CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.No.307/99

Tuesday, this the 21st day of August, 2001.

CORAM;

HON'BLE MR A.V.HARIDASAN, VICE CHAIRMAN

HON'BLE MR T.N.T.NAYAR, ADMINISTRATIVE MEMBER

M.Prasannakumar,
Sorting Assistant,
Sub Record Office,
RMS Tellicherry. - Applicant

By Advocate M/s OV Radhakrishnan, M.P.Prakash & Thomas Kutty M.A.

Vs

1. Director of Postal Services,
O/o the Postmaster General,
Central Region,
Ernakulam.

2. Hilda Ebraham,
Director of Postal Services,
O/o the Postmaster General,
Central Region,
Ernakulam.

3. Union of India represented by
the Secretary,
Ministry of Communication,
New Delhi. - Respondents

By Advocate Mr SK Balachandran, ACGSC

The application having been heard on 21.8.2001, the Tribunal on the same day delivered the following:

O R D E R

HON'BLE MR A.V.HARIDASAN, VICE CHAIRMAN

The applicant while working as Sorting Assistant, Sub Record Office, RMS, Tellicherry, was proceeded against under

Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules (CSS(CCA) Rules for short) for certain alleged misconduct by order dated 13.6.96(A-1). The articles of charges were as follows:

Article-I

That Shri M.Prasannakumar while working as Cashier in SRO Palakkad on 31.10.95 failed to ensure correctness of the cash balance of Rs.1,32,460/55 at the time when the amount was kept in the cash chest of SRO Palakkad and locked the cash chest at the close of the office on 31.10.95. In his capacity as joint custodian of cash he also failed to keep the said amount of Rs.1,32,460/55 in the cash chest in the physical presence of the custodian of the cash viz. SRO Palakkad. He further failed to open the cash-chest in the physical presence of SRO Palakkad on 1.11.95 at the commencement of the working of the office. Further even on noticing the loss of Rs.one lakh from the cash chest of SRO Palakkad on 1.11.95 morning Shri M.Prasannakumar, Cashier continued disbursement of amount to various persons, thereby frustrated police/departmental enquiries. By the above acts Shri M Prasannakumar exhibited grave negligence in discharging his duties which resulted in the loss of Rs. one lakh of govt. money from the cash chest.

It is imputed that Shri M Prasannakumar while functioning as Cashier in SRO Palakkad on 31.10.95 and 1.11.95 exhibited grave misconduct and utter negligence which caused loss of Rs.one lakh of govt. money from the cash chest of SRO Palakkad; thereby violated Rule 3(1)(i), 3(1) (ii) and 3 (1) (iii) of CSS(Conduct) Rules 1964.

Article-II

That the said Shri M Prasannakumar, while functioning as Cashier, SRO Palakkad on 31.10.95 and 1.11.95 entrusted the key bunch of SRO Palakkad to Smt.M.Devakiamma, Malayanchathan, Vadakumthara, Thamarakulam (Sweeper of Sub Record Officer Palakkad) on 1.11.95 morning so as to give the keys to SRO Palakkad. The key-bunch contained Cashier's key of cash chest of SRO Palakkad. Shri M.Prasannakumar failed to keep the key to remain in his proper custody. The negligence on his part to keep the key

in his proper custody resulted in the loss of Rs.one lakh of govt. money from the cash chest of SRO Palakkad which was noticed by him at 10.00 AM on 1.11.95.

It is, therefore, imputed that Shri M Prasannakumar while functioning as Cashier SRO Palakkad on 31.10.95 and 1.11.95 exhibited gross negligence and grave misconduct resulting in the loss of Rs.one lakh of govt. money; thereby violated Rule 19(6) of Postal Mannual Vol.VII (Eighth Edition corrected upto 1.4.86) and Rule 3(1) (ii) and (iii) of the CCS(Conduct) Rules 1964.

Article-III

That Shri M.Prasannakumar, Cashier (under suspension) of SRO Palakkad was called upon to give a statement before the SRM 'CT' Division on 7.12.95 in connection with the further investigation of the loss of Rs. one lakh of SRO Palakkad. Shri Prasannakumar did not give a statement to the SRM 'CT' Division as demanded, but refused to give the statement in writing and thus he did not cooperate in the departmental investigation.

It is therefore imputed that the said Shri Prasannakumar exhibited grave misconduct contravening the provisions of Rule 3(1)(ii) and Rule 3(1)(iii) of CCS(Conduct) Rules 1964."

2. An enquiry was held and the ad hoc disciplinary authority accepting the report of the Enquiry Officer, found the charges partly proved and imposed on him a penalty of reduction of pay by 4 stages from Rs.4,400/- to Rs.4,000/- in the time scale of pay of Rs.4000-100-6000 for a period of 4 years with effect from 1.5.98(A-3). Aggrieved by the penalty imposed on him, the applicant filed an appeal to the first respondent who, by the impugned notice dated 19.2.99, proposed to enhance the penalty to one of dismissal from service with immediate effect on the ground that the penalty imposed by the ad hoc Disciplinary Authority was not commensurate with the gravity of the charges alleged and proved against the applicant. Aggrieved by that, the applicant has filed this

application for setting aside the impugned order A-5 and for an appropriate direction or order directing the 1st respondent to consider and dispose of A-4 appeal petition of the applicant on merits in accordance with Rule 27 of the Rules, 1965. The applicant has alleged that one Mr K.Sukumaran, SRO, Palakkad, who was the custodian of the Cash chest at the time relevant time and as superior officer expected to be more responsible than the applicant was proceeded against on the very same allegation of loss of rupees one lakh from the SRO, Palakkad on 31.10.95, and the second respondent who functioned as disciplinary authority awarded to Shri Sukumaran, a penalty of reduction in pay to the minimum of the scale for a period of 11 months without cumulative effect, while the second respondent has acting as appellate authority in the case of the applicant proposed to enhance the penalty of reduction in pay to the minimum of the scale for a period of 4 years with cumulative effect, a much more severe penalty than was awarded to Shri Sukumaran and to award a penalty of dismissal from service arbitrarily and without application of mind. It has been further alleged that the proposal for enhancement by the second respondent before considering the appeal in the manner prescribed in Rule 27 of the CCS(CCA) Rules and entering findings on the relevant point like whether the enquiry has been held properly observing the procedure laid down in the rules, whether failure to do so has resulted in denial of natural justice and whether the findings of the enquiry officer is warranted by the evidence on record smacks of legal malafides.

3. Respondents have filed a reply statement and the applicant has filed a rejoinder. We have gone through the voluminous pleadings and also the material placed on record and have heard at length the argument of Shri OV Radhakrishnan learned counsel for the applicant and Shri S.K.Balachandran, learned counsel appearing for the respondents.

4. Shri Radhakrishnan with considerable tenacity argued that the action on the part of the respondents 1&2 in issuing the show cause notice for enhancement of the penalty without considering whether the enquiry has been held in accordance with the rules and whether the finding of guilt is really warranted by evidence on record and without disclosing as to why an enhancement of penalty is warranted exposes the biased mind of the Appellate Authority and therefore, the impugned show cause notice is liable to be interfered with. As it has not been disclosed as to why a penalty of dismissal is proposed and what is the severe misconduct established, the show cause does not afford to the applicant an effective opportunity to show cause, argued the learned counsel. Shri Balachandran on the hand, argued that it is not necessary for the Appellate Authority to discuss and state whether the enquiry has been held in accordance with the rules and or whether the evidence on record is sufficient to establish the guilt before issuing a show cause notice and that all these aspects could be stated in the final order to be passed after considering the reply to the show cause notice. He argued that as the applicant is given an opportunity to make a representation against show cause notice, the application is

premature and therefore, the applicant does not deserve any relief.

5. To decide whether before issuing a show cause notice for enhancement of the penalty, the appellate authority has to record findings on the question whether the enquiry was held as provided in the rules and whether the findings of the enquiry officer are warranted by the evidence on record, it is necessary to examine the relevant provisions of Rule 27(2) of the CCS(CCA) Rules. It is profitable to extract Rule 27 (2) which reads thus:

> "(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 noncompliance 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 direction as it may deem fit in the circumstances of these cases:
>
> 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 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 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 may be, in accordance with the provisions of Rule 16, of making a representation against such enhanced penalty."

6. The learned counsel of the respondents argued that before enhancing the penalty, the appellate authority is not under legal obligation to issue a show cause notice at all and therefore, the applicant has not acquired a valid cause of action as a final order is yet to come. The learned counsel is right in his argument that the appellate authority is not legally bound to issue a show cause notice before enhancing the penalty in a case where an enquiry under Rule 14 has been held, although it would be more fair and equitable if such a notice is given before enhancing the penalty awarded by the disciplinary authority. The real question in this case is not whether a show cause notice is required to be issued before enhancing the penalty. The question is whether the show cause notice issued proposing to enhance the penalty can be sustained for the reason that the appellate authority has not in the notice discussed and decided whether the enquiry was held in conformity with the rules, if not whether it has resulted in denial of principles of natural justice to the

applicant and whether the finding of guilt was warranted by the evidence on record and whether the appellate authority considered the penalty was not commensurate with the misconduct. Shri OV Radhakrishnan, learned counsel for the applicant argued that as far as the first two aspects viz, whether the enquiry was held in accordance with rules, and whether the findings A-4 warranted by evidence on record the impugned order A-5 is a concluded one for the appellate authority has taken a tentative decision to impose on the applicant a penalty of dismissal from service with immediate effect and that therefore, the order is liable to be struck down because it does not disclose the reasons for the conclusions arrived at against the applicant.

7. The learned counsel for the respondents argued that since the A-8 is only a show cause notice it is incorrect to say that on the first two aspects under Rule 27(2), the order is concluded and that the reason for conclusion need to be stated only in the final order to be passed after getting the reply of the applicant to the show cause notice. We find considerable force in the argument of the learned counsel for the applicant that A-5 is concluded in regard to the question whether enquiry has been held in accordance with the rules and whether the findings are warranted by the evidence on record, for otherwise there is no reason for the appellate authority to issue a show cause notice at all. Only because the appellate authority has held that the enquiry was held in conformity with the rules that failure to do so has not resulted in denial of natural justice to the applicant and

that the finding of guilt was warranted by evidence, it became necessary for the appellate authority to consider the adequacy of the penalty. Whatever explanation is given by the applicant in reply to A-5 these findings would not be reopened. Under such circumstances the appellate authority should have stated reasons for the conclusions. Otherwise, the appellate authority should have stated that the conclusion were only tentative or that if these points be held against the applicant, the penalty would be enhanced. A reading of the impugned order makes it clear that the appellate authority has concluded that the enquiry was held in accordance with the rules, that the applicant is guilty and that the penalty is not commensurate with the gravity of the misconduct proved. However, the grounds of appeals are not considered and reason for finding have not been recorded. The reason why the penalty is considered not commensurate with the misconduct alleged also has not been concluded. The Apex Court has in R.P.Bhat Vs Union of India and others, 1996(6) SCC, 651 observed:

> "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 noncompliance 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.
>
> 5. There is no indication in the impugned order that the Director General was satisfied as to whether

> the procedure laid down in the Rules had been complied with; and if not, whether such noncompliance had resulted in violation of any of the provisions of the Constitution or in failure of justice. We regret to find that the Director General has also not given any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record. It seems that he only applied his mind to the requirement of clause (c) of Rule 27(2), viz. whether the penalty imposed was adequate or justified in the facts and circumstances of the present case. There being noncompliance with the requirements of Rule 27(2) of the Rules, the impugned order passed by the Director General is liable to be set aside."

In this case also as the impugned show cause notice proposing to enhance the penalty apparently finding that the enquiry was held in accordance with the rules and the finding of guilt was warranted by evidence, the application of mind to the relevant aspect by the appellate authority is totally lacking and, therefore, we are of the considered view that the same is liable to be set aside.

8. In the conspectus of facts and circumstances discussed above, the argument of the learned counsel for the respondents that the impugned order being only a show cause notice cannot be challenged has no force. If the Appellate Authority dismisses the applicant from service on the basis of A-5, then he would have to fight his case being unemployed and without anything to fall back upon. He wanted to prevent such a calamity and is therefore invoking the jurisdiction of this Tribunal. Though in a different context, while dealing with the provisions of Prevention of Detention Act, the Apex Court in S.M.D.Kiran Pasha Vs Government of Andhra Pradesh and others, (1990) 1 SCC 328 observed as follows:

> "Resort to Article 226(1) has been provided inter alia for enforcement of one's right to life and personal

liberty guaranteed under Article 21. 'Enforcement' means to impose or compel obedience to law or to compel observance of law. When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. When such a right of a person is threatened to be violated or its violation is observance of his right by restraining those who threaten to violate. (Page 14)

The protection of the right is to be distinguished from its restoration or remedy after violation. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the right remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right. Thus resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. (Para 14)

..If overt acts towards violation have already been done and the same have come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right. It would not be proper instead to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus.."

9. Dismissal from service also affects right to life guaranteed under Article 21 of the Constitution. The principle enunciated by Their Lordships of the Apex Court in the decision under citation is applicable to the facts of this case also. It has to be noted that the Appellate Authority in

this case who was the Disciplinary Authority in the case of the SRO Mr Sukumaran who in fact had a greater responsibility than the applicant, had awarded only a penalty of reduction in pay for 11 months whereas in the case of the applicant, functioning as Appellate Authority, that the applicant should be dismissed from service enhancing the penalty of reduction in pay for 4 years with cumulative effect. This show cause notice has been issued without recording a finding as to whether the enquiry had been held properly in accordance with the rules and whether the finding of guilt was warranted by evidence on record as the appellate authority is enjoined to do in terms of Rule 27 of the CCS(CCA) Rules. Under the circumstances apprehending that the applicant would not get justice from the second respondent and that he would be deprived of his livelihood, the applicant has filed this application. We are convinced that in the circumstances of the case, the Tribunal is bound to intervene and the respondents cannot be heard to contend that the applicant should be asked to approach the Tribunal after the disaster has befallen him.

10. In the light of what is stated above, we allow the application, set aside A-5 and direct the first respondent to dispose of A-4 appeal in accordance with law. There will be no order as to costs.

Dated, the 21st August, 2001.

T.N.T.NAYAR
ADMINISTRATIVE MEMBER

A.V.HARIDASAN
VICE CHAIRMAN

trs

LIST OF ANNEXURES REFERRED TO IN THE ORDER:

1. A-1: True copy of the memorandum No.SSP/ADA-1/96 dated 13.6.96 of the Senior Superintendent of Post Offices, Calicut.

2. A-3: True copy of the Proceedings No.SSP/ADA-1/96 dated 27.4.98 of the Senior Superintendent of Post Offices, Calicut.

3. A-4: True copy of the appeal petition dated 27.6.98 of the applicant to the 1st respondent.

4. A-5: True copy of the Memo No.ST/7-34(a)/98 dated 19.2.99 of the 1st respondent.

5. A-8: True copy of the Notification No.A-11010/105/87-AT dt.28.9.93 published as GSR(E) in the Gazette of India