

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH

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Original Application No.290/00512/2016

Pronounced on : 07.02.2020
(Reserved on : 23.01.2020)

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CORAM: **HON'BLE SMT. HINA P. SHAH, MEMBER (J)**
HON'BLE SMT. ARCHANA NIGAM, MEMBER (A)

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Ashok Kumar Garg S/o Shri Shyam Sunder, aged 52 years, R/o 7-G-27, Jawahar Nagar, Sri Ganganagar. At present working SDOT, BSNL, Sriganganagar.

...APPLICANT

BY ADVOCATE: Ms Aditi Vaishnav proxy for Mr. Lokesh Mathur.

VERSUS

1. Union of India, through Secretary, Department of Telecommunications, Ministry of Communication and IT Govt. of India, Sanchar Bhawan, 20 Ashoka Road, New Delhi-110001.
2. The Director (Staff) Department of Telecommunication, Ministry of Communications and IT Govt. of India Sanchar Bhawan, 20 Ashoka Road, New Delhi.
3. General Manager Telecom District, Sri Ganganagar, Bharat Sanchar Nigam Limited, Sri Ganganagar.
4. Accounts Officer (Cash) General Manager Telecom District, Sri Ganganagar, Bharat Sanchar Nigam Limited, Sri Ganganagar.

RESPONDENTS

BY ADVOCATE: Mr. B.L. Tiwari for R/1 & R/2
 Mr. Kamal Dave for R/3 & R/4

ORDER

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Hon'ble Smt. Archana Nigam, Member (A):-

1. The present Original Application (O.A.) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985, wherein the applicant is seeking the following reliefs:

- "(a) The impugned order dated 30.07.2016 (Annexure-A/1) may be quashed and set aside and the respondents may be directed to fix the pay of applicant by giving the benefits of notional increments earned during his period of absence and place him in appropriate pay scale accordingly.
- (ii) The respondents may be directed to assign proper seniority to applicant treating his services to be continuous and place him above his immediate junior.
- (iii) Any other direction or orders may be passed in favour of the applicant which may be deemed just and proper under the facts and circumstances of this case in the interest of justice.
- (iv) That the cost of this application may be awarded."

2. The factual matrix of the present case as narrated by the applicant are that the applicant was initially appointed as Telecom Operator on 15.03.1984 with Department of Telecommunication. On account of ill-health, he remained absent from the duties in the year 1993 and after resuming fitness, he requested the respondents to permit him to join the duties but nothing was done. On 20.08.2003, the applicant was served with a charge sheet under Rule 14 of Central Civil Services (CCA) Rules, 1965 whereby he was charged for gross misconduct having contravened rule 3 (1) (i), (ii) and (iii) of Central Civil Services (Conduct) Rules, 1964 having not maintained absolute integrity and devotion to duty by remaining absent from duty without any information. He was punished with a penalty of reduction of pay by one stage in the time scale of his pay for a period of four years with directions that he will not earn increment of pay during this period and

the reduction will have the effect of postponing his future increment of pay vide order dated 17.07.2009 (Annexure-A/2). In the said order, it was also directed that the period of unauthorized absence shall be treated as "dies non". Though the applicant approached the department to allow him to join the duties in the year 2003, but long time was taken by respondents to permit the applicant to join his duties. Subsequently, the applicant joined the duties as TOA (P) at Kesrisinghpur on 27.08.2009. The office of General Manager Telecom District (GMTD) Sri Ganganagar vide order dated 26.08.2014 has fixed the pay of the applicant in revised CDA pay scale 5200-20200+GP 2000. In the same order, it was also noted that the penalty order dated 17.07.2009 imposed on applicant could not be implemented due to technical reasons. Being aggrieved of his pay fixation in above pay scale, the applicant submitted representations dated 10.09.2014, 03.08.2015 and 03.09.2015 to the respondent authorities wherein it was pointed out by the applicant that he is entitled to pay fixation by applying notional increments earned from the year 1993.

3. The literal meaning of 'dies non' in the legal glossary published by Ministry of Law and Justice, Government of India is "a day on which the courts do not ordinarily sit or carry on business; and day on which general business may not lawfully be transacted." Thus, from the above, it is apparent that Dies Non does not mean any break in service and it only implies that the period so involved does not entail performance of any official duty. Meaning thereby, there remains a continuity of service and only actual benefits of that period are not payable and in such circumstances the pay of the applicant ought to have correctly been fixed after applying notional increments to his last

pay fixed. In the instant case, the competent authority has not passed any order under FR 17-A and simply directed the period of absence to be treated as 'dies non'. Therefore, the applicant is entitled to all notional benefits during the said period of absence i.e. from 02.08.1992 to 15.09.2002 and his pay accordingly requires to be fixed after applying notional increment to his last pay drawn.

4 The influence of penalty order dated 17.07.2009 passed by respondent No.2 was over on 27.08.2013 and therefore the applicant was entitled for pay fixation by applying notional benefits earned by him during the period of his absence. But the respondents, after ignoring the representation submitted by the applicant, has passed the impugned order dated 30.07.2016 (Annexure-A/1) whereby the pay of the applicant was fixed as Rs.8610/- in pay scale of rs.5200-20200+GP 2000. The Annexure-A/1 order would show that pay fixation of applicant is made under revised pay rules consequent to recommendation of V and VI Central Pay Commission, notionally. Therefore, being aggrieved of incorrect pay fixation and impugned order dated 30.07.2016, the applicant has filed the present OA.

5. The respondents No.3 and 4 filed their reply on 02.02.2018 stating therein that the applicant was unauthorizedly absence since 01.04.1993 joined his duties on 27.08.2009 and the said period was treated as 'Dies Non' vide order dated 17th July, 2009 and the applicant preferred this Original Application on 18th November, 2016. Thus, the OA is highly belated as the cause of action as regard treating the period of Dies Non as well as the punishment inflicted way back in the year 2009. The said punishment has never been questioned by resorting to statutory remedy available under Rules of 1965 and the same has

already attained finality way back in the year 2009. The present OA is also not supported by any reason seeking condonation of delay in respect of which any decision as regarding condonation of delay can be taken.

6. The term 'Dies Non' as regard regularization of unauthorized person is clear as per Rule 25 of the Central Civil Services (Leave) Rules, 1972 which deals with subject of absence after expiry of the leave. As the order treating the period as 'dies non' was clear, if there was any grievance remedy available to the applicant, he needed to have raised it immediately. They have also referred the Office Memorandum issued by Ministry of Personnel, P.G. & Pensions (Department of Personnel & Training) dated 22 June 2010.

7. It is further submitted in the reply that the applicant has also raised a prayer for grant of seniority above his junior; but the same should have been raised immediately and not later than three years as held by the Hon'ble Supreme in the case of *Vijay Kumar Kaul & Ors v. Union of India & Ors.* (2012) 7 SCC 610 and *Shiba Shankar Mohapatra v. State of Orissa* (2010) 12 SCC 471. The applicant has also failed to mention the name of his immediate junior and also not make him party. Without impleadment of persons going to the adversely effected, the OA is not maintainable as held by the Hon'ble Supreme in the case of *State of Bihar v. Kameshwar Prashad Singh* (2000) 9 SCC 94.

8. It is further submitted in the reply that the pay fixation under the recommendation of 7th Pay Commission has been done for the employee vide Memo dated 21.09.2017. The fixation of the applicant reflects that the same was done in compliance of Leave Rules and the applicant was allowed whatever was permissible in view of the nature of

penalty inflicted by way of fixation. The term 'dies non' in respect of the period ordered to be treated as such results in non qualifying service for all purpose including earning increments, pension, leave etc. one has to earn increment after qualifying the period of 12 months and the same cannot be allowed to the employee who remains unauthorizedly absent. Therefore, the respondents No.3 & 4 prayed for dismissal of the present OA.

9. The respondents No. 1 & 2 have also filed their reply on 28.11.2018 stating that the OA is grossly barred by statutory period of limitation prescribed under Section 21 of the Administrative Tribunals Act, 1985. The order Annexure-A/1 dated 30.07.2015 is merely a consequential order giving effect to the original order of punishment dated 17.07.2009 (Annexure-A/2). The applicant never challenged the punishment order dated 17.07.2009 before the Higher Authority and thus he has accepted the same and now cannot impugned the effect and consequence of the same. Therefore, they also prayed that the present OA deserves to be dismissed.

10. Heard Ms. Aditi Vaishnav appearing as proxy for Mr. Lokesh Mathur, counsel for the applicant and Shri B.L. Tiwari, counsel for the respondents No.1 & 2 and Shri Kamal Dave, counsel for respondents No.3 & 4, and also perused the material available on record.

11. During the final hearing in the matter the Counsel for Applicant emphasized that the Applicant has admitted that he was absent from duty from 1993 to 2009 on account of ill health and that he was permitted to join duty only on 27th August 2009. She drew attention to the Penalty imposed upon the Applicant more specially on the imposition of Dies Non vide order dated 17.07.2009.

12. It was the case of the applicant that as per the Legal glossary published by the Ministry of Law Dies Non is defined as "A day on which courts do not ordinarily sit or carry on business or a day on which general business may not lawfully be transacted." Accordingly she submitted in hearing that "Dies Non" does not amount to a break in service and only period so involved does not entail performing duty. Upon query by the Bench as to the applicability of the definition as per Legal glossary, learned counsel reiterated that it was applicable and stated that the main ground in the OA is the counting of the period of Dies Non as qualifying service.

13. Per contra the learned counsel for Respondents 1 and 2 stated that the applicant has not assailed Annexure A/2 which is the order dated 17th July 2009 issued by Director Staff of Department of Telecommunication by which Penalty under Rule 3 1 (i) (ii) and (iiii) of CCS (CCA) Rules has been imposed. Learned counsel for respondents submitted that applicant has, in fact only assailed the consequent Calculation sheet issued vide Memo No.Q-447/74 dated 30th July 2015.

14. Unauthorized absence (or overstaying leave) is an act of indiscipline on the part of an employee. Whenever there is an unauthorized absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct would stand condoned. The second is to treat the unauthorized absence as misconduct, and hold an enquiry whereby punishments ranging from a major penalty like dismissal or removal from service to a minor penalty

like withholding of increments or dies-on may be imposed. The extent of penalty will depend upon the nature of service, the position by the employee, the period of absence and the cause / explanation for the absence.

15. Learned counsel for the Respondents made forceful plea that the present application is hit by the issue of delay & laches and highlighted that the Applicant has not filed any Application for condonation of delay; this has, in fact, been raised as a Preliminary Objection in the pleadings of the respondents. It has been stated in the Preliminary objection that a claim that arose in 2006 has been agitated in 2016 which is after a decade and without any reason much less cogent reasons for the same.

16. It was also stated that the applicant has sought relief against his juniors without impleading the said juniors; this is not tenable and for all these reasons the OA deserves to be dismissed. Learned Counsel for Respondents 1 and 2 adopted the submissions of Respondents 3 and 4, and reiterated the submissions made by those Respondents during the final hearing.

17. Admittedly the applicant has preferred the OA in 2016 challenging an inconsequential order. it is observed that the applicant has not assailed Annexure A2 which is the order dated 17th July 2009 issued by Director Staff of Department of Telecommunication by which Penalty under Rule 3 1 (i) (ii) and (iii) of CCS CCA rules has been imposed. Applicant has, in fact, only assailed the consequent Calculation sheet issued vide Memo No. Q- 447/74 dated 30th July 2015.

18. Without going further into the merits of the case and the applicability on the facts of the Penalty of 'Dies Non' it will be worthwhile to examine the matter in the light of the provisions for Limitation in the Administrative Tribunals Act, 1985. Section 21 in The Administrative Tribunals Act, 1985, reads as under:-

"21. Limitation.—

(1) A Tribunal shall not admit an application,—

- (a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;
- (b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section (2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."

19. Admittedly the Applicant has not preferred a MA for Condonation of Delay submitting any reasons whatsoever for the significant delay in preferring the OA. It is not dispute that applicant never felt aggrieved of ordered punishment and the decision to treat the period as "Dies Non", as such he cannot assail consequence of decision communicated way back in the year 2009 now in the year 2016. The Hon'ble Supreme Court in the case of *State of Jammu & Kashmir Vs. R.K. Zalpur & Ors*: AIR 2016 SCW 3006 held that belated challenge made under the writ jurisdiction of the order of dismissal does not deserve to be address on merit. It is held that the staleness of the claim remained stalled and could have been allowed to rise like a phonic by writ court. The relevant para 26, 27 & 28 of Hon'ble Supreme Court are reproduced as under:-

"26. In the case at hand, the employee was dismissed from service in the year 1999, but he chose not to avail any departmental remedy. He woke up from his slumber to knock at the doors of the High Court after a lapse of five years. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix by the writ court.

27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias" – 'thanks to God'.

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserved to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

20. Similar view in respect of the delayed approach for claimed relief is reflective in the case of *State of Tripura & Ors. Vs. Arbind Chakraborty & Ors.*; (2014) 6 SCC 460 as well as in the case of the *Chennai Metropolitan Water Supply & Sewerage Board & Ors. Vs. T.T. Murali Baba*; (2014 4 SCC page 108). The relevant para 16 is reproduced as under:-

"Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant – a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not

deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold.”

21. In view of the discussions made hereinabove as well as the judgment passed by the Hon’ble Supreme Court and Hon’ble High Court (supra), it is clear that the instant OA deserves to be dismissed. Accordingly, it is dismissed. No order as to costs.

(ARCHANA NIGAM)
MEMBER (A)

(HINA P. SHAH)
MEMBER (J)

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