

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 29227 of 2008

Sanjoy Kumar Singh

Vs.

Union of India & Ors.

For the petitioner: Mr. Achin Kumar Majumder

For the respondents: Mr. Arun Kumar Maiti

Heard on : 15.12.2022

Judgment on : 16.01.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging an order of suspension dated 7th October, 2003, charge sheet dated 23rd October, 2003, the dissenting note of the disciplinary authority dated 11th June, 2004, the order of punishment dated 30th July, 2004 and the order passed by the appellate authority dated 4th August, 2005.
2. The petitioner claims to be a constable of Railway Protection Force (RPF) of South Eastern Railway. At the time when the instant writ application was filed, he was posted at Adra. While the petitioner was working at RPF post Adra, he was placed under suspension by

an order dated 7th October, 2003. Subsequently, a charge sheet dated 23rd October, 2003 was served on the petitioner. Without providing any opportunity to the petitioner to respond to the charge sheet, the name of the enquiry officer was announced and the date of enquiry was also fixed. After conclusion of the enquiry, the disciplinary authority had by letter dated 11th June 2004, forwarded the findings of the enquiry officer along with the dissent note and called upon the petitioner to show cause. The petitioner had responded to such show cause, whereupon the final order of punishment dated 30th July, 2004 was passed, thereby reducing the pay of the petitioner by one stage lower, in the time scale of pay for two years with recurring effect. Although a statutory appeal was preferred, the appellate authority refused to interfere and dismissed the appeal.

3. Mr. Majumder learned advocate representing the petitioner submits that there was irregularity in the enquiry proceedings conducted by the respondent no.2 from the very beginning. He says that at the time when the charge sheet was issued, the respondent no 2, had made up his mind to hold the petitioner guilty. It is for such reason, without bothering to wait for the petitioner's reply, the date of enquiry was fixed and the enquiry officer was appointed. It is submitted that the enquiry proceedings, itself, stands vitiated on account of failure on the part of the disciplinary authority to give an opportunity to the petitioner to respond to the charge sheet prior to

taking a final decision for holding an enquiry. In support of his above contention, he places reliance on a judgment delivered by this Hon'ble Court in the case of **Sanjoy Kumar Singh –vs- Union of India & Ors.**¹ and an unreported judgment of this Hon'ble Court delivered in the case of **Dilip Kumar Palit –vs- Union of India & Ors.**, in **W.P. No. 5097 (W) of 2003.**²

4. Mr. Majumder, thereafter, by drawing attention of this Court to the dissent note issued by the disciplinary authority on the findings of the enquiry officer submits that the disciplinary authority had already made up his mind to hold the petitioner guilty and for such reason, while disagreeing with the findings of the enquiry officer, and while calling upon the petitioner to show cause, had recorded the petitioner to be guilty of the charges. It is submitted that the aforesaid dissent note is in conflict with rule 154.5 of the Railway Protection Force Rules, 1987 (hereinafter referred to as the 'said rules'). In the event the disciplinary authority was in disagreement with the report prepared by the enquiry officer, the disciplinary authority ought to have given his tentative findings, for the petitioner to respond to the same. In this case, the disciplinary authority had already held the petitioner to be guilty, at the time of forwarding the dissent note and calling for the show cause. This according to Mr. Majumder, vitiates the enquiry, at least from the

¹ *Sanjoy Kumar Singh –vs- Union of India & Ors.*, 2002 (2) SLR 266

² *Dilip Kumar Palit –vs- Union of India & Ors.*, W.P. No. 5097 (W) of 2003

stage when the show cause notice was issued on the petitioner, calling upon him to respond to the dissent note, when the finding of guilt was already returned by the disciplinary authority. In support of his aforesaid contentions, he places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Lav Nigam – Vs- Chairman & Md. ITI Ltd. & Another.***³

5. He next contends that the appellate authority also did not act in terms of the provisions contained in the said rule. He says that despite the petitioner preferring an appeal from the aforesaid order and despite, inter alia, contending that there had been non-compliance of the prescribed rules and procedure in conducting the enquiry, the appellate authority by a mechanical order, refused to interfere with the order passed by the disciplinary authority and had confirmed the final order passed by the disciplinary authority. He submits that the appellate authority despite being obliged to adhere to the rule 217.3 of the said rules, did not bother to render any findings thereon. He says that the aforesaid order of punishment seriously prejudices the petitioner. It is submitted that the entire enquiry proceedings stand vitiated and the same should be set aside.
6. *Per contra*, Mr. Maity, learned advocate appearing for the respondents submits that the writ petitioner, consequent upon receipt of the charge-sheet, had duly participated in such enquiry

³ *Lav Nigam –Vs- Chairman & Md, ITI Ltd. & Another., (2006) 9 SCC 440*

proceedings. The petitioner was given reasonable opportunity of hearing by the enquiry officer. All documents in connection with the enquiry proceedings were supplied to the writ petitioner. He says since the petitioner is a constable of the Railway Protection Force, he is covered by the service rules and regulations, inter alia, including the said rules. By referring to rule 153.5 of the said rules, it is submitted that such rule does not provide for any opportunity to show cause at the time of the issuance of the charge-sheet. The disciplinary authority had rightly issued the charge-sheet on the petitioner. The said charge-sheet was issued in conformity with Rule 153.5 of the said rules. There is no irregularity on the part of the disciplinary authority in issuing the charge-sheet in terms of the provisions contained in the said rules. It is submitted that the petitioner had never raised the issue of show cause either before the enquiry officer or before the disciplinary authority. The petitioner having not raised such point before the disciplinary authority, the enquiry officer and the appellate authority, cannot be permitted to raise such plea, for the first time before this Hon'ble Court. He says that the aforesaid defence is barred by constructive res judicata.

7. By drawing the attention of this court to rule 157.2 of the said rules, it is submitted that the aforesaid rule does not require a show cause notice to be issued prior to inflicting punishment on the petitioner. He says admittedly, the disciplinary authority had by notice dated 30th June, 2004, while forwarding his dissent note, in terms of rule

154.5 of the said rules, had called upon the petitioner to show cause and the petitioner had duly responded to such show cause. After receipt of the reply to the show cause and before inflicting punishment, the rules do not mandate service of further show cause notice. As such it cannot be said that no notice was issued calling upon the petitioner to show cause, prior to holding him guilty and inflicting punishment on him. Having regard to the aforesaid it is submitted that there had been no procedural irregularity in conducting the enquiry.

8. Mr. Maity, submits that detailed reasons were given by the disciplinary authority in the dissent note. This Hon'ble Court in exercise of its powers of judicial review, is not called upon to re-appreciate the evidence. He says in the event, this Court finds that some reasons are available, this Court ought not to interfere with the order passed by the disciplinary authority.
9. It is next contended by Mr. Maity, that the punishment inflicted on the petitioner is a minor punishment. By referring to rule 154.6 and 154.7 of the said rules, it is submitted that in the event the disciplinary authority proposes to impose minor punishment on the delinquent employee, there is no requirement of a further show cause prior to inflicting punishment.
10. Mr. Maity submits that a full-fledged enquiry has been conducted, the petitioner had duly participated in such proceedings. Rules of the natural justice have never been violated. He says that

the judgments cited by the petitioner are otherwise distinguishable on facts, the same have no bearing in the instant case and cannot assist the petitioner. The writ application should be dismissed with costs.

11. I have heard the learned advocates appearing for the respective parties and have considered the materials on record. Records reveal that the petitioner while working at RPF Post Adra, was placed under suspension and subsequently a charge sheet dated 23rd October, 2003 was served on him. He was charged for gross misconduct, while on duty on 29th September 2003, he abused, ill-treated, and threw stones on another constable resulting in injury on the fore-head of the constable.
12. I find admittedly, the petitioner was not provided with any opportunity to respond to the charges, prior to appointment of an enquiry officer. The same presupposes that the disciplinary authority had by then already taken a decision to hold an enquiry for imposing a punishment on the petitioner. The disciplinary authority also fixed the date of enquiry. I find that it has been strenuously argued on behalf of the respondents that since the rules do not provide for any opportunity of show cause at the time of issuance of charge sheet, the petitioner was not called upon to show cause. It has also been argued that in absence of any rule to offer an opportunity to show cause, the petitioner cannot claim a right to respond to the charge sheet before the enquiry is ordered. I am,

however, unable to accept the above contention. In service jurisprudence it is too well settled that while issuing the charge sheet an opportunity is required to be given to the delinquent employee to reply to the same. The right to respond to a chargesheet and explain, why enquiry should not be conducted is a right which is as fundamental as a right to defend. It is only on the basis of the reply that the disciplinary authority should take a final decision whether or not to hold an enquiry. I find that this Hon'ble Court had the occasion to consider such an issue and in the case of **Sanjay Singh (supra)**,⁴ this Hon'ble Court by placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **State of Punjab -vs- V.K. Khanna** ⁵, was, *inter alia*, pleased to observe as follows:

“9. Let us not make any discussion regarding the suspension order since the said suspension order has been revoked after the issuance of the same.

Now, let us have a look into the charge-sheet which is Annexure-C to the writ petition. In this context at the very out set it requires to be stated that basic principles of service jurisprudence speaks of arriving at a decision by the authority as to whether a charge-sheet is to be issued. On the issuance of the charge-sheet the delinquent employee should be given a chance to give his reply stating about his deference to the allegations levelled against him, the authority is then to scrutinize and scan the charge-sheet as well as the reply and after careful scrutiny authority is to come to a decision whether enquiry against the delinquent employee need be conducted or nor.

⁴ *Sanjoy Kumar Singh -v- Union of India & Ors.*, 2002 (2) SLR 266

⁵ *State of Punjab -v- V.K. Khanna*, AIR 2001 Supreme Court 343

10. In the memorandum dated 15.4.91 Annexure –C to the writ petition the Articles of charges statement of allegations list of witnesses and list of documents have been annexed. The first paragraph of the Memo states;

“Allegations on which the enquiry was proposed to be held are set out in the enclosed statement of allegations and the charges framed on the basis of the said allegations are specified in the enclosed statement of charges”.

11. As stated earlier the authority has to come to a decision first whether there will be charge-sheet, then whether there will be enquiry then the question of naming the enquiry officer and then it is the duty of the enquiry officer (not the duty of the disciplinary authority) to fix up the date and venue of the enquiry. But in the instant case; the Assistant Security Commissioner, the charge-sheet issuing authority at the very first memorandum decided about the enquiry without even considering or before submission of the reply to the charge-sheet by the delinquent employee and fix the date and place of enquiry himself with observation that in case of failure to attend the enquiry it will be made ex parte. This indicates the mind of the disciplinary authority which is closed and it is real bias.

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13. Hon’ble Supreme Court in its decision reported in AIR 2001 SC 343 (State of Punjab vs. V. K. Khanna & Ors.) discussed about the test of existence of bias or mala fide in an administrative action and scope of judicial review in such an administrative action and observed:

“The case test is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, a conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained”.

The Hon’ble Supreme Court in this case further observed:-

“It is well settled in service jurisprudence that the authority has to apply its mind upon receipt of reply to the charge-sheet or show cause as the case may be as to whether a further enquiry is called for. In the event upon deliberation and due consideration, it is in the affirmative – the enquiry follows but not otherwise. Thus, where even before reply was filed by the delinquent Chief Secretary to the charge-sheet issued against him, the Chief Minister made an announcement appointing an enquiry officer to go into the charges thus indicating its mind set that the enquiry shall proceed irrespective of the reply it cannot be said that the attitude of the authorities towards the delinquent is free and fair.

14. In the instant case it appears also from the Memorandum itself that Articles of charges were furnished in which Memorandum the authority informed the petitioner that there will be an enquiry in the same Memorandum the authority declared the name of the inquiry officer and also fixed the venue and time of the enquiry. Therefore, before receiving any reply to the allegations/charges levelled against the petitioner, the authority took a decision to conduct the enquiry and even the authority assumed the jurisdiction of the enquiry officer and fixed the venue and time of the enquiry, which clearly shows that the Memorandum containing Article of charges has been issued by the authority with a biased mind and the same indicate its mind set that the enquiry shall proceed irrespective of reply and as quoted above in the case of V. K. Khanna & Ors. (supra) the Hon’ble Supreme Court observed the attitude of the authority towards the delinquent in such circumstances is not free and fair”.

13. A similar view has been taken by this Hon’ble Court in the case of *Dilip Kumar Palit (supra)*.⁶ A perusal of the aforesaid judgment would make it clear that the disciplinary authority, while issuing charge sheet acted with a closed and biased mind. In this case as indicated above when the charge sheet was framed, the disciplinary

authority had decided to hold the enquiry without even calling for any response from the petitioner. Thus, the decision to hold an enquiry was taken without giving an opportunity to the petitioner to explain. In this case, the disciplinary authority had gone a step further in his zeal, to expedite the enquiry, had also appointed an enquiry officer and fixed a date for hearing. It is true that the petitioner has not raised the aforesaid points and did not question the procedure adapted by the disciplinary authority, in course of enquiry proceedings before the enquiring officer. However, the same does not absolve the disciplinary authority to act in accordance with law and to give an opportunity to show cause, though not specifically mandated in the rules. I am of the view that opportunity to show cause prior to the disciplinary authority deciding to hold an enquiry, must be given to the delinquent employee so as to explain why enquiry should not be conducted. It is only on the basis of the response to a show cause that a decision to hold or to drop the enquiry should be taken.

14. This apart I find the disciplinary authority, while deciding to hold the enquiry had not only appointed the enquiry officer but had also fixed the date of holding enquiry. As such the petitioner had very little or no opportunity to object to the procedure adopted by the disciplinary authority prior to participating in the enquiry itself. The steadfast manner in which the enquiry was being proceeded

⁶ *Dilip Kumar Palit –vs- Union of India & Ors.W.P. No. 5097 (W) of 2003*

with would only give an impression of bias. The sequence of events enumerated above would demonstrate, the threat of bias is writ large on the disciplinary authority. It is not just an apprehension of bias, the danger of the petitioner being punished without proper enquiry, was thus real. The above conduct of the disciplinary authority, thus, has the effect of vitiating the charge sheet itself, and the same is liable to set aside on the ground of appointment of an enquiry officer at the time of issuance of the charge sheet without calling for any show cause from the petitioner.

15. The defence in the form of constructive res judicata taken by Mr. Maiti, is wholly misplaced. For the principles of constructive res judicata to apply, the proceedings must be decided by a Court. Plea of res judicata is also not available where there is no contest on an issue between the parties and there is no conscious adjudication of an issue.
16. I would have proceeded to decide this writ application on the short point, however, since Mr. Majumder has argued this matter extensively, the same also requires to be dealt with and I proceed to adjudicate all the issues raised hereinabove.
17. It would appear from the records that after the enquiry officer had submitted his report, the disciplinary authority was not in agreement with the same. The disciplinary authority, while disagreeing with the findings of report of the enquiry officer, had called upon the petitioner to show cause. While doing so, he had

concluded that the delinquent employee was guilty of the charges. A perusal of rule 154.5 of the said rules would demonstrate that the disciplinary authority is entitled to disagree with the findings of the enquiry officer. As such, the authority exercised by the disciplinary authority in disagreeing with the findings of the enquiry officer, cannot be faulted. It is, however, a different issue that the disciplinary authority, while dissenting with the findings of the enquiry officer and while calling upon the delinquent employee to show cause, had already held the delinquent to be guilty. Such fact would corroborate from the dissenting note itself. This, I am afraid is neither mandated by rules nor does it show an open mind of the disciplinary authority. The disciplinary authority, at the stage of disagreeing with the report of the enquiry officer, at best, can give his tentative findings, by recording, reasons for his disagreement and its own finding on the charge. For clarity it would be relevant to refer to rule 154.5 of the said rules which is reproduced herein below:

“154.5 The disciplinary authority shall, if it disagrees with the findings of the Inquiry officer on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.”

18. I find that the Hon'ble Supreme Court in the judgment delivered in the case of **Lav Nigam (Supra)**⁷ while considering an identical situation had, *inter alia*, observed as follows:-

“10. The conclusion of the High Court was contrary to the consistent view taken by this Court that in case the disciplinary authority differs with the view taken by the inquiry officer, he is bound to give a notice setting out his tentative conclusions to the appellant. It is only after hearing the appellant that the disciplinary authority would at all arrive at a final finding of guilt. Thereafter, the employee would again have to be served with a notice relating to the punishment proposed.

11. In Punjab National Bank v. Kunj Behari Misra [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783] a Bench of this Court considered Regulation 7(2) of the Punjab National Bank Officer Employees' (Discipline and Appeal) Regulations, 1977. The Regulation itself did not provide for the giving of any notice before the disciplinary authority differed with the view of the enquiry officer. This Court held: (SCC p. 97, para 19)

“The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement

⁷ *Lav Nigam –Vs- Chairman & Md, ITI Ltd. & Another., (2006) 9 SCC 440*

and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

19. It is thus only natural that the principles of natural justice have to be read into rule 154.5 of the said rules. The dissent note and the show cause issued by the disciplinary authority were thus, not only contrary to rule 154.5 of the said rules, the disciplinary authority while recording his own findings on article of charge and while issuing the show cause, instead of giving his tentative findings on the articles of charge, concluded the petitioner to be guilty of the charges and had returned a finding of guilt of the petitioner. For reasons, as aforesaid, the dissent note with the show cause notice issued by the disciplinary authority, stands vitiated and is liable to be set aside. Since, the dissent note with show cause notice cannot be sustained, the final order of punishment which has been issued consequent upon receipt of the reply to the show cause also cannot be sustained, the same stands vitiated and should be set aside.

20. It has also been, inter alia, argued that the order passed by the appellate authority does not conform with rule 217.3 of the said rules. In this context, rule 217.3 of the said rules is extracted herein below:

“217.3 *In the case of an appeal against an order imposing any of the punishments specified in rules 148 or 149 or enhancing any penalty imposed under the said rules the appellate authority shall consider:-*

- (a) whether the procedure prescribed in these rules has been complied with, and if not, whether such non-compliance has resulted in violation of any constitutional provisions or in miscarriage of justice;*
- (b) whether the findings are warranted and based on evidence on record; and*
- (c) whether the punishment or the enhanced punishment imposed is adequate or severe and pass speaking orders for-*
 - (i) setting aside, confirming, reducing or enhancing the punishment, or*
 - (ii) remitting the case to the authority which imposed or enhanced the punishment or to any other authority with such directions as it may deem fit in the circumstances of the case:”*

21. A perusal of the aforesaid rule would demonstrate that the appellate authority is required to ensure whether the procedure prescribed in the rules has been complied with or not. I am afraid that the order passed by the appellate authority does not speak of such findings as such the order passed by the appellate authority also stands vitiated on such ground.
22. For reasons more fully discussed herein above, the charge sheet dated 23rd October, 2003, show cause notice issued by the disciplinary authority along with the dissenting note dated 11th June, 2004, the final order of punishment dated 30th July, 2004 and the order passed by the appellate authority dated 4th August, 2005, are liable to be and are accordingly set aside.
23. The petitioner shall be entitled to all consequential benefits.
24. With above observations/directions, the writ petition being WPA 29227 of 2008 is allowed.
25. There shall be no order as to costs.
26. The **Office** is directed to return the original records of the disciplinary proceedings, after making a photocopy thereof, to Mr. Maiti, learned advocate representing the respondents, against a proper receipt and the same along with copy of the records be retained in the file.

27. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)