

Central Administrative Tribunal, Lucknow Bench, Lucknow

Original Application No. 168/2012

This the 27th day of January, 2014

Hon'ble Sri Navneet Kumar, Member (J)
Hon'ble Ms. Jayati Chandra, Member (A)

Anjani Kumar Dubey aged about 50 years son of Sri Sunder Lal Dubey, resident of village and Post- Kadipur, District- Pratapgarh.

By Advocate:- Sri S.P.Singh Applicant

Versus

1. Union of India through its General Manager, Northern Railway (Personnel), Baroda House, New Delhi.
2. Divisional Railway Manager, Northern Railway, Lucknow.
3. Senior Divisional Mechanical Engineer (O&F), Northern Railway, Lucknow.
4. Divisional Mechanical Engineer (C&W), Northern Railway, Lucknow.
5. Assistant Divisional Mechanical Engineer (Power), Northern Railway, Lucknow.

By Advocate: Sri S.Verma Respondents

(Reserved on 27.11.2013)

ORDER

BY HON'BLE SRI NAVNEET KUMAR, MEMBER (J)

The present O.A. is preferred by the applicant u/s 19 of the AT Act, with the following reliefs:-

- a) issue an order or direction setting aside the order dated 13.4.2005 passed by disciplinary authority i.e. respondent No.5, appellate order dated 31.8.2005 passed by respondent No.4, order dated 25.1.2006 passed by revisional authority (respondent No.3) and order dated 23.11.2011 passed by respondent No.3 as contained as Annexure No. 1,2,3 and 4 to this original application.
- b) issue an order or direction to reinstate the applicant in service with all consequential benefits.
- c) issue an order or direction to the respondents to decide the petition/ appeal preferred by the applicant under Rule 31 of the Rules,

1968 within such reasonable time frame as this Hon'ble Tribunal deems just and proper.

- d) issue such other order or direction which this Hon'ble Tribunal deems just and proper protecting the rights and interest of the applicant in the circumstances of the instant case,
- e) Award costs of the Original Application in favour of the applicant.

2. The brief facts of the case are that the applicant was initially appointed as Cleaner in Northern Railway on 11.3.1975 and in the year 1990, when the applicant was posted as Call Man in the Northern Railway, Pratapgarh, an FIR u/s 302 IPC was registered and the applicant was taken into judicial custody and after 8 months, the applicant was released on bail by orders of the Hon'ble High Court. Subsequently, in 2003, the applicant was convicted and was also sentenced to Life imprisonment. Soon thereafter, the applicant preferred a criminal appeal and the Hon'ble High Court vide order dated 13.6.2003 admitted the criminal appeal and execution of the sentence including sentence of fine has been suspended till disposal of the appeal but no conviction was suspended /stayed by the Hon'ble High Court. It is also pointed out by the learned counsel for the applicant that the said criminal appeal is still pending before the Hon'ble High Court. It is also submitted by the learned counsel for the applicant that after the order dated 13.6.2003 passed by the Hon'ble High Court, applicant was released from jail and thereafter, he made a representation to the authorities to allow him to resume duty. Not only this, the applicant has also received a notice under Rule 14(1) of the Railway Servants (Disciplinary and Appeal) Rules, 1968 and the applicant was asked to make a representation on the proposed penalty of dismissal/removal but this notice /memorandum dated 6.5.2003 the applicant has also submitted his representation dated 18.4.2004 in reply to the memorandum/ notice dated 6.5.2003 and 19.3.2004 and

disciplinary authority came to the conclusion that the applicant is fit to be terminated and also advised that under Rule 18, the applicant is entitled to file an appeal. In pursuance of the said order, the applicant preferred an appeal and the appellate authority after considering the entire evidence on record and keeping in view Rule 14(i) of the Railway Servants (D&A)Rules,1968 and Article 311(2)(a) of the Constitution of India , rejected the appeal of the applicant. Subsequently, the applicant again preferred a revision petition and the said revision was also rejected by the authorities vide order dated 25.1.2006. Not only this, the applicant has also preferred an O.A.No. 367/2011 and the said O.A. was disposed of on 27.9.2011 and in pursuance of the said order, the respondents again passed order dated 23.11.2011 indicating therein certain rules, propositions and passed order. The learned counsel for the applicant has also pointed out that the impugned order of termination was passed only on the basis of the criminal trial and sentence awarded in a criminal case and also indicated that the respondents failed to appreciate the difference between the suspension of execution of sentence and the suspension of the judgment and order by means of which the sentence has been imposed. Not only this, the learned counsel for the applicant has pointed out that it is clear violation of Article 311(2) and second proviso of Constitution of India, as such liable to be interfered with and also to be struck down.

3. Learned counsel for respondents filed their reply and through reply, it is pointed out by the respondents that the order passed by the Disciplinary authority, appellate authority and revisionary authority as well as order passed in pursuance of direction given in O.A.No. 367/2011 (Anjani KumarDubey Vs. UOI) does not suffer from any factual or legal infirmity. Hence the present O.A. is liable to be dismissed. It is also submitted by the learned counsel for respondents that at the time of termination of service of the applicant, the applicant was working as substitute Call Man which is clear from the aforesaid

letter. The show cause notice was issued under Rule 14(1) of the Railway Servants (D&A) Rules, 1968 by the competent authority which was sent to him by registered cover and was served upon the applicant by the postal authority but the applicant refused to accept the same. The applicant has submitted the representation on 18.4.2004 in reply to the memorandum dated 6.5.2003 as such, it cannot be said that the said show cause notice was not delivered to the applicant. Not only this, the learned counsel for the respondents also denied this fact that the Disciplinary Authority terminated the service of the applicant with deliberate non-application of mind and without following the due procedure of law and against the rules. In the entire C.A., the learned counsel for the respondents tried to submit that the order passed by the Railway Administration is well within the norms and according to Rule.

4. Learned counsel appearing on behalf of the applicant filed Rejoinder Reply and through Rejoinder Reply, mostly the averments made in the O.A. are reiterated and it is once again pointed out by the learned counsel for the applicant that the order of termination passed solely on the ground of conviction in a criminal case, is violative of Article 311(2) of the Constitution of India. Learned counsel for applicant has also pointed out through Rejoinder Reply that one Sanjay Kumar Srivastava ,who was also convicted u/s 302 but instead of terminating his service, only a punishment of compulsory retirement was imposed upon him, as such it is argued by the learned counsel for the applicant that the applicant has been discriminated and was given a different punishment than the Sanjay Kumar Srivastava

5. Heard the learned counsel for the parties and perused the record.

6. Admittedly, the applicant was working in the respondents organization , was convicted in a criminal case and after due trial, he was sentenced for life imprisonment. He has also preferred an appeal

before the Hon'ble High Court and Hon'ble High Court vide order dated 13.6.2013 pleased to stay the execution of the sentence including fine till the disposal of the appeal. The applicant was served with a show cause notice and he was asked to submit reply which he submitted vide representation dated 18.4.2004 and after considering the said representation, the Disciplinary Authority has passed an order of termination vide order dated 13.4.2005. After that the applicant has moved an appeal and the appeal was also decided on 31.8.2005 and revision was also rejected vide order dated 25.1.2006. Not only this, the O.A. No. 367/2011 preferred by the applicant was also disposed of and the respondents have also passed an order on 23.11.2011, wherein they have indicated this fact that the applicant was terminated due to conviction and sentence passed by the Session's Judge (Fast Track Court No.3), Pratapgarh dated 25.4.2003. However, they have indicated that as per Rule 14(1) of the Railway Servants (D&A) Rules, the respondents can pass an order of termination. The learned counsel for the respondents have also quoted Rule 14(1) of Railway Servants (D&A) Rules 1968 which reads as under:-

“14. Special Procedure in certain cases

Notwithstanding anything contained in Rule 9 to 13.

- (i) Where any penalty is imposed on a Railway Servant on the ground of conduct which has led to his conviction on a criminal charge; or**
- (ii)**
- (iii)**

The Disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit.

[Provided that the Railway Servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case falling under Clause (i)

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule”

7. Now, the question which requires determination is whether a person /employee can be terminated or dismissed on the basis of conviction. The Hon'ble Apex Court in the case of **Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera** reported in 1995(3) SCC 377 has observed as under:-

“It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2).”

.....

What is really relevant thus is the conduct of the government servant , which has led to his conviction on a criminal charge.”

8. That the Hon'ble High court , Lucknow Bench Lucknow in the case of **State of U.P. Vs. Shyam Sundar Yadav and another** reported in (1989) 7 LCD 45 has held as under:-

“The order of dismissal shows that the Department never considered the conduct of the opposite party No.1 that had led to his conviction on criminal charge. It merely dismissed the employee saying that the opposite party no. 1 had been convicted. This is not permissible . Under Article 311 inquiry can be dispensed with only when a person is dismissed on the ground of conduct which led to conviction, in other words, when the punishing authority thinks that conduct, which resulted in conviction, is such that the person should be dismissed. Here that conduct was not considered and the employee was dismissed without considering that conduct, only on the simple ground

that the person had been convicted. This is not permissible . So the order of dismissal is certainly erroneous..."

9. That the Hon'ble High Court, Lucknow Bench , Lucknow in the case of **Sadanand Mishra Vs.State of U.P. reported in (2000) (18) LCD 88** has held as under:-

"In view of the above mentioned facts and circumstances, it is now well-settled that a Government employee cannot be dismissed, removed or reduced in rank merely on the ground that he has been convicted by a Court of law. Thus, conviction alone is not enough to punish a Government employee, but it is the conduct of employee concerned which had led to his conviction on the basis of which a Government employee can be punished. Hence, it is necessary for the disciplinary authority to consider the conduct of convicted Government servant which had led to his conviction. In absence of the same, the order of punishment would be bad."

10. Before proceedings further, Article 311 (2) and its second proviso of Constitution of India are required to be perused, which are quoted as under:-

"311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State

(1).....

.....
(2)No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges."

Provided.....

.....
Provided further that this clause shall not apply--

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
- (b) and
- (c).....
-"

11. In the case of **Union of India Vs. Tulsi Ram Patel 1985(3)**

SCC-398 the Hon'ble Apex Court has held as under:-

"Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case. This, however, has to be done by it *ex parte* and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in *Shankar Dass v. Union of India and another*, this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back

wages. It is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."

12. The preposition of law laid down in Tulsi Ram Patel's case has been constantly followed by Hon'ble High Court of Judicature at Allahabad. The learned counsel for the applicant also placed reliance on the following two such cases:-

(1) Krishna Gopal Sharma Vs. State of U.P. and Others 2004 Alld. L.J. 4240.

(2) Sada Nand Mishra Vs. State of U.P. & Anotehr L.C.D.-1993(11)-70

13. In the case of **State of U.P. Vs. Raj Pal Singh** reported in **(2010) 2 Supreme Court Cases (L&S) 107**, the Hon'ble Apex Court has observed as under:-

"6. It is undoubtedly open for the disciplinary authority to deal with the delinquency and once charges are established to award appropriate punishment. But when the charges are same and identical in relation to one and the same incident, then to deal with the delinquents differently in the award of punishment, would be discriminatory. In this view of the matter, we see no infirmity with the impugned order requiring our interference under Article 136 of the Constitution."

14. Hon'ble Apex Court in the case **Ram Pratap Singh Vs. State of U.P. and others** reported in **(2009) 2 UPLBEC 121** has been observed as under:-

"11. There are various kind of offences for which a person, who is also a civil servant, may be convicted and punished. The civil servant may be punished for a wrongful parking or jumping a red light. He may be punished in a minor scuffle, or for an offence in which,

he is gravely provoked. The appointing authority has to go through his conduct, which includes the evidence and findings of the criminal court and considered all the facts and circumstances of the case and the factors, which have led to the conviction and punishment of the person before deciding whether clause (a) of the second proviso of clause (2) of Article 311, will be attracted.”

15. The Hon'ble Apex Court in the case of **Vijaya Shanker Tiwari vs. State of U.P. and others reported in 1996(14) LCD page 126**, the Hon'ble High Court observed as under:-

“6. For the purpose of taking action under clause (a) of second proviso to Article 311(2) of the Constitution what is relevant is the conduct of the Govt. servant which has led to his conviction on a criminal charge. It is not open to the authorities to pass an order of dismissal or removal or reduction in rank of the government servant merely on the basis of conviction. Even in those cases, where offence for which a government servant is convicted is serious, he cannot be dismissed from service merely on the basis of conviction. In such a case also his conduct which led to his conviction on a criminal charge, has to be examined by the appropriate authority before imposing any penalty under clause (a) of second proviso. As held by Supreme Court in **Tulsi Ram Patel's case (supra)** in such cases before imposing any penalty under clause (a) of the second proviso, the appropriate authority “will have to peruse the judgment of the criminal court and consider all the circumstances of the case and various factors set-out in **Challappan's case (AIR 1975)**

SC 2216). This, however, has to be done by it ex-parte and by itself." Supreme Court in Challappan's case (supra) has laid down that before imposing a penalty the appropriate authority has to consider the entire conduct of the employee, the gravity of mis-conduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances and redeeming features, if any, in the case. A government servant, therefore, cannot be dismissed from service merely on the basis of his conviction however serious or heinous the offence may be for which he has been convicted. The authority concerned has to consider his conduct which has led to his conviction on a criminal charge, along with all other relevant factors and circumstances including redeeming feature, if any. The decision of Division Bench of this Court in Shyam Narain Shukla (supra) lays down the correct law and does not require reconsideration. Decision of writ petition No. 1701 of 1985 is good only to the extent whereby it was held that an order of dismissal of a govt. servant cannot be based on mere conviction. Other issue decided in the letter case (writ petition No. 1701 of 1985) has been rightly declared wrong and unenforceable by Division bench in the case of Shyam Narain Shukla(supra) in view of decision of Tulsi Ram Patel's case (supra).

16. Again in the case of **State of U.P. and others Vs. Shyam Sunder Yadav and another (supra)**, the Hon'ble High Court observed as under:-

"3. The opposite Party No.1 was dismissed without inquiry relying on Article 311 wherein it has been said

that this Article regarding inquiry etc. was not applicable where a person was dismissed on the ground of conduct which led to the conviction of the employee on a criminal charge. The order of dismissal shows that the Department never considered the conduct of the opposite party No.1 that had led to his conviction on criminal charge. It merely dismissed the employee saying that the opposite party No.1 had been convicted. This is not permissible. Under Article 311 inquiry can be dispensed with only when a person is dismissed on the ground of conduct which led to conviction, in other words, when the punishing authority thinks that conduct, which resulted in conviction, is such that the person should be dismissed. Here that conduct was not considered and the employee was dismissed without considering that conduct, only on the simple ground that the person had been convicted. This is not permissible. So the order of dismissal is certainly erroneous. As regards suspension, the matter was left to be decided by the Department. Hence, this writ petition had no merits."

17. That having come to know of the conviction of a Govt. servant on a criminal charge, the disciplinary authority must consider whether his conduct which had led to his conviction, was such as warrants the imposition of a penalty and if so, what that penalty should be. In considering the matter, the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features. But this required to be done by the Disciplinary authority. The principle, however, to be kept in mind

is that the penalty imposed upon the civil servant should not be grossly excessive or out of the proportion the offence committed or one not warranted by this fact and circumstances of the case.

18. It is explicitly clear by the bare reading of the Disciplinary Authority, Appellate authority and Revisionary Authority order that the orders passed by them against the applicant are only passed on the basis of conviction in a criminal case and it is also clear that the disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the civil servant is weak.

19. After examining the impugned order, we can not see any other ground in the termination order except the conviction and sentence awarded to the applicant. The applicant given reply to the show cause notice and has also preferred appeal but the ground taken in the appeal was also not considered and the order passed by the Disciplinary Authority was confirmed.

20. Considering the submissions made by the learned counsel for the parties, we deem it fit to interfere in the present O.A. Accordingly, the impugned orders dated 13.4.2005, 31.8.2005, 25.1.2006 and 23.11.2011 are quashed. The respondents are directed to reinstate the applicant in service, if he has already not retired but he will not be entitled for any back wages, since the applicant has not worked during this period. The matter is remanded back to appropriate authority to pass an order afresh in accordance with law. It is expected that the Disciplinary Authority, as well as appellate and revisionary authority will complete the entire exercise within a period of 9 months and decision so taken be communicated to the applicant. It is also expected that applicant will cooperated with the enquiry and even in case of non-cooperation by the applicant, the disciplinary authority would be at liberty to pass ex-parte order but that too in accordance with law.

21. With the above observations, O.A. is allowed. No order as to costs.

J. Chandra

(Jayati Chandra)
Member (A)

Navneet Kumar
(Navneet Kumar)
Member (J)

HLS/-