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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.No.583/98

Hon'ble Shri V.K.Majotra, Member(A)
Hon'ble Shri Shanker Raju, Member(J)

New Delhi, this the 5th day of February, 2001

Jai Prakash
s/o late Sh. Bir Singh
Ex-Work Shop Supervisor
Lok Nayak Hospital
r/o 105-A, Pocket-B
Dilshad Garden
Delhi - 110 095. ... Applicant

(By Shri K.B.S.Rajan, Advocate)

Vs.

1. Govt. of NCT of Delhi
through the Chief Secretary, Delhi
5, Sham Nath Marg
Delhi - 54.
2. Principal Secretary (Health)
Govt. of NCT of Delhi
5, Sham Nath Marg
Delhi.
3. Medical Superintendent
Lok Nayak Hospital
New Delhi - 2. ... Respondents

(By Shri Rajan Sharma, through Shri Ashwini Bhardwaj,
Advocate)

O R D E R (Oral)

By Shri Shanker Raju, Member(J):

The applicant, who was working as Workshop Supervisor with the respondents, has assailed an order dated 27.10.1995 passed by the respondents wherein it has been mentioned that regular departmental proceedings is not reasonably practicable against the applicant and as such by invoking Rule 19(ii) of CCS (CCA) Rules, 1965 a major penalty of removal from the service has been inflicted upon the applicant. The applicant had also preferred an appeal vide letter dated 17.5.1996 but the same was rejected as time barred, vide order dated 21.1.1998. Above stated orders are impugned in this application.

2. The brief facts leading to the present case are that the applicant on account of mitigating circumstances has alleged that due to the death of his relative and due to self-illness he remained absent from duty w.e.f. 12.12.1994 to 27.10.1995. According to the applicant, he had sent various communications to the department for grant of leave admissible and due to him by attaching the relevant record. It has been contended by the applicant that the respondents without affording an opportunity to the applicant, removed him from service and his request regarding extension of leave has been rejected much after the date of his removal from service. The applicant further contended that a show cause notice has been purportedly sent to him on the wrong address whereas he had already informed the department regarding his change of address by submitting the letter to the concerned authority which was duly diarised by the respondents. It has been further contended by the learned counsel for the applicant that in case of alleged unauthorised absence from duty, the provision of Rule 19(ii) cannot be resorted to, in view of the Constitutional Bench Judgement of Apex Court in Union of India & Others Vs. Tulsi Ram Patel. It has been contended that the right procedure was to proceed the applicant in an ex-parte proceedings presuming that he had been served as the fact of show cause notice was also reported in the news papers by the respondents. The applicant places reliance on the instructions issued under Rule 14 and 19(ii) ibid as well as Judgment of the Bangalore Bench of this Tribunal in C.Muniyappa Vs. Air Officer Commanding & Others (OA

No.2082/95) decided on 17.4.1996 and vehemently stressed that such a procedure cannot be adopted in the case where Government servant is allegedly found unauthorisedly absent from duty.

3. The respondents in the reply had denied the fact that the application of change of address was received by them. It has been further contended by the learned counsel for the respondents that the show cause notice was returned back 'undelivered' as such as a last resort the same was published in an Indian Express news paper, dated 10.7.1995. As the applicant could not turn himself within ten days there was no other alternative but to discharge the services of the applicant under Rule 19(ii) ibid. It is also contended that the explanation given by the applicant regarding his unauthorised absence is w.e.f. 2.7.1995 as compiled by him but there is no explanation of absence w.e.f. 12.12.1994 to 2.7.1995. The respondents' counsel, referred to Rule 7(ii) and 19 of CCS (Leave) Rules, 1972 to contend that the leave cannot be claimed as a matter of right and the absence was intentional and unauthorised. Applicant reiterated his contentions in the rejoinder filed by him.

4. We have carefully considered the rival contentions of the parties and perused the available material on record. As regards the issue of applicant informing the department about his change of address, our attention has been drawn by the learned counsel to the letter dated 1.6.1989 written to the Medical Superintendent, LNJP Hospital, New Delhi whereby the

applicant had informed the respondents regarding his change of address from C-50, Z-4, MIG Flats, Dilshad Garden to 105-A, Pocket ASB, Group III, Dilshad Garden, Delhi - 110 032. This letter has been diarised vide diary No.615 dated 1.6.1989. The aforesaid averment has been taken by the applicant in this OA at Para 4.2(a) to which the respondents had not given a specific denial and controverted the diary number existing in this letter. Mere averment that the letter was not received in the office of respondents would not be a complete denial of the contention of the applicant. In view of the fact that this averment of the applicant is uncontraverted and the same is taken to be true in the record. We are of the considered view that the applicant had already informed the department about his change of address which was existing in their records.

5. As regards the unauthorised absence of the applicant w.e.f. 12.12.1994 till the date of his removal from service, we find from the record that the applicant had sent various communications to the department for seeking leave of the kind due on the ground of death of relative and on account of his own illness. We have come across Annexure-K, letter dated 9.2.1996 addressed to the applicant by Director(Administration), LNJP Hospital whereby there was a reference of four communications sent by the applicant for grant of leave due to him. The respondents had rejected this request not immediately and took sufficient time to reject the same by referring to the fact that the applicant has already been removed from the Hospital the matter does not

pertain to the Department. Apart from it the applicant in para 4.4 of the OA has referred to certain remarks which have been in pursuance of the period of leave applied for and referred to the communications sent to personal branch of Medical Officer (Incharge) through messenger and through registered communication. It has been further averred that the communications have been returned without sanction of leave. To this averment of the applicant, we find that the respondents in para 4.4 has not specifically controverted the fact that the communications have been sent to the respondents as alleged by the applicant. We also find from the record that several medical papers annexed by the applicant as well as the death certificate of his relative. In our considered opinion the respondents despite information regarding the ground of absence of the applicant have not promptly informed him about the rejection of his request and served him on a wrong address which resulted in deprivation of reasonable opportunity to the applicant to put forth his defence including the documents explaining the period of absence. The respondents plea that though the letter show cause notice came back 'undelivered' as the applicant was not found would not amount to legal service as held by the Apex Court in Union of India & Others Vs. Deenanath Shantaram Karekar and Others, JT 1998 (6) SC 1. As regards the publication in the news paper of the show cause notice is concerned even if it is presumed that the same is validly published and had come to the knowledge of the applicant, the same would have to be treated as service upon the applicant. In

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this view of ours, we are fortified by the ratio laid down by the Co-ordinate Bench of this Tribunal, where it has been held as under:

"If that be so if the delinquent is not heard of inspite paper publication requiring his present, it should be treated on par with the case where the delinquent remains absent in spite of being served. The instances given in Tulsi Ram Patel's case are illustrative in nature and by no stretch of imagination a circumstances existing as in the present case can be construed to be justifiable to invoke Rule 19(ii) of the Rules. The order now impugned only states that the applicant was not present inspite of office having been issued by paper publication. That was precisely the reason why the disciplinary authority ought to have proceeded ex-parte and held ex-parte inquiry against him and then taken such an action as permissible under the Rules."

6. In our view, though Rule 19(ii) is an exception to procedure laid down under Rule 14 of CCS (CCA) Rules, but in cases where a Government servant unauthorizedly absents from duty the said provisions cannot be resorted to. After the ratio laid down by the Apex Court in Constitutional Bench in Union of India & Others Vs. Tulsi Ram Patel, 1985 SCC (L&S) 672, the Government of India has formulated certain guide-lines vide OM No.11012/11/85-Estt(A) dated 11.11.1985 and 4.4.1986 wherein para 5-A (c) and 6 are as under:

"5-A (c) Cases falling under Rule 19(ii): A question has been raised whether in a case where clause (b) of the second proviso to Article 311 (2) of the Constitution is invoked, the disciplinary authority may dispense with the issuing of charge memo, listing the charges. Clause (b) is attracted in a case where the disciplinary authority concludes "that it is not reasonably practicable to hold such an inquiry". The circumstances leading to such a conclusion may exist either before the inquiry is commenced or may develop in the course of the inquiry. In the Tulsi Ram Patel case, the Supreme Court observed as under -

"It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a Government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the Government servant or after he has filed his written statement thereto or even after the evidence had been led in part. In such a case also, the disciplinary authority would be entitled to apply clause (b) of the second proviso because the word 'inquiry' in that clause includes part of an inquiry."

Article 311(2) of the Constitution concerns itself with the punishment of dismissal, removal or reduction in rank, which comes in the category of major punishment under the service rules providing the procedure for disciplinary action against Government servants. The first step in that procedure is the service of a memorandum of charges or a charge-sheet, as popularly known, on the Government servant, listing the charges against him and calling upon him, by a specified date, to furnish a reply either denying or accepting all or any of the charges. An inquiry hence commences under the service rules with the service of the charge-sheet. Obviously, if the circumstances even before the commencement of an inquiry are such that the disciplinary authority holds that it is not reasonably practicable to hold an inquiry, no action by way of service of charge-sheet would be necessary. On the other hand, if such circumstances develop in the course of inquiry, a charge-sheet would already have been served on the Government servant concerned.

6. There are two conditions precedent which must be satisfied before action under clause (b) of second proviso is taken against a Government servant. These conditions are:-

(i) There must exist a situation which makes the holding of an inquiry contemplated by Art. 311(2) not reasonably practicable. What is required is that holding of inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate all the cases in which it would not be reasonably practicable to hold the inquiry. Illustrative cases would be -

- (a) Where a civil servant, through or together with his associates, terrorizes, threatens or intimidates witnesses who are likely to give evidence against him with fear of reprisal in order to prevent them from doing so; or
- (b) Where the civil servant by himself or with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that the officer is afraid to hold the inquiry or direct it to be held; or

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- (c) Where an atmosphere of violence or of general indiscipline and insubordination prevails at the time the attempt to hold the inquiry is made.

The disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the civil servant is weak and is, therefore, bound to fail.

It is important to note that the circumstances of the nature given in the illustrative cases, or other circumstances which make the disciplinary authority conclude that it is not reasonably practicable to hold the inquiry, should actually subsist at the time when the conclusion is arrived at. The threat, intimidation or the atmosphere of violence or of a general indiscipline and insubordination, for example, referred to in the illustrative cases, should be subsisting at the time when the disciplinary authority arrives at his conclusion. It will not be correct on the part of the disciplinary authority to anticipate such circumstances as those that are likely to arise, possible later in time, as grounds for holding that it is not reasonably practicable to hold the inquiry and, on that basis, dispense with serving a charge-sheet on the Government servant.

(ii) Another important condition precedent to the application of clause (b) of the second proviso to Art. 311(2), or Rule 19(ii) of the CCS (CCA) Rules, 1965, or any other similar rule is that the disciplinary authority should record in writing the reason or reasons for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Art. 311(2) or corresponding provisions in the service rules. This is a constitutional obligation and, if the reasons are not recorded in writing, the order dispensing with the inquiry and the order of penalty following it would both be void and unconstitutional. It should also be kept in mind that the recording in writing of the reasons for dispensing with the inquiry must precede an order imposing the penalty. Legally speaking, the reasons for dispensing with the inquiry need not find a place in the final order itself, though they should be recorded separately in the relevant file. In spite of this legal position, it would be of advantage to incorporate briefly the reasons which led the disciplinary authority to the conclusion that it was not reasonably practicable to hold an inquiry, in the order of penalty. While the reasons so given may be brief, they should not be vague or they should not be just a repetition of the language of the relevant rules."

7. Applying the ratio laid down by the Apex Court and the guide-lines, the case of the applicant does not fall in any of the illustrative cases

enumerated in the judgement supra. What we feel that the respondents despite having the current correct address of the applicant with a view to avoid holding of an enquiry resorted to the provisions of Rule 19(ii) ibid. In view of the facts stated above, we are of the considered opinion that the present case being one of unauthorised absence, the provisions of Rule 19(ii) have been wrongly applied to. we are further fortified in this view of ours by a Judgment of this Tribunal dated 24.1.2001 in OA No.1200/2000, Mrs. Shailamma Lawrance Vs. Govt. of NCT of Delhi and Others, where it has been held that in cases of remaining absence from duty Rule 19(ii) ibid would not have any application.

8. We also find from the record that the applicant has approached this Tribunal in OA 1162/97 and vide order dated 2.12.1997 the respondents have directed to dispose of the appeal of the applicant dated 7.5.1997 in accordance with the law with a reasoned and speaking order. Further liberty was granted to the applicant to approach the Tribunal in case he is aggrieved by the appellate order. In this conspectus we have perused the impugned appellate order whereby the appeal preferred by the applicant has been rejected as time barred without dealing with the contentions on merit taken by the applicant and despite the directions of the Tribunal to pass a detailed and speaking order. In our view the appellate order is also not legally sustainable.

9. As regards the order of removal, we find that the disciplinary authority only on the basis that one communication had come back 'undelivered' and as the notice was issued in the news paper proceeded to

resort to Rule 19(ii) of CCS (CCA) Rules, 1965 by concluding that the regular departmental proceedings cannot be initiated or contemplated. It appears that at the time of passing this order even the proceedings were not initiated against the applicant. As such merely on his ipse dixit the disciplinary authority presumed that the enquiry would not be reasonably practicable despite the fact that the applicant had already informed the department about the grounds of his absence and this has not been specifically controverted by the respondents in the reply. The order of the disciplinary authority does not confirm to the ratio laid down by the Apex Court in Tulsi Ram Patel's case supra as well as the Judgment of the Tribunal in C.Munlyappa's case supra.

10. Having regard to the discussion and observations made above, we allow this OA and quash and set aside the order of removal dated 27.10.1995 as well as the appellate order dated 21.1.1998. The respondents are further directed to reinstate the applicant back in service forthwith with all consequential benefits but we limit back wages to 50 per cent. However, the respondents are at liberty to hold an enquiry under Rule 14 ibid if so advised after affording a reasonable opportunity to the applicant and take a suitable decision with regard to the period of applicant's absence from 12.12.1994 to 27.10.1995 keeping in view of the explanation tendered and the rules and instructions on the subject. The aforesaid directions shall be complied with within a period of three months from the date of receipt of a copy of this order. No costs.

S. Raju
(SHANKER RAJU)
MEMBER(J)

V.K. Majotra
(V.K. MAJOTRA)
MEMBER(A)