

8

9

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 117 OF 1994.

Cuttack, this the 6th day of April, 2000.

Jayakrishna Behera.

....

Applicant.

-Vrs.-

Union of India & Ors.

...

Respondents.

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? Yes -
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? No -

(G. NARASIMHAM)
MEMBER (JUDICIAL)

Somnath Som
(SOMNATH SOM)
VICE-CHAIRMAN
8.4.2000

10

9

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 117 OF 1994.

Cuttack, this the 6th day of March, 2000.

C O R A M:

THE HON'BLE MR. SOMNATH SOM, VICE-CHAIRMAN

AND

THE HONOURABLE MR. G. NARASIMHAM, MEMBER (JUDL.) .

..

JAYAKRISHNA BEHERA,
Aged about 47 years,
Son of late Gobinda Behera,
At-Ratnakar Road, Bali Nolia Sahi,
Puri.

... Applicant.

By legal practitioner: M/s. S.K. Mohanty, S.P. Mohanty, Advocates.

-VERSUS-

1. Union of India represented by Secretary,
Ministry of Surface Transport, New Delhi-1.
2. Senior Hydrographic Surveyor, Minor Ports,
Survey Organisation of Commerce House,
4th floor, Ballard Estate, Bombay-38.
3. Chief Engineer and Administrator, Andaman
Lakhyadweep Harbour Works, Gandhi Nagar,
PO Box No. 161, Andaman-1.

... Respondents.

By legal practitioner: Mr. S.B. Jena, Addl. Standing Counsel .

.....

O R D E R

S. Som
MR. SOMNATH SOM, VICE-CHAIRMAN:

In this original Application, under section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for quashing the order dated 15-4-1993 at Annexure-14 dismissing him from service. Second prayer is for reinstatement in service with all consequential benefits.

2. Applicant's case is that he was appointed as Khalasi on 8-4-1969 on Ad-hoc basis in the Minor Ports Dredging Survey Organisation and was posted to C Survey Party stationed at Anakhajud, Puri. He was promoted to the post of Field Assistant on temporary basis w.e.f. 12-10-1972 in order dated 24.4.1973 at Annexure-2. He was further promoted to Assistant Marine Surveyor on Ad-hoc basis w.e.f. 13-10-1977 and was subsequently reverted to the post of Field Assistant in order dated 28.8.1978. Applicant was confirmed in the post of Field Assistant in order dated 4.8.1981 (Annexure-3) w.e.f. 6.9.1980. By order dated 12.12.1990, Field Assistants, who have passed matriculation examination were asked to give their willingness to appear at a competitive examination to be held for the post of Asst. Marine Surveyor. Applicant applied and was allowed to appear at the test, in which he secured 44% of marks. He worked in the post of Asst. Marine Surveyor on Ad-hoc basis in different periods from 12.8.1981 to 3.1.1983. He again took up the Departmental Competitive examination for the post of Asst. Marine Surveyor in April, 1983 and secured 64% of marks vide order dated 21.4.1983 (Annexure-4). He was promoted to the Post of Asst. Marine Surveyor from 1.1.1983 to 31.1.1984 in order dated 30.6.1984. In order dated 25.6.1984, he was promoted on Adhoc basis to the post of Jr. Hydrographic Surveyor from 1.2.1984 to 31.7.1984 and again from 11.11.1986 to 28.2.1987. In letter dated 15.12.1986 he was reverted to his permanent post of Field Asst. w.e.f. 15.12.1985 (Annexure-5). In OM dated 6.1.1987, it was intimated to him that the matriculation certificate submitted by him at the time of his promotion to the post of Field Asst. in

J. Jan.

1972 is false as per the report received from the Andhra University. In this letter, applicant was asked to show cause within seven days failing which Departmental proceedings shall be initiated against him. Applicant submitted his reply to the show cause notice on 9.3.87. Draft charges were issued against him on 9/11-3-1987 (Annexure-7). Applicant in his reply to the charges dated 21.3.1987 denied the charges and wanted to be heard in person. His explanation is at Annexure-8. Applicant was placed under suspension in order dated 23.1.1987. This order was received by the applicant on 4.4.1987. One Mr. N. Kanan, Deputy Chief Engineer, Lakhsdweep, Harbour Works, Calicut was appointed as Inquiring Officer. It was intimated to the applicant in order dated 28.7.1987 that the enquiry will be held on 11.8.1987 at 11 A.M. in the office of the Senior Hydrographic Surveyor, Minor Ports Survey Organisation Bombay. Again by telegram dated 31.7.1987 he was asked to attend the enquiry on the aforesaid date. Applicant in his letter dated 1.8.1987 intimated regarding nomination of one Narayan Mohapatra, Postal Assistant, College Square, Cuttack as his defence Assistant and also asked for payment of subsistence Allowance and other dues. The Senior Supdt. of Post Offices, Cuttack City Division, intimated that the services of Narayan Mohapatra, Postal Assistant could not be spared to function as Defence Assistance. In letter dt. 19.9.1987, applicant requested the concerned authority to allow him further time to choose his defence assistance. Inquiring Officer, in his notice dated 10.11.1989 directed him to attend the enquiry on 20-12-1989. In letter dt. 12.12.1989, applicant intimated that he will attend the enquiry on the date fixed and he also requested for payment of subsistence

S.S.M.

Allowance and TA Advance of Rs.500/-to him to meet to & fro journey to Bombay to attend the enquiry.He wanted Shri N.G. Marathe,Sub Post Master,Madhavbag Post Office,Bombay as his defence Assistance.Accordingly,enquiry was held on 20.12.87 and the same was adjourned at the request of the defence Assistance.Enquiry was next held on 26-2-1992 and on that date there was a change of Presenting Officer.Applicant has enclosed the minutes of the proceedings of the enquiry held on 20.12.1987 and 26.2.1992.Applicant has stated that the presentation of the case by the Presenting Officer was recorded and thereafter, defence version was recorded. The Inquiring Officer,thereafter concluded the enquiry without giving any reason and finding.Senior Hydrographic Surveyor,Bombay in the impugned order dated 15.4.1993 intimated the applicant that he is dismissed from service with immediate effect by the Chief Engineer and Administrator as per his order dated 29.3.1993.This letter of the Chief Engineer was not communicated to the applicant.Applicant has stated that the senior Hydrographic Surveyor was the Disciplinary Authority in his case and the Chief Engineer and Administrator was the Appellate Authority.The applicant has Stated that the final order of dismissal was passed by the Appellate Authority which is illegal . Applicant has stated that copy of the enquiry report was not supplied to him and the order of dismissal was passed by the Appellate Authority.Proceedings have been concluded inviolation of the principle of natural justice. Applicant did not have any opportunity to examine the witnesses in defence nor did the prosecution examine any witness in support of the charge.It is submitted that the report of the Andhra University does not indicate whether the signature on

impugned certificate was genuine or not. In the context of the above facts, the applicant has come up in this Original Appl. with the prayers referred to earlier.

3. Respondents, in their counter, have opposed the prayers of applicant. They have stated that applicant was originally appointed in the Gr.D Post of Khalasi in Minor Ports Survey organisation, Bombay under the Ministry of Surface Transport w.e.f. 8.4.1969. He was promoted to the post of Field Assistant on the basis of the recommendation of the Departmental Promotion Committee w.e.f. 12.10.1972 on his producing a certificate of having passed the Matriculation examination in 1971 from Andhra University. A copy of the certificate produced by the applicant is at Annexure-R/3. As the authenticity of the Matriculation certificate furnished by the applicant was doubtful, the competent authority decided to verify it from the Andhra University. Accordingly, in letter 6.8.1986 (Annexure-R/5) the Registrar, Andhra University was addressed along with copy of the Matriculation certificate furnished by applicant with a request to confirm whether such certificate was actually issued by the Andhra University. The reply received from the Andhra University in their letter dated 4.12.1986 is at Annexure-R/6, in which it was clearly mentioned that the certificate is a false certificate. In a further letter dated 11.6.1987, Annexure-R/7, the Registrar, Andhra University intimated the Respondents that the matter has been verified once again and no such candidate bearing the name of applicant took the matriculation examination in March, 1971 and the certificate was not issued by the Andhra University. Respondents have further stated that after receipt of the first report from the Andhra University, the applicant was placed under suspension

Som

on 23.1.1987. In the meantime, resignation letter dated 22.1.1987 was received from applicant but as at that time applicant was under suspension and major punishment proceedings were about to commence against the applicant, the resignation was not accepted. The applicant was asked to produce the original matriculation certificate which was again sent to the Andhra University for verification and the reply received from the Andhra University is in letter dated 11.6.1987 referred to earlier. Respondents have stated that the proceedings under Rule-14 of CCS (CCA) Rules, 1965 were initiated against him and on the applicant denying the charges, an Inquiring Officer was appointed. The Inquiring Officer submitted his report on 16.3.1992. Copy of the report is at Annexure-R/10. The IO held that the charges against the applicant have been proved. Respondents have stated that as the post of Senior Hydrographic Surveyor was vacant, the enquiry report was examined by the next higher authority i.e. Chief Engineer, and Administrator (ALHW) who is the Head of Department. He agreed with the findings of the I.O. who decided to impose on the applicant the penalty of removal from service. Applicant was given an opportunity to present his case against such penalty in memorandum dated 4.2.1993. Copy of the enquiry report and other documents were furnished to the applicant in this Memorandum. This memorandum was received by applicant vide his acknowledgement dated 10.2.1993 at Annexure-R/12. Applicant did not submit any representation against the penalty. Thereafter in letter dated 30.3.1993 (Annexure-R/13) penalty of dismissal from service was imposed on applicant. Respondents have stated that it has been proved that the

S. Sam

applicant submitted a false matriculation certificate and on that basis, applicant secured the promotion to the higher post and received the monetary benefits. This is a clear case of fraud and misconduct.

4. As regards the averment that the Subsistence Allowance was not paid to him, Respondents have stated that his application for payment of Subsistence Allowance has nothing to do with the enquiry and he is entitled to the Subsistence Allowance subject to fulfilment of the conditions for sanction of the same. Respondents have further stated that the original Defence Assistance suggested by the applicant was not permitted to take up his case by ~~the~~ controlling authority of the Defence Assistance. Applicant did not suggest any alternative name for appointment as Defence Assistance. Respondents have denied that the report of the I.O. was not supplied to the applicant. They have also stated that ⁱⁿ the enquiry principle of natural justice and the procedure laid down in rule-15 has been strictly followed and that the applicant was given all opportunity to produce/place his defence. It is also stated that the enquiry officer has given a detailed report giving reasons in support of the findings and the order of the Disciplinary authority is also a speaking order in which all the facts have been taken into consideration. On the above grounds Respondents have opposed the prayer of the applicant.

5. Applicant in his rejoinder has reiterated some of the averments made by the applicant in his original application and it is not necessary to refer to the same once again. In his rejoinder, he has stated that the IO recorded the statement of the applicant and his Defence Assistance and

16 12

as the Defence Assistance was not a witness his statement should not have been recorded. It is further stated that ~~no~~ witness was examined and as the documents was produced without the testimony of the custodian, these could not be ^{notice of} taken/against the delinquent. In support of the above contention, applicant has mentioned and quoted in extenso of the decision of the Ernakulam Bench in OA NO. 413 of 1991 -P.S.Gopala Pillai Vrs. Union of India and others. Applicant has further stated that the memorandum dated 4.2.1993(Annexure-R/11), the letter addressed to him at Annexure-R/12 and the punishment order at Annexure-R/13, were not received by him, as these were addressed to his address at Bombay while the applicant was residing in puri. On the above grounds, it has been submitted that the applicant has not received the enquiry report and the punishment order.

6. We have heard Mr.S.P.Mohanty,ld.counsel for the applicant and Mr.S.B.Jena,learned Addl.Standing Counsel appearing for the Respondents and have also perused the records.

7. Learned counsel for the applicant has submitted a date chart as also xerox copy of the relevant pages of the Swamy's compilation /Law Digest wheere the cases relied upon by him has been repotted,which have also been taken note of.

8. First point urged by the ld.counsel for the applicant that the applicant was not paid the subsistence allowance and he has represented several times for getting the subsistence allowance and as he was not paid the subsistence allowance, he could not effectively participate in

the enquiry. Therefore, it must be held that the reasonable opportunity was denied to him. There are decisions that non-payment of subsistence allowance does amount to denial of reasonable opportunity to the charged official to represent in the enquiry but in this case in the report of the Inquiring Officer, we find that the Inquiring Officer has directed for immediate payment of Subsistence Allowance. We also note that even though in the OA he has mentioned about the non payment of the S.A. but he has not taken the ground that because of non-payment of the subsistence allowance he was prejudiced. It has been submitted by the learned counsel for the applicant, during hearing that later on he has got the Subsistence Allowance. It is also borne out from the submission made by learned counsel for the petitioner that during the period of suspension, applicant was staying at Puri and not at Bombay where he was placed under suspension. It is well settled that during the period of suspension, the suspended employee must remain at the place which has been fixed as his headquarters during the period of suspension. In this case, neither parties have enclosed a copy of the order of suspension indicating the headquarters of the petitioner during the period of suspension. In the instant case we find that on the dates when enquiry were held, the applicant did attend the enquiry alongwith his defence assistance. In view of this, it can not be said that nonpayment of subsistence Allowance, during the course of enquiry, if it is a fact, has resulted in any prejudice to the applicant. This contention is therefore, held to be without any merit and is rejected.

9. Second contention urged by learned counsel for the applicant is that the enquiry report was not supplied to the applicant and thereby the mandatory requirement under the rules as also the principles of natural justice have been violated and the applicant has been prejudiced. Respondents, on the other hand, have stated that the enquiry report was sent to the applicant and he received the same vide his acknowledgement which is at Annexure-R/12. It has been submitted by learned counsel for the petitioner that this enquiry report was sent to his ^{Bombay} address even though he was staying in Puri and all other documents were sent to his address at Puri and because of this he has not received either the report of the enquiry or the penalty order. We have considered the submissions of learned counsels for both sides carefully and have also perused the records. Applicant has stated in para 4.23 in his Original Application that he has nominated one N.G. Marathe as his Defence Assistance. It also appears from the record of the proceedings that Shri Marathe appeared on behalf of applicant along with him in the enquiry as defence assistance of applicant. Enquiry report along with notice for showing cause against the proposed punishment was sent in the name of applicant C/o. Sub Postmaster, Madhavbag Post Office, Bombay which is the Address of Shri Marathe, Defence Assistance of the Applicant. It also appears from Annexure-R/12, that Shri Marathe has received this letter on 10.2.1993 vide his signature and stamp on Annexure-R/12. Therefore, question which arises for consideration is whether sending the enquiry report and the

J Som.

notice for showing cause against the proposed punishment and the enquiry report to the applicant C/o. his Defence Assistance is valid or not. It is to be noted in this connection that according to applicant during his period of suspension he was staying at Puri which could not have been declared as his headquarters during the period of suspension. It is also to be noted that the impugned order dated 15-4-1993 which was received by applicant and which has been enclosed by the applicant at Annexure-14 is also addressed to applicant C/o. Sub-Postmaster, Madhavbag Post Office, Bombay and apparently this letter has been received by the applicant. In view of this, it is not possible to hold that by sending the enquiry report to the applicant C/o. Sub-postmaster, Madhavbag Post Office, Bombay, the requirement of rules have not been complied with. After all, a Defence Assistance represents the charged official in all stages of the proceedings and till the proceedings are finalised by imposition of punishment, he continues to represent the interest of the charged official. Secondly as we have already noted that the impugned order sent to the applicant in the same address of Bombay has been received by him. Lastly it is also to be noted that after getting the impugned order at Annexure-14, applicant has not raised this point before the Disciplinary Authority by filing a petition/objection. This contention is, therefore, held to be without any merit and is rejected.

10. The third contention of learned counsel for applicant is that in this case the senior Hydrographic Surveyor was the Disciplinary Authority but the dismissal order has been issued by the Chief Engineer and Administrator who is the

Appellate Authority and such usurpation of power of the Disciplinary Authority by the Appellate Authority is illegal and on that ground the dismissal order is liable to be quashed. Respondents in Para-21 of the counter have stated that though the Senior Hydrographic Surveyor is the Disciplinary Authority, the final order in the disciplinary proceedings had to be taken by the Chief Engineer and Administrator as the post of Senior Hydrographic Survey was lying vacant at that time and some one else was merely holding the current charge of the post. Therefore, the point for consideration is whether in the absence of the Disciplinary Authority passing of final order by the Appellate Authority in a disciplinary proceedings, will make the order liable to be quashed. Rule-12 of the CCS(CCA) Rules provide for appointment of an Adhoc disciplinary Authority by a general or special order of the President. There may be cases where disciplinary authority though is in position may not be in a position to pass final orders. For example the Disciplinary Authority may be personally concerned with the charges or may be a material witness on behalf of the prosecution. In such cases, Rules provide for appointment of an adhoc disciplinary authority which may be the Appellate Authority but in this case, Respondents have not stated that the Appellate Authority was appointed as adhoc disciplinary authority under Rule-12 of CCS(CCA) Rules. Thus, obviously there has been a lacunae in the disciplinary proceedings in this respect but this is a procedural lacunae and the effect of this lacunae on the legality of the final order has to be examined. This general instruction about violation of rules, regulations

S. Som.

for citation
S. Som.

and statutory provisions governing the disciplinary/Departmental enquiries was considered by the Hon'ble Supreme Court in the case of STATE OF BANK OF PATIALA VRS. S.K.SHARMA - reported in AIR 1996 SC 1669. In that case, Hon'ble Supreme Court have evolved certain basic principles of natural justice in the matter ^{of} disciplinary proceedings. It has been held that an order ^{of} imposing a punishment on an employee consequent upon a disciplinary/Departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character. A substantive provision has normally to be complied with and the theory of substantial compliance or the test of prejudice would not be applicable in such case. In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision can not be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice; viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the

22

1/2

-14-

prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious no interference is called for. While laying down the above law, the Hon'ble Supreme Court have also noted that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. In such cases, the court may not insist on proof of prejudice. ~~when~~ ^{not} the delinquent officer was not given opportunity to lead defence in his evidence, the prejudice is self evident. In such cases no proof of prejudice as such need be called for. In the instant case by not issuing an order appointing the Appellate Authority as the adhoc disciplinary authority, applicant has not in any way been prejudiced. He has also not stated in his petition as also during hearing as to how he has been prejudiced by this lacunae. In view of this, it is held that the impugned order of dismissal from service is not liable to be set aside on this ground and this contention is, therefore, accordingly rejected.

11. The last contention of learned counsel for applicant is that in the enquiry against him no oral witness was examined and therefore, he did not get an opportunity to cross examine the oral witness and thereby his case was prejudiced. For considering this matter, it is necessary to refer to the charges levelled against the applicant.

12. There were two charges against the applicant; first is that the appellant while functioning as permanent Field Asst. and adhoc Jr. Hydrographic Surveyor has cheated the Govt. by producing false certificate of having passed matriculation examination and thereby violating the provisions of the conduct rules. The second charge is that the applicant had derived monetary benefits by acquiring promotion to the post of Field Asst. and Jr. Hydrographic Surveyor by putting the Govt. to financial loss which is unbecoming of a Govt. servant. In the statement of imputation supplied to applicant, by the authorities, it has been mentioned that the Andhra

University in their letter dated 4.12.1986 have reported that the certificate produced by applicant was false and fake. With regard to Charge No.2, it has been mentioned in the statement of imputation that had the applicant not produced the false certificate, he would have continued only as Khalasi or at most he would have promoted as Greased/Deck Hand, Tindel i.e. in the line of Group D promotions but because of the false certificate produced by him he was promoted to Gr.C post of Field Assistant, Assistant Marine Surveyor and Jr. Hydrographic Surveyor. Xerox copy of the matriculation certificate submitted by Applicant is at Annexure-R/3. On the top of the certificate in hand the Regn. No. has been noted as 7016. The Registrar of the Andhra University in his letter dated 4.12.1986 (Annexure-6) has reported that no such candidate by name Jayakrishnan Behera had appeared in the matriculation examination. University reported that he had manage to secure this fake and false certificate for getting employment.

Scdm. In fact one candidate by name P. Pusplatha had appeared in the examination with the registration No. 7016 in March, 1971 and passed in IInd Division. After the original certificate, later on, supplied by the applicant, the same was sent to the University and the University submitted a further report in letter dated 11.6.1987 at Annexure-R/7 in which the University reported that the particulars of the certificate said to have been issued to Shri J. Behera who is alleged to have passed matriculation in March, 1971 with Regn. No. 7016 has been verified once again. University reiterated that no such candidate by name of J. Behera has appeared in the matriculation examination held in March, 1971 and the certificate was not issued by the University. They have also reported that the

format which was actually used by the University during 1971 for issue of such certificate is completely different in size and latering from the certificate filed by the applicant. University has also enclosed a specimen copy of the certificate used by the University in 1971. The case of the applicant is that as no oral witness was examined he was denied the opportunity of cross-examining the witness. It is also stated by counsel for applicant that the documents produced in course of the enquiry should have been got produced by the persons who are the custodian of the documents and in the absence of this, the documents could not have been relied upon. In support of this contention, learned counsel for the applicant has relied on the decision of P.S. Gopala Pillai Vrs. UOI and others decided by the Ernakulam Bench of the CAT in Original Application No. 413 of 1991 on 14-2-1992. In this decision, it has been held that the documents produced without the testimony of its custodian, can not be treated as evidence against the delinquent. In this case, two relevant documents on which enquiry officer based his findings are the two reports of the Andhra University dated 4.12.1986 and 11.6.1987. It has been submitted by learned counsel for the petitioner that as the custodian of these two documents has not been examined, he has been denied the opportunity of cross-examining him. It has been stated by the learned counsel for the applicant that the University of the Andhra have not specifically reported if the signature on the certificate produced by applicant has been forged. In the instant case a large number of documents have been produced in course of the enquiry and most of the documents

relate to the appointment and promotion of applicant to different posts and are not really material for the purpose of proving the charge because it is admitted case between the parties that the applicant did join in a lower post and got promotion to higher post. The only relevant two documents which are relevant for the purpose of proving the charge are these two reports of the University. We have gone through the records of the proceedings of the enquiry and we find that this point was not taken by the applicant or his defence assistance before the Inquiring Officer at the time of enquiry. The applicant should have objected when these two documents were presented before the Inquiring Officer. Moreover, it is also well settled that strict rules of law of evidence are not applicable in a Departmental proceedings. We have referred to these reports of the Andhra University and we fail to see how the applicant's case has been prejudiced because the officer who has issued these two reports or the officer who has received these two reports have not been personally examined. This contention of the learned counsel for the applicant, is, therefore, held to be without any merit and is rejected.

13. In the result, therefore, we hold that the applicant is not entitled to any of the reliefs claimed in this Original Application and the same is rejected. No costs.

(G. NARASIMHAM)
MEMBER (JUDICIAL)

(SOMNATH SOM)
VICE-CHAIRMAN

KNM/CM.