

(7)

CENTRAL ADMINISTRATIVE TRIBUNAL: PRINCIPAL BENCH.

D.A.No.2277/89

New Delhi this the 8th day of June, 1994.

Shri Justice V.S. Malimath, Chairman.

Shri P.T. Thiruvengadam, Member (A).

Dr. C.M. Jain,  
S/o Shri M.C. Jain,  
R/o 25-A M.I.G, Pocket C,  
Ashok Vihar Phase III,  
Delhi-110052.

.....

Petitioner.

By Advocate Shri Sant Lal.

Versus.

1. The Union of India,  
through the Additional  
Secretary Labour, Chairman  
Standing Committee, Employees  
State Insurance Corporation,  
Shram Shakti Bhawan,  
New Delhi-110001.

2. The Director General,  
Employees State Insurance  
Corporation, 4, Kotla Road,  
New Delhi-110002.

.....

Respondents.

By Advocate Shri Vivek Gambhir.

ORDER (ORAL)

Shri Justice V.S. Malimath.

A disciplinary inquiry was held against Dr. C.M. Jain, who was holding the post of General Duty Officer in the Employees State Insurance Corporation Hospital. The principal charge is that he was guilty of negligence in treating Master Bharat Bhushan who had sustained a compound fracture of both bones of left forearm. Although the patient was examined originally by the petitioner, he performed close reduction under general anaesthesia in a very irresponsible and negligent manner which resulted in the necessity for re-reduction by another expert

in the field by the name Dr. Ahuja. The allegation is that the petitioner did not care to see and examine the patient coming for the purpose of check X-ray for his own satisfaction on 19.1.1987 and 20.1.1987. When he saw the patient on 21.1.1987, he did not care to examine him and thus showed utter negligence which resulted in amputation of left forearm of Master Bharat Bhushan. The Inquiry Officer after holding the inquiry on the aforesaid charge held the petitioner guilty. Accepting the report of the Inquiry Officer, the disciplinary authority passed the order, Annexure A-I, dated 10.3.1989 inflicting the penalty of reduction in pay by four stages for a period of four years with cumulative effect. On appeal, the appellate authority reduced the penalty reducing the pay by two stages for a period of two years with cumulative effect. It is in this background that the petitioner has challenged the said orders in this Original Application.

2. Shri Sant Lal, learned counsel for the petitioner, formulated the following submissions:

- (a) That he was not given the assistance for defending himself in the inquiry of Shri H.C. Taneja on the ground that he is not an official of the Corporation and that, therefore, his services cannot be availed of by the petitioner.
- (b) That the Inquiry Officer acted virtually as a prosecutor in this case, in that, the petitioner, who had not offered himself as a witness in support of his case was extensively cross-examined to establish the charges against him.
- (c) The Inquiry Officer acted unfairly thereby denying the petitioner reasonable opportunity of

defending himself by examining the father of Master Bharat Bhushan Shri Kishan Chand, the key witness, in the absence of the petitioner on 25 and 26.2.1988 when he was on leave.

- (d) That no reasonable and effective steps were taken by the Inquiry Officer to tender Kishan Chand for cross-examination by the petitioner.
- (e) That four other witnesses were examined by the Inquiry Officer who were not listed as witnesses without giving him prior notice of examination of those witnesses.
- (f) That the findings recorded by the Inquiry Officer which have been accepted by the disciplinary authority are based on surmises and conjectures and not on proper and legal evidence.

3. We shall first take up for consideration the principal contention of Shri Sant Lal, bearing on the recording of the evidence of Shri Kishan Chand, father of Master Bharat Bhushan, in the absence of the petitioner and the failure on the part of the Inquiry Officer to take effective steps to ensure that the petitioner had the requisite opportunity to cross-examine the said witness. After having perused the Inquiry Officer's report we have no doubt in our mind that the principal witness in this case, who came from independent source, was Shri Kishan Chand. Though there is evidence of Dr. Ahuja, Dr. Davar and Technician Tak Chand, we are left with the impression that having regard to the unfortunate amputation of forearm of Master Bharat Bhushan, it is <sup>not</sup> suprising that everyone in Orthopaedics department would have felt worried that the blame may fall on them directly or indirectly. It is, therefore, that we are inclined to take the view that the evidence of Kishan Chand, father of Master Bharat Bhushan, who had accompanied the patient at all times, was crucial for determining the guilt of the petitioner in this case. The Inquiry Officer's

report does indicate that considerable reliance was placed on this independent witness. If the evidence of Shri Kishan Chand is excluded from consideration, it would not be easy to predicate as to whether the Inquiring authority and the disciplinary authority would have recorded the findings of ~~the~~ guilt against the petitioner on the basis of the remaining evidence. These are well settled principles of law that when a finding of fact is based on <sup>no</sup> evidence, or based on surmises and conjectures, the said findings of facts stand vitiated. It is in this background that it has become necessary for us to examine the contention of the petitioner in regard to the examination of Shri Kishan Chand as a witness in the absence of the petitioner and failure on the part of the Inquiry Officer to <sup>enable him to</sup> cross-examine the said witness by the petitioner <sup>even though</sup> / such an opportunity was demanded by him.

4. It has come in evidence that the petitioner was on leave on 25 and 26.2.1988 when Shri Kishan Chand's evidence was recorded. The petitioner's case is that he took leave from 7.1.1988 to 3.3.1988 as he had certain personal difficulties which rendered it difficult to attend to his normal functions in the hospital. A Govt. servant particularly a responsible Doctor like the petitioner would not have taken Earned Leave for such a long period unless the circumstances required him to abstain from his normal functions and to go on leave. That the petitioner has not come forward to state during the Inquiry as to why he took leave and as to whether it was not possible

for him to attend to the inquiry on 25 and 26.2.1988 even though he was on leave are not aspects which have impressed us. It is also not easy to accept the contention of Shri Gambhir, learned counsel for the respondents that if the petitioner had any difficulty to participate in the inquiry when he was on leave, he should have placed those materials before the Inquiry Officer to persuade him not to examine the witness during that period. Our attention was drawn to the fact that the Presenting Officer was Head of the Department himself and the Inquiry Officer was child specialist in the same hospital. The petitioner was the responsible Doctor in the Orthopaedics department and was on leave for a period from 7.1.1988 to 3.3.1988. Everyone in the hospital would have known that a responsible Medical Officer was on leave and, therefore, not available. It is, therefore, reasonable to presume that both the Inquiry Officer as well as the Presenting Officer knew fully well that the petitioner was on leave. It was contended by Shri Gambhir, learned counsel for the respondents, that as a joint inquiry was being held in this case, the Inquiry Officer felt that the evidence of Kishan Chand should be recorded as his evidence was necessary for the purpose of inquiry against all the delinquent officials. He submitted that if, on the ground that the delinquent official is on leave, the inquiry is postponed, the Inquiring Officer may not be able to conclude the inquiry at all. As already stated, the petitioner had gone on leave from an anterior point of time, namely, from 7.1.1988 and not on the eve of the ~~the~~ dates on which Shri Kishan Chand was examined. It is, therefore, not possible to draw an inference

that going of the petitioner on leave and his not participating in the inquiry on 25 and 26.2.1988 was with a view to protract the inquiry or to defeat the real purpose of the inquiry. The Inquiry Officer, in our opinion, should have ~~acted~~ fairly and reasonably in postponing examination of Kishan Chand until the petitioner reported back to duty after expiring of leave as there is nothing to indicate that Kishan Chand would not be available for examination if his examination is postponed to another date. As the evidence of Shri Kishan Chand was very crucial, the Inquiry Officer ought to have acted with greater amount of concern for fairness to the delinquent official.

It has come on record that the petitioner did make a request to the Inquiry Officer to summon Kishan Chand and to tender him for cross-examination. The Inquiry Officer was obviously impressed by the request of the petitioner and directed notice to Kishan Chand to appear for the purpose of cross-examination but Kishan Chand did not turn up. The Inquiry Officer once again sent a notice to Kishan Chand but the witness did not turn up. It was contended by Shri Gambhir, learned counsel for the respondents, that unless the Inquiry Officer was <sup>powers</sup> armed with ~~to~~ to compel the attendance of the witness, his conduct cannot be faulted and no adverse inference should be drawn. It is necessary to point out that specific provisions have been enacted in the Departmental Inquiries Act to meet such a situation. Section 4 of the Act empowers the Central Government to confer ~~powers~~ on the authorised Inquiring Authority the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 for summoning and enforcing the attendance of any witness and examining him. ~~The~~ inquiring authority could have

have been empowered  
compel the attendance of the witness. No steps have been taken in this case to invoke the provisions of the Act. We find in the Swamy's Compilation of CCS(CCA) Rules extracted Government instructions in this behalf, paragraph 4 of which may for the sake of convenience be extracted as follows:

"4. It may please be noted that attendance of witnesses and production of documents before a departmental enquiry will continue to be secured in the manner as hitherto. Where, in the case of a departmental enquiry, the inquiring authority is satisfied that it is necessary to summon a person as a witness or to call for a document from him and that the attendance of such person as a witness or production of such documents may not otherwise be secured, it may, after recording the reasons for doing so, make a reference to the competent authority, or, where there is no competent authority, to the Central Government seeking authorisation under Section 4 of the Act, to exercise the powers specified in Section 5 in relation to such person. The power to authorise an inquiring authority to exercise the power specified in Section 5 of the Act *ibid.* may be exercised by the Central Government/the competent authority suo motu also if it is of the opinion that for the purpose of any departmental enquiry it is necessary so to do."

5. The inquiring authority having sent summons on two occasions to Kishan Chand and he having failed to appear as a witness ought to have followed the aforesaid instructions of the Government of India and sought empowerment for compelling attendance of the said witness. This is eminently a fit case

for following these instructions as Kishan Chand was a key witness in this departmental inquiry. No satisfactory explanation is forthcoming as to why the inquiring authority which had itself felt that it is necessary to summon Kishan Chand for cross-examination, did not take steps in accordance with the Government of India's instructions when he failed to ensure the attendance of Kishan Chand for the purpose of cross-examination by the petitioner. We have, therefore, no hesitation in holding that the inquiring authority did not act with the requisite amount of fairness in not taking necessary steps for compelling the summoning of Kishan Chand for the purpose of cross-examination by the petitioner. As the evidence of Kishan Chand is crucial for holding the petitioner guilty of the charges levelled against him, we are inclined to take the view that the inquiry stands vitiated by the use of the evidence of Kishan Chand, the petitioner having been deprived of the opportunity to test his evidence by exercise of his right to cross-examine him. On this short ground, we are inclined to interfere with the decision of the disciplinary authority and the appellate authority.

6. Shri Gambhir, learned counsel for the respondents, submitted that having regard to the gravity of the misconduct and the requirement of public interest, this is a fit case in which we should remit the case for fresh inquiry in accordance with law. We are not inclined to accept this request for two reasons. Firstly, the punishment imposed on the petitioner is only of withholding of reduction in pay by two stages with cumulative effect and not a very major penalty and secondly



for the reason that the incident took place long back. It would be difficult to procure evidence at this stage and, in our opinion, it is likely to result in unnecessary spending of public time and money.

7. For the reasons stated above, this petition is allowed and the impugned orders of the disciplinary authority and the appellate authority are hereby quashed. The petitioner is entitled to consequential benefits flowing from the quashing of these orders. Compliance shall be done within six months from the date of receipt of a copy of the judgement. No costs.

P. J. L.

(P.T. THIRUVENGADAM)  
MEMBER (A)

V. S. Malimath

(V.S. MALIMATH)  
CHAIRMAN

'SRD'  
0906094