

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.7414/2011**

% **Date of Decision: 10.10.2011**

Delhi Development Authority Petitioner

Through Mr.Dhanesh Relan, Advocate
Versus

Sh.Suresh Kumar Diwan Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

*

1. The petitioner, Delhi Development Authority, has challenged the order dated 9th May, 2011 passed by the Central Administrative Tribunal, Principal Bench in OA No.2669/2010 titled as 'Suresh Kumar Diwan v. DDA and Ors.', allowing the original application of the respondent and setting aside the penalty of reduction of pay by one stage for a period of one year with cumulative effect imposed on the respondent by order dated 7th June, 2007, which was also confirmed by the Appellate Authority's order dated 17th May, 2010. The Tribunal set aside both the orders and directed the petitioners to release the arrears

of pay withheld on account of penalty. The Tribunal also directed the petitioners to grant the 2nd ACP to the respondent due from 2005 and fixation of his pay accordingly.

2. Relevant facts to appreciate the disputes between the parties are that the respondent joined the petitioner's establishment in the year 1981 as a Field Investigator. While the respondent was working as a Field Investigator at the South East Zone, a demolition programme was scheduled and efforts for removal of the encroachment were made from March 2004 under the directions of the High Court. On 24th March, 2004 an order was issued by the Assistant Engineer (Demolition) SEZ whereby it stated that as per the request of the Dy. Director (I&L) demolition program was fixed. In this regard it was decided that the survey of jhuggi cluster of Azad Camp would be done by Assistant Director Ramkishan along with Sh. Kishan Singh, Sh. Vijay Paul, Sh. JC Sharma and the respondent who would start their survey from 24th March, 2004 onwards. The respondent, on the same day, came to know that his name had been listed for control room duty on 26th March, 2004. Since the applicant was already assigned the duty of demolition programme at Sarita Vihar and was required to conduct a survey at Mohan Cooperative Industrial Estate near Sarita Vihar on 26th March, 2004, the respondent informed the AE (Demolition) of his assigned duty at the Control Room. The AE (Demolition), Sh. Om Prakash Dingra, inturn assured the respondent that he would communicate the inability

of the respondent to attend the control room duty to the Dy. Director (LM) SEZ.

3. On 21st April, 2004, a complaint was received from one Sh. B.S. Tanwar addressed to the Vice Chairman, DDA stating that he had lodged a complaint with DDA Control Room on the telephone on 26th March, 2004 but the concerned staff was not available on the Control Room. One Sh. Chauhan, although was available in the Control Room at the time, had refused to note down the complaint of the caller.

4. Thereafter, a memorandum of charge dated 12th October, 2004 was issued by the respondents. The statement of Articles of Charges issued to the respondent is as under:-

“Shri Suresh Kumar Diwan, Research Asstt. while working as field Investigator in South East Zone, DDA during March, 2004 was deployed to perform his duty at the Control Room situated at ‘D’ block, Ground Floor, Vikas Sadan on 26.03.04 from 6 AM to 2 PM and on 08.04.04 from 2 PM to 6 PM vide office order no.F.13 (37) 89/LMC/DDA/193 dated 12.3.2004 issued by Dy. Director LMC, DDA, Sh.Suresh Kumar Diwan, Research Asstt. was found absent in Control Room, DDA on 26.3.2004 when a complaint was lodged by Shri B.S.Tanwar regarding encroachment on DDA land in Village Naraina. One Sh.B.S.Tanwar has submitted a written complaint dated 21.4.04 addressed to Vice-Chairman, DDA and informed that on 26.3.04, he has lodged the complaint with the DDA Control Room on Telephone No.24646382 but concerned staff was not available in Control Room while one Sh.Chauhan was available in the Control Room who refused to note down the complaint.

By his above act Sh.Suresh Kumar Diwan, Research/Asstt.exhibited lack of devotion to duty and acted

in a manner unbecoming of an authority servant thereby contravening Sub Regulation 1 (i) and (iii) of Regulation 4 of DDA, Conduct, Disciplinary and Appeal Regulation 1999 which are applicable to the employees of the authority.”

5. An enquiry was conducted and on the basis of the Enquiry Report, which held that the charges were proved, and the reply filed by the respondent, the Disciplinary Authority had imposed the penalty of reduction of pay by one stage for a period of one year with cumulative effect by order dated 7th June, 2007. An appeal was filed by the respondent on 14th July, 2008 which was dismissed by the Appellate Authority as being time barred by order dated 12th September, 2008. The respondent, however, challenged the order holding his appeal as time barred, and the said order was set aside by the Tribunal and the Appellate Authority was directed to decide the appeal on merit. The appeal was thereafter dismissed by the Appellate Authority by order dated 17th May, 2010 on merit.

6. The respondent challenged the order dated 7th June, 2007 of the Disciplinary Authority and order dated 17th May, 2010 of the Appellate Authority contending, inter-alia, that the evidence on behalf of the respondent had been not only rejected, but rather not even considered and that the conclusion arrived at by the authorities could not be arrived at reasonably and thus it is reflective of the non-application of mind by the concerned authorities. It was contended that the charge

against him is that he was not present in the Control Room of DDA on 26th March, 2004 without any justifiable reason, though the fact is that he was assigned on another duty, as he was deployed on an assignment in the context of the demolition programme and the respondent could not possibly be present at both the places simultaneously. The respondent contended that he took this plea at all stages i.e. in his reply dated 29th October, 2004 in response to the memorandum of charge; during the course of the enquiry; in his representation made to the Disciplinary Authority, and in his appeal dated 14th July, 2008. However, the plea of the respondent was negated on the ground that the respondent did not produce any documentary or oral evidence in support of his plea that he was assigned another duty pertaining to the demolition program and he had intimated AE (Demolition).

7. In the Original Application filed before the Tribunal under Section 19 of the Administrative Tribunal Act, 1985, the respondent categorically contended that on 24th March, 2004 an order for conducting demolition was issued and a joint survey was to be conducted from 24th March, 2004 onwards. In support of his plea he also produced the copies of file notings dated 12th March, 2004 till 24th March, 2004 pertaining to the demolition matter to which he was assigned. The respondent produced the order dated 24th March, 2004 issued by the Assistant Engineer (Demolition) LM/SEZ directing carrying out of a survey of Jhuggi clusters of Azad Camp by the

Assistant Director, Sh.Ram Kishan, along with Sh.Kishan Singh, FI, Sh.S.K.Diwan, (respondent); Sh.Vijay Pal and Sh.J.C.Sharma, FI, who had to start survey from 24th March, 2004 onwards. The order also stipulated that Sh.V.K.Srivastava JE, shall accompany Sh.Mange Ram, PS (Beldar) as this was an urgent work under the directions of High Court. The order further stipulated that all the above noted officials, including the respondent, shall attend the work compulsorily. The order dated 24th March, 2004 is as under:-

Sub: Demolition programme fixed for 31.03.2004 at Mohan Cooperative Industrial Estate in CWP (illegible)/98

On the request of Dy.Director (I.L) vide letter No.F.12(605)98/HC/Legal/438 dated 19.03.04. D/P has been fixed vide letter No.F.12(605)98/HC/Legal/124 dated 24.03.04 by DD (LM) SEZ. Joint Survey has been carried out with P.S.Sarita Vihar alongwith Sh.A.K.Sharma, JE (I.L). It has been decided that survey of jhuggi clusters of Azad Camp be done. A.D.Sh.Ram Kishan along with Kishan Singh, F.I, S.K.Diwan, Sh.Vijay Pal and Sh.J.C.Sharma, F.I will start survey on 24.03.04 onwards. Some of the portion of Azad Camp is required to be measured alongwith road and jhuggi cluster near Flat Show Room. Being urgent work Sh.V.K.Shrivastava, JE, DA 173 alongwith Sh.Mange Ram, PS(Beldar) DA 173 are directed to attend the said site to sort out the work by 26.03.04 positively as it is high court case. Accordingly, F.I's and J.E DA 173 has to attend the site immediately.

This is as per discussion with Dy.Director (LM)/SEZ.

Sd/24.3.04
AE(D)/LM/SEZ"

8. The respondent also categorically and specifically asserted that he had come to know from his colleagues that his name was listed for

Control Room Duty on 26th March, 2004 as well, and since he was already deputed for carrying out the survey along with other officials he immediately informed the AE (Demolition) of his assigned duty at the Control Room. The AE (Demolition), Sh.Om Prakash Dhingra, assured the respondent that he would communicate the inability of the respondent to attend the Control Room Duty to the Deputy Director (SEZ). The respondent also relied on the noting dated 26th March, 2004 which was addressed to the AE (Demolition) whereby the presence of the respondent at the concerned site on the said date was evident and produced a copy thereof.

9. In reply to the specific averments made by the respondent in para 4 (iv) to (vii), it was contended that the said paras in the original application of the respondent are irrelevant, baseless and misleading and that the documents relied on by the respondent do not reveal about the assignment of his duty or his inability to attend his duty at the control room on 26th March, 2004. It was also contended that he did not attend the duty assigned to him in control room from 6.00 am to 2.00 pm deliberately which is also mentioned in para 6.4.4.3 of the Enquiry Report. Para 6.4.4.3 of the enquiry report was also referred to which is as under:-

“6.4.4.3 C.O. thus admitted in his General Examination that though he had come to know that his Control Room duty was fixed for 26.03.04, he did not perform the same. Instead the C.O has contended that he was asked by the AE (Demolition) to attend to the demolition programme and

survey work on 26.03.04. **C.O has however, not produced any documentary evidence in support of his contention. C.O. also had the option to adduce evidence to support his contention by producing AE (Demolition) and/or Deputy Director (SEZ) as defense witnesses.** Thus the CO did not adduce any documentary or oral evidence in support of his claim that he was diverted to some other duty in lieu of the Control Room duty assigned to him vide Ex.P1.”

10. In the reply to sub para (vii) of para 4 of the original application of the respondent, it was again reiterated by the petitioner that the averments made by the respondent are irrelevant, baseless and misleading and that the respondent was well aware about his duty in the Control Room on 26th March, 2004, which is even admitted by him as he himself admitted that he had informed the AE (Demolition) about the same and therefore it stood established that he had deliberately failed and neglected to perform his duty without any justification.

11. The Tribunal, while considering the pleas and contentions of the parties, categorically noted that the respondent had produced the evidence in support of his contention proving that he was assigned the alternative duty to carry out the survey of Jhuggi clusters of Azad Camp from 24th March, 2004 which had to continue for demolition up to 31st March, 2004. The observations of the Tribunal in para 5 are as under:-

“5. Along with the O.A has been enclosed as Annex A/3 a communication dated 24.3.2004. This is a direction from the AE(D)/LM/SEZ on the subject of demolition programme

fixed for 31.3.2004 at Mohan Cooperative Industrial Estate in CWP (illegible)/98. As per this communication, after the discussion with the Dy. Director (LM)/SEZ, the demolition programme preceded by a survey had been fixed from 24.3.2004 onwards and the work was to be completed positively by 26.3.2004, as it was a High Court case. **The applicant had been included as one of the Members of this team and had been directed to attend the site immediately.** The records along with the OA also reveal that this document had been brought in the inquiry by the charged official as D-II (Annex.A/9).”

12. The Tribunal in its order dated 9th May, 2011 which is impugned by the petitioner/DDA held that there is no valid reason for non consideration of the documentary proof produced by the respondent and that the findings of the Enquiry Officer, the Disciplinary Authority and the Appellate Authority are based ignoring the relevant evidence produced by the respondent and therefore they would be vitiated. The Tribunal further observed that even though other grounds had been raised by the respondent, the penalty order and the order dismissing the appeal were liable to be set aside on this ground alone and therefore, other grounds raised by the respondent were not discussed by the Tribunal.

13. The learned counsel for the petitioner has admitted that the respondent produced the copy of the order dated 24th March, 2004 deputing the respondent for survey of Jhuggi cluster for demolition, pursuant to the order of the High Court, at Azad Camp along with other officials. Copies of various other notings produced by the respondent

also reflect that the respondent was assigned another duty. The learned counsel for the petitioner, however, emphasized that the same had been considered by the Enquiry Officer and relied on para 6.4.4.3 of the enquiry report. However, perusal of para 6.4.4.3, which is also reproduced hereinabove, shows that these documents i.e. order dated 24th March, 2004 and the notings produced by the respondent have not been considered at all. The respondent also categorically averred that when he came to know about the fixation of his duty in the Control Room also on 26th March, 2004, he had intimated the AE (Demolition), Sh.Om Prakash Dhingra, who had assured the respondent that he would communicate the inability of the respondent to attend the Control Room duty to Deputy Director (LM/SEZ). It is relevant to consider that neither AE (Demolition), Sh.Om Prakash Dhingra, nor the Deputy Director (LM) SEZ were examined, rather the witnesses who were examined before the Enquiry Officer by the petitioner were Sh. Damodar, UDC, LM (HQ) and Sh. Padam Singh DD (LMC) DDA. Once it has been established that the respondent was assigned another duty, it was incumbent on the petitioner to have examined AE (Demolition) Shri Om Prakash and Deputy Director (LM) and it was not for the respondent to have produced them. The averment made by the respondent has also not been denied categorically by the petitioner and therefore, the onus was on the petitioner to establish that after the respondent was deputed on another duty on 24th March, 2004, he had been relieved of his duty on 26th March, 2004. The five documents, P1

to P5 produced before the Enquiry Officer by the petitioner do not negate the documents produced by the respondent D1 to D3, nor counter the oral evidence adduced by the respondent nor is it the case of the petitioner that the documents D1 to D3 i.e. order dated 24th March, 2004 and the office notings, are fabricated or not correct. From perusal of the Enquiry Report, it is apparent that the documents produced by the respondent have not been considered rather the enquiry officer has inferred, on the premise that the respondent/charged officer did not produce any documentary or oral evidence in support of his claim that he was diverted on some other duty in place of his control room duty and the assigned work had to continue up to the date of demolition on 31st March, 2004. This is also not the case of the petitioner that the other work assigned to the respondent had been concluded on 26th March, 2004 and the respondent could carry out his control room duty from 6.00 AM to 2.00 PM on 26th March, 2004. From the order dated 24th March, 2004, it cannot be disputed that the respondent was deputed for carrying out the survey in the Jhuggi clusters of Azad Camp.

14. In the circumstances, the learned counsel for the petitioner has failed to show as to how the order of the Tribunal impugned by the petitioner suffers from illegality, irregularity or any such perversity which will necessitate interference by this Court. The orders of the petitioner ignoring the documentary and oral evidence of the

respondent cannot be sustained. From the documentary evidence produced by the respondent, the inevitable inference is that he was deputed for another assignment and could not be present at the Control Room duty which was also brought to the notice of the AE (Demolition), who in turn had assured the respondent that he would communicate the inability of the respondent to the Deputy Director (LM) SEZ which facts and evidence, documentary and oral adduced by the respondent, remained un-rebutted.

15. In the circumstances, the findings of the Enquiry Officer ignoring the relevant documentary and oral evidence on behalf of the respondents were perverse and could not be arrived at and the Tribunal was justified in setting aside the order of the Disciplinary Authority and the Appellate Authority imposing the punishment of reduction of pay by one stage for a period of one year with cumulative effect.

16. In the circumstances, the petitioner has failed to make out any such ground which would entail any inferences by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India against the order dated 9th May, 2011 passed by the Central Administrative Tribunal in OA No.2669/2001. There is no illegality or irregularity or any perversity in the order of the Tribunal impugned before this Court. For the foregoing reasons the writ petition is without

any merit, and it is, therefore, dismissed. Parties are however, left to bear their own costs.

CM Nos.16809-16810/2011

In view of the dismissal of the main writ petition, these applications also do not survive and they are also disposed of.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

OCTOBER 10, 2011.

vk