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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

O.A. No.1847 OF 2004^r

New Delhi, this the 2nd day of May, 2005^h

**HON'BLE SHRI SHANKER RAJU, MEMBER (J)
HON'BLE SHRI S.K. MALHOTRA, MEMBER (A)**

Bimal Kumar
Working as Assistant,
Regional Office, ESI Corporation,
Sector 16, Faridabad (Har.).

.....Applicant.

(By Advocate : Shri Yogesh Sharma)

Versus

1. Employees' State Insurance Corporation
Through the Director General,
Panchdeep Bhawan, Kotla Road, New Delhi.
2. The Director,
Employees' State Insurance Corporation
Panchdeep Bhawan, Kotla Road, New Delhi.
3. The Regional Director,
Employees' State Insurance Corporation
Sector 16, Faridabad.

.....Respondents

(None present even revised call)

ORDER

SHRI SHANKER RAJU, MEMBER (J) :

Applicant impugns the major penalty of withholding of two increments with cumulative effect passed in review as well as appellate order dated 2.4.2004 upholding the punishment.

2. Applicant while working as adhoc Assistant was served with a Memorandum for minor penalty on 7.1.1999, which was responded to. Resulted in minor penalty of censure awarded to the applicant by the disciplinary authority during the misconduct as a trivial act.

3. Thereafter an order passed on 28.8.2000 by the Director General exercising the power of review under Regulation 23 of the ESIC (Staff and condition of Service) Regulation 1959, set aside the order of censure and directed the holding of inquiry. A memorandum under Rule 14 of the CCS (CCA) Rules, 1964 of major penalty on the allegation of helping the employee to shift the liability, which culminating into finding of guilt by the inquiry officer and thereafter on responded to it, major penalty was imposed. Applicant has preferred an appeal against the major penalty, as no order was passed on it, OA 2738/2003 was filed by the applicant, which was disposed of on 19.11.2003 with a direction to the respondents to consider the aforesaid appeal and pass appropriate orders. Rejection of the appeal by the respondents led to filing of the present OA.

4. Though several contentions have been raised by the learned counsel of the applicant but at the outset, it is stated that before holding the inquiry, a preliminary investigation has been carried out during the course of which statement of one Shri Surjeet Singh has been recorded, who is an employer and who deposed that the form has been filled up by the applicant allegedly. As the aforesaid statement was relied upon to hold the applicant guilty of the charge, non-furnishing the copy of the statement or non-summoning of Shri Surjeet Singh as witness in the inquiry amounts to depriving of a reasonable opportunity to the applicant to defend and also it is in violation of the principles of natural justice. The decision of the Apex Court in the case of State of U.P. vs. Shatrughan Lal and another, (1998) 6 SCC 651, has been relied upon.

5. Learned counsel for respondents despite opportunity is not present.

We proceed to dispose of this matter by resorting to Rule 16 of the CAT (Procedure) Rules, 1987.

6. With regard to the aforesaid ground raised by the applicant, it is stated in the counter reply by the respondents that preliminary inquiry report was supplied to the applicant and inquiry has been held in accordance with rules.

7. We have carefully considered the contentions raised by the applicant and also perused the counter reply filed by the respondents. The Apex Court in the case of Ministry of Finance and another vs. S.B. Ramesh, 1998 (3) SCC 227, has made the following observations:-

“13. It is necessary to set out the portions from the order of the Tribunal which gave the reasons to come to the conclusion that the order of the Disciplinary Authority was based on no evidence and the findings were perverse. The Tribunal, after extracting in full the evidence of SW 1, the only witness examined on the side of the prosecution, and after extracting also the proceedings of the Enquiry Officer dated 18.6.1991, observed as follows:-

“After these proceedings on 18.6.1991 the Enquiry Officer has only received the brief from the PO and then finalized the report. This shows that the Enquiry Officer has not attempted to question the applicant on the evidence appearing against him in the proceedings dated 18-6-1991. Under sub-rule (18) of Rule 14 of the CCS (CCA) Rules, it is incumbent on the Enquiry Authority to question the officer facing the charge, broadly on the evidence appearing against him in a case where the mandatory provision of the CCS (CCA) Rules has been lost sight of by the Enquiry Authority. The learned counsel for the respondents argued in response to notice, it was not possible for the Enquiry Authority to question the applicant. This argument has no force because, on 18-6-1991 when the inquiry was held for recording the evidence in support of the charge, even if the Enquiry Officer has set the applicant ex parte and recorded the evidence, he should have adjourned the enquiry hereafter/or even if the Enquiry Authority did not choose to give the applicant an opportunity to cross-

examine the witness examined in support of the charge, he should have given an opportunity to the applicant to appear and then proceeded to question him under sub-rule (18) of Rule 14 of the CCS (CCA) Rules. The omission to do this is a serious error committed by the Enquiry Authority. Secondly, we notice that the Enquiry Authority has marked as many as 7 documents in support of the charge, while SW 1 has proved only one document, namely, the statement of Smt. K.R. Aruna alleged to have been recorded in his presence. How the other documents were received in evidence are not explained either in the report of the Enquiry Authority or in the proceedings. Even if the documents which were produced along with the charge-sheet were all taken on record, unless and until the applicant had requested the Enquiry Officer to mark certain documents in evidence on his side, the Enquiry Authority had no justification in marking all those documents which he had called for the purpose of defending himself on the side of the applicant while he has not requested for marking of these documents on his side. It is seen that some of these documents which are marked on the side of the defence not at the instance of the applicant, have been made use of by the Enquiry Authority to reach a finding against the applicant. This has been accepted by the Disciplinary Authority also. We are of the considered view that this is absolutely irregular and has prejudiced the case of the applicant. These documents which were not proved in accordance with law should not have been received in evidence and that, any inference drawn from these documents is misplaced and opposed to law. We further find that the Enquiry Authority as well as the Disciplinary Authority have freely made use of the statement alleged to have been made by Smt. K.R. Aruna in the presence of SW 1 and it was on that basis that they reached the conclusion that the applicant was living with Smt. K.R. Aruna. SW1 in his deposition which is extracted above, has not spoken to the details contained in the statement of Smt. K.R. Aruna which was marked as Ex. 1. Further it is settled law that any statement recorded behind the back of person who is said to have made that statement is made available for cross-examination, to prove his or her veracity. The Disciplinary Authority has not even chosen to include Smt. K.R. Aruna in the list of witnesses for offering her for being cross-examined for testing the veracity of the documents exhibited as Ex. 1 which is said to be her statement. Therefore, we have no hesitation in coming to the conclusion that the Enquiry Authority as well as the Disciplinary Authority have gone wrong in placing reliance on Ex. 1 which is the alleged

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statement of Smt. K.R. Aruna without offering Smt. K.R. Aruna as a witness for cross-examination. The applicant's case is that the statement was recorded under coercion and duress and the finding based on this statement is absolutely unsustainable as the same is not based on legal evidence. The other documents relied on by the Enquiry Authority, as well as by the Disciplinary Authority for reaching the conclusion that the applicant and Smt. K.R. Aruna were living together and that they have begotten two children have also not been proved in the manner in which they are required to be proved."

14. Then, again after extracting the relevant portions from the Disciplinary Authority's order, the Tribunal observed as follows:

"We have extracted the foregoing 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 Shri 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 Shri Ramesh mentioned in the municipal records was the applicant, on the basis of a comparison of the handwriting or signature or telephone numbers are only guesswork, 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

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in a departmental disciplinary proceedings. 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."

8. If one has regard to the above, non-supply of preliminary enquiry statement of Shri Surjeet Singh, which has been relied upon, has caused grave prejudice to the applicant in the matter of defence. As he cannot rebut allegations, reliance on these documents, which was not even incorporated as a document to be relied upon without examining the maker of the statement and without affording an opportunity to the applicant to cross-examine, is contrary to the principles of natural justice and the aforesaid statement has no admissibility and cannot be relied upon to hold the applicant guilty of the charges.

9. In the above view of the matter, OA is partly allowed. Impugned orders are set aside. The applicant shall be entitled to all consequential benefits. However, this shall not preclude the respondents, if so advised, from proceeding further in the inquiry from the stage of examination of Shri Surjeet Singh and thereafter to act in accordance with law. No costs.


(S.K. MALHOTRA)
MEMBER (A)

/ravi/


(SHANKER RAJU)
MEMBER (J)

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