

(2011) 04 DEL CK 0173

In the Delhi High Court

Case No : Writ Petition (C) No. 590 of 2008

Union of India (UOI) and Others

APPELLANT

Vs

Sh. Ashok Kumar Arora

RESPONDENT

Date of Decision : 26-04-2011

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 12(2), 14, 19, 3(1)

Citation : (2011) 04 DEL CK 0173

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : Gaurav Liberahan and B.S. Jain, for the Appellant; S.K. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The Petitioners, Union of India, through the Secretary Ministry of Defence, and Ors., have challenged the order dated 30th April, 2007 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 1367 of 2006, titled as "Ashok Kumar Arora v. Union of India, through Secretary, Ministry of Defence and Ors., allowing the OA of the Respondent and setting aside the orders dated 30th April, 2004 whereby the disagreement note to the enquiry report was given by the disciplinary authority and the order dated 23rd September, 2004 imposing a minor penalty of censure in a major penalty proceeding and treating the absence period from 23rd June, 1999 to 26th May, 2003 as extraordinary leave without medical certificate as well as the order dated 9th December, 2005 passed in the appeal affirming the order of the Disciplinary authority, which were quashed and the Petitioners were directed to accord all benefits for the period of 23rd June, 1999 to 27th May, 2003 to the Respondent including retiral benefit. The Petitioners have also challenged the order dated 25th July, 2007 passed in RA No. 139 of 2007 whereby the review application filed by the Petitioners was also dismissed.

2. Brief facts to comprehend the disputes between the parties are that the Respondent is a retired Assistant Engineer (Building & Roads) who had superannuated on 31st October, 2004. Before superannuation, the Respondent was served with a charge sheet dated 9th December, 2000 intending to initiate disciplinary proceedings under Rule 14 of the CCS (CCA) Rules, 1965 on the allegation that the Respondent pursuant to the High Court order was instructed to join GE (NW) Tunir as per E-in-C's Branch Delhi posting order No. MES/178/98 dated 11th November, 98 and GE (W) Delhi Movement Order No. 1014/Offrs/1111/E1B dated 21st June 1999. The Respondent on being SOS from his previous unit failed to report to his new unit at Tunir and remained absent w.e.f. 23rd June, 1999 and thus committed an offence of failing to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a Government servant and convened the provision of Rule 3 (1) (i), (ii) & (iii) of CCS (Conduct) Rules, 1964.

3. The Respondent had earlier been posted to a hard station and there he had been a chronic patient of bronchial asthma since, 1988. The Respondent was even subjected to a medical examination regarding fitness of civilians in the field service on account of his bronchial asthma in 1994, whereby it was represented that Silchar, the place of his posting did not suit him due to his ailment because of the specific climatic conditions.

4. On medical examination, the graded specialist recommended the Respondent, permanently unfit for duties in humid, dusty and extreme cold conditions. The Respondent, therefore, had been transferred in the year 1996 to Delhi.

5. The Respondent had again been transferred by order dated 11th November, 1998 from Delhi to Tunir, which was objected by him on account of adverse humid conditions which were not in consonance with his medical report which was given by the graded specialists of the Petitioners in the year 1994. The Respondent had represented against his transfer to Tunir and had filed a writ petition before the High Court which was however, not accepted. However, in his review application, it was directed to consider his medical fitness before posting him to Tunir.

6. Though the High Court in the review application had directed consideration of the medical fitness of the Respondent before posting him to Tunir, however, his medical fitness was not ascertained. Rather a major penalty charge sheet under Rule 14 of the CCS (CCA) Rules, 1965 was issued. The allegation of misconduct was that he remained absent from duty w.e.f. 23rd June, 1999 as he failed to report to his place of posting at Tunir which was tantamount to failure on the part of the Respondent to maintain integrity and devotion to duty and acting in a manner unbecoming of Government servant.

7. The enquiry officer held that the charges against the Respondent were not made out as his movement order was invalid and even the charge No. 4 regarding failing to maintain absolute integrity and devotion to duty was not

correctly proved and he was held to be not guilty. The enquiry officer noted that from the service record of the Respondent, it is evident that he had complied with the posting to a hard station in 1988 and 1993 and was declared unfit for duties in humid, HHA, dusty and extreme cold climatic conditions as being a case of bronchial asthma in 1994. Despite that he continued to serve till January, 1996 to complete his tenure of hard posting. The enquiry officer also noted that asthma is a disease with no cure and can be controlled only by prevention of its triggering and medications but despite this, the immunity of the body gets weaker as a person grows old and in the circumstances, rejected the plea of the Petitioners. The plea that the conditions of the Respondent would have improved was also repelled as it was found to be based on mere assumptions of the Petitioners without any evidence. It was also held that in his case neither justice was done, nor been seen to be done.

8. The disciplinary authority on receipt of the report of the enquiry officer, however, disagreed with the findings. The disagreement note was based on the assumption of the disciplinary authority that the humidity level at Silchar in Assam and Mumbai, are comparable and thus, if the Respondent could serve at Silchar till 1996, he could serve at Mumbai as well. It was also observed by the disciplinary authority that the Respondent had willfully not collected the movement order and had wrongly termed the case as subjudice. It was also held that the Respondent had not submitted any medical certificate for his absence and therefore, his unauthorized absence is proved beyond reasonable doubt. Regarding the declaration of the Respondent being declared unfit for duties in humid, HHA, dusty and extreme cold climatic conditions etc. vide 160 MH, C/O 99 APO dated 20th September, 1994, it was asserted that the said certificate was not renewed after completion of three years and therefore, its validity had expired and instead of getting himself medically re-examined, the Respondent indulged too frequently in letter writing and therefore, he tried to confuse the issues.

9. The disagreement note issued by the disciplinary authority was replied in detail by the Respondent, however, the disciplinary authority held that the charges were made out against the Respondent. Consequently, a minor penalty of censure with certain observations as detailed hereinafter was passed:

AND WHEREAS Shri Ashok Kumar Arora, AE B/R submitted his representation dated 27th May, 2004 bringing out the following points:

- (a) That CE WC is competent to issue his disagreement order.
- (b) That the disagreement order is discriminatory and biased against the CO since it is contrary to all facts and matters examined and recorded by IO."b
- (c) That on the basis of MC dated 20th September, 1994 of 160 MH C/O 99 APO his posting to Pathankot was cancelled in December, 1997. Thus, the reasons for non acceptance of the same report has not been addressed.

AND WHEREAS the undersigned has carefully considered the representation of CO dated 27th May, 2004 and the following is stated in this regard:

(a) That CE WC is competent to issue his disagreement order under CCS (CCA) Rules, 1965.

(b) That disagreement order is not discriminatory rather it is just, fair and equitable representing the true picture of the case. It has been issued after due deliberation on the fact and circumstances of the case.

(c) The CO has produced medical cert. Of September, 1994 which cannot be treated as latest medical report. The CO has failed to produce the latest medical report for consideration as his earlier MC cannot be considered permanently.

AND WHEREAS the under signed after careful consideration of the charge sheet, defence statement, oral inquiry report, comments/recommendation of CE Southern Command on disagreement order, representation of CO on disagreement order, other related facts and circumstances of the case has come to the conclusion that charges levelled against the said Shri Ashok Kumar Arora, AE B/R are proved

NOW THEREFORE, the undersigned in exercise of power conferred vide Sub Rule 2 (a) of Rule 12 of CCS (CCA) Rules, 1965 hereby impose the penalty of "CENSURE" upon Shri Ashok Kumar Arora, AE B/R with further direction that absence period from 23rd June, 1999 to 26th May, 2003 be regularized as EOL without Medical Certificate as per Leave Rule.

10. Aggrieved by the order of the disciplinary authority, the Respondent filed an appeal. However, the appeal was dismissed by the Appellate authority by order dated 9th December, 2005 and the minor penalty with certain observations as imposed by the disciplinary authority, was affirmed by the Appellate authority.

11. The Respondent challenged the order of minor penalty and affirmation of the punishment by the appellate authority on the ground that the disagreement arrived at by the disciplinary authority was not tentative but a final view of the matter, and therefore, the Respondent was denied a reasonable opportunity to show cause and reliance was placed on Yoginath D. Bagde Vs. State of Maharashtra and Another, The order was also challenged on the ground that the disciplinary authority had to act independently while awarding the punishment. However, the disciplinary authority had called for the comments from the Chief Engineer, Southern Command which could not form part of the record, nor could be relied on and therefore, punishment was imposed upon the Respondent on extraneous considerations. The Respondent also made a grievance that though a second enquiry was conducted on 6th December, 2001 but no orders for the same were issued and there could not be a de novo enquiry. The emphasis was also laid on the fact that pursuant to examination of the Respondent by the graded specialist of the Petitioners, it was recommended that the Respondent be transferred to a place which is not highly humid, HHA, dusty and with extreme

cold climatic conditions as it was not conducive for him and therefore, he was transferred from Silchar to Delhi, where climatic conditions were conducive for bronchial asthma. It was contended that the Respondent could not be posted to Tunir without considering his fitness especially in view of the directions issued by the High Court in RA No. 61/1999 in CWP No. 4691/1999 on 24th August, 1999 to get him medically examined. On behalf of the Respondent, it was also asserted that the Respondent has been punished by an incompetent authority which is not in accordance with law.

12. The pleas and contentions of the Respondent were opposed by the Petitioners contending inter-alia that the medical examination of the Respondent in the year 1994 would hold good only for three years and thereafter as no application for leave was submitted by the Respondent, he could not be accorded leave and in any case as the signatures were not appended on his medical leave application, his leave was rightly treated as EOL and therefore, he had been let off with a minor punishment of censure which should not be interfered with.

13. The Tribunal after considering the pleas and contentions of the parties held that the medical certificate by the Petitioners could not be denied to the Respondent, nor its consideration could be declined on the ground that the signatures of the Respondent were not appended on the application. The Tribunal opined that the transfer of the Respondent from Silchar to Delhi was on account of his medical examination by the graded specialist of the Petitioners who had declared him unfit to be posted at a place with humid climatic conditions. It was also held that the ailment of bronchial asthma is a permanent incurable disease, which is best treated by prevention as per the manual on asthma and its repercussions, which were appended to the Original Application that was filed before the Tribunal. The Tribunal held that the medical certificate stipulating unfitness of the Respondent at the humid and cold place issued by the graded specialist of the Petitioner was not only valid for three years but reflected permanent incapacitation on behalf of the Respondent to be posted at such places. In any case pursuant to the directions of the High Court in the review application which contemplated medical examination of the Respondent before his transfer, the Petitioners could not transfer the Respondent to Tunir without first getting him medically examined. The Tribunal also considered the fact that though the Respondent was not medically examined before transferring him to Tunir, however, when he reported at Mumbai, he had to be hospitalized. The allegation that hospitalization of the Respondent was merely dramatization was repelled as plea of the Petitioners with this regard was without any factual basis, and based merely on assumptions and was contrary to the medical record. The certificate issued by the hospital was accepted by the Tribunal being admissible and relevant as per Rule 19 of the CCS (Leave) Rules, 1972.

14. The Tribunal also took into consideration the order dated 16th April, 2003 re-transferring the Respondent from Tunir to Delhi on the same medical ground. Though the Respondent was transferred back from Tunir to Delhi without

prejudice to the departmental action, however, his posting back from Tunir to Delhi unequivocally reflected his medical conditions which had made him unfit for transfer even in 1999, and consequently, without his medical examination especially pursuant to the order of the High Court dated 24th August, 1999 in RA No. 61/1999 in CWP No. 4691/1999 the Petitioners could not have transferred the Respondent from Delhi to Tunir, and his failure to join there, could not be held to be misconduct that could be attributed to him nor could he be punished for the same.

15. The Tribunal has also held that the disciplinary authority pre-determined the issue by holding the charge as proved which makes the disagreement note, not as tentative but a final decision and thus, reasonable opportunity was denied to the Respondent. The Tribunal also observed the non-consideration of the pleas and contentions raised by the Respondent while passing the punishment order by the disciplinary authority after the disagreement note was served on the Respondent, and thus, set aside the minor punishment which was imposed with the observations of the disciplinary authority as detailed hereinbefore imposed on the Respondent.

16. This Court has heard learned Counsel for the parties in detail and also perused the record which was produced before the Tribunal which has been annexed along with the present writ petition.

17. Learned Counsel for the Petitioners has reiterated the pleas and contentions raised before the Tribunal, that medical certificate which was issued by the Petitioners' graded specialist was for three years and despite the Petitioners being graded as unfit in 1994, he continued to work till January 1996 where after he was transferred to Delhi. Thereafter, he was posted at Tunir, however, the Respondent did not collect the movement order, nor joined at Tunir, and thus the charges against the Respondent have been proved. The learned Counsel for the Petitioners feebly admitted to contend that the disagreement note of the disciplinary authority was not final but only tentative.

18. The certificate issued by the graded specialist of the Petitioners could not be ignored on the ground that the certificate was not renewed by the Respondent three years after 1994. This is not the case of the Petitioners that they had directed the Respondent to appear for the medical test, however, the Respondent avoided his medical checkup or that he was not present for his medical checkup to get ascertained his physical condition and fitness. Rather the medical certificate of 1994 had also reflected that the ailment of bronchial asthma is a permanent incurable disease, which is best treated by prevention as per the manual on asthma. From the medical certificate and other materials produced, it is also apparent that the immunity of the body gets weaker as a person grows old and the bronchial asthma does not improve with the aging of a person which facts have been taken into consideration by the Tribunal.

19. The learned Counsel for the Petitioners has not been able to show any such

ground which will reflect that the reasoning of the Tribunal is perverse or the inferences of the Tribunal are based on any extraneous material or evidence. Rather it is relevant to note that the disciplinary authority had taken into consideration the comments from the Chief Engineer, Southern Command, a copy of which was not even given to the Respondent. Under the procedure for enquiry there was no provision to take the comments of the Chief Engineer, Southern Command before taking the decision by the disciplinary authority. The Respondent could not be held liable for writing letters frequently on account of arbitrary procedure adopted by the Petitioners. The Petitioners transferred the Respondent from Silchar to Delhi on account of finding him unfit to humid and cold places and despite opinion from their expert and despite the order of the High Court to transfer him to a place only after having him medically examined, the Petitioner passed an order to get the Respondent transferred from Delhi to Tunir. This is not denied that climatic conditions at Tunir were not conducive for the Respondent as per his medical report which was rendered by the graded experts of the Petitioners. The report also indicated the permanent nature of the Respondent's ailment which could not be negated on the ground that the report of 1994 was valid only for three years. Rather the Petitioners transferred the Respondent back from Tunir to Delhi in 2003 on the ground of his medical unfitness for such places. Though his transfer from Tunir to Delhi was without prejudice to the disciplinary proceeding initiated against him, however, the unsuitability of the Respondent to work at Tunir could not be ignored. While considering whether the Respondent has misconducted in not joining at Tunir, it was incumbent upon the Petitioners to get him medically examined pursuant to the order of the High Court dated 24th August, 1999 in RA No. 61/1999 in CWP No. 4691/1999. No reasons have been given or disclosed as to why the order of the High Court was not complied with before posting him to Tunir. This fact has not been denied and cannot be denied that when the Petitioner went to Mumbai to report at Tunir, he had to be hospitalized. The certificate issued by the hospital has been considered by the Tribunal. There is no evidence on the part of the Petitioners to rebut the medical certificate of the Respondent issued by the hospital where he was admitted in Mumbai. The plea of the Petitioners that the admission of the Respondent at the hospital in Mumbai was mere dramatization by him is based on mere assumption of the Petitioners and is not in consonance with any legal evidence. Rather transferring back the Respondent from Tunir to Delhi is the vindication of the Respondent's plea of unsuitability of humid climatic conditions with regard to the health of the Respondent. If the Respondent was unfit for transfer in 1998 and could not be transferred without first getting him medically examined, then how he has done a misconduct in not joining at Tunir has not been explained by the learned Counsel for the Petitioners satisfactorily. It is not that the Respondent just refused to go to Tunir but he went to Mumbai so as to reach Tunir despite being unfit for its climatic conditions and even before reaching Tunir, at Mumbai he had to be hospitalized. The learned Counsel for the Petitioners has failed to make out any cogent ground for sustaining the order of the disciplinary authority which is based on no evidence

and is rather based on the assumptions of the disciplinary authority and extraneous considerations.

20. The Tribunal has also held the order of the appellate authority to be illegal as the order is not in consonance with law. The Appellate authority had failed to consider that the period of absence of the Respondent could not be treated as EOL, causing a break in service. The Tribunal has relied on *Narinder Mohan Arya v. United Insurance Co. Ltd. and Ors.*, 2006 (3) SLR SC 1992, holding that the non-application of mind on this pertinent aspect, has rendered the appellate order to be illegal, and thus it ought to be set aside. Learned Counsel for the Petitioners has not been able to make out any ground which will show any illegality or unsustainability with the reasoning and finding of the Tribunal in the facts and circumstances.

21. In the totality of the facts and circumstances, there are no such illegalities or perversities in the order of the Tribunal setting aside the orders passed against the Respondent by the Disciplinary authority and the Appellate authority and directing the Petitioners to accord all benefits to the Respondent for the period from 23rd June, 1999 to 27th May, 2003 including retiral benefit. In the facts and circumstances, therefore, there are no grounds to interfere with the order of the Tribunal and the writ petition is therefore, dismissed. However, the parties are left to bear their own costs.