CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.: 611 OF 1993.

Dated the 25th day of November, 1998.

Arjun Shankar Pawar, Petitioner.

Shri G. K. Masand, Advocate for the Petitioner.

VERSUS

Union Of India & Others, Respondents.

Shri S. S. Karkera for
Shri P. M. Pradhan, Advocate for the Respondents.

CORAM :

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

Hon'ble Shri D. S. Baweja, 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

(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

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CORAM : HON'BLE SHRI JUSTICE R. G. VAIDYANATHA, VICE-CHAIRMAN.

HON'BLE SHRI D. S. BAWEJA, MEMBER (A).

Arjun Shankar Pawar,
Residing at -
G. B. Parars Chawl,
Gamdevi Road, Tembe Pada,
Panchsheel Nagar, Bhandup,
Bombay - 400 078. ... Applicant

(By Advocate Shri G. K. Masand)

VERSUS

1. Union Of India through
The Member (Personnel),
Postal Service Board,
Dak Bhavan,
New Delhi - 110 001.

2. The Director,
Postal Services,
Bombay City,
O/o. Chief Postmaster
General, Mumbai - 400 001. ... Respondents.

3. The Senior Manager,
P & T Mail Motor Service,
Worli, Mumbai - 400 018.

(By Advocate Shri S. S. Karkera
for Shri P. M. Pradhan).

: ORDER :

PER.: SHRI R. G. VAIDYANATHA, VICE-CHAIRMAN

This is an application filed under Section 19 of the Administrative Tribunals Act, 1985. Respondents have filed reply. We have heard the Learned Counsels appearing on both sides.

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2. The applicant was working as a Driver in the Postal Department. It appears,he used to be absent frequently and then applying for leave either on the ground of ill-health, domestic reasons or some other reasons. Then the applicant remained absent for sufficiently long time for nearly two years. Then at the time of joining duty he gave a medical certificate. The department being dissatisfied with the applicant's habitual absence from service, including the last one long absence, decided to take disciplinary action against him. Hence the department issued a charged sheet dated 13.06.1989 alleging that he is absenting from duty frequently, deliberately and unauthorisedly in contravention to Service Rules and thereby, he has committed misconduct. The applicant gave a reply stating that his earlier period of absence has been regularised by sanctioning leave from time to time and it cannot be again enquired into in a departmental enquiry. As far as the last long absence is concerned, his plea was that, he was suffering from illness, namely - mental illness, which prevented him from joining duty. As soon as he was medically fit, he resumed duty and started working. It was therefore stated by him that there was no deliberate or willful absence from duty.

An enquiry officer was appointed. The prosecution did not adduce any oral evidence but relied on number of documents to prove applicant's habitual absence. In defense, the applicant examined himself and produced documents and medical certificates to show

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that his absence was not intentional but was due to medical reasons. The Inquiry Officer submitted a report holding that the charge is proved. A copy of the Inquiry Report was sent to the applicant and he gave a reply. On considering the inquiry report, the Disciplinary Authority held that the charge is duly proved and in view of the applicant's habitual absence from service he found that it was not a fit case to continue the applicant in service and, therefore, imposed the penalty of removal from service.

The applicant's appeal to the competent authority was unsuccessful. He carried the matter in revision before the Revisional Authority and that also came to be rejected. Being aggrieved by these orders, the applicant has approached this Tribunal challenging the orders of the Disciplinary Authority and higher authorities.

3. The applicant has taken number of grounds challenging the impugned orders. It is stated that the enquiry was vitiated since the charge-sheet was issued in English, which is not known to the applicant. It is alleged that when previous absence has been regularised by granting leave, the same cannot be the subject matter of departmental enquiry. That the appointment of the Inquiry Officer even before the receipt of written statement from the applicant was illegal. That, both the Inquiry Officer and the Disciplinary Authority have acted with prejudice and with a closed mind. The medical certificates produced by the applicant are not

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taken into consideration and commented by the Inquiry Officer or the Disciplinary Authority. That the enquiry is bad for not observing the principles of natural justice. Then it is also contended that the punishment is disproportionate to the misconduct. Therefore, the applicant wants that impugned order to be quashed and the applicant should be reinstated with all back-wages.

4. Respondents have filed reply justifying the initiation of disciplinary enquiry. It is stated that the enquiry has been done according to law. That there are no violation of rules or principles of natural justice. That even though the applicant might be suffering from illness, he did not obtain prior permission from the competent authority before remaining absent unauthorisedly. That the orders passed by the Disciplinary Authority and the higher authorities are perfectly justified, legal and valid and do not call for interference by this Tribunal.

5. The Learned Counsel for the applicant has taken us through the materials on record and contended that the enquiry is vitiated and, therefore, the punishment should be set aside. Alternatively, he submitted that the penalty of removal from service is disproportionate to the misconduct and therefore, the penalty should be reduced and modified to one of the minor penalties. On the other hand, the Learned Counsel for the respondents submitted that the scope of judicial review in a matter like this, is very limited and this Tribunal should not interfere with the findings of misconduct or with the quantum of penalty imposed by the Disciplinary Authority.

We will consider the contentions urged on behalf of the applicant one by one.

The first contention is that, the applicant knows very little English and inspite of his request, the respondents did not furnish the translation either in Marathi or in Hindi. Nodoubt, the respondents have rejected the request of the applicant for translation. The Rule on this point is very clear which may be found in Rule 170 in Volume-III of Post & Telegraph Manual, which clearly says that the charge-sheet could be either in English or Hindi. It is for the delinquent to get the same translated into some other language for his own benefit. Therefore, discretion is given to the Disciplinary Authority to issue the charge-sheet either in English or Hindi. If it is issued in english, as in the present case, it is for the applicant to get it translated either to Hindi or Marathi or any other language which he knows.

Applicant's Counsel relied on 1992(1) SLJ 161 (Shri Teja Nonghar V/s. Union Of India & Others) where nodoubt it is observed that if translation is not given, then it violates the principles of natural justice. But the decision must be read with reference to the facts of that case. The Tribunal has observed that the enquiry records were not available hence, it is not possible to know whether the charge-sheet was translated and explained to the applicant in the language known to him. Then it is pointed out that the railway rules were silent on this point.

In the present case, the Post & Telegraph Rules clearly provides that the charge-sheet can be either in Hindi or in English and the responsibility is that of the delinquent to get it translated. Then further, the enquiry record shows that on the first date of hearing, the charge-sheet was explained to the applicant in the language known to him and then his plea was recorded when he pleaded ~~of~~ not guilty. Further, the applicant has given his written statement in English. That means, he has got it translated and knew what case he has to meet and gave a lengthy written statement mentioning all aspects of his defense. He is assisted by a Defence Assistant in the enquiry who knows english. Further, the entire thing in this case is based on admitted and undisputed facts. The fact of applicant being absent is admitted. The only question is, whether applicant's absence was intentional and deliberate or it was inevitable due to medical reasons? The applicant has put forward his medical certificates in defense and his stand is that, due to his illness he could not attend the office. Hence, in the peculiar facts and circumstances of the case, we do not find that any ~~injustice~~ prejudice is caused to the applicant by the issuance of charge-sheet in english. No prejudice has been caused to the applicant since the charge-sheet is based on admitted facts and further, the applicant has participated in the enquiry by engaging a defence assistant, who knew english. Hence, we find no merit in the first contention.

6. The next contention is that the Inquiry Officer has been appointed even prior to the receipt of the

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written statement and this is in violation of Rule 14(5)(a) of the C.C.S (C.C.A) Rules. Reliance was placed on a case reported in 1989 (1) ATR 391 (Ratnakar Behura V/s. Union Of India & Others (where no doubt it is held that the said rule is mandatory and if it is violated, the proceedings were vitiated. We need not examine this question in detail since the said decision of the Cuttack Bench of the Tribunal has been subsequently over-ruled by a Full Bench of this Tribunal in the case of R. D. Gupta V/s. Union Of India & Anr. reported in 1991 (2) ATJ 431. The Full Bench has held that the rule in question is not mandatory and violation of it will not vitiate the disciplinary proceedings unless prejudice is caused.

In this case it is not demonstrated either in the pleadings or in the argument as to what prejudice is caused to the applicant if the enquiry officer is appointed prior to the receipt of the written statement. In this case, admittedly, the applicant did not submit his written statement within ten days after receipt of the charge-sheet. Therefore, the Disciplinary Authority was well within his rights to appoint an Inquiry Officer when the applicant did not submit the written statement within the required time. The point that the applicant had asked for translation of the charge-sheet for preparing the written statement is wholly irrelevant. If once the time for submitting written statement is over, then the Disciplinary Authority can proceed to appoing an Inquiry Officer. Hence, we find no merit in the second contention.

7. It was argued that for the previous absence, leave has been granted and the absence is regularised.

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The Disciplinary Authority cannot issue any charge-sheet and cannot take into consideration the previous absence. Reliance was placed on the decision of a Learned Single Judge of Punjab High Court in the case reported in 1988(3) SLJ 216 (State of Punjab V/s. Chanan Singh). In that case, in respect of the same absence for which charge-sheet had been filed, separate order had been passed regularising that absence and treating it as leave without pay. It was, therefore, observed that this amounts to condonation of absence. It is very difficult to accept the broad proposition that the department has to ignore the habitual absence of an employee for all times to come. In the present case, there was an undue and long absence of two years and odd on the last occasion and there was a previous conduct of the applicant being habitually absentee, though the previous absence was regularised by granting leave with or without pay. In our view, it cannot be said that the previous habitual absence should be ignored for all times to come even when the applicant remains absent for a long period of two years and odd at a later stage. Even though no disciplinary action may be taken regarding the previous plea of regular service, the previous habitual absence may be a material to consider while awarding the penalty.

We are also not impressed by the argument of the Learned Counsel for the applicant on the question of bias or prejudice on the part of the enquiry officer or disciplinary authority.

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The fact that the applicant remained absent for two years and odd at a stretch, cannot be disputed. He did not send the leave application earlier. It was only at the time of joining duty he gave the explanation. There was his previous conduct of habitual absence on nearly forty-seven occasions. A Government official has to apply for leave in advance. If due to sudden illness leave cannot be applied in advance, atleast an intimation should be given to the office about the inability of the official to come to duty and subsequently, formal leave application should be given. Hence, taking into consideration the previous conduct of the applicant of habitual absence and the present absence of two years and odd at a stretch, we find that the finding of misconduct against the applicant is justified.

8. The only other contention is about the quantum of penalty. It is not a case of willful or wanton absence from duty. The applicant has given some explanation, namely - about his illness in keeping away from the office. It is not denied that the applicant had illness. The Inquiry Officer in the report admits this fact, which could be gathered from para 8 of his report (page 44 of the paper book) where he has mentioned as follows :

> "Even though the C.O. was suffering from Anxiety Neuriosis no body from his family nor co-drivers sent any intimation/Unfit M.C. to the office."

It may be his not sending information is a misconduct, but the question is about the gravity of the misconduct. If the person is suffering from mental neuriosis, which has been accepted by the Inquiry Officer, then the gravity of the misconduct will be less.

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If it is a case of deliberate, willful or wanton absence from duty, then the gravity of the misconduct will be high.

Unfortunately, the Disciplinary Authority nowhere discusses the applicant's explanation about illness. Number of medical certificates are marked as exhibits in the case. We have perused the enquiry file which clearly shows that the applicant had produced number of medical certificates to prove his illness.

As far as the last long spell of absence, there is a medical certificate dated 03.03.1989 issued by the Deputy Superintendent of G. T. Hospital, Bombay, which reads as follows :-

> "This is to certify that Shri A.S. Pawar, aged about 45 years, male patient, has been under treatment in this hospital for Anxiety Neuriosis from 06.12.1987. He is advised to resume his duty as he is fit for the job."

This document has been marked as applicant's defence exhibit and numbered as exhibit-D-I(21). Unfortunately, the Disciplinary Authority has not applied his mind to all the medical certificates and in particular, to this certificate which explains the long absence for two years and odd.

Even if the applicant had come to attend the office, he could not have been taken on duty in view of his mental problem. If he has not sent earlier information it is because of his mental illness. Unfortunately, the Disciplinary Authority and even the higher authorities have not applied their mind to the medical certificates produced by the applicant which would have lessened or reduced the gravity of misconduct.

9. The Learned Counsel for the applicant fairly conceded about the limitation and the powers of this Tribunal while exercising judicial review. However, he submitted that in view of the latest decision of the Supreme Court in Chaturvedi's case (1996(1) SC SLJ 9) he submitted that this Tribunal may take a lenient view and interfere with the quantum of penalty. In Chaturvedi's case, the Supreme Court has observed that normally a Court or Tribunal should not interfere with the quantum of penalty. However, it is pointed out, that if the punishment imposed by the Disciplinary Authority shocks the conscience of the High Court or Tribunal, it can appropriately mould the relief either by directing the Disciplinary Authority or the concerned authority to reconsider the penalty imposed or to shorten the litigation, it may itself, in exceptional cases, impose appropriate punishment with cogent reasons in support thereof.

In our view, the penalty of removal from service, in the facts and circumstances of this case and particularly, in view of the unchallenged sickness of the applicant, appears to be highly disproportionate to the misconduct so as to shock our judicial conscience. If there was serious dispute between the parties on the question of applicant's illness, then the matter would be different.

10. We have already seen how the Inquiry Officer records a finding accepting that the applicant was unwell. The Disciplinary Authority and the higher authorities do not apply their mind to the medical certificates and

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the applicant's explanation about illness. In the written statement filed in this case, in para 7 it is admitted as follows :

> "These respondents state that these respondents do not dispute the genuineness of the medical certificate, but it is in fact his conduct of not obtaining the prior approval and/or sanction for the leave period ... ... charge-sheet."

Therefore, the genuineness of the medical certificate is not disputed. The illness of the applicant is not disputed but the respondents' contention is that, the applicant did not intimate or did not apply for leave in advance. It is no doubt a misconduct but the question is, whether it is such a misconduct to invite the highest punishment of removal from service? Having regard to the nature of illness of the applicant, we find that the authorities have not applied their mind to the explanation given by the applicant about his illness and they have not applied their mind to the medical certificates and straight-away imposed the penalty of removal from service after recording the period of his absence. Justice must be tempered with mercy. Each case has to be decided on the facts and circumstances of the case. We, therefore, hold that the punishment of removal from service is wholly and grossly disproportionate to the misconduct in view of the unchallenged illness and unchallenged medical certificates.

11. At one stage, we thought that the matter should be referred back to the Appellate Authority or Disciplinary Authority to pass appropriate order of punishment. But we find that this is a charge-sheet

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of 1989. Ten years have lapsed. Then we find that the subject matter of charge-sheet is about absence from service from earlier period on different occasions from 1985 to 1989. The misconduct is only about unauthorised absence. No allegation touching the honesty or integrity of the applicant is made. To cut short the litigation and having regard to the facts and circumstances of the case, we feel that we should substitute a proper punishment in the place of penalty of removal awarded by the Disciplinary Authority.

Having regard to the unauthorised absence of two years and odd, this is not a case of awarding minor punishment of stopping increments, censure, etc. On his own showing, the applicant has the disease of anxiety neuriosis, which is a mental illness. The applicant's job is that of a Driver. A person who has a past history of mental neuriosis, cannot be kept in the service of that of a Driver of a vehicle. It will not be in public interest to direct the respondents to reinstate the applicant in service as a Driver. It will also not be in the interest of the applicant for being placed again in service as a Driver. Since his post is that of a technical person like a Driver, he cannot be given any lower post. If he cannot be reinstated in service as a Driver and if the order of removal from service is disproportionate to the misconduct, for the reasons mentioned above, the one and only penalty that can be imposed under the rules is one of compulsory retirement from service. Hence, in the facts and circumstances of the case, we are substituting the penalty to compulsory retirement from service in lieu of removal from service with effect from

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the same date, namely - 30.04.1990.

12. In the result, the application is allowed partly. While upholding the finding of misconduct recorded by the Disciplinary Authority and higher authorities, but in view of unchallenged explanation of illness and medical certificates produced by the applicant, the penalty of removal from service with effect from 30.04.1990 is set aside and substituted with a penalty of compulsory retirement from service w.e.f. the same date, namely - 30.04.1990. As ~~the~~ a consequence, the applicant is entitled to all retirement benefits to which he is entitled, subject to the qualifying service at his credit, as per rules. The respondents are directed to pay pension and other retirement benefits to the applicant within a period of four months from the date of receipt of a copy of this order. In the circumstances of the case, there will be no order as to costs.

(D. S. BAWEJA)
MEMBER (A).

(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

27-11-95

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