on 10th

September, 2005 wherein the doctor prescribed him some medicines and also referred to Central Hospital at Kalia for further treatment although

the said appellant did not go to the said Central Hospital at Kalia for further treatment. In the aforesaid circumstances, it can be said that the

employee concerned has been able to establish proper and acceptable cause for his absence and the same, therefore, cannot be regarded as grave

misconduct which warrants dismissal from service. We are of the opinion that a fresh opportunity should be granted to the employee concerned,

namely the appellant herein, to improve his performance in future and the termination of service of the appellant herein, in our view, is shockingly

disproportionate with the charge as levelled against him and mentioned in the charge sheet dated 23rd September, 2005.

13. In the instant case, we are also of the considered view that by taking into consideration the alleged habitual absenteeism of the appellant herein,

concerned respondents particularly, the disciplinary authority travelled beyond the scope of the charge sheet and, therefore, the punishment of

termination of service cannot be sustained in the eye of law apart from the same being shockingly disproportionate with the charge as mentioned in

the charge sheet dated 23.09.2005. That being so, we quash the order of termination of service passed by the respondent authority dated

07.01.2006. The judgment and order under appeal is also set aside. However, we send back the matter to the respondent authority to consider

the question of punishment having regard to the charge levelled against the appellant herein as per charge sheet in question and pass appropriate

order excepting the order of termination of service. With this observation we dispose of the appeal and direct the respondent authority to pass the

appropriate order as aforesaid within two months from the date of communication of the order.

14. There will be no order as to costs. Urgent zexor certified copy of this order, if applied for, be handed over to the parties as early as possible.

I agree.

Pranab Kumar Chattopadhyay, J.