

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7390 of 2014

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1. Om Prakash Roy son of Late Sita Ram Roy, resident of mohalla- Barmasiya (Budhu Chak Road), PO, PS and District- Katihar (Bihar)

.... Petitioner/s

Versus

1. The Union of India through the Chief Secretary Commissioner/R.P.F./H.Q./N.F. RAILWAY, Maligaon (Guwahati) Assam.
2. The Sr. Divisional Security Commissioner/RPF/N.F.RAILWAY, Katihar Division, P.O.AND District- Katihar
3. The Inspector/R.P.F. Post Katihar (East), P.O. and District- Katihar (BIHAR)

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Om Prakash Roy (in person)
For Union of India : Mr. Anjani Kumar Sharma, CGC
For the Railways : Mr. Anil Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

CAV JUDGMENT

Date: 18-02-2015

Shivaji Pandey,J

Heard counsel for the petitioner and the respondents.

In the present case, petitioner is challenging the order, vide DO No. 86/Pro/2011 dated 15th September 2011 passed by the Senior Divisional Security Commissioner, RPF/NF Railway, Katihar whereby and whereunder the disciplinary authority imposed major penalty of dismissal from service with effect from 28th March 1995 on the ground of having been convicted on grave charges for offences under Sections 25(A) & 26 of the Arms Act and also for the offences under Sections 363, 366A, 376 and 422/34 of the Indian Penal Code.

The short facts of the case is that the petitioner was appointed as constable in the Railway Protection Force (in short, referred to as 'RPF') and was sent for RPF Training Centre, Domohani in the district of Jalpaiguri (West Bengal). After completion of training,



petitioner was posted at Alipurduar division at RPF Post, thereafter in Bongaigaon in the State of Assam and later on was transferred to Katihar Division and was posed as constable, RPF Post, Kumedpur in the district of Malda (West Bengal). While posted in Katihar Division, the disciplinary proceeding was initiated against the petitioner making allegation that on 28th April 1993 at about 09:55 AM to 10:00 A.M., petitioner approached the Sub-Inspector, RPF, namely Baliram Das and requested him to forward his leave application.

It appears that for some reason or the other, Baliram Das was not agreeable to forward the application, as a result of which petitioner abused him in filthy and vulgar language, including he had attempted to assault him with Lathi made with iron rod quoted with plastic.

In pursuance of the allegation, a departmental proceeding was initiated against the petitioner and the Enquiry Officer arrived to the conclusion that the petitioner had used filthy language and also attempted to assault his superior Officer, passed the order of dismissal from service and the same was upheld by the appellate authority.

The order of dismissal was challenged before the Calcutta High Court in WP No. 1758(W) of 2003 (Om Pakash Roy v. Union of India and others). The Single Bench arrived to a conclusion that the order of dismissal is shockingly disproportionate to the gravity of charge alleged against the petitioner, accordingly, set aside the order of dismissal and directed reinstatement of the petitioner with continuity of service with all consequential benefits.

The order of the Writ Court was challenged before the appellate authority in appeal vide MAT 209 of 2011 with CA No. 6010 of 2011 (Union of India v. Sri Om Prakash Roy) where the Division Bench approved the view of the Single Bench, in the matter of granting relief, directed the disciplinary authority to pass suitable order proportionate to the gravity of charges against the petitioner.

The Senior Divisional Security Commissioner, RPF, NF Railway, Katihar vide order dated 13th September 2011 directed his reinstatement along with payment of arrear of salary from 14th October 1993 till the date of reinstatement as was treated to be on duty with full consequential benefit as admissible to him, the major penalty of dismissal was modified and substituted with minor punishment of censure.

In pursuance of the order passed by the disciplinary authority, petitioner was given C-shift duty from 13:45 hrs to 21/45 hrs on the same day as per entry no.31.

On 16th September 2011 again the petitioner was given duty in B-shift from 05/45 hrs to 13/45 hrs but he was not allowed to join the duty on account of order of dismissal dated 15th September 2011 on account of having been convicted in a criminal case under the Arms Act as well as for having kidnapped and committed rape upon a minor girl, served 10 years' sentence for the aforesaid offence.

In the order it has been recorded that the petitioner was convicted on grave criminal charges, that too of heinous nature, involving moral turpitude, not practicable or expedient to hold an enquiry for there being no merit or scope left in the same.



Against the order of dismissal, petitioner filed an appeal and during the pendency of the appeal petitioner challenged the order of dismissal before this Court, vide CWJC No. 11353 of 2013 and this Court vide order dated 20th June 2013 directed the appellate authority to consider the plea of the petitioner and take a final decision expeditiously. In pursuance of the direction of this Court, vide order dated 21st August 2013, the appellate authority rejected the appeal and thereby affirmed the order of punishment passed by the disciplinary authority against the petitioner.

Petitioner appeared in person and placed his case has taken a plea that the action of the respondents is tainted with mala fide on two grounds: Firstly, the order of punishment cannot be passed retrospectively with effect from the year 1995 so much so the Officer of the RPF were asked to appear in Court by the Calcutta High Court for that, the petitioner suffered wrath of the higher Officials which resulted in imposition of punishment of dismissal on account of conviction in criminal case which has no nexus with the discharge of his official duty so much so the order has been passed without giving any notice or show cause as enshrined in the Constitution as well as the Railway Protection Act (in short, referred to as the 'Act') and the Railway protection Rules (in short, the 'Rules') framed thereunder.

In contra counsel for the Railways has challenged the submission of the petitioner and submitted that the allegation of actuation with mala fide is completely far from truth, rather the fact is that the petitioner was involved in a heinous crime of commission of rape upon a minor girl, sexually assaulted her without her consent and for that reason

the petitioner had to serve 10 years' imprisonment led to his dismissal from service and further submitted that there was no need to hold a departmental enquiry as the petitioner was convicted and sentenced in a criminal trial and relied on the judgment in the case of Union of India v. Tulsiram Patel AIR 1985 SC 1416.

Counsel for the Railway has taken a plea that the writ petition is not maintainable in view of availability of alternative forum by way of revision which has been provided under the Rules for redressal of his grievance.

Having considered the rival contention of parties, this Court is of the view that retrospective dismissal is unknown in the service jurisprudence but merely because a retrospective order of dismissal has been passed, it cannot be said that the entire order of dismissal is illegal the order is bad to the extent of retrospectivity but it will be a good order of prospectively and, as such, the order of dismissal with retrospective effect is bad in law, will operate prospectively. The matter does not end as the challenge is also for prospective portion.

It will be appropriate to examine certain provisions of the Act and the Rules: Rule 219 of the Rules provides the forum of revision against the order of the appellate court, which runs as follows:

“Rule 219(1):Revision:

219.1 An enrolled member of the Force whose appeal has been rejected by a competent authority may prefer an application for revision to the next superior authority. The powers of revision may be exercised only when, --

(a) in consequence of some material irregularity, there has been injustice or miscarriage of justice; or

(b) fresh evidence is disclosed which could not be produced or was not available at the time of passing of the impugned order. ...”

Other following provisions relate to dismissal from service.

Rule 162 of the Rules deals with the procedure to be followed in a case of criminal conviction by a criminal court. It will be relevant to quote Section 162 of the Rules which is as follows:

“Rule: 162. Procedure to be followed in case of conviction by a Criminal Court.

162.1 The Divisional Security Commissioner or the Commanding Officer shall go through the record of every case brought against an enrolled member of the Force in the Court, and shall take departmental cognizance of every Criminal case in which an enrolled member of the Force is convicted or acquitted or discharged (except when the case is false) and record on appropriate order.

162.2. Effect of imprisonment. – Every enrolled member of the Force punished with imprisonment or released on probation after

conviction for an offence implying moral turpitude, such as theft, perjury, rape, or with imprisonment exceeding one month for any other offence or for any matter specified in Section 17 shall be proceeded against for dismissal, and shall ordinarily be dismissed from service.

162.3 Effect of fine. – When an enrolled member of the Force is sentenced to fine by a Criminal Court, disciplinary authority may examine the circumstances of the case and, if necessary in the interest of the Force, draw up proceedings for dismissal.

162.4 Form of chare in such cases:

162.4.1 The charge in proceedings under sub-rules (2) and (3) shall be that the accused has been convicted, imprisoned or fined, as the case may be, for the offence concerned.

162.4.2 Without prejudice to the rights of the accused on final acquittal, such proceedings shall be taken up as soon as the first trial Court has passed orders of conviction and disposed of immediately in order to avoid the wasteful expenditure involved in allowing the enrolled member of the Force to remain under suspension.” ...

In the present case, admittedly, the petitioner has been



convicted in criminal offences which are grave in nature and also in the nature of moral turpitude as the petitioner has served the sentences for conviction under Section 376 IPC as rape having been committed by him on a minor girl. It cannot be approved by any person of civilized society, that too, for a person who is supposed to be member of disciplined force was duty bound to give protection to weaker section of the society, especially to the girls. But the question has been raised that the respondents before passing the order of termination have not followed the provisions of the Rules, as mentioned above. On forensic examination of Rule 162.2 of the Rules, provides that every enrolled member of the Force punished with imprisonment or released on probation after conviction for an offence implying moral turpitude, such as theft, perjury, rape, or with imprisonment exceeding one month for any other offence or for any matter specified in Section 17 shall be proceeded against for dismissal, and shall ordinarily be dismissed from service.

Rule 162.4.1 provides that the charge in proceedings under sub-rules(2) and (3) shall be that the accused has been convicted, imprisoned or fined, as the case may be, for the offence concerned and Rule 162.4.2 provides that without prejudice to the rights of the accused on final acquittal, such proceedings shall be taken up as soon as the first trial Court has passed orders of conviction and disposed of immediately in order to avoid the wasteful expenditure.

The question in the present case arises as to whether it was the duty of the disciplinary authority before passing the order of dismissal to give a show cause notice on account of his conviction in a criminal trial. It will be prudent to examine earlier judgments touching

the issue raised in the present case.

In a similar matter in the case of Divisional Personnel Officer v. T.R...Chellappan, reported in (1976)3 SCC 190 while interpreting Rule 14(i) of the Railway Servants (Discipline and Appeal) Rules, 1968, the Hon'ble Supreme Court held that the disciplinary authority after considering the case can impose penalty on a Government servant on a conduct which led to his conviction on criminal charge. The Hon'ble Court while interpreting the Article 311(2) of the Constitution of India and its proviso provided that no person can be dismissed, removed or reduced in rank, except after the enquiry in which he has been informed the charge against him and will be given reasonable opportunity of being heard will not be required to be followed where the person is dismissed or removed or reduced in rank on the ground of conviction in a criminal offence.

The Court interpreting Article 311(2)(a) held that the constitutional scheme guarantees protection three stages in the departmental enquiry before passing the order of dismissal or removal or reduction in rank.

In addition, proviso (a) to Article 311(2) of the Constitution of India dispenses with granting of protection of three stages of departmental enquiry, when an employee is convicted on a criminal offence. The reason for addition of proviso is that in a criminal trial the employee has already enjoyed full and complete opportunity to contest the allegation leveled against him and to make out his defence. In a criminal case, charges are framed to give clear notice regarding the allegation made against the accused persons, secondly, the witnesses are

examined and cross-examined in his presence and thirdly, the accused is given full opportunity to produce his defence and it is only after hearing the argument, the Court passes the final order of conviction or acquittal.

In these circumstances, after conviction by a court, if fresh departmental enquiry is not dispensed with, it will lead to unnecessary wastage of time and expenses and fruitless duplication of the said proceeding all over again. It will be relevant to quote Para 9 from T.R.Chellappan case(supra) as follows:

"Para-9. In the instant case we are concerned only with clause (i) of Rule 14 of the Rules of 1968 which runs thus:

"Notwithstanding anything contained in Rules 9 to 13:

(1) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

The word 'penalty' imposed on a railway servant, in our opinion, does not refer to a sentence awarded by the court to



the accused on his conviction, but though not happily worded it merely indicates the nature of the penalty imposable by the disciplinary authority if the delinquent employee has been found guilty of conduct which has led to his conviction on a criminal charge. Rule 14 of the Rules of 1968 appears in Part IV which expressly contains the procedure for imposing penalties. Furthermore, Rule 14 itself refers to Rules 9 to 13 which contain the entire procedure for holding a departmental inquiry. Rule 6 of Part III gives the details regarding the major and minor penalties. Finally Rule 14(i) merely seeks to incorporate the principle contained in proviso (a) to Article 311(2) of the Constitution which runs thus:

“(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such

penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry:

Provided that this clause shall not apply—

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge.”

An analysis of the provisions of Article 311(2)(a) extracted above would clearly show that this constitutional guarantee contemplates three stages of departmental inquiry before an order of dismissal, removal or reduction can be passed, namely, (i) that on receipt of a complaint against a delinquent employee charges should be framed against him and a departmental inquiry should be held against him in his presence; (ii) that after the report of the departmental inquiry is received, the appointing authority must come to a tentative conclusion regarding the penalty to be imposed on the delinquent



employee; and (iii) that before actually imposing the penalty a final notice to the delinquent employee should be given to show cause why the penalty proposed against him be not imposed on him. Proviso (a) to Article 311(2), however, completely dispenses with all the three stages of departmental inquiry when an employee is convicted on a criminal charge. The reason for the proviso is that in a criminal trial the employee has already had a full and complete opportunity to contest the allegations against him and to make out his defence. In the criminal trial charges are framed to give clear notice regarding the allegations made against the accused, secondly, the witnesses are examined and cross-examined in his presence and by him; and thirdly, the accused is given full opportunity to produce his defence and it is only after hearing the arguments that the Court passes the final order of conviction or acquittal. In these circumstances, therefore, if after conviction by the Court a fresh departmental inquiry is not dispensed with,



it will lead to unnecessary waste of time and expense and a fruitless duplication of the same proceedings all over again. It was for this reason that the founders of the Constitution thought that where once a delinquent employee has been convicted of a criminal offence that should be treated as a sufficient proof of his misconduct and the disciplinary authority may be given the discretion to impose the penalties referred to in Article 311(3), namely, dismissal, removal or reduction in rank. It appears to us that proviso (a) to Article 311(2) is merely an enabling provision and it does not enjoin or confer a mandatory duty on the disciplinary authority to pass an order of dismissal, removal or reduction in rank the moment an employee is convicted. This matter is left completely to the discretion of the disciplinary authority and the only reservation made is that departmental inquiry contemplated by this provision as also by the Departmental Rules is dispensed with. In these circumstances, therefore, we think that Rule 14(i) of the Rules of 1968



only incorporates the principles, enshrined in proviso (a) to Article 311(2) of the Constitution. The words "where any penalty is imposed" in Rule 14(i) should actually be read as "where any penalty is imposable", because so far as the disciplinary authority is concerned it cannot impose a sentence. It could only impose a penalty on the basis of the conviction and sentence passed against the delinquent employee by a competent court. Furthermore the rule empowering the disciplinary authority to consider circumstances of the case and make such orders as it deems fit clearly indicates that it is open to the disciplinary authority to impose any penalty as it likes. In this sense, therefore, the word "penalty" used in Rule 14(i) of the Rules of 1968 is relatable to the penalties to be imposed under the Rules rather than a penalty given by a criminal court.

In the case of Union of India v. Sunil Kumar Sarkar (2001)3 SCC 414 the Hon'ble Supreme Court was also considering the effect of conviction and sentence of an employee in a criminal trial. The Court has held that only summary procedure is required to be taken



against a Government servant who is already convicted in a criminal proceeding. Only it is required under Rule 19 of the Central Civil Services (Classification, Control and Appeal) Rules 1965 (for short, 'CCA Rules') to give a show cause notice and reply to show cause notice, if any, should be properly considered before passing any order of punishment and while passing the order, it has to be kept in mind the gravity of charge and conviction suffered by the Government servant in a criminal proceeding. It is relevant to quote Para-8 of the judgment which is as follows:

Para- 8. The Division Bench also found fault with the order of dismissal passed by the disciplinary authority on the ground that the same was solely based on the conviction suffered by the respondent in the court-martial proceedings. The Court in this regard held that the disciplinary authority had a predetermined mind when he passed the order of dismissal. Here again, in our opinion, the Division Bench did not take into consideration Rule 19 of the Central Rules which contemplates that if any penalty is imposed on a government servant on his conviction in a criminal charge, the disciplinary authority can make such order as it deems fit (dismissal from service is one



such order contemplated under Rule 19) on initiating disciplinary proceedings and after giving the delinquent officer an opportunity of making a representation on the penalty proposed to be imposed. As a matter of fact, this type of disciplinary procedure is contemplated in the Constitution itself as could be seen in Article 311(2)(a). Rule 19 of the Central Rules is in conformity with the above provisions of the Constitution. This, as we see, is a summary procedure provided to take disciplinary action against a government servant who is already convicted in a criminal proceeding. The very foundation of imposing punishment under Rule 19 is that there should be a prior conviction on a criminal charge. Therefore, the question of having a predetermined mind does not arise in such cases. All that a disciplinary authority is expected to do under Rule 19 is to be satisfied that the officer concerned has been convicted of a criminal charge and has been given a show-cause notice and reply to such show-cause notice, if any, should be properly considered



before making any order under this Rule. Of course, it will have to bear in mind the gravity of the conviction suffered by the government servant in the criminal proceedings before passing any order under Rule 19 to maintain the proportionality of punishment. In the instant case, the disciplinary authority has followed the procedure laid down in Rule 19, hence, we cannot agree with the Division Bench that the said disciplinary authority had any predetermined mind when it passed the order of dismissal.

The Hon'ble Supreme Court was considering somewhat similar issue in the case of *State of M.P. v. Hazarilal*, reported in (2008)3 SCC 273 in which after the conviction in criminal trial show cause notice was issued to the employee concerned as to why the disciplinary action should not be taken against him, in view of the judgment of conviction passed against him in a criminal case. Thereafter his services were terminated. The Court has held that the disciplinary authority while exercising the power is bound to take into consideration all the attending facts and circumstances of the case before imposing a penalty. While exercising such power, the disciplinary authority must act reasonably and fairly. It is relevant to quote Para-9 and 10 of the judgment which are as follows:



Para 9. The Tribunal, in our opinion, rightly placed reliance upon the decision of this Court in *Shankar Dass v. Union of India*¹ wherein this Court commended the judgment of a Magistrate of Delhi as he had let off the appellant therein under Section 12 of the Probation of Offenders Act stating: (SCC p. 361, para 6)

"Misfortune dogged the accused for about a year ... and it seems that it was under the force of adverse circumstances that he held back the money in question. Shankar Dass is a middle-aged man and it is obvious that it was under compelling circumstances that he could not deposit the money in question in time. He is not a previous convict. Having regard to the circumstances of the case, I am of the opinion that he should be dealt with under the Probation of Offenders Act, 1958."

Para 10. Despite the said observation Shankar Dass was dismissed from service. This Court held: (SCC p. 362, para 7)

"7. It is to be lamented that despite these observations of the



learned Magistrate, the Government chose to dismiss the appellant in a huff, without applying its mind to the penalty which could appropriately be imposed upon him insofar as his service career was concerned. Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the Government the power to dismiss a person from service 'on the ground of conduct which has led to his conviction on a criminal charge'. But, that power, like every other power, has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may, perhaps, not be entitled to be heard on the question of penalty since Clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a



government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly. Considering the facts of this case, there can be no two opinions that the penalty of dismissal from service imposed upon the appellant is whimsical."

What will be the moral turpitude, has been considered in the case of Sunil Kumar Singhal v. Punjab National Bank, reported in (2010)8 SCC 573. There a cash of Rs.5,000/- (five thousand) was handed over to deposit the same as due for the Telephone Bill in the post Office but he did not do so. In a criminal trial conviction was recorded but was given the benefit under the Probation of Offenders' Act. Claim was made for reinstatement, the Hon'ble Supreme Court had occasion to determine which conduct constitutes moral turpitude means any action contrary to honesty, modesty or good moral. It is relevant to quote Para-25 of the judgment which is as follows:

"Para-25: In view of the above, it is evident that moral turpitude means anything contrary to honesty, modesty or good morals. It means vileness and depravity. In fact, the conviction of a person in a crime involving moral turpitude impeaches his credibility as he has been found to have indulged in shameful,

wicked and base activities.”

In the present case, the petitioner has been dismissed from service on the ground of having been convicted in a criminal trial for the offence under the Arms Act as well as under the Indian Penal Code for committing rape upon a minor girl. The Service Rules provides that an employee having been convicted in a criminal trial, specially in a case of rape and defalcation of money is an act of immorality, shall be dismissed ordinarily from service.

On minute examination of rules 162.2, 162.3 and 162.4 of the Rules, it appears that the disciplinary authority, after conviction in criminal trial shall proceed against the delinquent for dismissal but 162.4 provides the head –form of charge, in such cases. The charge shall be that the accused has been convicted, imprisoned or fined, as the case may be for the offence concerned 162.4.2 provides earliest action on conviction in criminal trial. So tentatively it gives a meaning that the disciplinary authority before passing a final order in pursuance of the conviction was required to give a notice of show cause and ask him explanation about his conviction in the criminal trial but in the present case, no explanation of show cause has been asked from the petitioner. The ground that has been shown is that it was not reasonable, practicable nor expedient to hold an enquiry. This Court feels that the opinion record by the disciplinary authority is without any foundational fact as to why it was not possible, practicable and expedient to hold an enquiry when the petitioner had joined a day before and on the next day he was dismissed from service the ground shown to dispense with enquiry does not appear to reasonable and proper.

But in the present case, when admittedly, petitioner has been convicted and served 10 years' imprisonment for offence, admittedly heinous, outrageous to conscience act constitutes, suffers from moral turpitude, remand of matter to disciplinary authority asking him to give show cause notice will not serve any purpose, as it will be a useless formality, nothing else.

In such view of the matter, the order of dismissal with retrospective effect is illegal, but will remain in operation prospectively. Hence, in the result, the petitioner is entitled to salary from 14th October 1993 upto 15th September 2011.

Alternative remedy is not a bar but is a self-imposed restriction to the Court. As the petitioner is conducting his case by himself, it will be travesty of justice to ask him to first exhaust the revisional forum and then to approach this Court.

Accordingly, his petition is partly dismissed and partly allowed with the above observation/directions.

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(Shivaji Pandey, J)