

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 4074 OF 2004

Prakash Manohar Kulkarni	...Petitioner
Versus	
Union of India & Ors.	...Respondents

Mr. S. V. Marne for Petitioner.
Mr. T. J. Pandian for Respondents.

**CORAM: SMT. V. K. TAHILRAMANI, Acting C. J. &
M. S. SONAK, J.**

DATE : 12 APRIL 2018

ORAL JUDGMENT :

- 1] Heard the learned counsel for the parties.

- 2] The challenge in this petition is to the judgment and order dated 8th October 2002 made by the Central Administrative Tribunal (CAT) in Original Application No. 284 of 1996 instituted by the petitioner questioning the removal of the petitioner from service and seeking reinstatement with all consequential benefits.

- 3] Mr. Marne, the learned counsel for the petitioner

submits that from the material on record, it is quite clear that the petitioner, had in fact reported for duties before Loco Foreman on 6th September 1991 but the petitioner was not allowed to resume duties on the said date without assigning any reasons. Mr. Marne submits that on receipt of communication dated 12th January 1993, once again, the petitioner, reported for duty and even addressed a letter seeking instructions in the matter of reporting for duty. However, since, the respondents, failed to communicate or even permitting the petitioner to report for duties, the petitioner, could not actually resume duties. Mr. Marne submits that in these circumstances, the respondents were were not at all justified in leveling charge of unauthorised absence against the petitioner. He submits that the findings recorded by the enquiry officer are perverse and ought to have been interfered with by the CAT.

4] Mr. Marne however submits that in this case, despite demand, no subsistence allowance was paid to the petitioner during the period of which he was placed under suspension pending disciplinary proceedings. He submits that non payment of subsistence allowance disabled the

petitioner from attending the enquiry and putting forth his defence. The enquiry, which was held *ex parte*, was thus, vitiated for non compliance with principles of natural justice and fair play. Mr. Marne submits that the penalty, which is imposed on the basis of said *ex parte* enquiry is also vitiated for non compliance with principles of natural justice and fair play.

5] Mr. Marne submits that initially, the charge sheet dated 5th December 1991 had been issued to the petitioner. However, the same was withdrawn without assigning any cogent reasons and thereafter, a fresh charge sheet dated 12th January 1993 was issued to the petitioner. Mr. Marne submits that this is clearly impermissible and virtually amounts to double jeopardy. He submits that the penalty, which is imposed on the basis of such second charge sheet dated 12th January 1993 is in fact a nullity and the CAT, has erred in not even considering this issue. For all these reasons, Mr. Marne submits that the impugned order made by the CAT is liable to be set aside and the reliefs prayed for by the petitioner in his OA before the CAT are liable to be granted.

6] Mr. T. J. Pandian, the learned counsel for the respondents submits that in the present case, the petitioner has remained absent unauthorizedly for the period between 3rd September 1991 and 26th June 1995. He submits that intimations were sent to the petitioner to resume duties, however, despite the same, the petitioner failed to resume duties. Besides, the petitioner, made alterations on his transfer order so as to indicate that he had been transferred on a higher post. Mr. Pandian points out that despite opportunities, the petitioner failed to participate in the enquiry. The report of the enquiry officer is based upon the evidence on record and past conduct of the petitioner was also not at all good. Taking into consideration all these factors, penalty came to be imposed upon the petitioner. He submits that the scope of judicial review in matters of disciplinary proceedings is quite limited. For all these reasons, Mr. Pandian submits that this petition may be dismissed.

7] The rival contentions now fall for our determination.

8] In this case, a charge sheet was issued to the petitioner on 5th December 1991. However, at a later stage, this charge sheet was cancelled on administrative account vide communication dated 12th January 1993. Under the cover of the same communication, a fresh charge sheet dated 12th January 1993 was issued to the petitioner. On perusal of the two charge sheets, it is clear that the first charge with regard to unauthorised alterations in the transfer order remains the same. The second charge regarding unauthorised absence has been elaborated because in the meanwhile the period of such unauthorized absence, increased. This is certainly, not some case of double jeopardy, particularly because it is not as if the charges leveled in the charge sheet dated 5th December 1991 were enquired into and the petitioner was exonerated therefrom. Further, the communication dated 12th January 1993 not only states the reason for cancellation of the first charge but, simultaneously, serves a fresh charge sheet upon the petitioner. Accordingly, there is no merit in Mr. Marne's contention that the very issuance of the second charge sheet was a nullity.

9] From the record, which has been scanned in substantial detail by the CAT, it is apparent that more than ample opportunities were afforded to the petitioner to participate in the enquiry. However, the petitioner, avoided participation, thereby, leaving no option to the enquiry officer, other than to proceed *ex parte*.

10] At this juncture, it is necessary to note that the petitioner, on one occasion when the enquiry was scheduled for 8th December 1994, applied for adjournment before the enquiry officer on the ground that his father-in-law had expired on 6th December 1994. The CAT, has taken cognizance of application dated 19th August 1991 filed by the petitioner in connection with yet another charge sheet issued to the petitioner on 8th November 1990 in which the petitioner had stated that his father-in-law, had expired on 14th June 1990. Further, the CAT has taken cognizance of the fact that the petitioner in his response to enquiry report, by representation dated 19th August 1991, had asserted that his father-in-law had expired on 14th June 1990. From this, it is apparent that the petitioner, without any good reason, and in fact, by making false statements, avoided attending

the enquiry before the enquiry officer. In such circumstances, the petitioner, can hardly complain of any violation of principles of natural justice or fair play.

11] There is material on record from which, it is clear that the petitioner, time and again, was sent letters / intimations to resume duty. However, the petitioner, failed to resume duty and instead, has alleged that he was not permitted to join the duties. The petitioner, was neither reporting for duties nor participating in the enquiry. In such circumstances, the petitioner, cannot complain of either non payment of subsistence allowance or violation of principles of natural justice and fair play.

12] The enquiry officer, based upon the evidence on record, held charges as proved against the petitioner. There is really no defence raised by the petitioner except to say that there has been non compliance with principles of natural justice and fair play on the part of the respondents. The charge of making alterations in the transfer order so as to create an impression that the petitioner was transferred to a higher post of a diesel assistant is quite a serious

charge. Similarly, the charge of absence of almost four years without authorization also stands proved and the same is also quite a serious charge.

13] In ***Union of India & Ors. vs. P. Gunasekaran***¹, the Hon'ble Supreme Court, in the context of exercise of powers under Articles 226 and 227 by the High Court in relation to disciplinary proceedings has held that the High Court is not and cannot act as a second court of first appeal. The Hon'ble Court has spelt out the restrictive parameters of jurisdiction to be exercised by a High Court in relation to disciplinary proceedings. It is held that the High Court cannot go into reliability and adequacy of evidence. Similarly, the High Court cannot re-appreciate the evidence before the enquiry officer in order to reach to a different finding. Interference is permitted only where the findings of fact is perverse. The test laid down by the Hon'ble Supreme Court, which will apply also to Central Administrative Tribunal exercising the powers of judicial review are as follows :

“(I) The High Court can only see whether:

a). the enquiry is held by a competent authority;

1 AIR 2015 SC 545

- b). the enquiry is held according to the procedure prescribed in that behalf;*
- c). there is violation of the principles of natural justice in conducting the proceedings;*
- d). the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;*
- e). the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;*
- f). the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;*
- g). the disciplinary authority had erroneously failed to admit the admissible and material evidence;*
- h). the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;*
- i). the finding of fact is based on no evidence.*

II) Under Article 226/227 of the Constitution of India, the High Court shall not:

- (i). re-appreciate the evidence;*
- (ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;*
- (iii). go into the adequacy of the evidence;*
- (iv). go into the reliability of the evidence;*
- (v). interfere, if there be some legal evidence on which findings can be based.*

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

14] Despite limited scope of judicial review is explained by the Hon'ble Supreme Court, the CAT, in the present case, has examined the material on record in substantial details, possibly because, the petitioner, was penalized on the basis of an *ex parte* enquiry. The CAT, has, quite correctly held that there was sufficient evidence before the enquiry officer to hold the charges as proved. This is also, not some case of disproportionate penalty.

15] In the petitioner's tenure of service from 1983 to 1995, i.e. 11 years there were no less than four disciplinary proceedings held against the petitioner, on account of unauthorised absence for periods of 31 days, 200 days, 773 days and 1030 days. On the first occasion, a minor penalty of withholding increments for three months was imposed upon the petitioner, on the second occasion, on account of absence for 200 days, increments of one year were withheld. On the third occasion, when the petitioner, was

absent for almost 773 days, three years increments were withheld with cumulative effect. This means that the petitioner, was a habitual absentee and despite previous penalties, had not bothered to improve himself.

16] Taking into consideration all the aforesaid aspects, we see no reason to interfere with the impugned judgment and order. This petition is therefore dismissed. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA