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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

O.A.No.2143/1990

New Delhi, This the 30th Day of November 1994

Hon'ble Shri Justice S.C.Mathur, Chairman

Hon'ble Shri P.T.Thiruvenkadam, Member(A)

Noor Ahmed s/o late Shri Zahoor Ahmed
r/o Quarter No.79, P.T.S. Police Colony
Malviya Nagar, New Delhi - 17.Applicant

By Shri Sankar Raju, Advocate

Versus

1. Commissioner of Police Delhi,
Delhi Police Headquarters, M.S.O. Building
I P Estate, New Delhi.
2. Additional Commissioner of Police(A.P.)
Delhi Police Headquarters, M.S.O. Bldg
I.P. Estate, New Delhi.
3. Deputy Commissioner of Police, 8th Bn.D.A.P.
P.T.S. Malviya Nagar, New Delhi.

....Respondents

By Shri Rajinder Pandita, Advocate

ORDER

Hon'ble Shri P.T.Thiruvenkadam, Member(A)

1. The applicant joined Delhi Police on 7.2.69 and while posted in 8th Battalion, D.A.P. proceeded on 45 days EL with effect from 18.11.88 and was due back on 2.1.89. But he did not turn up and requested for further extension. He was granted further extension of 15 days leave with effect from 2.1.89 and was thus due to return on 16.1.89. But again he failed to report back and sent medical certificate. It is the case of the respondents that the applicant was advised 8 times to appear

before Civil Surgeon of the District for a second medical opinion. But he did not obey these orders. He was placed under suspension and a regular departmental enquiry was ordered against him on 6.6.89. by nominating an enquiry officer. A summary of allegations along with documents and list of witnesses was served on the applicant on 22.6.89. After examining the four prosecution witnesses in the presence of the applicant a chargesheet was framed and served on the applicant on 5.10.89. The chargesheet reads as under:-

"I, Insp. Jai Pal Singh, charge you, Const. Noor Ahmed, No.9350/DAP, that you proceeded on 45 days E.L. w.e.f. 18.11.88 and was due back on 2.1.89, but you did not turn-up and requested for further extension. You were also granted an extension of 15 days E.L.w.e.f 2.1.89 on your request and thus was due back on 16.1.89. But again failed to come back and sent the medical certificate and availed the rest without prior approval of competent authority according to S.O.No.111. You were directed as many as eight times through registered letters to appear before Civil surgeon of the Distt for second medical opinion, but you avoided knowingly to undergo second medical opinion and remained on Medical rest at your own sweet-will. Your past record of absence shows that you are a habitual absentee.

The above act on your part amounts to gross negligence and carelessness in discharging of your duties in violation of Rules 3(I)(III) C.C.S.(Conduct) Rules, 1964 rendering you liable for departmental action u/s 21 of D.P. Act, 1978."

The applicant denying the charge pleaded that no notice requiring him to appear before the Civil Surgeon for second medical opinion was served upon him. He, however, did not dispute that he did not obtain second medical opinion from the Civil Surgeon. He also denied that he was a habitual absentee.

2. In support of the charges, the department examined four witnesses. In support of his defence, the applicant examined two witnesses. In his statement, as observed by the Enquiry Officer, the applicant stated that neither any postman visited his house nor any letter/information was received by him and that during illness, he was under no obligation to remain present at his house at all times.

3. It appears from the report of the Enquiry Officer that the applicant's witness, DW I- Shri Ram Kishan Sharma stated that he was a resident of the same place where the applicant resided and that he had occasionally gone to the house of the applicant to enquire about his illness. The Enquiry Officer did not find him a reliable witness as he belonged to the applicant's native place and also because he could not tell the place from where the applicant was getting medicines.

4. In respect of DW-2, the Enquiry Officer has observed that he has not supported the applicant as he deposed that the postman usually visited the area to deliver letters. The Enquiry Officer was thus of the opinion that his testimony was not helpful.

5. Earlier the Enquiry Officer has referred briefly to the depositions of the departmental witnesses. PW-1 had deposed about the grant of leave to the applicant, and the despatch of letters requiring the applicant to send medical certificate. After stating that as many as 8 ^{were sent} absentee notices (exhibits PW 1-8), the witness, according to the enquiry report, deposed that the applicant avoided

to undergo the second medical opinion. The witness does not appear to have stated whether the 8 absentee notices were received by the applicant or they came with some postal endorsement. If they came back, there does not appear to be any statement made by the witness about the postal endorsement on the notices. The Enquiry Officer has not mentioned that this witness made any statement regarding previous unauthorised absence of the applicant.

6. PW-2, S.I. Avtar Singh appears to have stated about the arrival of the applicant after 149 days, 23 hours and 45 minutes on 1.6.1989. It does not appear from the report of the Enquiry Officer that this witness made any statement regarding the service of the absentee notices upon the applicant or about his previous unauthorised absence.

7. PW-3 appears to have stated that on 2.1.1989 he recorded the absence of the applicant as he had not joined after the expiry of the period of earned leave. The Enquiry Officer's report does not show that this witness made any statement regarding the service of the absentee notice and previous unauthorised absence of the applicant.

8. Regarding PW-4, the Enquiry Officer states that he deposed that on his arrival after the absence, the applicant submitted his medical papers to him which he transmitted to the Assistant Sub Inspector of Police on 7.6.1989 for necessary action. This witness again, it appears, did not make any statement regarding service of notices and the previous unauthorised absence of the applicant.

9. After referring to the depositions and prosecution witnesses, the Enquiry Officer refers to the charge framed against the applicant. Thereafter he refers to the depositions of the defence witnesses about whom we have made observations hereinabove. After discussion of the

depositions of the witnesses, the Enquiry Officer records his conclusion as follows:-

"As above discussion it is totally proved that he (defaulter) had knowingly avoid to go under second medical opinion and he is a habitual absentee. The charge against him is proved without any doubt of shadow." (emphasised).

10. In view of the pleadings of the parties, two material questions of fact arose for determination to establish the charge against the applicant. - (i) whether the absentee notices issued to the applicant were served upon him; and, (ii) whether the applicant habitually absented from duty without obtaining leave.

11. Finding on the first question could be recorded only after discussion of the A.O. receipt if received from the Postal Department or of the postal endorsement made on the returned letters. Mere despatch of notices does not result in service of notice upon the applicant. The finding recorded is that the applicant knowingly avoided to undergo second medical opinion. This finding could be recorded only after recording the finding that the notices were either actually served upon the applicant or in law they would be presumed to have been served. There is no finding either in respect of actual service or presumed service in accordance with law. The finding recorded by the Enquiry Officer is, therefore, unsustainable.

12. Similarly the finding of being habitual absentee could also be recorded only after mentioning the number of times the applicant remained absent without submitting leave applications or absenting without grant of leave. None of the prosecution witnesses appears to have deposed before the Enquiry Officer about the number of times the applicant remained absent in this manner. Accordingly a finding that applicant was a habitual defaulter is also not based on evidence on record. If there is any evidence on record,

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the same has not been referred to in the report of the Enquiry Officer.

13. The disciplinary authority and the appellate authority have not made any independent assessment of the evidence on record. They have merely accepted the finding recorded by the Enquiry Officer. Since, in our opinion, the finding of the Enquiry Officer is not based on evidence, the findings of the disciplinary authority and the appellate authority also suffer from the same infirmity; the punishment order cannot, therefore, be sustained.

14. We are conscious of the fact that it is not open to courts to interfere with findings of fact recorded in disciplinary proceedings. However, this principle applies only where the finding is based on evidence on record. We have observed hereinabove that the finding in the present case is not based on evidence; accordingly the finding is open to judicial review.

15. During the course of arguments, our attention was invited to 1994 SCC (L&S) 562 DR. RAMESH CHANDER TYAGI Vs. UNION OF INDIA and AIR 1989 SCC 1433 GUJARAT ELECTRICITY BOARD AND ANOTHER Vs. ATMARAM SUNGOMAL POSHANI. In the first case, their Lordships were dealing with letter returned with the postal endorsement "on repeated visits people in the house said he has gone out and they do not disclose where he has gone. Therefore, it is being returned." In respect of this endorsement, their Lordships observed :

"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."

Once the Enquiry Officer starts examining the postal

endorsements in order to record finding of service, he will have to take note of the observations made by their Lordships in this judgment and other judgments which may be brought to his notice. We need not make any further comments on this authority as the Enquiry Officer has yet to examine the postal endorsements and record finding.

16. In the second authority, their Lordships have observed:-

"Letter sent under registered cover if returned with postal endorsement that the addressee refused to accept the same can be presumed to have been served. This can be refuted by the petitioner that he never refused....."

This authority will also have to be taken note of when the Enquiry Officer proceeds to examine the department's plea that notices were served and the applicant's plea that the notices were not served.

17. The appellate authority has observed in its order that leave is a privilege and not a right and Police Officers cannot take it for granted that the applications sent for leave would be automatically sanctioned. We may presume that ^{the} proposition of law stated by the appellate authority is correct. Even then from the notices said to have been issued by the department requiring the applicant to obtain second medical opinion shows that the department did not intend to refuse the leave asked for; the department only wanted to be satisfied about the correctness of the purpose for which leave was being sought. It is not uncommon in Government Departments to grant leave after the period of absence has already expired. This is especially so when a government servant remains absent on account of illness.

18. Number of other grounds were raised by the learned counsel for the applicant to challenge the order

of punishment but we do not consider it necessary to deal with them as we are reserving liberty to the department to pass fresh orders in accordance with law.

19. In view of the above, the O.A. is allowed and the Enquiry Officer's report dated 9.11.1989, the order of disciplinary authority dated 24.11.1989 and the order of the appellate authority dated 14.9.1990 are hereby quashed. The respondents shall be at liberty to pass fresh orders in accordance with law taking into account the observations made hereinabove. There shall be no order as to costs.

P. J. Th^{iru}
(P.T. THIRUVENGADAM)
MEMBER (A)

S. C. Mathur
(S.C. MATHUR)
CHAIRMAN

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