

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD.

Dated : This the 7th day of Oct 2003.

Original Application no. 683 of 1998.

Hon'ble Maj Gen K K Srivastava, Member (A)
Hon'ble Mr A K Bhatnagar, Member (J)

J. Pinto, S/o Mr F Pinto,
R/o 86, Isai Tola, near St Anthony's Church,
JHANSI. (UP)

... Applicant

By Adv : Sri M.P. Gupta

Versus

1. The Union of India through the General Manager, Central Railway, CST Mumbai.
2. The Divisional Railway Manager, Central Railway, Divisional Office, Jhansi (UP).

.... Respondents

By Adv : Sri D.C. Saxena

O R D E R

By Maj Gen K K Srivastava, Member-A.

In this OA, filed under Section 19 of the A.T. Act, 1985, the applicant has prayed for quashing the punishment order dated 8.12.1997 awarding the punishment of removal (Ann 1) and Appellate Order dated 30.3.1998 (Ann 10), rejecting appeal of the applicant with prayer for direction to the respondents to re-instate the applicant on his post of Mail Driver with all consequential benefits like arrears of pay and allowances etc and also seniority.

2. The facts, in short, are that the applicant was working as Mail Driver in the respondents' establishment till 8.12.1997. The applicant was served with charge sheet

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(Ann 2) dated 18.7.1997 with allegation that on 13.7.1997 while working as Driver of 2480 UP Goa Express, the applicant failed to apply timely brakes on account of which he passed danger signal at Mathura Railway Station and has thus shown utter negligence towards his duties.

After completion of disciplinary proceedings, the Disciplinary Authority passed the punishment order dated 8.12.1997, awarding punishment of removal. The applicant filed appeal, challenging the punishment order and the Appellate Authority vide order dated 30.3.1998 rejected the appeal. Hence, this OA, which has been contested by the respondents by filing counter affidavit.

3. Sri M.P. Gupta, learned counsel for the applicant at the outset submitted that both the impugned orders are illegal, null and void, arbitrary, malafide and also against the principles of natural justice. The applicant has been ~~not~~ punished for applying the timely brakes. It was proved that the applicant had earlier tested the brakes and failure of the brakes at Mathura Jn. Railway Station was something which was beyond the control of the applicant. Learned counsel for the applicant submitted that though finding of the Inquiry Officer (in short IO) are in-favour of the applicant yet without giving any ~~desending~~ note, the Disciplinary Authority passed the impugned punishment order. Even, opportunity of hearing has not been given to him. Learned counsel for the applicant has placed reliance on the judgment of Hon'ble Supreme Court in case of Yoginath D. Bagde Vs. State of Maharashtra & Ors, JT 1999 (6) SC 62. Learned counsel for the applicant also submitted that the quantum of punishment is too heavy and also that for such lapses drivers have not been removed. Thus the action of the

respondents is discriminatory. Learned counsel for the applicant finally submitted that the plea of the respondents, the principle of waiver, estoppel and acquiescence would apply because the applicant accepted and payment and also the pension granted, thereafter, is not sustainable because the respondents on their own sanctioned the amounts without the applicant even representing or applying for the same. This proves that respondents realised their mistakes and granted the financial benefits. He has placed reliance on the following judgments:

- a. AIR 1958 (Alld) 54, Abdul Shakur & Ors Vs. Kotwaleshwar Prasad & Others.
- b. 1968 Lab. I.C 1386, Namburnadi Tea Co., Ltd., Vs. Workmen of Namburnadi Tea Estate and others.
- c. 1970 Lab. I.C. 629, Somu Kumar Chaterjee and others, Vs. The District Signal Telecommunication Engineer & Ors.
- d. AIR 1977 Allahabad 386 (Lucknow Bench), Smt. Munni Devi & Ors. Vs. State of UP & Others.
- e. AIR 1974 Kerala 139, Eyyakku Vs. Unnalachan.
- f. AIR 1967 SC 420, Workmen of Subong Tea Estate represented by the Indian Tea Employees Union Vs. Outgoing Management of Subong Tea Estate and others.
- g. AIR 1974 SC 2089, P Dasa Muni Reddy Vs. P Appa Rao.

4. Resisting the claim of the applicant, Sri D.C. Saxena, learned counsel for the respondents submitted that the OA is not maintainable on two grounds. Firstly, that the applicant has not impleaded Senior DEE/TRD Central Railway, Jhansi, who is the Disciplinary Authority and who has passed the punishment order and secondly, the applicant has not exhausted the remedies available to him, as the applicant has not filed any review/revision before Chief Operating Manager, Central Railway Mumbai, under Rule 25 of Railway Servants(D & A) Rules 1968.



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Learned counsel for the respondents has placed reliance on the judgment of Hon'ble Supreme Court in case of Secretary, Minor Irrigation & Rural Engineering Services, UP & Others Vs. Sahngoo Ram Arya and others, 2002 SCC (L&S) 775. Learned counsel for the respondents submitted that in case of removal an employee is not entitled for any pension etc. However, there is provision of compassionate allowance. In the present case compassionate allowance has been sanctioned without any protest, and also accepted by the applicant/ after having filed OA. Therefore, opportunity of Wavier, estoppel and Acquiscience will apply. Learned counsel for the respondents has placed reliance on the judgment of Hon'ble Supreme Court in case of State of Punjab and others Vs. Krishan Niwas, 1997 SCC (L&S) 998 and also on the judgment of Hon'ble Gauhati High Court in case of Albert Francis Lobo vs. The Chief Engineer, Flood Control and Irrigation Department, 1977 LAB I.C. 1179.

5. Heard learned counsel for the parties, considered their submissions and perused the record.

6. We find substance in the submission of learned counsel for the respondents that the case is not maintainable for non-joinder of necessary party. The punishment order dated 8.12.1997 has been passed by Senior DEE/TRD Jhansi and the applicant has not made Senior DEE/TRD, Jhansi as one of the parties in the array of the respondents. Therefore, on this ground alone the OA is liable to be dismissed. We also find substance in the contention of the respondents that the applicant should have filed a review/revision petition before Chief Operating Manager, Central Railway, Mumbai as provided under Rule 25 of Railway Servant (D&A) Rules 1968.



7. Learned counsel for the applicant raised several points and also cited number of cases regarding the applicability of the principle of Wavier and estoppel. It has been argued by the applicant's counsel that a right can be abandoned only if it is a conscious abandonment. Therefore, the principle of waiver and estoppel would not apply as there has been no request whatsoever by the applicant to the respondents to pay him compassionate allowance. Learned counsel for the applicant has cited various judgments of the Superior Courts. It would be appropriate to discuss the law laid down in the cases cited by the learned counsel for the applicant. In case of Somu Kumar Chaterjee (supra) the Hon'ble Patna High Court has held that the Railway is an Industry within meaning of 'Act'. In para 20 of the said judgment the petitioner has raised the contention that the technical rules of estoppel is not applicable in industrial cases basing reliance on the decision of the Hon'ble Supreme Court in Workmen of Subong Tea Estate (supra) and the Hon'ble High Court after considering all the arguments of the parties allowed the petition. In case of Eyyakku (supra) the Hon'ble Kerala High Court has held that there was no evidence as to any conscious waiver of the right under the statute and therefore the theory of waiver was untenable. In case of Smt. Munni Devi (supra), the Lucknow Bench of Hon'ble Allahabad High Court has dealt with applicability of principle of waiver and estoppel. The case law in case of Namburnadi Tea Co. (supra) is easily distinguishable and, therefore, not applicable. The law laid down by Hon'ble Allahabad High Court in case of Abdul Shakur & Ors (supra) will not help the applicant on the plea that there has been no conscious abandonment. The Hon'ble Supreme Court in case of P Dasa Muni Reddy (supra) has held as under :-

".....The essential element of waiver is that there

must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question....."

The present case law in addition to law laid down in other cases cited by the learned counsel for the applicant will also not be helpful for the applicant in view of our later observations.

8. Learned counsel for the respondents placed before us Rule 65 of Railway Servant (Pension) Rules 1993 dealing with compassionate allowance. For convenience sake the same is reproduced below :-

"Compassionate allowance.- (1) A railway servant who is dismissed or removed from service shall forfeit his pension and gratuity :-

Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension."

The respondents have also placed reliance on the judgment of Hon'ble Supreme Court in case of State of Punjab & Ors (supra). In para 4 of the said judgment the Hon'ble Supreme Court has held as under :-

"The respondent having accepted the order of the appellate authority and joined the post, it was not open to him to challenge the order subsequently. By his conduct, he has accepted the correctness of the order and acted upon it. Under these circumstances, civil court should not have gone into the merits and decided the matter against the appellants."

The respondents have sanctioned compassionate allowance as provided under Rules and it has not been brought out by the

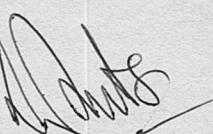
applicant at any stage that he accepted the same under protest.

The same has been accepted by the applicant unconditionally and voluntarily, therefore, the law laid down by Hon'ble Supreme Court in case of State of Punjab (supra) is directly applicable and the applicant after having accepted the payments and also the pension of Rs. 3243/-, as stated in para 7 of the Suppl. Written statement, by the respondents, the applicant has no case.

9. In the facts and circumstances and our aforesaid discussions, we do not find any good ground for interference. The OA is devoid of merit and is accordingly dismissed.

10. There shall be no order as to costs.


Member (J)


Member (A)

/pc/