13

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA 248/1993

NEW DELHI, THIS 4TH DAY OF AUGUST, 1994

Shri N.V.Krishnan, VC(A)
Shri C.J. Roy, Member(J)

Shri Gandhi Ram
s/o late Shri Godha Ram
r/o 385-386, Village & PO Bhim Nagar
Gurgaon, Haryana .. Applicant

By Shri Shankar Raju, Advocate

Versus

1. The Addl. Commissioner of Police
(New Delhi Range)
Police Headquarters
I.P.Estate, New Delhi

2. The Dy. Commissioner of Police
East District, Shahdara, Delhi .. Respondents

By Shri S, Adlakha, Advocate

ORDER (Oral)

(By Shri N.V.Krishnan, Vice-Chairman(A)

The applicant here, a former Head-constable, was proceeded against in disciplinary proceedings and he was dismissed from service on 28.4.92 by the Annexure A-7 order. The appeal filed by him was also dismissed by Annexure A-9 letter dated 7.8.92. Hence he has filed this application challenging the impugned orders and seeking a direction to quash the Annexure A-7 order passed by the disciplinary authority and Annexure A-9 order of the appellate authority and to reinstate him with all consequential benefits.

2. The matter came up before us today. The learned counsel for the applicant submitted that this is a case where, as per the summary of allegations, charges were framed against the applicant. A preliminary enquiry had been held and a number of witnesses have been examined. All these

..P/2

14

witnesses have been cited in the summary of allegations filed at Annexure A-2 as witnesses. It is also admitted by the applicant that alongwith summary of allegations, the applicant received copies of the statements of the witnesses recorded at the preliminary enquiry.

3. However, the learned counsel points out that the enquiry officer adopted a strange procedure of recording the evidence of these witnesses, which denied the applicant his basic right. For, instead of examining these witnesses in the presence of the applicant, as required under Rule 16(iii) of the Delhi Police (Punishment & Appeal) Rules, 1980 (Rules for short), the enquiry officer read over the previous statements of the witnesses recorded in the preliminary enquiry and enquired of the witnesses whether the same was correct or not. In reply to this, all the witnesses stated that the statements so recorded earlier were correct and that the statements may be construed as their statements in the departmental enquiry. The examination of these witnesses concluded with this admission. Thereafter, the witnesses were directed to be cross examined by the delinquent. The procedure adopted is violative of Rule 15(3) and Rule 16(iii) and hence, the disciplinary proceedings are vitiated.

4. It is contended that, by adopting this procedure, valuable rights of the applicant in regard to proper cross-examination of the witnesses have been taken away. For, if the witnesses had been required to depose orally, without being shown the statement given by them earlier, they would

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..P/3

15

have made statements which may not have been entirely the same as in previous statements. This would have enabled the delinquent to cross examine them more effectively.

5. We notice that such an objection was not raised either during the enquiry or in appeal. We wanted to know whether this can be raised for the first time before this Tribunal. In reply, the learned counsel contended that this objection can be raised by the applicant, in view of the decision rendered by this Tribunal in 1990(1)ATR-CAT-112. That judgement refers to the judgement of the Supreme Court in AIR-1969-SC-983, Central Bank of India Vs. P.C. Jain, where the Supreme Court had held as under:

> "But it has nowhere been laid down that even substantive rules which would form part of principles of natural justice also can be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom the enquiry is held and that statements made behind the back of the person charged, are not to be treated as substantive evidence, is one of the basic principles which can not be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act"

Further he draws attention to the Supreme Court's judgement in Rattan Lal Sharma Vs. Managing Committee (1993-SCC-L&S-1106) wherein it was observed that the Division Bench of the High Court heard and set aside the judgement of the Single Bench on a technical ground, namely that the point raised before the High Court was not earlier raised before the Tribunal or administrative authorities. The Supreme Court held as follows:

..P/4

16

"Generally, a point not raised before the Tribunal or administrative authorities may not be allowed to be raised for the first time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not of course a must as indicated by this Court in A.M.Allison Vs. State of Assam particularly when the plea sought to be raised for the first time in a writ proceeding requires investigation of facts. But if the plea, though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceedings for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut down from raising such plea which goes to the root of the lis involved"

6. In this case the issue now raised for the first time does not require any investigation. The facts alleged are borne out by the Enquiry Officer's report. We are, therefore, satisfied that the applicant has a right to raise this issue before us, i.e. the serious irregularity committed in taking on record statements recorded in the preliminary enquiry without the witnesses first deposing before the Enquiry Officer in this regard.

7. The learned counsel for the respondents submits that, in any case, no injustice was caused to the applicant. His right to cross-examine was not taken away. An opportunity to cross-examine the witnesses was given to him. He further submits that in the light of K.L.Tripathi Vs. SBI and others (1983(2)-SLJ-623-SC) it is to be held that no right of the applicant has been violated by adopting this procedure. He draws our specific attention to Head Note (iv) of that case.

..P/5

17

8. Relevant extracts of Rule 15(3) and 16(iii) are reproduced below:

15(3): The file of preliminary enquiry shall not form part of the formaldepartmental record, but statements therefrom may be brought on record of the departmental proceedings when the witnesses are no longer available. There shall be no bar to the Enquiry Officer bringing on record any other documents from the file of the preliminary enquiry, if he considers it necessary after supplying copies to the accused officer.

16(iii): As far as possible the witnesses shall be examined direct and in the presence of the accused, who shall be given opportunity to take notes of their statements and cross-examine them. The Enquiry Officer is empowered, however, to bring on record the earlier statement of any witness whose presence cannot, in the opinion of such officer, be procured without undue delay, inconvenience or expense if he considers such statement necessary provided that it has been recorded and attested by a police officer superior in rank to the accused officer, or by a Magistrate and is either signed by the person making it or has been recorded by such officer during an investigation or a judicial enquiry or trial.

..P/6

18

It is clear that only in exceptional circumstances, statements recorded behind the back of a delinquent in a preliminary enquiry can be taken on record without examining the witnesses. In this case there was no warrant for adopting this extraordinary procedure. The witnesses were, admittedly, present. They should first have been examined orally. Thereafter alone, the statements recorded earlier could have been taken on record either to confirm or contradict them.

9. We are of the view that the provision of Rule 16(iii) is salutary and is intended to safeguard the interests of the charged officer (C.O.). Witnesses should orally be compelled to testify in the presence of the C.O. This will give an opportunity to the C.O. to not only hear what the witnesses say but also observe his reactions to the question put to him, his demeabour etc. Further, the atmosphere in the room of the Enquiry Officer is totally different from the atmosphere where a preliminary enquiry is conducted. In particular, there would be no pressure on a witness when he testifies before the E.O. Therefore, it is possible that a witness, who testifies orally before the E.O. may state things which are materially different from what he had stated earlier in the preliminary enquiry. This gives a vital opportunity to the delinquent to wear down the witnesses in cross-examination

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19

and establish that the previous statement can not be relied upon and that the truth is something different. This is the merit of directly examining such witnesses. We are of the view that by not following this procedure, the applicant has been prejudiced in as much as he was prevented from getting material which would have come to him from direct oral testimony. The question is whether this vitiates the disciplinary proceeding.

10. There can not be much argument about this. The right to cross-examination is one of the important ingedients in a departmental proceedings safeguarding the interest of the C.O. Admittedly, the provisions of Rule 16(iii) have been violated without any justification or necessity. Thereby circumstances were created which prevented effective cross-examination. The learned counsel for the respondents however contended that no injustice has been done to the applicant and has relied on the Supreme Court judgement in K.L.Tripathi supra.

11. We have seen that judgement. That was rendered in totally different circumstances. In that case also, which concerned the punishment of an employee of the State Bank under their rules, an objection was raised that reliance was placed on evidence collected behind the back of the employee and that therefore this vitiated the enquiry. The court agreed with the principle involved in the objection. In para 30 of the report, it however held that when the attention of the employee was drawn to the report drawn after a preliminary enquiry

...P/8

20

of witnesses, who admittedly, were not examined by him, the employee did not dispute the facts disclosed by the enquiry which formed the basis of the charge. He only sought to give an explanation. It is in this circumstance that the Court held as follows:

> "The basic concept is fair play in action administrative, judicial or quasi-judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version of the statement of the person who has testified, is, in dispute, right of cross-examination must inevitably form part of fair play in action but where there is no lis regarding the facts but certain explanation of the circumstances there is no requirement of cross-examination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of cross-examination per se does not invalidate or vitiate the decision arrived at fairly. This is more so when the party against whom an order has been passed does not dispute the facts and does not demand to test the veracity of the version of the credibility of the statement"

12. That judgement does not in any way justify the action of the respondents. It is because the applicant had denied the summ ary of allegations that further enquiry was made. Therefore, the E.O. should have asked the witnesses to testify orally independent of their earlier statements. The earlier statement could have been taken on record only th ereafter. The applicant should have been given an opportunity to cross-examine them on the basis of such oral statements. The denial of this opportunity vitiates the enquiry and the decision arrived at in such enquiry is liable tobe quashed.

..P/9

21

13. Accordingly, the impugned orders of the disciplinary authority (Annexure A-7) and appellate authority (Annexure A-9) are quashed and the respondents are directed to reinstate the applicant within one month from thedate of receipt of this order without prejudice to the right of respondents to suspend him again, in accordance with law. We make it clear that it is open to the respondents to resume the D.E. proceeding from the stage of denovo examination of prosecution witnesses by the Enquiry Officer and conclude it in accordance with law in the light of the observations made herein. If they intend to do so, they shall inform the applicant of their decision in this regard, within four months from the date of receipt of this order failing which the respondents will forfeit their right to resume the disciplinary proceedings. The question as to how the period of suspension and the period of absence of the applicant from the date he was dismissed will he is reinstated by this order should be regularised and what pay and allowances shall be paid for the period should be decided by the disciplinary authority in accordance with law.

(C.J. ROY)
MEMBER (J)
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4/8/94
(N.V. KRISHNAN)
VICE-CHAIRMAN(A)
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