CAT/7/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW DELHI

O.A. No. 1055/92 199

T.A. No.

DATE OF DECISION 4.11.97

Sh. M.S. Kareer — Petitioner

Sh. D.R. Gupta — Advocate for the Petitioner(s)

Versus

U.O.I. & Ors. — Respondent

Sh. S.K. Gupta — Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. Justice K.M. Agarwal, Chairman

The Hon'ble Mr. S.P. Biswas, Member (A)

1. To be referred to the Reporter or not? No.

2. Whether it needs to be circulated to other Benches of the Tribunal?

(S.P. Biswas)
Member (A)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

(15)

OA No.1055/1992

New Delhi, this 4th day of ~~October~~ November 1997

Hon'ble Mr. Justice K.M. Agarwal, Chairman
Hon'ble Mr. S.P. Biswas, Member(A)

Shri H.S. Kareer
1/114, Old Rajinder Nagar
New Delhi-60. .... Applicant

(By Shri D.R. Gupta, Advocate)

versus

Union of India, through
1. Secretary
Ministry of Urban Development
New Delhi.

2. Director General of Works
CPWD, Nirman Bhavan,
New Delhi.

3. Supdt. Engineer
CPWD, Ele. Circle I
New Delhi. .... Respondents

(By Shri S.K. Gupta, Advocate)

ORDER

Hon'ble Mr. S.P. Biswas

Heard rival contentions of learned counsel for both parties. The facts giving rise to this Original Application, briefly stated, are as under.

2. The applicant, a Junior Engineer in CPWD is aggrieved by A1 order dated 20.2.87 dismissing him from services under Rule 19(ii) of CCS(CCA) Rules, 1965. He remained away from duty for two years from 15.3.82 to 22.3.84 on medical grounds. Prior to March, 1982, he was on a foreign assignment in Zambia as Electrical Supervisor from 1976 to beginning of March 1984. After joining duties on 23rd March, 1984, he hardly worked for a fortnight and submitted an

application for leave from 3.4.84 to 3.7.84 and that the same application was intended also to cover concurrently three months' notice mandatory for the purpose of proceeding on voluntary retirement. Applicant claims that the respondents vide their communication dated 18.4.94 had promised to regularise the aforesaid period of absence and that he was also told of there being no difficulty in accepting his request for voluntary retirement because of health problems. Respondents not only have denied to have made any commitment but declined to regularise the absence of two years as sought for. Respondents have also categorically refused in writing to grant 3 months earned leave (3.4.84 to 3.7.84) originally applied on account of domestic problems and have it simultaneously converted as a statutory notice period preparatory to voluntary retirement. Applicant is also alleged to have disobeyed the written orders of the competent authority as regards joiniing of duties. The applicant, however, felt surprised to receive in 1990, through his relative, the impugned order dated 20.2.87, dismissing him from service.

3. The main plank of applicant's attack on the order of dismissal is based on the following:-

(1) The procedure adopted for dispensing with the enquiry and dismissing him from service by invoking the special procedure under rule 19(ii) of the CCS(CCA) Rules, 1965 has been violated and the principles of natural justice has been ignored. **(emphasis added).**

(2) There was nothing on record to show as to which prevented the respondents from publishing the notice in newspaper before resorting to this special procedure under Rule 19(ii) thereby depriving the applicant of the reasonable opportunity to represent his case in inquiry to be conducted under Rule 14 of the CCS(CCA) Rules, 1965 contemplated under Rule 311(2) of the Constitution;

(3) That actions under clause (b) of second proviso to Article 311 can be taken only on fulfilment of two conditions which have not been complied with.

The learned counsel for the applicant has placed strong reliance on the decision of the Hon'ble Supreme Court in Tulsi Ram Patel's case reported in 1985 SCC(L&S) 672 which lays down the basic foundation, with illustration cases, for invoking the provisions of Rule 19(ii) of the rules. He also seeks to draw support from the decision of the Bangalore Bench of this Tribunal in OA-2085/95 reported in 1996(3) SLJ 53. Respondents have controverted all the claims made by the applicant.

4. Arising out of the facts afore-mentioned, the issues that falls for determination in this application are whether:-

(i) the applicant's unauthorised absence for two years could have entitled the respondents concerned to proceed against him under Rule 19 (ii) of the Rules or whether the conditions-

(18)

precedent in Clause (b) of second proviso to Article 311 have been satisfied?;and

(ii) the Disciplinary Authority could have held ex-parte inquiry without resorting to Rule 19(ii) of the Rules?

We shall now proceed to examine these aspects.

5. Clause (2) of Article 311 of the Constitution of India declares that no person who holds a civil post under the Union or the State:

> "....shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges".

The second proviso to clause (2), however, specifies three situations in which the requirements of clause (2) do not apply. Clause (b) of second proviso states that:

> "where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such an inquiry", the enquiry and the opportunity provided by clause (2) can be dispensed with and punishment imposed straightway."

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6. In **U.O.I. vs.Tulsiram Patel's** case (Supra), it has been held by the Constitution Bench that the second proviso to Article 311 is based on public policy, is conceived in public interest and is to be applied in public good. The Constitution Bench has also pointed out that the paramount thing to bear in mind is that the second proviso will apply only where the conduct of the Government servant is such that he deserves the punishment of dismissal or removal or reduction in rank. It has been further pointed out that once the above test is satisfied, there are yet other conditions specified in the relevant clause of second proviso that must also be satisfied. They are:-

> "(i) The decision to do so (dispensing with enquiry) cannot rest solely on the ipse dixit of the concerned authority. It is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of whim or caprice. There must be independent material to justify the dispensing with the inquiry envisaged by Art. 311(2).
>
> (ii) The satisfaction must be that of the authority who is empowered to dismiss, remove or reduce the officer in rank and he must apply his mind to it. As Cl.(3) clearly says, there must be 'decision' of the authority empowered to dismiss, etc., and then the reasonableness of the decision will be immune from being challenged in a court of law.
>
> (iii) The authority empowered to dismiss, etc., must record his reasons in writing for denying the opportunity under Cl.(2), before making the order of dismissal, etc.

(iv) The reasons recorded must ex facie show that it was not reasonably practicable to hold a disciplinary inquiry, and must not be vague or irrelevant.

(v) The power must be exercised bona fide, having regard to relevant consideration."

It is only after the fulfilment of all the conditions aforesaid that the second proviso is attracted and it would not be necessary to comply with requirements specified in clause (2). It has also been held that recording of reasons for forming the requisite satisfaction (that the enquiry cannot be held) is mandatory. Though it is not necessary that those reasons must find a place in the order of punishment, it has been held that the authority must produce the same when called upon to do so by the Court. If any authority is required for these propositions, it is available in **1996 SCC (L&S) 870 (CHANDIGARH ADMINISTRATION, UNION TERRITORY, CHANDIGARH AND OTHERS** Vs. **AJAY MANCHANDA AND OTHERS)**. In this case, the Apex Court has dealt with the factors relevant to determine whether the circumstances were reasonably practicable to hold the enquiry.

7. Coming to fulfilment of the above requirements in the present case, we find that the applicant was charge-sheeted, as per provisions laid down in Rule 14 of CCS(CCA) Rules, 1965 vide Memo dated 6.11.86. The charge against the applicant was that while he was working in PWD, Electrical Division-V(DA), he failed to maintain absolute

devotion to duty and indulged in an act of misconduct in as such as he wilfully absented from duty for two years (from middle of March 82 to end of March 84) without intimation to the Department and without prior sanction. The applicant again proceeded on leave after joining duty in the Divisional Office on 23rd March, 1984 (AN) after which he did not resume duty and has, therefore, contravened Rule 3 of CCS(Conduct) Rules, 1964.

8. On the basis of the materials placed before us and in the background of the situation then obtaining, we are satisfied that it was not reasonably practicable to hold disciplinary enquiry against the delinquent. In the circumstances of the present case the delinquent would not have come forward to depose. The dismissal order itself incorporates the following reasons:-

(i) The charge-sheet could not be served on the applicant and the same had been received back in the office of the respondents with the remarks of the postal authorities "REFUSED". That apart, final notice to join duty was published in three newspapers to which no response from the delinquent was received.

(ii) Inquiry Officer could not be appointed as neither the charge-sheet could be served nor the delinquent indicated the change of his address. The charged officer was therefore found absconding.

9. There are yet other materials to satisfy that the departmental inquiry could not have been held. These relate to refusal of the charged official

in accepting R-6 notification wherein the applicant was directed to report for duty with an appropriate warning. That communication also indicated respondents' decision regarding non-regularisation of the period of absence of two years from 15.3.82 to 23.3.84. This order though served on him but he refused to accept it. Applicant was again alerted through R-7 telegram dated 16.4.84. That was followed by public notice in three newspapers in December, 1986. All these did not evoke any response from the applicant. The applicant all through has been claiming unauthorised absence on medical grounds but in his letter dated NIL received by the respondents in September, 1982, reasons for extension of leave has been mentioned as "**due to unavoidable circumstances** and not due to my illness". That forced the respondents to deny the applicant's claim of leave on health grounds.

10. The decision of Bangalore Bench of the Tribunal in O.A.No.2082/95 (decided on 17.4.1996) cited by the applicant does not render any help. That was the case where it was held that the case of unauthorised absence cannot be dealt with under Rule 19(ii) of the CCS (CCA) Rules because unauthorised absence in that case did not show that it was not reasonably practicable to hold the enquiry. In that case, no specific chargesheet was framed against applicant therein. Nor was there any formal warning given to report for duty which he refused to accept. In the present case the applicant's refusal to accept the chargesheet as well as the letter of warning

conveying respondents' inability to regularise the period of two years' absence has not been denied. There are evidences to indicate that there was a change of applicant's permanent address and the applicant did not care to inform the respondents of the same.

11. We have to judge each case on its own merit keeping in mind the relevant provision of Article 311(ii) and the interpretation placed upon it by the Hon'ble Supreme Court in **Tulsi Ram Patel's** case (supra). On the basis of the facts and circumstances of the case as well as the evidence available before us, we are satisfied that the applicant was absconding deliberately. It was not reasonably practicable to hold the departmental enquiry at that relevant time. Second proviso to clause (b) could be applied rightly on the grounds that the employee was avoiding service of charge-memo and that it was not reasonably practicable to have it served on him based on the circumstances of the case. We also do not find any material to conclude that the authorities did not apply their mind to the question of practicability of holding the enquiry or there was any negligence on their part in attempting to serve the notice. All the conditions under Clause (2) and proviso (b) thereof as mentioned in the case of Chandigarh Admn. UT, Chandigarh & Ors. (supra) have been fully complied with and circumstances as aforementioned in paras 8,9,10&11 did exist for application of Rule 19(ii).

12. We also find that Clause (3) of Article 311 is really a continuation of clause (b) of the second proviso. Clause (3) says:

> **"If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such an inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."** (emphasis added)

A-1 order by the competent authority records the reasons for the final decisions taken. The applicant has not come out with any good ground, much less convincing ones, to warrant our interference in the order.

13. Before we part with the case, we are reminded of the responsibilities the Court/Tribunal have to undertake to see if delinquent's case has been dealt with from the touchstone of prejudice in the totality of circumstances. **The ultimate test is the test of prejudice (natural justice/fair hearing) and the principles**, to be applied in final disposal of disciplinary proceedings cases have been laid down by their Lordships in the case of **State Bank of Patiala and Ors.** Vs. **S.K. Sharma** (JT 1996(3) SC 722). Touching upon the problems on hand it has been held:-

> "There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

Applying the test aforequoted, we do not find any infirmity in the order.

14. For the reasons aforementioned, the application deserves to be dismissed and we do so accordingly. There shall be no order as to costs.

(K.M. Agarwal)
Chairman

(S.P. Biswas)
Member(A)

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