

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

WPCT 155 of 2014

With

IA NO: CAN 3 of 2018 (Old No: CAN 8904 of 2018)

Dr. Akbar Ali Khan
-Versus-
Union of India & Ors.

Petitioner in-person : *Dr. Akbar Ali Khan.*

For the Union of India : *Mr. Smrajit Roy Chowdhury,*
Mr. Anirban Mitra.

For the respondent no.2 : *Mr. Ranjan Saha.*

For the respondent no.3 : *Mr. Arun Kanti Chattopadhyay.*

Hearing is concluded on : *30th April, 2024.*

Judgment On : **16th July, 2024.**

Tapabrata Chakraborty, J.

1. A procrastinated legal battle pertaining to a disciplinary proceeding initiated under the provisions of the All India Services (Disciplinary and Appeal) Rules, 1969 (hereinafter referred to as the 1969 Rules) which culminated in an order of dismissal from service dated 12th February, 2013

was assailed before the learned Tribunal by the original applicant/ the writ petitioner in an original application (hereinafter referred to as OA), being OA 146 of 2013. The order of dismissal of the said OA dated 25th July, 2014 is the subject matter of challenge in the present writ petition.

2. It is the petitioner's case that he belongs to the 1977 batch of the Indian Police Service (hereinafter referred to as IPS). After due selection through the Union Public Service Commission (hereinafter referred to as UPSC), he was allocated the West Bengal Cadre and he served in various capacities under the State Government (hereinafter referred to as SG) and also under the Central Government (hereinafter referred to as CG). For the period from 1993 to 1998 he was the Deputy Inspector General (hereinafter referred to as DIG), CISF on deputation under Ministry of Home Affairs. He returned to his parent cadre, West Bengal, on 31st March, 1998 and was posted as DIG Armed Police, North Bengal. He was eligible for his next promotion to the post of Inspector General of Police (hereinafter referred to as IGP) in the year 2001, however, while other DIGs were promoted as IGPs on 28th December, 2001, his name was not considered. In response to the representations submitted thereafter, the SG *vide* memo dated 17th January, 2002 intimated that the memo no. 224/P/A/R (VIG) dated 12th June, 1980 was not applicable to him and he was refused promotion. Challenging the said order, the petitioner preferred OA 245 of 2005 which was disposed of by an order dated 18th November, 2005 directing the respondents to consider the petitioner's claim towards promotion. As the said order was not complied with, the petitioner preferred a contempt petition being CPC 54 of 2006 and during pendency of the same, the petitioner was issued a charge sheet dated

29th March, 2006 under the provisions of Rule 8 of the 1969 Rules. Challenging the initiation of the disciplinary proceedings (hereinafter referred to as DP), the petitioner preferred OA 348 of 2006 with MA 241 of 2006 seeking a direction upon the respondents not to give any effect to the decision of initiation of a fresh DP till he is promoted in terms of the order of the learned Tribunal dated 18th November, 2015. The said OA was disposed of on 24th April, 2006 directing the respondents to conclude the hearing and enquiry expeditiously. The petitioner thereafter submitted his written statement of defense on 11th May, 2006. The Inquiring Authority (hereinafter referred to as IA) submitted his report on 23rd October, 2006 and forwarded the same to the Vigilance Commissioner (hereinafter referred to as VC), who *vide* memo dated 2nd November, 2006 agreed with the findings of the IA and recommended a punishment of compulsory retirement. Thereafter the Disciplinary Authority (hereinafter referred to as DA) agreed with the views of the VC on 16th November, 2011. At that stage, the petitioner preferred OA 466 of 2007 challenging the DP. The said OA was dismissed on 7th August, 2009 with liberty to come upon exhaustion of departmental remedies observing *inter alia* that the secret inquiry report (hereinafter referred to as PIR) of VC was not a relied upon document (hereinafter referred to as RUD) and that no intervention was called for at that stage. The said order was challenged in a writ petition being WPCT 320 of 2010. The same was dismissed on 7th February, 2011 observing *inter alia* that if report of VC is considered by the DA, without giving opportunity to controvert, it may be a ground to agitate after finality of the proceedings. The special leave petition (hereinafter referred to as SLP) preferred by the petitioner against the said

order was, however, dismissed on 10th May, 2011 as not pressed observing *inter alia* that the DA shall deal with all the grounds as may be raised by the petitioner before him, in accordance with law. Subsequent thereto, the CG passed an order on 16th of May, 2012 imposing a penalty of dismissal from service. The said order of penalty dated 16th May, 2012 was challenged in OA 501 of 2012. The same was disposed of quashing the order of penalty and directing reinstatement with consequential benefits due to non-service of UPSC advice dated 20th April, 2012. As the said order was not being complied with, the petitioner preferred a contempt application being CPC 56/2012. During pendency of the same, the petitioner was reinstated on 3rd August, 2012 with deemed suspension from the date of dismissal till reinstatement. The said order dated 3rd August, 2012 was challenged in OA 758 of 2012. The same was disposed of on 5th October, 2012 with liberty to proceed from the stage of making available a copy of UPSC report to the petitioner for furnishing reply thereto. In the writ petition being WPCT 392 of 2012 preferred thereafter, the petitioner's prayer for early conclusion of the disciplinary proceeding was accepted and by an order dated 31st October, 2012 the said application was disposed of directing conclusion of the enquiry within six months observing *inter alia* that '*the petitioner has not challenged before us the legality of such enquiry*'. On 18th December, 2012 the Ministry of Home Affairs (hereinafter referred to as MHA) advised the petitioner to give reply to the UPSC recommendation but he failed and thereafter an order of dismissal was passed on 12th February, 2013. In the midst thereof, the petitioner thereafter preferred OA 09 of 2013 for leave to cross examine prosecution witness. The interim prayer was refused on 10th

January, 2013. In connection with the said OA 9 of 2013, one Abdul Kalam preferred an application being MA 45 of 2013 for addition of party stating to be one of the Directors of M/s Pataka Industries Private Limited but the same was dismissed with costs by an order dated 28th January, 2013. The order dated 10th January, 2013 was challenged by the petitioner before the Hon'ble High Court by filing a writ application being WPCT 42 of 2013 but the same was dismissed by an order dated 19th February, 2013 observing *inter alia* that '*the petitioner is suffering from a misconception that the suspension order dated August 3, 2012 and the order of this Court date October, 31, 2012 together created an obligation of the disciplinary authority to hold a further inquiry*'. The petitioner ultimately withdrew the original application being OA 9 of 2013 and the final order of punishment dated 12th February, 2013 was challenged in OA 146 of 2013 but the same was dismissed by an order dated 25th July, 2014, impugned in the present writ petition.

3. Mr. Khan the petitioner, appearing in person submits that prior to issuance of the charge sheet dated 29th March, 2006, a preliminary enquiry was conducted and the SG upon examination of findings of the PIR and other documents decided to initiate the DP and accordingly the charge memo was issued. Such fact stands admitted on behalf of the respondent no.2 in paragraph 7 of the reply filed in OA 466 of 2007. Due to non-supply of the PIR in an enquiry conducted behind his back, the very initiation of the DP was arbitrary, illegal and violative of the principle of natural justice.

4. Placing reliance upon the documents pertaining to the DP availed on the basis of the application filed under the provisions of the Right to

Information Act, 2005 (hereinafter referred to as 2005 Act), Mr. Khan submits that the respondents allegedly took into consideration a PIR, depositions-oral statements of the prosecution witnesses and the general examination of the petitioner as well as the ACRs. However, no statement of the petitioner was recorded and no copy of the PIR was supplied on the basis of which the petitioner was penalized.

5. Drawing our attention to the recommendation of the VC, annexed at page 247 of the paper book, he argues that the VC had observed that the file may be placed before the DA after adopting a decision on the quantum of penalty and thereafter the copy of enquiry report should be sent to the writ petitioner for his submission, if any on the findings of the IA. From such sequence of facts, it is explicit that prior to consideration of reply to the report of the IA, a decision was taken to penalize the petitioner and such action is *ex-facie* arbitrary and *mala fide*. The respondents proceeded with a closed mind and were predetermined to penalize the petitioner. Such arguments, as advanced, were glossed over by the learned Tribunal and no finding was returned on the same and such infirmity warrants interference in the present writ petition.

6. He argues that it would be evident from the records that in blatant violation of the provisions of Rule 8 (24) (ii) of the 1969 Rules, the IA send the enquiry report to the VC for onward transmission to DA though the VC has no jurisdiction to comment on the findings arrived at by the IA. The DA, on its turn, merely observed that '*we may agree with the VC*' without any independent application of mind. The OA was, however, dismissed in a mechanical manner without dealing with such infirmity as specifically

pleaded by the petitioner in the OA and the supplementary affidavit filed by the petitioner.

7. According to Mr. Khan the learned Tribunal erroneously discounted the plea of non-supply of the PIR and refused to consider the said issue on the rudiments of an erroneous finding that the said issues cannot be re-opened after dismissal of the OA 466 of 2007, the WPST 320 of 2010 and the SLP (Civil) No. 10720 of 2011 failing to appreciate that the said issues were left to be decided by the DA before issuance of the final order.

8. He contends that in OA 758 of 2012 the subject matter of challenge was an order dated 3rd August, 2012 by which the petitioner was placed under deemed suspension and in the writ petition arising out of the final order passed in OA 758 of 2012, a direction was issued by the Hon'ble High Court on 31st October, 2012 to conclude the enquiry in accordance with law. Thereafter by a letter dated 29th December, 2012, the petitioner sought for a clarification as to whether representation to the UPSC is required to be submitted to the SG or to the CG. In response thereto, it was intimated by a letter dated 4th January, 2013 that the CG is the competent authority to impose punishment and as such he should file the representation before the CG. However, as the petitioner could not file such representation in time, the competent authority came to a conclusion that he has nothing to say on the advice of UPSC towards imposition of the penalty and accordingly, a fresh order of punishment was issued on 12th February, 2013.

9. He argues that the respondents have proceeded with a preconceived notion that the petitioner is guilty of the charges and such conclusion as regards the guilt of the petitioner at the stage of issuance of the charge

sheet, reflects the biased mind of the DA and that as such the charge sheet itself is liable to be set aside. In support of such contention, reliance has been placed upon the judgment delivered in the case of *ORYX Fisheries Private Limited v. Union of India and others*, reported in 2010 (13) SCC 427.

10. He argues that the expression 'sufficiency of evidence' postulates existence of some evidence which links the charged officer with the misconduct alleged against him but in the instant case no such nexus stands established. The prosecution has miserably failed to prove the charges which could justify the punishment. The learned Tribunal has taken note of irrelevant considerations and relevant aspects have been eschewed from consideration. Judicial review is permissible when the process in reaching the decision has not been observed correctly.

11. Mr. Roy Chowdhury, learned advocate appearing for UOI and its functionaries denies and disputes the contention of the petitioner and submits that there is no specific challenge to the charge sheet, the inquiry report, the order of the DA in the OA writ petition and the OA filed by the petitioner itself was not maintainable in view of an adequate and efficacious remedy available to the petitioner under Rule 25 of the 1969 Rules.

12. He contends that the earlier penalty dated 16th May, 2012 was challenged in OA 501 of 2012. The same was disposed of quashing the order of penalty and directing reinstatement with consequential benefits due to non-service of UPSC advice dated 20th April, 2012. Had the petitioner replied to the UPSC advice as sought for in the year 2012 itself, the matter could have been finalized immediately thereafter. The delay is thus attributable to the petitioner. In paragraph 4.13 of OA 146 of 2023, the petitioner stated

that he had submitted an application before the State Government offering to take immediate voluntary retirement from service if he is promoted as DGP like other batchmates. However, in the OA the petitioner prayed for reinstatement with a direction upon the respondents to proceed with the charge sheet from the date of service of a copy of the PIR.

13. He argues that it is not a case that the appellant had been found guilty on the basis of mere surmises. His guilt stands established through the specific findings in the report of the IA as well as in the order of the DA. It is also not a case that the petitioner was not granted adequate opportunities to defend himself. He was furnished all the documents upon which reliance was placed and was also allowed to cross-examine the prosecution witnesses and in the said conspectus the argument of violation of natural justice is not sustainable.

14. He argues that in a proceeding under article 226 of the Constitution, the High Court does not sit as an appellate authority over the findings of the DA. In exercise of the power of judicial review, Court cannot reappreciate the evidence and come to any different or independent finding on the evidence already on record. It is also not a case that the authorities have acted *mala fide* or in an arbitrary or unreasonable manner and as such question of interference in the present writ petition does not occasion.

15. Mr. Saha, learned advocate appearing for the State respondents adopts the submissions of Mr. Roy Chowdhury and submits that the petitioner had tried to frustrate the DP by taking recourse to vexatious litigations and he is responsible for the delay in finalization of the

proceedings. Such delay is attributable to the petitioner and he cannot shift the burden towards such delay upon the respondents.

16. He contends that the DP against the petitioner had been conducted in strict consonance with the Rules granting appropriate opportunity of hearing at every stage of the proceedings and he himself failed to submit reply to the advice of UPSC. Having refrained from submitting any such representation, he cannot turn back and challenge the final order of dismissal imposed by the competent authority.

17. He further submits that in the backdrop of the charges which have been proved against the petitioner, question of relaxation of the order of punishment imposed does not occasion inasmuch as it needs to be borne in mind that in State administration absolute diligence, integrity and honesty is required to be preserved and in the event such discipline is not maintained by senior government officers, the confidence of public would be impaired.

18. Mr. Chattopadhyay, learned advocate has entered appearance on behalf of the respondent no.3 and has placed before us the advice of UPSC pointing out that *vide* memo dated 18th December, 2012, the petitioner was afforded opportunity to reply to the same. Having failed to reply to the same, the petitioner cannot challenge the order of dismissal.

19. We have heard the learned advocates appearing for the parties at length and we have given our anxious consideration to the facts and circumstances of the case.

20. It would be necessary to first deal with the objection as regards availability of an alternative remedy to the petitioner. It is no longer *res*

integra that existence of an alternative remedy is not an absolute bar against maintainability of a writ petition under Article 226 of the Constitution of India. The existence and pursuit of an alternative remedy before invoking writ jurisdiction under Article 226, as held by the Supreme Court on numerous occasions, is more of a rule of convenience than a rule of law. The jurisdiction of this Court cannot be fettered by a mechanical tendency to retreat from exercise of the plenary powers vested in this Court by Article 226 of the Constitution. A statutory appeal against any order made by the President is barred, as would be explicit from Rule 15 of the 1969 Rules. Submission of a memorial under Rule 25 of the 1969 Rules cannot be equated as a statutory appeal. The nature and the grounds of challenge against the DP are such that the alternative remedy of a memorial is no remedy in the eye of law to cover the challenge. The scope and ambit of a memorial is thus limited and cannot be construed to be an adequate and efficacious remedy. In the said conspectus, the argument of Mr. Roy Chowdhury that the preference of the OA before the learned Tribunal was barred at the threshold since the petitioner did not avail the alternative efficacious remedy provided under the 1969 Rules is not acceptable to this Court. We are of the opinion the learned Tribunal erred in law in arriving at a negative inference as the petitioner did not choose to exercise his right to prefer a memorial.

21. The DP was initiated primarily on the rudiments of a complaint lodged by a private individual against the petitioner. There is also no specific finding that the petitioner had caused any financial loss to the employer. Even existence of a risk of loss cannot be equated to be actual

loss or misappropriation. Furthermore, in a DA, charge of causing serious loss or dishonest gain should be proved beyond doubt and not on merely probabilities or hearsay evidence and such a serious charge is required to be proved to the hilt as it brings civil and criminal consequences upon the employee concerned but such aspect of the matter has not been taken into consideration by the learned Tribunal while issuing the order impugned in the instant writ petition.

22. It would be explicit from the records that the DA upon receipt of the enquiry report from the VC approved the same stating that '*We may agree with the views of VC*' on 16th November, 2016. It is only thereafter by a memo dated 23rd November, 2016 the report of the IA was forwarded to the petitioner. In the present case the report of the IA was forwarded to the petitioner after the DA decided on the quantum of punishment. There was thus a formation of mind as regards the quantum of punishment by the DA before consideration of the petitioner's reply to the report of the IA. Such act constitutes violation of the principles of natural justice.

23. It appears that the learned Tribunal had proceeded on the basis that since the OA 466 of 2007 was dismissed, the points urged in the same could not have been reargued in OA 146 of 2013. Such a finding is improper in as much as OA 466 of 2007 was preferred at the juncture of service of the enquiry report. The DP was not completed at that stage. Observing such stage of the proceeding, the learned Tribunal refused to exercise jurisdiction leaving it open to the petitioner to approach the learned Tribunal after the proceedings are completed and all departmental remedies are exhausted. The learned Tribunal appears to have mechanically rejected the OA failing to

appreciate that the stage of the DP at the time of moving OA 466 of 2007 was not identical to the stage when the OA 146 of 2013 was preferred and the learned Tribunal misdirected itself in abruptly shutting down the doors of justice to the petitioner.

24. Even looking to the charges proved in the DP we find that no financial loss caused to the employer by misconduct, fraud, gross negligence or other conduct of like nature. In such circumstances, the imposition of penalty of dismissal from service was unduly harsh and grossly disproportionate to the alleged misconduct.

25. It is fundamental that in departmental proceedings which is initiated by the issuance of a charge sheet, the ultimate order or the order of punishment has to be in consonance with the charge sheet. In other words, the scope of the entire proceedings is defined by the charge sheet. The same is true for decisions of any State or other authority within the meaning Article 12 of the Constitution arising out of a charge sheet. When a process is triggered off by a charge sheet, the reasonableness of what follows, including the quality of the opportunity afforded to the person proceeded against and the propriety of the ultimate decision, are pegged to and rooted in the charge sheet. The proceedings can, ordinarily, not be expanded beyond what is conceived of and outlined in the charge sheet, as appears to have been done in the present case.

26. It is elementary that in this jurisdiction under Article 226 of the Constitution, the Court scarcely sits in appeal over the impugned decision. To emphasize on the limited scope of judicial review available in this jurisdiction, it is the authority of the decision-making body to make the

decision which is assessed in addition to ascertaining whether a reasonable procedure was followed and the matter culminated in a cogent decision. It is on such tests that the present writ petition and the grievance of the writ petitioner need to be addressed. The first article charged the petitioner of being involved in a trade relating to purchase and sale of landed property as he floated advertisement in the Times of India, Kolkata pertaining to promotion of land. The burden of proof towards establishment of such allegation was shifted to the petitioner and the IA observed that as the petitioner failed to produce necessary documents to establish that his wife runs a Real Estate business under the name and style of '*Sunshine Future Growth Infrastructure Development Pvt. Ltd.*', he '*has no alternative but to draw adverse presumption against the C.O.*' The second charge was that the petitioner received an amount of Rs.1,60,00,000/- from one Mr. Mustak Hossain on different dates in order to purchase land through one Mr. Abdur Rahim Gazi and that the petitioner paid Rs.1,02,00,000/- to Mr. Abdur Rahim Gazi and misappropriated an amount of Rs.57,50,000/-. It is thus explicit that the alleged receipt of a quantified amount and non-refund of a part of the same was a private dispute and pertaining to such payment no receipt was produced and the P.W-2, himself stated that he did not lodge any criminal case and he did not even ask the petitioner to liquidate the arrears. He further stated that he had '*no receipt to show that payment was made to C.O. as the C.O. joined them as a well wisher and social worker*'. The IA, however, failed to note the deposition of PW2 and such exclusion of admissible and material evidence had influenced the ultimate decision. The third charge was that the petitioner had neglected to submit the declaration

of his assets in due time. Such allegation, if proved, can at best be construed to be an irregularity. The fourth charge was that the petitioner was maintaining two bank accounts jointly with his daughter and that such fact was not disclosed in the declaration of assets with an ulterior motive to suppress the actual acquisition of asset and the sources thereof. The IA arrived at a finding as regards such alleged suppression, being oblivious of the petitioner's contention that the account was in the name of the petitioner's daughter as the first account holder and the said account was maintained for the purpose of obtaining loan for the State Bank for her higher studies in USA. No material could also be highlighted by the IA in support of his findings as regards any nexus of such account with the alleged private transaction between the petitioner and one, Mr. Mustak Hossain. The fifth charge was that the petitioner had taken an amount of Rs.4,80,000 from eight persons '*without taking prior sanction of the competent authority*'. The IA proceeded to establish the alleged charge being oblivious of the fact that the persons mentioned in the charge were relations of the petitioner's daughter from her maternal side and without arriving at a finding pertaining to any nexus of the transfer of such amount with the alleged real estate business as referred to in the first charge.

27. As per the settled position of law, even in a case where the punishment is found to be disproportionate to the misconduct committed the matter is to be remitted to the DA for imposing appropriate punishment/penalty which as such is the prerogative of the DA. However, today, as the petitioner has retired, it would be iniquitous to direct the petitioner to contest a proceeding from the stage of supply of the enquiry

report. In the said conspectus of facts, we are of the opinion that the equities need to be balanced among the parties.

28. The petitioner had worked for about 27 years in different capacities and got promotions and he had no antecedent. Measure, magnitude and degree of misconduct needs to be taken into consideration for weighing the proportion. Regard being had to the facts involved and the nature of post held by the petitioner, we are of the opinion that the doctrine of proportionality is invokable.

29. The DP was initiated against the petitioner in the year 2006. For about two decades, the petitioner had remained trapped in a purgatorial legal rigmarole, moving back and forth between the High Court, the respondents and the learned Tribunal. The order of punishment was passed on 12th February, 2013 and during pendency of the litigation the petitioner attained the age of superannuation on 31st March, 2016. He has been out of employment for more than twelve years, which on its own merit, is a matter of great suffering, agony and ignominy. This is an appropriate case for this Court to soothe the wounds and agonies by putting an end to the already protracted legal proceedings. Taking into consideration the misconduct alleged, the petitioner should not be deprived of his terminal benefits which is the only source of his livelihood.

30. In view of the discussion made above, we find that the punishment of dismissal imposed on the petitioner was far too harsh in the facts and circumstances of the case and to put a quietus to the matter, it would be appropriate to direct substitution of the punishment of dismissal. Since in a case where the original punishment is set aside, only to be

substituted by a new punishment, pursuant to an order of judicial review, then ordinarily such substituted punishment would relate back to the date of original punishment.

31. The order of dismissal dated 12th February, 2013 is, accordingly, set aside and the respondents are directed to impose a punishment of reduction to a lower stage in the time scale of pay from the date of imposition of the punishment (12th February, 2013) till the date of retirement, without cumulative effect. The respondents shall reinstate the petitioner with continuity in service.

32. In the totality of the facts and circumstances of the case, it would not be proper for us to grant back-wages to the petitioner for the period during which he has not worked. However, to serve the ends of justice we direct that the petitioner be provided notionally the benefit of continuity of service not for the payment of back-wages for the period that he did not serve the organization, but for the purpose of retirement benefits like employer's contribution towards provident fund, payment of gratuity, pension and leave encashment.

33. With the above observations and directions, the writ petition and the connected applications, if any, are disposed of.

34. There shall, however, be no order as to costs.

35. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)