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

+ **LPA 603/2018**

MANAGEMENT OF JHABBAN LAL DAV SR SECONDARY PUBLIC
SCHOOL

..... Appellant

Through: Counsel for the Appellant
(appearance not given).

versus

K M YADAV & ANR

..... Respondents

Through: Mr.Sanjeev Ralli with Mr.Bibhash
K.Sharma & Mr.Amber Sachdeva,
Advocates.
Ms.Rashmi Chopra with Ms.Vriti
Anand, Advocates for R2.

+ **LPA 321/2018 & C.M. APPL.24187/2018**

K M YADAV

..... Appellant

Through: Mr.Sanjeev Ralli with Mr.Bibhash
K.Sharma & Mr.Amber Sachdeva,
Advocates.

versus

MANAGEMENT OF JHABBAN LAL DAV SR SECONDARY PUBLIC
SCHOOL & ANR

..... Respondents

Through: Counsel for the Respondents
(appearance not given).

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

J U D G M E N T

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31. 10. 2018

Dr. S. Muralidhar, J.:

1. These two appeals - one by the Management of Jhabban Lal DAV Sr Secondary Public School (hereafter 'the School') and the other by K.M.Yadav (hereafter 'the employee') - are directed against the same impugned judgment dated 17th May 2018 passed by the learned Single Judge disposing of WP(C) 10900 of 2016 filed by the School against the order dated 23rd August 2016 of the Delhi School Tribunal (Tribunal).

2. The background facts are that the employee joined the school in 1996 as TGT (Physical Education). On 21st November 2011 he was served with four articles of charge. Article I was that on 17th August 2011 at around 12 noon he had entered the office of the Principal of the School and misbehaved by shouting at her using unparliamentary language thereby violating Rule 123(1) (b) (vi) and Rule 123(1) (c) (ii) of the Code of Conduct in terms of the Delhi School Education Rules, 1973 (DSE Rules). Article II was that he declined to take certain arrangement classes on several dates in August and September 2011 and did not take sports classes as per time table on 25th October 2010 thus violating Rule 123(1) (a) (i) of the Code of Conduct. Article III was that he had refused to receive a number of communications and obey the orders of the principal thereby violating Rule 123 (1) (c) (ii). Article IV was that he had on 11th February 2011 used abusive language while talking to the dance teacher (PRT) which was highly insulting to any female and hurt dignity of the said teacher. These acts were alleged to be highly unbecoming of an employee of the school.

3. The said memorandum dated 21st November 2011 informed the employee

that an inquiry was proposed to be held. A former Deputy Secretary (Inquiries) of the Department of Telecommunication (DoT), Government of India was appointed as the Presenting Officer (PO) for the School.

4. At the hearing held on 31st December 2011 the IO noted that the employee had nominated one Shri Sudhir Nayyar, Ex- Senior Vice President TCS as his Defence Assistant (DA). The IO rejected the request on the ground that Shri Nayyar was neither a working or retired employee of Central Government. It appears that the inquiry proceeded without the employee being permitted a DA. The IO submitted an inquiry report dated 18th April 2012 holding that all four articles of charge stood proved.

5. The Chairman of the School, as a Disciplinary Committee, agreed with the inquiry report and awarded the employee the penalty of removal from service which would not be a disqualification for future employment in any other recognised private school.

6. The employee then challenged the above order dated 5th June 2012 of the Disciplinary Committee before the Tribunal. By an order dated 23rd August 2016, the Tribunal set aside the report of the Inquiry Officer as well as the above order on the ground that they were unfair and illegal. The employee was directed to be reinstated with consequential benefits and full wages. The employee was permitted to make a representation for arrears of wages and the School was directed to decide it within four weeks by a speaking order.

7. Aggrieved by the above order of the Tribunal the school filed WP(C)

10900 of 2016 which was disposed of by the Single Judge by the impugned order by holding as follows:

(i) The IO ought to have permitted the employee to be represented by the DA of his choice since the Presenting Officer (PO) on the side of the school was a former Deputy Secretary of the DOT. It was noted that the DSE Rules made no reference to the Central Civil Services (CCA) Rules concerning the right of the employee to have a DA of his choice.

(ii) The resultant violation of the principles of natural justice had caused prejudice to the employee. Consequently, the order of the Tribunal was sustained on the above sole ground that the denial of a DA to the employee was “wholly improper.” Restriction of choice of a DA to a serving or retired government servant or an employee of the DAV organisation had resulted in ‘travesty of justice.’

(iii) Nevertheless considering the gravity of the charges which was appropriate to direct a de novo inquiry into the charges against the employee. It was directed that the direction of the Tribunal to reinstate the employee with consequential benefits would not be given effect to for a period of six months from the date that the de novo inquiry commences.

(iv) The de novo inquiry was directed to be conducted and concluded within a period of six months from the date it commenced failing which the reinstatement of the employee with consequential benefits or adequate compensation be thereof would be given effect to.

8. Before us learned counsel appearing for the school urged, on the basis of the decisions in *State Bank of Patiala v. S.K. Sharma* 1997 LLR 268, *Crecent Dyes & Chemicals Ltd. v. Ram Naresh Tripathi* 1993 LLR 97, *S.L.Tagra v. New India Assurance Co. Ltd.* 1998 LLR 327, *Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union* 1999 SCC (L&S) 361, *Hombe Gowda EDN Trust v. State of Karnataka & Ors.* 2006 LLR 141, *Parimal Kumar Dutta v. Apeejay School* [decision dated 20th April 2010 of a learned Single Judge of this Court in WP(C) 2063 of 2010] that the denial of a DA to a delinquent employee in a disciplinary inquiry would not be in violation of principles of natural justice particularly when the Rules are silent on that aspect. He also relied on the decisions in *DTC v. Prem Singh* 2015 V AD (Del) 566 and *State of Tamil Nadu v. S. Subramaniam* AIR 1996 SC 1232, to urge that the Tribunal exceeded its jurisdiction in re-appreciating the evidence and coming to a different conclusion on the merits of the case. Learned counsel for the School urged that the charges were grave and the employee was not at all prejudiced by the denial of DA to him since he participated in the inquiry and cross-examined all the witnesses himself. He further urged the employee ought not to have waited for the conclusion of the inquiry to raise an objection against the denial of a DA to him. It is submitted that the learned Single Judge erred in directing a *de novo* inquiry.

9. Learned counsel for the School relied upon Rule 14 of the CCS (CCA) Rules and in particular Rule 14 (8) (a) and (b) thereof regarding a delinquent government servant taking the assistance of another serving government

servant but not being entitled to engage a legal practitioner unless the PO was also a legal practitioner.

10. Mr. Sanjeev Ralli, learned counsel for the employee, was aggrieved by the impugned judgment of the learned Single Judge to the extent that no de novo inquiry was warranted because the Tribunal had examined the matter even on merits and found that there was no evidence on the basis of which the four articles of charge against the Appellant could be sustained. Secondly, Mr. Ralli submitted that in the event impugned order was sustained then a direction ought to be issued to treat the employee as being on suspension from the period of his removal till the conclusion of the de novo inquiry and also be entitled to subsistence allowance during the period of suspension. In support of this submission he placed reliance on the decision dated 12th July 2018 in LPA 26 of 2017 (*Kulachi Hansraj Model School v. Hari Om Sharma*).

11. The above submissions have been considered. In the present case it is not in dispute that the DSE Rules are silent as to the right of a delinquent employee who have a DA of his choice during the disciplinary inquiry. In such circumstances the question that arises is whether the denial of a DA to the delinquent employee while permitting the School to have a PO who happened to be a former government servant would be unfair and unreasonable so as to be considered as a violation of the principles of natural justice.

12. In *State Bank of Patiala v. S.K. Sharma* (*supra*) the Supreme Court reiterated that the ultimate test was whether the delinquent “had or did not have a fair hearing.” The observations of the Supreme Court in *S.L. Kapoor v. Jagmohan* (1980) 4 SCC 379 that “The non-observance of natural justice is itself prejudiced to any man and proof of prejudice independently a proof of denial of natural justice is unnecessary” was held to be subject to the *dicta* of the Constitution Bench in *Managing Director, ECIL v B. Karunakar* (1993) 4 SCC 727. The real test was whether the denial of natural justice resulted in prejudice to the delinquent employee.

13. It must be noticed here that the decision in *State Bank of Patiala v. S.K. Sharma* was not specific to the issue of denial to the delinquent employee. *Inter alia*, it was explained, with the reference to case law, that the principles emerging could be summarized thus:

“(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provisional which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived its then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could not be waived by him, then the

Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in *B.Karunakar*, (supra). The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rule/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice [rule of *audi alteram partem*] and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing".

(a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule [*audi alteram partem*].

(b) But in the latter case, the effect of violation [of a facet of the rule of *audi alteram partem*] has to be examined from the stand point of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

6. While applying the rule of *audialteram partem* (the primary principle of natural justice) the Court /Tribunal / Authority must always bear in mind the ultimate and overriding objective

underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.”

14. Next turning to the decision in *Crescent Dyes and Chemicals Ltd. v Ram Naresh Tripathi*, the Court there was examining validity of the Standing Order which mandated that a delinquent employee could only be represented by a clerk or a workman working in the same department as himself. The question was whether the said Standing Order was consistent with Sections 21 and 22 (ii) of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The Supreme Court answered the question in the affirmative and observed that the law in India “also does not concede an absolute right of representation as an aspect of the right to be heard, one of the elements of principle of natural justice.” It was held that there was no right to representation as such “unless the company by its Standing Orders recognises such a right.” The question, however, to be answered was whether the refusal of the workman’s request to be represented at the enquiry would vitiate the enquiry. Summarizing the legal position, it was observed as under:

“12. It is, therefore, clear from the above case law that the right to be represented through counsel or agent can be restricted, controlled or regulated by statute, rules, regulations or Standing Orders. A delinquent has no right to be represented through counsel or agent unless the law specifically confers such a right. The requirement of the rule of natural justice insofar as the delinquent's right of hearing is concerned, cannot and does not extend to a right to be represented through counsel or agent. In the instant case the delinquent's right to representation was regulated by the Standing Orders which permitted a clerk or a workman working with him in the same

department to represent him and this right stood expanded on Sections 21 and 22(ii) permitting representation through an officer, staff-member or a member of the Union, albeit on being authorised by the State Government. The object and purpose of such provisions is to ensure that the domestic enquiry is completed with despatch and is not prolonged endlessly. Secondly, when the person defending the delinquent is from the department or establishment in which the delinquent is working he would be well conversant with the working of that department and the relevant rules and would, therefore, be able to render satisfactory service to the delinquent. Thirdly, not only would the entire proceedings be completed quickly but also inexpensively. It is, therefore, not correct to contend that the Standing Order or Section 22(ii) of the Act conflicts with the principles of natural justice.”

15. It can clearly be seen that as far as the decision in ***Crescent Dyes and Chemicals Ltd. v Ram Naresh Tripathi*** (*supra*) was concerned, the Court was weighing the right of the delinquent to be represented by a counsel or agent as against the right to be represented only by another workman in the same organization. It was not categorically held by the Supreme Court that in no situation a delinquent employee can be entitled to a DA at all. In fact, the legal position summarized hereinbefore appears to indicate otherwise.

16. Both from the decisions in ***State Bank of Patiala v. S.K. Sharma*** (*supra*) and ***Crescent Dyes and Chemicals Ltd. v. Ram Naresh Tripathi*** (*supra*), the legal position that emerges that if the rules are silent on the aspect, an employee cannot as a matter of right insist on a representation by DA. However, the question would still arise whether the denial of DA in such instance would render the enquiry against the delinquent employee unjust or unfair. That aspect obviously differs from case to case. For, in a

case where the management (or for that matter, School in this instance) is represented by a PO, denying a DA of his choice (other than a lawyer) to the delinquent employee would obviously be unfair, as it would be a denial of equality of arms. While a delinquent employee cannot insist on being represented by a lawyer, particularly when the rules are silent and further since the PO is not a lawyer himself, it cannot be said that even where the management is represented by a PO, the delinquent employee would have no right whatsoever to have a DA of his choice. Further, in restricting the choice of the delinquent employee to either a serving or retired employee of the government or of the same organization, particularly when there are no rules restricting his choice, the IO would be acting unfairly.

17. While the Court agrees that there can be no hard and fast rule on what could constitute to be an unfair procedure, and further that not every violation of procedural requirement can be said to cause prejudice, that question would have to be examined on a case by case basis.

18. In the present case, it is not in dispute that the charges against the delinquent employee were serious. The school was relying at least on five witnesses in support of the charges. Two of those witnesses were not produced. However, the witnesses that were produced were required to be cross-examined. While the delinquent employee did himself cross-examine some of the witnesses, that would not be the same as done by his DA, particularly when the School is being represented by a PO of its choice. In any enquiry of this nature, with the management being represented by a PO, who happened to be a former government servant, the denial to the

delinquent employee a DA of his choice would, as rightly observed by the learned Single Judge constitute a violation of the principles of natural justice.

19. There is no warrant in straightaway adopting the CCS (CCA) Rules in this regard, particularly since the DSE Rules are silent on this aspect. Therefore, the decision in *Bharat Petroleum Corporation Ltd. v. Maharashtra General Kamgar Union* (*supra*) would not assist the School in this regard. The decision in *S.L. Tagra v. New India Insurance Company Ltd.* (*supra*) involved the interpretation of General Insurance (Conduct, Discipline and Appeal) Rules, 1975, which restricted the right of an employee to have a DA. It was not a case of total denial to an employee of his right to have a DA, as has happened in the present case.

20. Consequently, the Court is not persuaded that the learned Single Judge erred in holding that the IO had acted unfairly in denying to the employee the DA of his choice, particularly when the DA of his choice was not a lawyer but only a former employee of TCS. This part of the impugned order, therefore, does not call for any interference.

21. As far as the grievance of the employee is concerned the Court finds that the Tribunal's discussion of the merits of the charges and the inquiry report is cursory and superficial. For instance as regards charge No.1 after noting that the two witnesses cited by the school were not produced the Tribunal straightaway concluded that an adverse inference could be drawn against the School. The evidence produced by the School was not even noticed by the Tribunal in order to decide whether article of charge stood proved.

Admittedly, the Principal of the school who was allegedly misbehaved with by the employee was not even discussed.

22. Considering the charges were fairly serious the direction issued by the learned Single Judge that there should be a *de novo* inquiry cannot be said to be erroneous.

23. However, the Court accepts the plea of the employee that since a *de novo* inquiry has been ordered six years after the order of removal was passed by the disciplinary committee of the School, the learned Single Judge ought to have treated this long period, till the conclusion of the *de novo* inquiry, as the period during which the employee would be placed under suspension and be entitled to some subsistence wages.

24. Consequently, the impugned order of the learned Single Judge is modified only to the extent indicated hereunder:

(i) The *de novo* inquiry in terms of the impugned order will be held and concluded within a period of six months from today.

(ii) For the period between the date of his removal by the disciplinary committee i.e. 5th June 2012 till the date of conclusion of the *de novo* inquiry and the consequential order passed thereon, the employee will be treated as being in service but under suspension and be entitled to 50% of the wages during the said period which will be paid to him hereafter before the 10th of every month.

(iii) As far as the arrears of the subsistence wages is concerned it will be

paid to the employee by the school within a period of eight weeks from today.

(iv) The de novo inquiry will be held by providing the employee the DA of his choice and a fresh inquiry report will be rendered uninfluenced by the earlier inquiry report or any observations on merits of the Tribunal, the learned Single Judge of this Court, or in the present judgment.

25. LPA 603 of 2018 is accordingly dismissed. LPA 321 of 2018 and the pending application are disposed of in the above terms. The interim order passed by this Court on 31st May 2018 stands vacated.

S.MURALIDHAR, J.

SANJEEV NARULA, J.

OCTOBER 31, 2018

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