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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

Yes
Removal

O.A. No. 709 OF 1988
~~T.A. No.~~

DATE OF DECISION 31st March, 1993.

Shri Chandu Chhotu — Petitioner

Shri B.B.Gogia — Advocate for the Petitioner(s)

Versus

Union of India and others — Respondent

Shri R.M.Vin — Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. N.B.Patel : Vice Chairman

The Hon'ble Mr. V.Radhakrishnan : Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal ? No.

Shri Chandu Chhotu,
Nr.Railway Station,
Shapur,
Sorath,
Dist. Junagadh. ...Applicant.

(Advocate : Mr.B.B.Gogia)

Versus

1. Union of India,
Through : General Manager,
Western Railway,
Churchgate,
Bombay.

2. Senior Divisional Engineer (II),
Western Railway,
Bhavnagar Para. ...Respondents.

(Advocate : Mr.R.M.Vin)

J U D G M E N T

O.A.NO. 709 OF 1989

Dated :31st March, 1993.

Per : Hon'ble Mr.N.B.Patel : Vice Chairman

By filing this application under Section-19 of the Administrative Tribunals Act, 1985, the applicant seeks a declaration that the order dated 15.6.1979, passed by the Disciplinary Authority, namely, the Asst. Engineer,Junagadh, imposing punishment of dismissal of the applicant from service as well as the order dated 07.07.1988, passed by the respondent no.2, Divisional Railway Manager, (E), Bhavnagar, confirming the said order are illegal,ineffective,null and void.

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The applicant has prayed for a further declaration of his continuance in service with full back wages and all consequential benefits despite the said impugned orders. The applicant has also sought the quashing of the suspension order dated 09.05.1979, passed against him by the Asst. Engineer, Junagadh, whereby he was suspended with effect from 06.01.1979.

2. There is no dispute about the basic facts of the case and they may first be narrated. The applicant joined Railway service as a Gangman in 1970 and was subsequently made permanent. On 22.01.1977, the applicant was arrested along with two other persons on Mangrol-Keshod High way and it is alleged that, at that time, the applicant was found in possession of one bottle containing illicit liquor. It is said that the two other companions of the applicant were also carrying liquor. A charge-sheet was filed against the applicant and his two companions in the Court of learned Judicial Magistrate (First Class), Keshod and Criminal Case no.156/78 was Registered thereupon. At the end of the trial, the learned Magistrate convicted the applicant and the other two persons of the offence under Section-66 (1) (b) of the Bombay Prohibition Act and sentenced each of them to three months' simple imprisonment and a fine of Rs.500/-, in default, one month's further

simple imprisonment. The applicant did not file any appeal against this order of conviction and sentence. His conviction and the order of sentence, therefore, became final. The Disciplinary Authority namely, the Asst. Engineer, Junagadh, having come to know about the conviction of the applicant, passed an order dated 09.05.1979, suspending him from service with effect from 06.01.1979. This order is to be found as Annexure-A/2. On the same day, the Disciplinary Authority issued a memorandum to the applicant stating that the applicant was not a fit person to be retained in service as he was guilty of conduct which led to his conviction. The memorandum stated that, in the circumstances, the Disciplinary Authority had provisionally concluded that a penalty of dismissal from service should be imposed on the applicant in exercise of the powers confirmed on the Disciplinary Authority under Rule-14 (1), of the Railway Servants (Discipline and Appeal) Rules-1968. The applicant was called upon to make a representation against the proposed penalty, if so desired by him, within 15 days and was assured that such representation, if any, will be "considered" by the Disciplinary Authority before passing final orders in the matter. The applicant did make a representation in response to the memorandum, but the Disciplinary Authority passed the impugned dismissal

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order dated 15.6.1979. This order is Annexure-A/4 to the petition. The applicant then filed Regular Civil Suit No. 689 of 1983, in the Civil Court at Junagadh and challenged the legality of the dismissal order. This suit was transferred to this Tribunal and was numbered as T.A./087/87 and the said T.A. was disposed of by the order dated 16.02.1988. The Tribunal found that, though it was open to the applicant to file a departmental appeal against the dismissal order, he had not done so. The Tribunal, therefore, gave an opportunity to the applicant to file a departmental appeal within 15 days of the date of its order and directed the Appellate authority to dispose of the appeal within three months the receipt of a copy of of the date of its order regardless of the question whether there was delay in the filing of the appeal. The applicant then preferred an appeal against the dismissal order to the Appellate authority, the memo of appeal being at Annexure-A/7. This appeal came to be dismissed by the Divisional Railway Manager by his order dated 07.07.1988, to be found at Annexure-A/8.

3. As already stated, it is the order (Annexure-A/4), dated 15.6.1979, passed by the Disciplinary Authority and the order dated 07.07.1988, passed by the Divisional Railway Manager dismissing the applicant's appeal, which are in challenge in the present application.

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4. The main contention advanced on behalf of the applicant by his learned advocate Shri B.B.Gogia was that the Disciplinary Authority as well as the Appellate Authority had both completely ignored the applicant's representation against the proposed penalty and his memo of appeal respectively. It was vehemently argued that neither of the authorities had considered any of the grounds put forward by the applicant to show that the penalty of dismissal was extremely harsh and disproportionate to the facts and circumstances of the case. It was also submitted by Shri B.B.Gogia that both the orders betrayed complete non-application of mind by both the authorities and their orders disposing of the applicant's representation and appeal were non-speaking and laconic orders. It was submitted by Shri Gogia that this is a fit case where the Tribunal should not only judicially review the orders passed by the authorities, and especially the appellate order, but also reduce the punishment awarded to the applicant, if not to quash it altogether. Shri B.B.Gogia also made a rather half-haearted attempt to persuade us to set aside completely the order holding the applicant guilty and urged that he should be totally exonerated. Shri Gogia also tried to challenge the suspension order passed against the applicant, but we may straightaway say that we are not inclined to interefere

with the suspension order, because the applicant had remained in jail consequent upon his conviction which was not appealled against by him and also because there was no challenge to the suspension order either in the suit filed by the applicant and registered by the Tribunal subsequently as Transfer Application or in the departmental appeal filed by the applicant as permitted by this Tribunal. The Appellate Authority was only required to dispose of the appeal which the Tribunal had permitted the applicant to file long after the expiry of the period of limitation provided for filing departmental appeal. Even then, the applicant did not challenge, in that belated appeal, the legality of the suspension order. The applicant can not, therefore, be permitted to challenge the legality of the suspension order now.

5. On behalf of the respondents, the learned Railway Counsel Shri R.M.Vin, supported the dismissal order passed by the Disciplinary Authority and confirmed in appeal by the Appellate Authority.

6. The first argument advanced by Shri Gogia was that being found in possession of illicit liquor cann not be held to be misconduct rendering the applicant liable to any disciplinary action. This argument has to be rejected forthwith, because the charge against the applicant

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was that he was guilty of conduct which led to his conviction for a criminal offence. A glance at Rule-22 of the Railway Services (Conduct) Rules, 1966 is sufficient to show that the argument advanced by Shri Gogia is devoid of any substance. Clause (a) of Rule-22 (1) states :

> A railway servant shall : -
>
> (a) strictly abide by the law relating to intoxicating drinks or drugs in force in any area in which he may happen to be for the time being :

There can not be any doubt that by possessing illicit liquor in the State of Gujarat, where the Bombay Prohibition Act makes such possession punishable, the applicant had failed to abide by a law relating to intoxicating drinks. The delinquency committed by the applicant was, therefore, a clear act of misconduct. It contravened the rules of conduct which the applicant was bound to observe. The reliance placed by Shri Gogia in this connection on the case of Rattan Lal Vs. State of Haryana and others (1983 (2) SLR P. 243) is totally misplaced, because, in that case, it was found that mere consumption of alcohol "does not amount to any misconduct known to the Service Rules". The petitioner in the said case before the Punjab and Haryana High Court was a constable and it appears that there was no law prohibiting ~~the~~ consumption of alcohol at the place where the petitioner was alleged to be found with smell of alcohol issuing from his mouth. In our case,

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there is a law, namely, the Bombay Prohibition Act, and it prohibits and punishes possession of liquor and the petitioner had committed breach of that law and, therefore, his act was clearly in contravention of Rule 22 (1) (a) of the Railway Services (Conduct) Rules, 1986. It was submitted by Shri Gogia that, even assuming that possession of liquor is an act of misconduct, it should be held that it was not a misconduct involving moral turpitude. There may be two opinions on this point, but the question whether any particular misconduct had an element of moral turpitude can have bearing only on the aspect of punishment to be awarded to the delinquent. Therefore, that factor has to be borne in mind by the Disciplinary Authority and the Appellate Authority while considering as to what punishment should be awarded to the delinquent. That does not mean that the delinquent is entitled to be exonerated from the charge of having committed an act against the Rules of conduct governing him.

7. However, the contention of Shri Gogia that the order of dismissal passed against the applicant is a product of total non-application, if not mis-application of mind, on the part of the two authorities and the punishment awarded to the applicant is extremely harsh and callous has got to be upheld in the circumstances of this case. Both the orders are also open to the charge of being non-speaking orders. It is an undisputed fact that

the applicant had filed a representation before the Disciplinary Authority in response to the memorandum Annexure-A/3 served upon him. It can safely be presumed that, in his representation, the applicant must have put forward some grounds for a lenient view being taken on the question of punishment. The impugned order Annexure-A/4, passed by the Disciplinary Authority, does not anywhere even remotely refer to, much less consider, any such grounds. The Disciplinary Authority has passed only a cryptic order in the following words :

> " Looking to the nature of offence for which you were sentenced to suffer S.I. of 3 months and fine of Rs.500/- under Section-66 (1) (B) of B.P.A., your retention in Railway service is considered undesirable. Your representation dated 17.5.1979 is not accepted. Dismissal from Service."

8. Nowhere there is any mention as to what was the representation made by the applicant and what were the grounds urged by him to desist from awarding the extreme penalty as proposed by the Disciplinary Authority.

9. We then come to the impugned order passed by the Appellate Authority and produced at Annexure-A/8. It reads as under :

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"Your above quoted appeal dated 24.2.1988 was put up to appellate authority i.e. DEN II and the orders passed by appellate authority on your appeal are as under : -

"To honour the CAT's decision, the appeal of Shri Chandu Chhotu, Ex.Gangman, though time-barred, has been considered, with due care.

After going through the details of the case and appeal, it is seen that Shri Chandu Chhotu was convicted by the Court of law to suffer SI of 3 months and fine of Rs.500/- under section 66 (1) (B) of B.P.A.

In the appeal, he has not produced any new facts which dis-approve the charges for which he has been convicted by the Court of law. Consumption of alcohol is prohibited by the Gujarat Government and also it is a serious offence, which has been proved in the court of law for which he has also been convicted.

Looking to the above fact, the punishment already awarded for 'Dismissal from service' stands good."

10. It is quite revealing to note that the Appellate Authority expected the applicant to "produce" new facts which would "disapprove" the charges for which the applicant was convicted by the Court of law. We have before us, by way of Annexure-A/7, the memo of appeal which the applicant

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had filed. In this memo, the applicant has first pointed out that it was on account of his poverty and consequent inability to engage a lawyer that he came to be convicted. In other words, the applicant, a mere Gangman, urged the ground of poverty. He also stated that the offence said to have been committed by him did not involve moral turpitude. In the end, he urged that the punishment imposed upon him was un-warranted, severe and harsh in the circumstances of the case. He also stated that he had responsibility of supporting a large family who should not be driven to a life of starvation after his long and faithful service in the Railways.

11. It is abundantly clear that the Appellate Authority also failed to discharge its duty to be just and fair to the applicant while punishing him. In the non-speaking order quoted above, it is not stated, even as an empty formality, that the applicant had urged the grounds of poverty and economic ruination of his family (in case of his dismissal) after long and faithful service to the Department as factors deserving to be considered while awarding punishment to him.

12. But the matter does not rest with the total non-consideration of the grounds urged by the applicant to take a lenient view on the question of punishment. The non-application or mis-application of mind by the Appellate Authority is writ large on the face of the order itself. The Appellate Authority does not seem to

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have even cursorily read the papers of the case. Otherwise, it would not have referred to the misconduct of the applicant as consumption of alcohol when the charge against the applicant was of possession of alcohol.

13. It may be noted that the applicant was working as a lowly paid employee, being a Gangman. There is no reason to disbelieve him when he says that his employment was the main, if not the only, source of livelihood for himself and his family-members. The applicant was a permanent Gangman and had put in nearly nine years of service when he came to be punished. Apart from the question whether the act of possessing a small quantity of liquor involves any moral turpitude, it requires to be noted that prohibition laws are not in force in all the states of the country. For ought we know, if the applicant was not serving in Gujarat at the relevant time but was serving in some wet area of the country, his conduct would not have led to his conviction for a criminal offence. The applicant must be an illiterate person as evidenced by the fact that he has put his thumb-mark on the Vakalatnama. There is a total and misarable failure on the part of the Appellate Authority to consider any of these factors while deciding the question of punishment to be awarded to the applicant. At least the Appellate order does not disclose that any of these factors or any factor whatsoever was considered before awarding the extreme and drastic penalty to the

applicant. The implications of such a penalty on a poor person are totally overlooked by the Appellate Authority. It appears that the impression of the Appellate Authority was that the only punishment which could be awarded to the applicant was the punishment of dismissal from service. On our part, we are in no doubt whatsoever that such drastic punishment was totally uncalled for in the circumstances of the case. We feel that the ends of justice would have been met and there would also have been no jeopardy to the discipline of the establishment if only some minor penalty would have been awarded to the applicant.

14. That, however, takes us to the question whether the Tribunal can substitute its own order of punishment for the order of punishment passed against the applicant departmentally. Before adverting to the legal aspect of this question, we may note that when the Tribunal relegated the applicant to the Appellate Authority and when it went to the length of stating that the delay on the part of the applicant in filing the appeal must be condoned by the Appellate authority, it must have expected the Appellate authority to take a just and reasonable view on the question of punishment. We find that the expectation of the Tribunal has not come true in this case. It is true that in Parma Nanda's case reported in (1989) 10 Administrative Tribunals Cases-30, the Supreme Court has emphatically ~~rulled~~ ruled;

"The jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Inquiry Officer or Competent authority where they are not arbitrary or utterly perverse. The power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of legislature or rules made under the proviso to Article-309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misdonduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter for the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer of the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter."

15. But then the Supreme Court in that very case has also held :

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"However, there is an exception to this proposition. Where the person, without enquiry is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court under clause (a) of the second proviso to Article-311 (2), the Tribunal may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently, unreasonable or uncalled for, having regard to the nature of the criminal charge, the Tribunal may step into render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under clause (a)."

16. In carving out the above exception to the general proposition of non-interference by the Tribunal, the Supreme Court has quoted with approval the following passage from its earlier judgment in Union of India and Another Versus Tulsiram Patel, (1985) 3 Supreme Court Cases 398 :

"Where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be .....The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank

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of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass Vs. Union of India this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the

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court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

17. It is thus clear that in some rare cases, based on the charge of conviction by a criminal court, it is open to the Tribunal to substitute a penalty which is just and proper in the circumstances of the case.

18. Having seen the fate of the appeal which the applicant had filed before the Appellate Authority, and bearing in mind the long lapse of time since the levelling of the charge against the applicant, we find that it will not be in the interests of justice to drive this poor applicant back once again to the Appellate Authority. We find that the penalty of dismissal is extremely harsh and disproportionate in the overall circumstance of the case. In our view, it will serve the ends of justice if we substitute the order of dismissal from service by an order awarding the punishment of withholding of three yearly increments due to the applicant after the date of the impugned order. Of course, the applicant will not be entitled to back wages upto the date of the filing of the appeal by him before the Appellate Authority i.e. upto the 24th February, 1988. The delay in filing the appeal must result in the applicant losing back wages till the date of the filing of the appeal. He will not also get costs of this application for having rushed to the court

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without exhausting the remedy of departmental appeal.

19. The prayer for declaration of illegality of the suspension order will be rejected for the reasons already stated.

20. In the result we pass the following order :

ORDER

The application is partly allowed. The prayer for declaring that the suspension order dated 09.05.1979, is illegal is rejected.

(ii) The order dated 15.6.1979, punishing the applicant with dismissal from service, which was confirmed by the appellate order dated 07.07.1988, is quashed and set aside, and is substituted by the order of punishment of withholding of three increments of the applicant accruing due to him after the date of the impugned order i.e., after 15.6.1979. The withholding of the increment will be with permanent effect.

(iii) The respondents are directed to reinstate the applicant in service within two months of the date of the receipt of a copy of this order with 50% back wages (subject to the aforesaid order of punishment of withholding of three increments) from the date of the Departmental Appeal

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preferred by the applicant (24/02/1988) till the date of his reinstatement in service with all other consequential benefits. The back wages payable to the applicant in terms of this order shall be calculated within the aforesaid period of two months and shall actually be paid to him within a period of one month thereafter. No order as to costs.

(V.Radhakrishnan)
Member (A)

(N.B.Patel)
Vice Chairman

AIT