IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

AHMEDABAD BENCH

#es Increment withheld

O.A.429/91 Date of decision: 27-4-1993.

Sh.M.V.Shah .. Petitioner

versus

Union of India & others .. Respondents.

Sh.V.M.Dhotare .. Counsel for the applicant.

Sh.Jayant Patel .. Counsel for the respondents.

Coram:

The Hon'ble Sh.N.V.Krishnan, Vice Chairman.

The Hon'ble Sh.B.S.Hedge, Member(J)

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? ✗

J U D G E M E N T

(Hon'ble Sh.N.V.Krishnan, Vice Chairman)

The applicant was proceeded against under Rule 16 of the CCS (CCA) Rules, 1965 - Rules for short-on the

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basis of memorandum dated 28th February, 1991, (Annexure A) containing the imputations of misconduct. The imputation, in short, is that the applicant agreed to pass on an illegal gratification of Rs.5000/- to help the daughter of his friend to clear the H.S.C. Examination. After considering his reply dated 5.9.1991 (Annexure A-1), the Disciplinary Authority found him guilty and, by the order dated 10th September, 1991 (Annexure A-2), he ordered that the next increments of the applicant be withheld for a period of three years without cumulative effect.

2. The applicant preferred an appeal on 26th September, 1991, to the appellate authority, the Director, Postal Services - the Respondent No.2. By the order dated 23.12.1991 (Annexure A-3), the appellate authority came to the conclusion that, looking to the gravity of the charge levelled against the applicant, a proceeding for imposing a major penalty should be initiated under Rule 14 and, accordingly, he ordered that de novo proceedings under Rule 14 be initiated against the applicant by the Disciplinary authority from the stage of issuance of fresh chargesheet.

3. In the meanwhile, after the disciplinary proceedings under Rule 16 were initiated, the applicant

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sent a notice to the third respondent, the Senior Superintendent of R.M.S. 'A.M.' Division, Ahmedabad, on 26th August 1991 (Annexure A-4), under Rule 48-A of the Pension Rules, seeking voluntary retirement w.e.f. 2nd January, 1992 on health grounds. The third respondent accepted the notice of retirement, he being the competent authority and permitted the applicant by his memorandum (Annexure A-5) dated 19th September, 1991, (i.e. 9 days after passing the Annexure A-2, penalty order), to retire with effect from 2nd January 1992 as requested in the Annexure A-4 notice.

4. Apparently, on a perusal of the records of the original case relating to the imposition of the minor penalty, the appellate authority became aware of this development. He, therefore, referred to this development in the Annexure A-3 appellate order and remarked that, by accepting the voluntary retirement, the penalty of stopping the increments for three years had been wiped out. He also observed that the notice of voluntary retirement was also sent by the applicant while disciplinary proceedings were in progress. Therefore, in his appellate order dated 23rd December, 1991 (Annexure A-3), he also directed that the disciplinary authority shall, however, ensure, that the applicant was not allowed to retire voluntarily till the proceedings under Rule 14 are finalised, including the period of appeal/review.

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5. The applicant is aggrieved by the original (Annexure A-2) penalty order dated 10.9.1992 and the appellate order dated 23.12.1991 (Annexure A-3) and has requested that these orders be quashed.

6. The respondents have filed a reply opposing the reliefs sought. It is stated that the applicant is not entitled to any relief and that there is no illegality either in Annexure A-2 order of the disciplinary authority or in the order dated 23.12.1991 (Annexure A-3) of the appellate authority. The charge against the applicant being grave, the appellate order is fully justified.

7. We have perused the records of the case and heard Shri V.M. Dhotare, learned counsel for the applicant and Shri Mukesh Patel, Advocate for the respondents holding brief of Shri Jayant Patel.

8. A perusal of the reply dated 5.9.1991 (Annexure A-1) given by the applicant to the Annexure A memorandum of charges indicates that the applicant admits that, with intention of helping his friend, he involved himself in the transaction of passing on illegal gratification. The charge is, therefore, not less than abetting an act of bribery, though not concerning the applicant's work.

9. Very forceful arguments were advanced by the parties. The learned counsel for the applicant contended that the appellate authority has not properly considered

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his appeal at all, as would be evident from Annexure A-3 order. He also contended that the voluntary retirement notice, having been accepted by the competent authority, the appellate authority did not have any authority to issue any direction in this regard in the appellate order.

10. The learned counsel for the respondents submitted that, the charge against the the applicant is a grave matter. The disciplinary authority not only imposed a light penalty but that, in effect, it was wiped out by permitting the applicant to retire voluntarily on 2.1.1992, before even his next increment could be stopped. Therefore, the appellate order for de novo proceedings under Rule 14 is justified, as also the appellate order directing that the voluntary retirement should not be allowed to take place.

11. Having given our anxious consideration to the issues raised, we are of the view that this application should be allowed for more than one reason.

12. The applicant has not filed a copy of the appeal memorandum filed by him. We do not know what grounds were raised by him against the Annexure A-2 order of the disciplinary authority imposing the penalty. However, the order dated 23.2.1991 (Annexure A-3) of the appellate authority makes no reference, whatsoever, either to the appeal memorandum or to the grounds raised therein.

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The appellate authority was duty bound to consider the appeal under Rule 27 (2) as follows:

"2. In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the appellate authority shall consider -

(a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provision of the Constitution of India or in the failure of justice;

(b) whether the findings of the disciplinary authority are warranted by the evidence on record; and

(c) whether the penalty or the enhanced penalty imposed is adequate inadequate or severe;"

This is in addition to a proper discussion of the points raised in the appeal, as has been stressed in Government of India instruction under Rule 27 of thee CCA Rules. The instructions are as follows:

"Thus the rule requires that even if the appellant

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has not brought out any new points in the appeal, it is obligatory on the part of the appellate authority to discuss how there has been no procedural flaw or denial of opportunity of defence and that the findings of the Disciplinary authority are based on evidences and are just. This is rarely done and the result is obvious. It has also created a feeling (though may not be quite correct) that the decisions of the appellate authority are arbitrary and summary in nature. The appellate authorities should bear this in mind and issue the appellate orders in such a way that such unjust feelings or impressions are not created. This is possible only if the appellate orders discuss thoroughly the following points:-

i) the procedural aspects as well as the justness of the findings of the disciplinary authority with reference to the admissible evidences:

ii) a proper discussion of the points raised in the appeal; and

iii) any objective assessment of the lapse on the part of the punished official with a view to coming to a decision that the charge(s) had been established and that the penalty is

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appropriate/adequate and does not require to be either toned down or enhanced".

13. We find that the appellate authority has not adverted to any ground raised by the appellant and has failed to consider the appeal in the light of Rule 27(2) and the instructions thereunder. Therefore, the appellate's order has necessarily be set aside as it has been passed arbitrarily.

14. It is only after properly considering the appeal filed by the applicant that the appellate authority could have come to the conclusion whether the guilt has been proved or not, whether the penalty imposed is light and what action can be taken. As the appeal has not at all been considered properly, the conclusion of the appellate authority that the penalty imposed is light is without any foundation and is arbitrary.

15. There is one more point. A question arises whether the appellate authority should have given the applicant a notice to show cause why the minor penalty imposed should not be enhanced to a major penalty and why, for that purpose, a direction should not be issued that proceedings under Rule 14 be initiated.

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16. We may see the provisions in Rule 27 in this regard. After providing that an appellate authority may also enhance the penalty imposed, there are four provisos to this Rule which read as follows:(Swamy's compilation of C.C.S.(C.C.A. Rules-Nineteenth edition):

"Provided that-

i) the Commission shall be consulted in all cases where such consultation is necessary;

ii) if such enhanced penalty, which the appellate authority proposes to impose, is one of the penalties specified in clauses (v) to (ix) of Rule 11 and an inquiry under Rule 14 has not already been held in the case, the appellate authority shall, subject to the provisions of Rule 19, itself hold such inquiry or, direct that such inquiry be held in accordance with the provisions of Rule 19, itself hold such inquiry or, direct that such inquiry be held in accordance with the provisions of Rule 14 and thereafter, on a consideration of the proceedings of such inquiry and make such orders as it may deem fit;

iii) if the enhanced penalty which the appellate

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authority proposes to impose is one of the penalties specified in clauses (v) to (ix) of Rule 11, and an inquiry under Rule 14 has already been held in the case, the appellate authority shall make such orders as it may deem fit; and

iv) no order imposing an enhanced penalty shall be made in any other case unless the appellant has been given a reasonable opportunity, as far as many be, in accordance with the provisions of Rule 16, of making a representation against such enhanced penalty". Provisos (ii), (iii) and (iv) are relevant.

17. Proviso (ii) and (iii) read thus after the amendments made in them by the M.H.A. Notification No.11012/11/78- Est.(A) dated 2nd March, 1979, as seen from the foot note to this rule on p.101 of Swamy's Complilation. The exact nature of the amendment made is not made clear in the foot note. However, similar amendments have also been carried out in the corresponding provisions applicable to railway servants. On a perusal of M.L.Jand's "Railway Servants (Discipline & Appeal) Rules, 1968" (IVth Edition 1991),it is seen that the provisos (~~ii~~ (ii)) and (iii) of Rule 22 (which are para material with provisos (ii) and (iii) of Rule 27(2) of the C.C.S.(C.C.A.) Rules, 1965) were amended by a notification

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dated 25.10.79. The foot note on page 257 of the book reads as follows:

> "From proviso ii & iii words "after giving the appellant a reasonable opportunity,as far as may be, in accordance with the provisions of sub-rule 5, of Rule 10 of making a representation against the penalty proposed on the basis of evidence adduced during the inquiry" dropped vide S.O.3777, (E(D&A) 79 RG 6-12 of 18/25.10.79, SC 173/79).

18. It is only to be added that the reference in this extract to sub-rule 5 of rule 10 is to sub-rule 5 as it stood before its substitution also by an earlier amendment, vide S.O.3643 of 29.12.78 and notification E(D&A) 78 RG 6-54 of 24/29-11-78 SC 204/78 as seen from page 128 ibid. It, thus appears that in the C.C.S.(C.C.A) Rules, 1965 and, the corresponding Rules applicable to Railway employees, there were provisions that no action under proviso (ii) or (iii) shall be taken without giving the appellant a reasonable opportunity of making a representation. This requirement was deleted in 1979.

19. Therefore, as the provisos now stand, no opportunity need be given by the appellate authority in respect of enhancement of penalty referred to in proviso

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(ii) and (iii). Proviso (iv) alone requires that no order imposing an enhanced penalty shall be made in any other case until the appellant has been given a reasonable opportunity of making a representation against such enhanced penalty. So far as we can see, the only other case that gets covered by proviso (iv) is a case where the appellate authority desires to substitute a more severe minor penalty for a lesser one already imposed by the Disciplinary authority in proceedings under Rule 16 or Rule 14. All other cases appear to be covered by provisos (ii) and (iii). This will lead to an absurd result. For, it would mean that if a penalty of censure is to be enhanced to withholding of increment, notice has to be given to the appellant, but, if a penalty of withholding one increment, imposed in a proceeding under Rule 14 is to be enhanced to a compulsory retirement or, if a penalty of reduction to a lower grade post is to be enhanced to one of removal, no notice is required to be given. This cannot, perhaps be the intention of the provisos to Rule 27.

20. There is one more consideration. If the appellate authority does not now give this opportunity to the applicant he will not get this opportunity again. For, the Disciplinary Authority can commence proceedings under Rule 14 and no doubt, he will give the applicant a copy of the enquiry report. But the disciplinary authority can impose any major penalty on the delinquent,

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without giving a notice to show cause why such penalty should not be imposed. The applicant can then challenge the quantum of punishment only by filing an appeal thereafter. Therefore, the appellate authority has a mandatory obligation to issue a notice to the appellant to show cause why fresh proceedings under Rule 14 should not be commenced with a view to imposing any of the major penalties.

21. We would like to add that the first proviso to Article 311(2) of the Constitution which declares that it shall not be necessary to give a person, against whom an enquiry is initiated in terms of Article 311(2) an opportunity of making representation on the penalty proposed to be imposed on him, is restricted and applies only to the penalty imposed by the disciplinary authority. If the appellate authority, before whom an appeal is filed, finds that the penalty imposed is inadequate and he feels that it should be enhanced, this proviso to Article 311(2) does not give him the licence to enhance the penalty without giving the delinquent an opportunity to show cause why the penalty should not be enhanced even if the appeal is treated as an extension of the disciplinary proceedings. The delinquent has a right to be informed why the appellate authority feels that the punishment is inadequate and why an enhanced penalty should be imposed so that he can make a suitable representation. This is a mandatory requirement based on the principles of natural justice.

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21. This principle has been recognized in the Rules when they deal with the powers of revision/review. Thus the first proviso to sub-rule (1) of Rule 29 dealing with revision makes it clear that a revising authority cannot enhance the penalty unless the Government servant is given a reasonable opportunity of making a representation against the proposed enhanced penalty. Similar is the provision in respect of enhancement of penalty by reviewing authorities.

22. Therefore, we are of the view that even after the amendment in the second and third provisos to Rule 27(2), the appellate authority has to give an opportunity to the appellant before the penalty is enhanced. Failure to give such an opportunity will be against the principles of natural justice and this is not protected by the proviso to article 311(2) of the Constitution. The appellate order is therefore, liable to be quashed on this ground also.

23. It is also necessary to point out that, perhaps, the disciplinary authority did not, after all, commit any mistake in accepting the notice of voluntary retirement, which was given by the applicant, when the minor penalty proceedings were pending. The respondents have filed Annexure R-4, which is stated to be Government

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of India's decision under Rule 48-A of the CCS Pension Rules. We have referred to Swamy's Compliation on the above subject and notice that the said instruction was issued by the O.M. dated 26.8.87.Para 1 (iii) of the instruction, which is relevant, is as follows:

> "Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending or contemplated against the Government servant concerned for the imposition of a major penalty and the disciplinary authority having regard to the circumstances of the case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case, or (b) in which prosecution is contemplated or may have been launched in a Court of Law against the Government servant concerned. If it is proposed to accept the notice of voluntary retirement even in such case, approval of the Minister - in - Charge should be obtained in regard to Group 'A' and Group 'B' Government Servants and that of the Head of the Department in the cases of Group 'C' and Group 'D' Government servants".

In the present case, the Disciplinary authority

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initiated proceedings only for imposing minor penalty. Therefore, he could have accepted the retirement notice.

24. We have only to point out that,in pursuance of the appellate authority's order, the disciplinary authority issued a notice on 26th December, 1991 (Annex.A-5) informing the applicant that the earlier order of acceptance of his voluntary retirement (Annexure A-4) has been cancelled. A further order in this behalf was issued to him, to that effect on 1.1.1992. The applicant has not challenged either the Annexure A-5 order dated 26th December, 1991 or the order dated 1st January, 1992. These are administrative orders not germane to the appeal. Hence, it is open to the applicant to take such remedial measures as may be advised in this regard.

25. Therefore, we only quash the Annexure A-3 order of the Appellate authority and remand the case to the appellate authority for a fresh disposal of the applicant's appeal in accordance with law, keeping in view the observation made by us in this judgement. The application is thus disposed of with no order as to costs.

(B.S.Hegde)
Member(J)

(N.V.Krishnan)
Vice Chairman(A)

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