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CENTRAL ADMINISTRATIVE TRIBUNAL

Circuit Bench at LUCKNOW

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Gandhi Bhawan, Lucknow

May 2, 1989

Registration O.A. No. 847 of 1987

Jagdish Narain Dwivedi Applicant

vs.

Union of India and ors Opp. Parties

Hon' Mr. Justice Kamleshwar Nath, V.C.

Hon' Mr. D.S. Misra, A.M.

(By Hon' Mr. Justice K. Nath, V.C.)

This is an application under section 19 of the Administrative Tribunals Act, No. XIII of 1985, for issue of an order in the nature of certiorari to quash the order dated 27-5-1987, contained in Annexure No. 24, whereby the applicant was reverted from the post of Upper Division Clerk to the post of Lower Division Clerk. There is also a consequential prayer for grant of salary and allowances for the post of Upper Division Clerk and for sanction of medical leave for the period between 15-3-1982 to 17-10-1983.

2. The facts of the case are not ⁱⁿ much dispute. The applicant was working as Lower Division Clerk when on 19-10-1981, he was transferred from Lucknow to Ramgarh. He did not proceed to join the assignment for the reasons of alleged illness. He remained absent from 15-3-82 to 17-10-83; in the meantime he was promoted on 24-3-1983 as Upper Division Clerk.

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3. For his unauthorised absence from duty from 15-3-82 onwards, the disciplinary proceedings were started on the basis of charge sheet dated 20-5-83. The applicant filed a reply to the charge sheet on 5-6-83, and ultimately proceeded to join Ramgarh on 18-10-83.

4. It appears from the statements contained at page 93 of the paper book that for the period of his absence from 4-4-82 to 15-9-82, he despatched a medical leave application with a certificate on 15-10-82. Again for the period for his absence from 16-9-82 to 22-2-83, he despatched an application with medical certificate on 22-2-83. On 5-6-83, the applicant sent a medical certificate for his absence from 23-2-83 to 3-6-83. Again for the period of his absence from 4-6-83 to 14-9-83, he despatched a medical certificate in September, 1983.

5. The first inquiry report is dated 13-4-84 (Annexure No. 16). The Inquiry Officer held that for reasons beyond his control, the applicant was absent from 15-3-82 to 17-10-83, and since he, ultimately joined at Ramgarh depot on 18-10-83, the charge that he disobeyed the lawful orders of his superior officers was not proved. The matter was considered by the disciplinary authority, who passed an order on 10-5-84 (Annexure RA-1), holding that on account of procedural errors/lapses, in so far

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as, the provisions of Rule 14 (19) of the CCS (CC&A) Rules, 1965 had not been substantially followed, he directed a further inquiry to be conducted.

6. The result of the second inquiry is contained in Annexure Nos. 19, 20 and 21 dated 23-3-1985. The disciplinary authority held that although the charge of absence was proved, the absence was supported by medical certificate. When the matter figured before the disciplinary authority again, he held in his order dated 1-6-85 (Annexure No. 22), that the charge of disobedience of the superior authorities ~~is~~ stood proved. He, however, agreed with the report of the Inquiry Officer that the absence was supported by the medical certificate. Even so, the Inquiry Officer treated the absence to be unauthorised absence and awarded the punishment of dismissal of service with immediate effect.

7. The applicant preferred an appeal, contained in Annexure No. 23 (to the application), and the matter was considered by the Executive Committee of the Board of Control, Canteen Services. Shri Dinesh Chandra, Brig. of the Board issued the impugned order dated 27-5-87, annexed to Annexure No. 24, the communication thereof, in which it was held that benefit of doubt be accorded to the applicant and the appeal be allowed to the extent that the penalty of "dismissal ^{from} service with immediate effect" be modified to the penalty of reversion to the rank of Lower Division Clerk. It was further ordered that the period from 15-3-82 to 17-10-83 for which

the applicant remained on medical leave may be adjusted by the Canteen Stores Department against his earned and commuted leave, and the balance period may be treated as extra ordinary leave without pay and allowances. It was further directed that the period from the date of dismissal and to the date of rejoining of duty on reinstatement as Lower Division Clerk would be treated as "on duty" for all purposes without pay and allowances.

8. Affidavits have been exchanged. We have heard the learned counsel for the applicant. We have no benefit of hearing the learned counsel for opposite parties; even so, we have gone through the entire record.

9. The first point urged by the learned counsel for the applicant is that, the disciplinary authority, while passing the order dated 1-6-85 (Annexure No. 22) mentioned that he had considered both the inquiry reports. The learned counsel for the applicant stated that the previous inquiry report having been washed off by the earlier order dated 10-5-1984 (Annexure R-1), it should not have been considered. Linked to this, his further submission is that the appellate authority did not appreciate that the disciplinary authority had considered both the inquiry reports and since the order of the disciplinary authority would be vitiated by consideration of both the inquiry reports, the appellate order would also stand vitiated.

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10. We are of the opinion that while the disciplinary authority was not justified in looking into the first inquiry report, no substantial injustice has been done by looking into it, because the result of the first, as well as, of the second inquiry report was the same. In other words, the contents of first inquiry report did not in any manner prejudice the second inquiry report. The disciplinary authority, therefore, in considering both the reports did commit any irregularity, which does not constitute an illegality, because it did not affect the merits of the matter before him. The court have to go essentially by the concept of substantial justice, where procedural matters are concerned. In view of what we think of this situation, the further contention that the appellate authority was not competent to pass the order also falls. The learned counsel for the applicant has referred to the case of Barad Kant Mishra Vs. State of Orissa and another, 1966 Service Law Reporter 186 in support of his contention that, if the disciplinary authority's order is void, the appellate authority is not capable of passing a valid order. That is not the law laid-down in this case. There, the disciplinary proceedings were initiated against an officer of subordinate judiciary. The High Court in exercise of its powers of control under Article 235 of the Constitution of India passed an order of reduction in rank. Subsequently on the basis of that very order, the High Court forwarded the case to the Governor with a ~~xxxxx~~....

recommendation for dismissal of the Officer.

The Governor, basing his finding on the order of reduction in rank, passed the order of dismissal.

The Hon'ble Supreme Court held that the power to pass an order of reduction in rank vests in the appointing authority under Article 311(1) of the Constitution of India and does not extend to the High Court, under its powers and control under Article 235 of the Constitution. The order of reduction in rank, therefore, was held to be unconstitutional. The Hon'ble Supreme Court then went to say that the substratum of order of the order of dismissal, that is, the order of reduction in rank, being unconstitutional, the order of dismissal cannot have any legal force. It is in this background that the decision contains an observation that if the order of ~~judicial~~^{disciplinary} authority is void, the order of appellate authority cannot make it valid. That is not the case before us. The order of disciplinary authority, for reasons recorded above, was not void or invalid; it was irregular, but not illegal. The appellate authority, therefore, was quite competent to pass the impugned order of reversion.

11. The learned counsel for the applicant then referred the Rule 27 (2) (b) of the CCS (CC&A) Rules, 1965 and says that the appellate authority did not record a finding that the finding of the disciplinary authority ^{was} ₁ warranted by evidence on record. Here again the learned counsel for the applicant placed reliance upon the fact that the disciplinary authority has referred to both the

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reports, while the appellate authority did not mention it. We have already dealt with the aspect of this case and need not repeat it here. What is important is that, in the impugned order, annexed to Annexure No. 24, it was stated that the case was considered by the Executive Committee of Board of Control Canteen Services. The factual and circumstantial features of this case adduced during the inquiry were taken into consideration. It is true that the evidence which was produced during inquiry and the circumstantial evidence which figured in case were not set out in express words in the impugned order; but the order leaves no manner of doubt that all these material were considered. It would definitely have been better, and that is what should normally be done, to set out the basic features of the evidence adduced in the course of inquiry, but, in sofar as the appellate authority concurred with the findings of the disciplinary authority, it was not absolutely necessary in the eye of law to reproduce the entire set of reasoning adopted by the disciplinary authority.

12. The next point of the learned counsel for the applicant is that while the applicant's appointing authority is Major General, the appellate order has been passed by Brigadier who is an officer of lower rank to the appointing authority i.e. Major General. This contention of the learned counsel must be turned down on a plain reading of impugned order dated 27-5-87. The impugned order in express term says that the case was considered

(A)
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by Executive Committee of the Board of Control,
Canteen Services.

13. At the end, where Dinesh Chandra, Brig. signed the orders in his capacity as Secretary, Board of Control Canteen Services, it is clearly mentioned that he did so, " for and on behalf of Executive Committee of the Board of Control Canteen Services, ". The decision was taken by the Executive Committee of Board of Control Canteen Services; Brig. Dinesh Chandra only authenticated it. In this connexion, it is interesting to refer to relief No. 1, as set out in para 7 of the application itself. The relief seeks " a direction in the nature of certiorari quashing the order dated 27-5-87 passed by the Board of Control of Canteen Services". Plainly the applicant himself has said that the order was passed by the Board of Control of Canteen Services.

14. The next point urged by the learned counsel for the applicant that the disciplinary authority being Chairman of the Department, is also a member of the Board of Control of Executive Committee, and, therefore, the order is invalid. The plea set out in para 42 of the rejoinder is that, since the disciplinary authority is a Chairman of the Department, and, therefore, a member of the Board of Control Executive Committee, and the impugned order is an out come of his influence. What has been challenged in the application is not an illegality of the order on account of



participation, if at all, of the disciplinary authority as a Member of the Board of Control, but on account of supposed exercise of his influence upon the Board. There is no evidence that either the disciplinary authority was actually deliberating in the proceedings of the Board of Control when the Executive Committee took a decision, or that the impugned order was a result of his influence.

15. The next point urged is that the appellate authority itself recorded a finding that the applicant was entitled to a benefit of doubt and that being so, a major penalty could not have been inflicted or, indeed, there could have been no penalty at all. The decision does not spell out the purport of the expression "benefit of doubt," but the expression must be read in the entire context in which it appears. The benefit of doubt, as indicated in the order, persuaded the Executive Committee of the Board of Control to allow the appeal to the extent shown thereunder; and the most important part of the extent is the conversion of the punishment of dismissal into reversion to lower rank. The established facts, as would appear from what has been stated above, are that after the applicant was ordered to be transferred to Ramgarh, he did not proceed to Ramgarh and instead, he became absent from 15-3-82 and continued to remain absent till 17-10-83. The applicant joined Ramgarh after the disciplinary inquiry had started, charge sheet had been served and reply has been submitted by him. It is also clear from the admitted facts that every time, the applicant sent medical certificate

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of illness after he had already spent his period of leave; the commencement of any period of leave did not coincide with his submission of medical certificate. In a way, every time he confronted the Department with fait accompli. Even so, the Inquiry Officer found that the absence was supported by medical certificate which had not been controverted by any medical examination by the authorised medical attendant of the Department itself. One may wonder how this could have been done, when the medical certificates were being submitted after the expiry of the period for which leave was sought. But, failure to report at Ramgarh despite orders of transfer was *prima facie* disobedience, and the absence from duty with submission of medical certificate after the period of absence, is *prima facie* inappropriate. The only feature which could be open to scrutiny was, whether this act of the applicant was deliberate or on account of causes beyond his control. The inquiry authorities thought that on account of illness, it was beyond his control. The disciplinary authority did not agree and found him to be guilty of disobedience. It was perhaps between these two findings that the Executive Committee of Board of Control was to decide which way the balance tilted and then, it appears they thought that there was some doubt of which the benefit could be given to the applicant. The doubt, therefore, could not be for culpability, it could only be for mitigation. It is this mitigation, which found impression in the ultimate view of the Board of Control that the order of dismissal be modified to an order of reversion. We do not think, therefore,

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that the use of expression "benefit of doubt" in the impugned order conflicts with the ultimate order passed.

16. The last point urged is that the applicant should have been given an opportunity of personal hearing by the appellate authority itself. Reliance is placed upon the decision in the case of Ram Chander Vs. Union of India (1986) S.C. case 103. It is unnecessary for us to go into consideration in detail upon the point, because we are of the opinion that even on the finding arrived at by the appellate authority, the punishment of reduction in rank is excessive. The learned counsel for the applicant says that he has no objection to the applicant being awarded with a lesser punishment. The doctrine of excessive punishment has been set out by the Hon'ble Supreme Court in the cases of Rama Kant Mishra Vs. State of U.P. (1982) S.C. 1552 and Bhagat Ram Vs. State of Himachal Pradesh (1983) (2) S.C. cases 442. We are aware that the Department in which the applicant was working is a Defence Department which calls for strict discipline and obedience to the orders of superiors. We would also like to mention that apart from the various rights of the citizen of this country, which has been guaranteed in the Constitution, there are also fundamental duties which are set out in Article 51 (A) of the Constitution of India. The rights and duties have to be balanced and it is ordinarily very difficult to ~~consonance with~~ ^{countenance} ~~an~~ employee of the Defence Department, who is

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disobedient, and would not conform to the norms of straight conduct. Even so, the applicant after all did join at Ramgarh and has suffered in some measure by the lapse of time and loss of salary during the period of absence. We think that having regard to all the facts and circumstances, rights and obligations, it would be fair and just to reduce the punishment of reversion to stoppage of two annual increments with cumulative effect. Similar reduced punishment was given by the Hon'ble Supreme Court in the two cases cited above.

17. The application is partly allowed, and the impugned order dated 27-5-87 contained in Annexure No. 24 to the application reverting the applicant from the post of Upper Division Clerk to Lower Division Clerk is quashed and instead the applicant is awarded a punishment of stoppage of two increments with cumulative effect with effect from 27-5-87, the date of the impugned order. We notice that the impugned order has already treated the period from the date of applicant's dismissal to the date of his rejoining duty on reinstatement to be " on duty " for all purposes without pay and allowances. That direction, as also the direction regarding adjustment of his leave contained in para 3 (b) of the impugned order, do not call for any interference. The parties shall bear their own cost.


MEMBER (A)


VICE CHAIRMAN

(sns)

Lucknow

MAY 2, 1989.