CENTRAL ADMINISTRATIVE TRIBUNAL,LUCKNOW BENCH

LUCKNOW

Lucknow this the 7th day of August,97.

O.A. No. 386/91

HON. MR. S.DAS GUPTA, MEMBER(A)

HON. MR. D.C. VERMA, MEMBER(J)

Lalta Prasad (Painter skilled No. 28) aged about 38 years, son of late Bhagwati Prasad, Resident of 445 /129, Musahibganj, Mallahi Tola, P.S. Chowk, Lucknow.

Applicant.

By Advocate Shri A. Moin.

versus

1. Union of India through Secretary, Ministry of Railways, Govt. of Inida, (Railway Board) New Delhi.

2. Chief Works Manager, Loco Workshop, Northern Railway, Lucknow.

3. Deputy Chief Engineer, Loco Workshop. N. Railway, Charbagh, Lucknow.

4. Works Manager(F), Loco Workshop, N. Rly. Charbagh, Lucknow.

opp. parties.

By Advocate Shri A.K. Chaturvedi.

O R D E R

HON. MR. S. DAS GUPTA, MEMBER(A)

In this Original application filed under section 19 of the Administrative Tribunals Act, 1985, the applicant is aggrieved by order dt.5.6.91 by which the penalty of removal of service was imposed onthe applicant, the order dated 6.8.91 by which his appeal was rejected and finally the order dated 23.8.91/3.9.91 by which his review application was also rejected. By way of relief he has sought quashing of these orders and a direction to the respondents to continue the applicant in service with all service benefits.

2. The facts of the case lie within a short compass. A case was registered against the applicant for theft of some quantity of Coaltar Paint under section 3 of Railway Proprty (Unlawful possession) Act on 22.6.1986. In May, 1989,the applicant confessed his guilt before the court of Judicial Maigistrate First Class, Northern Railway, Lucknow and on the same date he was convicted and sentenced to three months rigorous imprisonment. The sentence howerver, was suspended and the applicant was released on probation of one year under the provisions of Probations of Offenders Act, 1958. On 14.3.91 a memo was issued to the applicant by respondent No. 4 proposing imposition of penalty of dismissal from service and directing him to represent against the proposed penalty. The applicant submitted representation on 26.3.91 which was however, not found satisfactory by the respondent No. 4 who imposed, by the impugned order dated 5.6.91,the penalty of removal from service of the applicant. The applicant challenged this order by filing the O.A. 190/91 which was dismissed as premature by this Tribunal giving liberty to the applicant to file a statutory appeal before the competent authority and also with a direction to the competent authority to consider and pass final order on the appeal, if filed. Thereafter, the applicant filed a detailed appeal and the same was dismissed by the impugned order dated 6.8.91. A review application was filed by the applicant which was also rejected by the impugned order dated 22.8.91.

3. The applicant has taken several grounds in the O.A. in challenging the impugned order. In the first place, he has taken a plea that the notice issued to him under memo dated 14.3.91 was purported tobe in exercise of the powers conferred by rule 25(i) of the Railway Servants (Discipline and Appeal)Rules, 1968 (for short D.A.R.),

wehreas ,the Works Manager i.e. respondent No. 4 who issued this Memo was not competent to exercise powers under the aforesaid rule. The second plea is that as the applicant was released under the provisions of Probation of Offenders Act, 1958, the conviction in fact would not be a ground for imposition of penalty on him in view of the provisions contained in section 12 of the said Act. Thus the action taken against the applicant is stated to be violative of the provisions of section 12 of the Probation of Offenders Act.

4. A further plea taken by the applicant is that even if it is conceded that the respondents could have taken action against the applicant despite the provisions of section 12 of the Probation of Offenders Act, the conviction, by itself could not have been the foundation for the order of penalty without holding any enquiry. It is stated that udner rule 14(i) of the D.A.R, the conduct which led to his conviction on a criminal charge should have been considered before imposition of penalty dispensing with the normal provisions of holding enquiry into the charges. It is alleged that the authority imposing the penalty of removal from service did not consider the conduct which led to the conviction of the applicant.

5. Lastly, the applicant has taken the plea that his appeal and review application have been rejected in an arbitrary manner in disregard ofthe judicial pronouncement of the Hon'ble Supreme Court and the High Courts.

5. The respondents have filed a counter affidavit in which it has been submitted that the applicant was removed from service as he commited serious offence of theft of railway material and therefore, the continuance of such an employee in railway service was likely to encourage other employes to indulge in such activities. It has been further stated that the notice issued under

Memo dated 5.6.91 was in terms of the provisions of rule 14(i) of D.A.R. and the rule 25 of the D.A.R. had no apoplicability.

6. The applicant has filed a rejoinder affidavit in which the contentions are primarily a re-iteration of the averments in the O.A.

7. We have heard the learned counsel for both theparties and also perused the pleadings on record carefully.

8. With regard to the first plea taken by the applicant, the respondents themselves have admitted that the provisions of rule 25(i) of D.A.R. were not applicable to this matter and therefore, we need not probe the matter further to ascertain whether the respondent No. 4 was competent to exercise powers under these rules. The mention of rule 25 (i) of D.A.R. in the Memo dated 14.3.91 was therfore, wholly erroneous. The question therefore is whether the mention of this rule render the afore-said memo void and therefore, vitiates all actions taken in pursauance thereof.

9. We have carefully considered the aforesaid question. We quote the relevant portion of the memo which is as follows:

> "Sri Lalta Prasad T. No. P.S. 28 Designation Sk. Painter is hereby informed that on careful consideration of the circumstances of the case/ charges levelled against him by Railway Magistrate on Jugment in case No. 528/86 dated 3.5.1989, the undersigned in terms of para 25(1) of Railway Servants (Discipline and Appeal) Rules, 1968, considers that further retention in Railway service is undesirable. The undersigned has, therfore, provisionally come to the conclusion that:
>
> Sri Lalta Prasad T. No. P.S.-28 Designation Sk.

Painter is not fit person to be retained in service and so the undersigned in exercise of the powers conferred by Rule 14(1) of the Railway Servants (Discipline and Appeal) Rules, 1968 proposes to impose on him the penalty of dismissal from service."

It would be seen from the above that hte aforesaid Memo is purpored to be issued not only in terms of rule 25(i) of the D.A.R. but also in exercise of the powers conferred by rule 14(i) thereof. Rule 14(i) confers power on the competent authority to impose any penalty on a railway servant on the ground of conduct which has led to his conviction on criminal charge. Such action can be taken by the disciplinary authority after considering the circumstances of the case and giving opportunity to the railway servants of making a representation on the penalty proposed to be imposed. There is no denial that the applicant was convicted on a criminal charge and therefore, the disciplinary authority was competent to proceed in terms of rule 14(i) of the D.A.R. to impose penalty on the applicant. Thus, rule 14(i) was appropriate in this regard and the same has also been mentioned in the memo dated 14.3.91.

10. There is no doubt that the mention of rule 25(i) of D.A.R. in the memo dated 14.3.91 is irrelevant in the context of the action proposed tobe taken alongside rule 14(i) which is the appropriate rule in this regard. This is no doubt a procedural lacuna which the memo suffers from. We however, tested this lacuna on the touchstone of prejudice that may have been caused to the applicant as a result of the mention of rule 25(i) erroneously. We are of the view that no prejudice was

really caused to the applicant since the memo clearly stated that the authority signing the memo was proposing to proceed against the applicant on the basis of the case/ charges levelled against the applicant by the Railway Magistrate in his judgement dated 3.5.1989. This fact read with the mention of rule 14(i) of D.A.R. was sufficient to make it clear to the applicant that the action was proposed to be taken against him in pursuance of his conviction in criminal case. There was no room for any misconception for such action was being taken in the review jurisdiction. In that view of the matter, the first plea taken by the applicant that the respondent No. 4 was not competent to exercise jurisdiction under rule 25(i) of the D.AR. loses relevance tothe controversy before us.

11. A substantive ground taken by the applicant is that the respondents could not have proceeded under rule 14(i) of the D.A.R. since the applicant was released under the Probation of Offenders Act. Para 12 of the Act reads as follows:

> "12.Removal of disqualification attaching to conviction:
>
> Notwithstanding anything contained in any other law, a person found guiltyof an offence and dealt with under the provisions of section 3 or 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:
>
> Provided that nothing in this section shall apply to a person who, after release under section, is subsequently sentenced for the original offence."

The import of the aforesaid section in relation to service matters has been the subject matter of judicial scrutiny in a large number of cases. The consistent view taken by the Hon'ble Supreme Court as well as various

High Courts is that when an employee has been released under section 4 of the Probation of Offenders Act, the mere fact of his conviction would not impose any disqualification on him though the authorities would not be precluded from taking action against him on the basis of his conduct which led to his conviction.In other words, while the conviction per se will not be a foundation for imposition of penalty on the employee, the conduct which led to his conviction could be the basis of any departmental action taken against him. In this regard we may mention some of the cases which the learned cousel for the app9licant himself had relied on:

12. In the case of Om Prakash vs. Director of Postal Services reported in AIR 1973, Punjab and Haryana 1, the Punjab and Haryana High court considered the scope of section 12 of Probation of Offenders Act in relation to disciplinary proceedings against an employee and held that disciplinary proceedings cannot be called a disqualification but is at best liability incurred in certain circumstances. It has also been held that the departmental proceedings are not taken because the employee has been convicted, but these are directed against the original misconduct of the employee. Only the procedure varies in such cases where the necessity of a formal inquiry into the allegations of misconduct is rendered unnecessary on account of such an enquiry having been held by a criminal court on the basis of much higher standard of proof requisite for the conviction of an accused. Section 12 does not wash away the misconduct of the employee and no part of this section is intended to exonerate an employee of his liability to departmental punishment for misconduct.

13. The similar question also came up before Mysore High Court in the case of Gangayya Veerayya Kashimath

vs.Commissioner,Hubli and another reported in 1974(1) SLR page 281, following the ratio of the decision in Om Prakash, the Mysore High Court, interalia held that the liability to be departmentally punished for misconduct which has led tothe conviction of an employee does not attach to the conviction, but attaches to the original misconduct which constituted the offence of which the official had been convicted. Similar view was taken by Delhi High Court in the case of Som Nath vs. I.I.T. reported in 1979 (2) SLR ,48.

14. It is thus clear that the plea ofthe applicant that no action could have been taken against him on the basis of conviction in a criminal case in view of the provisions contained in section 12 of the Probation of Offenders Act is not tenable. The only restric-tion that this section imposes is that the conviction per se will not lead to imposition of penalty. This proposition also flows from the provisions contained in section 14(i) of D.A.R. In fact this also brings us tothe third plea taken by the applicant that the respondents did not consider the conduct leading to the conviction and had imposed penalty on him merely because he was convicted in a criminal case. The relevant provisions of rule 14(i)is quoted below:

> **"14.Special Procedure in certain cases:**
>
> (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)xxxxxxxxxx
>
> (iii)xxxxxxxxxxx
>
> 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 oportunity of making representation on the penalty

proposed to be imposed before only an order is made in a case falling under clause(i)"

15. It would be seen from the above that in order to proceed under rule 14(i) of D.A.R. the first pre-requisite is that the reailway servant is convicted on a criminal charge. Once this happens the disciplinary authority shall be at liberty to dispense with the procedure outlined in rules 9 to 13 of D.A.R. and impose any penalty as it deems fit. The imposition of penalty however, will be only after carefully considering the conduct which led to his conviction. In other words, it must consider whether the conduct which led to his conviction was such as would warrant imposition of penalty and if so what should be the quantum of the penalty to be imposed. For this purpose it must peruse the judgment of the criminal court and consider all the facts and circumstances of the case. The disciplinary authority should take into account the entire conduct of the employee, the gravity of the misconduct committed by him, the impact which the misconduct is likely to have on the administration andthe extenuating circumstances or redeeming features, if any. This has to be done by the disciplinary authority itself. Once such authority reaches a conclusion that the Government Servant's conduct warrants imposition of penalty it must decide what penalty should be imposed. Such penalty should obviously not be grossly excessive or out of proportion to the misconduct.

16. The learned counsel for the applicant argued that the Memo dated 14.3.91 as well as the impugned order dated 5.6.91, by which a penalty of removal was imposed, betray the lack of application of mind on the part of the disciplinary authority to the facts and circumstances of the case as well as the conduct of the applicant leading to his conviction. The applicant has stated that the article which was alleged to have been

stolen by him was worth only Rs10/- and that he had confessed his guilt only as he was assured by his counsel that if he would confess his guilt, he would be let off without any disqualification with regard to his service and he did so to escape the agony of a prolonged litigation. The Magistrate took into account the fact that this was the first offence and released him on probation. The learned counselfor the applicant emphasised that all these facts were not taken into consideration by the disciplinary authority before imposition of penalty of removal from service. He also cited the decision ofthe Ahmedabad Bench of the Tribunal in the case of Joseph Raiman vs. Union of India and others reported in (1991) 15, A.T.C., 547 in which, in a similar case where the conviction was for a theft of coal worth Rs10/- the Tribunal held the penalty of removal from service as disproportionate and quashed the order of penalty, remitted the matter back to the respondents for re-consideration of his appeal and for imposition of lesser penalty like withholding of increment etc.

17. We have already quoted the relevant portion ofthe Memo dated 14.3.91. We now quote the relevant portion ofthe impugned order of penalty dated 5.6.91:

> "I have carefully considered your representation dated 26.3.1991 in reply to the Memorandum of Show Cause Notice No. L/PC/LP/PS-28 dated 14.3.91. I do not find your representation to be satisfactory due to the following reasons:
>
> "Court [illegible]
>
> (REmoval from service)".
>
> I, therefore, hold you guilty of the charges laid as per judgment of Ist Class Judicial Magistrate,

N. Rly. dated 3.5.1989,in case No. 528/86 levelled against you. I have decided to impose upon you the penalty of removal from service. You are therefore, removed from service w.e.f. 5.6.91 (A.N.)"

18. In the Memo dated 14.3.91 there is only a bald recital that the circumstances of the case/charges levelled against him have been carefully considered by the disciplinary authority. There is no analysis of the various circumstances attending upon the conviction of the applicant which would make it evident that the disciplinary authority had taken all relevant aspects ofthe case into consideration before proposing the penalty of dismissal from service. Also in the impugned order dated 5.6.91, all that has been stated is that the disciplinary authority did not find the applicant's representation to be satisfactory due to the fact that according to the court,the applicnt was guilty and therefore, he was being removed from service.

19. From the aforesaaid, we get an impression that the disciplinary authoriyt was swayed by the fact of conviction of the applicant not only in initiating action under rule 14(i) of D.A.R. but also in deciding the quantum of pentl/ Though no doubt, in the order on the review petition, the reviewing authority appears to have considred the matter in some detail, the fact remains that the basic order of the disciplinary authority suffers from a serious lacuna, viz, lack of consideration of the circumstances attending upon the conviction of the applicant and this lacuna cannot be cured by a subsequent analysis, however detailed, the same be, of the facts and circumstances of the case by the appellate or the reviewing authority. The impugned order dated 5.6.91 is therefore,not sustainable in law which has already

been discussed (supra). The learned counsel for the respondents argued that the very fact that the disicplinary authority had initially proposed the penalty of dismissal from service and actually imposed the penalty of removal from service is indicative of the application of mind to the facts and circumstances of the case in deciding the quantum of penalty. We are unable to accept this argument and in any case there is no evidence of consideration of the facts and circumstances in deciding to proceed against the applicant under rule 14(i) of D.A.R.

20. The learned cousel for the applicant also raised a plea that even if it was assumed that the respondents have correctly invoked the provisions of rule 14(i) of D.A.R. in imposing the penalty on the applicant, the penalty itself was grossly disproportionate to the misconduct and therefore, should have been substituted by a lesser penalty. This however, is an area which we do not want to trench upon and we leave the matter to be decided by the competent authority.

21. In view of the foregoing, we quash the order dated 5.6.91 issued by the disciplinary authority and consequently, also the appellate order dated 6.8.91 and the review order dated 23.8.91. The applicant shall be reinstated in service forthwith in the same grade in which he was working at the time of removal from service. The respondents however, shallbe at liberty to consider all the facts and circumstances of the case in the manner indicated in the foregoing paragraphs and pass appropriate orders of penalty after issuing a show cause notice proposing penalty. Applicant shall not be entitled to any back wages. The parties shall bear their own costs.

MEMBER(J) MEMBER(A)

Lucknow;Dated: 7/8/97

Shakeel/