IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 413/91 ~~499~~

DATE OF DECISION 14.2.92

P.S. GOPALA PILLAI Applicant (s)

Mr. M.G.K. Menon Advocate for the Applicant (s)

Versus

Union of India and 2 others Respondent (s)

Mr. NN Sugunapalan, SCGSC Advocate for the Respondent (s)

CORAM :

The Hon'ble Mr. N.V. Krishnan, Member(Administrative)

The Hon'ble Mr. N. Dharmadan, Member(Judicial)

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

N. Dharmadan, Member(Judicial).

A Group-B officer of the Central Excise who retired on 31-12-86 after 32½ years of unblemished services in the department challenges the punishment order, Annexure A-12 mainly on the ground of violation of principles of natural justice based on failure to comply with the provisions of Rule 14 of the CCS(CCA) Rules 1965.

2. During 1981 to 1985 the applicant was in charge of the Punalur Range of Central Excise. He was assisted by four Inspectors and two Sepoys. As Superintendent, he was to over-see and supervise the work of four Inspectors in charge of the four sectors. Punalur Paper Mills, Punalur

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was within the purview of the Range headed by him. The Collector of Central Excise has issued Annexure A.1 instructions containing the percentage of checks with frequency of visit to be carried out by the Superintendent and his subordinate officials for detection of evasion of excise duty, within the area of his superintendence.

3. The applicant along with others received letter dated 10-10-86 from the Deputy Collector, Customs, calling for explanation regarding certain alleged lapses in checking the activities of M/s. Punalur Paper Mills, Punalur. The Inspectors, who were on the spot duty and directly responsible for the lapses and the applicant, who is responsible for 5% periodic checks as supervisory officer, submitted explanations. On receipt of the explanations, the cases against xxxx the officials were dropped with simple warning. But no intimation was given to the applicant.

4. The applicant was to retire on 31-12-86. On 1-12-86 Annexure A-2 charge memo was issued to the applicant. It contains the following charges:

> "...(A-I)-The applicant while functioning as Supdt. of Central Excise, Punalur Range during the period 8/81 to 5/85 had not conducted the checks prescribed under Production Based Control properly in respect of M/s. Punalur Paper Mills, resulting in non-detection of large scale suppression and clandestine removal of paper by M/s. Punalur Paper Mills;
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> (A-II)- The applicant had certified the raw- material account books of Punalur Paper Mills without verifying the genuiness, thereby enabled the company to avail concessional rate of assessment of Central Excise duty;
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> (A-III)-The applicant issued 'End Use Certificate' in

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respect of imported waste paper without verifying the genuineness of the receipt and concumption thereof, thereby enabled the Punalur Paper Mills to avail inadmissible exemption of duty;

(A-IV)-The applicant failed to maintain absolute devotion to duty and his gross negligence resulted in considerable loss of revenue to the department....."

5. Annexure-III to charge memo contains a list of 11 documents. The copies of these documents were relied on in the enquiry. They were neither furnished to the applicant nor is there a case for the respondents that the applicant was given sufficient opportunity to verify all the documents for preparing and shapping his defence at any time. Neverthless, he submitted his defence statement on 8-12-86. His bonafide belief was that the respondents have dropped the proposal to hold an enquiry following the decision of the respondents in the case of others.

6. After his retirement on 23-7-87, the enquiry was initiated. The applicant denied all the charges. On the next hearing the defence assistant objected the acceptance of the document in the enquiry. He filed Annexure A-5 dated 19-8-87. It contains the following statements:

"....As per rule 14(14) of the CCS(CCA) Rules, the oral and the documentary evidence by which the articles of charge are proposed to be proved shall be produced and that the witnesses shall be examined, cross examined and re-examined. As per said rule, therefore, recording of evidence includes proving the activity of the listed documents through witnesses. It is only through such testification and oral evidence, in other words examination in Chief, the cross examination part is done and as such testification of the listed documents by independent witnesses is a lawful necessity in the inquiry proceedings under rule 14 of the CCS(CCA) Rules. The very purpose of the oral inquiry, therefore, is to record evidence through testification and acceptance of such documents as exhibits and unless therefore such of those documents remain not testified

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such documents remain to be more documents of the prosecution and not Exhibits in the inquiry proceedings....." (emphasis ours)

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"....Inquiry proceedings conducted under rule 14 of the CCS(CCA) Rules being quasi judicial proceedings, non production of witnesses to testify the documents to be taken as Exhibits, and aribtrarily taking these documents listed in the Annexure as Exhibits without affording the charged officer the reasonable opportunity of cross examination is not only illegal and unjustifiable but also quite contrary to the provisions of the statute itself...."

7. On the next posting, the applicant was given Annexure-B reply stating that all the documents are basically the 'government documents/seized documents' and 'can be presented through authorised officer and hence it is decided that the inquiry shall be proceeded with and next hearing was fixed on 23-10-87.....' But the next hearing was postponed as evidenced by Annexure A-7.

8. The applicant submitted Annexure A-8 on 23-10-87 stating that "....production of documents alone by the presenting officer and according it as evidence in the presence of the Govt. Servant making the latter as a silent onlooker without affording him the chances of any opportunity do not make the inquiry under rule 14 as an oral inquiry as contained in the rules.." Without adverting to this request the inquiry was continued. No witnesses were examined. Enquiry was closed on 19-4-88 as seen from Annexure A-10 and Annexure A-11 enquiry report was submitted. A copy of it was furnished to the applicant. After getting concurrence from UPSC, the disciplinary authority passed Annexure A-12 order imposing the punishment of "withholding of 50% pension otherwise admissible". No appeal against

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the order is provided. Hence he filed this application under Sec.19 of the Adminstrative Tribunals Act 1985.

9. The main argument advance by the learned counsel for the applicant, Shri M.G.K. Menon, is that the applicant was neither given copies of all the documents listed as Annexure-III to the Charge memo, Annexure A-2, nor was he given any opportunity to verify the same. No witness was examined nor are the documents proved in the enquiry by marking them through the custodian of the documents. Hence there is no proof of guilt and the whole enquiry is vitiated on account of violation of principles of natural justice.

10. In this case there is no oral evidence. Admittedly the decision was taken by the enquiry authority on documentary evidence. There is no whisper either in the enquiry repprt or the order imposing penalty that the applicant was given copies of all documents. He was not given any opportunity at any time during currency of enquiry to go through the documents in the custody of the presenting officer. But it is stated in the reply statement filed by the respondents 1 to 9 that 'the applicant was given ample opportunity to examine and take extracts of listed documents. No request was made by the applicant for copy of the listed documents.' This statement cannot be believed without clear proof particularly in the light of the denial of the applicant and absence of any such statement in the

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enquiry report which contains all details of the minutes and meetings and entire proceedings of the enquiry. It is settled that failure to give copy of the document or at least an opportunity to peruse the documents vitiates the enquiry.

11. A more important ground is urged by the learned counsel to support his case of violation of principles of natural justice based on Rule 14(14) of CCS(CCA) Rules. He submitted that production of documents in enquiry is not proof. The documentary evidence can be relied on as having been proved only if it comes before the enquiry authority through a statement from the custodian of the same. At least one witness who has the custodian of the documents should give statement about the documents for marking them in enquiry as having proved them for being accepted in evidence.

12. Rule 14(14) of CCS(CCA) Rules is silent about the proving of documents in the enquiry. It reads as follows:

> "...(14) On the date fixed for interview, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross examined by or on behalf of the Govt. servant. The presenting officer shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter, without the leave of the Inquiry authority. The inquiring authority may also put such questions to the witnesses as it thinks fit..."

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It only says that documentary evidence relating to the charges proposed to be proved shall be produced by or on behalf of the disciplinary authority. Mere production of the documents when objected to by the delinquent employee cannot be accepted in evidence by marking them in the enquiry to prove the charges. A document produced in the enquiry become documentary evidence when it is accepted and marked in the enquiry as part of the proceedings. It can be marked with the consent of the employee who is delinquent. If he objects it needs proof of having produced before the enquiry authority by the custodian of such document. It may be a public document or a seized document. But it should be produced by the person having custody of the same giving his version about source of the document.

13. A documentary evidence means all documents produced before the court or an authority for inspection which contains statement which can be taken judicial cognizance. But a document being an inanimate thing necessarily comes to the cognizance of judicial or quasi judicial authorities through the medium of human testimony; for which reason it has been denominated as'dead proof'(probata mortua) in contradistinction to witnesses who are said to be "living proof"(probata viva). There are documents under the evidence Act which are admissible and inadmissible in evidence; public and

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private documents having different method of promotion and proof thereof. However mere production of a document without the testimony of the custodian of the same cannot convert it into documentary evidence forming part of the proceeding particularly when there is no consent or admission by the other side. It cannot be relied on or accepted in evidence and marked as part of the case for being relied on, in the enquiry. If such a procedure is allowed to be followed in the departmental enquiries there would not be any safety for the delinquent employees. Rule 14(14) does not contemplate such a situation. Reading the provisions of Rule 14(14), with the principles prescribed by the procedural provisions contained in Evidence Act it is to be held that documents produced in enquiry without giving any copy of the same to the opposite side and marking it as part of the records through human testimony cannot be treated as evidence against the delinquent employee when he has objected to the very acceptance of such documents in evidence without following this procedure.

13. In the instant case for finding the applicant as guilty of the charges the following documents maintained by M/s. Punalur Paper Mills were relied on:

"....i) Register showing consumption of waste paper in various papers

ii) Register showing consumption of various raw-materials pulp

iii) Waste paper receipt and payment Register

iv) Register showing wood pulp receipt

v) Stock Register of imported waste paper..."

14. Of course, these documents were seized by the authorities. But these documents have not come to the cognizance of the enquiry authority through the medium of any human testimony at least to verify the custodian of the same and find out whether they are genuine documents or not or whether they are admissible in evidence or not or as to whether they are documents to be proved in the manner contemplated in Chapter-V and VI of theEvidence Act. The applicant has stoutly objected the acceptance and marking of the document by filing Annexures-5 and 8 objections giving reasons. The objections are not considered properly by due application of mind in accordance with law.

15. In an analogous situation, this Bench of the Tribunal in V.D. Joseph V. Union of India,(1990)14 ATC 99 and observed as follows:

> "....The whole case against the applicant is based on the fact that the railway ticket numbers which he had given in support of his LTC claim were fictitious and no ticket bearing those numbers had been issued from the Ernakulam Junction in accordance with the letter of the Chief Booking Supervisor, Ernakulam Junction, dated 20-9-83. Though this letter was listed amongst the 5 documents in Annexure-III to the charge memo, and heavily relied upon the Chief Booking Supervisor who wrote this letter was not produced to prove the same and to subject himself to cross-examination by the applicant. He was the key witness and by keeping him outside the pale of cross examination by the applicant, the applicant can be said to have been denied reasonable opportunity of defence...."

16. In the light of foregoing discussion, we are of the view that on the verge of retirement of the applicant on 31-12-86 he as served with a charge memo on 1-12-86

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after dropping the proceedings taken against all others and conducted enquiry without duly following the procedural formalities and imposed the punishment. The whole proceedings are vitiated and violative of principles of natural justice on account of the failure of the respondents to follow the procedures prescribed by law.

17. In the result, the punishment order Annexure A-12 is liable to be set aside. Accordingly, I do so. I also direct the respondents to disburse the full pension to the applicant with all arrears. This shall be done within a period of three months. But I make it clear that this decision will not stand in the way of the respondents to initiate further proceedings on the basis of the same charges in accordance with law, if they so decide.

18. The Original Application is allowed as above. There shall be no order as to costs.

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(N. Dharmadan)
Member(Judicial)

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N.V.Krishnan, Member (Administrative)

19. I agree with the judgement of my learned brother. I would, however, like to add a few words in view of some strange features of this case.

20. In my view, the most serious infirmity of the disciplinary proceedings against the applicant is the absolute and complete denial of the right of cross-examination, which is available to a delinquent government servant in any proceedings conducted in pursuance of the provisions of Article 311 of the Constitution other than the second proviso to Article 311(2), by deciding not to produce any witness to testify orally to prove the charges, probably in the bonafide belief that, in the circumstances of the case, the charges could be proved by documentary evidecne alone. Even that evidence was not introduced formally in the proceedings, by any witness, for reasons best known to the respondents.Instead, the Presenting Officer produced these documents before the Enquiry Officer, who took them on record. Naturally, the delinquent could not have cross-examined the Presenting Officer, as he was not a witness. Thus, the entire evidence against the delinquent has been taken on record, without being subjected to the ordeal of a rigorous cross-examination. This is a blatant denial of one of the foremost principles of natural justice, which will vitiate the proceedings, however strong and credible the documentary evidence might be.

21. There are two important aspects which have to be remembered in this connection. The first is that even the acceptance of a document as part of the record of the disciplinary proceedings will not establish the truth of what is stated in that document. Secondly, the production

of a document only for the sake of formally introducing it as a piece of evidence by the person in whose custody it is kept will only amount to proving that such a document exists. It will not imply that the contents of that document has been proved. In any case no such document can be relied upon until the delinquent government servant had been given an opportunity to exercise his right of cross examination to impugn the contents of the document or the inference that can be drawn from the document. This would be possibly only if a knowledgeable witness is examined.

22. In my view, there is perhaps, only one document which can speak for itself and which need not be proved separately and about which it can be said that the right of cross-examination does not arise. I have in mind a judgement in a criminal case convicting a government servant which is then used in proceedings under Rule 19 of the CCS (CCA) Rules, 1965 to dismiss or remove him from service without recourse to the normal procedure under the CCA Rules by giving a notice to him along with a copy of the judgement or merely referring to it. The judgement, by itself, will eloquently speak for itself about the facts of the case, the nature of the crime, the decision of the Court and the nature of the punishment awarded to him. Unless the delinquent denies its existence, it would not be necessary to formally prove this document in any manner. The disciplinary authority can fully rely on the facts of the case as given in that judgement to assess the gravity of the charges for determining what penalty should be imposed after considering the delinquent's reply to the notice. Cross examination of any witness does not arise.

23. Otherwise, all documents will not only have to be proved by a competent witness but it will also have to be explained as to how it proves the allegation against the delinquent. In so doing, the delinquent will get his opportunity to cross examine this witness.

24. Thus, if we take Article (1) of the charges (Ann. A2) which alleges that during the period from 8/81 to 5/85 the applicant "had not conducted the checks prescribed under Production Based Control properly in respect of M/s Punalour Paper Mills.", this allegation cannot be proved merely by producing the documents listed in Annexure-III to the Ann.A2 memorandum of charges. Document No.2 and Document No.3 listed therein will no doubt show what standing instructions were issued by the Collector in this regard. Document 1, i.e show cause notice to the Punalur Paper Mills, will normally contain only the allegation against the Mills. The enquiry officer's report does not show how, if at all, this document 1 establishes this allegation. It needs to be stressed that what has to be established is that the applicant did not conduct these checks. Therefore, somebody conversant with the facts of the case should have testified and established, at least on a sample basis, as to how and in what manner such a conclusion can be drawn on the basis of the documents already produced as evidence. Naturally, when such averments are made by a witness, the applicant would have got a full opportunity to cross examine him, with a view to proving that the allegations are baseless or that in the circumstances some other conclusion can be drawn or that the responsibility for such verification was on the Inspectors who were present on the spot.

25. Likewise, in the statement of imputations, a narrative has been given as to how M/s Punalur Paper Mills has resorted to various malpractices and evaded tax and it is stated that these matters have been brought out in the show cause notice issued to the Mills which is document No.1 in Annexure-3. It is then alleged that the applicant paid 38 visits to the Mill and conducted checks of production and clearance, etc. but as these were perfunctory and ineffective, they led to the commission of irregularities and malpractices by the Mill. Such a serious charge cannot be proved by merely producing the

show cause notice to the Mill in evidence. It should have been explained how and in what respect the checks made by the applicant were deficient and ineffective and establish how this led to evasion of duty. This would have required the examination of a knowledgeable witness and, necessarily, his cross-examination.

26. In my view, this single lapse of thus denying the right of cross-examination is absolutely fatal to the entire proceedings and they deserve to be quashed

27. The second feature which attracts attention is the manner in which the Union Public Service Commission has defended the procedure adopted by the respondents in the advice tendered to Government in its letter dated 23.10.90, enclosed to the impugned Ann.12 order.

28. In my view, no injustice would be caused if a document is admitted in evidence, without being produced by anybody. Unless its authenticity is challenged there should be no objection to following such a procedure. However, it has to be clearly understood, as stated earlier, that what the document purports to state has to be explained by a witness who should subject himself to cross-examination. This aspect of the right of a delinquent Government servant has not been properly appreicated by the UPSC. Its contention that the applicant himself could have produced his own witnesses to disprove the charge is not correct for 2 reasons. Firstly, it is for the Department to prove its charges. If the charges are not properly proved, as in the present case, it is not all necessary for the delinquent to enter any defence. Secondly, it is wrong to expect the delinquent to cite as his witness one who ought to have been examined as a Departmental witness. For, he would then have been deprived of his precious right of cross-examination.

29. In the circumstances, I agree with the decision rendered by my learned brother. I would only add that, while permitting the respondents to hold the enquiry again, they should also be permitted to amend the memorandum of charges by including in it a list of witnesses to be examined to prove the charges against the applicant.

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(N.V.Krishnan)
Member (Administrative)

ORDER OF THE BENCH

In the light of the foregoing discussions, we allow this Original Application and set aside Annexure A-12. We also direct the respondents xxxxxxxxxxxxxxxx to disburse the full pension to the applicant with all arrears. This shall be done within a period of three months. However, we make it clear that the respondents are at liberty to resume further proceedings against the applicant on the basis of the same charges in accordance with law, if so advised, including list with questions to be examined to prove the charges. In the circumstances of the case, we make no order as to costs.

14.2.92

(N. Dharmadan)
Member (Judicial)

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(N.V. Krishnan)
Member (Administrative)

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