

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 117/1991
~~XXXX~~No.

199

DATE OF DECISION 6.3.1992

K.J.Vavachan _____ Applicant (s)

M.K.Damodaran _____ Advocate for the Applicant (s)

Versus

Superintendent of Post Offices, Alleppey and Respondent (s)
3 others.

Mr.P.Sankarankutty Nair, ACGSC _____ Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. S.P.MUKERJI, VICE CHAIRMAN

The Hon'ble Mr. A.V.HARIDASAN, JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. To be circulated to all Benches of the Tribunal? Yes

JUDGEMENT

(Hon'ble Shri S.P.Mukerji, Vice Chairman)

In this application dated 1.1.1991 the applicant who has been working as a Postman under the Superintendent of Post Offices, Alleppey has challenged Rule 157 of P&T Manual, Vol.III (copied at Annexure-XII) as unconstitutional inasmuch as it authorises imposition of double penalty for the same misconduct. He has also challenged the impugned order of punishment dated 4.12.89 (Annexure VII) of withholding of next one increment for a period of one year without cumulative effect, the appellate order dated 29.6.1990 at Annexure-IX confirming the penalty, the impugned order dated 6.6.90 (Annexure-XI) cancelling the order of his promotion dated 1.6.1990 because of the currency of the punishment. He has prayed that the first respondent be directed to promote him to the next higher grade with effect from 1.3.1990 with all consequential benefits.

2. The applicant was an active member of the P&T Staff Quarters' Residents' Welfare Association in Alleppey. There were some differences of

opinion between the Postal and Telecom staff members and according to the applicant there was lot of dissatisfaction with the functioning of the General Secretary. It appears that in the 3rd week of June after the expiry of the nominated President and transfer of the Vice President, one Shri Unnithan, Accounts Officer in the Office of the T.D.E, Alleppey was an aspirant for the post of President. The Secretary of the Association had convened a meeting of the General Body of the Association on 25.6.1989 in the staff quarters' premises. According to the applicant a number of members present vehemently protested against a proposal to have Shri Unnithan preside over the meeting. The applicant came to the meeting a little later. According to him one Shri Achary was presiding over the meeting when he came and there was no unruly or bad behaviour, except for the allegations of the fund mismanagement by the Secretary. According to the applicant the Secretary of the Association sent a letter dated 1.7.1989(Annexure-II) to the Telecom District Engineer about what happened in the aforesaid meeting when Shri Unnithan was present there to preside over the meeting. According to the letter four members of the Postal Wing came there under influence of some intoxicant and began to use filthy language to disturb the meeting and threw away the food packets which had been prepared to be distributed amongst the inmates and their families. Seeing this unruly behaviour of those 'hooligans', Shri Unnithan and many other members left the place on which Shri Achary Member of the Governing Council was requested to preside over the meeting. According to the applicant, in reply to Annexure-II, the Telecom District Engineer (T.D.E) Alleppey wrote back to the General Secretary of the Association on 5.7.89(Annexure-III) that convening the annual general body meeting without the President or the Vice President was not regular and not valid. The applicant allege that the Secretary of the Association and Shri Unnithan took it as a personal insult and sent lot of false complaints against the applicant

and others to the 1st respondent who thereafter served the chargesheet dated 12.10.89 on the applicant. The Statement of Imputations attached with the charge memo is at Annexure-V. In this the letter of the Secretary of the Association dated 1.7.89 (Annexure-II) was quoted verbatim and the following observations were made:-

" Necessary enquiries were made into this through ASP Alleppey Sub Dn. Enquiry revealed that Sri K.J.Vavachan Postman Alleppey HO residing in the Postal quarters allotted to him, behaved in an indecent and highly objectionable manner under the influence of liquor and uttered vulgar language in the meeting held on 25.6.89. It was also revealed in the enquiry that Shri K.J.Vavachan, Postman, Alleppey HO failed to observe the decorum and decency expected of from Govt. Servant, on that day at the time of the meeting. This has been testified by other members in the P&T Quarters viz. V.J.Joseph Stanley, K.V.V.Achary, Telegraphist, CTO Alp, T.Karthikeyan Telecom. Auto Exchange Alp., K.C. Rajan, IPO(C&PG), Alp.Dn, N.Radha, PA Alp.IB, P.R.Omana Gr.D, SRO Alp. and others."

The applicant gave his reply on 6.11.89(Annexure-6) denying the allegations and making it clear that he only challenged the unconstitutional illegal procedure adopted in the meeting and arguing that the fact that the applicant himself was elected to the governing council in the same meeting in which he was ^{to have} alleged misbehaved, disproves the charges levelled against him as otherwise none would have voted for him. The applicant has argued that he was not given an opportunity to take part in the enquiry or to cross-examine the witnesses whose statements were taken behind his back by the ASP, Alleppey and relied upon by the disciplinary authority. He was neither given a copy of the statements of these witnesses nor were they subjected to cross-examination. His appeal dated 5.1.1990 (Annexure-8) was rejected vide the impugned order at Annexure-9 without any application of mind. The applicant's further grievance is that by the memo dated 1.6.1990 the first respondent had ordered his promotion from the post of Postman to the next higher grade with effect from 1.3.1990 as at Annexure-10. Subsequently by the impugned order dated 6.6.1990 the order of promotion was cancelled

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because of the currency of the penalty given at Annexure-7. The applicant has argued that he has been subjected to double penalty of withholding of increment vide Annexure-7 and also cancellation of the promotion vide Annexure-II by invoking Rule 157 of P&T Manual, a copy of which is at Annexure-12 which prohibits promotion of an officer during the currency of the penalty "even where the competent authority may consider, that in spite of the penalty, the officer is suitable for promotion". He has also argued that ⁱⁿ the letter dated 1.7.1989 sent by the association Secretary (Annexure-2) which is the foundation of the punishment order, there is not even a whisper of allegations against the applicant. The main contention taken by the applicant is that the rules of natural justice were completely violated inasmuch as the punishment was imposed by the disciplinary authority on the basis of an enquiry conducted behind his back by the ASP and without giving him any opportunity of cross-examining the witnesses. The copy of the preliminary enquiry report on which alone the order of punishment is based, was also not made available before the order was passed. He has referred to Rule 16 of the CCS(CCA) Rules, according to which it is incumbent on the authority to apply its mind whether an enquiry was necessary or not when such an enquiry even in case of a minor punishment is asked for by the charged official. According to the applicant as the charge was 'highly controvertible', the disciplinary authority should have exercised its discretionary powers under Rule 16(1)(b) of the aforesaid rules for a regular enquiry under Rule 14 of those rules. They have also referred to sub-rule 1-A of Rule 16 of those rules stating that since the penalty of withholding of increment is to affect their pension, Rule 14 enquiry was mandatory. He has referred to a few rulings of the Supreme Court also in support of his contention.

3. In the counter affidavit the respondents have stated that the ASP who conducted the preliminary enquiry had actually confronted the applicant with the statements recorded from other witnesses and have stated that the statement given by the applicant himself showed that he was given chance to explain what he had to say on the alleged

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incident. They have also stated that the ASP had actually shown the statements of witnesses to the applicant and ~~have~~^{had} questioned the applicant on the basis of those statements. They have explained that since the increment was stopped without cumulative effect the applicant was to get the benefit of withheld increment after one year and since he had 11 years of service still left and ~~the~~^{his} pension is calculated on the basis of the average pay for the last ten months of the service, the pension of the applicants would not in any manner be affected by the punishment.

4. In the rejoinder the applicant has categorically stated that the ASP who conducted the enquiry had not supplied copies of the statements recorded from the witnesses nor was he allowed to cross-examine the witnesses. These witnesses were interested persons who had animus against the applicant and who were acting at the behest of the Secretary and Shri Unnithan. He has referred to the ruling of the Supreme Court in AIR 1986 SC 2118 laying down that even a copy of the preliminary enquiry report has to be supplied to the delinquent if the same is to be relied on for proving the charges. He has argued that the nature of charges against him are so controvertible that they could be proved only if an effective opportunity to cross-examine the witnesses was given to the employee. Having decided to conduct a preliminary enquiry at the back of the applicant it was the bounden duty of the Enquiry Officer to conduct a full fledged enquiry with right of cross-examination to be given to the applicant. Without a full fledged enquiry, without the copy of the statements given to him and without the witnesses being subjected to cross-examination, the enquiry report could not be relied upon to establish the guilt of the applicant. He had requested for copies of the statements and providing for a confronting enquiry but the same were denied.

5. We have heard the arguments of the learned counsel for both the parties and gone through the documents carefully. The impugned order of punishment is based entirely on the preliminary enquiry by the ASP, Alleppey Sub Division. It is admitted that the ASP's enquiry is based on the statements of some witnesses recorded by him behind

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the back of the applicant. From the enquiry papers shown to us there is nothing to show that the statements of the witnesses recorded by the ASP behind the back of the applicant had been given to the applicant. It is a fundamental element of natural justice that when any evidence is relied upon for coming to a finding adverse to the charged officer it should be such as had been recorded in the presence of the charged officer who should also be given an opportunity to cross-examine such witnesses. Otherwise, such evidence remains an ex parte evidence which cannot be relied upon in any quasi judicial proceedings. It is true that the witnesses examined during the preliminary enquiry need not ^{normally} be ~~examined during the preliminary enquiry~~ ^{be} examined in ^{during investigation} presence of the delinquent officer nor subjected to cross-examination [^] but this may be so when such an enquiry is in the nature of a fact-finding enquiry for formulating a charge. But where such an enquiry is for the sole purpose of drawing a conclusion about the guilt or otherwise of the charged officer, the rules of natural justice have to be followed. In this case since the preliminary enquiry report was relied upon by the disciplinary authority in the impugned punishment order, violation of the rules of natural justice in depriving the applicant of the opportunity of seeing the statements of the witnesses recorded behind his back and of cross-examining them, is a fatal flaw in the entire disciplinary proceedings.

6. Further, in reply to the charge memo the applicant had asked for an enquiry to be held. Under Rule 16 (1)(b) of the CCS(CCA) Rules though it is upto the disciplinary authority to allow holding of an enquiry as contemplated in Rule 14, the disciplinary authority must exercise its discretion judiciously where such an enquiry is requested for. The following extracts from the Department of Personnel's O.M dated 28th October, 1985 (Govt. of India's instructions No.1 below Rule 16 of the CCS(CCA) Rules in 17th Edition of Swamy's Compilation) will be relevant:-

"In other cases, where a minor penalty is to be imposed, Rule 16 (1) ibid. leaves it to the discretion of disciplinary authority to decide whether an inquiry should be held or not. The implication of this rule is that on receipt of

representation of Government servant concerned on the imputations of misconduct, or misbehaviour communicated to him, the disciplinary authority should apply its mind to all facts and circumstances and the reasons urged in the representation for holding a detailed inquiry and form an opinion whether an inquiry is necessary or not.(emphasis added)

In the counter affidavit it has ^{been} stated that the disciplinary authority did not consider it necessary to hold an enquiry under Rule 14 especially when the misbehaviour of the applicant was not connected with the official duties but related to things ^{which} happened outside. We feel that the ground taken is totally irrelevant. So long as the charge has been framed on the basis of the alleged misbehaviour of the applicant, holding an enquiry has nothing to do with, whether the misbehaviour was in connection with the official duties or not. The circumstances of the case fully warranted that an enquiry should have been held or in any case full opportunity should have been given to the applicant to rebut and demolish the ex parte statements given by some witnesses against him.

7. In Ram Babu Pushkar vs. Union of India, (1988) 6 ATC 1004, it has been held that a preliminary inquiry is only a fact-finding inquiry and has no legal sanction to become basis of any punishment. It was further held that the statements made during preliminary enquiry cannot be used in the regular enquiry unless the witness presents himself before the inquiry officer, makes a deposition and is subjected to cross-examination. In the present case there has not only been absence of regular enquiry but also the ex parte statements of witnesses taken during preliminary enquiry have formed the basis of the punishment order, without supplying the applicant copies of the statements recorded and without subjecting those witnesses to cross-examination. The principle of natural justice has been violated in one more important respect. The disciplinary authority relied upon the preliminary enquiry report of the ASP and came to his finding of guilt of the applicant without making a copy of that enquiry report available to the applicant before passing the order of punishment. In Union of India vs. Mohd. Ramzan Khan, Judgment

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Today (1990) 4 SC 456, the Supreme Court held that in a quasi-judicial matter if the delinquent is being deprived of knowledge of the material against him though the same is made available to the punishing authority in the matter of reaching his conclusion, rules of natural justice would be affected.

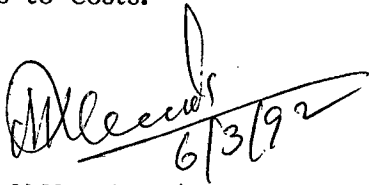
8. As regards setting aside the provision of Rule 157 of P&T Manual, Vol.III copied at Annexure-12 which prohibits the promotion even of a suitable officer during the currency of the penalty, this rule was under scrutiny of the Hon'ble Supreme Court in Civil Appeal No. 4718 of 1991 (Arising out of S.L.P.(C)No.15707 of 1991). In the judgment dated 20th November 1991 the judgment of this Tribunal to the contrary was set aside. The following observations of the Hon'ble Supreme Court in the aforesaid Civil Appeal are relevant:-

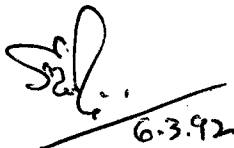
"4. We have considered the matter closely and in our opinion the view taken by the Tribunal both in the impugned judgment and in the earlier decisions holding that as a result of the provisions of Rule 157 forbidding the promotion of a State employee during the currency of the penalty results in a second punishment, is not correct. There is only one punishment visiting the respondent as a result of the conclusion reached in the disciplinary proceeding leading to the withholding of increment, and the denial of promotion during the currency of the penalty is merely a consequential result thereof. The view that a Government servant for the reason that he is suffering a penalty or a disciplinary proceeding cannot at the same time be promoted to a higher cadre is a logical one and no exception can be taken to Rule 157. It is not correct to assume that Rule 157 by including the aforementioned provision is subjecting the Government servant concerned to double jeopardy. We do not find any merit in the argument that there is no justification or rationale behind this policy; nor do we see any reason to condemn it as unjustified, arbitrary and violative of Articles 14 and 16 of the Constitution of India. On the other hand, to punish a servant and at the same time to promote him during the currency of the punishment may justifiably be termed as self-contradictory.

"The impugned judgment is, therefore, set aside.

"5. It has been stated by the learned counsel for the parties that except for the above punishment, the respondent is fit for promotion and that the currency of the penalty will expire on 14.9.1990. In that view he may be promoted immediately thereafter with effect from 15.9.1990, provided he is not otherwise disqualified for promotion by incurring some other disqualification. The appeal is accordingly allowed but without costs."

9. In the conspectus of facts and circumstances we allow the application in part and set aside the impugned orders at Annexures VII and IX and consequently the order at Annexure XI and direct the respondents to restore the pay and allowances of the applicant withheld on the basis of aforesaid orders, with retrospective effect and pay him the arrears thereof and also to give effect to the order of promotion dated 1.6.90 as if these impugned orders had not been passed. As regards Annexure-XII we uphold the validity of the same. There will be no order as to costs.


(A.V. Haridasan)
Judicial Member


(S.P. Mukerji)
Vice Chairman