

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH MUMBAI

ORIGINAL APPLICATION NO:265/99

DATE OF DECISION:

22/01/2003

Shri L.S. Patil

Applicant.

Shri G.K. Masand with Shri A.I. Bhatkar

Advocate for
Applicant.

Verses

The Commissioner of Customs Pune and others Respondents.

Shri V.S. Masurkar.. Advocate for

CORAM

Hon'ble Shri B.N. Bahadur - Member (A)

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

(1) To be referred to the Reporter or not? Yes

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

(3) Library.

yes

S:VJN
(S.L. Jain)
Member (J)

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CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO: 265/99

the 22nd day of JANUARY 2003.

CORAM: Hon'ble Shri B.N. Bahadur, - Member (A)

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

L.S. Patil

Residing at 16/673

M.H.B. Fisherman Colony

Mahim (W), Mumbai.

...Applicant

By Advocate Shri G.K. Masand with Shri A.I.Bhatkar.

V/s

1. Union of India through
The Flag Officer
Commanding-in-Chief,
Headquarters Western
Naval Command,
Shahid Bhagat Singh Road,
Mumbai.
2. The Chief Staff Officer
(Personnel & Administration)
Headquarters Western
Naval Command, SB Singh Road,
Mumbai.
3. The Admiral Superintendent
Naval Dockyard, Lion Gate,
Mumbai.

...Respondents.

By Advocate Shri V.S. Masurkar.

O R D E R

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

This is an application under Section 19 of the Administrative Tribunals Act 1985 to quash and set aside the order dated 30.12.1997 passed by Respondent No.2 and 20.8.1998 passed by Respondent 1 with the direction to them to reinstate the applicant in service with full back wages and all the consequential benefits entitled there to.

S.L.J. -

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2. The applicant who was serving as Lower Division Clerk in the office of CTA Naval Dock Yard, Mumbai was served with charge sheet dated 11.2.1997 by Personnel Manager for Admiral Superintendent (Exhibit 3, OA page 41 to 45) asking the applicant to submit his defence within ten days. The applicant vide letter dated 8.3.1997 (Exhibit 4, OA page 46) sought time to file reply in a couple of weeks. The Rear Admiral Admiral Superintendent vide his order dated 26.3.1997 (Exhibit 5, OA page 47) and order dated 30.4.1997 (Exhibit - 7 OA page 49) appointed an Enquiry Officer and Presenting Officer respectively. The Enquiry Officer proceeded with the enquiry and the applicant participated in the enquiry. The Enquiry Officer submitted his report to the Rear Admiral Admiral Superintendent. The Disciplinary Authority Commodore - Chief Staff Officer, P & A received the report of Enquiry Officer, after serving the said report on the applicant held the applicant guilty of the charges levelled against him vide his order dated 30.12.1997 and awarded the penalty - removing the applicant from service. The applicant preferred an appeal against the said order which was decided vide order of the Appellate Authority Vice Admiral - Flag Officer Commanding in Chief dated 20.8.1998 (Exhibit 2, OA page 34) upheld the order of Disciplinary Authority.

3. One of the grievance of the applicant is that the charge sheet was issued by in-competent authority, the appointment of Enquiry Officer and presenting officer was also by in-competent authority and in fact the authority issuing the charge sheet being superior in rank, the Disciplinary Authority being

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subordinate to him prevailed over him and the Disciplinary Authority only signed the order of removal of the applicant being influenced by his superiors without application of mind. As such the whole proceedings is vitiated.

4. We may also refer to one of the grounds raised by the applicant that after closer of the evidence by the departmental authority the applicant was not examined by the Enquiry Officer which is a denial of principle of audi alteram.

5. We shall not deal with other grounds raised by the applicant for the reason that if the applicant to succeed only on these grounds, other grounds need not to be examined for the reasons that it may prejudice the case of either of the parties.

6. The claim of the applicant is being resisted by the respondents on the ground that the Rear Admiral being a Senior Officer was entitled to issue the charge sheet, the applicant has not replied to the charge sheet on merits as such the applicant's case for appointment of Enquiry officer or Presenting Officer is in no way prejudiced. The Disciplinary Authority has in fact after receipt of the report of the Enquiry officer after application of mind passed the impugned order of removal from service of the applicant. It is further being stated that the ground raised by the applicant is after thought which does not vitiate the enquiry at all.

7. Article 311 (1) (2) is worth reproducing which is extracted below:

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(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

(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 these charges.

Provided that where it is proposed after such inquiry, to impose upon him any such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply

8. The learned counsel for the applicant argued that Article 311 (1), though empowers the authority superior to the appointing authority to pass an order of dismissal or removal but when Rules under Article 309 of Constitution of India framed called CCS (CCA) Rules 1965, the said Rules has to be followed.

9. Sufice to state that none of the parties placed on record the appointment order of the applicant.

10. As the Disciplinary Authority has passed the impugned order of removal from service of the applicant, we proceed on the basis that Disciplinary Authority is the appointing authority of the applicant. The learned counsel for the respondents placed on record the order dated 13.9.1979 by which appointing authority of L.D.C. is the Chief Staff Officer. As such we have to examine the grievance of the applicant after arriving to the conclusion that the authority issued the charge sheet to the applicant is not the appointing authority of the applicant.

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11. We extract Rule 13, 14 (2), (3), and (5) of CCS (CCA) Rules 1965.

12. The word Disciplinry Authority is also been mentioned in Rule 14(4). We are not reproducing the same for the reason that the delievery of charge sheet can be made by the Disciplinary Authority or cause to be made by someone else also as such it being not a mandatory provision and it may not prejudice the case of the applicant.

RULE 13

The President or any other authority empowered by him by general or special order may -

- (a) institute disciplinary proceedings against any Government servant.
- (b) direct a disciplinary authority to institute disciplinary proceedings against any Government servant on whom that disciplinary authority is competent to impose under these rules any of the penalties specified in Rule 11.

RULE 14(2)

Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Government servant, if any itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act 1850, as the case may be, an authority to inquire into the truth thereof.

Explanation.....

(3) Where it is proposed to hold an inquiry against a Government servant under this rule and Rule 15, the disciplinary authority shall draw up or cause to be drawn up -

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain -

(a) a statement of all relevant facts including any admission or confession made by a Government servant

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(5) (a) On receipt of the written statement of defence, the disciplinary authority may itself inquire into such of the articles of charge as are not admitted, or, if it considers it necessary to do so, appoint under sub-rule (2), an inquiring authority for the purpose, and where all the articles of charge have been admitted by the Government servant in his written statement of defence, the disciplinary authority shall record its findings on each charge after taking such evidence as it may think fit and shall act in the manner laid down in Rule 15.

(b) If no written statement of defence is submitted by the Government servant the disciplinary authority may itself inquire into the articles of charge, or may, if it considers it necessary to do so, appoint, under sub-rule (2), an inquiring authority for the purpose.

(c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding any inquiry into such charge, it may, by an order, appoint a Government servant or a legal practitioner, to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge.

(Emphasis supplied by us)

13. Perusal of the same makes it clear that every where the word "Disciplinary Authority" is being mentioned which is defined in Rule 2(g) CCS (CCA) Rules 1965 which is extracted below:

"Disciplinary Authority" means the authority competent under these rules to impose on a Government servant any of the penalties specified in Rule 11.

14. Rule 11 deals with competent authority to impose the penalty prescribed therein. The removal from service being a major penalty is to be awarded only by the Disciplinary Authority and no one else.

15. Initiation of disciplinary proceedings is not a matter of procedure, but it is an act after application of mind. Similarly

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after the receipt of reply of the delinquent employee, appointment of an Enquiry Officer requires a consideration of the said reply and to arrive to the conclusion that enquiry is necessitated.

16. The learned counsel for the applicant relied on (1987) 4 ATC 626 Clement Dungdung V/s Union of India and others which laid down the proposition that appointment of enquiry officer before receipt of explanation to be submitted by the employee within the prescribed time in response to charge sheet issued to him indicates close mind of the disciplinary authority. AS such appointment is violated. The applicant has sought time for submission of reply. We do not find that he was ever communicated the decision that time sought by him is rejected after due consideration.

17. The learned counsel for the applicant argued that as per the rules referred above action has to be taken only by the Disciplinary Authority. As such the whole enquiry is vitiated. In reply to it the learned counsel for the respondents relied on (1997) 11 SCC 17 Steel Authority of India and Another Vs Dr. R.K. Diwakar and others, (1996) 2 SCC 145 Inspector General of Police and Another Vs Thavasiappan, (1997)3 SCC 387 Secretary to Government and others Vs A.C.J. Britto and argued that issuance of charge sheet by an officer subordinate to the Disciplinary Authority is in competent, it is not necessary that every authority competent to impose the proposed penalty should issue the charge sheet and controlling authority is competent to issue the charge sheet. It is to be mentioned that in the present

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case the authority subordinate to Disciplinary Authority has not issued the charge sheet but the charge sheet is issued by superior authority than the Disciplinry Authority. AS such case of A.C.J. Britto referred above is not applicable to the present case. The case of Dr. R.K. Diwakar and Others referred above is also not applicable to the present case the reason being neither there is delegation of powers nor the Superior Authority who has issued the charge sheet was the Controlling Authority.

18. We are in agreement with the proposition of law laid down in the case of Thavasiappan, but the proposition cannot be extended to the extent that it can be issued by any authority other than prescribed in CCS (CCA) Rules 1965.

19. The learned counsel for the respondents relied on 1996(3) SCC 364 State Bank of Patiala and others V/s S.K. Sharma and others and argued that no inflexible rule can be laid down - invalidating an action / order / decision on ground of mere technical violation of the principles, which amounts to negation of justice instead of doing justice between the parties, would not be justified. Regarding waiver it has been mentioned that even a mandatory requirement can be waived by the person concerned if such requirement is in his interest and not in public interest. The object of rule is to ensure that there would not be failure of justice where State of public interest requires curtailing of the rule, court should balance that interest with the requirements of natural justice.

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20. If we examine the facts of the present case we find that the applicant has not waived his right but he was not even afforded a reasonable opportunity to reply the charge sheet, even he was not served with the order rejecting his request, neither ^hEither state nor public interest requires curtailing of the rules. We are aware that mere use of the word 'shall' not be a decisive factor for interpretation of status or the rules. If we examine the case of disciplinary proceedings in the said light we are of the considered opinion that whether a disciplinary action is to be taken against an employee or not, Whether the enquiry should proceed or not - and how enquiry should proceed - Whether appointment of Presenting Officer is necessary or not, whether the enquiry should be conducted by the Disciplinary Authority or not are the decisions after application of mind of the officer who has control^h over the Government servant being the appointing authority is necessary. As such the Rule 13 and 14 of CCS (CCA) Rules 1965 cannot be negative by saying that they are procedural one.

21. The authority who has issued the charge sheet, appointed the Presenting Officer and Enquiry Officer having not considered the request for grant of time, fails to convey the decision to the applicant either accepting or rejecting the same, thereafter receiving the report of the Enquiry Officer, when he was neither the Disciplinary Authority nor the appointing authority, may be superior in rank the action cannot be upheld when the final order removing the applicant from service is passed by the Disciplinary Authority. Had the final order in enquiry has been passed by

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authority who has initiated the enquiry and acted through out during the course of enquiry , the order passed by the said authority, the question of being prejudice or not must have been the subject matter for considerion by the Tribunal. In the present case we are of the considered opinion that it is a case where there is flagrance^w violation of mandatory provisions, the initiation of enquiry, appointment of Enquiry Officer and Presenting Officer without application of mind of the competent authority which is necessary one, as such the enquiry is being vitiated.

22. We are not however dealing with the other grounds raised by the applicant but only narrating the said grounds. The applicant has raised the ground that the charge ^h sheet levelled against him is not a mis-conduct. The Enquiry Officer proceeded with the case under the influence of Superior Authority, charge sheet being vague and the documents belatedly supplied and punishment imposed is not proportionate to the charge levelled against the applicant. The Disciplinary Authority passed the order under influence of the superior authority.

23. Where there is violation of mandatory provisions of rules question of raising the objections at first stage certainly gains improtance but when the delinquent is not afforded an opportunity the said principle cannot be made applicable.

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24. In the result the OA is allowed. The impugned order dated 30.12.1997 and 20.8.1998 passed by Disciplinary Authority and Appellate Authority respectively are quashed and set aside. The respondents are at liberty to take disciplinary action against the applicant, as per Rules, if they desire to do so and a decision is taken to take action, within one month of receipt of copy of order. The enquiry be completed at the disciplinary authority stage within four months from the date of receipt of copy of the order. The applicant be reinstated in service with 50% of backwages within a period of one months from the date of receipt of copy of the order. No order as to costs.

SLJ-87A/
(S.L.Jain)
Member(J)

B.N.Bahadur
22-1-03
(B.N. Bahadur)
Member(A)

NS

CP No. 44/2003

For orders on

25/3/2003

Q.W.
21/3 31/3/03

C.P. on //

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25/3/2003-3

Heard Shri A. I. Bhattar,
Counsel for applicant.

Issue notice to

Commodore K. Raina,

Respondent No. 2 to file
an affidavit in reply

to CP-44/2003 as to

why the proceedings

under Part V of Courts
Act should not be taken
against him.

The personal appearance

of Commodore K Raina

is dispensed with for the

time being.

List the case on 25/4/2003.

Given
(S. K. Hajra)
M(A)

(A. V. Haridasan)
V.C.

alp.

26/3/03
MP 27/3/03 for
entry 8/4/03

MP 27/3/03 for
entry 8/4/03
a 31/3/03

(19)

31.7.03

V.S.

Heard learned counsel for parties. Mr. ~~Gupta~~
 Chanchal ^{respondent} learned counsel for ~~applicant~~ at the
 outset pointed out that the orders passed
 in this OA are challenged before Hon'ble
 High Court and the Hon'ble High Court in
 W.P. No 1320/03 had issued Rule and
 stayed the operation of the order. Since
 the order passed in this OA is stayed by
 Hon'ble High Court evidently this C.P.
 cannot be proceeded further. We, there-
 fore, dispose of this CP with liberty
 to applicant to move another CP as and
 when the cause arises. M.P. 220/03 is moved
 for extension of time. But we find
 that the order passed in the OA are already
 challenged by the respondents before the
 High Court and High Court had granted
 stay of operation of the order. Therefore
 M.P. becomes infunctional and the same is
 disposed of as infunctional. No order as to
 costs.

Ar

A/-

(Chanchal Basu)
 MCA)

(A.S. Sanghvi)
 M.T)

Rg:

Order/Judgment despatched
 to applicant/respondent(s)
 8.8.2003