

CENTRAL ADMINISTRATIVE TRIBUNAL, LUCKNOW BENCH

Lucknow this the day of Sept., 94.

O.A. No. 268/92

HON. MR. D.C. VERMA, J.M.

HON. MR. S. DAYAL, A.M.

Chand Miyan, aged about 39 years son of Sri Ahmad Jan, resident of House No. 109, Hata Suleman Qadar, Maulviganj, Lucknow.

Applicant

By Advocate Shri Vimal Kumar and Km. Vishwa Mohini.

versus

1. Director General, C.S.I.R., Rafi Marg, New Delhi.
2. Director, C.D.R.I., Lucknow.
3. Dr. S.K. Basu Scientist F. Enquiry Officer, C.D.R.I., Lucknow.

Respondents.

By Advocate Shri Harihar Saran.

O R D E R

By S. Dayal, Member(A)

This application has been filed on 9.6.92 by Shri Chand Miyan, who was working as a 'Head' Mechanic in the Central Drug Research Institute, Lucknow, prior to his removal, seeking directions in the form of a writ of certiorari to his employers who are the Director General of C.S.I.R. and the Director, C.D.R.I., Lucknow to the effect that enquiry report dated 5.4.90, impugned punishment order dated 30.7.91 and the order dated 9.4.92 in appeal should be quashed, declare the applicant to be in continuous service

from 1.11.83 to 30.3.88 and thereafter allow all the consequential benefits including promotion in service on his reinstatement and award the costs of the application.

2. The facts in brief as contained in the application are that the applicant applied for leave on 28.2.83 on the ground that his uncle had fallen ill in Saudi Arabia and that he was required there to take care of him. He applied for further extension of leave for the same purpose upto 11.6.83 and yet another extension upto 31.10.83. These three applications are claimed to have been sanctioned on 5.4.83, 24.5.83 and 6.8.83 respectively. Thereafter, the applicant claims that he was diagnosed to have gastric ulcer and was advised bed rest for six months and the applicant made the application for leave on medical grounds, and the period of bed rest was extended by six and three months by a certificate dated 1.6.84 for 1 year by certificate dated 1.3.85 and for six months nine months, 18 months, 6 months by a certificate dated 1.12.87. The applicant claims to have sent several leave applications by post attaching medical certificates and to have received some communications regarding medical leave in the beginning but afterwards did not get any reply. Since he did not get any order of refusal of leave, he presumed that his leave applications were accepted and allowed. He returned to India on receiving news of his daughter's sickness and forgot to obtain a fitness certificate from his doctor in Saudi Arabia and later obtained from Dr. D.P.Banerji in

India. He submitted his joining report on 21.3.88. He admits to have received a communication from respondent No. 2 that he had been taken back on duty without any prejudice to disciplinary proceedings.

3. The applicant was served with a charge sheet on 6.6.88 levelling charges of unauthorised absence from 1.11.83 to 20.3.88. An enquiry officer was appointed on denial of charges by the applicant. The enquiry officer conducted the enquiry from 23.10.89 to 12.12.89. He gave an enquiry report which was served on the applicant on 17.6.90. The applicant submitted his representation which was rejected and the order of removal was passed on 30.7.91. The applicant filed an appeal on 7.9.91 but since no reply came, he filed an application under section 19 of the Administrative Tribunals Act, 1985, which was disposed of with a direction on 25.10.91, that the appeal may be disposed of by a speaking order within three months of the receipt of the order. The appeal was not disposed of within three months and the applicant filed Contempt petition while the respondents sought for extension of time. The appeal was finally disposed of on 9.4.92 and the order was received by the applicant on 18.4.92.

4. The grounds of seeking relief given in the application are non examination of the witnesses named in Annexure 4 of the charge sheet and thereby violating Rule 14(iv) of the C.C.S. (CCA) Rules, the punishment of removal has been awarded without any enquiry and in the absence of

any material or evidence to hold the applicant guilty of unauthorised absence, that the enquiry report is based on surmises and conjectures that the letter sent to him in Saudi Arabia by the employer could not have been assumed to have been served on him as it was sent back with the endorsement of insufficiency of address, that the claim of the applicant that he had sent letters could not be disbelieved in the absence of statements of the relevant witness-es, that the burden of proof would shift to the applicant only if satisfactory evidence of charge was given by the employers, that the respondent No.2 failed to apply his mind to decide whether or not the charges against the applicant had been proved, that the applicant was under bonafide impression that his applications had been sanctioned and that the order in appeal dated 9.4.1992 was passed without considering the principles of law propounded by the Hon'ble Supreme Court of India and is not a speaking order, thereby violates the directions given by the Tribunal.

5. Km. Vishwa Mohini and Shri Vimal Kumar were heard on behalf of the applicant. They reiterated the grounds put forth in the Original Application and cited case law in favour of the grounds. Shri Harihar Saran argued on behalf of the respondents in which he reiterated the averments made in the written reply of the respondents.

6. Another ground of non-adherence to the procedure contained in Rule 14 of the C.C.S.(CCA) Rules advanced on behalf of the applicant, appears to have been based on some averments contained in para 4 of the application. These averments are that the enquiry Officer refused to adjourn the proceedings inspite of oral and written request for adjournment on 23.1.89, acceptance of thirteen documents on 23.10.89 without their substantiation by the witnesses named in Annexure 4 to the charge sheet, the examination of the applicant on 23.1.89 with respect to the charges levelled against him when he was unprepared, the failure of the presenting Officer when asked by the defence assistant to put up his case and produce witnesses on 9.11.89, the conduct of enquiry

through questions to the presenting Officer and the defence assistant including the question on 12.12.8, regarding previous leave sanctioned by the respondents, non-discharge of burden of proof to show that the applications accompanied by medical certificates had not been received, lack of further efforts on the part of the respondents to send further communication to his permanent address in India or temporary address in Saudi Arabia, basing the conclusions of enquiry on letter of refusal of leave by the respondents, sent by them to his address in Saudi Arabia, returned unserved taking cognizance of his return before the completion of the period of alleged bed rest, basing the conclusions of enquiry on unproved documentary evidence and surmises and conjectures and passage of the order of removal without application of mind.

7. The legal representatives of the applicant have urged that non-examination of witnesses named by the respondents in Annexure-4 to the charge-sheet amounts to violation of Rule 14(14) of the C.C.S. (CCA) Rules and shows that enquiry was not conducted in accordance with the procedure laid down in the rule. It is urged that his claim that his applications with medical certificates were sent, cannot be disbelieved in the absence of statements of these four witnesses. These grounds are not valid. The respondents have the right to submit whatever evidence they want to submit for the consideration of the enquiry Officer. It is not compulsory for them to produce all the evidence which they might have indicated in the annexures attached to the charge-sheet. The enquiry Officer will base his conclusions on the evidence received by him in the enquiry. The issues in this case are such which will have to be proved by documentary evidence. The oral averments are bound to have little value in view of the circumstances. The witnesses cited could not have thrown any light on the documents which are enumerated in Annexure III of the memorandum of charges. Thus, the witnesses were not material witnesses from the point of view of the respondents. The emphasis placed on behalf of the applicant on examination of these witnesses indicates that the applicant considered these witnesses material

from his point of view . If it was so, the applicant could have named them as defence witnesses and obtained their statements. Therefore, their non-examination by the respondents does not lead to any violation of principles of natural justice . Rule 14 lays down the order in which departmental enquiry will take place . However, it does not make it compulsory that even if a charge can be proved by documentary evidence, it will be necessary to include oral evidence in all cases in which a departmental enquiry for any of the major penalties is held . The citations made by the legal representative of the applicant of (1991) 17 Administrative Tribunal Cases 596, 1993 A.T.C.43, 1991 ATC 36, 1992 ATC 659, only talk about non-examination of material witnesses and are inapplicable.

8. The documentary evidence relied upon by the respondents in this case was mentioned in annexure 4 to the memorandum of charge. The introduction or validity of such documents has not been challenged by the applicant in his reply to the memorandum of charge, nor has it been challenged in his representation against the enquiry report nor in his appeal against the order passed by the disciplinary authority. It was challenged first time as unproved in the application under section 19 of the Administrative Tribunals Act. The documents mentioned in Annexure 4 of the memorandum of charge are communications made by the applicant himself by way of his applications dated 28.2.83, 9.3.83, 10.4.83, nil (but received on 13.6.83), 22.7.83 and 13.8.83 and his joining report dated 21.3.88 . The other six documents are office memoranda of the institute which have been issued to Shri Chand Miyan himself by way of sanction of leave and one of which was sent to Shri Chand Miyan at his Saudi Arabia but was returned undelivered as having insufficient address. The validity of these documents has also not been challenged by the applicant. Therefore, the contention that the documents were unproved is not tenable .

9. The non-adjournment of proceedings on 23.10.89 inspite of admission made on behalf of the respondents in the written reply that the applicant had met the enquiry Officer on 23.10.89 at 5.30 P.M. was a strict measure. However, it is understandable in view of the

fact that the applicant was asked to make this request on 23.10.89 at the time of opening of the enquiry but the applicant chose to absent himself. As the only business transacted on that day was production of documents mentioned in Annexure 4 of the memorandum of charge by the Presenting Officer, no prejudice was caused to the case of the applicant as he had 24th October, 9th and 10th November and 11th and 12th December to challenge the documents presented and produce his own evidence. Similarly, non-adjournment of proceedings on 24.10.89 due to absence of the defence assistant has also not caused any prejudice to the reasonable opportunity to defend himself because the only business transacted was denial of the charges by the applicant for which the presence of defence assistant was not required.

10. The objection that the enquiry officer put a number of questions to the presenting officer and defence assistant does not cause prejudice to the opportunity of the applicant to defend himself. Since in this case, the evidence produced by both the parties was in the form of the documents, it is not surprising that the enquiry officer put such questions in order to understand their true import. The question regarding previous leave sanctioned by the respondent was also relevant in view of the repeat of the same in the event which is the subject matter of the charge against the applicant. This was very much within the purview of the enquiry because the statement of documents (Annexure 4, cites the documents about previous leave also.

11. The employer has to prove the charge against the delinquent in a domestic enquiry. In this case the employer has shown that the applicant had taken leave and left for Saudi Arabia and thereafter sent four applications by registered post which were received by him. Thereafter, no applications were received and the period after 31.10.89 became unauthorised absence for which a letter dated 6.1.84 was sent to the applicant at the address given by him in his last application dated 6.8.80 but it was sent back unserved on the ground that the address was insufficient. The applicant could not be contacted thereafter as no communications were received from him and his address

in Saudi Arabia was not known. The documents produced and the charge sheet make this position very clear. It is also clear from the averments made by the applicant himself that he was grossly negligent in changing the mode of sending his applications, in furnishing his incomplete address and in not ascertaining whether any leave was sanctioned to him after 31.10.83 for a period of nearly four and a half years. In view of his negligence, it was for the applicant to prove that he had sent the applications and made all efforts to ensure that the leave was sanctioned to him. But he has produced no evidence except the Xeroxed and undated copies for part of the period of leave on which incomplete address of the respondents was transcribed. No proof is given that these copies or their originals were ever sent. The applicant's insistence without proving that the letters were ever sent, that the respondents should prove that they ^{has} did not receive them, as the burden of proof shifted to the respondents, cannot be accepted. The legal representatives of the applicant have advanced the argument that since the letter dated 6.1.84 was not received by the applicant, there was no wilful disobedience of notice and, therefore, there was no wilful absence from duty. Since it was not a wilful absence from duty, it should be regularised by grant of half pay leave and extraordinary leave in accordance with Rule 25 of CCS(Leave) Rules. It can be seen that the circumstances of this case do not justify the acceptance of this argument. Another argument advanced by the legal representatives is that the respondents should have started departmental enquiry immediately after 1.11.83. However, it is difficult to see how the respondents could have served even a charge-sheet on the applicant in the absence of his complete address till he returned. The citation of (1992) 15 Administrative Tribunal Cases 815 is, therefore, inapplicable in this case.

12. The applicant has stated that the registered letter dated 6.1.84 which was returned unserved could not be taken to have been served on him. The enquiry officer has dealt with it in fourth paragraph of his report but has not at any place assumed service.

It is only in the order of punishment made by the disciplinary authority that this is assumed to have been served upon the applicant. It is not possible to agree with this view of the disciplinary authority. However, the letter is important in showing that the address given by the applicant in his application dated 6.8.85 was incomplete and it also shows that there was no communication from the applicant till the letter was sent. The applicant has alleged that no effort was made by the employer to trace out the applicant after this. However, the applicant himself was responsible for this as he had not furnished his proper address to the respondents.

13. The applicant's objection to the cognizance taken by the enquiry Officer of his return before the completion of period of bed rest claimed to have been prescribed by the physician is not proper. In such a case the conduct of the applicant has become of much greater significance and taking cognizance of it is consistent with the principle of evidence.

14. It has been contended by the legal representatives of the applicant that the absence of the applicant without leave will not come within the definition of misconduct (1992 ATC 438). However, the citation given by the legal representatives of the applicants shows that misconduct includes improper conduct. It was further argued that if the absence is due to compelling circumstances, it cannot be considered as misconduct. However, the citations (1989) 9 Administrative Tribunal Cases 26 and (1988) 6 Administrative Tribunal Cases 11 have facts different from those of the present case as in both the cases cited the applicants had taken all precautions to obtain leave, indicate period of absence and the complications arises because of the prejudiced actions of the superior Officers. This is not the case here. The applicant had joined the organisation on probation in 1979 and started working after probation from 1980 but remained mostly on leave from June, 1981 onwards as indicated in the report of the enquiry Officer. He resorted to proceeding to a foreign country and applying for extension of leave while in the foreign country, more than once as has been indicated in the report of the enquiry Officer. The other

circumstances of allegedly sending his applications by simple post and continuing to do so without receiving any response while all his registered letters had brought him response and that too for a period of more than four years as well as returning during the period of advised bed rest according to applicant's own admission are relevant circumstances to show misconduct on the part of the applicant.

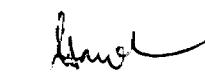
15. The applicant has objected to the mention of the past conduct in the report of the enquiry Officer. In this connection, the first two documents listed in annexure 4 to the memo of charge show that the applicant was aware in advance that the instance of past conduct will be taken into account. However, the findings of punishment are based on the absence from 1.11.83 to 20.3.88 and the past conduct only showed that he had repeated unauthorized absence. Therefore, no prejudice is caused by it to the applicant.

16. The legal representatives of the applicant have argued that the appellate authority did not observe the obligations under Rule 27(2) of the CCS(CCA) Rules. The appellate authority has passed a detailed order and has dealt with the issues raised by the applicant in his appeal. The appellate authority has covered all the three requirements of Rule 27(2), while dealing with the representation of the applicant in appeal. The legal representatives have also cited the case 1986 ATC 47 (Ram Chandra Vs. J.O.I.) and argued that failure to provide personal hearing by appellate authority vitiated the appellate order. The ratio decidendi of the judgment is that the appellate authority must give opportunity to the delinquent to put forward his case and pass a reasoned order after taking the delinquent's case into consideration. The requirement of personal hearing appears to be more by way of a dictate which is specific to the case and would not apply to the applicant whose appeal memorandum has been considered in detail and replied.

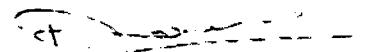
17. The last issue raised by the applicant is that the penalty is highly excessive for simple overstayal of leave due to illness. The applicant has not been able to establish that he had sent applications

for grant of leave alongwith medical certificates for the period from 1.11.83 to 24.3.88 . He has also not been able to establish that he was sick for this entire duration. The charge of wilful absence from duty is thus established. This conduct of the applicant after relatively short period of duty after joining service increased the gravity . The fact that he had done it in the past also as is clear from the first two documents listed in Annexure 4 to the charge-sheet makes his conduct all the more reprehensible.

18. The application, therefore, fails and is rejected.


(S. Dayal)

Member(A)


(D.C. Verma) 30/9/94

Member (J)