

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Dated this Tuesday the 17th day of June, 2000

Coram: Hon'ble Mr.V.K.Majotra - Member (A)
Hon'ble Mr.Shankar Raju - Member (J)

O.A.351 of 2000

Pravin Madhusudan Mangle,
aged about 41 years,
R/o Ram Building,
24/A, 2nd Floor,
Dr.Bhale Rao Marg,
Girgaum, Mumbai 400 004.
(By Shri P.M. Mangle - In person) - Applicant

Versus

1. Union of India,
through Ministry of Defence,
New Delhi.
2. O/o Admiral Superintendent,
Naval Dockyard, Mumbai.
3. The Flag Officer,
Commanding -in-Chief,
Western Naval Command,
Mumbai - 400 001.
4. The Chief of the Naval Staff,
Naval Headquarters (DCP),
New Delhi - 110 011.
(By Advocate Shri V.S.Masurkar) - Respondents

O R D E R (ORAL)

By Hon'ble Mr.Shankar Raju, Member (J) -

Applicant has sought challenged to the order of removal dated 26.2.1998 as well as the orders on appeal dated 11.1.1999 as well as 17.9.1999 upholding the punishment, quashment of the above has been sought with direction for reinstatement and consequential benefits.

2. Applicant was appointed as an Unskilled Labour on 4.2.1980 and was regularised on 18.8.1984. On account of his mother's death applicant had become mentally upset and emotionally disturbed with pressure of family circumstances leading to divorce, went into depression.

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3. Applicant was taken to G.S. Medical College, Parel where he was diagnosed ~~with~~^{of} anxiety neurosis and was advised complete rest. During this interregnum, Applicant absented from work and had also sent four communications.

4. Applicant was issued fitness certificate on 11.2.1997 and was referred for medical examination before the Board where the ailment of the applicant was found justifiable and was declared fit to perform normal duties.

5. During the interregnum of absence of the applicant a charge sheet was issued. Respondents proceeded against the applicant under Rule 14 of the CCS (CCA) Rules, 1965 in a major penalty on the allegations of his remaining absent from 9.3.1996 to 11.12.1996, the date of memorandum. Two communications were sent to the Applicant which were duly received and on non-participation in the disciplinary proceedings the same were conducted ex-parte.

6. Enquiry Officer in his report dated 25.7.1997 held the Applicant guilty of the charge, a copy of the same was sent to the Applicant but was delivered unclaimed.

7. Disciplinary Authority on the basis of the record of the proceedings imposed upon the Applicant punishment of removal from service taking into consideration is unauthorised absence from duty w.e.f. 9.3.1996 to 6.12.1997.

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8. On Appeal the punishment order was maintained. A mercy appeal preferred was turned down giving rise to the present OA.

9. Applicant appeared in person. Contention put forth by the Applicant in the OA are as follows:-

(a) That the enquiry has been proceeded in violation of principles of natural justice depriving the applicant a reasonable opportunity to defend.

(b) That once the Respondents themselves referred the Applicant to Medical Board and on proof of genuinity of the medical record they are estopped from treating the period of absence as unauthorised or wilful.

(c) Enquiry was illegally proceeded ex-parte and copy of the enquiry report was not served upon the Applicant.

(d) The Applicant was prevented due to his mental sickness to perform his duties and there is no iota of wilfulness in the absence. Punishment is harsh and disproportionate.

(e) Genuinity of medical record is not disputed.

(f) That the Applicant has been punished for remaining absent for 22 months. In fact the absence was only from 9.3.1996 to 10.2.1997 which was covered by the medical record not considered by the authorities.

10. On the other hand Respondents' counsel Shri Masurkar vehemently opposed the contentions and produced the DE record. According to him the issue regarding the Applicant being absent which has not been put as a specific charge against him and taking into consideration extraneous matter being a mixed question of fact and law not raised by the Applicant cannot be gone into by the Court. In so far as the ex-parte proceedings it is contended that two communications have been sent to the Applicant to produce his medical record failing which he be subjected to certain medical examination though intimation was given on four occasions without any medical record. As such absence of 22 months without medical certificates and along with applications and prior authorisation, misconduct is grievous which makes punishment proportionate and commensurate with the misconduct.

11. It is further stated that proportionality has already been gone into by the authority in mercy petition and the enquiry report was sent to the Applicant which was undelivered as unclaimed would amount to service under Rule 30 of the CCS (CCA) Rules, 1965. As the applicant despite opportunities has not availed the same, violation of principles of natural justice cannot be raised.

12. We have carefully considered the contentions of the learned counsel of parties and perused the material on record. In so far as issue regarding consideration of extraneous matter

by the disciplinary authority is concerned, on perusal of the record, we find that the charge sheet was issued on 31.12.1996 alleging wilful absence till date. Enquiry Officer through his report held the Applicant guilty of the charge of remaining unauthorisedly absent from 9.3.1996 to 31.12.1996 i.e. the date of issuance of the memorandum of charge.

13. On persual of the DA[✓] order we find that the disciplinary authority imposed punishment upon the Applicant for his alleged misconduct of unauthorised absence from 9.3.1996 to 6.12.1997. The aforesaid plea was raised by the Applicant in Para 5 (r) contending that though charge sheet pertains to 22 months, Applicant was absent till 10.2.1997 when he joined duties and was subjected to medical examination. The aforesaid plea of taking into consideration extraneous matters not alleged against the applicant is and in the light of the decision of the Apex Court in Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and others, 1993 SCC (L&S) 1106. Any plea which had not been raised before quasi-judicial bodies, is raised for the first time and the plea goes to the root of the question and is based on admitted and[✓] uncontroverted facts and does not require any further investigation into a question of fact, the ~~quasi~~[✓]-judicial bodies are not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut out from raising such a plea which goes to the root of the lis involved but the same be allowed to be raised.

14. The fact that the disciplinary authority has considered absence period beyond 31.12.1996 is admitted, uncontroverted position which requires no more investigation as such the plea raised by the Applicant is very much admissible being ⁱⁿ ~~is~~ legal as the disciplinary authority has taken into consideration extraneous matters without putting it to the Applicant even in an exparte proceeding. Such a procedure is an anti-thesis to fair play and natural justice.

15. In so far as absence is concerned, we find on record four communications of the Applicant in April, 1996 where he had informed the concerned officer that his physical condition is not as such to allow him to perform duty. Due to his illness he has to be hospitalised. He sought leave from the concerned authority and undertakes to join duty as soon as he is declared fit.

16. In furtherance to this, we also find fitness certificate issued to the Applicant on 11.2.1997 where the Applicant was declared fit by the Doctor/Medical Incharge concerned at K.E.M. Hospital, Parel where the diagnosis was Anxiety-Neurosis. The Applicant joined his duties and thereafter he was referred by the Respondents to a Medical Board on 11.2.1997. The aforesaid Medical Board declared the Applicant fit and had established the genuinity of the medical certificates and the ailment of the Applicant. Whereas the Enquiry officer who proceeded ex-parte and delivered his finding on 25.7.1997 oblivious of the Medical Board held the Applicant guilty of the charge without considering

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his medical record, though PW2 Shri M.D.Warang, UDC produced medical records of the Applicant for the absence period also holding that the Applicant was unauthorisedly absent without recording a finding that it was wilful. It was recorded that the Applicant was guilty. Disciplinary authority in its order without dealing with the medical record of the Applicant which existed on record exceeded his jurisdiction and without recording the reasons imposed upon the Applicant a penalty of removal from service even without going into its proportionality or its adequacy. The length of service of the Applicant ^has well right for retiral benefits was also given a go-by.

17. In our considered view absence on account of genuine illness cannot be treated as wilful or ^hwould not amount to any misconduct and an absence which entails punishment is one which is deliberate, intentional without any justified cause. The fact of illness of the Applicant and his having treated in the Government Hospital cannot be put to question as the same established its genuinity as the Applicant was referred to the Medical Board.

18. The Division Bench of the Gujarat High Court Dulal Chandra Sarma Vs. State of Mizoram and others, 2003 (1) A.T.J.404 has held as follows:-

"5. In the case of Assam State Electricity Board Vs. Surya Kanta Roy (supra) cited by MrmVaiphei, learned Additional Advocate General, Mizoram, the Division Bench of this Court has made it clear that where the learned single Judge had ignored the settled principles of law the

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appellate Court can interfere with the judgment in a writ appeal. In the present it will be patently clear from the findings of the Enquiry Officer quoted above that the appellant had been submitting applications from time to time for leave on medical grounds and the appellant was also granted leave for some period. The aforesaid enquiry report also made it clear that the defence of the appellant against the charge of unauthorised absence from duty with effect from 30.6.1973 till 9.1.1974 was that he was infected by some disease requiring him to be admitted in Durtlang Hospital for treatment of Pulmonary Kocks and that a medical certificate dated 11.12.1974 certifying that the appellant had wilfully not reported for duty contrary to directives of the superior authorities and remained absent and yet the disciplinary authority by impugned order dated 20.10.1975 has held that the appellant had acted in gross disobedience and was guilty of wilful absence from duty and has dismissed him from service."

In Radheshyam Tanwar Vs. Union of India & others, 2003 (2) A.T.J. 44 the Mumbai Bench of the C.A.T. has relied upon the decision of the High Court of Punjab and Haryana in Ex-Constable Balwant Singh vs. State of Haryana, 1999 (2) ATJ 113 wherein the proposition has been laid down 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.

19. In view of the aforesaid as it is not more res integra that the Applicant during this period of absence was under treatment and the certificates issued by Government Hospital are authenticated on second medical examination by the Board conducted through the Respondents, they are estopped from going into the genuinity or authenticity of the certificates these are

deemed to be genuine and as such the period through which the Applicant has been held to be absent wilfully cannot be countenanced. In this view of the matter we are of the considered view that absence of the Applicant was ^hneither wilful nor intentional but was on account of his mental illness as proved from record.

20. Non-consideration of this medical record by the Disciplinary Authority has greatly prejudiced the Applicant and it is denial of reasonable opportunity and non-application of mind by the disciplinary authority as to the circumstances of the case.

21. In so far as the appellate order is concerned though several contentions have been raised by the Applicant and though it is mandatory under Rule 27 of the CCS (CCA) Rules, 1965 to see the procedural irregularity and also to go into the adequacy, proportionality of the punishment, the same has not been gone into by the Appellate Authority. The Medical Record was also not considered. Being a quasi-judicial authority it was incumbent upon the appellate authority to have gone into the contentions put forth and meticulously examine them when the medical record is proved authentic and existing on record. Non-consideration shows a mechanical exercise by the appellate authority. :

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22. In mercy petition though the appellate authority has observed the punishment as commensurate but on account of absence of 22 months which was not a charge put forth and proved against the Applicant.

23. As for Rule 19 of the CCS (Leave) Rules, 1972 though leave cannot be claimed as a matter of right but in cases where a Government servant informs the authorities about his illness and seeks leave and produces medical record on joining, it is open for the authorities to subject the Government servant for second medical examination and if the medical record is found to be authentic, the aforesaid period of absence cannot be treated as wilful.

24. Having regard to the aforesaid, we are of the considered view that the punishment imposed and affirmed upon the Applicant cannot stand scrutiny of law and has been passed in flagrant violation of the rules as well as principles of natural justice and is an anti-thesis to the doctrine of fair play. Accordingly, the OA is allowed. Impugned orders are quashed and set aside. Respondents are directed to reinstate the Applicant in service within a period of three months from the date of communication of this order. The Applicant shall also be entitled to all consequential benefits except back wages.

25. There shall be no order as to costs.

S. Raju
(Shankar Raju)
Member (J)

V.K. Majotra
(V.K. Majotra)
Member (A)

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