CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION NO. 1291/92

Date of Decision: 13.11.98

Shri Anand Prakash Gupta ____ Petitioner/s

Shri S.P. Saxena. ____ Advocate for the Petitioner/s.

v/s.

The Chairman, ESIC, and others. Respondent/s

Shri V.D.Vadhavkar. ____ Advocate for the Respondent/s

CORAM:

Hon'ble Shri Justice R.G.Vaidyanatha, Vice Chairman

Hon'ble Shri D.S.Baweja, Member (A)

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

(2) Whether it needs to be circulated to other Benches of the Tribunal? ✓

(D.S. Baweja)
Member(A)

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH 'GULESTAN' BUILDING NO:6
PRESCOT ROAD, BOMBAY: 1

Original Application No. 1291/92.

Pronounced the 13th day of November 1998.

CORAM: Hon'ble Shri Justice R.G.Vaidyanatha, Vice Chairman

Hon'ble Shri D.S. Baweja, Member (A)

Anand Prakash Gupta
Residing at A-4
E.S.I.C. Resd Complex
Chinchwad Station,
Poona. ... Applicant.

By Advocate Shri S.P. Saxena.

V/s.

The Chairman(Standing Committee
ESIC) and The Secretary
Ministry of Labour
New Delhi.

The Director General
E.S.I.C.
'Panchdeep' Bhavan,
Kotla Road,
New Delhi. ... Respondents.

By Advocate Shri V.D. Vadhavkar.

O R D E R

(Per Shri D.S.Baweja, Member (A))

This application has been filed challenging the order dated 18.6.1991 of the Disciplinary Authority imposing the punishment of stoppage of two increments without cumulative effect and order dated 23.1.1992 of Appellate Authority rejecting the appeal.

2. The applicant while working as Senior Hindi Translator on adhoc basis at New Delhi under Director General, E.S.I.C. was transferred to Pune on regular promotion against a regular vacancy. As per the applicant, a vacancy was available at New Delhi and inspite of request being made for adjusting at New Delhi against the vacancy, his

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request was turned down. The applicant had challenged this transfer through OA 482/87. This O.A. was dismissed by order dated 22.5.87. The applicant joined on transfer at Pune on 25.6.87. The applicant was thereaster issued a charge sheet dated 4.11.1987 for major penalty with two charges namely (a) levelling serious allegations of malafide, unfair practice, motivated action and abuse of power against the administration and in particular against the Director General, ESIC (b) bringing political pressure to cancell the order transferring him to Pune and submitting of representations on 4.12.1986 and 10.12.1986 directly to Labour Minister's office without routing through proper channel. An Inquiry Officer was nominated forconducting the enquiry. The Inquiry Officer had submitted his report on 16.11.1990 with the findings that charge No.1 is partly proved, while charge No.2 is not proved. The Disciplinary Authority however dis-agreed with the findings of the Inquiry Officer and concluded that charge No.2 is also proved and charge No.1 is partly proved. A copy of the report alongwith the observations dated 2.4.1991 of the Disciplinary Authority for dis-agreeing with the findings of the Inquiry Officer were supplied to the applicant as per letter dated 18.4.1991. The applicant submitted his reply to the same as per his letter dated 30.4.1991. Thereafter the Disciplinary Authority through his order dated 18.6.1991 imposed the penalty of withholding of two increments without cumulative effect. The applicant made an appeal against this order and the appeal was rejected by the Appellate Authority as per order dated 23.1.1992. Feeling aggrieved, the present O.A. has been filed by the applicant on 15.12.1993 challenging the orders of the Disciplinary Authority and the Appellate Authority.

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3. The applicant has pleaded that the impugned orders imposing the punishment are bad in law and deserve to be quashed on the following grounds.

(a) The applicant had filed OA 482/87 challenging his transfer to Pune on the grounds of malafide, unfair practice, motivated action and abuse of power by the concerned authority. The Charge No.1 in the charge sheet is made on the fact that the grounds taken in the O.A. challenging the transfer order were false and baseless and therefore the applicant has committed grave misconduct. The applicant has submitted that the legal grounds in OA 482/87 before the Tribunal cannot form the base or foundation for the departmental action against the applicant and therefore charge No.1 is mis-conceived and mis-applied and thus is not legally sustainable. It is further stated by the applicant that it is for the Tribunal to consider these grounds and to accept or reject the same, but the same cannot constitute mis-conduct and form the basis for disciplinary proceedings.

(b) Additional relevant documents were demanded by the applicant, but the applicant was not allowed the inspection of the same. Therefore the applicant was denied adequate opportunity of defending his case.

(c) The defence assistant of the applicant could not reach the place of enquiry on 22.3.1989 and therefore he made a request for postponing the enquiry for a period of two months. However the Enquiry Officer did not accept his request and proceeded with the enquiry and recorded the statements of the prosecution witnesses. The applicant though was allowed to cross examine the witnesses but the

applicant could not avail this opportunity in the absence of his defence assistant, in view of the fact that the presenting officer was a legally qualified person. On a subsequent date his defence assistant made a request for re-calling the witnesses to enable their cross examination, but his request was turned down by the Inquiry Officer. Thus the applicant was denied a reasonable opportunity to defend his case and this action of the Enquiry Officer is unfair and bad in law.

(d) The reasons recorded by the Disciplinary Authority for dis-agreeing with the findings of the Enquiry Officer are totally irrelevant, reflect a hyper-technical approach and are not based on any evidence on record. The Disciplinary Authority has passed the punishment order mechanically and the order is not a speaking order taking into consideration on the points raised by the applicant in his representation dated 30.4.1991. Further the observation of the Disciplinary Authority that the onus of proof was upon the applicant to show that the allegations of malafide, unfair practice etc. were valid is contrary to law on disciplinary inquiry.

(e) The appellate order is also a non-speaking one and has been passed in a routine manner without application of mind. The applicant is thus denied justice even by the appellate authority.

4. The respondents have filed their reply. The respondents have strongly controverted the grounds of challenge taken by the applicant in the O.A. The respondents submit that the enquiry has

been conducted in compliance with the principles of natural justice and as per the rules laid down by E.S.I.C. The applicant has been furnished all the documents and wherever the documents asked for were not relevant, the applicant has been suitably informed. As regards the postponement of the enquiry on 27.3.1989, the respondents contended that the applicant made a request to postpone the enquiry for two months as his defence assistant could not come to Delhi due to unknown reasons. The Enquiry Officer informed him that it was not possible to postpone the enquiry and called upon the applicant to cross examine the witnesses, whose statements were recorded on that date in the presence of the applicant, but he did not avail the opportunity. It is further submitted that the Disciplinary Authority has passed the order of punishment after considering all the points raised by the applicant in his representation. The respondents also contended that the Disciplinary Authority and the Appellate Authority have passed the orders after application of mind on all the points and their orders are speaking orders. The respondents plea is that in view of the submissions made in reply, the applicant has not been able to make any case for the relief sought by him and therefore the application deserves to be dismissed.

5. The applicant has not filed any rejoinder reply for the written statement of the respondents.

6. We have heard the arguments of Shri S.P. Saxena, the learned counsel for the applicant and Shri V.D. Vadhavkar for Shri M.I. Sethna, the learned counsel for the respondents. The material brought on the record has also been given careful consideration.

The original file containing the proceedings of disciplinary action has been made available by the respondents and the same has been gone through.

7. The various grounds based on which the impugned orders of punishment have been challenged have been summerised in para 3 above. These will be deliberate upon to identify if punishment orders are vitiated by any of the grounds.

8. The first contention of the applicant in challenging the impugned orders is that the legal grounds taken in O.A. 482/87 cannot form the basis or foundation of departmental action against the applicant, as such an action of the applicant does not constitute a mis-conduct calling for disciplinary action. After careful consideration the findings recorded by the Bench in the order dated 22.5.1987 in OA 482/87 and the submissions made by the respondents in the written reply, we are not inclined to subscribe to the view of the applicant. The applicant had challenged his transfer order to Pune through OA 482/87 making serious allegations of malafide, unfair practice, abuse of power and motivated action by the administration and in particular by the Director General ESIC. The Tribunal in its order dated 22.5.1987 in para 4 has recorded that in the instant case the allegation of grave nature cannot be accepted merely on superficial suspicion. This finding clearly bring out that the applicant did not produce any material to support his allegations. In fact he did not implead the Director General in his personal capacity as a

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party in the case. This leads to infer that the applicant had made false and baseless allegations against administration, perhaps to add colour to his grounds for challenging the transfer order. Making such wild allegations against administration and in particular against the Head of the Organisation is certainly a misconduct, even if such allegations are made while challenging the transfer order before a judicial forum. It is for the concerned authority to take notice of such allegations made in the O.A. before the Tribunal or to, ignore the same. If the competent authority decides to take serious note of the false allegations and initiates disciplinary action for misconduct, we are unable to find any infirmity in such an action. We, therefore do not find substance in the argument of the applicant and hold that charge No.1 in the charge sheet is not bad in law.

9. The second ground taken by the applicant is that additional documents demanded by the applicant had not been made available and therefore he was denied adequate opportunity of defending his case. The applicant has mentioned this in para 4.11 of the O.A. but the details of the additional documents demanded by him and denied have not been furnished. However on going through the report of the Enquiry Officer at A-8, we find that the complete detailes of various documents demanded by the applicant have been given. It is noticed that the request of the applicant for additional documents was considered and some documents were furnished and for the other documents, the applicant had been suitably replied giving the reasons for non-supply. It is noticed that

after the decision with regard non-furnishing of the documents demanded by the applicant was conveyed to him, he participated in the enquiry. From the proceedings of the enquiry, we do not find that at any stage protest was made by the applicant on this account. Further from the pleadings in the O.A., we do not find any averment to indicate as to how the non-supply of the documents had prejudice the case of the applicant. Even in the appeal filed by the applicant, though the applicant has taken the issue of non-supply of the documents demanded by him but he had not brought out as to how these documents were vital in defending his case. Mere denial of the documents demanded by the delinquent official cannot be taken to cause prejudice to his case until and unless it is established that in the absence of the demanded documents, the delinquent official could not defend his case. In this connection we refer to the judgement of the Hon'ble Supreme Court in the case of State Bank of Patiala V/s. S.K. Sharma 1996 SCC(L&S) 717. In this judgement the Hon'ble Supreme Court after reviewing the various judgements has laid down the principles based on which " test of prejudice" is to be applied to find out if any prejudice has been caused due to non-supply of the documents or any other infirmity in the disciplinary proceedings. In the present case we find that the applicant has merely made a submission of non-supply of the documents and has not come out with any explanation to establish that the documents demanded were vital and relevant in defending his case. In the absence of any such details, we are not convinced that non-supply of the documents demanded by the

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applicant has caused any prejudice to his case and thereby denying the reasonable opportunity of defending himself.

10. The third ground is that the applicant has been denied the opportunity of cross examination of the prosecution witnesses. It is an admitted fact that on 22.3.1989 the defence assistant of the applicant could not be present for the enquiry and request was made by him for postponement of the enquiry for further period of two months. The enquiry officer did not accept his request and the Inquiry Officer proceeded with recording of the evidence of the prosecution witnesses. The statement of witnesses were recorded in the presence of the applcant. The applicant was given an opportunity to cross examine the witnesses. However he refused the same in the absence of his defence assistant. The applicant has made averment in the O.A. that the applicant was not in a position to cross examine the witnesses wihout his defence Assistant in the presence of the presenting officer who was legally qualified person. It is also noted that subsequent request made by the defence assistant for calling the prosecution witnesses for cross-examination was not allowed by the Inquiry Officer. From these facts, it is quite obvious that the applicant was given an opportunity to cross examine the witnesses but he did not avail of the same in the absence of defence assistant. Taking this as an infirmity in the disciplinary enquiry proceedings, the question that arise is whether any prejudice has been caused to the applicant, Keeping in view what is held by the Hon'ble Supreme Court in the judgement referred to above in the case of

'S.K. Sharma', the applicant has not made any averments to demonstrate as to how the non cross examination of the prosecution witnesses has caused prejudice to his defence. On going through the statements of the witnesses, it is seen that these witnesses had been called only to prove the documents relied upon in the charge sheet. These witnesses have not disclosed any other details with regard to the charges. From the averments of the applicant in the O.A. or in the appeal, it is apparent that the applicant had not at any time doubted the genuineness of the documents relied upon by the respondents. Keeping these facts in view, we are of the opinion that though the Inquiry Officer had proceeded with recording of the evidence of the prosecution witnesses, non cross-examination had not caused any prejudice to the case of the applicant.

11. The order of the disciplinary authority has been assailed on several infirmities. One of the contention made by the applicant is that the observation made by the Disciplinary authority that onus of proving the allegations of malafide, unfair practice etc. was on the applicant is not valid and contrary to the law concerning the Disciplinary enquiry. Keeping in view the facts of the case, we are unable to appreciate any merit in this contention. In a disciplinary enquiry, the burden of proof may lie on the prosecution side or the defence side depending upon the nature of charges and the evidence relied upon. In this connection we seek support of the judgement of the Hon'ble Supreme Court in the case of Orissa Mining Corporation and

another V/s. Ananda Chandra Prusty 1997 (1) SLJ 133. In para 4, their Lordships have held as under:-

> " The position with respect of burden of proof is as clarified by us hereinabove viz. that there is no such thing as an absolute burden of proof, always lying upon the department in a disciplinary enquiry. The burden of proof depends upon the nature of explanation and the nature of charges. In a given case the burden may be shifted to the delinquent officer, depending upon his explanation."

In the present case the charge No.1 is with regard to making of allegations of malafide, unfair practice, motivated action and abuse of power against the Administration and in particular against the Head of the Organisation. These allegations have been made by the applicant against the Administration and therefore it was for the applicant to establish these allegations leading adequate evidence before the Enquiry Officer. The Administration was not expected to prove that the allegations made by the applicant are false. As held by the Hon'ble Supreme Court in the case of K. Nagraj and others V/s. State of Andhra Pradesh AIR SC 1985 551, the burden to establish malafide is heavy burden to be dis-charged by the party making these allegations. In this view of the matter, we are unable to find any infirmity in the reason recorded by the Disciplinary Authority that the burden of proof was on the applicant to prove his allegations. The second contention is that the

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reasons recorded by the disciplinary authority's in differing with the findings of the Inquiry Officer are not based on any evidence on record. On carefully going through the orders of the Disciplinary Authority, we are not impressed by the argument of the applicant. The Enquiry Officer has recorded in his findings that charge No.1 is partly proved and charge No.2 is not proved. However the Disciplinary Authority has recorded in the findings that charge No.2 is proved to the extent that the applicant has made direct approach to the Minister without routing through proper channel. In regard to the other portion of the charge No.2, the disciplinary authority has agreed with Inquiry officer. The Disciplinary Authority has also reasoned out that charge No.1 is fully proved. We do not find any infirmity in these findings as the applicant could not produce any evidence on record to establish his allegation. We are therefore not able to accept the contention of the applicant that the findings of the Disciplinary Authority are not based on any evidence on record. The third contention made by the applicant is that the order of the Disciplinary Authority has been passed in a mechanical way and is not a speaking order and all the points raised by him have been not taken into consideration. On carefully going through the order dated 18.6.1991 of the Disciplinary Authority as well as the reasons recorded by the Disciplinary Authority for dis-agreeing with the findings of the Inquiry Officer, we find that various points raised by the applicant in his representation have been detailed in the order and the same have been considered. We are therefore unable to agree with the contention of the applicant that the order of the Disciplinary Authority is not

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a speaking order. After consideration of the various infirmities pointed out in the order of the Disciplinary Authority, we conclude that none of the contentions raised have any substance. We therefore do not find any infirmity in the order of the Disciplinary Authority.

12. The last ground taken by the applicant is that the Appellate order is also non-speaking and without any application of mind. On going through the order of the Appellate authority, we note that the Appellate authority has considered all the points raised by the applicant in his representation. We do not find the order of the Appellate authority is not a speaking order and therefore this ground of the applicant has no merit.

13. In the result of the above deliberations, we are unable to find any of the grounds advanced in challenging the impugned punishment order having any merit to vitiate the disciplinary proceedings. Accordingly the O.A. deserves to be dismissed and accordingly the same is dismissed. No order as to costs.

(D.S. Baweja)
Member(A)

13/11/98
(R.G. Vaidyanatha)
Vice Chairman

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