10

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.756/2002

New Delhi this the 6th day of January, 2003.

HON'BLE MR. GOVINDAN S. TAMPI, MEMBER (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

A.S.I. Prakash Chamoli,
No.3815/D,
IIIrd Bn. DAP,
Delhi. -Applicant

(By Advocate Shri Arun Bhardwaj)

-Versus-

1. Union of India through
Lt. Governor,
Govt. of NCT of Delhi,
Raj Niwas Marg,
Delhi.

2. Addl. Commissioner of Police,
Armed Police Kingsway Camp,
New Delhi.

3. Dy. Commissioner of Police,
IIIrd Bn. DAP,
Vikaspuri,
Delhi. -Respondents

(By Advocate Shri Ajesh Luthra)

ORDER (ORAL)

Mr. Shanker Raju, Member (J):

Applicant impugns respondents' penalty order dated 6.12.99 as well as appellate order dated 19.11.2001, upholding the punishment. He has sought quashment of the orders with accord of all consequential benefits.

2. Applicant, who was working as Assistant Sub Inspector and posted for night checking duty on the night of 25.4.98 on a surprise check the staff was found to have been demanding money and applicant was watching these activities while sitting in Gypsy. A disciplinary enquiry was ordered against him on 5.2.99. A summary of allegation was served upon him and the Inquiry Officer (IO) after recording evidence framed a charge to which applicant has not pleaded guilty and produced his defence witnesses and

submitted the statement of defence. IO through his findings dated 2.9.99 concluded the charge of harassment and pressurising for illegal gratification, partly proved the charge of recovery of currency notes.

3. Disciplinary authority disagreed with the findings and after serving a show cause notice and receipt of the reply by applicant imposed upon him a major penalty of permanent forfeiture of two years approved service for a period of two years, entailing reduction in pay with loss of increment and deferment of future increments.

4. The appeal preferred against the order was rejected by an order dated 26.7.2000. Applicant preferred OA-2250/2000 and the appellate order was set aside by an order dated 20.8.2001 for incompetence of the Joint Commissioner to act as an appellate authority.

5. In compliance thereof, appeal was decided by Additional Commissioner of Police, upholding the punishment by an order dated 19.11.2001, giving rise to the present OA.

6. Shri Arun Bhardwaj, learned counsel appearing for applicant though taken several contentions to challenge the impugned order, but, at the outset, agitated the following two grounds:

i) according to him punishment is ultra vires and is not inconformity with Rule 8 (d) (iii) of the Delhi Police (Punishment and Appeal) Rules, 1980, in so far as withholding of increment and deferment of future increment

12

is concerned, as held by the High Court of Delhi in CWP-2368/2000, Shakti Singh v. Union of India & Ors. decided on 17.9.2002.

ii) Learned counsel has also challenged the vires of Rule 16 (iv) of Delhi Police (Punishment and Appeal) Rules, 1980 by contending that unlike CCS (CCA) Rules where a definite charge is framed against a delinquent official only then prosecution evidence is recorded with an opportunity to cross examine the witnesses, whereas in the Delhi Police Rules ibid a summary of allegation is framed on which the evidence is recorded and thereafter a charge is framed and approved by the disciplinary authority and thereafter the onus is on the delinquent official to rebut the same by production of defence evidence and defence statement. According to him, charge is not proved by further examination of the witnesses and no evidence is led, which deprives a reasonable opportunity to the delinquent official to effectively defend the charges.

7. Shri Bhardwaj further contended that by framing the charge nothing survives and the inquiry and the remaining process of the defence etc. is an empty formality and as the rule is un-constitutional the same is to be set aside and after the charge stage entire evidence to show the charge proved is to be recorded and thereafter an opportunity of cross-examination the finding is to be recorded.

8. He further states that the issue raised in this OA has not been discussed in OA-2098/2001 Ompal Singh v. Union of India decided on 5.2.2002, as such the same can be agitated and adjudicated by this court.

13

9. On the other hand, respondents' counsel Sh. Ajesh Luthra vehemently denied the contentions of applicant but on the issue of punishment imposed it is fairly conceded in the light of the decision of the High Court that latter part of the punishment where increments have been withheld with effect over future increment is to be modified. However, on the issue regarding illegality of procedure it is stated that applicant has not objected to this procedure throughout the inquiry and has not taken any ground in his appeal. As such the aforesaid illegality, as alleged, has been waived by him. Apart from it, it is contended that applicant has failed to establish any prejudice caused to him on account of framing up of charge as during the course of inquiry sufficient opportunity has been given to rebut and after availing the same it is not open for applicant to assail violation of rules, which cannot be countenanced in the light of the decision of the Apex Court in State Bank of Patiala v. S.K. Sharma, JT 1996 (3) SC 722. Shri Luthra further stated that vires of Rule 16 (i) to (xi) has already been gone in Ompal Singh's case (supra) where it has been held that these procedural rules are neither unconstitutional nor ultra vires, rather provide sufficient avenues to the accused officer in consonance with the principles of natural justice and fair play.

10. Shri Luthra further stated that summary of allegation is a statement of imputation, i.e., misconduct levelled against a police official to which he has due notice with the evidence to be adduced and the documents relied upon. Under Rule 16 (iii) of the rules evidence is recorded on the allegation with an opportunity to cross

examination to the police official. Thereafter if the evidence establishes the summary of allegation a charge is framed against a police official which is approved by the disciplinary authority under Rule 16 (iv) ibid. After this applicant is accorded an opportunity to examine the defence witnesses and also to give his defence statement.

11. The IO the records his findings on the basis of the evidence adduced and the defence produced in the enquiry and forwards this finding to the delinquent official and on his reply a punishment is imposed. The aforesaid procedure has been framed having regard to the principles of natural justice and fair play and at every stage police official is accorded an opportunity to effectively defend the imputation against him. What he has to cross-examine is the evidence brought on record in support of accusation and even if the charge is proved it has not attained finality, as the accused officer gives his defence which is considered by the IO by recording reasons in support of each article of charge. As such even if the charge is framed that would not automatically in an implied manner seals the inquiry. The same is considered in the light of defence and once the accused officer knows about imputation and the evidence recorded in support of it, he has a due notice of the material against him, which he could rebut by way of producing his defence and the same would be considered in subsequent stage of inquiry.

12. We have carefully considered the rival contentions of the parties and perused the material on record. In Ompal Singh's case (supra) the vires of the provisions contained in Rule 16 (i) to (xi) has been examined and these provisions after meticulously recording

reasons on the basis of the decision of the Apex Court have been found to be constitutional, intra vires and in consonance with the principles of natural justice and fair play.

13. A departmental enquiry cannot be equated with either a warrant or summon case where the pre-charge and post-charge evidence is to be recorded. As per Rule 20 of the Rules ibid standard of proof is on the basis of pre-ponderence of probability and in the light of principles of natural justice and fair play, which includes the principle of audi alteram partem, i.e., fair hearing and compliance with the substantive procedure of law. Neither Evidence Act nor Cr. P.C. has any application.

14. In the light of what has been stated above, we find that summary of allegation is an imputation of misconduct against the delinquent official which is provided under Rule 16 (i) of the Rules. Alongwith others a list of witnesses with deposition to be made and documents are served upon the delinquent official so that he may know in advance the material to be placed by the prosecution in support of the summary of allegation and gets an opportunity to effectively defend the same. These witnesses depose in support of the prosecution by making oral statement under Rule 16 (iii) ibid and thereafter delinquent official is provided an opportunity to cross-examine the same. After recording of evidence in support of allegation the IO frames a charge and gets it approved from the disciplinary authority who applies his mind as to the evidence and thereupon a formal charge is framed which is put to the delinquent official and in case

16

of his denial he is accorded further opportunity to produce his defence apart from cross-examination of the witnesses already done and also to submit his defence statement.

15. The object and purpose of recording evidence in the DE is to bring evidence through witnesses and documents in support of the accusation made against the delinquent official by way of cross-examination to rebut and to bring his defence by way of cross-examination. As the summary of allegation is tentative description of alleged misconduct against the police official which is only an allegation is confirmed by examination of witnesses and on availability of evidence to support the same. Thereupon, definite allegations are framed against the delinquent official which is in nomenclature termed as charge. This charge gets approved from the disciplinary authority. Even after framing up of a formal charge inquiry does not conclude. As the delinquent is aware of the material against him he is afforded an opportunity to state his defence by examination of witnesses and to give his defence statement. In DE there cannot be a concept of pre or post charge evidence. What matters is that Government servant is put to a due notice and gets a reasonable opportunity to defend himself. The provisions for examination of the defence witnesses and submission of defence statement do comply with the cardinal principles of reasonable opportunity and fair play. The contention put-forth by Sh. Bhardwaj that once the definite charge is framed, evidence is to be recorded again to prove the same, cannot be countenanced, as the material has already come in support of allegation and thereafter the summary of allegation put to a definite and final stage. This charge is not an end to the inquiry as after recording of the

defence evidence the IO does not hold applicant guilty of the charge on the basis of the charge itself but he takes into account the prosecution evidence, defence evidence, defence documents and the contentions putforth and on recording reasons on each article of charge he records his finding, which is not mechanically acted upon by the disciplinary authority, but an opportunity of representation is provided to the delinquent official and on his reply final order is passed. We do not see any arbitrariness or contravention of principles of natural justice in the procedure adopted. As the vires of these provisions has already been upheld in Ompal Singh's case (supra) the provisions regarding framing of charge is in consonance and is intra vires, the concept introduced by Sh. Bhardwaj of recording evidence even after the charge stage is illogical, irrational and is liable to be rejected.

16. Another aspect of the matter is that applicant despite aforesaid illegality committed during the inquiry has not objected to the same and after having participated in the inquiry without any objection to the procedure followed in appeal preferred has waived of the illegality, if any. Moreover, as we have already held that applicant has not been prejudiced in any manner as he has failed to bring-forth any ground or material to establish the same. The Following observations have been made by the Apex Court in S.K. Sharma's case (supra):

> We may summarise the principles emerging from the above discussion. These are by no means intended to be exhaustive and

18

are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee.

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained herein before and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or

order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgement, take a case where there is a provision expressly providing that after the evidence of the employer/government the evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need the test is one of prejudice, i.e., whether the

person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. if it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on

the other hand, it is found that the delinquent officer/employee has not it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions(include the setting aside of the order of punishment, keeping in mind the approach adopted by the Conditional Bench in B.Karunakar. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action- the Court or the Tribunal should make a distinction between a total violation of natural justice [rule or audi alteram partem] and violation of a facet of the said rule, as explained in the body of the judgement. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nulity if one chooses to]. In such cases,

normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule [audi alteram partem]. (b) But in the latter case, the effect of violation of a facet of the rule of audi alteram partem has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. It is made clear that this principal [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere].

(6) While applying the rule of audi alteram partem [the primary principle of natural justice] the Court/Tribunal/Authority must always bear in mend the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that the is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

17. If one has regard to the ratio laid down by the Apex Court (supra), reiterated in ECIL's case (supra) by the Constitutional Bench, we do not find any infirmity or illegality in the procedure laid down under Delhi Police (Punishment & Appeal) rules, 1980 and followed in the case of applicant.

18. However, there cannot be a denial to the fact that the punishment in the light of the decision of the High Court in Shakti Singh's case (supra) is not legally sustainable and particularly the latter part of withholding of increment with future effect.

19. For the foregoing reasons, although we do not find any merit in the contentions of applicant as to the procedure adopted in the inquiry as well as punishment imposed upon him as affirmed by the appellate authority, as applicant has not raised any other ground except the two, which have been adjudicated, but keeping in view the decision of the High Court in Shakti Singh's case (supra), we dispose of this OA with the direction to the respondents to accordingly modify the punishment order dated 6.12.1999 in so far as it relates to withholding of increment with future effect and if applicant is found to be entitled to

any consequential benefits, he shall be accorded the same, within a period of three months from the date of receipt of a copy of this order. The OA is partly allowed, with the above directions. No costs.

S. Raju

(Shanker Raju)
Member (J)

(Govindan S. Tampi)
Member (A)

'San.'