

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

Present:

The Hon'ble Justice Lapita Banerji

**WPO 153 of 2020
Sri Debasis Chattopadhyay
Vs.
Tea Board and Ors.**

For the Petitioner : Mr. Amal Baran Chatterjee, Sr. Adv.
Mr. Chittaranjan Panda, Adv.
Mr. Harisankar Chattopadhyay, Adv.

For respondent nos.1 & 3 : Mr. Biswaroop Bhattacharya, Adv.
Mr. Victor Chatterjee, Adv.
Mr. A. Sarkar, Adv.
Ms. Deblina Chattaraj, Adv.

Hearing concluded on : 21.04.2023.

Judgment on : 19.05.2023.

Lapita Banerji, J.:- The petitioner was an employee of the Tea Board, working in the capacity of Senior Assistant. The petitioner challenged an Order of *Dismissal* dated December 20, 2018 passed by the Disciplinary Authority and the Order dated August 6, 2019 passed by the Appellate Authority. On December 14/20, 2016, a Memorandum of Charges/charge sheet was issued against the petitioner for alleged *misconduct*, primarily on 2 grounds:

- (a) He was absenting himself frequently from official duty since June 1, 2016, without prior intimation and permission;
and

- (b) He was a habitual late comer and seldom came to the office as per the time schedule.

2. A Reply was given to the Charge sheet on December 26, 2016. In Reply, the petitioner categorically denied and disputed the Articles of charge. He stated that the Charge Sheet did not contain clear and unambiguous charges. The number of days petitioner's late arrival to office and the number of days of his absence was not indicated therein.

3. In the said Reply, it was maintained that the petitioner's place of posting/seating in the office was clearly under the CCTV coverage. In the event the said CCTV footage was provided on and from June 1, 2016 till November 30, 2016, it would appear that the petitioner had not remained in unauthorized absence for a period of 37 days, as imputed by the said Charge Sheet.

4. The petitioner further contended, that it was perplexing to note that the respondent/Tea Board sought to allege that the petitioner was present at the office only for 3 days between June to November, 2016. It was undisputed that the Tea Board sought to adjust the earned and medical leave of the petitioner for the purported unauthorized absence which could not be done without intimation. Repeated requests were made for a complete and detailed chart with supporting documents of the actual number of days of purported absence and late attendance from June 1, 2016 to November 30, 2016.

5. The petitioner's case was that, after utilizing the petitioner's services for the whole day since the time he arrived at office (even if late), the entire day's salary could not be deducted.

6. After giving his initial Reply on December 26, 2017 the petitioner again on March 29, 2017 and July 3, 2017 requested the Authorities/Enquiry Officer to provide the necessary documents without which it would not be possible to comment or respond to the charges against him. The petitioner reiterated his request for providing a complete and detailed chart with the actual days of absence and the actual number of days for late attendance. He requested to be provided with CCTV footage and a print copy of the biometric system of attendance.

7. Despite repeated requests, the documents, which the petitioner sought to rely upon for formulating his defence to the enquiry proceedings, were not provided to the petitioner.

8. A Second Memorandum of Charges was issued on October 10/12, 2018, whereby, the petitioner was informed that an Enquiry proceeding was decided to be conducted against him on a different issue relating to his 'transfer' to 'Coonoor'. The petitioner responded to the said charges by a communication dated October 25, 2018.

9. Sometime in or around March 2018, the petitioner was sought to be transferred to Coonoor. The said Order of Transfer was challenged upto Supreme Court but the same was not interfered with. Thereafter, the petitioner prayed for voluntary retirement. The same was not acceded to by the Tea Board and the Memorandum of Charges dated October 10/12, 2018 intimating the decision to conduct enquiry was issued. The same is not the subject matter of challenge in the present writ petition.

10. Mr. Chatterjee, Learned Senior Counsel appeared on behalf of the petitioner and argued that the penalty of “*dismissal*” was passed in violation of the principles of Natural Justice. When the petitioner prayed for vital documents necessary for giving a reply to the purported Charge Memo, the respondent authorities were under an obligation to provide the same. Only upon receiving the Reply, the Respondent/Employer/Tea Board had to independently apply its mind and decided whether or not to conduct an enquiry proceedings. The charges were vague and ambiguous. The petitioner did not know the ‘definite’ charges that he was required to respond to.

11. It was then submitted that no employee could be put to double jeopardy. Once the employer decided to adjust the days of ‘leave’ of an employee against his unauthorized absence, then, no disciplinary proceedings could be conducted on the self-same cause of action.

12. Mr. Chatterjee, cited an Apex Court Judgment reported in (1998) 8 SCC 222 (**State of Punjab and Others vs. Bakshish Singh**), for the proposition that once the period of absence from duty is treated to be ‘a period of leave without pay’ and the unauthorised absence is regularised and converted into leave without pay, the charge of ‘unauthorised absence’ from duty did not survive. The Apex Court held that the Lower Appellate Court erred by remanding the matter back to the disciplinary authority having found that the Charge of ‘unauthorised absence’ from duty did not survive. The matter could not be remanded back to the punishing authority for reduction of punishment as the Charge itself did not survive.

13. Next, he relied on a Judgment reported in (2008) 8 SCC 469 (**State of Punjab vs. Dr. P.L. Singla**), for the proposition that whenever there is an allegation of ‘unauthorised absence’ by an authority, two courses were open to the employer. The first was to condone the unauthorised absence by accepting the explanation and sanctioning leave for the period of unauthorised absence. In such case the misconduct stood condoned. The second was to treat the ‘unauthorised absence’ as a *misconduct*, hold an enquiry and impose a punishment for the *misconduct*. If the leave is sanctioned *post-facto*, and the ‘unauthorised absence’ is condoned, it will not be open to the employer to thereafter initiate Disciplinary Proceedings, with regard to the said misconduct unless the employer reserved the right to take disciplinary action, while sanctioning the leave.

14. Next, he relied on Civil Appeal No. 4059/2015 filed in the Supreme Court of India (**Union of India and Another vs. R.K. Sharma**). In that case the doctrine of proportionality was discussed by the Hon’ble Apex Court for consideration whether the punishment of “*dismissal*” from service on account of absence from duty was proportionate, reasonable and in conformity with Article 14 and 16 of the Constitution of India. In that case, the Apex Court considering the period of unauthorised leave was pleased to “*compulsorily retire*” the employee from service upon completion of minimum ‘qualifying service of 20 years to earn pension and other retiral benefits’.

15. Next, he relied on a Judgment reported in AIR 1995 Cal 48 (**Kalyani Spinning Mills Limited and Others vs. Smt. Sudha Sashikant Shroff and**

Another), for the proposition that no party should be allowed to approbate and reprobate simultaneously and blow hot and cold at the same time. A party litigant cannot be permitted to assume inconsistent positions in court to play fast and loose, to the detriment of his opponent. There can be no dispute to the said proposition of law.

16. Mr. Bhattacharya, Learned Counsel appearing on behalf of the Tea Board, submitted that there is no infirmity in the decision making process. In the Memorandum of Charges dated December 14/20, 2016, the number of days of unauthorized absence was clearly indicated to be 37 days and number of days of late attendance was clearly indicated to be 85 days. Therefore, the petitioner could not urge that the Charge Memo contained vague or arbitrary charges.

17. A writ petition being W.P.O. No.6191 of 2017 challenging the said Charge Memo was filed by the petitioner. The said writ petition was dismissed for default on February 5, 2020. No restoration application was preferred against such dismissal. The issues contained in W.P.O. No.6191 of 2017 were, therefore, barred by constructive Res Judicata and cannot be urged in the present writ petition being W.P.O 153 of 2020.

18. Neither the Disciplinary Authority nor the Appellate Authority committed any error in dismissing the writ petitioner from service. Upon consideration of the Reply dated December 26, 2016 (which was a conclusive reply), the Regular Departmental Enquiry was conducted. The petitioner asked for certain

documents in a roundabout way, which did not in any way affect the conclusiveness of the Reply.

19. In the Regular Departmental Enquiry, the petitioner was given adequate opportunity to defend himself. He chose not to cross-examine any of the witnesses or deal with the documents. When presented with his own response to show cause regarding absence/late attendance dated November 2016, the petitioner reiterated his stance taken in December, 2016. In response to show cause the petitioner admitted that he met with an accident in 2016 and after that he was unable to avail of public transport during busy office hours. The petitioner also suffered from Arthritis. The petitioner chose not to respond to the findings of the Enquiry Officer dated July 18, 2017 despite having an opportunity. Hence, the final Order of Penalty was passed considering the materials on record. The Appellate Authority also duly considered the appeal filed by the petitioner and rejected the same.

20. The standard of proof in a disciplinary proceeding is different from that of a criminal trial. On a preponderance of probability, the delinquent employee was to be found guilty and the Disciplinary Authority was not required to prove the charges, beyond all reasonable doubt. There was no vagueness or ambiguity in the Charge Memo. Based on an Office Circular dated July 21, 2015, the number of days of unauthorized absence and late attendance were calculated.

21. Mr. Bhattacharya, relied on a decision reported in AIR 1956 Cal 662 (**A.R.S. Choudhury vs. Union of India and Ors**). He submitted that a

Departmental Enquiry is not a judicial proceeding and the law and procedure applicable to the judicial proceedings are not applicable. The strict rules of the law of evidence are not to be applied. However, the rules of Natural Justice must still be applied. There is no dispute with regard to the principles enunciated **A.R.S. Choudhury** (supra).

22. Next, he relied on a decision reported in AIR 1964 SC 364 (**Union of India vs. H.C. Goel**). In that case the respondent/Government Officer was dismissed from service pursuant to Departmental Proceedings. The High Court held that purported “misconduct” was not supported by any evidence at all. The Hon’ble Apex Court held that even though the Government is competent to differ from the findings of fact recorded by the Enquiry Officer who has been entrusted with the work of holding a Departmental Enquiry under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, but the Appeal failed on merits because no case was made out for punishing the respondent/employee. This Court fails to see how **H.C Goel’s** case aids the Respondent/Tea Board in the present proceedings.

23. Considering the rival submissions of the parties and the materials placed on record, this Court finds that:

- (i) A Show-Cause Notice was issued on November 4, 2016 to the petitioner.
- (ii) A Reply to the Show-Cause Notice was given on November 10, 2016. In the reply to the Show-Cause, the petitioner admitted

that often he was absent from his duty and also attended the office late due to his physical health condition.

- (iii) In the said Reply to show cause, the petitioner also clearly indicated that such absence/late attendance have already been adjusted against his accrued leave, to his great loss.
- (iv) There is no dispute with regard to the fact that the absence and/or late attendance was adjusted against the accrued leave credits of the petitioner.
- (v) Being dissatisfied with the Reply to the Show-Cause, a Memorandum of Charges was issued on December 14/20, 2016. Article 1 of the said Memorandum clearly indicated that the petitioner was present in the office for 3 days between June 2016 till November 2016. He was absent for 37 days and attended the office late for 85 days.
- (vi) The petitioner replied to the Charge Memo by Reply dated December 26, 2016. He alleged that the Articles of Charge were vague. The actual days of absence/late attendance were not clearly stated as it was impossible that the petitioner was only present for 3 days during a period of 6 months (between June 1, 2016 and November 30, 2016). He was also paid his salary during the said period. He prayed for documents like CCTV footage and a print copy of the biometrics system of attendance

to conclusively draw up a defence to the said Memorandum of Charges.

- (vii) It was indicated in the Reply dated December 26, 2016 that the area in which the petitioner was posted/seated was within CCTV coverage. Therefore, it could be clearly demonstrated from the CCTV footage whether the petitioner was guilty of unauthorized absence/late attendance for the number of days that was alleged.
- (viii) The respondent authorities failed and neglected to supply the necessary documents that were considered vital for drawing up of an effective Reply/defence.
- (ix) Two reminders dated March 29, 2017 and July 3, 2017 were given to the Enquiry Officer for supply of such documents. Such reminders are not in dispute. No reasons have been given as to why the said documents were not supplied prior to April 5, 2017.
- (x) Without responding to the Reply dated December 26, 2016 and reminders dated March 29, 2017 and July 3, 2017, the Enquiry proceedings were conducted and the findings made on July 18, 2017. An internal document dated April 5, 2017 from the Presenting Officer to the Inquiry Authority is relied upon to show that old CCTV footage was not available. It is not lost upon the mind of this Court that show cause was issued on

November 4, 2016 and Charge Memo issued on December 20, 2016 for alleged misconduct between June 1, 2016 till November 30, 2016, still the authorities did not care to preserve the CCTV footage for that period, which to the mind of this Court is a vital piece of evidence that could have clinched the issue. This is not a case where show cause has been issued long after the period of unauthorized absence. It is during the course of unauthorized absence that the show cause was issued.

- (xi) From the findings of the Enquiry Officer dated July 18, 2017, it appears that the documents were not supplied to the petitioner/charged officer. Only during the course of the hearing, a chart containing the number of days of late attendance/absence were shown to the charged officer/petitioner.
- (xii) Mr. Bhattacharya relied on an office Circular dated July 21, 2015. The same is reproduced for convenience.

1. All employees are required to register themselves in the present Biometric Attendance System and mark their attendance as per the following guidelines and stipulations:

- a. The working hours of the office is from 09.45 AM to 06.15 PM with half-an-hour lunch break from 01.00 PM to 01.30 PM on all working days.*
- b. Every employee should attend office positively by 09.45 AM on all working days. Thirty minutes grace time in respect of the arrival time i.e., upto 10.15 AM may be allowed to cover any unforeseen contingencies.*

- c. *If any employee attends office after 10.15 AM, he/she shall be treated as LATE for that day. However, such late attendance upto an hour i.e., upto 10.45 AM on not more than three occasions in a month may be condoned if this is due to unavoidable reasons. Half-a-day's Casual Leave shall be debited against his/her Casual Leave account for each subsequent day beyond three days.*
- d. *Employee attending office after 10.45 AM on any working day shall be treated as ABSENT and in that case, he/she shall apply for admissible leave from his/her leave account.*

(xiii) No calculation has been provided in the Charge Memo as to how the number of days of late attendance led to the deduction of half a day of casual leave and then to marking of absence. Only the number of days of unauthorized absence and late attendance appear from the Charge Memo. The said statement is a bald assertion without any basis provided as to the computation of the same. A delinquent employee has to first understand/comprehend the charges against him before formulating a defence thereto. The Charge Memo is not only vague and ambiguous but also suffers from arbitrariness and highhandedness. Even on a query raised by the Court the Ld. Advocates appearing for the Tea Board could not satisfactorily explain the calculation of the number of days of 'unauthorized absence' in correlation with the 2015 Circular.

- (xiv) No reason has been recorded in writing as to the necessity of conducting the Enquiry proceedings based on an inconclusive Reply.
- (xv) The Disciplinary Authority was under a legal obligation to apply its mind and come to a finding that it was necessary to conduct the Disciplinary Proceedings after considering the defence of the petitioner to the Memorandum of Charges.
- (xvi) The Disciplinary Authority acted against the principles of Natural Justice by withholding the documents necessary for formulating the defence, causing prejudice and injury to the petitioner.
- (xvii) This Court also finds that during the course of hearing between March 27, 2017 till May 15, 2017, the petitioner has again prayed for supply of relevant documents. There is no mention of such requests/prayers in the findings of the Enquiry Officer dated July 18, 2017.
- (xviii) Furthermore, the Enquiry Officer sought to rely on the part of the reply dated November 10, 2016 to the Show-Cause dated November 3/4, 2016, whereby, the petitioner admitted unauthorized absence/late attendance, but, did not consider the part where he had stated that his leave credits were adjusted against such unauthorized absence. The findings of the Enquiry Officer are completely silent on the said issue and

also in respect of the computation of the days of unauthorized absence and the days of late attendance translating to 'unauthorized absence' in terms of office Circular dated July 21, 2015.

- (xix) A document has to be read as a whole. An employer should not be allowed to pick and choose a part of the document that is in his favour and ignore the part of the document which is against him.
- (xx) There is no finding at all as to how the calculation of the late attendance culminating into the whole day's unauthorized absence in terms of the Office Circular dated July 21, 2015, has been arrived at.
- (xxi) The petitioner has repeatedly stated that the charges are vague, suffering from lack of clarity. Even then, the Tea Board/Employer/Enquiry Officer did not clarify the computation of the unauthorized absence in accordance with the 2015 Circular.
- (xxii) There is no finding to the effect that the unauthorized absence or the late attendance culminating into unauthorized absence was beyond the permissible leave credits of the petitioner.
- (xxiii) A person cannot be put in double jeopardy and once the leave has been adjusted, it could be reasonably inferred that the unauthorized absence/misconduct is condoned unless it was

intimated to him that the condonation will not be permitted, prior to such adjustment of leave.

- (xxiv) Therefore, this Court holds that the entire initiation/conduct of the disciplinary proceedings was in breach of the principles of Natural Justice since the petitioner/delinquent employee was deprived of the opportunity of drawing up a meaningful defence/making a meaningful representation. Hence, the Disciplinary Proceedings were violative of Art 311(2) of the Constitution of India.
- (xxv) The enquiry proceedings were conducted in a high-handed manner and in colourable exercise of power. Some documents were only shown to the petitioner during the course of the hearing but not supplied.
- (xxvi) Non-supplying of the documents after the Memorandum of charges was issued and the petitioner/employee asked for the same for proper formulation of his defence leads to the entire Enquiry Proceedings being vitiated. The documents prayed for by the petitioner were quite relevant and the non-supply of the said documents before or during the course of the Enquiry Proceedings without providing any explanation to the petitioner is a procedural impropriety committed by the Tea board. In the absence of the said documents the petitioner was deprived of a reasonable opportunity to formulate his defence. A beneficial

reference may be made in a Judgment reported in 1981 SCC OnLine Cal 237 (**Nipendra Nath vs. Union of India and Others**).

- (xxvii) A Judgment reported in (1993) 1 SCC 13 (**State Bank of India and Others vs. D.C. Aggarwal and Another**) is relied upon for coming to a finding that imposition of punishment on an employee on a material which was not supplied to him could not be condoned. Procedural fairness is as much an essence of right and liberty as the substantive law itself.
- (xxviii) This Court finds it perplexing that without giving an employee a proper opportunity to frame his defence on the basis of vital/relevant documents how the Disciplinary Authority could come to the finding that an Enquiry was necessary to be conducted against the employee. In the event, mechanically and without any application of mind the issuance of Memorandum of charges automatically leads to conducting of Enquiry proceedings then there would be no need at all to give an opportunity to a delinquent employee to submit his defence to the Memorandum of Charges.
- (xxix) Since it is held that the initiation of the disciplinary proceedings is bad, therefore, the question of whether or not the petitioner challenged the findings of the Enquiry Officer dated July 18, 2017, is not germane to the issues in the present proceedings.

- (xxx) Mr. Bhattacharya's submission with regard to the present writ petition being barred due to the applicability of the principles of Res Judicata under Section 11 of the Code of Civil Procedure, 1908 cannot be accepted since in W.P.O. No. 1691 of 2017 only the Memorandum of Charges/findings of the enquiry officer were assailed. There was no decision on merits. The said writ petition was dismissed for default. The final Order of the Disciplinary Authority and the Order of the Appellate Authority have been passed after filing of WPO 1691 of 2017. A beneficial reference may be made to an Apex Court's decision reported in MANU/SC/0327/2023 (**Prem Kishore and Ors vs. Brahm Prakash & Ors**).
- (xxxi) In the present writ petition, the Order of the Disciplinary Authority dated December 20, 2018 and the Order of the Appellate Authority dated August 6, 2019 have been challenged.

24. In the light of the discussions above, the Order of the Disciplinary Authority dated December 20, 2018 and the Order of the Appellate Authority dated August 6, 2019 are set aside and/or quashed.

25. Upon consideration of the facts of the case, this Court is of the view that no effective purpose will be served by directing re-instatement of the petitioner in service since he has already reached the age of superannuation. Therefore,

this Court directs the petitioner to be treated as voluntarily retired from his service of the Tea Board with effect from December 20, 2018 (date of dismissal). All the retiral dues along with arrears thereon calculated on and from December 20, 2018 should be disbursed to the petitioner within two months from date.

26. With the directions aforesaid, **W.P.O. No.153 of 2020** is **disposed** of.

27. All parties to act on the downloaded server copy of this order from the website.

28. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance of all the requisite formalities.

(Lapita Banerji, J.)

Later:-

A prayer for stay of the Order/Judgment is made by the learned Counsel appearing on behalf of the respondents/Tea Board.

Such prayer is considered and refused.

(Lapita Banerji, J.)