Central Administrative Tribunal
Principal Bench

OA No.2450/2004

New Delhi this the 10th day of January, 2007.

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

Shri M.N. Saxena,
R/o 258-B,
Packet-C,
Mayur Vihar-II,
Delhi. -Applicant

(By Advocate Shri A.K. Behera)

-Versus-

Union of India : through

1. The Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
Central Secretariat,
New Delhi.

2. The Director,
Directorate of Enforcement,
(Foreign Exchange Management Act),
Govt. of India,
6th Floor,
Lok Nayak Bhawan,
Khan Market,
New Delhi. -Respondents

(By Advocate Shri H.K. Gangwani)

1. To be referred to the Reporters or not? yes

2. To be circulated to outlying Benches or not? yes

S. Raju

(Shanker Raju)
Member (J)

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O R D E R (ORAL)

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

Applicant, an Assistant Enforcement Officer, impugns respondents' order dated 3.2.2004, whereby after following disciplinary proceedings a major penalty of compulsory retirement has been imposed upon. Also assailed is an order passed in appeal on 14.7.2004, upholding the punishment.

2. After being placed under suspension applicant has been proceeded against on the ground that while handling investigation in the case of M/s Iqbal International he has allegedly demanded illegal gratification and had met the proprietor beyond the office hours outside the office premises. It is also stated that the proprietor Shri R.S. Chauhan in his complaint attached a video cassette, where applicant has been shown to be in a compromising position with a woman.

3. During the course of enquiry list of witnesses was not annexed with the memorandum and when the presenting officer was asked by the Enquiry Officer (EO) to submit the list of witnesses it is categorically stated that no witnesses are to be produced by the department and the charge would be proved on the strength of the documents and evidence. The EO in his report though established the charge but exonerated applicant on the charge of illegal gratification.

4. The disciplinary authority (DA) vide its letter dated 9.8.2003 recorded the following disagreement on tentative basis:

> "A copy of the inquiry report given by the Inquiry Officer is enclosed. The Disciplinary Authority has taken a view that he is in agreement with the Inquiry Officer's findings in respect of the two charges which the Inquiry Officer has held as proved on the basis of analysis of the evidence. But, the Disciplinary Authority is tentatively not in agreement with the Inquiry Officer's finding in respect of the charge that the charged officer demanded illegal gratification from Shri R.S. Chauhan, prop. of M/S. Iqbal International, as not proved. In his tentative view adequate evidence was there before the Inquiry Officer to hold the charge as proved.

If you wish to make a representation or submission, you may do so in writing to the Disciplinary Authority within 10 days from the date of receipt of this report failing which the matter will be decided on merits.

This has the approval of Director of Enforcement."

5. In response thereto, the penalty imposed upon applicant when affirmed in appeal, gives rise to the present OA.

6. Though learned counsel appearing for applicant raised several legal contentions to assail the impugned orders, at the outset stated, relying upon a decision of the Apex Court in ***Kuldeep Singh v. Commissioner of Police***, JT 1998 (8) SC 603 and ***Ministry of Finance v. S.B. Ramesh***, 1998 SCC (L&S) 865, that the documents annexed with the list of documents along with the memorandum pertain to letters written by one Shri R.S. Saxena and non-examination of Saxena in the enquiry when he is not even cited as a witness and the presenting officer having denied to produce any witness the maker of these documents having not been examined deprives applicant of a reasonable opportunity to cross-examine and to effectively defend the charge, which ultimately deprives him a reasonable opportunity and causes prejudice, which, in turn is an infraction to the principles of natural justice.

7. Learned counsel would further contend that whereas the disagreement has been arrived at on one charge by the DA, yet no whisper as to the reasons in tentative form has been recorded by the DA. Accordingly, in defending the disagreement on this

specific charge applicant has been prejudiced and denied a reasonable opportunity.

8. Learned counsel would contend that it is not clear as to what charge has culminated into its gravity the extreme punishment of compulsory retirement, which has a cumulative effect on all the charges and as the charge against applicant of illegal gratification has been established by the DA in disagreement only on doubt the same is on surmises and not on evidence. As the aforesaid order does not pass the test of a common reasonable man the finding is perverse.

9. On the other hand, learned counsel appearing for respondents vehemently opposed the contentions. It is stated that applicant in his statement made on 7.9.2000 has admitted to have met Shri Chauhan and as such the charges are established against him by following the due procedure. It is also stated that the witnesses have been sent summons but have not responded to and as the documents including video cassette was clear and established the guilt of applicant, after passing speaking orders the punishment, commensurate with the misconduct, has been inflicted upon applicant, which cannot be assailed.

10. We have carefully considered the rival contentions of the parties and perused the material on record. It is trite that principles of natural justice cannot be put in a straightjacket formula. Its applicability depends on the fact situation. The underline principle of these rules is that one should not be condemned unheard and in the backdrop of accord of reasonable opportunity what is reasonable from its literal construction

should be reasonable, i.e., it should be free from caprice or arbitrariness. The test of reasonableness is the *wednusbury* principle and also view point of common reasonable prudent man. It is also established that a Government servant whose misconduct has been established beyond doubt cannot be let off scot free and any punishment which is commensurate with the misconduct cannot be interfered with in a judicial review unless there is a clear illegality in the procedure or the finding recorded is perverse.

11. Having regard to the aforesaid principle though the strict rules of evidence are not applicable in the disciplinary proceedings, which is based on preponderance of probability, yet when a document is tendered in the enquiry it cannot be cross-examined being a non-living entity by the concerned person. Behind the back of a Government servant any number of complaints could be filed but once the complainant comes in the witness box to depose to the authenticity of the contents of the complaint and when he is put to cross-examine as a part of reasonable opportunity to defend to the Government servant the process of a fair hearing is completed, yet when the documents are adduced in the enquiry, which are procured by on its own and have not been confronted with by the charged officer, it not only deprives him a reasonable opportunity to put question in cross-examination but to make his defence. Non-examination of the witness, despite availability, is an infraction to *audi alteram partem* and also injustice to the concerned. Gravity of misconduct may be a determining factor for punishment but

before hand it has to be established in accordance with law and rules, which, *inter alia* includes accord of reasonable opportunity.

12. In the light of the above, it is admitted that along with the memorandum only three documents, i.e. letters written by Shri Saxena, had been filed but there was no list of witnesses attached. Later on, when the presenting officer was asked to name his witnesses he refused to cite any witness and as a result thereof these letters have been accepted and relied upon by the EO to hold applicant guilty of the charge. It is pertinent to note that neither the witness was examined who had written these letters nor was applicant afforded an opportunity to cross-examine him. Even by the standard of preponderance of probability such a procedure is not legal.

13. The Apex Court in ***S.B. Ramesh's*** case (supra) held as follows:

> "14. Then, again after extracting the relevant portions from the disciplinary authority's order. The Tribudnal observed as follows :-
>
> "We have extracted the fore-going portions from the order of the disciplinary authority for the purpose of demonstrating that the disciplinary authority has placed reliance on a statement of Smt. K. R. Aruna, without examining Smt. Aruna as a witness in the inquiry and also on several documents collected from somewhere without establishing the authenticity thereof to come to a finding that the applicant has conducted himself in a manner unbecoming of a Government servant. The nomination form alleged to have been filed by Sri Ramesh for the purpose of Central Government Employees' Insurance Scheme, was not a document which was attached to the memorandum of charges as one on which the Disciplinary Authority wanted to rely on for establishing the charge. This probably was one of the documents which the

applicant called for, for the purpose of cross-examining the witness or for making proper defence. However, unless the Government servant wanted this document to be exhibited in evidence, it was not proper for the Enquiry Authority to exhibit it and to rely on it for reaching the conclusion against the applicant. Further, an inference is drawn that S.B.R. Babu mentioned in the school records (admission registers and Sh. Ramesh mentioned in the Municipal records was the applicant, on the basis of a comparison of the hand-writing or signature or telephone numbers are only guess work, which do not amount to proof even in a disciplinary proceedings. It is true that the degree of proof required in a departmental disciplinary proceeding, need not be of the same standard as the degree of proof required for establishing the guilt of an accused in a criminal case. However, the law is settled now that suspicion, however strong, cannot be substituted for proof even in a departmental disciplinary proceeding. Viewed in this perspective we find there is a total dearth of evidence to bring home the charge that the applicant has been living in a manner unbecoming of a Government servant or that, he has exhibited adulterous conduct by living with Smt. K. R. Aruna and begetting children."

15. On a careful perusal of the above findings of the Tribunal in the light of the materials placed before it, we do not think that there is any case for interference, particularly in the absence of full materials made available before us in spite of opportunity given to the appellants. On the facts of this case, we are of the view that the departmental enquiry conducted in this case is totally unsatisfactory and without observing the minimum required procedure for proving the charge. The Tribunal was, therefore, justified in rendering the findings as above and setting aside the order impugned before it."

14. In the light of the above, the enquiry is vitiated on the ground of relying upon a material which has not been established and proved in accordance with law. Consequently, the penalty and its affirmation meet the same fate.

15. Another illegality which has cropped up in the proceedings is the tentative view taken on disagreement by the DA. Unless the reasons are given in its tentative form, which would not be taking up a final view by the DA of the matter, the concerned in whose favour the finding has been given by the EO would be well equipped to rebut the view point of the DA as to its disagreement. Failure to record tentative reasons and disagreeing mechanically on *ipsi dixit* and in the present case a vague statement as to adequate evidence available before the EO without any further detail as to what material and evidence was there has put applicant to a Herculean task to investigate into as to what was the material against him and evidence thereof which had weighed in the mind of the DA to disagree. The reasons may be tentative and cannot be in air but should be deduced in black and white. Failure to record tentative reasons has denied applicant a reasonable opportunity, which, in turn, an infraction to the principles of natural justice.

16. The Apex Court in ***Yoginath D. Bagde v. State of Maharashtra***, 1999 SCC (L&S) 1385, insofar as necessity to record reasons on tentative basis held as follows:

> "31 In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent

employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away in any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution."

17. In ***Bank of India v. Degla Suryanarayana***, 1999 (5) SCC 762, the Apex Court observed as under:

"13. In the case at hand a perusal of the order dated 5-1-1995 of the Disciplinary Authority shows that it has taken into consideration the evidence, the finding and the reasons recorded by the Enquiry Officer and then assigned reasons for taking a view in departure from the one taken by the Enquiry Officer. The Disciplinary Authority has then recorded its own finding setting out the evidence already available on record in support of the finding arrived at by the Disciplinary Authority. The finding so recorded by the Disciplinary Authority was immune from interference within the limited scope of power of judicial review available to the Court. We are therefore of the opinion that the learned single Judge as well as the Division Bench of the High Court were not right in setting

> aside the finding of the Disciplinary Authority and restoring that of the Enquiry Officer. The High Court has clearly exceeded the bounds of power of judicial review available to it while exercising writ jurisdiction over a departmental disciplinary enquiry proceeding and therefore the judgments of the learned single Judge and the Division Bench cannot be sustained to that extent. The appeal filed by the Bank of India deserves to be allowed to that extent."

18. Having regard to the above, we are of the considered view that the disagreement arrived at by the DA is not in consonance with law, which has deprived applicant of a reasonable opportunity to defend.

19. In the result, for the foregoing reasons, OA is partly allowed. Impugned orders are set aside. Respondents are directed to forthwith reinstate applicant in service. The interregnum period would be operated upon in accordance with FR. However, this shall not preclude respondents, if so advised, to take up the proceedings from the stage of issuing a chargesheet along with list of witnesses and in such an event, law shall take its own course. No costs.

(N.D. Dayal)
Member(A)

(Shanker Raju)
Member (J)

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