CENTRAL ADMINISTRATIVE TRIBUNAL
PATNA BENCH, PATNA
O.A. No. 195 of 2006
Dated : 6th ~~Decem~~ January ~~November~~, 2012

CORAM

Hon'ble Mr. Naresh Gupta, Member [Administrative]
Hon'ble Ms. Bidisha Banerjee, Member [Judicial]

Bijendra Prasad son of Sri Brahmdeo Mahto, resident of Village – Dhankob, P.S. Goshbari, District – Patna.

.... Applicant

By Advocate : Shri Gautam Bose

Vrs.

1. The Union of India through its Secretary, Post and Telegraph Deptt. Govt. of India, New Delhi.

2. The Chief Post Master General, Bihar, Patna.

3. The Director, Postal Services, [H.Q.], Patna.

4. The Superintendent of Post Offices, Nalanda Division, Biharsharif.

5. The Assistant Superintendent of Post Office, Head Quarter, Nalanda. [Then enquiry officer of the Departmental Enquiry].

6. The Assistant Superintendent of Post Office, Barh Sub-Division, Barh.
[Presenting Officer of Departmental Enquiry].

.... Respondents.

By Advocate : Shri R.K.Choubey, ASC.

ORDER

Bidisha Banerjee, Member [Judicial] :- In the OA, the applicant has prayed for the following reliefs :

> "8[1] For quashing the order dated 28.10.1999 [Annexure-1] dismissing the applicant from service and debarring from Govt. employment in future and also for quashing of the order dated 12.04.2005 [Annexure-1/1] dismissed the appeal.
>
> 8[II] The respondents may be directed to reinstate the applicant in service from the date of dismissal i.e., from 28.10.1999 and pay the full benefits with seniority and other benefits available to him."

2. The case of the applicant in short is that, while working as EDBPM, Dhanakove B.O., he was put off duty and was charge-sheeted for alleged mis-

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appropriation of funds under Rule 8 of EDA [Conduct & Service] Rules, 1964. Simultaneously a criminal case was also filed against him.

3. On 28.10.1999, the departmental proceedings culminated into an order of dismissal from service i.e. the gravest form of penalty inflicted by the disciplinary authority, but in an ex-parte proceedings.

4. In the criminal case, in 2002 the learned Court of Judicial Magistrate, Barh acquitted him on benefit of doubt.

5. On 08.01.2003 and 22.01.2003, the applicant filed representations for reconsideration, on his acquittal, to the Chief Postmaster General and Superintendent of Post Offices respectively.

6. The applicant had earlier filed OA No. 142 of 2004 challenging the dismissal order dated 28.10.1999 and agitating non consideration of his representations and sought for quashing the penalty order on the basis of his acquittal by Criminal Court. Without going into merits of the case, the earlier OA was disposed of on 10.12.2004 by this Court with a direction upon the respondents to consider the representation of the applicant already pending with them and also to consider the appeal which would be filed by the applicant to the appropriate authority [Director of Postal Services] within a period of one month. The respondent was directed to dispose of both the representations as well as the appeal within a period of four months from the date of receipt/production of a copy of the order.

7. The applicant in compliance of the order dated 10.12.2004 filed an appeal before the Director, Postal Services [respondent no.3] which was dismissed by affirming the order of punishment, which according to the applicant, is without giving any application of judicial mind to the fact and circumstances of the case under which the applicant has not been allowed to place his defence.

8. The learned counsel for the applicant Shri Gautam Bose has strenuously argued that law is now well settled that if a person is tried departmentally and by

a criminal court simultaneously, and if no charges are proved in the criminal trial there should not be any occasion for keeping him out of service departmentally for the same charges. He has placed reliance upon the following decisions of the Hon'ble Apex Court :

[i] Capt. M. Paul Anthony vs. State of A.P. reported in 1999 SCC [Vol. 3] page 679;

[ii] G.M.Tank vs. State of Gujarat & Another reported in AIR 2006 SC 2129; and

[iii] a decision of Hon'ble Patna High Court in Takur Ram vs. State of Bihar & Ors. Reported in 1991 [2] PLJR 324.

9. Per contra, the respondents have submitted that the instant application is based on erroneous and misleading facts hence, fit to be dismissed with cost. The respondents have further submitted that the applicant was involved in SB fraud case in which total amount misappropriated was Rs. 2,45,190.25. The applicant was proceeded against under Rule 8 of EDA's [Conduct and Service] Rules, 1964 and in departmental enquiry, the applicant was awarded the punishment of dismissal of service, being appropriate and commensurate with the gravity of charges. As such , the application is fit to be dismissed having no merit. It is also denied that the departmental enquiry was concluded ex-parte without notice to the applicant. It is stated that the applicant was given sufficient opportunity to defend his case in best possible way in the following manner :

"He was intimated for personal hearing on 05.04.1999 under Muzaffarpur R.L. No. 4208 dated 08.03.1999, which was returned undelivered with the remarks that the charged official had gone out without address. The registered letter containing the notice of hearing was delivered to the applicant but he did not turn up for hearing on 02.06.1999. Before proceeding with the enquiry ex-parte, the applicant was served a copy of the proposal through Mokama R.L. No. 1122 dated 02.06.1999, which was also received back refused. The applicant was also issued a notice for regular hearing from 19.07.1999 to 21.07.1999 under registered post which was also received back as refused. A copy of the enquiry report was

sent to the applicant on 07.09.1999 for submission of his final representation but the registered cover this time was returned undelivered with remarks refused." Thus, according to the respondents, there was no violation of natural justice and the order of dismissal is neither bad in law nor on facts. The order passed in appeal is also not contrary to the principle of departmental enquiry and violation of Article 311[2] of the Constitution of India as alleged. It is further submitted and stated that the applicant has not been acquitted on the merit of the case rather only on benefit of doubt in Barh Court GR Case No. 533/94 dated 27.2.2002. Moreover, it has no bearing on the departmental action as the SB/TD account no. in which fraud was committed, mentioned in departmental proceedings were different than those mentioned in F.I.R. and the charges levelled in departmental proceedings and F.I.R. are not the same rather they are different. In departmental proceedings, there is scope of preponderance of evidence and it is different in someway with reference to criminal case lodged against the applicant in a Court of law.

10. In the rejoinder, the applicant has specifically dealt with the contention of respondents on proper service of notices. It is alleged that the Postman himself wrote on the registered letter 'refused' due to extraneous consideration. It is further stated that it was the duty of the respondents to give notice to the applicant by publishing notice through newspaper, if registered letter were returned undelivered. The applicant has submitted that "reasonable opportunity to defend his case has not been given to the applicant, which is against the principle of natural justice, therefore, the finding of the Enquiry Officer and punishment thereon, are vitiated ~~vide order passed~~ in view of law laid down in **1991 [2] PLJR 324 Thakur Ram vs. state of Bihar"**. The applicant has also submitted that the Criminal Case vide Barh Court G.R. Case No. 533/04 was lodged against him in which he was acquitted by Sri R.J.Pal, J.M., Ist Class, Barh, Patna on 27.02.2002 on the ground of not proving the guilt. Therefore, he is entitled for reinstatement. The applicant

has further submitted that the proceeding has been concluded ex-parte and no opportunity to defend has been given to him, therefore, punishment of dismissal is not commensurate to the offence.

11. The contentions of applicant can be summarized as under :

    [i] Acquittal in criminal case warrants setting aside of penalty order; and

    [ii] The applicant was not afforded adequate opportunity to meet the charges, which vitiates the entire proceedings.

12. To justify the first contention, reliance has been placed upon Apex Courts' decision of **Capt. M. Paul Anthony vs. Bharat Gold Mines Ltd. & Anr. and G.M.Tank vs. State of Gujarat** [supra]. In Capt. M. Paul Anthony's case, it has been held that "where the departmental proceedings and criminal case are based on identical and similar set of facts and the charges are also the same and where the same witnesses were examined in the criminal case on the basis of which the criminal court acquitted on the ground that the prosecution has not proved the guilt alleged beyond reasonable doubt resulting in acquittal, it would not only be unjust and unfair but oppressive to allow the findings recorded in the departmental proceedings against the employee to stand. The Court clarified the law by observing that the distinction which is usually between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in such a case".

The respondents' counsel has submitted that the criminal case and the departmental proceedings were not grounded on the same facts, charges or evidence, hence acquittal in criminal case did not warrant setting aside of the penalty oder. They had, however, refrained from giving the details of the criminal case. On the contrary, the applicant at para 5 of the rejoinder, has stated that : "on the same set of facts made in departmental proceedings Criminal Case was lodged against the applicant in which the applicant was acquitted by the Judicial Magistrate Ist Class, Barh, Patna on 27.02.2002 on the ground of not proving the guilt. Therefore, the applicant is entitled for reinstatement.

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It is, thus, not clear whether the criminal case and the departmental proceedings against the applicant are grounded on the same set of facts, charges, circumstances and evidence, hence the cited decision cannot come to the aide of the applicant.

14. On the question whether acquittal in criminal case warrants setting aside of the penalty order. in **G.M.Tank vs. State of Gujrat & Anr.** [supra], the Hon'ble Apex Court, while relying upon Capt. M. Paul [supra] held as follows :-

> "In our opinion, such facts and evidence in the department as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though finding recorded in the domestic enquiry was found to be valid by the Courts below, when there was an honourable acquittal of the employee during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in Paul Anthony's case [supra] will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed."

Apart from being grounded on some set of facts, evidences in both departmental as well as criminal proceedings, it was a case of acquittal on merit, whereas in the instant case the acquittal was not on "merit" but on "benefit of doubt". Mr. Bose, learned counsel for the applicant has tried to persuade this Court to believe that every acquittal on "merit" is on "benefit of doubt" which is quite otherwise. Hence, the ratio of G.M. Tank is not applicable here.

15. Law is well settled : [1] Since criminal and disciplinary proceedings operate in different fields, there can be no bar against initiation of disciplinary proceedings even if a person is acquitted in a criminal trial; **[2007] 13 SCC 251** [2] Acquittal in criminal case does not ipso facto absolve the charged employee from the liability under disciplinary jurisdiction of the employer. [2005] 7 SCC 704; and [3] Only where the Departmental and Criminal proceedings are based on identical and similar set of facts and the charges are also same, and same

evidence and same witnesses are examined in the criminal case and the criminal court 'honourably' acquitted the employee, it would not only be unjust and unfair but oppressive to allow the findings recorded in the departmental proceedings against an employee to stand [Capt. M. Paul Anthony's case [1999] 3 SCC 679 and G.M.Tank's case [supra].

16. To justify the second contention, the applicant's counsel placed reliance upon **Thakur Ram vs. The State of Bihar and Ors.** [supra] which dealt with the issue of service of notice upon the Government servant in disciplinary proceedings; it was observed that – [2]. ...... from the order it appears that "the notice was sent under registered to permanent address of proceedee cover and the same was returned back with the Peon's report that the petitioner was not residing at his village house. It has been submitted on behalf of the State that since the petitioner has left his permanent abode without leaving any address, in that event, the State was helpless and nothing could have been done on behalf of the State for serving the notice upon him. [3] In our view , the submissions is fallacious, is well settled under general law that if service is not effected either by ordinary mode or by registered post, in that event, steps could have been taken by the State for substituted service, that is, by publication of notice in the newspaper. The provision of Order V Rule 19A of the Code of Civil Procedure does not apply to departmental proceeding, but the principle enumerated therein surely does apply to each and every proceeding. Undisputedly, no step has been taken for substituted service. In view of the aforesaid fact, we have no option but to hold that no reasonable opportunity was afforded to the petitioner in the disciplinary proceeding." The finding of the Inquiry Officer, the order of the disciplinary authority and the order of the appellate authority were thus quashed.

17. In the instant case, the applicant has tried to impress upon that the proceeding was conducted ex parte and hence the entire DA proceedings got vitiated. The respondents, on the contrary, have detailed at para 7 of their written

statement, narrating how the department had tried to serve notice to the applicant as already discussed hereinabove. According to them, there was no violation of principles of natural justice. However, admittedly the applicant did not receive notice of enquiry and enquiry was held ex parte.

In para 4 of the rejoinder, the allegation has been adequately met with. It is submitted that "the Postman himself wrote on the registered letter 'refused' due to extraneous consideration. It was the duty of the respondents to give notice to the applicant through publishing notice through newspaper etc. if registered letter was returned unserved." However, it seems that no service was ever got witnessed.

18. In Thakur Ram, the Hon'ble High Court at Patna hold that the service of notice by registered post was not sufficient and that what was required was following the procedure of substituted service as laid down in Code of Civil Procedure i.e. by publication of notice in a newspaper and where no such steps are taken, the finding of the Enquiry Officer and the DA are liable to be quashed. It appears to be too far fetched , that every time an employee does not attend the enquiry, notice have to be published in newspaper. It seems what was intended to by the Hon'ble High Court was that notice by registered post was not sufficient. The procedure of substituted service as provided under Order V of the Code of Civil Procedure ought to have been followed.

19. ~~The~~ procedure of service envisaged under Code of Civil Procedure which is indicated in Thakur Ram, under **Order 5 Rule 17 ~~is~~**- "Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued,

with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person [if any] by whom the house was identified and in whose presence the copy was affixed."

And, under Rule 18 - "The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person [if any] identifying the person served and witnessing the delivery or tender of the summons."

Admittedly, the service was not done in accordance with law and it cannot be said that the notices of enquiry or ex parte enquiry ever reached the applicant.

20. Section 27 of General Clauses Act deals with "Meaning of service by post" and lays down -

> Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service s hall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

21. However, presumption of delivery by registered post is a rebuttal one, Section 28 of the General Clauses Act, makes it clear that such presumption is not obligatory but optional under section 114 [e] of the Evidence Act 1872. This was best evidenced in the Calcutta High Court case of Manoranjan Dasgupta vs. Suchitra Ganguly, where one copy of ejection notice was sent to defendant's address at the suit premises which came back with the postal endorsement "refused". Another copy was sent to the defendant's place of business and the same was also returned with the postal endorsement "the door of the office was always closed". In the said context and in view of defendant's categorical testimony that the notice had never been tendered to him and the fact t hat the postal peon had never been examined to prove such tender, it was held that the Court below rightly declined to raise a presumption of service and held instead that such presumption stood rebutted."

22. In **Union of India & Ors. vs. Dinanath Shantaram Kerekar & others**

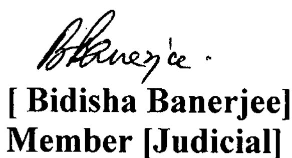
[1998 Supreme Court Cases (L&S) 1837] : The Hon'ble Apex Court dealt with a similar issue. It was held :

> "10. Where the disciplinary proceedings are intended to be initiated by issuing a charge-sheet, its actual service is essential as the person to whom the charge-sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also ,when the show cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "communication" cannot be invoked and "actual service" must be proved and established. It has already been found that neither the charge-sheet nor the show cause notice w ere ever served upon the original respondent, Dainanath Shantaram Karekar. Consequently, the entire proceedings were vitiated."

23. It is thus, apparent that service of charge-sheet, notices and show cause is not done in accordance with law, as proper procedure was not followed.

24. We have no hesitation to hold that the service of charge-sheet and show cause notice is insufficient. Consequently, the entire enquiry proceedings against the applicant are vitiated.

25. As a result, the entire DA proceedings including the penalty order are quashed. The applicant shall accordingly be reinstated. However, the respondents shall be at liberty to proceed afresh in departmental proceedings in accordance with law after giving an opportunity of hearing to the applicant. No order as to costs.



[Bidisha Banerjee]
Member [Judicial]

[Naresh Gupta]
Member [Administrative]

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