

G. Kannan Vs. the Commanding Officer and anr.

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Court : Central Administrative Tribunal CAT

Decided On : Sep-16-1998

Judge : S V Vice-, R a K.

Appellant : G. Kannan

Respondent : The Commanding Officer and anr.

Judgement :

1. The applicant has challenged the order dated 6.3.1996 (Annexure-A5) passed by the Disciplinary Authority holding that the charge framed against him had been proved and imposing the penalty of compulsory retirement from service as well as the order of the Appellate Authority (Annexure-A10) dated 27.1.1998 confirming the order of the Disciplinary Authority.

2. The charge framed against the applicant was to the effect that he, while functioning as Cook at Station Workshop, EME, Bangalore-7 absented from duty without prior sanction for a total period of 54 days from 3rd September, 1995 to 26th October, 1995 even though he had been warned on several occasions verbally by the Administrative Officer and also in writing vide the letter dated 29.9.1995 and he is thus guilty of gross misconduct. The Disciplinary Authority appointed a Board of Inquiry consisting of an Inquiring Authority and two members by order dated 17th November, 1995. The board of Inquiry commenced the proceedings on 5th December, 1995 and adjourned the same for some reason or the other on a few dates and ultimately the applicant appeared before the Board on 13th February, 1996 along with his Defence Assistant. The applicant on being

questioned as to whether he pleads guilty or not guilty to the charge, pleaded not guilty. He examined himself and stated that though he has reported for duty from 3rd September 1995, he was not permitted to sign the attendance register at the gate as per the order of given by Maj. R. Ramanathan, Administrative Officer of the Unit and that he reported this matter to the Secretary, Works Committee and the Secretary of the Union as well as the Union Vice-President. The Board put certain questions to the applicant. The Defence Assistant requested to call for three witnesses in support of the statement of the applicant. On the same day witnesses C.G. Bhaskaran and M.K. Balaraman who were produced were examined.

Another defence witness who was not available was given up by the applicant. Thereafter Maj. R. Ramanathan, the Administrative Officer was examined and cross-examined by the applicant and his Defence Assistant. On 14.2.1996 Sub. Maj. H.L. Sharma of Station Workshop, EME and T.K. Sarangan were examined as witnesses 6 and 7. The applicant cross-examined Shri Sub. Maj. H.L. Sharma. However, he declined to cross-examine Sri T.K. Sarangan. The Inquiry Officer then submitted his report holding that the applicant committed gross misconduct by unauthorisedly absenting himself from duty without prior sanction from 3rd September, 1995 to 26th October, 1995.

3. On receipt of the above report, the Disciplinary Authority issued a memorandum dated 20.2.1996 (Annexure-A3) informing the applicant that by agreeing with the findings of the Inquiring Authority he had provisionally come to the conclusion that the applicant should be awarded the punishment of compulsory retirement from service and giving an opportunity to the applicant for making representation on the proposed penalty on the basis of the evidence adduced during the inquiry. The applicant gave a representation as per Annexure-A4. The Disciplinary Authority after considering that representation and holding that there was no fresh material in his representation, passed the impugned order (Annexure-A5) imposing the penalty referred to above. The appeal filed by the applicant against that order was rejected by the Appellate Authority by order dated 1.6.1996 (Annexure-A8). In O.A. No. 222 of 1997 filed by the applicant, this Tribunal after holding that the order passed by the Appellate Authority was cryptic and was not a speaking order set

aside the Appellate Authority's order and directed the Appellate Authority to pass a speaking order. The Appellate Authority thereafter has passed the speaking order dated 27.1.1998 (Annexure-A10) rejecting the applicant's appeal. The applicant has now filed this application challenging that order as well as the order of the Disciplinary Authority.

4. The learned counsel for the applicant Shri M. Vasudeva Rao has urged the following grounds to contend that the inquiry proceedings are vitiated and that the orders cannot be sustained: 1. The copy of the Inquiring Authority's report was not furnished to the applicant along with Annexure A3 and as such he had no opportunity to put forth his representation against the report of the Inquiring Authority.

2. The Disciplinary Authority could not have constituted a three member Inquiring Committee.

3. The Disciplinary Authority ought to have appointed a Presenting Officer and that on account of failure to appoint the Presenting Officer, the Inquiry Officer has himself examined witnesses and questioned the delinquent elaborately. The Inquiring Authority has taken the role of both the prosecutor and the judge and this has vitiated the proceedings.

4. In the inquiry instead of the witnesses of the Disciplinary Authority being examined first and thereafter the applicant being examined as contemplated under Rule 14 of the Central Civil Services(Classification, Control and Appeal) Rules (hereinafter referred to as the Rules), the applicant has been examined first and thereafter the witnesses in support of the charge are examined.

5. The witnesses examined on behalf of the Disciplinary Authority had not at all been cited in the memorandum of charge and they have been examined without prior intimation to the applicant. The Inquiring Authority has allowed evidence about past misconduct of the applicant without the same forming part of the charge. The Disciplinary Authority and the Appellate Authority have taken into consideration that past misconduct while imposing the punishment and rejecting the appeal respectively.

6. The Inquiring Authority has not at all considered the evidence of the witnesses of the applicant while appreciating the evidence. The applicant has not been examined under Rule 14(18) of the Rules after the witnesses on behalf of the Disciplinary Authority were examined to give him an opportunity to explain their evidence.

5. The learned counsel appearing for the respondents has contended that the copy of the inquiry report has been furnished to the applicant and he has also given an acknowledgement for the same, that the applicant has been given full opportunity to meet the case of the Disciplinary Authority and that the proceedings are in no way vitiated. He further contended that having regard to the Rules it is not obligatory to appoint a Presenting Officer and on the facts of this case, there was no necessity to appoint the Presenting Officer. According to him, even if there was any procedural irregularity, it has not caused any prejudice to the applicant and also that the applicant has not complained of the same having caused any prejudice and that taking into consideration the facts that the applicant was in the habit to unauthorisedly absenting from work and that had caused great problem in the establishment, the Disciplinary Authority has imposed the punishment which cannot be said to be grossly disproportionate to the gravity of the charge framed against the applicant.

6. So far as the first ground regarding non-furnishing of inquiry officers' report is concerned, on the material on record, we are unable to hold that the copy of the Inquiry Officers' report was not furnished to the applicant. The inquiry file shows that the copies of the inquiry proceedings were furnished to the applicant on each day. It is seen that on 14.2.1996, the applicant has been furnished with the copies of the Board proceedings from pages 30 to 38. On the previous day i.e., on 13.2.1996 he has been provided with the copies of the proceedings from pages 9 to 29. The proceedings from page 9 to 29 contain the full deposition of all the witnesses recorded on 13th and 14th February, 1996 as well as the record of the proceedings on those two dates. The applicant has furnished another acknowledgement dated 17.2.1996 where he has acknowledged receipt of complete record of the Board proceedings on that day. The inquiry report is dated 17.2.1996 and as the applicant has been furnished copies of the proceedings upto

page No. 38 and it is only the inquiry report which is available from page 39 onwards upto the end, it is obvious that he must have been furnished with the copy of the inquiry report on 17.2.1996 itself. The applicant's counsel was unable to explain as to which document the acknowledgement dated 17.2.1996 pertains. Above all it is significant to note that when he filed O.A. No. 222 of 1997, the applicant never took the plea that he was never furnished with the copy to the Inquiry Officers' report. On the other hand in para 3(e) of that application the applicant has specifically referred to the Inquiry Officers' report and complained that "no finding had been recorded against Major Ramanathan." This clearly shows that the applicant had received the copy of the inquiry report. As such this ground urged by the learned counsel for the applicant cannot be accepted.

7. Coming to the second contention, Rule 14(2) of the Rules provides for the Disciplinary Authority to appoint an authority to inquire into the truth of any imputation of misconduct. There is no bar for appointing a three member Board as an Inquiring Authority. The learned counsel for the applicant was unable to point out as to how the constitution of the 3 member Board as Inquiring Authority can be said to be illegal. Even if there was any irregularity in that regard, it is not even the case of the applicant that has in any way caused prejudice to him. The proceedings cannot be said to have been vitiated on this ground.

8. Coming to the next contention that non-appointment of the Presenting Officer has vitiated the proceedings, we must point out that Rule 14(5)(c) stipulates that the Disciplinary Authority 'may' by an order appoint a Government Servant or Legal Practitioner to be known as the "Presenting Officer" to present the case in support of the articles of charge. It is only a discretion given to the Disciplinary Authority. It cannot be said that the appointment of a Presenting Officer is mandatory. The Learned counsel for the applicant has relied on the decisions of the Madras High Court in T.N. Govindarajan v. The Management of Indian Overseas Bank and Ors., (1992 Lab. I.C. 1832) and Jagbir Singh v. Lt. Governor Through Commissioner of Police, N. Delhi and Ors., [(1991) 16 ATC 192 (Delhi Bench of the Tribunal)] in support of his contention that the non-appointment of Presenting Officer vitiates the inquiry. In Govindarajan 's case it has been pointed out that it is not necessary for appointment of a Presenting Officer where the Inquiring

Authority has to consider only documentary evidence and that however, the Disciplinary Authority should appoint a Presenting Officer if Inquiring Authority is to consider evidence let in on behalf of the prosecution. In that case on the facts, the Court found that the Inquiring Authority had acted as the Presenting Officer and he had played the role of Prosecutor as well as the Judge. The Inquiring Authority had itself examined the witnesses. In Jagbir Singh's case, the Inquiring Authority himself cross-examined the charged officer and the defence witnesses and the Tribunal found that the contention on behalf of the applicant that the Inquiry Officer was totally biased had been made out. The Inquiry Officer had suggested to the defence witnesses that he was making a false statement. He had put questions in the nature of cross-examination to the defence witnesses. It is under those circumstances, the Tribunal held that the proceedings had been vitiated. Prior to the above two decisions, this Bench in *K. Farooq Ahmed v. Union of India and Ors.*, [1990 (1) SLJ (CAT) 304] has dealt with the same question regarding the effect of non-appointment of Presenting Officer. In that case it is pointed out that in Railways no Presenting Officer is generally appointed in disciplinary proceedings.

In that case also it was contended that the Disciplinary Authority who held the inquiry himself had put questions and had acted as a prosecutor as well as a judge. It was held that though it was desirable that Presenting Officers are appointed, that desirable practice cannot be a ground to invalidate all legal proceedings against the delinquent, that the object of all enquiries is to ascertain the fact in issue or truth of the case and that merely because the Inquiring Authority puts questions to the witnesses in a domestic proceeding, it cannot be a ground to hold that the Inquiry Officer had acted both as a prosecutor and a Judge.

9. In the present case, we see that when the applicant produced two witnesses in support of his defence the Board has only put one question to witness No. 2 mentioning the stand taken by the applicant and enquiring whether that was correct. To witness No. 3 the Board has put similar question and has put an additional question whether the applicant was never permitted to come to the officer during that period, in his presence. When those questions were answered no further questions were put and there was no cross-examination of the

witnesses.

So far as the witnesses who appeared on behalf of the Disciplinary Authority, they have themselves made statements and thereafter same questions have been put by the Inquiring Authority seeking some clarification. The applicant has been allowed to cross-examine these witnesses. The Rules specifically authorise the Inquiring Authority to question the witnesses as well as the charged official. Merely because the Inquiring Authority puts questions to the witnesses to arrive at the truth, it cannot be said that he has taken the role of a prosecutor. Even in Courts the Presiding Judge can at any time put any question to a witness. It is only if the Inquiring Authority puts leading questions suggesting the answer to the witnesses examined on behalf of the Disciplinary Authority in support of the charge or cross-examines defence witnesses only with a view to discredit them and thereby gives an impression that he is biased, the question of the proceedings being vitiated would arise. Even in such a case it is not because of the non-appointment of a Presenting Officer that the proceedings would be vitiated but because the Inquiry Officer was biased. In the present case after looking through the proceedings we do not find that the Inquiring Authority had either put leading questions to the witnesses on behalf of the Disciplinary Authority or had cross-examined the applicant and his witnesses to indicate bias on its part. Above all, the applicant has no where alleged bias against the Inquiring Authority either in his representation to the Disciplinary Authority or in his memorandum of appeal or in the two applications filed by him in this Tribunal. As such, we are unable to accept the contention of the learned counsel for the applicant that either because of the non-appointment of the Presenting Officer or because of the fact that the Inquiring Authority has put some questions to the witnesses, the proceedings are vitiated.

10. The next contention urged is with regard to the irregularity in the examination of the applicant and his witnesses first and thereafter the witnesses on behalf of the Disciplinary Authority. The learned counsel for the applicant pointed out that as per Rule 14(14) the oral and documentary evidence produced by the Disciplinary Authority will have to be first examined and that it is only after the entire evidence is over, the evidence on behalf of Government servant will have to be produced. He relied on the decision in *Cheluvvaraju v. State Vigilance Commission and Anr.*,

1989 (2) SLJ (CAT) 102 and M.S. Dasan v. Union of India and Ors., (1993) 24 ATC 431 to contend that where the Government employee is examined first and thereafter the evidence on behalf of the Disciplinary Authority is adduced the proceedings get vitiated. In Cheluvvaraju's case the point that had arisen for consideration was whether it was permissible for the Disciplinary Authority to lead fresh prosecution evidence by examining witnesses not cited in the charge memo after the prosecution closed the evidence and the charged officer had been questioned in regard to the prosecution case and the charged officer had also examined his defence witnesses and addressed his arguments. The Tribunal found that it was at that stage the Disciplinary Authority wanted to adduce some additional evidence in order to fill up the gaps. The Tribunal held that, that was not permissible. In M.S. Dasan's case the charge was that the applicant while on duty had consumed liquor and became violent, caused hurt to his co-workers and used abusive language etc. When the Government employee pleaded not guilty to the charges, the Inquiring Authority permitted the Presenting Officer to examine the Government employee even before any evidence was adduced in support of the charges. At that stage, the Government employee was not even assisted by another official. That apart, the Inquiry Officer put several leading questions to the witness. It is in those circumstances, it was held that as per Rule 14(14) the oral and documentary evidence in support of the charge will have to be first produced.

11. We have to see whether in the instant case the fact the applicant and his witnesses were examined first will have the effect of vitiating the proceedings. The charge against the applicant was that he had remained unauthorisedly absent from duty during a particular period.

The fact that the applicant did not perform duties during that period and that he had not even applied for leave during that period were not disputed. The applicant's case is that though he tried to go for duty, he was prevented at the gate itself. In effect, though the facts which constituted the charge were not disputed, the applicant was seeking to explain his absence and attribute his absence to the instructions given by the Administrative Officer not to allow him inside the gate. In a case of this type, the burden of proving the reason for the absence lies on the employee. If the applicant is able to make out the plea put forth by him, then the

charge would necessarily stand not proved. If under these circumstances the Inquiring Authority allowed the applicant to examine himself and to examine his witnesses in support of his plea, it cannot be said that the proceedings are vitiated. In fact, it is seen that the applicant's assistant had given a memo seeking permission to call the defence witnesses for that day's enquiry to ascertain the truth. This shows that even the applicant wanted to adduce the evidence in support of his plea in the beginning itself, possibly because he has realised that he has to explain his absence which was not disputed. It is only after the applicant sought to make out his explanation for the absence by examining some witnesses and imputing the cause for his absence to the instructions given by the Administrative Officer, the Disciplinary Authority in order to rebut that evidence has chosen to examine the Administrative Officer and two other witnesses. This rebuttal evidence has been adduced to show that no such instructions had been given to prevent the applicant at the gate and that the applicant had in fact come inside the office premises to draw his pay and salary and to participate in the Association elections.

12. It is no doubt true that the names of the three witnesses who are examined on behalf of the Disciplinary Authority had not been cited in the memorandum of charge. The reason for that is obvious. Two of these witnesses were examined only to rebut the evidence adduced by the applicant and at the time of issue of the charge sheet the necessity of examining them could not have been felt as at that stage the plea of the applicant was still not known. Though the learned counsel for the applicant contended that they were examined without prior notice, that is a grievance made out only for the first time during arguments.

Neither in the appeal nor in the earlier application filed before this Tribunal nor even in the present application any plea has been taken that the witnesses were examined without notice to the applicant or that this has caused prejudice to the applicant.

13. Regarding the contention that the applicant was not examined under Rule 14(18), as already pointed out the evidence adduced on behalf of the Disciplinary Authority was only in rebuttal of the evidence adduced by the applicant who had

got himself examined and to adduce some evidence to show the penalty imposed against him in the earlier proceedings. Whether in these circumstances it was obligatory to examine the applicant under Rule 14(18) is debatable. Even assuming that the applicant had to be examined under Rule 14(18), failure to comply with it does not automatically vitiate the proceedings. This Bench in *B. Venkateshwarulu v. The Administrative Officer, ISRO and Ors.*, O.A. No. 470 of 1997, decided on 28.8.1998, referring to the decision of the Supreme Court in *State Bank of Patiala and Ors. v. S.K.Sharma*, (*AIR Sunil Kumar Banerjee v. State of West Bengal and Ors.*, (AIR 1980 SC 1170) has held that the applicant has to establish prejudice on account of non-compliance with the provision. So far as the evidence regarding the previous inquiry proceedings against the applicant and the penalty imposed thereon is concerned it is not even the case of the applicant that he has not suffered those penalties. The other evidence is, as already pointed out by way of rebuttal of what had been stated by the applicant and his witnesses.

What prejudice is caused on account of his non-examination under Rule 14(18) was not pointed out. That apart, no such specific plea has even been taken in this application. Even in the earlier application such a plea had not been taken.

14. The learned counsel for the applicant contended that the Inquiring Authority could not have allowed evidence regarding past misconduct of the applicant as the same was not the subject matter of the charge. He relied on the decisions in *The State of Mysore v. Manche Gowda*, (AIR 1964 SC 506) and *B. Nagaraju v. Management, KSRTC* (ILR 1993 Kar. 1008) in support of his contention that without the previous conduct being made a subject matter of the charge, evidence could not have been let in and that the applicant had no opportunity to meet that case.

Manchegowda's case was during the period prior to the amendment of Article 311 of the Constitution. In that case it was held that before the Disciplinary Authority can take into consideration the previous record of the Government servant to determine the quantum of punishment, the Government servant must be given notice about that fact. In that case it was suggested that the past record of a Government servant if it is intended to be relied upon for imposing the punishment

it should be made a specific charge in the first stage of the inquiry itself. Dealing with the suggestion, the Supreme Court has observed as hereunder: "..... It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made specific charge in the first stage of the enquiry itself and if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done, in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinizes it and imposes punishment is the authority empowered to impose the same. Whether a particular person has a reasonable opportunity or not depends, to some extent, upon the nature of the subject matter of the enquiry. But, it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same. It will thus be seen that the Supreme Court has not held that the previous record of misconduct should be made a subject matter of charge itself. All that the above decision indicates is that before the previous record is taken into consideration the Government servant should be given a reasonable opportunity to know the fact and meet the same.

15. Even in Nagaraju's case all that is laid down is that the past bad record, if sought to be used for imposing the penalty, it should form part of the disciplinary proceedings and the delinquent must have full opportunity to meet the same as otherwise the proceedings would not be just and fair. This decision also does not lay down that the past conduct should be subject matter of a charge itself.

16. In the present case it is not as if the Disciplinary Authority has relied on the previous record of service pertaining to imposition of penalties for similar misconduct of unauthorised absence and penalty for being intoxicated, without the applicant having any knowledge about the fact that such previous record would be

used. The material pertaining to the past bad record has been placed in evidence during the inquiry proceedings itself. The applicant had an opportunity to cross-examine the witnesses through whom this evidence was adduced. In fact he had cross-examined one of those witnesses. The Disciplinary Authority before imposing the penalty has issued a second notice, which was not necessary, informing the applicant about the proposed penalty and requiring him to show cause against such penalty on the basis of the evidence on record. Though the Disciplinary Authority had not specifically referred to the past bad record in that notice, the applicant very well knew that evidence had been adduced about the past bad record and he was given an opportunity to put forth his representation against the proposed penalty. In the circumstances, we cannot say that merely because evidence of past bad record had been adduced in the inquiry, the proceedings are vitiated. The finding recorded on the charge is based entirely on certain undisputed facts and on the unacceptable explanation given by the applicant. As such, it cannot be said that the finding recorded on the charge is in any way influenced by the evidence regarding the past misconduct.

17. Another contention urged by the learned counsel for the applicant is that the Inquiring Authority has not at all considered the evidence adduced by the applicant in support of his defence and that on account of this the inquiry report is vitiated. In support of this contention he relied on the decision in Govindarajan's case as well as V.Gnanasadayana v. Union of India and Ors., [(1996) 32 ATC 304 (Madras Bench)] in this connection. In Govindarajan's case the evidence of two witnesses had not at all been considered. That was also a case where the Court found that the Inquiring Authority had acted as the Presenting Officer. In Gnanasadayana's case though the applicant had examined 7 witnesses including medical officer in support of his defence, the inquiry report did not make any reference to the defence put forward by the applicant and there was no summary of the assessment of the evidence in support of the articles of charge. In that case a reference was made to the decision of the Supreme Court in Anilkumar v. Presiding Officer, [1985 (3) SCC 378] where the Supreme Court after noting that the Inquiry Officer had merely recorded his ipse dixit that charges are proved and he did not assign a single reason why the evidence produced by the appellant did not appeal to him or was not creditworthy, held that the inquiry report was not a

speaking report.

18. In the present case it is no doubt true that in the inquiry report there is no direct reference to the evidence of two witnesses examined by the applicant. It may be noted that the only evidence elicited from those two witnesses is that the statement made by the applicant that he remained absent from duty because he was not permitted to enter the workshop on the instructions of Maj. R. Ramanathan was correct and that Maj. Ramanathan had told witness No. 3 two or three times that he will not permit the applicant to enter the workshop. The inquiry report specifically refers to the defence taken by the applicant that he was never permitted to enter the workshop as per the instructions issued by Maj. Ramanathan and has recorded a finding that, that allegation is found to be incorrect for as many as 6 reasons given thereunder. With reference to the evidence it has been pointed that the applicant had in fact been issued a notice by Ramanathan himself on 29.9.1995 stating that he had remained absent from duty from 3rd September, 1995 without sanction, that this lapse was viewed seriously by the CO of the unit and further advised the applicant to report for duty forthwith failing which necessary administrative action would be initiated against him.

The other reasons given for not accepting the defence put up by the applicant are that he has gone to the workshop to collect his pay and allowance on 29th September, 1995, that he had been going to the unit for canvassing for works committee election and to cast his own vote and that admittedly the applicant voluntarily went to duty on 2.1.1996 without being prevented from entering the unit. It is also pointed out that the applicant did not make any complaint to the Commanding Officer that he was being prevented from entering the unit. Though there is no specific reference to the two witnesses examined by the applicant in support of his defence, the Inquiring Authority has considered the defence put forth by the applicant and has given very cogent reasons for not accepting the same. In these circumstances, we do not think that the inquiry report can be held to be bad merely because there is no specific reference to the evidence of two witnesses examined by the applicant. Here again, we must point out that this ground has not been taken even in the application and it is advanced only during arguments.

19. So far as the penalty is concerned, it should be noted that the applicant is working as a cook in a military unit and the authorities have pointed out as to how the absence of the applicant created problems in providing food to the personnel. Added to this, the applicant had been penalised previously for his unauthorised absence and he did not mend his ways. In the circumstances we do not think that the imposition of penalty of compulsory retirement is so grossly disproportionate as to call for interference by this Tribunal. We do not find any good ground to interfere with the impugned orders.

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