CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION No. 1082 /1993

Date of Decision: 12.2.97

Shri R. S. Sharma, — Petitioner/s

Shri B. P. Dharmadhikari, — Advocate for the Petitioner/s

V/s.

Union Of India & Another, — Respondent/s

Shri M. G. Bhangde, — Advocate for the Respondent/s

CORAM:

Hon'ble Shri B. S. HEGDE, MEMBER (J).

Hon'ble Shri P. P. SRIVASTAVA, MEMBER (A).

(1) To be referred to the Reporter or not ? No

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

(B. S. HEGDE)
MEMBER (J).

os*

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

CAMP : NAGPUR.

ORIGINAL APPLICATION NO.: 1082/93.

Pronounced Dated this _____, the 12th day of February, 1997.

CORAM : HON'BLE SHRI B. S. HEGDE, MEMBER (J).
HON'BLE SHRI P. P. SRIVASTAVA, MEMBER (A).

R. S. Sharma
Plot No. 1,
Deonagar, Khamla Road,
Nagpur - 15. ... Applicant

(By Advocate Shri B. P. Dharmadhikari).

VERSUS

1. Dy. Director General,
Vigilance (T),
Dak Tar Bhawan,
Sansad Marg,
New Delhi - 110 001.

2. The Union Of India
through its
Secretary,
Ministry of Communication,
Dak Tar Bhawan,
Sansad Marg,
New Delhi - 110 001.

(By Advocate Shri M.G. Bhangde)

: ORDER :

PER.: SHRI B. S. HEGDE, MEMBER (J)

In this O.A., the applicant challenges the impugned order of dismissal dated 04.08.1993 as unconstitutional and illegal and prayed for normal retirement pension with arrears, etc.

2. The applicant was serving as a Divisional Engineer with the Respondent No. 2 at its Nagpur office when the order of dismissal dated 19.06.1986 came to be served upon him. The said dismissal order was served just five days before his date of supperannuation. The applicant entered the service of the respondents in the

...2

year 1949 as Telephone Operator and thereafter, he earned the last posting on promotion on January, 1982. He submits that he has got clean record of service throughout and no adverse remarks were communicated to him. It was for the first time that the Departmental Enquiry in which impugned order was passed, came to be held against him. While he was working at Hyderabad as Divisional Engineer, he received the charge-sheet dated 14.06.1984 alleging that he has submitted false cash memo in the name of M/s. Lotus Electrical Repairs for the year 1981 to 1983 and directed him to give his reply within a specified time. The applicant replied to the charge-sheet on 06.07.1984. The Enquiry Officer and the Presenting Officer was appointed on 29.08.1984. After submitting his reply to the charge-sheet, the applicant vide his letter dated 20.09.1984 asked for a defence assistant - trained advocate, which was rejected by the respondents stating that his request for engaging a legal practitioner i.e. an Advocate as defence assistant has been carefully considered by the President and it has been decided that this is not a fit case where permission should be accorded for engaging a legal practitioner to appear as defence assistant. Thereafter, the applicant has chosen another Defence Assistant by name - Shri C. Emmanuel, Assistant Director (Telecommunications, Guntur, who gave his consent as on 01.12.1984 and stated that he was made available to the applicant only on 13.12.1984, as he was involved in some other enquiry.

3. It may be recalled, as against the dismissal order of the respondents, the applicant had filed an O.A. no. 471 of 1986, which has been disposed of by the Tribunal vide its order dated 19.04.1991. While allowing

...3

the O.A., the Tribunal quashed the dismissal order passed by the respondents on the ground of Mohammed Ramzan Khan's case. Thereafter, the applicant made a representation vide dated 14.09.1992, which was replied by the respondents. Thereafter, the present impugned order dated 04.08.1993 was passed by the President of India, against which, the applicant filed this present O.A. No. 1082/93. The learned counsel for the applicant urged that the impugned order passed by the respondents is not sustainable on the following grounds :-

(i) The respondents ought to have given the applicant a defence assistant immediately after the service of charge-sheet on him.

(ii) The Presenting Officer is also a Vigilance Officer of the department well trained in conduct of departmental enquiries. The Presenting Officer being a well trained officer, the applicant ought to have been given the assistant of an advocate.

(iii) The Commissioner of Departmental Inquiry should not have fixed the case for preliminary hearing without giving to the applicant any defence assistant.

(iv) The Commissioner of Departmental Inquiry should not have directed the applicant to inspect the documents in the absence of defence assistant.

(v) As per rules, the defence assistant should have been given sufficient time to prepare the evidence.

...4

(vi) Though the defence assistant gave his consent on 01.12.1984, he was made available only on 13.12.1984, thereby, neither the applicant nor the disciplinary authority has seen the documents and prepared, worked out the defence, which was fixed on 13.12.1984.

(vii) The C.D.I. should not have accepted any documents on record without giving the applicant and his defence assistant an effective opportunity to inspect these documents and he ought not to have proceeded with the enquiry on 13.12.1984 without giving the applicant and his defence assistant an opportunity to examine the documents and to work out their defence as per rule 14(11) of C.C.S.(C.C.A) Rules, 1965.

(viii) The C.D.I. has not applied his mind correctly to the facts proved before him and did not demonstrate that the applicant is guilty of any misconduct.

(ix) The C.D.I. should have taken note that the Presenting Officer had on 14.08.1994, 16.08.1994, 17.08.1994, 05.09.1984 and 08.10.1984 recorded in his presence the statements of the persons to be examined as witnesses and examined as such on 13.12.1984, whereas, the charge-sheet was issued on 14.06.1984. These persons were administratively subordinate to the Presenting Officer and in the circumstances

(of the case, it is apparant that their statements are influenced because of his presence at the relevant time.

(x) The C.D.I. should have noticed that the witnesses examined before him were not independent witnesses and infact, were duty bound to stick to their previous written statement recorded in his own presence by the administrative superior i.e. the Presenting Officer, is appointed subsequent to the issuance of the charge-sheet and the appointment of an enquiry officer, which has resulted in denial of fair enquiry to the applicant, etc.

It is not the case of the respondents that any loss has been caused to the department by virtue of his alleged submission of false bills and obtained cash from his subordinates. As a matter of fact, two hearings have been given to the applicant, one is stated to be the preliminary hearing as on 12.10.1984 and another is the final hearing on 13.12.1984. He made representation on 29.12.1984 and the Enquiry Officer gave his findings on 19.01.1985 and the competent authority, the President of India, imposed the penalty on 19.06.1986 which was received by the applicant on 26.09.1986, just five days before his retirement. Though the applicant has raised an objection on 13.12.1984 before the Commissioner of Departmental Enquiry that the Presenting Officer could not function as a Presenting Officer because he had conducted a preliminary investigation and it is clear from the D.G., P & T, New Delhi letter dated 28.8.1963 that he was debarred

to function as a Presenting Officer. Despite the objection, the C.D.I. had made an observation that the Presenting Officer stated that he has recorded certain statement subsequent to the issuing of charge-sheet and that he was not associated with the preliminary investigation. He stated further that these statements were not to be utilised by the prosecution in the present inquiry and accordingly, the objection raised by the applicant has been rejected by the Commissioner of Department Enquiry. Similarly, he has raised an objection that he wanted to verify the documents alongwith the defence assistant on 12.10.1984. The said contention has been rejected by the Commissioner of Department Inquiry. Accordingly, it was observed that the request of the Charge-Officer for adjourning the case for three clear days are turned down by the C.D.I., as he felt that sufficient opportunity had already been given to the charged-officer for the perusal of the additional defence documents, if he did not avail of it, it was his fault and thereby, no adjournment was granted. The learned counsel for the applicant further contended that he has brought out various grounds in his representation before the competent authority on receipt of the enquiry report but the said contention has not been delt with by the final order passed by the President on 04.08.1993 and the competent authority has not applied its mind, which is clear on perusal of the order, narrating the various articles of charges and other sequences and has not delt with any of the contention raised in the application. He also submitted that the applicant does not have any recourse to any Appellate or Reviewing authority, it is the duty of the respondents department to deal with all the contentions

raised in the representation and pass a speaking order, thereby, his right of earning pension has been denied to him without compliance of due process of law.

4. On the other hand, the learned counsel for the respondents urged that the enquiry conducted by the respondents is in accordance with the rules and there is no infirmity or injustice caused to the applicant. Though he has raised certain objections before the start of the enquiry, which has been considered by the C.D.I. but the same was rejected, thereafter, having participated in the enquiry, he cannot raise such plea. The President, who is the competent disciplinary authority in this case, after carefully examining the report of the Inquiry Officer, the records of inquiry, the evidence adduced during the inquiry and facts and circumstances of the case and in consultation with the U.P.S.C., arrived at the conclusion that the charges levelled against the applicant were establishment. During the course of argument, the learned counsel for the respondents urged that the applicant has raised five grounds -

(i) In the absence of defence assistant, he could not verify the documents,

(ii) After issuance of the charge-sheet, the Presenting Officer examined certain prosecution witnesses,

(iii) The charges are not proved,

(iv) No personal hearing was given and

(v) His service record was throughout good.

As against this allegations, the learned counsel for the respondents, Shri M.G. Bhangde, submits that the Inquiry Officer had directed the applicant to inspect the documents, as the volume of document was not bulky, only

certain bills, which does not require any help of defence assistant or anyone else. Since the applicant himself is a gazetted officer, he could very well verify the same and the Defence Assistant had given his consent on 01.12.1984 but he was engaged in some other enquiry from 10.12.1984 to 12.12.1984 and the applicant could have very well briefed his defence assistant in the meanwhile. On the other hand, the counsel for the applicant submits that though the defence assistant had given his consent as on 01.12.1984, he was not available for his service till 13.12.1984, thereby, his right of availing the service of the defence assistant has been denied. As against this, the learned counsel for the respondents submits that since the applicant had cross-examined the prosecution witnesses, he cannot now say that any prejudice is caused to him. It was open to him at that point of time to seek time before cross-examining the prosecution witnesses, which was not done. So far as the second ground is concerned, he submits, that it is not relevant to the issue. Charge No. 1 and 5 are clearly established. It is true that Charge No. 3 and 4 has not been proved against the applicant. The contention of the learned counsel for the respondents is that, sufficient time was not given to bring the defence assistant, is not based on receipt, except urged during oral arguments, therefore, it cannot be said that neither the rules of natural justice nor any statutory rules have been violated in the completion of the enquiry or imposition of penalty against the applicant. In support of his contention, Shri Bhangde relies upon the recent decision of the Supreme Court in State Bank Of Patiala & Others V/s. S.K. Sharma [(1996) 3 SCC 364] stating that

...9

no prejudice has been caused to the applicant by the delay in engaging the defence assistant, as he had already participated in the enquiry proceedings despite objections.

5. The Apex Court has held that - "the several procedural provisions governing the disciplinary enquiries, (Whether provided by rules made under the proviso to Article 309 of the Constitution, under regulations made by statutory bodies in exercise of the power conferred by a statute under that matter, by way of statutes are nothing but elaboration of the principles of natural justice and their several faces. It is a case of codifaction of the several facets of rule of audi alteram partem or the rule against bias. Sub-clause (iii) of clause (b) of Rule 68 of the State Bank of Patiala (Officers') Service Regulations, 1979 is part of a regulation made in exercise of statutory authority. The sub-clause incorporates a facet of the principle of nature justice. It is designed to provide an adequate opportunity to the delinquent officer to cross-examine the witnesses effectively and thereby defend himself properly. It is a procedural provision. Merely because of use of word 'shall' therein, it cannot be held to be mandatory. Moreover, even a mandatory requirement can be waived by the person concerned if such mandatory provision is conceived in his interest and not in public interest. From his conduct, the respondent must be deemed to have waived it. This is an aspect which must be borne in mind while examining a complaint of non-observance of procedural rules governing such enquiries. As a rule, all such procedural rules are designed to afford a full and proper opportunity to the delinquent officer/employee to defend himself a full and proper opportunity to the

delinquent officer/employee to defend himself. Hence, whether mandatory or directory, they would normally be conceived in his interest only. Thus sub-clause (iii) is conceived in the interest of the delinquent officer and therefore, he can waive it. It would not be correct to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. The approach and test adopted in B. Karunakar should govern all cases where the complaint is not that there was no hearing (no notice/no opportunity and no hearing) but one of not affording a proper hearing than adequate or a full hearing) or of violation of a procedural rule or requirement governing the enquiry, the complaint should be examined on the touchstone of prejudice. The test is : all things taken together whether the delinquent officer/employee had or did not have a fair hearing."

6. In the light of the above observations, it cannot be said that the applicant has not been given full hearing or not given any opportunity to defend himself. After examination of the prosecution witnesses, if he feels that he requires some time for cross examination, he could have done so at that point of time, which he did not do so. Infact, he cross examined the witnesses and participated in the enquiry. That being so, it cannot be said that any prejudice has been caused to the applicant in the enquiry.

7. The learned counsel for the applicant submits that non-supply of defence assistant at an appropriate time is not a procedural matter, it affects his rights, thereby, the procedure adopted by the C.D.I. is prejudicial to his interest. In support of his contention, he relies upon

the decision of the Bombay High Court in 1997 LAB I.C. 974 - Union Of India V/s. Abdul Kadar Balasaheb Soudagar wherein he submits that it is stated that if a defence assistance is denied, no separate prejudice is required to be established. He also cited another decision of Himachal Pradesh High Cour ((1983)LAB I.C. 73(H.L. Sethi V/s. The Municipal Corporation, Simla & Others wherein it is stated that even if ex-parte enquiry is conducted, five days time has to be given, as per Rule 14(11) of the C.C.S(C.C.A) Rules, 1965. In the instant case, though the applicant has sought time, the C.D.I. has rejected his contention stating that he has been given due opportunity, which is contrary to the rules.

8. In the light of the above, the question for consideration is, whether the punishment imposed by the respondents is in accordance with the relevant rules and is based on evidence. The further question to be seen here is, whether any prejudice has been caused to the applicant in allowing the defence assistant at a belated stage or has he been denied of any opportunity to defend himself. On perusal of the records, we find no such plea has been raised by the applicant, except stating that enquiry has been completed, firstly preliminary enquiry on 12.10.1984 and secondly, the final enquiry on 13.12.1984. Though the defence assistant was allowed to be engaged belatedly, despite the same, the applicant has participated in the enquiry and cross examined the prosecution witnesses and defence witnesses, thereby, it cannot be said that any prejudice has been caused to the applicant nor can it be said that rules of

natural justice has been violated. His further contention is that, in the impugned order dated 04.08.1993, expept para 5, other narrations are only the recitation of articles of charges and U.P.S.C. observations, thereby, the competent authority has not applied its mind while coming to the conclusion of dismissal of service and withholding of pensionary benefits and no where it has dealt with any of the contentions raised by the applicant in his representation dated 14.09.1992. It is true that the applicant has no other recourse to go against the order of the President and the appeal as well as the representation is barred because the competent authority itself is the President of India, therefore, it was necessary for the respondents to consider the various grounds raised by the applicant in his representation and ought to have passed a speaking order on the points raised by the applicant. In this context, it is to be considered whether any prejudice has been caused to the applicant by not passing a speaking order. In view of the recent Supreme Court decision, it cannot be said that any prejudice has been caused to the applicant because the documents for verification were only certain bills and other incidental documents. The applicant being a Class-I Officer, he himself could verify and find out any discrepancy in the charges levelled against him and the documents furnished by him for verification. Just because the defence assistant has not been given an opportunity to verify, that does not mean that serious prejudice has been caused to the applicant.

9. The Apex Court has held again and again that jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere

with the findings of the Inquiry Officer or competent authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on a competent authority either by an Act of legislation or rules made under the proviso of Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with the principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. Further in State Bank Of India & Others V/s. Samarendra Kishore Endow & Another (1994 SCC (L&S) 687) the Apex Court has held that the Tribunal cannot interfere if punishment has been imposed after holding enquiry. It it is considered that the punishment imposed is harsh, the proper course is to remit the case back to the Appellate or the Disciplinary Authority.

10. During the course of hearing, the learned counsel for the applicant urged that taking the statement of the prosecution witnesses subsequent to the issuance of the charge-sheet by the Presenting Officer had caused considerable prejudice to the interest of the applicant because the prosecution witnesses were working under the Presenting Officer, who had taken the evidence subsequent to the issuance of the charge-sheet, which is not in accordance with the rules. The said statement has been used against the applicant during the course of enquiry, which is not permissible. However, on perusal of the

Inquiry Officer's proceedings dated 13.12.1984, it is noticed that the Presenting Officer stated that he had recorded certain statement subsequent to the issuance of the charge-sheet and that he was not associated with the preliminary investigation. He stated further that this statements were not to be utilised by the prosecution in the present inquiry. Accordingly, the charge-sheet was not amended so as an inference could be drawn that recording of these statements subsequent to issuing of charge-sheet could be deemed to be supplementary preliminary investigation. Since there is no substance in the contention of the applicant, the same was rejected by the C.D.I. Considering the totality of the case, we are of the view that the competent authority ought to have considered the various contentions raised by the applicant in his representation and should have passed a speaking order. As stated earlier, no prejudice has been caused to the applicant either in the enquiry proceedings or in the final order passed by the respondents. In view of the Apex Court's consistent observations that it is not for the Tribunal to sit as an Appellate Forum over the findings of the competent authority but the Tribunal can only review if there is any infirmity or error crept in, in the conduct of the disciplinary proceedings and not on merit of the Disciplinary proceedings enquiry.

11. In the result, we do not see any merit in the O.A. and the same is dismissed with no order as to costs.

(P.P. SRIVASTAVA)
MEMBER (A).

(B. S. HEGDE)
MEMBER (J).

os*