

**CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI**

ORIGINAL APPLICATION NO. : 43/96

Date of Decision : 12th December 2002

R.S.Tanwar Applicant

Smt. N. V. Masurkar Advocate for the
Applicant.

VERSUS

Union of India & Ors. Respondents

Advocate for the
Respondents

CORAM :

The Hon'ble Shri S.L.Jain, Member (J)

The Hon'ble Smt. Shanta Shastray, Member (A)

(i) To be referred to the reporter or not ? yes

(ii) Whether it needs to be circulated to other Benches of the Tribunal ? no

(iii) Library yes

(S.L.JAIN)
MEMBER (J)

mrj.

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION NO. : 43\66

Date of Despatch :

Applicant : R.S.Tiwari
Advocate for the
Applicant : G.M.N.V.Mandalkar

REVERSE
Respondent : Union of India & Ors.
Advocate for the
Respondent : Shri R.K.Sepetta

COURT :

The Hon'ble Shri S.L.T.Jain, Member (1)
The Hon'ble Shri G.P.Saxena, Member (A)

(i) To be referred to the respondent or not ? (i)

Member if needs to be circumjested to open
Bench of the Tribunal ? (ii)

(iii) If so, 4.

(a) T.JAIN
MEMBER (1)

W.D.

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH, MUMBAI

OA.NO.43/96

Dated this the 12th day of Dec., 2002.

CORAM : Hon'ble Shri S.L.Jain, Member (J)

Hon'ble Smt.Shanta Shastry, Member (A)

Radheshyam Tanwar,
Block No.96, Kher Wadi,
Bandra (E), Mumbai.

...Applicant

By Advocate Smt.N.V.Masurkar

vs.

1. Union of India
through the Secretary,
Ministry of Defence,
South Block, New Delhi.
2. The Group Captain,
Commanding Officer,
Air Force Station,
Cotton Green, Mumbai.
3. Air Vice Marshal
Headquarters, South Western
Air Command, Indian Air Force
Ratanada, Jodhpur.
4. Air Marshal
Air Headquarters (VB)
DHQ Post Office,
New Delhi.
5. Mr.Bapat,
Wing Commander,
Air Force Station,
Cotton Green,
Mumbai.

...Respondents

By Advocate Shri R.K.Shetty

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O R D E R

{Per : Shri S.L.Jain, Member (J)}

This is an application under Section 19 of the Administrative Tribunals Act, 1985 to quash and set aside, the impugned order of deemed suspension, dismissal, appellate authority, Revisional authority and compulsory retirement dated 31.1.1992, 21.2.1992, 17.8.1992, 29.3.1995 and 5.9.1995 respectively with direction to the respondents to pay full back wages with continuity in service and all consequential benefits w.e.f. 21.2.1992 and for the period of deemed suspension full back wages, i.e. w.e.f. 29.3.1989 to 21.2.1992.

2. The applicant joined the services on 8.8.1968 and w.e.f. 28.8.1968 as a Civilian Chawkidar at Bombay, permanently working with the Respondent No.2. The applicant could not attend his duties, as he claims to be bedridden from 12.1.1982 to 16.1.1983 and was under treatment of Dr.Bijur, Bandra, Bombay. He could not apply for leave immediately but applied for the same on medical ground to Shri Harpal Singh vide letter dated 6.2.1982 by Registered Post but the postal authority returned the same to the applicant with the remark "not claimed". The applicant further claimed that his mother also fell sick and she was also under treatment. The applicant is the only son to look after her. He was completely out of sense for a long period. He received a letter dated 3.3.1982 signed by Shri G.D.Bamboat, Office Incharge calling him to report for duty within 5 days from the receipt of the said letter but could not comply with the same.

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3. On 29.10.1982 he received a Memorandum No.Bom/C-3815/68/PC regarding his absence from duty. He resumed his duties on 17.1.1983, worked w.e.f. 17.1.1983 to 2.6.1983 but his earned wages were also not paid. An enquiry was conducted against the applicant in respect of the charges levelled against him and thereafter the services of the applicant were terminated w.e.f. 3.6.1983. Being aggrieved by the said order, the applicant preferred an appeal dated 7.12.1983 to the appellate authority which was allowed vide order No.CAC/C3007/34/PC dated 2.2.1985 and held that "the disciplinary proceedings cannot be held as per the Ministry of Defence Order No.5(8)/79/D(1ab) dated 12.11.1979 and have not been finalised under Rule 14 and 15 of the CCS (CCA) Rules, the case was remitted to the Station Commander, AF station for initiation of the proceedings de novo by the authority vide order dated 2.2.1985.

4. The applicant reported to his Unit as per the instructions in letter under reference No.CAC/3007/34, dated 2.2.1985 but the Respondent No.2 did not allow him to resume his duties. Pursuant to the order passed in appeal, Shri K.R.Dutton, Group Captain, Station Commander, Mumbai vide order dated 11.7.1985 appointed Shri M.R.Bapat as Enquiry Officer and Shri K.R.Ratnaswami as Presenting Officer but no enquiry proceedings were held till 24.9.1986 and the applicant was also not allowed to resume his duties. He was also not paid the earned wages for the period 17.1.1983 to 2.6.1983.

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5. The applicant filed OA.No.321/86 seeking payment with direction to resume duties which was disposed of 30.1.1987 with direction to the respondents to arrange to settle all amounts due to the applicant w.e.f. 3.6.1983 until the date of reinstatement within a period of 3 months from the date of the order.

6. During the pendency of the OA. Revisional Authority under Rule 29 of CCS (CCA) Rules,1965 suo moto called for the records of the applicant's case and passed the order dated 19.12.1986. Pursuant to the Revisional Authority's order dated 19.12.1986, the Group Captain, Air Force Station, Cotton Green, Bombay allowed the applicant to resume his duties w.e.f. 1.1.1987.

7. Shri V.S.Yadav, Group Captain, Air Force Station, Mumbai vide Memorandum dated 10.2.1987 issued the fresh chargesheet to which the applicant replied vide his reply dated 20.2.1987. Shri Bapat, Wing Commander and Shri Raghvan were appointed as the Enquiry Officer and the Presenting Officer respectively. The grievance of the applicant is that neither the chargesheet was issued by the competent authority nor the enquiry officer was appointed by the competent officer. The applicant appointed Shri K.B.Pahilajani and Shri P.B.Diwan as Defence Assistants. The enquiry was fixed on 10.4.1987 but defence assistant Shri Pahilajani could not attend the enquiry proceedings who well in advance vide letter dated 6.4.1987 intimated the enquiry officer for his absence due to his prior engagement, the enquiry was adjourned sine-die.

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8. The applicant received a letter dated 30.4.1987 from Shri K.S.Babbar, Wing Commander to which he replied vide his reply dated 7.5.1987. Received another letter dated 6.6.1987 directing the applicant to appoint his defence assistant without any further delay which was replied by him on 7.7.1987. The applicant approached Shri Babu Singh Chowhan who has agreed to assist him in the enquiry proceedings and gave a written consent vide letter dated 16.5.1987 which was tendered by the applicant to Shri K.S.Babbar who refused to accept the same. Hence, he sent the said consent to the Commanding Officer by Registered Post with A.D. The applicant received two letters dated 18.5.1987 and 19.5.1987 signed by Shri K.S.Babbar directing the applicant to submit the panel of 3 persons working within Headquarters, South West Air Command. As the applicant has already submitted the panel of defence assistant and was entitled to defend his case through a person of his choice but Shri Babbar illegally and without any justification insisted for a panel of defence assistants within Headquarters, South Western Air Command. He further received letter dated 25.5.1987 for submission of fresh panel of defence assistants, the panel submitted by him was not cancelled but the authority i.e. the enquiry officer insisted to appoint a fresh panel contrary to law. The applicant informed the Commanding Officer, Air Force Station, Mumbai in this respect by letter dated 18.6.1987 and 29.6.1987. The enquiry was fixed on 6.7.1987. None was present to defend the applicant. Shri Babu Singh Chouhan was not asked to appear as Defence Assistant. On being asked by the enquiry

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officer Shri Bapat, the applicant stated that he remained absent from 12.1.1982 to 16.1.1983 giving reasons of his absence in writing in Hindi and also in English. Shri Bapat recorded the things in English without explaining the contents thereof to the applicant and took the signature. No further enquiry proceedings were held. Shri V.S.Yadav, Group Captain vide order dated 31.7.1987 passed the dismissal order. The applicant preferred appeal dated 26.8.1987 which was decided on 8.12.1987 without application of mind and affording an opportunity of being heard by a non speaking order. Being aggrieved by the appellate authority's order, the applicant preferred the revision petition dated 5.1.1988.

9. The applicant filed OA.No.24/88 before this Bench on 29.12.1988 but on 5.1.1989 the applicant received a telegram from the respondents calling upon the applicant to report to the concerned authority immediately. The applicant on 6.1.1989 went to Shri P.V.Inamdar, Senior Administrative Officer who in turn told the applicant that the disciplinary authority would withdraw the dismissal order dated 8.12.1987, will conduct a fresh enquiry and handed over the letter dated 5.1.1989 along with the enclosure dated 19.12.1988. He requested Shri Inamdar to allow him to resume duty, pay wages and other attendant benefits for the intervening period but he refused to allow the applicant to resume duties and also told that the dismissal order will continue and enquiry will be conducted to remove the illegalities and irregularities in the earlier enquiry. The applicant placed

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the aforesaid facts on record vide letter dated 19.1.1989 and delivered the said letter personally and obtained the acknowledgement. The applicant received another dismissal order dated 29.3.1989 without withdrawing the earlier dismissal order dated 3.7.1987.

10. The dismissal order dated 29.3.1989 was impugned by the applicant by amending the OA.No.24/88 which was decided on 8.8.1991 by setting aside the disciplinary action against the applicant - Ordered to supply the copy of the enquiry officer's report as the applicant moved the Contempt Petition.

11. He was never under suspension prior to dismissal order dated 29.3.1989. Vide letter dated 31.1.1992, it was decided to proceed further from the stage of supply of the copy of the enquiry officer's report and applicant would be under deemed suspension. The applicant submitted the representation against the enquiry officer's report and against the order of deemed suspension on 18.2.1992 which was not replied but applicant was held guilty and penalised with order of dismissal vide order dated 21.2.1992. The applicant preferred an appeal against the said impugned order of dismissal which was rejected vide order dated 17.8.1992. Thereafter, preferred a revision petition on 22.2.1993 which was finally decided on 20.3.1995 communicated to the applicant on 15.9.1995. The appellate authority's decision was modified and converted into compulsory retirement w.e.f. 21.2.1992 after duty hours. The disciplinary authority passed

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the order dated 15.9.1995 with 75% gratuity in exercise of powers under Rule 40 of C.C.S.(Pension) Rules, 1972. The applicant claims that order of the appellate authority as well as revisional authority is without application of mind. Hence, this OA. for the above said reliefs.

12. The respondents resisted the claim of the applicant stating the fact that the applicant was paid Rs.23,864/- by way of subsistence allowance for the period of his deemed suspension. The orders impugned by the applicant are passed after following the prescribed procedure and are legal one. The applicant was afforded opportunity at every stage of enquiry and proceedings, as such the orders cannot be faulted. The letter which the applicant claims to have been sent to Shri Harpal Singh, the then Commanding Officer, no individual with the name of Harpal Singh was the commanding officer of this Station. Shri G.D.Bamboat, Office Incharge is also not correctly named. Full efforts were made to procure services of Shri Babu Singh Chauhan but he was not relieved. The defence assistants could not be procured on administrative grounds, the applicant was asked to name panel within Headquarters was with full justification but he failed to do so. Hence, prayed for dismissal of the OA. along with cost.

13. While deciding the revision petition vide order dated 29.3.1995 (Ex.A-III, OA. page 40) the revisional authority has only ordered the punishment of compulsory retirement. Thereafter, the disciplinary authority passed the order "compulsory retirement from 21.2.1992 after A DHRs with 75% Gratuity." The penalty which the revisional authority has awarded cannot be interferred by the disciplinary authority as such the order of the disciplinary authority dated 15.9.1995 (Ex.A-IV, OA. page 42) to the extent of "with 75% Gratuity" can not be upheld.

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14. We have perused the chargesheet, impugned orders of the Disciplinary Authority, Appellate Authority and Revisional Authority and on perusal of the same, we are of the considered opinion that there was neither a charge about gravest or Grave misconduct nor the Disciplinary Authority, Appellate Authority and Revisional Authority has recorded the finding regarding guilt of the applicant being gravest or grave misconduct.

15. We have afforded ample opportunities to the respondents to place on record the file relating to disciplinary proceedings commenced after 6.1.1989 but the respondents failed to produce the said file, Appeal file and Revision File. Hence, there is irresistible conclusion that no steps were taken in Disciplinary File. As the OA.No.24/88 was decided on 8.8.1991 based only on principle of Ramzan Khan's case, the applicant is entitled to raise every grievance in respect of the disciplinary proceedings.

16. We have carefully perused the reply of the applicant dated 20.2.1987 and we are of the considered opinion that absence being admitted but cause of absence was agitated by the applicant claiming that his absence was based on sufficient cause, i.e. self illness, mother's and wife's illness. As such, absence is claimed not intentional and also claimed to have apprised the respondents by letter addressed to Harpalsingh which was undelivered and returned to him.

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17. The learned counsel for the applicant relied on (1991) 17 ATC 427 - K.E.Vavichi vs. Senior Superintendent of Post Offices, Palghat & 4 Ors. decided by C.A.T. Ernakulam Bench which lays down the proposition that admission has to be unqualified and unequivocal, otherwise it is not justified to dispense with the enquiry. Disciplinary Authority must record reasons where it is decided to dispense with the enquiry due to admission of charge. Normally, when the charge is admitted in an unqualified and unequivocal manner, there is nothing left for the Disciplinary Authority to enquire into and therefore a departmental enquiry becomes an ~~ideal~~ formality. Violation of principles of natural justice can not also be claimed in those circumstances but whether the admission is unqualified and unequivocal depends on facts and circumstances of each case.

18. The learned counsel for the applicant relied on 1982 (1) A.I.SLJ 697 - Bhursingh Hamsingh Rajput vs. The State of Gujrat and Anr. decided by Hon'ble High Court of Gujrat and argued that plea against admission in the reply to show cause notice - even in reply to the second show cause notice, a delinquent is entitled to show that he is not guilty and the Punishing authority is required to extend an opportunity to him to make good his defence.

19. The learned counsel for the applicant relied on A.I.R. 1977 S.C. 1712 - Sitaram Bhau Patil vs. Ramchandra Nago Patil by L.Rs & Anr. which lays down the proposition as extracted below :-

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"An admission is relevant and it has to be proved before it becomes evidence. The provisions in the Evidence Act that 'admission is not conclusive proof' are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, it is sound that if a witness is under cross examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule. Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him."

20. Suffice to say that the precedents relied i.e. case of K.E.Vavichi, Bhursingh Hamsingh Rajput and Sitaram referred above are not relevant to the issue involved for the reason that the enquiry was not dispensed with on admission.

21. The learned counsel for the applicant relied on A.I.R. 1963 S.C. 1332 - Hindustan Times Ltd. New Delhi vs. Their workmen for the proposition that having regard to the nature of ^{gratuity} _{quality} it will not be proper to deprive an employee of the gratuity earned by him because of his dismissal for misconduct and the proper provision to make in this connection is that where an employee is dismissed for misconduct which has resulted in financial loss to the employer, the amount lost should be deducted from the amount of gratuity due.

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22. In 1998 (2) SC SLJ 127 - Union of India & Ors. vs. Shri B.Dev, the Apex Court has held that one of the powers of the President is to recover from pension, in a case where any pecuniary loss is caused to the Government, that loss. This is an independent power in addition to the power of withdrawing or with-holding pension. The contention of the respondent, therefore, the Rule 9 cannot be invoked even in case of grave misconduct, unless pecuniary loss is caused to the Government is unsustainable. The Apex Court has also considered the case of D.V.Kapoor vs. Union of India and Ors. (A.I.R.1990 SC 1923) in this judgement and stated as extracted below :-

"In that case also disciplinary proceedings were initiated against the Government servant under Rule 3(ii)(iii) of the CCS(Conduct) Rules and were later continued under Rule 9 of the CCS (Pension) Rules,1972. The charge against the appellant there was that he absented himself from duty without any authorisation and despite his being asked to join duty he remained absent. The Inquiry Officer, however, held that his absenting himself from duty could not be termed as entirely willful because he could not move due to his wife's illness. The Inquiry Officer recommended that the case of the appellant should be considered sympathetically. The recommendation and finding of the Inquiry Officer were accepted by the President. However, it was decided to withhold full gratuity and payment of pension in consultation with the Union Public Service Commission. In these circumstances, this Court held that there was no finding that the appellant had committed grave misconduct as charged and that the exercise of power under Rule 9 was not warranted."

23. The perusal of the proposition of law laid down by the Apex Court in Union of India & Ors. vs. Shri B.Dev holds good and the case of D.V.Kapoor was decided based on facts of the said case. The case of Hindustan Times Ltd. referred above which only directs the making of proper provision in this respect in view of the latest precedents - now does not hold\$ field.

24. The case of Union of India & Ors. referred above further held that unauthorised absence from duty - willful, willfully disobeying the orders of the Government from joining duty with untenable excuses, conduct being premediated amounts to grave misconduct.

25. The case of Kuldeep Singh vs. The Commissioner of Police reported in 1999 (2) ATJ 177, relied by the learned counsel for the applicant decides about the finding recorded by the Enquiry Officer based on no evidence, i.e. not supported by any evidence and the consequence thereof.

26. The case of Ex-Constable Balwant Singh vs. State of Haryana - 1999 (2) ATJ 113 decided by the Hon'ble High Court of Punjab and Haryana relied on by the learned counsel for the applicant lays down the proposition that if an employee is under treatment during the period of absence, absence from duty cannot be said to be gravest act of misconduct, to which we subscribe.

27. The case of 1992 (1) SLR 174 - The State of Punjab vs. Prakash Chand who was a police constable governed by Punjab Police Rules, 1934, relied by the learned counsel for the applicant lays down the proposition that gravest act of misconduct not capable of being put in strait jacket or confined to a definition, must however relate to an action which is of the utmost gravity and grossly ^{flagrant} - it implies a matter of utmost seriousness and absence without leave does not amount to gravest act of misconduct. If the order of the punishing authority does not record a finding that the act of the charged officer amounts to gravest act of misconduct - order not sustainable.

28. The chargesheet dated 10.2.1987 was issued by the Group Captain was cancelled on 23.3.1987 and thereafter fresh chargesheet was issued on the same day by Group Captain.

29. It is true that the applicant has nominated Pahilajani as Defence Assistant who did not appear on 10.4.1987. We are of the considered opinion that it was not an intentional absence of the Defence Assistant Pahilajani but on account of sufficient cause for which he has well in advance intimated the Enquiry Officer. P.D.Diwan was also the Defence Assistant but no attempt was made by the Enquiry Officer to secure his presence.

30. The respondents vide letter dated 30.4.1987, 6.5.1987, 7.5.1987, 18.5.1987, 19.5.1987, 25.5.1987 insisted for fresh panel of two/Three Defence Assistants, ultimately, after exchange of various correspondence the applicant on 29.5.1987 stated that "I shall myself attend the case at your end". On 13.5.1988 the applicant again sent a letter stating that "I do not desire to engage Defence Assistant in my case. I will defend myself. We are not recording any opinion on the insistence of the respondents for panel of Two/Three Defence Assistants for the reason that the applicant on 29.5.1987 consented to appear and proceed himself. The applicant can not blow hot and cold together, as such, he is estopped to challenge the said fact that the respondents did not allow him to defend his case by the Defence Assistant of his choice.

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35. We do not find any error in issuing the chargesheet by Group Captain.

36. In the result, OA. is allowed. The order of the Disciplinary Authority, Appellate Authority, Revisional Authority dated 21.2.1992, 17.8.1992 and 29.3.1995 respectively are quashed and set aside with all consequential benefits. The respondents are at liberty to continue with the enquiry from the stage of after issue of the chargesheet. The respondents to communicate their decision regarding continuation of the enquiry, if they choose so, within one month from the date of receipt of the copy of the order and if such a decision is taken, to conclude the enquiry as per law within a period of three months thereafter at the stage of Disciplinary Authority. No order as to costs.

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(SMT. SHANTA SHAstry)

MEMBER (A)

S.L.Jain

(S.L.JAIN)

MEMBER (J)

mrj.