

**Central Administrative Tribunal
Principal Bench**

OA No.474/2002

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New Delhi this the 20th day of March, 2006.

Hon'ble Mr. Shanker Raju, Member (J)
Hon'ble Mr. N.D. Dayal, Member (A)

Shri V.S. Tyagi,

-Applicant

(By Senior Counsel Shri G.D. Gupta with Shri S.K. Sinha, Advocate)

-Versus-

1. Union of India and others.

-Respondents

(By Advocate Shri V.S.R. Krishna)

1. To be referred to the reporter(s) or not? ~~not~~ yes
2. To be circulated to outlying Benches or not? ~~not~~ yes

S. Raju
(Shanker Raju)
Member (J)

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Shri V.S. Tyagi,
10/12, Railway Colony,
Sewa Nagar,
New Delhi.

-Applicant

(By Senior Counsel Shri G.D. Gupta with Shri S.K. Sinha, Advocate)

-Versus-

1. Union of India through
General Manager,
Northern Railway,
Baroda House,
New Delhi.
2. Chief Medical Superintendent,
Delhi Division Hospital,
S.P. Mukherjee Marg,
Delhi.
3. Sr. D.M.O. Chest/Clinic/OPD,
Delhi Division Hospital,
S.P. Mukherjee Marg,
Delhi:

-Respondents

(By Advocate Shri V.S.R. Krishna)

ORDER

Mr. Shanker Raju, Hon'ble Member (J):

Applicant, an ex-Pharmacist in the Railways impugns respondents' order dated 16.9.2000, imposing upon him, after disciplinary proceedings, a major penalty of compulsory retirement from service as well as an order passed on 2.2.2001, upholding the punishment.

2. Applicant who had been general secretary of the registered trade union of the Railways was initially appointed as a Pharmacist on 11.2.1974 and was promoted in the pay scale of Rs.550-750 w.e.f. 3.10.1986 by General Manager (P) with the approval of CMD retrospectively by an order dated 26.5.1993. The union raised an industrial dispute on 9.8.1995 regarding strike and other ancillary matters with the result applicant who had been functioning as DMO, Anand Vihar was transferred on 25.9.1995 to Delhi Division Hospital which was assailed in OA-2035/1995 before the Tribunal and by an order dated 3.10.1996 holding that competent authority to transfer him was Chief Medical Officer, OA was allowed and the order of transfer was set aside. As applicant was not allowed to join his duties, an order passed by the respondents on 10.6.1997 one post of Senior Pharmacist was transferred from Anand Vihar to Delhi hospital temporarily for six months. This has been assailed before the Assistant Labour Commissioner (ALC) under Section 33 (a) of the Industrial Disputes Act, 1947, wherein several undertakings given by respondents to keep applicant at Anand Vihar have gone futile. Meanwhile, on the assurance of the competent authority to transfer back applicant when nothing happened on 24.2.98 warrant of arrest had been issued by the ALC, which was assailed by the respondents in WP No.1370/1998 before the High Court of Delhi. The aforesaid Writ Petition was withdrawn on the ground that the matter had failed in conciliation and rather the respondents in letter to RLC dated 27.10.1999 gave an

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undertaking that applicant is now working as Chief Pharmacist at Anand Vihar and the dispute stands settled.

3. Meanwhile, charge sheet dated 18.5.1998 was issued to applicant which he came to know through one of the replies filed in the proceedings before the Tribunal. However, vide endorsement dated 3.11.1999 applicant was accorded a copy of the reply on 15.11.1999. Applicant on 4.10.1999 made an application against the bias of the enquiry officer (EO), yet despite such an application the EO continued with the proceedings and though no service was effected through registered AD etc. stating that the charge sheet and notice were served in presence of witnesses on the door of applicant's available address the proceedings were held ex-parte on 25.9.1999. On that date the statements of witnesses were recorded and without issuing further notice to applicant in compliance of Rule 9 (12) of the Railway Servants (Discipline & Appeal) Rules, 1968 the enquiry was concluded with a finding of guilt against applicant on 9.12.1999. Responding through representation applicant sought an opportunity of defence, yet an order passed compulsorily retired applicant from service. In appeal applicant has taken several objections as to competence of the disciplinary authority (DA) and non-consideration of proportionality of punishment, yet the appellate authority without discussing the same affirmed the punishment.

4. Learned Senior Counsel Shri G.D. Gupta, appearing for applicant along with Shri S.K. Sinha has taken plethora of legal

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issues to assail the impugned order, including issue of charge sheet by an incompetent authority, non-compliance of Rule 9 (12) of the Rules ibid with denial of reasonable opportunity, punishment by an incompetent authority in violation of Article 311 (2) of the Constitution of India and bar of Section 33 of the Industrial Disputes Act, 1947 to impose any punishment on misconduct during the conciliatory proceedings.

5. On the other hand, learned counsel appearing for respondents, vehemently opposed the contentions and produced before us the record of the disciplinary proceedings. It is stated that there is no legal infirmity in the conduct of the disciplinary proceedings, as applicant despite accord of reasonable opportunity had not participated in the enquiry despite notice, on the charge of not complying with the transfer order and remaining absent without any just cause, the punishment imposed is commensurate with the misconduct.

6. On careful consideration of the rival contentions of the parties, Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968, provides as under:

"22. Consideration of appeal.-

(1) In the case of an appeal against an order of suspension, the appellate authority shall consider whether in the light of the provisions of Rule 5 and having regard to the circumstances of the case, the order of suspension, is justified or not and confirm or revoke the order accordingly.

(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 6 or enhancing any penalty imposed under the said rule, the appellate authority shall consider-

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(a) whether the procedure laid down in these rules has been complied with, and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe; and pass orders-

(i) confirming, enhancing, reducing or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such directions as it may deem fit in the circumstances of the case;

Provided that -

(i) the commission shall be consulted in all cases where such consultation is necessary;

(ii) if the enhanced penalty which the appellate authority proposes to impose is one of the penalties specified in clauses (v) to (ix) of Rule 6 and an inquiry under Rule 9 has not already been held in the case, the appellate authority shall, subject to the provisions of Rule 14, itself hold such inquiry or direct that such inquiry be held in accordance with the provisions of Rule 9 and thereafter, on a consideration of the proceedings such inquiry make such orders as it may deem fit;

(iii) if the enhanced penalty which the appellate authority proposes to impose, is one of the penalties specified in clauses (v) to (ix) of Rule 6 and an inquiry under rule 9 has already been held in the case, the appellate authority shall, make such orders as it may deem fit;

(iv) subject to the provisions of Rule 14, the appellate authority shall-

(a) where the enhanced penalty which the appellate authority proposes to impose, is one specified in clause (iv) of Rule 6 and falls within the scope of the provisions contained in sub-rule (2) of Rule 11; and

(b) where an inquiry in the manner laid down in Rule 9, has not already been held in the case, itself hold such inquiry or direct that such inquiry be held in accordance with the provisions of Rule 9 and thereafter, on a

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consideration of the proceedings of such inquiry, pass such orders as it may deem fit; and

(v) no order imposing an enhanced penalty shall be made in any other case unless the appellant has been given a reasonable opportunity, as far as may be, in accordance with the provisions of Rule 11, of making a representation against such enhanced penalty

(3) In an appeal against any other order specified in Rule 18, the appellate authority shall consider all the circumstances of the case and make such orders as it may deem just and equitable."

7. If one has regard to the above, while an appeal is preferred it is incumbent upon the appellate authority not only to record reasons but also he shall consider any non-compliance vitiating the enquiry in contravention of the Constitution of India and also whether the penalty is adequate or not. Applicant in the OA has clearly averred that he had been promoted in the pay scale of Rs.550-750 w.e.f. 3.10.1986 by General Manager (P) with the approval of CMO now being called CMD vide order dated 26.5.1993.

8. Rule 2 (1) (a) of the Railway Servants (Discipline & Appeal) Rules, 1968 defines an appointing authority as under:

"2. Definitions.-

(1) In these rules, unless the context otherwise requires -

(a) "appointing authority" in relation to a railway servant means -

(i) the authority empowered to make appointments to the service of which the railway servant is, for the time being, a member or to the grade of the service in which the railway servant is, for the time being, included, or

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(ii) the authority empowered to make appointments to the post which the railway servant, for the time being holds, or

(iii) the authority which appointed the Railway servant to such Service, grade or post, as the case may be, or

(iv) Where the Railway servant having been a permanent member of any other Service or having substantively held any other permanent post, has been in continuous employment under the Ministry of Railways, the authority which appointed him to that service or to any grade in that service or to that post:

Whichever authority is the highest authority."

9. If one has regard to the above, an appointing authority would be the one who has appointed the railway servant in service or grade and the authority, which is the highest one. Generally rules framed under Article 309 of the Constitution of India are binding, yet the Railway Board's circulars issued from time to time being supplementary not inconsistent are also to be binding on the authorities.

10. As per Railway Board's letter dated 20.8.1997 No. E (D&A)63RG 6-49, the appointing authority has been clarified as follows:

"(8) 'Appointing authority of staff in relation to imposition of penalties of dismissal/removal/compulsory retirement-clarification-Reference Board's letter No.(D&A) 63 RG 6-23 dated 21.2.1964 wherein the Board had decided that in cases where records or appointment letters to show the actual appointing authority are not available, the General Manager should be treated as the 'appointing authority' and it would not be safe to follow any other course.

2. Consequent upon a decision of the Calcutta High Court on 16.7.1976 in FMA NO.1022

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of 1975 dismissing the appeal of the Eastern Railway against the judgment dated 2.9.1974 of the Single Judge of Calcutta High Court quashing Eastern Railway's Orders of removal from service served on Shri P.C. Chaudhary and other Class III staff, inter alia, on the ground that the expression 'whichever' authority is the highest, authority' appearing below Rule 2 (1) (a) of Railway Servants (Discipline and Appeal) Rules, 1968 applies with all force to all the sub-clauses (i) (ii), (iii) thereby providing that of the authorities making appointments of Railway servants to the service or grade or post, the highest authority among them shall be the appointing authority.

The Board have considered the matter. It is clarified that delegation may serve the purpose only so long as the employee is not in a position to prove that he was not actually appointed by any higher authority in spite of the delegation. In other words, in spite of delegation, if an authority higher than the authority to which powers have been subsequently delegated has actually made the appointment, it would be the function of that appointing authority to dismiss, remove or compulsorily retire the employee.

[Railway Board's letter No.E(D&A) 76 RG 6-49 dated 20.8.1977, NR 6857, SC 108/77]"

11. If one has regard to the above, any subsequent delegation in the matter of assigning power of appointment in respect of any particular grade or post in Railways the appointing authority would be the authority that has actually made the appointment despite subsequent delegation.

12. Applicant in his OA in paragraphs 4.58 and 4.59 took the aforesaid plea of incompetence of Senior DMO as a disciplinary authority by stating that once applicant was further promoted in the pay scale of Rs.550-750 as Chief Pharmacist with the approval of CMO and by General Manager (P) the authority who has passed the orders, i.e., Senior DMO is an authority below the rank of the appointing authority and for a Chief Pharmacist General



Manager (P) or CMO is the actual authority who issued the orders, General Manager (P)/CMO not being the highest authority who could impose punishment.

13. Article 311 (1) of the Constitution of India provides that no one should be removed/dismissed or even compulsorily retired as prescribed under the Railway Rules that only an authority of the rank of an appointing authority would inflict the penalty mentioned from serial No.5 to 9. This aspect of the matter is not specifically rebutted by the respondents in their reply except a bald and non-specific denial and assertion of applicant's compulsory retirement being by the competent authority.

14. Applicant in his appeal has specifically took this objection in paragraph 5 of the order of penalty being passed without jurisdiction by an incompetent authority has not at all been considered, discussed or rebutted by the appellate authority. Under Rule 22 of the Rules *ibid* any violation in the procedure including infliction of penalty, which violates constitutional right guaranteed under Article 311 (2) of the Constitution of India, by a reasoned order such a specific finding has to be recorded. Having not done so, the appellate order is not in conformity with the rules being non-speaking without discussing the aforesaid issue, is also not legally tenable.

15. As regards proportionality of punishment, applicant who had long service of about 26 years with an excellent service record in the past for which he had been accorded promotions from time to time, merely because punishment has been inflicted



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on non-complying with the transfer order and his alleged absence for about one year is mitigated on the fact that before the order was passed the conciliatory proceedings were in vogue where the issue of transfer was in dispute. Section 33 of the Industrial Disputes Act, 1947 bars passing of any adverse order during the interregnum of conciliation. Moreover, it is the statement which culminated the proceedings before the High Court in the Writ Petition (supra) that applicant is being transferred back to Anand Vihar. Moreover, applicant having raised the issue of bias of EO and as per Rule of Discipline in such an event enquiry should have been stayed. Neither any order passed to reject his request nor were the proceedings stayed culminated into a finding of guilt, which has greatly prejudiced applicant and henceforth the denial of reasonable opportunity in violation of principles of natural justice.

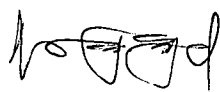
16. In the orders passed in appeal though the appellate authority is mandated to consider all the contentions raised and to pass a reasoned order, there is no finding discussing the reasons as to proportionality of punishment upon applicant. As such the order of the appellate authority is not in conformity with Rule 22 of the Rules showing non-application of mind.

17. In the result, for the foregoing reasons, without adjudicating upon other legal issues raised by applicant, OA is partly allowed. Order passed by the appellate authority is set aside. The matter is remanded back to the appellate authority to re-consider appeal of applicant and all his contentions raised therein,

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including jurisdiction of the disciplinary authority as well as other issue of denial of reasonable opportunity and proportionality of punishment by passing a detailed and speaking order to be passed within a period of two months from the date of receipt of a copy of this order. In the event the appellate authority decides to put back applicant in service the interregnum would be decided as per Indian Railway Establishment Manual akin with FR

54. No costs.



(N.D. Dayal)
Member (A)



(Shanker Raju)
Member (J)

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