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CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

THIS THE 9th DAY OF ~~AUGUST~~ October, 1996

Original Application No. 1006 of 1988

HON.MR.JUSTICE B.C.SAKSENA,V.C.

HON.MR. S. DAS GUPTA,MEMBER(A)

Central Public Works Department
Junior Engineer's Association(India)
Allahabad Branch, Allahabad through its
Branch Secretary Sri Badri Prasad

Applicants

BY ADVOCATE SHRI SUDHIR AGRAWAL

Versus

Union of India and Ors

Respondents

BY ADVOCATE SHRI N.B. SINGH

O R D E R(Reserved)

JUSTICE B.C. SAKSENA,V.C.

This OA has been filed by the Central P.W.D Junior Engineers Association Allahabad Branch through its Branch secretary. In Annexure 1 a list of 41 members of the said Association Allahabad Branch have been given.

2. The brief facts leading to the filing of the OA need to be noted first. The Association made several representations to the Govt. raising grievanc es of its members regarding channel of promotion, salary, pay scales, fixed T.A. etc. It is stated that several times assurances was extended to consider and remove the grievances but they remain unredressed. Consequently a notice dated 8.5.87 in compliance of Section 22 of the I.D. Act was served upon the respondent no.2 informing that the Association proposed to go for indefinite strike w.e.f. 14th july, 1987 for the reasons disclosed in the said notice. It is further stated that no heed was paid to the charter of demand of the Association and all the Members of the Association went on

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strike on 14.7.1987. The strike continued for some time and the respondent no. 1 and 2 are stated to have invited the representatives of the applicants Association and the agreement was signed on 20.8.87 and the strike was called off on the same date.

3. In this OA specific reference has been made to clause 8 and 11 of the agreement. Clause 8 indicated that there shall be no victimisation of Junior Engineers who had gone on strike while under clause 11 of the agreement it was also agreed that those Junior Engineers whose services were terminated for participation in the strike will be permitted to resume duties and the period of strike shall be condoned in relaxation of rule 27 and 28 of the CCS(Pension) Rules and Rule 17-A of the Fundamental Rules. So far as the pay and allowances for the period of strike it was agreed that the matter would be referred to the Department of Personnel to consider whether leave as admissible to the junior Engineers can be adjusted against the period of strike.

4. It has also been stated in the OA that none of the Members of the applicants Association were served with any order of termination during the period of strike and the said members resumed their work on 20.8.87. An Office Memorandum dated 16.10.87 was issued indicating that the junior Engineers shall not be entitled for any salary for the period from 14.7.87 to 19.8.87(both days inclusive). This decision is stated to have been taken by the Govt. of India. The applicants have challenged this order as also an order dated 17.12.87 contained in Annexure 7. With reference to the earlier office memorandum it indicates the decision taken in relaxation of Rule 27 and in terms of Rule 28 of the CCS(Pension) Rules 1972 as also Rule 17-A of the Fundamental Rules that the period of absence due to strike shall be condoned to the extent that the period involved will not entail the forfeiture of the past services,

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for the purposes referred in these rules but the period of strike itself shall be treated as dies non and will not count as qualifying service.

5. One of the other plea taken in the OA is that in the case of the teachers the period of strke was regularised but as far as the members of the Junior Engineers Association were concerned, the aforesaid two orders were passed , a plea of discrimination has therefore been raised.

6. The respondents have filed a counter affidavit in which it has been pleaded that the applicants went on illegal strike and after negotiation it was agreed that they would resume their work and there would be no victimisation but the matter of strike period will be decided by the Ministry of Personnel. It is pleaded that the Ministry of Personnel decided the matter and on the basis of the said decision the two orders impugned in the OA were passed. It has further been pleaded in the counter affidavit that the work of the respondents had suffered a lot on account of strike and the Department had given the work to the Contractor on higher rate thus incurring huge loss. The Public at large had also suffered inconvenience at the cost of illegal strike of the petitioner - Association. It has been indicated that the members of the applicants Association not only created indiscipline in the department but in other departments also.

7. As far as the plea of discrimination is concerned, the respondents have indicated that the striking teachers had worked over time to make up the loss of teaching work during the strike period and they were not paid any extra payment for the said over time. It is further indicated that the teachers worked on holidays(Sunday) and over time daily also. The impugned orders have been justified on the ground that if for the strike period the principle of no work no pay is not applied it would create chaos in the Govt.

Department and which may lead to any limit of indiscipline. The strike had lasted for 37 days. It has further been pleaded in the counter affidavit that the Department of Personnel and Training took the decision on the basis of instructions issued by the said department in its O.M. dated 25.4.78 addressed to all Ministries. The said O.M. indicated that the cabinet of the Union Govt. had taken the decision that all Ministries must observe the principle of 'no work no pay' and this should not be circumvented in any way including grant of leave for the period of strike. It has further been pleaded that the C.P.W.D in consultation with the Ministry of Urban Development approached the Ministry of Health and Family Welfare and they had been informed that they accepted the policy of the Govt of 'no work no pay'. The Ministry had not agreed to the regularisation of the strike period. It has further been stated that the Ministry of Human Resources Development, Department of Education has stated that they had not issued any instruction for the payment of salary for the period of strike consequent on the withdrawl of the strike by the University teachers on 4.9.87. It has further been indicated that the Teachers Association in some Universities decided to make up the loss in teaching by working on holidays and vacation. The University of Delhi also rescheduled its academic time table to make up the loss of teaching due to strike by holding classes on saturdays and holiday and .by curtailing winter vacations.

8. The applicants Association have filed a rejoinder affidavit in which the averments in the OA have been reiterated and it has been stated that the applicants members worked day and night without claiming the over time etc.and thus the Government did not suffer any financial or otherwise loss and all the works were completed within time. The specific averment in the counter that during the strike period the works in progress have to be entrusted to the

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contractors has not been specifically answered or denied. It has been further pleaded that since the demands were considered the strike was legal and justified. A plea of violation of principle of natural justice have also been raised.

9. We have heard the learned counsels for the parties.

10. The learned counsel for the applicant has made the following submissions on the basis of the grounds raised in the OA.

(i) That an order for 'dies non' can be passed only in accordance with the principles of natural justice after affording an opportunity to show cause and since there has been violation of principles of natural justice the impugned order calls for interference.

(ii) That in the CCS(CCA) Rules and the Fundamental Rules and other Statutory provisions governing the conditions of service of the applicants there is no rule which provides for deduction of wages applying the principle of 'no work no pay'. As a corollary it is also submitted that the strike resorted to by the applicant was just and valid and the principle of 'no work no pay' will not be applicable.

(iii) The impugned orders were discriminatory inasmuch as the employees of other departments have regularised and salary have been paid but the members of the Applicants Association have been denied salary for the period of strike.

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11. In support of his first submission the learned counsel for the applicant cited the following decisions:

(i) A.I.R. 1985 Supreme Court 514
Shiv Shanker and Another Vs. Union of India and Ors.

(ii) (1990) 14 A.T.C 223 K.V. Sivakumaran Vs. Member, Audit Board, Madras and Others.

(iii) (1989) 9 A.T.C 106 Yash Pal Kohli Vs. Union of India and Others

(IV) 1987 (3) SLR 617 Vardarajan Ananthan alias V. Ananthan Vs. Union of India and Ors.

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12. We may now proceed to analyse the decisions cited by the learned counsel for the applicant. In the case of Shiv Shanker and another Vs. Union of India and Others(Supra) the controversy related to the order passed by the DRM notifying break in service of the appellant for participating in an illegal strike. The Hon'ble Apex court relying on an earlier decision in Dayal Saran Vs. Union of India and Ors AIR 1980 S.C held that the principle of natural justice must be observed when an order of forfeiture of service on the ground of participation in a strike is made.

13. The order impugned in the case before us doesnot entail the forfeiture of the service of the applicant. On the other hand, the order dated 17.12.87 actually protects the past service of the applicant from being forfeited. The ratio of the decision in Shiv Shanker is therefore not applicable to the facts of the present case.

14. In K.V. Sivakumaran, the applicant's absence on 13.8.1984 afternoon and 14.8.1984 forenoon was treated as unauthorised entailing loss of pay resulting in break in service. The Madras Bench of the Tribunal held that an order directing the period of absence to be treated as resulting in break of service could not be passed without giving a reasonable opportunity. Sivakumaran's case is clearly diastinguishable by reason of different set of facts and consequences of the impugned order. In the first place, the impugned order does not entail break in service. Secondly,this is not a case of mere absence but a case of participation in strike.

15. The Supreme Court decision in Shiv Shanker(Supra) was also the basis of the decision by the Principal Bench in Yash Pal Kohli's case(see para 17 of the ~~case law~~ decision.)

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It was also ~~indicated~~ referred to by the Calcutta Bench of the Tribunal in Varada Rajan Ananthan, ~~and also in a~~ besides the decision in Dayal Saran's case(Supra).

16. In Yash Pal kohli's case the order under challenge before the Principal Bench of the Tribunal was an order by which the unauthorised absence of the applicant was directed to constitute a break in service under the Fundamental Rule 17-A. The absence in this case was contended to be on the ground of illness. Thus, it would be evident that the facts of the case before us are totally different from the facts in Yash pal kohli's case. More over, in the case before the P.B, the petitioner was to suffer break in service, whereas the order impugned before us does not ~~force~~ impose any such infirmity.

17. In Varada Rajan Ananthan's case again the impugned order involved break in service of the applicant. The Calcutta Bench of the Tribunal held the order as violative of the principles of natural justice as the applicant was not given any opportunity before the order was passed. This case again is clearly not an all fours with the case before us.

18. The learned counsel for the applicants also cited a decision of the Hon. Supreme court in Bhagwan Shukla Vs. union of India and Others reported in 1994(5) J.T. 253 in support of the submission that before passing an adverse order opportunity is a must if the order visits the persons concerned with civil consequences. In that case the basic pay of the petitioner was sought to be reduced with retrospective effect without granting them an opportunity to show cause. This was held to be fragrant violation of the principles of natural justice. There can be no dispute with regard to the proposition of law laid down in the said case but its applicability with the facts of the present case is doubtful. As would be

evident from subsequent discussion the order impugned in the present OA as a matter of fact entails no adverse consequences.

19. We may now take up for consideration the second submission made by the learned counsel for the applicant. To enable us to analyse the said submission in a proper perspective we may advert to the relevant provision contained in the Fundamental Rules and the Central Civil Services(Pension) Rules 1972(Pension Rules for short) dealing with unauthorised absence, break in service and consequences thereof.

20. Rule 17-A FR reads as follows:

> FR 17-A- without prejudice to the provisions of Rule 27 of the Central Civil Services (Pension) Rules, 1972, a period of an unauthorised absence:-
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> (i) in the case of employees working in Industrial Establishments, during a strike which has been declared illegal under the provisions of the Industrial Disputes Act, 1947, or any other law for the time being in force;
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> (ii) in the case of other employees as a result of action in combination or in concerted manner, such as during a strike, without any authority from, or valid reasons to the satisfaction of, the Competent Authority; and
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> (iii) in the case of an individual employee, remaining absent unauthorisedly or deserting the post shall be deemed to cause an interruption of break in service of the employee, unless otherwise decided by the Competent Authority for the purpose

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of leave travel concession, quasi-permanency and eligibility for appearing in Departmental examination, for which a minimum period of continuous service is required.

EXPLANATION1- For purposes of this rule "strike" includes a general, token, sympathetic or any similar strike, and also participation in a Bundh or in similar activities.

EXPLANATION 2- In this rule, the term "Competent Authority", means the"Appointing Authority".

21. It would be clear from the text of the Rule 17-A that in respect of those Central Government employees who are governed by the FR, whether or not such employees are working in an Industrial Establishment, participation in a strike shall be deemed to cause an interruption or break in service of such employees, unless otherwise decided by the Competent Authority. Such break in service shall visit the employees with certain specific disabilities with regard to leave travel concession, quasi-permanency and eligibility for appearing in a Departmental examination for which a minimum period of continuous service is required. The only point to be noted in this Rule is that in the case of employees working in the Industrial Establishments, such break in service will be deemed to have been caused only if the strike has been declared as illegal under the provisions of Industrial Disputes Act, 1947. In other cases, such disability will be incured by the employees if action was taken by them to resort to strike without any authority or valid reasons to the satisfaction of the Competent Authority.

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22. Rule 27 of Pension Rules deals with the effect of interruption of service of the Central Government servants. Therse rules read as follows:

27. Effect of Interruption in service.

(i) An interruption in the service of a Government servant entails forfeiture of his past service, except in the following cases:-

(a) unauthorised leave of absence;

(b) unauthorised absence in continuation of authorised leave of absence so long as the post of absentee is not filled substantively;

(c) Suspension, where it is immediately followed by reinstatement, whether in the same or a different post, or where the Government servant dies or is permitted to retire or is retired on attaining the age of compulsory retirement while under suspension.

(d) transfer to non-qualifying service in an Establishment under the control of the Government if such transfer has been ordered by a Competent Authority in the Public interest;

(e) joining time while on transfer from one post to another.

(2) Notwithstanding anything contained in Sub-rule(1), the Appointing Authority may, by order, commute retrospectively the periods of absence without leave as extraordinary leave"

23. It would be clear from the text of the rule quoted above that the interruption in service of a Central Government servant would entail forfeiture of his past service. The rule, however, provide certain exceptional circumstances in which the interruption in service will not be visited by forfeiture of past service but these exceptions do not cover the interruption in service caused by participation in strike.

25. Rule 28 of the Pension Rules deal with condonation of interruption in service. This Rule reads as follows:-

"28. Condonation of Interruption in Service.

(a) In the absence of a specific indication to the contrary in the service book, in interruption between two spells of civil service rendered by a Government servant under Government including civil service rendered and paid out of Defence Services Estimates or Railway Estimates shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.

(b) Nothing in clause(a) shall apply to interruption caused by resignation, dismissal or removal from service or for participation in a strike.

(c) The period of interruption referred to in clause (a) shall not count as qualifying service."

24. It would be clear from Sub-rule (b) of the Rules quoted above that interruption in service caused interalia by participation in a strike shall not be automatically condoned and pre-interruption service shall not automatically be treated as qualifying service. in other words, if an interruption in service is caused due to participation in strike, the employee concerned would

forfeit the benefit of his entire past service, for being counted as qualifying period for pensionary benefits. However, it would also imply that though there would not be any automatic condonation, the Competent Authority may issue an order expressly condoning such interruption in service.

25. Having set out the relevant statutory provisions we may consider the facts of the case before us in the light of the rules quoted hereinabove. There is no denial that the applicants have participated in the strike which lasted for 37 days. thus there was an interruption in their service resulting in their incurring disabilities specified in both Fr 17-A and Rule 27 of the Pension rules. What the impugned order dated 17.12.87 sought to achieve was to relieve the applicants of the burden of the diabilities they had incurred as a result of the interruption in service by relaxing the provisions of rule 27 of Pension Rules and Rule 17-A of FR. If this is kept in mind then we have no manner of doubt that the conclusion reached by us that the impugned order has no adverse effect on the applicants, but in fact is an order by which they have been benefited is clearly supported. There is, however, a stipulation in the impugned order that the period of strike itself shall not count as qualifying service. In our opinion there is nothing in the rules to indicate that even the Competent Authority has any power to relax this provision.

26. The learned counsel for the applicant in support of his submission that there is no provision in the statutory Rules governing the service conditions of the applicants which provide for 'no work no pay'. ~~In support of this submission the learned counsel for the~~

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~~applicant~~ cited a decision of the Calcutta High Court in the case of Krishnatosh Dass Gupta Vs. Union of India and Others reported in 1979(3) SLR 681.

27. In the said case the applicants therein had demonstrated to express their dissatisfaction in a lawful manner with an order of suspension of three of their colleagues and subsequent disciplinary proceedings against them. Subsequently, a settlement was reached between the employees and workers union and Association on one hand and the management on the other and the order of suspension was withdrawn. However, thereafter a circular letter was issued by the Joint Director threatening that there would be deduction from the pay and allowances of the staff who had attended the office but did not do any work during the demonstration. Subsequently, despite the protest of the employees, the Joint Director issued another circular notifying that those employees, who did not attend to their normal duties but merely came to the office and signed in the attendance register, would considered as 'not on duty'.

28. The Management thereafter relying on the O.M dated 25.4.78 issued by the department of Personnel & Administrative Reforms, the Management effected pay cut from the pay and allowances of the employees. The Calcutta High court held that the deduction in pay has been made by the Authority not under the Fundamental Rules but pursuant to the notification issued by them which does not refer any Fundamental Rules, but only refers to a Cabinet decision. It was further held that the Fundamental Rules which govern the service conditions of the permenant employees of the Central Government do not contain any such provision.

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29. We have carefully considered the said decision of the High Court but in view of the differing sets of facts the applicants before us cannot draw any support.

30. FR 17 reads as follows:

"FR 17.(1) Subject to any exceptions specifically made in these rules and to the provision of sub-rule(2) an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties.

provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence.

(2) The date from which a person recruited overseas shall commence to draw pay on first appointment shall be determined by the gerneral or special orders of the authority by whom he is appointed."

31. It is clear from the proviso under Sub-rule 1 of Rule 17 that an employee who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence. There is no denial that the applicants before us were absent from duty for 37 days. The aforesaid proviso to Rule FR 17 is, therefore, clearly applicable to them and they can statutorily be denied pay and allowances for this period. This case is quite different from the case of Krishnatosh Dass Gupta inasmuch as in the latter case the employees had attended the office but had allegedly did not attend

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to work. Such a situation is not envisaged in FR 17, and, therefore, it would be quite correct to say that there is no statutory provision for deduction of salary in such situations.

32. Since FR 17, clearly provides for denying pay and allowances to the employees who participated in strike and thus remained absent from duty, the applicants before us do not have any statutory right to demand pay and allowances during the period they were on strike. In the memorandum of settlement it was interalia agreed that the question of payment of pay and allowances for the period of strike would be referred to the department of Personnel to cosider whether leave as admissible to the applicants could be adjusted against the period of strike. The department of Personnel decided against any such adjustment and, therefore, the impugned oprder dated 16.10.1987 was issued notifying that the period of strike shall be treated as period of 'no work no pay'. In our opinion, since the applicants, as already indicated by us, had no right vested in them to demand that they be paid salary during the period of strike or that the period of strike be regularised by grant of leave as due, there was no necessity to give the applicants an opportunity before the said order was issued. The order clearly did not involve any fresh civil consequence. Such consequence was already inherent in the circumstances of the case, and therefore, the question of issuing any notice in conformity with the principles of natural justice, does not arise.

33. We may examine this issue from another angle also. The applicants have claimed that they are workmen under

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the Industrial Disputes Act, and, therefore, they have a right to resort to strike as a valid weapon of collective bargaining. The respondents on the other hand have stated that the applicants are not workmen under the Industrial Disputes Act. Even assuming that the applicants were workmen under the said Act, the question would be whether they have a right to resort to strike and if so, they had a right to receive pay and allowancess for the strike period.

34. The various decisions of the Hon'ble Supreme Court and other Courts have recognised that strike is a valid weapon of collective bargaining in the hands of workmen under the Industrial Disputes Act. However, the question whether they are entitled to receive salary for the strike p½eriod came under close judicial scrutiny of the Hon'ble Supreme Court in a bunch of cases of which the leading case was Syndicate Bank and another Vs. K. umesh Nayak(1994) 28 ATC 146.

35. In the aforesaid case the Hon'ble Supreme Court has ruled absolutely clearly that wages during the strike period shall be payable only if the strike is both legal and justified but not payable if the strike is legal but not justified or justified but illegal. It was further held that the High court, whose decision was appealed against in the aforesaid case had erred in recording its finding on both the counts viz the legality and justifiability, by assuming the jurisdiction, which was properly vested in the Industrial adjudicator.

36. It would be relevant to note that the Government of India had prohibited strike in certain essential services including the services rendered by the department in which the applicants were employed in exercise of the power conferred by the ESMA for a period of three months

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on and from the date of publication of the order. The order, itself is dated 17.7.1987. The applicants went on strike on 14.7.1987. the applicants have averred that the strike resorted to by them was legal since they had given notice as required in the relevant provisions of the Industrial Disputes Act. However, even if the strike was legal to start with, as contended by the applicants, there is no doubt that it became illegal immediately after the issue of the notification under ESMA. As to whether the strike was justified or not, there is insufficient material in the pleadings for us to come to any conclusion. Moreover, as the Hon'ble Supreme court has already cautioned, the determination on the legality and justifiability of strike comes within the domain of Industrial adjudicator and not of this Tribunal. If the case of the applicants is that they should be granted salary during the period of strike on the ground that the strike was both legal and justified they should have approached the appropriate forum under the Industrial Disputes Act, for redressal of their grievances.

37. Before parting with this case, we may point out another relevant factor relating to this application. This application has been filed by the Central Public Works Department Junior Engineer's Association(India), Allahabad Branch through its Branch Secretary Sri Badri Prasad. The respondents have taken a plea in their counter affidavit that the petition is not maintainable as it has been filed through an Association. In this regard we have seen the relevant provision contained in Rule 4(5)(b) of the Central Administrative Tribunal(Procedure) Rules, 1987. This Rule reads as follows:

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"5(b) Such permission may also be granted to an Association representing the persons desirous of joining in a Single application provided, however, that the application shall disclose the class/grade categories of persons on whose behalf it has been filed(provided that atleast one affected person joins such an application)."

38. It is clear from the rule quoted above that an association may be permitted to file an application provided atleast one affected person joins such an application. In the present case, the sole applicant is the association through its Branch Secretary. An application has been filed under Rule 4(5)(b) seeking permission for the association to file the application but there is nothing in this application to indicate that its Branch Secretary through whom the application has been filed is also one of the affected persons. Also, even if he is an affected person, he has not been separately arrayed as an applicant, strictly speaking the application is, therefore, not maintainable. however, as the application was admitted after allowing the application under Rule 4(5) (b), we have ignored this aspect and proceeded to consider the application on merit as hereinabove.

39. In view of the discussion hereinabove, all the grounds raised by the learned counsel for the applicant are held to be untenable in the facts of the present case. The OA lacks merit and is accordingly dismissed. The interim order if any, is vacated.

MEMBER(A)

VICE CHAIRMAN

Dated: October..9th..1996

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