(18)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.246/2002

New Delhi this the 5th day of September, 2003.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)
HON'BLE MR. R.K. UPADHYAYA, MEMBER (ADMNV)

Dr. Dharmendra Singh,
S/o Sh. N.P. Singh,
R/o B-35, New Gopal Nagar,
Dhasa Road, Najafgarh,
New Delhi-110043. -Applicant

(By Advocate Shri B.B. Raval)

-Versus-

1. Kendriya Vidyalaya Sangathan,
through the Commissioner,
18, Institutional Area,
Shaheed Jeet Singh Marg,
New Delhi-110016.

2. Shri Gurpal Singh,
Principal Kendriya Vidyalaya No.2,
Air Force Station,
Amritsar (Punjab).

3. The Assistant Commissioner,
Kendriya Vidalaya Sangathan,
Regional Office,
1-DC, Gandhi Nagar,
Jammu.

4. Sh. S.S. Gill,
Principal,
Kendriya Vidyalaya No.3,
Near Amritsar Cantt.,
Amritsar (Punjab).

5. Union of India,
through the Secretary,
Ministry of Human Resource Development,
Shastri Bhavan,
New Delhi-110001. -Respondents

(By Advocate Shri S. Rajappa)

1. To be referred to the Reporters or not? YES/~~NO~~ ✓

2. To be circulated to other Benches of the Tribunal? YES/NO

S. Raju

(Shanker Raju)
Member (J)

(19)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.246/2002

New Delhi this the 5th day of September, 2003.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)
HON'BLE MR. R.K. UPADHYAYA, MEMBER (ADMNV)

Dr. Dharmendra Singh,
S/o Sh. N.P. Singh,
R/o B-35, New Gopal Nagar,
Dhasa Road, Najafgarh,
New Delhi-110043. -Applicant

(By Advocate Shri B.B. Raval)

-Versus-

1. Kendriya Vidyalaya Sangathan,
through the Commissioner,
18, Institutional Area,
Shaheed Jeet Singh Marg,
New Delhi-110016.

2. Shri Gurpal Singh,
Principal Kendriya Vidyalaya No.2,
Air Force Station,
Amritsar (Punjab).

3. The Assistant Commissioner,
Kendriya Vidalaya Sangathan,
Regional Office,
1-DC, Gandhi Nagar,
Jammu.

4. Sh. S.S. Gill,
Principal,
Kendriya Vidyalaya No.3,
Near Amritsar Cantt.,
Amritsar (Punjab).

5. Union of India,
through the Secretary,
Ministry of Human Resource Development,
Shastri Bhavan,
New Delhi-110001. -Respondents

(By Advocate Shri S. Rajappa)

O R D E R

By Mr. Shanker Raju, Member (J):

Applicant impugns removal order dated 20.9.1999 as well as appellate order dated 14.12.2001, upholding the punishment. Quashment of the above order has been sought with all consequential benefits.

2. Applicant joined KVS as Primary Teacher on 2.11.1982 and thereafter selected as Post Graduate Teacher (Physics) in the year 1986. By an order dated 26.2.1996 applicant was transferred to Amritsar and relieved on 1.3.1996. However, a request has been made to modify the transfer order on medical grounds made through representation and review. The request was turned down. It is alleged that though applicant reported for duty at KVS on 1.7.1996, he was not taken on duty. As the salary of applicant was not released from December, 1996 to November, 1997, finding no response to the representation made, CWP No.3399/1997 was filed before the High Court of Delhi in August, 1997, where notices have been issued on 28.10.1997. On a direction in CMP No.10418/1997 the High Court was pleased to order release of subsistence allowance to applicant. Being aggrieved with non-payment applicant filed CWP No.6615/1997 and thereafter the Writ Petition stood transferred to the Tribunal as TA-1/1999.

3. Applicant filed contempt petition in OA on which notices have been issued. By an order dated 16.7.2001 in TA-1/1999 as well as CP-306/1999, taking note of the removal order passed in pursuance of the disciplinary proceedings initiated against applicant liberty has been given to applicant to exhaust the remedy and to approach the Court in accordance with law afresh.

4. In pursuance thereof, applicant preferred a detailed appeal on 17.8.2001 to the respondents assailing illegal exparte proceedings and non-supply of the enquiry report along with other grounds. As the appeal was turned down on 14.12.2001, the present OA has been filed.

5. Learned counsel for applicant Sh. B.B. Raval has taken several pleas to assail the impugned order. One of the main pleas taken is non-furnishing of the enquiry report before imposition of punishment. According to him, enquiry report has not been validly and legally served upon applicant. As such, a grave prejudice has been caused to him, which vitiates the orders. He relies upon the decision of the Apex Court in **Dr. R.C. Tyagi v. Union of India**, 1994 (2) SCC 416 to substantiate his plea. Further placing reliance on a decision of the Apex Court in **G.S. Chadha v. State of Rajasthan**, AIR 1961 SC 1418, it is contended that as the matter was sub judice before the High Court and stood transferred to the Tribunal, any proceeding taken during this interregnum is liable to be set aside.

6. In so far as available address of applicant is concerned, in the pleadings in para 5 (M) it is contended that in CWP No.776/1998 in Civil Writ Petition No.3399 of 1997 applicant sent a copy of the order dated 11.8.1999 passed by the Tribunal in TA to expedite the payment of subsistence allowance, where address of applicant as F-4, Budh Vihar, Phase-I, New Delhi was mentioned. Aforesaid communication was sent on 20.8.1999. Despite that no notices have been issued on furnishing applicant a copy of the enquiry report.

7. Learned counsel of applicant Sh. B.B. Raval contends that a service is effective only when it is either refused or in a disciplinary proceeding no presumption of service can be drawn and what matters is actual service.

He relies upon decision of the Apex Court in **Union of India & Ors. v. Dinanath Shantaram karekar & Ors.**, JT 1998 (6) SC 1, to substantiate his plea. In this backdrop it is stated that the only communication has come back undelivered as applicant was not found, cannot be treated as a valid legal service.

8. In so far as prejudice is concerned, it is stated that on ex-parte enquiry which has been resorted to illegally without adhering to the request of applicant to adjourn the proceedings, the finding recorded by the enquiry officer is an additional material with the disciplinary authority which has been weighed heavily in his mind to impose upon the punishment. As denial of an opportunity to rebut the conclusions arrived at by the enquiry officer by not furnishing to applicant copy of the enquiry report has prejudiced him and his case is squarely covered by the decision of the Apex Court in **E.C.I.L., Hyderabad v. B. Karunakar**, JT 1993 (6) SC 1.

9. Lastly, learned counsel for applicant states that in view of the decision of the Constitutional Bench of the Apex Court in **D.R. Deb v. Collector of Central Excise, Shillong**, 1971 Supp. SCR 375 remanding the case back to the respondents would amount to de novo proceedings.

10. On the other hand, respondents' counsel on the aforesaid issue vehemently opposed the contentions and also produced the departmental record. According to him, on applicant's three available addresses of applicant communication was sent but the same remained undelivered

and as aforesaid communication was sent through registered AD post as per Section 27 of the General Clauses Act, presumption of service is to be drawn. According to him, applicant though has been served with the enquiry report, yet he has not filed any reply which is a due compliance of the constitutional mandate and there is no violation of principles of natural justice. Placing reliance on the following decisions of the Apex Court it is contended that in a judicial review the Tribunal should not mechanically set aside the order and mere non-supply without any prejudice would not vitiate the enquiry:

i) Lalit Popli v. Canara Bank & Ors., 2003 (2) SCALE 358.

ii) Canara Bank and Ors. Vs. Shri Debasis Das and Ors., 2003(3) SCALE 220

11. However, on our pointed query as to the knowledge of the addresses furnished to the respondents, we find that the contentions raised in paragraph 5 (M) of the OA remained unrebutted.

12. According to Shri Rajappa, applicant's misconduct is grave, warranting extreme punishment and his contentions raised in the appeal have been meticulously dealt with by the Appellate Authority. According to him as applicant has refused to take over the charge, remained unauthorizedly absent and entered into second marriage.

The proportionality of punishment has been gone into and there is no infirmity in the proceedings as well as in the orders passed. Hence the OA is liable to be dismissed.

13. We have carefully considered the rival contentions of the parties and perused the material on record.

14. Before proceeding to adjudicate the present issue, on scanning of the record, we find that Enquiry Officer through his report dated 5.7.99 held applicant guilty of the charge. The only communication which is existing on record is a speed post containing enquiry report sent to applicant on 6.9.99 on his address at C-18, Phase-I, Budh Vihar, New Delhi. The aforesaid communication had remained undelivered with the postal comments that the adressee had left the place. In this view of the matter, it has to be ascertained whether the aforesaid amounts to a legal and valid service.

15. As per Section-27 of the General Clauses Act, a registered A.D. post if sent on the correct address entails presumption of service.

16. The Apex Court in Karkekar's case (supra) while dealing with the case where the charge sheet sent through registered post when returned with endorsement of 'not found' the show cause notice published in Newspaper showing no wide circulation held as follows:-

> "3. Respondent was an employee of the appellant. His personal file and the entire service record was available in which his home address

also had been mentioned. The charge sheet which was sent to the respondent was returned with the postal endorsement "not found". This indicates that the charge sheet was not tendered to him even by the postal authorities. A document sent by registered post can be treated to have been served only when it is established that it was tendered to the addressee. Where the addressee was not available even to the postal authorities, and the registered cover was returned to the sender with the endorsement "not found", it cannot be legally treated to have been served. The appellant should have made further efforts to serve the charge sheet on the respondent. Single effort, in the circumstances of the case, cannot be treated as sufficient. That being so, the very initiation of the departmental proceedings was bad. It was ex-parte even from the stage of charge sheet which, at no stage, was served upon the respondent.

7. As would appear from the perusal of that decision, the law with regard to "Communication" and not "Actual Service" was laid down in the context of the order by which services were terminated. It was based on a consideration of the earlier decisions in State of Punjab v. Khemi Ram, AIR 1970 SC 214; Bachhittar Singh v. State of Punjab, 1962 Supp. (3) SCR 713 = AIR 1963 SC 395; State of Punjab v. Amar Singh Harika, AIR 1966 SC 1313 and S.Pratap Singh v. State of Punjab (1964) 4 SCR 733 = AIR 1964 SC 72. The following passage was quoted from S.Pratap Singh's Judgement (supra):-

" It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change in its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it.

> In our view, once an order is issued and it is sent out to the concerned government servant, it must be held to have been communicated to him, to matter when he actually received it."

8. It was in this background that in cases where services are terminated or a person is dismissed from service, communication of the order and not its actual service was held to be sufficient. But this principle cannot be invoked in the instant case.

> 10. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet its actually services essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So, also when the show-cause notice is issued, the employee is called upon to submit his reply to the action propose to be taken against him. Since in both the situations, the employees is given an opportunity to submit his reply, the theory of "Communication" cannot be invoked and "Actual Service" must be proved and established. It has already been found that neither the charge-sheet nor the show-cause notice were ever served upon the original respondents, Dinanath Shantaram Karekar. Consequently, the entire proceedings were vitiated."

17. The Apex Court in R.C. Tyagi's case (supra) has held as follows:-

> "7. As regards the dismissal of the appellant it is unfortunate that he did not join. The service discipline does not permit such adamant attitude. We do not approve of the conduct of the appellant. At the same time the authorities too did not adopt any reasonable or rational attitude. They were out to squeeze the appellant and were not willing to budge and consider even when the Director of the Pune Institute requested them not to post him there as sending such a person was waste

for a man of such high calibre. True, the terms and conditions of appointment provide that he could be transferred anywhere in the country. yet the action must be fair and order legal. We have avoided entering into fairness but on legality there is no doubt. Such attitude of the administrative set-up is neither healthy nor conducive. In service culture devotion to work and duty is more important than clash of false ego. We are pained to observe that entire proceedings do not leave very happy and satisfactory impression. It was vehemently argued that there was no procedural irregularity. But that is writ large on the face of it. No charge sheet was served on the appellant. The Enquiry Officer himself stated that the notices sent were returned with endorsement "left without address" and on other occasion, " on repeated visits people in the house that he has gone out and they do not disclose where he has gone. Therefore, it is being returned". May be that the appellant was avoiding it but avoidance does not mean that it gave a right to enquiry Officer to proceed ex parte unless it was conclusively established that he deliberately and knowingly did not accept it. The endorsement on the envelope that it was refused, was not even proved by examining the postman or any other material to show that it was refusal by the appellant who denied on oath such a refusal. No effort was made to serve in any other manner known in law. Under Postal Act and Rules the manner of service is provided. Even service rules take care of it. Not one was resorted to. And from the endorsement it is clear that the envelope containing charge-sheet was returned. In absence of any charge-sheet or any material supplied to the appellant it is difficult to agree that the inquiry did not suffer from any procedural infirmity. No further need be said as the appellant having been removed for not complying with the transfer order and it having been held that it was invalid and non est the order of dismissal falls automatically."

18. If one has regard to the above, in a case of disciplinary proceedings the presumption of service cannot be inferred. It is the actual service in a disciplinary proceeding which matters. It is not disputed that the address on which the communication was sent applicant had left and it could not be delivered. However, as it is not rebutted that the address of applicant at F-4 Budh Vihar, Phase-I, New Delhi was within the knowledge of the respondents, sending no communication on the aforesaid address speaks volume about the action of the respondents. The service shown as effective is not a valid legal service. We also find that only one communication has sent and the alternative mode of publication in Newspaper of wide circulation has not been followed. Be that as it may, the fact remains that the enquiry report has not been validly and legally served upon applicant.

19. In so far as prejudice for not furnishing copy of enquiry report upon applicant is concerned, we have gone through the record and find that applicant in receipt of the Memorandum under Rule-14 of the CCS (CCA) Rules, 1965 had requested respondents to keep the enquiry in abeyance. The same remained unresponded and no orders have been passed. Moreover, applicant has been deprived of an opportunity to submit his version and rebut the allegations. This gains more importance and is mandated in consonance with the principles of natural justice and fair play in cases where the extreme punishment of dismissal and removal is to be inflicted. By the action of the respondents the right of livelihood of applicant has been divested away from him. The constitutional Bench of the Apex Court in ECIL's case (supra) observed as under:-

"58. The findings or recommended punishment by the enquiry officer are likely to affect the mind of the disciplinary authority in his concluding the guilt or penalty to be imposed. The delinquent is, therefore, entitled to meet the reasoning, controvert the conclusions reached by the enquiry officer or is entitled to explain the effect of the evident recorded. Unless the copy of the report is supplied to him he would be in dark to know the findings, the reasons in support thereof or nature of the recommendation on penalty. He would point out all the factual or legal errors committed by the enquiry officer. He may also persuade the disciplinary authority that the finding is based on no evidence or the relevant material evidence was not considered or overlooked by the enquiry officer in coming to the conclusion. With a view to persuade the disciplinary authority to disagree with the enquiry officer and to consider his innocence of the charge, or even the guilt of the misconduct has not been established on the evidence on records or disabuse the initial impression formed in the minds of the disciplinary authority on consideration of the enquiry report. Even if the disciplinary authority comes to the conclusion that charge or charges is/are proved, the case does not warrant imposition of any penalty. He may plead mitigating or extenuating circumstances to impose no punishment or a lesser punishment. For this purpose the delinquent needs reasonable opportunity or fair play in action. The supply of the copy of the report is neither an empty formality, nor a ritual, but aims to digress the direction of the disciplinary authority from his derivative conclusions from the report to the palliative path of fair consideration. The denial of the supply of the copy, therefore, causes to the delinquent a grave prejudice and avoidable injustice which cannot be cured or mitigated in appeal or at a challenge under Art. 226 of the Constitution or S.19 of the Tribunal Act or other relevant provisions. Ex post facto opportunity does not efface the past impression formed by

> the disciplinary authority against the delinquent, however, professedly to be fair to the delinquent. The lurking suspicion always lingers in the mind of the delinquent that the disciplinary authority was not objective and he was treated unfairly. To alleviate such an impression and to prevent injustice or miscarriage of justice at the threshold, the disciplinary authority should supply the copy of the report, consider objectively the records, the evidence, the report and the explanation of offered by the delinquent and make up his mind on proof of the charge or the nature of the penalty. The supply of the copy of the report is, thus, a sine qua non for a valid, fair, just and proper procedure to defend the delinquent himself effectively and efficaciously. The denial thereof is offending not only Art. 311(2) but also violates Arts. 14 and 21 of the constitution.

20. If one has regard to the aforesaid the conclusion arrived at by the enquiring authority in an additional material weighed in the mind of the disciplinary authority to impose an extreme punishment. Before doing so, an opportunity to rebut and to show cause has been denied to applicant. This, in fact, prejudices applicant in the circumstances of the case. The Apex Court in such a case observed the following follow up action in E.C.I.L's case (supra):

> "31. Hence, in all cases where the Inquiry Officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal , and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/Tribunal comes to the conclusion that the non-supply of the report would have made no

difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to shortcuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, [and not any internal appellate or revisional authority], there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the

report and no more, where such fresh inquiry is held. That will also be the correct position in law.'

21. We also find that the appellate authority despite contentions put-forth by applicant regarding supply of the enquiry report has not recorded any finding and this shows non-application of mind to the record of the proceedings. On this count orders passed by the disciplinary authority as well as appellate authority cannot sustained in law.

22. In the result for the forgoing reasons, without dealing with other contentions of applicant, the impugned orders are quashed and set aside. Applicant is directed to be reinstated in service forth-with. However, respondents are at liberty to further proceed the enquiry, if so advised, by placing applicant under suspension and resume the enquiry from the stage of furnishing applicant copy of the enquiry report. The intervening period and benefits including back wages would be decided by the respondents in accordance with rules and instructions and would be subject to the outcome of the orders passed. Aforesaid directions shall be complied with by the respondents within a period of two months from the date of receipt of a copy of this order. The OA stands disposed of accordingly. No costs.

(R.K. Upadhyaya)
Member (A)

S. Raju
(Shanker Raju)
Member (J)

'San.'