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CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH: CUTTACK

ORIGINAL APPLICATION NO. 442 OF 2000  
Cuttack this the 16<sup>th</sup> day of February/2004

Bairagi Sethi

...

Applicant(s)

-VERSUS-

Union of India & Ors. ...

Respondent(s)

FOR INSTRUCTIONS

1. Whether it be referred to reporters or not ?
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not ?

  
( B.N. SOM )  
VICE-CHAIRMAN(A)

  
(B.PANIGRAHI)  
VICE-CHAIRMAN(J)

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CENTRAL ADMINISTRATIVE TRIBUNAL  
CUTTACK BENCH  
O.A. 442 of 2000

Present : Hon'ble Mr. B. N. Som, Vice-Chairman  
Hon'ble Mr. Justice B. Panigrahi, Vice-Chairman

Bairagi Sethi,  
S/o Late Bharamarabar Sethi,  
L.D.C. at Local Office,  
Employees State Insurance Corp.  
P.O. J.K. Puri,  
R/o Plot No. 48/13360 Bhima Tangi  
Housing Board Colony, Phase-II,  
Kapil Prasad Area,  
Bhubaneswar-2

Vs

1. Union of India through the  
Secretary, M/o Labour, Shrama Shakti  
Bhawan, New Delhi
2. Employees State Insurance Corporation  
through its Director General, Panchadeep  
Bhawan, Kotla Road, New Delhi-2
3. Additional Commissioner ( P & A )  
E.S.I. Corporation, Panchadeep Bhawan,  
Kotla Road, New Delhi-2
4. Regional Director, ESI,  
Panchadeep Bhawan, Janapath,  
Bhubaneswar.

..... Respondents

For the applicant : Mr. B.S. Mishra, Counsel

For the respondents : Mr. P.P. Ray, Counsel

Heard on : 10.2.04 : Order on : 16.2.04

O R D E R

Justice B. Panigrahi, V.C.:

The applicant being affected with and aggrieved by the order passed by appellate authority for this compulsory retirement as a measure of penalty has filed this case.

2. The applicant was initially appointed as a Peon on 19.7.71
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and in course of time, on the basis of seniority-cum-fitness, he was promoted to the post of Lower Division Clerk in the year 1977. Since then he had been functioning as such for the last 23 years. It is stated in the application that the applicant while functioning as Receiving Clerk and Diarist in the Regional office at Bhubaneswar being posted at the reception counter, he was absent for a while on 21.6.89. After he resumed his duties, he noticed a letter was lying on his table which was addressed to the Regional Director, ESI Corporation from the District Employment Officer, Bhubaneswar. As per prevalent practice, the applicant had to deliver the letters to the Headclerk. A few days after he delivered such letter, he was interrogated by the Vigilance Deptt. officers on the allegation that there was some manipulation/ tampering in the list of candidates which was appended to the said letter of the District Employment Officer. After a discreet enquiry by the Vigilance it was found that the applicant was not present in his seat for some time when the letter in question was received by a Peon viz. Sri Sadasiva Das @ Barik. It was learnt that in the said letter the names of certain candidates were sponsored by the District Employment Exchange for recruitment to Group D posts in the office of Regional Director, ESI, Bhubaneswar. It is further learnt that the said letter was sent by the District Employment Officer through Shri R.K. Mohapatra, Peon of that office, but however, instead of handing over the said letter to the applicant, he (Shri Mahapatra) delivered the letter to Sadasiva Das Barik, Peon of the Regional Office of ESI, Corporation, Bhubaneswar. During enquiry by the Vigilance

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it was conclusively proved that the applicant was not there in his seat at the receiving counter at the time the said Peon (Mahapatra) brought the letter and he, therefore, handed over it to Sadashiva Das Barik, Peon. The Peon from the Employment Exchange had also collected signature of Sadashiva Barik as a token of acknowledgement.

It appears that the respondent authorities after a lapse of three years started a disciplinary proceeding against the applicant for his unauthorised absence from his seat and conniving with others in tampering with the document. The applicant's grievance is that the enquiry conducted by the Inquiry Officer was perfunctory, illegal and mala fide inasmuch as no opportunity was provided to the applicant to adduce evidence on his behalf. His further grievance is that even though he made a prayer for being represented in the enquiry through a legal practitioner since the case was of serious nature, but the authorities without any adequate reasons turned down his such request as a ~~reason~~ <sup>reason</sup> whereof he was deprived of reasonable opportunity of defending himself in the enquiry. The disciplinary authority held that there was no iota of doubt regarding the receipt of the letter on 21.6.89 from the District Employment Officer, Bhubaneswar by Sadashiva Das Barik, Peon, and therefore, he was inclined to agree with the finding of the enquiry officer that the article of charge against the present applicant was partly proved as he was responsible for not receiving the dak in question from the district Employment Exchange. In the concluding para the disciplinary authority recorded the reasons that the delinquent official was negligent in not remaining in his seat

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when the dak was intended to be delivered. It has also been observed that it was difficult to prove that the present applicant had acted as a party to the manipulation of the list of sponsored candidates. Therefore, the disciplinary authority imposed a minor penalty of stoppage of 3 yearly increments. The order of the disciplinary authority is dated 7.10.99 and is available at Annexure-5.

Being aggrieved by such punishment imposed by the disciplinary authority, it seems that the delinquent applicant preferred an appeal before the appellate authority who imposed the punishment of compulsory retirement from service after enhancing the same vide order dt. 11.9.2000 (annexure-1). It seems that prior to that a show cause notice was issued on 16.8.2000 whereby it was indicated that the appellate authority disagreed with the finding of the inquiry officer and intended to impose the penalty of dismissal from service. However, there is no mention of punishment of compulsory retirement. It is stated that the order of compulsory retirement was wrong, illegal and discriminatory and suffered from the vice of mala fide. It has further been stated that such punishment is based on no evidence on record.

3. The respondents have filed their reply contesting the application. It is stated that two sheets which were enclosed to the letter appeared to be different from the other contents of the letter. Out of 17 candidates, 9 candidates were found to be related to the employees of the ESI Corporation. It is further stated that the punishment imposed by the disciplinary authority was quite disproportionate to the delinquency caused by the

applicant. Therefore, the appellate authority enhanced the punishment by passing the order of compulsory retirement. The charges being grave and serious and it was conclusively proved regarding the applicant having hand in glove in the matter, therefore, the appellate authority did have no further choice but to pass such drastic punishment of compulsory retirement. The applicant having followed unethical means to manipulate the enclosures to the letter, therefore, it was within the competency of the appellate authority to enhance the punishment by substituting it with the punishment of compulsory retirement.

4. Mr. Mishra, Id. counsel appearing for the applicant has submitted that in this case apart from the applicant, one Sadashiva Das Barik, Peon, of the Regional office of ESI Corporation, Bhubaneswar, had also been involved. There was a departmental proceeding against Sadashiv Das Barik on the same set of facts and the departmental proceeding culminated with the imposition of punishment of stoppage of increments for five years whereas the applicant was visited with the minor punishment of stoppage of yearly increments for 3 years. But unfortunately since the applicant was dissatisfied with such punishment and he preferred an appeal and as such he was victimised by filing such appeal whereas Sadashiva Das Barik calmly had undergone the punishment. Therefore, only five yearly increments were directed to be stopped in his case. But the applicant has been meted out discriminatory, illegal, inequitable and illogical punishment compared to the delinquency alleged to have been caused by him.
5. Mr. Mishra further contended that in case the appellate

authority was of the view to disagree with the observation of enquiring authority/~~disciplinary~~ disciplinary authority, then the applicant should have been given a chance of hearing and further enquiry ought to have been directed to be held in the matter. But in this case, the appellate authority with a closed mind enhanced the punishment imposed by the disciplinary authority to that of compulsory retirement.

6. In course of hearing, it was brought to our notice that the appellate authority while imposing such punishment acted on surmise and conjecture and without any evidence on record. The applicant was charged only with remaining unauthorised absent~~at~~ at the time when the dak was tendered to the Peon Sadashiv Das Barik, but the appellate authority found the applicant guilty to have tampered with the records.

7. From the order impugned before us, it seems that the appellate authority has relied upon only on the statement of defence purported to have been filed by the applicant before the disciplinary authority. In this case, the disciplinary authority after thorough scrutiny found the applicant not present at the time when the letter was purportedly tendered by R.K.Mahapatra, Peon, District Employment Exchange to Sadashiv Barik. It seems that the appellate authority has arrived at the conclusion that the applicant was guilty totally ignoring the finding of the disciplinary authority. No doubt, the appellate authority can disagree with the finding of the disciplinary authority, but in that event he ought to have given an opportunity to the applicant and embarked upon an independent enquiry. Save and except the statement purported to have been filed by the applicant, no further



evidence was recorded by him and the very statement of the applicant was already taken care of by the disciplinary authority who held that the applicant was not guilty of manipulation of any record. The only charge that was alleged to have been proved against the applicant was of remaining absent in his seat by the time the letter was tendered.

8. While examining the aforesaid contentions raised by the ld. counsel appearing for both parties, the Employees State Insurance Corporation (Staff and Conditions of Service) Regulations, 1959, have been placed before us. In the Fourth Schedule it has been provided as under :-

"Provided that if the enhanced penalty which the appellate authority proposes to impose is one of the penalties specified in clauses (v) to (ix) of Regulation 11 and the inquiry under sub-paragraphs (1) to (22) of para 3 of the Third Schedule has not already been held in the case ~~the~~ appellate authority shall, subject to the provisions of paragraph 6 of the Third Schedule, itself held such an inquiry or direct that such an inquiry be held in accordance with the provisions contained in sub-paragraphs (1) to (22) of paragraph 3 of the Third Schedule and thereafter, on consideration of the proceedings of such an inquiry, make such orders as it may deem fit.

- (iii) If the enhanced penalty which the appellate authority proposes to impose is ~~one~~ of the penalties specified in clauses (v) to (ix) of the Regulation == and an inquiry under provisions contained in sub-paragraphs (1) to (22) of paragraph 3 of the Third Schedule has already been held in the case, the appellate authority shall after giving appellant a reasonable opportunity, as far as may be, in accordance with the provision of sub-paragraph (26) of paragraph 3 of the Third Schedule, of making a representation against the penalty proposed on the basis of the evidence adduced during inquiry, 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 may be, in accordance with the provisions of paragraphs 1 to 2 of the Third Schedule of the Regulations, of making a representation against such enhanced penalty. "
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9. It is quite evident from the above that if the appellate authority intends to enhance the punishment, it is incumbent upon him to issue a prior show cause notice. From the purported show cause notice dt. 16.8.2000 it appears that the appellate authority has differed with the finding of the enquiry officer. There is no indication in this show cause notice that the appellate authority intended to differ with the finding of the disciplinary authority. Be it noted that the disciplinary authority vide his order dated 7.10.99 discussed the finding of the enquiry officer and came to the conclusion that the charge was partly proved against the applicant as he was responsible for not receiving the dak in question. Thus, the disciplinary authority agreed with the finding of the enquiry officer and imposed the punishment of stoppage of increments for 3 years. The appellate authority in the show cause notice did not indicate that he wanted to differ with the finding of the disciplinary authority too. In such a situation, we are of the opinion, that this show cause notice is not a proper show cause notice as required under the regulations.

Be it noted here that apart from the applicant, Sadhashiv Das Barik had also been proceeded against on the self-same charge, who was visited with the punishment of stoppage of five yearly increments whereas the appellate authority decided to impose the punishment of compulsory retirement on the applicant. Therefore, it is quite clear that the appellate authority did not apply his mind in awarding the punishment on the applicant. In such a situation the action of appellate authority appears to be illogical, discriminatory and whimsical apart from being illegal.

10. If the appellate authority/disciplinary authority intends to take a different view than that of the enquiry officer, then it ought to have ~~be~~ embarked upon an independent enquiry after giving

reasonable opportunity of hearing to the charged official. In this connection, reliance may be placed on the decision of the Hon'ble Supreme Court reported in 1998 SCC ( L & S) 1783, Punjab National Bank & Ors -vs- Kunj Behari Mishra etc. etc. In para 18 of the judgement it is observed as follows :-

" Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar case , (1993 SCC (L&S) 1184)."

11. As we have noted above, in the purported show cause notice, the appellate authority intended to disagree with the finding of the enquiry officer whereas an enquiry report has to be first accepted or discarded by the disciplinary authority, who is the final authority in the matter. The appellate authority in his show cause notice never indicated that he wanted to disagree with the finding of the disciplinary authority or to enhance the punishment already imposed by the said authority.

12. Apart from ~~the~~ rule position whereby it is provided that an opportunity of hearing must be given to the charged officer, in the above decision of the Hon'ble Supreme Court also in no uncertain term, it was held that it was imperative upon the disciplinary/

appellate authority for giving such reasonable opportunity to the delinquent. We have already held that no such opportunity of hearing was given to the applicant, and the purported show cause notice issued to him was not a proper show cause notice as per rules.

13. In the result, we have no other option but to hold that the punishment of compulsory retirement imposed by the appellate authority was bad in law. Accordingly, the order of the appellate authority dated 11.9.2000 is hereby set aside.


14. Now the question arises for our consideration is whether in the above facts and circumstances, would it be proper to remit back the records to the appellate authority for re-hearing of the case. Mr. Mishra, the ld. counsel for the applicant has submitted that the other delinquent i.e. Sadashiva Das Barik has already suffered the punishment of stoppage of five yearly increments. The applicant was also inflicted with the punishment of stoppage of three yearly increments by the disciplinary authority. Therefore, the applicant cannot be treated differently. We find there is substantial force in this submission.

15. Thus, keeping the amount of delinquency in our view, we direct : the applicant to undergo the punishment as was imposed by the disciplinary authority. However, in terms of the appellate order, the applicant has already retired from service. Since the punishment of compulsory retirement has been substituted by the order of stoppage of three yearly increments, we direct the authorities to reinstate the applicant with effect from the date he was retired compulsorily within three weeks from the date of communication of this order. Since the applicant has not worked during the intervening period, we do not propose to direct the respondents

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to pay any arrear salary for this period. However, if any pension has been received by the applicant in the meanwhile, the same shall be treated as such and no recovery shall be made from the applicant on that count. If necessary, the entire period be treated as an extra-ordinary leave.

16. With the above directions the application is disposed of without any order as to costs.

  
( B.N. SOM )  
VICE CHAIRMAN  
16 -2-04

  
( B. PANIGRAHI )  
VICE CHAIRMAN  
16 -2-04