CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 198 of 2009

Wednesday, this the 20th day of January, 2010

CORAM:

HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE MS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

C.P. Jayashree,
Senior Social Security Assistant,
Employees Provident Fund Organisation,
SRO, Kollam, on deputation as Assistant,
The Kerala State Higher Education Council,
P.M.G., Thiruvananthapuram. ... Applicant.

(By Advocates Mr. Sudheesh.A & Mrs. Bindu C.V.)

versus

1. The Regional Provident Fund Commissioner-I,
Thiruvananthapuram.

2. The Regional Provident Fund Commissioner-II,
Kollam.

3. The Additional Central Provident Fund
Commissioner & Appellate Authority,
Employees Provident Fund Organisation,
No. 3-4-763, Barkatpura, Hyderabad. ... Respondents.

(By Advocate Mr. N.N. Sugunapalan (Sr.) with Mr. S. Sujin)

The Original Application having been heard on 06.01.2010, this Tribunal on 20.01.10 delivered the following :

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The applicant was issued with a charge sheet dated 21-08-2006 with the charges that while working as Sr. SSP, at S.R.O., Kollam, during the period March 2006 to July 2006, the applicant absented herself unauthorizedly from 13.03.2006 to 07-07-2006 even when her leave application dated 17-03-2006

and 03-04-2006 were rejected due to administrative exigencies. Further, she had produced false medical certificate dated 01-04-2006 and 19-05-2006 to avail leave on medical grounds and absented herself unauthorizedly from 01-04-2006 and 19-05-2006 respectively. On denial of the charges, regular inquiry was conducted and the inquiry officer rendered the Annexure A-7 report dated 28-05-2007 holding that the two articles of charge (unauthorized absence from duty as well as production of false medical certificates) stood proved. The applicant furnished her representation dated 14-06-2007 against the charge sheet stating that the conclusions of the I.O. Are based on surmises and not facts as proved in the inquiry and the report is biased and that the medical certificates were illegally rejected due to personal vendetta and thus pleaded for exoneration. The Disciplinary Authority after considering the whole issue and on verification of records agreed with the inquiry report and imposed a penalty of reduction of pay to a lower stage in the time scale by one increment for a period of six months with cumulative effect for 3 years, vide Annexure A-9 penalty order dated 26-06-2007. The applicant filed her appeal, vide Annexure A-11 dated 09-08-2007 which was considered by the Appellate authority, who had reduced the penalty to one of reduction of pay to a lower stage in the time scale by one increment for a period of six months, vide Annexure A-12 dated 03-04-2008. The period of absence in question as well as certain other subsequent period were also treated as *dies non* vide Annexure A-10 order dated 13-07-2007. Appeal filed against this order is stated to be still pending. The applicant has challenged the inquiry report, order of penalty, appellate order as well as order whereby the period of absence was treated as *dies non*. The following are the grounds of challenge:-

(a) Rejection of leave application on the recommendation of the branch officer is illegal.

(b) The applicant is entitled to child care leave even for 730 days as per sixth pay commission recommendations.

(c) Leave application supported by a valid medical certificate for the period after 01-04-2006 had been rejected by the authorities with pre determined prejudice and malafide and even before any attempt at second medical opinion.

(d) There was no clinical examination at all conducted by the Medical Board on 18-05-2006nor was the report made available to the Ayurvedic Board as required under the State Government Rules.

(e) The allopathic medical board has no jurisdiction to deal with the case when the treatment undertaken by the applicant was through an Ayurvedic doctor.

(f) There is a collusion between the administration and the medical board.

(g) The applicant was later referred to an Ayurveda Medical Board which found that the applicant is suffering from ailment as certified by the Chief Medical officer earlier. But this was not intimated to the applicant and even though the applicant had produced the same as Exhibit D-1, the inquiry officer did not consider it while rendering his inquiry report.

(h) The appellate authority without properly going into the merit of the case and examining the evidence produced by the applicant found that the procedure laid down in the rules has been complied with where as clear violation of Rules were pointed out in the appeal.

(i) Appeal against the order treating the period of absence as *dies non* has not been considered.

2. Respondents have contested the O.A. According to them, there is no legal flaw in the conduct of the inquiry and the penalty awarded was based on such inquiry. The petition was filed on wrong footing and the same is liable to be dismissed.

3. The applicant has filed her rejoinder annexing the medical certificate issued by the medical officer on 19-05-2006 and also, copy of the reply dated 01-07-2006 submitted by the medical officer. Evidence as to the filing of the appeal in respect of order treating the period of absence as *dies non* has also been filed, vide Annexure A-16.

4. Counsel for the applicant argued that there has been a pre-determined decision to penalize the applicant and it was accordingly designed in the proceedings. When the applicant underwent ayurvedic treatment, there was no reason to refer the matter to the Medical Board of Allopathic faculty. Again, when the medical opinion was sought from the Medical Board of Ayurvedic Faculty, its opinion was not considered by the authorities, as the same went in favour of the applicant. **The appellate authority has failed to exercise his powers as per the provisions of the relevant rules.**

5. Counsel for the respondents argued that there is no legal flaw in the decision making process and the entire proceedings have been conducted as per the provisions of the relevant rules.

6. Arguments were heard and documents perused. At the very outset it is to be held that in so far as challenge to Annexure A-10 is concerned (Treating the period of absence as *dies non)* since the appeal is pending before the authorities (as could be seen from Annexure A-16) , the appellate authority shall consider the same and decide the issue within a period of two months from the date of communication of this order.

7. Coming to the disciplinary proceedings, the applicant has challenged the I.O's report, the penalty order as well as the order of the appellate authority.

The articles of charge are two in number, one relating to unauthorized absence from duty and the other relating to the furnishing false medical certificate. As regards the former, the evidence relied upon by the inquiry authority is that there was no sanction of leave, the leave applications are belated and that the applicant had shifter her stand from 'domestic reason' to 'medical ground' and again back to 'domestic reason'. As regards the second charge of furnishing false medical certificate, reliance has been made to the report of the medical board, which had opined "We could not elicit any clinical finding to render her unfit for clerical job" In defence, the applicant has relied upon the medical opinion of the Ayurvedic Medical Board dated 27-11-2006 (Exhibit D-4) and it is the definite case of the applicant that the inquiry authority has thoroughly ignored to consider the same. In this regard, the following submissions are relevant:-

(a) Vide para 9 of the reply dated Nil August, 2006 to the charge sheet, the applicant has contended that the second medical opinion ought to have been obtained from Ayurvedic Medical Board and not from the Medical Board of Allopathic discipline.

(b) Vide para 10 of Defence Brief at Annexure A-6, the relevance of D-4 has been referred to.

(c) Vide submission under Item No. 12 (of Annexure A-8), it has been stated, "Ext. D4 and D5 have been by passed by the inquiry officer as they do not come within the period of 3-1/2 months leave covered by the memo, these are quite relevant to show that the organization became aware of existence of an Ayurveda Medical Board and of possible recurrence of the ailment from which I have been suffering later also."

(d) Ground G of the O.A.

If at all there be any substantial ground of challenge, it is the above fact that second medical opinion ought to have been obtained from the Ayurveda Medical

Board and when one such opinion was obtained, according to the applicant, the same was ignored as not pertaining to the period in question.

8. From the words of the applicant herself, vide para 13 of the appeal (Annexure A-11) reference to Ayurveda Medical Board was in respect of an ailment suffered by the applicant at a different spell. The contention of the applicant is that the second occasion of the ailment was relapse of the first. But the medical opinion of the Ayurveda Board did not say so. It only certified that the applicant was suffering from "griddassy" . Thus, this contention that the inquiry authority had ignored the second medical opinion given by the Ayurveda Medical Board and hence the inquiry is bad is untenable.

9. Thus, the only contention of the applicant worth consideration is asto whether the appellate authority has exercised his powers and has acted in accordance with the provisions of the relevant rule applicable to the applicant.

10. According to the counsel for the respondents, Inquiry report is perfectly valid, the order of the disciplinary authority does not suffer from any legal lacuna and that the Appellate authority had itemized all the grounds of appeal and cogently narrated the entire case and referred to the relevant provisions of the Rules and came to a conclusion that there is no legal flaw in the conduct of the case. The question is whether such a conclusion would meet the requirement of the Rules.

11. The Apex Court has occasion to analyze and crystallize the extent of powers and responsibilities of the appellate authority in dealing with the appeals preferred against the penalty orders.

12. It is settled law that when appeal is preferred the appellate authority has to on the basis of material available in the records is expected to determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was just. Rule 23 of the Employees Provident Fund Staff (Classification, Control and Appeal) Rules 1971 which deals with appeal reads as under:

> *"23. (2) In the case of an appeal against an order imposing any of the penalties specified in Rule 7 or enhancing any penalty imposed under the said rule, 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 provisions 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 the record; and*
>
> *(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;*
>
> *and pass orders—*
>
> *(i) confirming, enhancing, reducing or setting aside the penalty; or*
>
> *(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such directions as it may deem fit in the circumstances of the case:"*

13. Rule 23(2) of the EPFS (CC&A) Rules, 1971 is pari materia with Rule 22(2) of the Railway Servants (Disciplinary and Appeal Rules). While interpreting the said provisions of the Railway Rules, the Apex Court in ***Ram Chander v. Union of India, (1986) 3 SCC 103***, held as under:-

> *"Rule 22(2) provides that in the case of an appeal against an order imposing any of the penalties specified in Rule 6 or enhancing any penalty imposed under the said rule, the appellate authority shall "consider" as to the matters indicated therein. The word "consider" has different shades of meaning and must in Rule 22(2), in the context in which it appears, mean an objective consideration by the Railway Board after due application of mind which implies the giving of reasons for its decision."*

14. Rule 23(2) of the EPFS (CC&A) Rules, 1971 is also pari materia with Rule 27 of the CCS(CC&A) Rules, 1965 and while considering the same, the Apex Court in the case of ***R.P. Bhatt v. Union of India, (1986) 2 SCC 651***, held as under:-

> ***"4.*** *The word "consider" in Rule 27(2) implies "due application of mind". It is clear upon the terms of Rule 27(2) that the Appellate Authority is required to consider (1) whether the procedure laid down in the Rules has been complied with; and if not, whether such non-compliance has resulted in violation of any provisions of the Constitution or in failure of justice; (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or may remit back the case to the authority which imposed the same. Rule 27(2)* ***casts a duty on the Appellate Authority to consider the relevant factors set forth in clauses (a), (b) and (c) thereof.*** (emphasis supplied)"

15. The appellate authority is also the fact finding authority as held in the case of B.C. Chaturvedi vs Union of India, (1995) 6 SCC 749. And, the duties cast upon the appellate authority have been succinctly brought out in the case of ***Narinder Mohan Arya v. United India Insurance Co. Ltd.,(2006) 4 SCC 713*** wherein the Apex Court has held as under:-

> *"The Appellate Authority, therefore, while disposing of the appeal is required to apply his mind with regard to the factors enumerated in sub-rule (2) of Rule 37 of the Rules. ..... He was required to show that he applied his mind to the relevant facts. He could not have without expressing his mind simply ignored the same."*

16. In ***Moni Shankar v. Union of India,(2008) 3 SCC 484***, the Apex Court observed:

> ***"17.*** *The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring*

commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See State of U.P. v. Sheo Shanker Lal Srivastava and Coimbatore District Central Coop. Bank v. Employees Assn.)

***18.** We must also place on record that on certain aspects even judicial review of fact is permissible. (E v. Secy. of State for the Home Deptt.)*

***19.** We have been taken through the evidence of Shri S.B. Singh by Dr. Padia. Significantly the examination-in-chief was conducted by the enquiry officer himself. As the proceeding was for imposition of a major penalty, why the presenting officer, who must have been engaged by the Department, did not examine the witness is beyond any comprehension. Even the minimum safeguard in regard to the manner in which examination-in-chief was conducted has not been preserved. The questions posed to him were leading questions. It is interesting to note that in answer to a question as to whether he had asked the appellant to return Rs 5, he not only answered in the negative but according to him the said statement was made by him as instructed by the Vigilance Inspector. He although proved Exhibits P-1 and P-2 which were written in English language but also stated that he did not know what had been written therein. Strangely enough, the enquiry officer started re-examining him. Even in the re-examination he accepted that he could not read and write English.*

***20.** The enquiry officer had put the following questions to the appellant:*

"Having heard all the PWs, please state if you plead guilty? Please state if you require any additional documents/witness in your defence at this stage? Do you wish to submit your oral defence or written defence brief? Are you satisfied with the enquiry proceedings and can I conclude the enquiry?"

***21.** Such a question does not comply with Rule 9(21) of the Rules. **What were the circumstances appearing against the appellant had not been disclosed.** (Emphasis supplied)"*

18. The sum and substance of the above decisions is that the appellate authority has the legal obligation of considering the appeal both from the factual position as well as the legal position and ensure that the procedure prescribed

has been duly followed and there is no lacuna in that regard. In the instant case, as for example, the inquiry report only states, "Full opportunity was given during the course of the inquiry to the Charged Official to rebut the charges against her and adduce evidence in her favour both oral and written." Perhaps this appears to be in compliance with the provisions of Rule 16 to 19 of the Rules, 1971. Though the records were made available, the same did not contain the depositions or proceedings on the days of hearing. As such, it is not possible for the Tribunal to ascertain whether the provisions of Rule 18 of the 1971 Rules have been duly followed. The said Rule provides as under:-

> *"The Inquiring authority may, after the employee closes his case, and shall, if the employee has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the employee to explain any circumstances appearing in evidence against him "*

19. The above provision is in pari materia with the provisions of Rule 9 (21) of the Railway Servants Rules on which the apex Court has, vide **'Moni Shankar'** (Supra) stated that what were the circumstances appearing against the charged official should be disclosed. This legal aspect has to be critically examined by the appellate authority, whereas, the appellate order does not reflect the same. The allegation of the applicant that the provisions of Rule 10(6) (ii) have not been complied with, though referred to in the appeal had not been addressed by the appellate authority to render his findings.

20. In view of the above, as the Apex Court has in unequivocal terms stated that the appellate authority has to analyze the case threadbare and arrive at a judicious conclusion and with full application of mind, the case has only to be remitted to the appellate authority to reconsider the entire appeal keeping in view the law laid down by the Apex court as referred to above.

21. In view of the above, the OA is disposed of with a direction to the appellate authority to deal with the appeal afresh and arrive at a judicious decision, keeping in view the dictum of the Apex Court. The appellate order shall be fully speaking and reasoned one, dealing with all the relevant provisions of the rules, as well as the factual position. Accordingly, Annexure A-12 order is quashed and set aside. Till such time the decision by the appellate authority is arrived at, the penalty already suffered by the applicant would remain without change. The appellate authority is granted three months time to decide the appeal.

22. No costs.

(Dated, the 20th January, 2010)

K. NOORJEHAN
ADMINISTRATIVE MEMBER

Dr. K B S RAJAN
JUDICIAL MEMBER

cvr.