(1965) 03 BOM CK 0031

Bombay High Court

Case No: Misc. Petition No. 252 of 1962

Vithal Mahadeo Kumbhar		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: March 8, 1965

Acts Referred:

- Railway Protection Force Rules, 1959 - Rule 40(4), 41, 44(11), 44(5), 44(9)

Citation: AIR 1967 Bom 332 : (1966) 68 BOMLR 560 : (1967) 1 LLJ 639

Hon'ble Judges: Tarkunde, J

Bench: Single Bench

Advocate: N.H. Gurushahani, for the Appellant; S.A. Desai, for the Respondent

Judgement

(1) The Petitioner, who was formerly a member of the Railway Protection Force, has filed this petition under Art, 226 of the Constitution to challenge the validity of an order passed on 21st December 1961 dismissing him from the Force, and also of an earlier order dated 14th January 1961 by which he was suspended from service with retrospective effect.

(2) At the material time the petitioner was employed as a Rakshak in the Central Railways. During the night between the 19th and the 20th of August 1959, there was a theft of some scrap materials valued at Rs. 415 and the petitioner was one of the persons arrested in connection with the theft. he was placed under suspension by an order dated 20th August 1959. He was tried and convicted by a Presidency Magistrate of an offence under S. 381 read with S. 114 of the Indian Penal Code. Following his conviction he was dismissed from service with effect from 16th August 1960 by an order dated 9th August 1960. Later, however, his conviction was set aside and he was acquitted in an appeal preferred by him in the High Court Consequently the Security Officer passed an order on 13th January 1961 by which he cancelled the order of dismissal and directed that the petitioner be trated as being under suspension from 16th August 1960, i.e. from the date of his dismissal under

the cancelled order. He was then served with the charge-sheet which contained the charge that, while he was on duty, he had failed to detect and to prevent the theft of scrap materials which were lying in his charge. A departmental inquiry against him was conducted by the Assistant Security Officer. The latter examined serveral witnesses and submitted his report to the Security Officer in the course of which he held that the charge against the petitioner was duly established. The Security Officer called upon the petitioner to show cause why he should not be dismissed from service, and, after receiving the petitioner''s reply passed an order dismissing the petitioner from service on 21st December 1961. An appeal filed by the petitioner to the chief Security Officer was dismissed and the order of dismissal was confirmed.

(3) Most of the grounds taken in the petition against the order of dismissal relate to the appreciation of the evidence which was recorded by the Assistant Security Officer. The merit or otherwise of those grounds cannot be considered in this petition. Mr. Gurusahani, who appeared for the petitioner, challenged the order of dismissal on two grounds on which its validity could be questioned.

(4) Mr. Gurusahani tried to point out, in the first place, that the charge-sheet, which was framed against the petitioner by the Security Officer, not only contained the charge of negligence of duty as mentioned above, but it also called upon the petitioner to show cause why the penalty of dismissal, or any of the other penalties enumerated in Rule 41 of the Railway Protection Force Rules, 1959, should not be imposed upon him. According to Mr. Gurusahani, the inclusion of such a show cause notice in the charge sheet on which a departmental inquiry took place was contrary to Article 311 of the Constitution and vitiated the subsequent order of dismissal passed against the petitioner. Mr. Gurusahani sought to rely on the decision of a single Judge of the Madras High Court in S. Manickam Vs. Superintendent of Police and Others, . In the very short judgment which was given in that case, the learned Judge referred to the portion in the charge-sheet which called upon the petitioner in that case to show cause why he "should not be dismissed from the force or otherwise punished for the gross in disciplinary conduct." and went on to say:

"At the stage of the charge, no question of punishment can arise. The fact that the proposed punishment is mentioned in the charge can only show that even before the charges were enquired into and a finding arrived at on the basis of the enquiry, the petitioner had been prejudged. On this short ground . . . . . .the order of dismissal is quahsed".

(5) Now, it has never been the case of the present petitioner that the aforesaid paragraph contained in the charge sheet framed against him showed that he had been prejudged . of that the security Officer who had framed the charge sheet. and the Assistant Security Officer who had conducted the departmental inquiry were prejudiced against him. No objection to the said paragraph in the charge sheet was taken during the departmental inquiry or in the reply to sent to him by the Security Officer after receiving the report of the inquiry from the dum of appeal which was

sent to him by the Security Officer after re-Assistant Security Officer, on in the memorandum of appeal which was submitted by the petitioner to the Chief Security Officer against the order of his dismissal. In fact such an objection has not been taken even in the present petition. Whether the petitioner was prejudged and whether the Assistant Security Officer or the Security Officer were prejudiced against him are questions of fact, and, in my view, they cannot be allowed to be agitated by the petitioner for the first time in the course of arguments. I accordingly disallowed the above contention which was sought to be advanced by Mr.Gurusahani on the basis of the aforesaid Madras decision.

(6) Even if I had allowed Mr. Gurusahani to advance the above argument. I would not have found it possible to accept it. I cannot agree that an order of dismissal passed against a Government servant is necessarily vitiated, if the charge-sheet which was sent to him prior to the departmental inquiry contained a clause calling upon him to show cause why any one of the prescribed punishments should not be awarded to him. The aforesaid Madras case is perhaps distinguishable on the ground that the relevant clause in the charge-sheet in that case had described the alleged conduct of the delinquent as "gross indisciplinary conduct". If the learned Judge who decided that case intended to lay down as a general proposition that a charge which incidentally called upon the delinquent to show cause why he should not be punished for the alleged delinquency was necessarily violative of Art 311 of the Constitution, I must with great respect, differ from that view.

(7) It was next urged by Mr. Gurusahani that the departmental inquiry conducted against the petitioner, and the subsequent proceedings resulting in his dismissal and the confirmation of his dismissal in appeal were vitiated by breaches of certain provision contained in the Railway Protection Force Rules, 1959. Clause (5) of Rule 44 provides that the Inquiring Authority may permit a member against whom an inquiry is to be held to present his case with the assistance of any other member approved by the Inquiring Authority. In the present case the petitioner had expressed his desire that one Amarnath Sharma should be allowed to assist him in cross-examining witnesses. When the inquiry against the petitioner commenced, Amarnath Sharma was not present and it is the grievance of the petitioner that he was not informed why Amarnath Sharma was absent and was given no further time to appoint some other person as his defence counsel. An affidavit in reply to the petition has been field by the Assistant Security Officer who conducted the inquiry and he has stated in the affidavit that Amarnath Sharma had been informed of the petitioner''s request for assistance, that Amarnath Sharma replied a day prior to the date fixed for the inquiry that he was not interested in defending the petitioner that the contents of this letter were explained to the petitioner at the commencement of the inquiry, and that the petitioner did not express any desire to appoint any other defence counsel, nor asked for any adjournment of the case but that, on the contrary the petitioner was ready to proceed with the inquiry and in fact cross-examined the witnesses who were examined by the Department Some, of

these averments were denied by the petitioner in his affidavit rejoinder. The statements of the Assistant Security Officer appear to the supported by the record, and, in any cause. I cannot accept the above contention of the petitioner as it involves contested questions of fact.

(8) Mr. Gurusahani then referred to clauses (9) and (11) of Rule 44 of the Railway Protection force Rules, 1959. These clauses require that the Disciplinary Authority, if he is not the Inquiring Authority, shall consider the record of the inquiry, shall record its findings on each charge, and communicate them to the delinquent. In the present case the Disciplinary Authority was the Security Officer, whereas the Inquiring Authority was the Ass. Security Officer, I have, however, no reason to hold that Cls. (9) and (11) of R.44 were not complied with by the Security Officer. In the letter dated 28th September 1961 (Ex.I to the petition). Which the Security Officer had sent to the petitioner, the Security Officer''s finding on the single charge which had been framed against the petitioner has been recorded and communicated to the petitioner.

(9) Mr. gurusahani also referred to R.58 were required the appellate authority (the Chief Security Officer in the present case) to consider whether the procedure prescribed by the rules was complied with, whether the findings were justified, and whether the penalty imposed was excessive, adequate or inadequate. I have no reason to suppose that the appellate authority in the present case did not comply with the requirements of this rule. Mr.Gurusahani argued that the appellate authority ought to have given an oral hearing to the petitioner and should have given more exhaustive reason than it has done in rejecting the petitioner''s appeal. I do not think that it was incumbent on the Chief Security Officer, as the Appellate authority in the present case, to either give an oral hearing to the petitioner or to give more detailed reasons than he has done in rejecting he petitioner''s appeal.

(10) Besides the order of dismissal the petitioner has also challenged the order passed by the Security Officer on 13th January 1961 that the petitioner be regarded as being under suspension with effect from 16th August 1960 Mr. Gurusahani argued that when the petitioner was dismissed on 16th August 1960 his previous suspension merged in the order of dismissal, and the Security Officer had no authority. When he made his order dated 13th January 1961 setting aside the order of dismissal, to direct that the petitioner shall be treated asunder suspension with retrospective effect as from 16th August 1960. Mr. Gurusahani relied on the decision of the Supreme Court in Om Prakash Gupta Vs. The State of Uttar Pradesh, where it was held that where a Government servant is suspended pending a inquiry and dismissed by way of penalty as a result of the inquiry the order of suspension lapses, and a subsequent declaration by a Court that the order of dismissal was illegal does not revive the order of suspension. Mr. Gurusahani argued that the suspension of the petitioner prior to 16th August 1960 having lapsed when the order of dismissal was passed, the subsequent order setting aside the dismissal

cannot revive the order of suspension . I agree that would have been the result in the absence of any rule to the contrarry, However, Clause 940 of Rule 40 of the Railway Protection Force Rules, 1959, specifically provides that where a penalty of dismissal is rendered void in a subsequent decision of a Court of law, and where the disciplinary Authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against the member concerned, the member shall be deemed to have been placed under suspension "from the date of the original order of dismissal" and shall continue to remain under suspension until further orders. Thus, the impugned order of the Security Officer of 13the January 1961 was in effect a reproduction of the relevant portion of clause (4) of Rule 40, and was not contrary to law.

(11) In the result, the petition fails and is dismissed with costs.

(12) Petition dismissed.