

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

HON'BLE JUSTICE SUBRATA TALUKDAR
AND
HON'BLE JUSTICE ANIRUDDHA ROY

M.A.T. 1537 of 2016
With
CAN 1 of 2018 (OLD No. 8072 of 2018)
With
CAN 2 of 2018 (OLD No. 8073 of 2018)

Sudarshan Kolya
-Vs.-
The State of West Bengal & Ors.

For the Appellant	: Mr. Soumya Mazumder Mr. S.S. Mondal
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For the Respondent/SBSTC	: Mr. Ayan Banerjee Mr. Arindam Chatterjee Ms. Debasree Dhamali
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For the State-respondents	: Mr. Srijan Nayak Mrs. Rituparna Maitra
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Heard on	: 15/12/2020
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Judgment on	: 11/03/2021
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Subrata Talukdar, J:

The appellant, who was the writ petitioner before the Hon'ble Single Bench, challenges the order dated 14th June, 2016 whereby the Hon'ble Single Bench was pleased to uphold the order of removal passed by the Disciplinary Authority (DA) against the appellant. The

genesis of the Disciplinary Proceeding (*DP*) lay in the two-fold charges against the appellant of unauthorised absence from his duties and causing loss to his employer due to such unauthorised absence.

The appellant/ writ petitioner was a bus conductor with the South Bengal State Transport Corporation (*SBSTC*). In 2011 the appellant was charged with absenting himself from duties for the period 10th June 2011 to August 2011 amounting to a total of seventy days. The appellant was also charged with causing loss to the *SBSTC* on account of such unauthorised absence.

It is an admitted fact that the charge-sheet was sought to be served on the appellant without success. The charge-sheet could be ultimately served to the appellant through his wife.

It is a further admitted position that the appellant did not participate in the *DP*. Notice of the *DP* had to be, therefore, published by the *SBSTC* in a local newspaper. The appellant, being continuously absent in the *DP* inspite of paper publication (*supra*), the *DP* was concluded *ex parte*.

Upon closure of the *DP*, the *DA* passed the order of removal against the appellant. The order of removal again could not be served upon the appellant inspite of the *DA* adopting three modes of service, viz. postal, by e-mail and by mobile messaging. Ultimately, the *DA* issued the final order of punishment in 2012.

Mr. Majumdar, Ld. Counsel appearing for the appellant, submits that the appellant was facing a criminal charge at the relevant point of time. Mr. Majumdar primarily argues that assuming that the charge against the appellant of unauthorised absence stands proved in the *DP*, the punishment of removal imposed upon the appellant is shockingly disproportionate. It is submitted that the *DA* has not brought the charge of *habitual absence* of the appellant from his duties. The appellant was only absent for seventy days in service spanning eleven years. It is argued that the non-participation of the appellant in the *DP* does not pave the way for the *DA* to automatically pass a final order of punishment which is disproportionate to the charge of absence not, *habitual absence*.

Mr. Majumdar next argues that the charge of causing loss to *SBSTC* is vague. The quantum of loss is not specified. It is unbelievable and, equally unreasonable to presume, that the appellant could cause a financial loss so colossal to his employer for being absent for just seventy days, thereby warranting the penalty of removal from service.

Referring to the order of the *DA*, Ld. Counsel for the appellant submits that the reasons specified in the said order are wholly extraneous to the charge-sheet. The *DA* has travelled beyond the charge-sheet by, *inter alia*, even holding that the appellant is not dependant on his salary for his livelihood. Ld. Counsel points out that it was the duty of the *DA* to stick to the charges in the charge-sheet

which is one of *absence*, not *habitual absence* and loss, which has not been quantified.

Mr. Majumdar submits that soon after obtaining bail in the criminal proceedings, the appellant approached the DA with a representation to reconsider the punishment of removal. The DA did not respond to such representation, thereby compelling the appellant to file the statutory appeal before the Appellate Authority (AA). The said appeal is still pending with the AA.

Next, Ld. Counsel for the appellant submits that the relevant rule empowering the DA to initiate a *DP qua* the charges against him is Rule 25(4) of the Service Rules, 2017 (for short 'SR 2017'). However, a bare perusal of Rule 25(4) of SR 2017 would show that the same does not contemplate any action in a *DP* connected to absence from duty or, causing loss. It is submitted that the charges as framed under Rules 25(1), (2), (3) and (5) of SR 2017 do not correspond to the Articles of Charges in the Charge-Sheet.

Referring to the order impugned in this appeal passed by the Hon'ble Single Bench, Mr. Majumdar submits that the Hon'ble Single Bench has acted in excess and, therefore, in arbitrary exercise of jurisdiction by travelling beyond the Charge-Sheet and the moot issues arising therefrom in the *DP*. It is submitted that the Hon'ble Single Bench took notice of the conduct of the appellant post his removal which was not the subject matter of the Charge-Sheet. Even assuming that the charges were proved in the absence of any defence

placed by the appellant, the charge of absence for seventy days only could not culminate in a punishment of removal.

In respect of his arguments Mr. Majumdar relies upon the following authorities: *2001 7 SCC 503, 2007 15 SCC 759, 1996 2 LLN 645, 2009 7 SCC 301 and AIR 2003 SC 3909.*

Per contra, Mr. Banerjee, Ld. Counsel appearing for *SBSTC*, submits that there is no ambiguity in the charge-sheet. It is submitted that the petitioner was proceeded against in the *DP* and punishment was imposed following the *SR* of 2011, which was the applicable *SR* corresponding to the period of the *DP*. Producing a copy of *SR* 2011, Mr. Banerjee points out that Rule 25(3) of the said *SR* 2011 specifically provided for a *DP* in cases of unauthorised absence. Rule 25(3) of *SR* 2011 has been replaced by Rule 25(4) of the *SR* as amended in 2017. It is therefore submitted that the *SR* of 2017 shall have no manner of application to the appellant, who shall be purely governed by the *SR* of 2011. It is thus, reiterated by Mr. Banerjee that the charges were correctly framed.

Next, Ld. Counsel for the *SBSTC* submits that the writ petition itself was not maintainable due to the long delay in filing the same. It is submitted that the writ petition was filed in 2015 after a delay of nearly three years following the order of punishment passed in the year 2012. The appellant also delayed considerably before approaching the *AA* with his appeal. Therefore, the delay on the part

of the appellant in seeking relief, assuming that he had a right to do so, defeats the reliefs claimed by him.

It is further submitted that the *DA* was required to take a holistic approach *qua* the charges framed against the appellant. The initiation of the *DP* with service of copy of the charge-sheet upon the wife of the appellant cast a duty on the appellant to immediately inform the *DA* of his position arising out of the pending criminal charge. However, the appellant chose to play truant in the *DP* and, such factors could not have been ignored by the *DA* while weighing in the quantum of punishment.

The newspaper publication of the proceedings in the *DP* tantamount to a declaration to the public at large that the appellant was subject to a *DP*. Pursuant to such public notice, the deliberate non-appearance of the appellant in the *DP* was also a factor in considering whether the appellant continued to enjoy the confidence of his employer. The pretext of avoiding the *DP* on the ground of pendency of a criminal charge, when law permits both criminal and departmental proceedings to proceed on their own respective merits, more so when charges in either are different, render the order of removal justified.

Mr. Banerjee submits that mere reliance on the technicality of the charges, viz. unauthorised absence and causing loss to his employer, would not operate as mitigating factors in the assessment of the final order of punishment of removal. It is pointed out that the

appellant was rightly proceeded against and rightly punished. The Hon'ble Single Bench correctly took notice of the entire facts and circumstances while upholding the order of removal. In respect of his aforesaid contentions Mr. Banerjee relies upon the following authorities: 1995 4 SCC 683 and 1997 2 SCC 617.

Ld. State Counsel, Mr. Nayek, adopts the stand taken by Mr. Banerjee.

In the backdrop of the above discussion, the attention of this Court is drawn to certain salient facts. It is an admitted position that the criminal case was initiated against the present appellant on 6th of June 2011. The appellant was alleged to be on unauthorised leave from 10th of June 2011 to 16th of August 2011. Ultimately, charge sheet was issued against the present appellant on the 20th of August 2011 and the dates fixed for enquiry.

It is a matter of record that the charge sheet could not be served on the appellant and could be ultimately served on his wife in his absence. Presumably, the appellant went underground with the start of the criminal case against him on the 6th of June 2011. The appellant surfaced only after he had obtained bail in 2015, i.e. four years after the initiation of the *DP* by the filing of the charge sheet on 20th of August 2011.

Due to the continued absence of the appellant the *DP* was completed *ex parte* on 15th of November 2011. The report of the Enquiry Officer (*EO*) was finalized on 20th of November 2011.

Yet again the appellant/ the Charged Officer (CO) was not present to receive the report. Therefore, the Report had to be despatched to the appellant on the 22nd of November 2011. Since the appellant yet failed to receive the Report of the EO which was despatched to him, it became necessary to have a paper publication of the said report on 29th of March 2012.

Following the newspaper publication of the report of the EO in the DP on 29th of March 2012, the appellant submitted a reply to the DA on 7th of April 2012. In his reply the appellant stated that he has been unwell since the 10th of June 2011, i.e. the starting period of his first alleged unauthorised leave.

The appellant wrote a second letter to the DA on the 2nd of May 2012 reiterating that he has been unwell from 10th of June 2011 to 23rd of April 2012. In support of his claim of being unwell, the appellant submitted a Doctor's Certificate.

The final order of punishment was thereafter passed on the 19th of May 2012.

It is again a matter of record that the prayer of the appellant for anticipatory bail was rejected on the 15th of July 2013. On the 2nd of September 2014 the prayer for anticipatory bail of the appellant was also rejected by the Hon'ble Apex Court. Therefore, although the appellant was not in custody in connection with the criminal case during this period, i.e. during the period of the DP, commencing with the issue of the charge sheet on 20th of August 2011 till the final order of punishment dated 19th of May 2012, no steps were taken by the

appellant to apprise his *DA* of his true state of affairs. Considering that the appellant claims to have been unwell starting with the period when the *DP* was in process, his claim to illness stands grossly unsubstantiated.

It is again a matter of record that the appellant, after rejection of his prayer for anticipatory bail by the Hon'ble Apex Court, surrendered on 14th of November 2014 and was taken into custody. The appellant was ultimately released on bail and thereafter filed a representation before the Managing Director, *SBSTC* on the 20th of July 2015. The second representation was thereafter filed on the 6th of August 2015 followed by a third on the 17th of December 2015. In his representation dated 6th of August 2015 the appellant has, *inter alia*, stated as follows:-

*"To
The Managing Director
South Bengal State Transport Corporation
Dr. B.C. Roy Avenue
P.O.-Durgapur
Dist- Burdwan
Pin- 713201*

*Prayer for reinstating me as conductor in
S.B.S.T.C.*

.....

6. That it may be mentioned herein that notice of enquiry and enquiry report could not be served upon me due to my absence in my residential house and for such absence notice was published in newspaper.

7. That thereafter I sent a regretted letter for my uncommuniacion in the matter of my absence from duty.

8. That ultimately I had to surrender before the court in connection with the aforesaid

Anandpur P.S. case No- 36/2011 and after detention from some period I was granted bail.

9. That actually I was absent from my duty from 10.06.2011 and onwards for the above reason being false implication of mine in the aforesaid criminal case.

10. That on the basis of the aforesaid enquiry report submitted by the Enquiry Officer on order removing me from service of SBSTC with effect from 19.05.2012 has been passed by Divisional Manager, Durgapur Division, SBSTC vide his office memo No - 1123/SBSTC/12 dated 19.05.2012.

11. That my absence from my duty as conductor in SBSTC was not intentional one and under compulsion I had to remain absent from my service and the circumstances was beyond my control.

.....

*Yours faithfully
Sudarson Kolya
Conductor T6 3312
6/8/2015"*

From the above statements, it shall be palpably clear that the original stand of the appellant when the *DP* commenced citing illness as the reason for his leave is *ex facie* false. The appellant clearly admits in his representation (*supra*) that in spite of having knowledge of the *DP*, he was prevented by reason of the pending criminal case from participating in the *DP*. It is therefore obvious that the appellant has taken a different stand at different points of time to suit his convenience. As a consequence his *DA* had to shoulder the responsibility of sending notice of the charge-sheet to the appellant and the charge-sheet was received by his wife. Thereafter the *DA* had to also cause paper publication of the Report of the *EO*.

It is also found from the records that the appellant, although having received the privilege of bail on the 14th of November 2014, waited for nearly one year before making his first representation to the MD, SBSTC on 20th of July 2015. Once again, the order terminating his service which was passed on the 19th of May 2012 was challenged by way of this writ petition by the appellant around six months short of four years on the 25th of January 2016.

Taking judicial notice of the above referred facts, not only this Court finds the appellant culpable of misrepresentation to his DA by feigning illness but, also finds unexplained delay in seeking a remedy in the pending DP. There is no mitigating circumstance pointed out by the appellant justifying his non-participation in the DP. Nor has the appellant been able to justify his truant conduct in the DP and the large time lags in between his approach to the authority and subsequently before the judicial forum.

Nearly four years after the institution of the DP, the appellant for the first time tried to bring the facts connected to the criminal case before his former employer on 20th of July 2015. There is, therefore, a long hiatus between the date of issue of the charge-sheet on 20th of August 2011 and the first authentic representation of the appellant on the 20th of July 2015. There is no material to show that during this period of nearly four years from 2011 to 2015, except for the brief period of his custody prior to release on bail, there were a chain of adverse circumstances which justified the truant conduct of the appellant *qua* his DA.

This Court accordingly finds that the appellant has been unable to disclose any mitigating circumstance to prove that the penalty of removal as imposed against him was disproportionate. As noticed by the Hon'ble Apex Court in *Mithilesh Singh Vs. Union of India and Ors.* reported in **2003 3) SCC 309** at Paragraph 10:-

“10.it is for the employee concerned to show how the penalty was disproportionate to the proved charges. No mitigating circumstances has been placed by the appellant to show as to how the punishment could be characterized as disproportionate and so called shocking.”

To the mind of this Court, misrepresentation of the appellant feigning illness during the subsistence of the *DP* and his failure to apprise the *DA* of the correct state of affairs discloses not only a lack of mitigating circumstances but also a conduct of playing deliberately truant with his *DA*. This Court cannot miss the fact that ultimately the *DA* was compelled to publicly advertise its Report on the *DP* in a newspaper prompting the appellant to respond. The public advertisement, undoubtedly necessitated by the continuing truancy displayed by the appellant/ the *CO* throughout in the *DP*, implies a strong message of loss of confidence in its employee/ the appellant by his employer/ the *SBSTC*.

Before parting with this discussion, this Court also finds that the opening earnestness in the arguments of Mr. Mazumdar, Ld. Counsel for the appellant, on non-framing of the charge-sheet

correctly, such argument deserves to be thrown out at the threshold in view of the admitted applicability of *SR 2011* in contradistinction to *SR 2017*.

For the above reasons, ***M.A.T. 1537 of 2016*** with ***CAN 1 of 2018 (OLD No. 8072 of 2018)*** and ***CAN 2 of 2018 (OLD No. 8073 of 2018)*** stand **dismissed**.

There will be however, no order as to costs.

Parties are permitted to act on a server copy of this order downloaded from the official website or this Court.

Urgent Xerox certified photocopies of this judgement, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Aniruddha Roy, J.)

(Subrata Talukdar, J.)