

In The High Court At Calcutta
Civil Appellate Jurisdiction

Present:

The Hon'ble Justice Harish Tandon.
&
The Hon'ble Justice Prasenjit Biswas

W.P.C.T. 65 of 2022

Union of India & Ors.
v.
Shri J. Sanmukh Rao.

For the Petitioners : Mr. Ashok Chakraborty, Ld. A.S.G.,
Mr. Anirban Mitra.

For the Respondent. : Mr. P. C. Das,
Mr. S. Ganguli.

Heard on : December 14, 2022.

Judgment on : December 14, 2022.

The Court:- The Union of India have filed the instant writ petition assailing the judgement and order dated 9th November, 2021 passed by the Central Administrative Tribunal, Kolkata Bench in OA 817 of 2021, wherein the charge sheet issued by the authority was quashed and liberty was granted to the petitioner to act in accordance with law.

Mr. Mitra, learned Advocate appearing for the petitioners, submits that during consultation with his client he was informed that in a spate of litigation before this Court concerning identical and similar circumstances, some of the respondents have died though he was unable to disclose the name. When the instant writ petition is taken up, we invited attention of the learned Advocate appearing for the respondent whether the respondent is alive and we are informed by the said learned Advocate with an authority to his command that his client is alive. Believing such statement to be true we proceeded to hear the instant writ petition. It would be profitable and relevant to adumbrate the undisputed facts discerned from the record.

Admittedly the respondent was under employment of the Railways and the statement of charges was issued upon him on 14th March, 2014 alleging misconduct in course of his service during the year 2010-2011. The said statement of charges/article of charges was challenged by the respondent herein before the Central Administrative Tribunal in OA 1588 of 2015. The said tribunal application remained pending until 5th February, 2020, when the Tribunal directed the authorities to take a decision on the basis of the points raised by the respondent by filing a representation.

By a speaking order dated 26th February, 2021 the authority found that the said statement of charges/article of charges dated 14th March, 2014 is not in conformity with the Rules and cancelled the same by making certain observations, which would be dealt with later on. Subsequently a fresh article of charges/statement of charges is issued upon the respondent on 25th February, 2021, which is further challenged in OA 871 of 2021, and disposed of by the impugned order.

It would be relevant to note that the respondent attained superannuation with effect from 31st March, 2016. The Tribunal quashed

and set aside the said statement of charges/article of charges being contrary to Rule 9 of the Railway Services (Pension) Rules, 1993 promulgated by the President in exercise of power under Article 309 of the Constitution of India. There is no ambiguity that the said Rule has a statutory force and its applicability cannot be denied.

Mr. Mitra, learned Advocate appearing for the Union of India, submits that Rule 9 of the said Rules contemplate the situation where the disciplinary proceeding may be instituted after the retirement, as the article of charges was quashed on a technical aspect. He further submits that the article of charges issued on 25th February, 2021 is in effect in continuance of the first article of charges dated 14th March, 2014, which would further be found from the observations made by the authority in the speaking order dated 26th February, 2021. He, thus, submits that the Tribunal has wrongly interpreted and misconstrued the provisions contained in Rule 9 of the said Rules and, therefore, the impugned order is liable to be quashed and set aside. It is further submitted that the respondent should be treated under deemed suspension between the period 31st January, 2014 till 31st March, 2016, i.e. the date of dismissal from service and the date of retirement respectively and, therefore, the Rule 9(2)(b) of the said Rules has no manner of application.

On the other hand, the respondent submits that the incident alleged by the authority in the first statement of charges and the initiation of the disciplinary proceeding relates to the year 2010-2011 and the moment the said proceeding was quashed and there was no de novo trial on the basis of the same article of charges, the subsequent statement of charges issued by the authority is a fresh proceeding and, therefore, the case squarely comes within the ambit of the aforesaid provision.

Mr. Das further submits that once an embargo is created in the statutory Rule, the authority cannot act contrary thereto nor in derogation of the aforesaid provisions. It is thus submitted that the Tribunal has rightly observed that the second statement of charges / article of charges is hit by Rule 9(2)(b) of the said Rules and, therefore, cannot withstand.

On the conspectus of the aforesaid facts fundamentally we do not find any distinction in the language employed under Rule 9 of the said Rules. The said Rule is explanatory and exhaustive and imbibes within itself all the conceivable situations that may arise in course of service of the railway servant. The said Rule 9 is quoted as under:

“9. Right of the President to withhold or withdraw pension.

(1) The President reserves to himself the right of with holding or withdrawing a pension or gratuity, or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Railway, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement;

Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees three thousand five hundred per mensem.

(2) The departmental proceedings referred to in sub-rue (1) -

(a) if instituted while the railway servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the railway servant, be deemed to be proceeding under

this rule and shall be continued and concluded by the authority by which they commenced in the same manner as if the railway servant had continued in service.

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President;

(b) if not institute while the railway servant was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with the sanction of the President;

(ii) shall not be in respect of any event which took place more than four years before such institution; and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which and order in relation to the railway servant during his service.

(3) In the case of a railway servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule 96 shall be sanctioned.

(4) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a railway servant.

(5) For the purpose of this rule -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognisance, is made; and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.”

The aforesaid provisions relate to the right of the President to withhold or withdraw the pension and other retiral benefits either wholly or in part or permanently or for a specified period or may recover any pecuniary loss because of the misconduct of a railway servant during his period of service or if he is re-employed then within the period of re-employment.

Sub-Rule (1) is of no consequence, as it relates to the power bestowed upon the President to do certain things in the event the railway servant is found guilty of his misconduct or negligence during the period of service. However, Sub-Rule (2) assumes importance and to be significantly seen on interpretation and applicability of the clauses incorporated therein.

According to the Union of India, the case falls within the situation contemplated in clause (a) of Sub-Rule (2) of Rule 9 of the said Rules; on the other hand, the respondent contends that the case squarely come within the ambit of clause (b) of Sub-Rule (2) of Rule 9 of the said Rules. Sub-Rule 9 engulfs within itself two eventualities; clause (a) reflects one eventuality where the departmental proceeding is instituted against a railway servant while he is in service. The same shall not perish or automatically cease on attainment of age of superannuation, but may be continued treating the railway servant to be in service. However, the proviso inserted thereto mandates that when such departmental

proceeding was instituted by an authority subordinate to the President, the report in this regard is to be submitted by such authority to the President for taking a decision thereupon.

Admittedly the first statement of charges was issued on 14th March, 2014 culminating into an order of dismissal, which was challenged before the Tribunal in OA 1585 of 2015. The said tribunal application was disposed of on 5th February, 2021 directing the authority to take a decision keeping all the points open to be decided by such authority; and by a speaking order dated 28th June, 2021 the authority decided to cancel the said article of charges leading to a termination and decided to issue a fresh article of charges and contemplated to initiate a proceeding.

The second article of charges is the resultant effect of the speaking order dated 26th February, 2021, which is further challenged before the Tribunal and by virtue of the impugned order the same is quashed and set aside.

The question begging answer whether the cancellation of first article of charges / statement of charges by an authority and issuance of fresh statement of charges / article of charges though on the same incident of misconduct can be regarded as a continuance of the proceeding by applying doctrine of relation back.

According to the Union of India, the authority while passing the speaking order dated 26th February, 2021 was conscious of such situation and made certain observations, which would indicate that the fresh article of charges / statement of charges was intended to be continuance of the earlier proceeding and, therefore, there is no infirmity or illegality in the

decision. It is profitable to quote the speaking order dated 26th February, 2021, which runs as under:

“A Major Penalty Charge Sheet was issued against Shri J. Sanmukh Rao, the then DMS of DLS/KGP due to shortage of Rly Materials to the tune of Rs.12,69,729/-.

On finalization of the DAR proceedings the Disciplinary Authority i.e. Dy. C.M.M/GSD/KGP had imposed following penalty against him.

(a) The penalty of recovering 50% of loss suffered by the Rly. i.e. Rs. 6,34,865/-

(b) Dismissal from Services with immediate effect without granting compassionate allowance and DCRG.

I have gone through the entire proceedings carefully along with the report of the fact finding committee.

After applying my mind without prejudice and bias, I find that there are some serious/Major lacuna/infirmity was done during the issuing Charge Sheet to proceedings, which violates the fundamental Rules as circulated under the Rly Bd's letter No. E(D&A) 63 RG-16 dt.23.12.68 (read with letter dt. 23.05.69), which speaks as “Authority who has acted as a member of a fact finding committee, should not act as Disciplinary Authority because the charged employee would apprehend that the officer having expressed earlier an opinion would not as a Disciplinary Authority, depart from his own earlier findings. He may not thus get justice”.

But in the instant case Dy. C.M.M. / GSD / KGP was a member of the fact finding committee and Disciplinary Authority also.

It is also observed that in the instant case departmental enquiry was conducted by three Asst Rank Officers though fact finding committee was constituted by three J.A. Grade Officers which violates

the Rly Bd's instruction Vide letter No: E(D&A) 62 RG 6-19 circulated under Estt Srl No. 38/2003, which speaks as where the departmental enquiry was held by an Officer of a status lower than the one who has conducted the fact finding enquiry, there was a possibility of the Enquiry Officer being influenced by the findings of the Superior Authority.

However having consider all aspect of the case, I, the undersigned in exercise of power conferred under RS D&A rule 1968 and in the capacity of the competent authority do hereby cancel the entire proceeding from the stage of issuing charge sheet due to technical flaws without prejudice to take fresh action as extant proviso of rule circulated vide Rly.Bd'S Letter No. E(D&A) 93 RG-83 (RBE No. 171/93) dated 01.12.1993 communicated by PCPO/GRC's Estt. Srl. No. 5/94. The administration reserves concurrent power to issue fresh charge sheet on cancellation of the earlier one.

In view of the above, I being the Administrative Officer of this deptt, as a changed disciplinary authority in the light of Estt. Srl No:5/94, order to cancel the whole proceedings as well as the Charge Memorandum dt. 09/14.03.2014 and issued a fresh Charge memorandum against him on same date concurrently. The period from the date of dismissal of the charged official to the date of his superannuation (had he been in service) to be treated as deemed suspension till further orders treating it as a continued proceedings."

We are unable to appreciate the aforesaid contention of the Union of India for the simple reason and the reasons to be stated hereinafter that such clause contemplates the situation like one projected before us at the behest of the Union of India.

Clause (a) of Sub-Rule (2) of Rule 9 of the said Rules can be manifestly seen and applied in a situation where the departmental proceeding is instituted before the railway servant attains the age of superannuation and to be continued after such retirement. Clause (b) is relatable to an eventuality, which is not covered under Clause (a) of the said Sub-Rule. The said provision relates to a situation where the departmental proceeding is instituted against a railway servant after he attains the age of superannuation subject to the adherence of three conditions, namely sanction of the President, the incident or events should be within four years from the date of the institution and to be conducted by such authority as the President may direct in accordance with the procedure applicable to a departmental proceeding in relation to a railway servant while in service.

It is undisputed that the respondent retired from service on 31st March, 2016 and the first tribunal application was pending at such relevant point of time. The said tribunal application came to be disposed of on 5th February, 2020 without canceling or quashing or setting aside the orders passed in the departmental proceeding, but a direction was passed upon the authority to take an independent decision on all the points agitated by the respondent in the said application. The speaking order dated 26th February, 2021 is the resultant effect of the order of the Tribunal and the authority thought that the said proceeding suffers from incurable, palpable irregularities, illegalities and cancelled the same; even if certain observations are made to put an end to the said proceeding but the issuance of fresh article of charges/statement of charges tantamounts to institution or initiation of a fresh proceeding although based upon the events or incidents, which constitute the foundational basis in the first article of charges.

Sub-Rule (5) of Rule 9 of the said Rules indicates when the departmental proceeding would be deemed to have been instituted; in other words, it defines the date of institution of the departmental proceeding. It is manifestly clear therefrom that the departmental proceeding shall be deemed to have been instituted on the day when the statement of charges was issued to the railway servant or if the railway servant has been placed under suspension from an earlier date, on such date. Therefore, the departmental proceeding shall be initiated on the date of the issuance of the statement of charges upon the railway servant or if he was put under suspension then from the date of such suspension.

If the Rule has clarified and defined a particular situation, then wherever the situation is contemplated in the said Rule the same definition should be assigned and no external aid for the purpose of interpretation is warranted. The moment the date of institution is included in the Rule itself, then such institution would be deemed to have been made on the basis of such definition and cannot be interpreted in such manner, which would frustrate the object and purpose of sublime incorporation thereof.

It is no longer *res-integra* that the statutory authority cannot do a thing not contemplated in the statutory document nor should be permitted to travel beyond the circumference thereof. The Rules have a statutory flavour and cannot be undermined nor be permitted to be flouted at the behest of the authority. Mere making certain observations while canceling the earlier statement of charges or the proceeding does not whittle down the rigor of Rule 9(2)(b) of the said Rules. It is beyond cavil of doubt that the moment the entire proceeding is quashed and set aside and a fresh notice or the statement of charges or article of charges are issued, it would be regarded as a fresh proceeding and doctrine of relation back has no manner of application in this regard. Something which perishes cannot be

resurrected by taking circuitous route invoking the provision diametrically opposite to the spirit for which it found place in the statute book.

Admittedly the statement of charges / article of charges was issued on 25th February, 2021 and, therefore, the departmental proceeding would be deemed to have been instituted on the said date. We have, therefore, no hesitation to say that the departmental proceeding is instituted after the retirement of the respondent and, therefore, Rule 9(2)(b) of the said Rules applies. Three conditions have been enshrined in the said clause and it is not disputed that there was no sanction of the President and it would further appear from the said statement of charges that the incidents on which the charges are founded relates to the incidents happened during the year 2010-2011; admittedly four years before issuance of the said statement of charges. We thus find that at least two conditions incorporated in clause (b) of Sub-Rule (2) of Rule 9 of the said Rules have not been satisfied.

So far as the plea of deemed suspension is concerned after noticing the language employed in para 5 of the Railway Services (Discipline and Appeal) Rules, 1968, the deemed suspension is relatable to a specific situation and cannot be extended or applied in a situation not provided therein. There was no order of suspension ever passed by the authority, but a plea is sought to be taken that since he was dismissed from service in the year 2014 and subsequently the disciplinary proceeding was quashed and set aside in the year 2020 and in the meantime he retired from service in the month of March, 2016, the said period between the date of dismissal/termination and the date of retirement has been deemed to be under suspension. We are unable to accept the aforesaid contention in absence of any specific provision incorporated in this regard, nor we can

perceive that any power is vested upon the authority to treat that particular period to be under deemed suspension.

Therefore, we do not find any infirmity or illegality in the impugned judgement of the Tribunal.

The writ petition is thus dismissed.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)