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(2011) 11 DEL CK 0035

In the Delhi High Court

Case No : Writ Petition (C) 7890 of 2011 and CM No. 17855 of 2011 (for stay)

The Chairman, Central Board of Trustees — APPELLANT

Vs

M. Vijayaraj — RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 15
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 5D(7)

Citation : (2011) 185 DLT 688 : (2012) 2 SLJ 79

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : H.K. Gangwani, for the Appellant; Manjeet Singh Reen, for the Respondent

Final Decision : Dismissed

Judgement

Acting Chief Justice

Caveat No.999/2011.

Since the counsel for the respondent has appeared, the Caveat stands

discharged.

CM No.17856/2011 (for exemption).

Allowed, subject to just exceptions.

W.P.(C) 7890/2011.

1. Rule DB.

2. Since short question of law only is involved, with the consent of counsels we have heard the matter at this stage and proceed to finally dispose of this writ petition.

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3. The petitioner had issued charge sheet dated 29th April, 2010 to the respondent inter alia leveling the charge that the respondent had committed serious irregularities in the capacity of Appointing Authority and which resulted in irregular appointment of seven personnel as canteen staff. The irregularities were detailed in the charge sheet.

4. The respondent herein challenged the said charge sheet and sought quashing thereof by filing an application u/s 19 of the Administrative Tribunals Act, 1985, before the Central Administrative Tribunal (CAT), Principal Bench, New Delhi. The premise on which the respondent set up his case and sought the quashing of charge sheet was that no prior approval of the Central Vigilance Commission (CVC) had been obtained before serving the charge sheet and thus the petitioner could not proceed with the inquiry on the basis of such charge sheet.

5. The petitioner pleaded before the Tribunal that "prior approval" of the CVC was not required before issuing the charge sheet and only "advice" of CVC which was required to be taken at that stage. The petitioner though accepted the fact that such advice, known as "first stage advice" had not been taken but at the same time pleaded that the CVC, after issuance of the charge sheet, had granted ex post facto approval. Thus, according to the petitioner the same was sufficient compliance with the relevant rules and instructions.

6. The learned Tribunal did not accept the aforesaid contention of the petitioner and relying on Union of India v. Vinod Kumar 1996 (4) SLR 719 held that the requirement being of prior approval of CVC, ex post facto approval would not meet the requirement of law. On this reasoning, charge sheet dated 29th April, 2010 has been set aside with observations that the petitioner would be well within its right to issue fresh memo to the respondent and proceed departmentally against the respondent after obtaining CVC''s advice.

7. In this petition filed by the petitioner questioning the validity of the aforesaid order dated 20th December, 2010 of the Tribunal, it is the contention of the learned counsel for the petitioner that the learned Tribunal has glossed over a vital distinction between "prior approval" and "advice". It is contended that the requirement was only of "first stage advice" to be taken before issuing the charge sheet. It is contended by Mr. Gangwani, Advocate that there is a substantial difference between "prior approval" and "first stage advice" and not taking "first stage advice" was merely an irregularity which could be cured and was in fact cured in the instant case by taking ex post facto advice.

8. The learned counsel for the respondent on the other hand supported the order of the learned Tribunal by contending that "prior approval" was required. He also submitted that the petitioner has not been rendered remediless as it can still issue fresh memo of charge sheet after consulting CVC and obtaining its advice as per the directions of the learned Tribunal contained in the impugned order. He also referred to the judgment of Supreme Court in Vinod Kumar (supra) relied upon by the learned Tribunal. He also drew our attention to another decision

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dated 17th February, 2009 rendered by the learned Tribunal in OA No.856/2008 titled Shri Karamvir Singh v. Union of India and submitted that in the said decision the learned Tribunal has discussed this issue in greater detail and therefore no interference in the impugned order of the learned Tribunal was called for.

9. In order to appreciate the respective contentions of the learned counsels for the parties, it would be necessary to reproduce the exact instructions which prescribe taking of CVC''s advice on such matter. Both counsels have referred to Swamy''s Compilation of CCS (CCA) Rules, under Rule 15 it is so mentioned:-

3. The Commission, at present, is being consulted at two stages in disciplinary proceedings, i.e., first stage advice is obtained on the investigation report before issue of the charge-sheet, and second stage advice is obtained either on receipt of reply to the charge-sheet or on receipt of inquiry report. It however, does not seem necessary to call for the representation of the concerned employee on the first stage advice as the concerned employee, in any case, gets an opportunity to represent against the proposal for initiation of departmental proceedings against him. Therefore, a copy of the Commission''s first stage advice may be made available to the concerned employee along with a copy of the charge-sheet served upon him for his information. However, when the CVC''s second stage advice is obtained, a copy thereof may be made available to the concerned employee, along with the IO''s report to give him an opportunity to make representation against IO''s findings and the CVC''s advice, if he desires to do so.

10. A reading of the aforesaid para manifests that CVC is to be "consulted at two stages in disciplinary proceedings". We are concerned here with the first stage which arises before the issuance of the charge sheet. The second stage is only after the inquiry has been conducted. The nature of first stage advice and the purpose thereof is evident from there being no need for representation of the employee there against and the requirement being only of furnishing copy thereof along with charge sheet to the employee. After the preliminary investigation is conducted by the department, the procedure and purpose for approaching CVC for first stage advice is to seek the opinion of the CVC as to whether charge sheet should be issued or not and secondly the nature of charges which should be mentioned in the charge sheet. That is the only purpose of advice at that stage. It is trite that no prior consent or approval of the CVC is required and even if CVC, in a given case, states that inquiry need not be held, the Disciplinary Authority, for sufficient reasons can ignore the said advice though normally it will go by the advice of the CVC. It is felt that the learned Tribunal has failed to appreciate that while an "approval" denotes an element of compulsory and mandatory, "advice" refers to an action which by nature is not compulsorily implementable. What we are emphasizing here is that CVC is not an authority whose prior approval is required or that is mandatory requirement before issuance of charge sheet. When we look into the matter from this angle, it becomes apparent that if the advice of the CVC was not taken, it was a mere

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irregularity and not illegality.

11. In the case of Karamvir (supra) the learned Tribunal had taken into consideration the various provisions of the Central Vigilance Commission Act, 2003 and on that basis stipulated the role of CVC. There is no quarrel with the said proposition. The question which falls for consideration is as to whether ex post facto advice would cure the irregularity. In Karamvir no such ex post facto approval also existed. In our opinion, ex post facto approval which was accorded in the present case has made all the difference. It would be apposite to re-produce the communication dated 21st May, 2010 granting ex post facto approval to the charge sheet issued by the petitioner as Disciplinary Authority. It reads as under:-

2. The case has been examined by the Commission. The Commission advises:-

(a). Ex-post-facto approval for initiation of major penalty proceedings against Shri M. Vijay Raj, the then RPFC (retired).

(b). To initiate major penalty proceedings against rest of four other selection committee members i.e. Shri P. Subramani, RPFC, Shri Thulasi Raj, RPFC, Shri G.R. Suchindranth, RPFC and Shri B. Rama Koti, DD, ESIC.

12. It is clear from the above that not only CVC has given its nod for initiation of major penalty proceedings against the respondent herein, even the specific charge sheet containing the charges which was served upon the respondent, has been acceded to and approved by the CVC.

13. We are further of the opinion that the Tribunal erred itself in relying upon the judgment of the Supreme Court in Vinod Kumar. That was a case where the Supreme Court dealt with the rule of granting promotion of 50% of the quota giving two years additional benefit to the Upper Division Clerks. The question was as to whether while granting this promotion the Government could deviate from procedure prescribed in Section 5D(7)(a) of the Employees'' Provident Fund & Miscellaneous Provisions Act, 1952. The proviso to the said provision clearly stipulated that prior approval of the Central Government was required. This Rule thus contained the expression "prior approval" and based thereupon the judgment was rendered. It is clearly not applicable in the instant case. Here, as already pointed out above, there is no requirement of "prior approval" and it is only "advice" which is to be taken from CVC.

14. The matter can be examined from another angle which will yield the same result. The learned Tribunal itself has observed that after consulting CVC and taking its advice, fresh memo can be issued to the respondent. The fact is that the action has already been taken in consultation with CVC and the advice is also on record and as per the advice not only action taken by the petitioner of serving the charge sheet but even the format of charge sheet is approved by the CVC. Therefore no prejudice is caused to the respondent at all. At the most, he was entitled to have the copy of CVC''s advice which has been furnished to him. We

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may notice that the Apex Court recently in Union of India (UOI) and Others Vs. Alok Kumar, has held in somewhat similarly facts that without prejudice being shown to the delinquent employee and burden of showing which is on the employee such irregularity would not vitiate the departmental proceedings. Relying thereon, the Division Bench of this court in The Secretary, (Railway Board) and Another Vs. Sh. R.K. Sareen held that without prejudice being shown, non-supply of second stage advice of CVC also cannot be a ground for interfering with the departmental proceedings. To the same effect is the judgment of another Division Bench of this Court in Union of India (UOI) and Another Vs. Tarlok Singh .

15. For all these reasons, we make the rule absolute, set aside the impugned order and as a result OA filed by the respondent herein before the tribunal is dismissed.

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