IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Original Application No: **425/94**

Date of Decision: 22.6.99

Mrs.Nalini P.Joshua — Applicant.

Shri D.V.Gangal — Advocate for Applicant.

Versus

Union of India & Ors. — Respondent(s)

Shri S.C.Dhawan. — Advocate for 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? Yes

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

(R.G.VAIDYANATHA)
VICE-CHAIRMAN.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO.425/94.

, this the 22nd day of June 1999.

Coram: Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman,
Hon'ble Shri D.S.Baweja, Member(A).

Mrs.Nalini P.Joshua,
Substitute Mid-wife,
Quarter No.2/E,
Railway Colony,
Jalna. ... Applicant.
(By Advocate Shri D.V.Gangal)

Vs.

1. The Union of India through
the General Manager,
South Central Railway,
Secunderabad,
Andhra Pradesh.
2. Chief Medical Officer,
South Central Railway,
Secunderabad,
Andhra Pradesh.
3. Shri Rajeshwar Rao,
Medical Superintendent,
Divisional Hospital,
Lallagud,
Secunderabad,
Andhra Pradesh. ...Respondents.
(By Advocate Shri S.C.Dhawan)

: O R D E R :

(Per Shri Justice R.G.Vaidyanatha, Vice-Chairman)

This is an application under section 19 of the Administrative Tribunals Act, 1985. Respondents have filed their reply. We have heard the learned counsels appearing on both sides.

2. The applicant's case, stated briefly, is as follows.

The applicant was working as a substitute Mid-wife in the Health Unit, Jalna. She had complained against the Medical Officer that he was harassing her. The department issued a charge sheet against the applicant dt. 15.1.1982 alleging that she had given false complaint against the Medical Officer and

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further she has failed to attend a delivery case of the wife of one Fireman Shivaji. The applicant denied the allegations in the charge sheet. Then a regular enquiry was held where number of witnesses were examined on behalf of the Administration and applicant also adduced defence evidence. The Enquiry Officer submitted a report that the charges were proved. On that basis the Disciplinary Authority straight away passed order dt.23.8.82 by imposing a penalty of removal from service. The applicant challenged that order by filing a suit in the Civil Court at Jalna. Subsequent to the Constitution of this Tribunal the suit came to be transfered to this Tribuinal and re-numbered as T.A. No.28/89 and this Tribunal quashed the order of penalty passed by the Disciplinary Authority and to reinstate the applicant with a further direction that Disciplinary Authority may serve a copy of the Enquiry Report on the applicant and on her reply to the Enquiry Report he can proceed to pass final orders. In pursuance of that direction, the applicant was reinstated and a show cause notice dt. 20.12.1991 was issued. The applicant gave a reply to that notice, then again the Disciplinary Authority passed the order dt.21.6.1993 holding that the charges are proved and imposed a penalty of removal from service. The applicant challenged that order before the Appellate Authority who by order dt. 2/5.11.1993 dismissed the appeal.

3. The applicant's case is that the orders passed by the respective authorities are illegal and liable to be quashed. Her case is that the charges alleged against her are false and they are not proved in the enquiry. The findings of the Enquiry Officer is perverse and based on no evidence. ~~It is~~ The applicant's version as to why she could not attend the delivery

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of Shivaji's wife should have been accepted. There are discrepancies in the evidence recorded during the enquiry. The evidence given by the Prosecution Witnesses is not reliable and should not have been accepted. The Disciplinary Authority has not given detailed reasons in support of his order accepting the Enquiry Report. The order of the appellate authority is also perverse. Then the applicant has narrated many facts to demonstrate that her version is correct and should be accepted. It is also alleged that the allegation against the applicant is minor, but a major penalty of removal from service is given. The applicant therefore, pressed that the impugned orders be quashed and the applicant should be reinstated with full back wages and other consequential reliefs.

4. The respondents in their reply have justified the action taken against the applicant. After holding a regular enquiry and after applying his mind the Disciplinary Authority has held that the charges are proved and passed the impugned order of removal from service. There is no illegality or irregularity in conducting the enquiry. The applicant has committed mis-conduct as per the charge sheet and it has been proved during the enquiry. There is sufficient and overwhelming evidence to prove the charges against the applicant. That no grounds are made out to interfere with the impugned orders. The applicant had all reasonable opportunity as per rules to defend herself in the enquiry case, the applicant is not entitled to any of the reliefs.

5. At the time of arguments, the learned counsel for the applicant pressed only two grounds before us. His first ground is on merits viz. that the charges against the applicant are not proved. He took us through the evidence recorded in the case and

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commented on the discrepancies in the evidence and contended that the charges are not proved against the applicant and the findings of the Enquiry Officer are perverse and based on no evidence. The second ground is only on the quantum of penalty. It is argued that even if the charges are held to be proved, the punishment of removal from service is grossly dis-proportionate to the mis-conduct and this was the case where the applicant should have been given minor penalty. The learned counsel for the applicant further made a submission that if the Tribunal comes to the conclusion that the charges are proved, then applicant may be given some minor penalty or even a penalty of reduction to Group 'D' post. He further submitted on instructions from his client who was present at the time of hearing that his client will not press for any back wages in case she is ordered to be reinstated. On the other hand, the learned counsel for the respondents contended that this Tribunal cannot act as an Appellate Court and re-appreciate the evidence and then interfere with the findings of the domestic Tribunal on merits. Alternatively, he submitted that there is sufficient and overwhelming evidence to prove the charges against the applicant and hence the findings recorded by the Enquiry Officer and confirmed by the higher authorities cannot be interefered with. As far as the quantum of penalty is concerned, his submission is that the Tribunal cannot and should not interfere with the quantum of penalty which is at the sole discretion of the Disciplinary Authority. Alternatively, he submitted that having regard to the mis-conduct proved against the applicant the penalty is just and sufficient and does not call for interference.

6. In the light of the arguments addressed before us, the

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points that fall for determination are :

(1) Whether it is a case of 'no evidence' and the orders of the Competent Authorities are perverse and liable to be quashed and set aside?

(2) Alternatively, whether the penalty imposed against the applicant is grossly dis-proportionate and calls for interference by this Tribunal?

(3) What Order?

7. Point No.1 :

In the charge sheet there are two charges against the applicant, which reads as follows :

"Article - I :

Smt.Nalini Joshua, while working as Midwife, Jalna has committed serious misconduct and behaved in a manner of unbecoming of a Railway Servant in that she had made false complaints against Dr.Rajeshwar Rao, ADMO.J when he started enforcing discipline in the Health Unit as her controlling Officer whenever he noticed irregular working on her part such as late attendance for duty and unauthorised absence, etc.

Article - II :

On 28.10.1980 Smt. Nalini Joshua, was asked to attend the delivery case of wife of Sri Shivaji, Fireman/Jalna to which she has not attended thus she has neglected her duties and violated rule 3(i) (ii) & (iii).'

As can be seen from the Enquiry Report, which is at page 104 of the paper book, six witnesses viz. S.Sridhar, T.B.G.Nair, B.N.Arli, Shivaji Valmiki Rao, Dr.Rajeshwar Rao, K.Chandrasekhar were examined. In defence, the applicant examined herself and seven witnesses viz. Rahim Sheriff, Poulas David Zambra, Lahi Kondiram, P.A.Poulachan, D.K.Kulkarni and M.M.Walade.

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8. As per Charge No.I applicant sent a complaint making false allegations against her boss viz. Dr.Rajeshwar Rao since he took action to discipline her. In fact, it has come on record and even admitted by the applicant that many days she used to come late and Doctor used to question her. Some days, she had remained absent and subsequently on her request the Doctor regularised the absence by granting leave. The stand of the administration is since the Doctor was questioning the applicant about coming late and about her absence etc. she sent a false complaint to the higher officers.

As far as the second charge is concerned, a word was sent to the applicant to attend the delivery of the wife of Shivaji Rao. Admittedly, the applicant declined to go, though she gives some reasons as to why she did not go. The learned counsel for the applicant contended that applicant has no medical fit to attend to delivery and it is not a Maternity Hospital and hence there was no obligation on the part of the applicant to attend for delivery. In our view, this argument has no merit since the applicant has herself admitted in her statement that she has previously attended six deliverys. There is no medical fit from the beginning. It may be that she may not be able to arrange for actual delivery, but she will have to advise the patient, give some first-aid and send the pregnant woman to the nearest hospital. She cannot decline to go. Even as per the Railway Medical Manual brought to our notice by the learned counsel for the respondents a Midwife has to attend delivery either in the hospital or in the residence of Railway Official..

9. On the basis of evidence produced, the Enquiry Officer considered the evidence and recorded a finding that both the charges are proved against the applicant. The Disciplinary

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Authority considered the Enquiry Report after furnishing a copy of the Enquiry Report to the applicant and then passed an order dt. 21.6.1993. He has gone through the enquiry report and has given reasons as to why he is accepting the Enquiry Report. In other words, it is a speaking order by the Disciplinary Authority applying his mind to the facts of the case and then accepting the Enquiry Report.

Then, we find that the applicant preferred an appeal and the appellate authority after giving personal hearing to the applicant, considered all the grounds urged by the applicant in her appeal and gave reasons rejecting the grounds and holding that the charges are proved.

10. The learned counsel for the applicant extensively read over the statement of witnesses and made some comments on discrepancies, improbabilities, interestedness of the witnesses etc. The learned counsel for the respondents Mr.Dhawan rightly urged that this Tribunal cannot re-appreciate the evidence and take a different view.

The law on the point is fairly well settled by number of recent Judgments of the Apex Court.

In our view, the scope of judicial review is very limited only to find out whether the enquiry has been done as per rules and whether there is observance of principles of natural justice. That means in judicial review we are concerned with the legality of the decision making process and not the actual decision.

In 1998(1) SC SLJ 74 (Union of India & Ors. Vs. B.K.Srivastava) the Bench of this Tribunal at Allahabad had set aside the findings of the Disciplinary Authority by re-appreciating the evidence. The Supreme Court allowed the appeal and set aside the order of the Tribunal. In para 6, the

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Supreme Court observed that the Tribunal was not right in its approach and it has acted more as a court of appeal which it was not entitled to do so. In para 7 at page 78, the Supreme Court again observed as below :

> "The Tribunal could not sit in appeal against the orders of the Disciplinary and Appellate Authorities in exercise of its power of judicial review.".

Again in para 8 it has observed as follows :

> "There has been lawful exercise of power by the Disciplinary and Appellate Authorities. There has been no abuse of power. In these circumstances, the Tribunal should have stayed its hands. It is no part of the function of the Tribunal to substitute its own decision when enquiry is held in accordance with rules and punishment is imposed by the authorities considering all the relevant circumstances and which it is entitled to impose."

In another recent judgment in 1998 (1) SC SLJ 78 (Union of India & Ors. Vs. A.Nagamalleshwar Rao) the Supreme Court has again reiterated the principles that the approach of the Tribunal in interfering with the orders of the Disciplinary Authority was erroneous, as it had proceeded to examine the matter as if it was hearing an appeal. In the last part of para 5 at page 80, it is observed as follows :-

> "It is really surprising that inspite of the clear position of law in this behalf and as regards the jurisdiction of the Tribunal in such cases, the Tribunal thought it fit to examine the evidence produced before the Enquiry Officer as if it was a court of appeal."

11. We have also come across the latest decision of the

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Supreme Court on this point reported in AIR 1999 SC 625 (Apparel Export Promotion Council Vs. A.K.Chopra). After referring to the case law on the point, the Supreme Court has explained the limited scope of judicial review which is recorded in the Head Note - 'A' as follows :

> "In departmental proceedings, the Disciplinary Authority is the sole judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to re-appreciate the evidence and to come to its own conclusion, on facts, being the sole fact finding authorities. Once findings of fact, based on appreciation of evidence are recorded, the High Court in Writ Jurisdiction may not normally interfere with those factual findings unless it finds that the recorded findings were based either on no evidence or that the findings were wholly perverse and/or legally untenable. The adequacy or inadequacy of the evidence is not permitted to be canvassed before the High Court. Since, the High Court does not sit as an Appellate Authority, over the factual findings recorded during departmental proceedings, while exercising the power of judicial review, the High Court cannot normally speaking substitute its own conclusion, with regard to the guilt of the delinquent, for that of the departmental authorities."

The Supreme Court has clearly observed that the Disciplinary Authority is the sole Judge of fact and it is not open to review or re-appreciate by a Court or Tribunal. The Tribunal cannot sit in appeal over the findings of fact recorded

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by a domestic Tribunal and re-appreciate the evidence and take another view, even if another view is permissible. Of course, if it is a case of perverse order or based on no evidence or there is violation of principles of natural justice or mandatory procedural rules, then the Tribunal may have to interfere.

12. In the present case, though the learned counsel for the applicant argued at length and extensively referred to statements of witnesses in detail, he did not point out any legal defect in conducting the enquiry. He did not point out any violation of principles of natural justice in conducting the enquiry. His one and only submission is that on merits it is a false case and it is an order based on no evidence.

As already pointed out, number of witnesses were examined by the department to prove its case. It cannot be a case of no evidence. Whether the evidence is sufficient or not, whether the evidence is reliable or not are not matters which can be agitated when a Tribunal is exercising judicial review and not an appellate jurisdiction. There is some evidence on record which would be sufficient to prove both the charges. Some of the facts are admitted by the applicant. Hence, in view of the law declared by the Apex Court referred to above, we do not find that any case is made out to interfere with the order of the respective authorities on merits of the case. There is no illegality in conducting the departmental enquiry. The applicant had enough and more opportunity to defend herself and to produce her witnesses. The learned counsel for the applicant invited our attention to a case reported in AIR 1979 SC 1022 (Union of India Vs. J.Ahmed.), where it was a question of error of Judgment on the part of an officer in reacting to a particular situation. In our view, the said judgment is not applicable to

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the facts of this case. Here, it is not a case of applicant doing something in error of judgment. It is a question of fact involved viz. whether applicant sent a false complaint against her boss and whether she failed to attend delivery case when called at a particular time and place. Hence Point No.1 is answered in the negative.

13. Point No.2 :

We have seen the two charges against the applicant. The first charge is that she had sent a complaint to the higher officer against her immediate superior by making false allegation. But the applicant has given some explanation that since the officer was harassing her she had to send that complaint. We have already held that the mis-conduct is proved. Merely because the applicant had sent a complaint against her boss, it is not such a mis-conduct so as to call for removal from service.

Similarly, the second charge is that the applicant did not attend the delivery of wife of Shivaji, applicant's explanation is that it was mid-night when the call came and she had no medical kit and therefore, she did not go. Even if she had gone she could not have attended the delivery for want of medical kit and at best she would have advised the lady to be taken to the nearest hospital. It has also come on record that the said lady gave birth to a child in the house itself later. That means no untoward thing has happened due to applicant declining to attend the delivery.

No doubt, the above two instances are mis-conduct, but the question is whether it calls for the extreme penalty, ~~of~~

14. The learned counsel for the respondents is right in his

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submission that the Court cannot sit as an Appellate Court and modify the quantum of penalty. Normally, this Tribunal cannot sit in Judgment over the quantum of penalty. It is for the Disciplinary Authority to decide as to what is the proper penalty and not for a Court or Tribunal to interfere with the same. From a trend of decisions of the Supreme Court we can gather that the latest position in law is that normally the Courts or Tribunals should not interfere with the quantum of penalty and for this rule the ~~explanation~~ exception is that the quantum of penalty is grossly dis-proportionate to the mis-conduct so as to shock the conscience of the Court or Tribunal. Even in such a case of exception, normally the Tribunal or Court must remit the matter to the Competent Authority to take a decision on the quantum of penalty, but in ~~later~~ a given case the Tribunal can itself interfere in order to save time in the peculiar circumstances of the case. This position in law is not disputed by the learned counsel for the respondents.

We have seen the nature of mis-conduct. We feel that for such a mis-conduct removal from service, which is an extreme penalty, is not called for. On the ~~basis~~ face of it the penalty is grossly dis-proportionate and it shocks the conscience of the Tribunal. Therefore, we feel that it is a fit case in which the Tribunal should interfere with the question of quantum of penalty.

15. As already stated even though the Tribunal may come to the conclusion that the quantum of penalty is dis-proportionate, still the matter should be left ~~with~~ to the Competent Authority to decide the proper punishment. We therefore, feel that this question should be remitted to the Appellate Authority to apply his mind and then decide as to what is the proper penalty. There

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are two extreme penalties provided viz. removal from service and dismissal from service. Both of them mean one and the same thing as far as an official is concerned, since he/she will be without job. We have already indicated that such an extreme penalty is not called for having regard to the nature of mis-conduct proved against the Applicant. The next major penalty provided in the rules is Compulsory Retirement. In this case, the applicant was only a substitute and had hardly put in four to five years of service. She will not get any retirement benefits if she is ordered to be compulsorily retired. One must have at least minimum 10 years service to get some retiral benefits. In this case, if the order of compulsory retirement is passed then it virtually amounts to removal from service since the applicant will not get any retirement benefits.

Therefore, in the peculiar facts and circumstances of the case, we hold that having regard to the nature of mis-conduct and circumstances of the case, this is not a case which attracts the penalty of dismissal from service, removal from service or Compulsory Retirement. Except these three punishments, the Appellate Authority can impose any major or minor penalty by using his discretion. Point No.2 is answered accordingly.

16. Point No.3 :

Now remains the question as to what type of orders ~~are~~ to be passed. In view of our finding on Point No.1 the finding of mis-conduct has to be confirmed. In view of our finding on Point No.2, the matter has to be remanded to the Appellate Authority only for the limited question of deciding the question of proper penalty in the light of the observations in this Judgment. As

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already pointed out, the learned counsel for the applicant fairly submitted, on instructions from his client who was present in the Tribunal at the time of hearing, that his client will not press back wages if she is ordered to be reinstated. On instructions from his client, applicant's counsel made one more submission that his client will accept any penalty including a penalty of reduction ~~in~~ to grade to Group 'D' post. She is prepared to accept any job so that she would get some opportunity to earn her livelihood. The Appellate Authority may note these two statements made on behalf of the applicant at the time of passing order.

17. finaIn the result, the O.A. is allowed as follows.

(1) The finding of the respective authorities on the question of mis-conduct of the applicant in respect of the two charges is hereby confirmed.

(2) As far as the quantum of penalty is concerned, the matter is remanded to the Appellate Authority. The Appellate Authority shall take the appeal on his ~~applicant~~ file and then decide as to what is the proper punishment to be given to the applicant in the facts and circumstances of the case and in the light of observations made in this order and in particular para 15 & 16. We leave it to the Appellate Authority to award any appropriate penalty on the applicant including reduction in grade as mentioned above, except penalty of dismissal from service, removal from service or compulsory retirement.

(3) Irrespective of the nature of the order to be passed by the Appellate Authority, we make it clear that applicant is not entitled to any back wages.

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However, we leave it to the Appellate Authority to indicate as to how and in what manner the period from 21.6.93 till the date of new order to be passed by him should be treated for the purposes of qualifying service, leave, etc.

(5) Since this is a case pertaining to an incident of 81 and this is a second round of litigation, we direct the Appellate Authority to pass fresh order regarding quantum of penalty in the light of the observations of this judgment, within a period of 3 months from the date of receipt of copy of this order, after giving personal hearing to the applicant.

(6) In the circumstances, there will be no order as to costs.

(D.S.BAWEJA)
MEMBER(A)

22-6-95
(R.G.VAIDYANATHA)
VICE-CHAIRMAN

B.