OPEN COURT

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD.

Dated : This the 10th day of MAY 2004.

Original Application no. 1284 of 2003.

Hon'b le Maj Gen K K Srivastava, Member-A.

Surendra Bahadur Srivastava, S/o late P.N. Srivastava,
R/o LIG 85 Neem Sarai Colony,
ALLAHABAD.

... Applicant

By Adv : Sri V. Budhwar, Sri A Tripathi &
Sri S.K. Mishra

V E R S U S

1. Union of India through General Manager,
N.C. Rly.,
ALLAHABAD.

2. Chairman, Railway Board, Rail Bhawan,
NEW DELHI.

3. General Manager, N.C. Rly.,
ALLAHABAD.

... Respondents

By Adv : Sri A.C. Mishra

O R D E R

Maj Gen K K Srivastava, AM.

In this OA, filed under Section 19 of the A.T. Act, 1985, the applicant has prayed for quashing the impugned order dated 5.8/9/2003 passed by respondent no. 3 i.e. General Manager, N.C. Railway, Allahabad with consequential benefits.

2. The facts, in short, are that the applicant was initially appointed in the respondent's establishment on the post of Catering Khalasi on 01.06.1962. In due

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course of time he was promoted on the post of Ticket Collector (in short TC) and was posted at Kanpur. During 1981 (12.3.1981) the Railway employees through out India proceeded on strike and as per applicant, he tried his level best to join his duties during the strike period i.e. from 12.3.1981 to 14.3.1981, but he was resisted by the persons on strike. The grievance of the applicant is that the respondents have treated the period from 12.03.1981 to 14.03.1981 as break in service. The respondents was not informed about it in writing, orally or by any other mode. Therefore, the applicant was under the impression that there was no adverse order against him. The applicant at the time of superannuation on 30.6.2002 came to know that period from 12.3.1981 to 14.3.1981 has been treated as break in service resulting into forfeiture of his unblemished service from 01.06.1961 to 11.03.1981. The applicant preferred representation on 23.07.2002 before respondent no. 2. Earlier to that he had filed representations on 11.3.2002 and 5.4.2002. Besides when nothing was heard he filed another representation on 1.9.2003, which has been rejected by the respondent no. 2 by impugned order dated 5.8/9/2003. Aggrieved by the same the applicant has filed this OA which has been contested by the respondents by filing counter affidavit.

3. Sri Vikas Budhwar, learned counsel for the applicant submitted that the applicant obtained the copy of the letter dated 4.6.1984 whereby 202 persons were granted condonation in respect of strike period from 12.3.1981 to 14.3.1981.

4. Inviting my attention to annexure 6 i.e. the

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letter dated 29.05.2003 issued by D.R.M. North Central Railway, Allahabad addressed to General Manager (P), Northern Railway, New Delhi, the learned counsel for the applicant submitted that perusal of the same would reveal that the strike period i.e. from 12.3.1981 to 14.3.1981 was condoned in respect of 202 employees. It is also mentioned in the same letter that the applicant for the first time, for condonation, applied on 08.01.2003 and the application of the applicant has been sent to General Manager (P), N. Rly., N. Delhi. In the last para of the same letter it is also mentioned that two persons i.e. Sri S.B. Mishra and Sri Mohan Singh also did not apply within time, but their break in service has been condoned. Therefore, the matter was sent for re-consideration in respect of those who had not applied within time but applied very late.

5. Learned counsel for the applicant submitted that it would be too harsh on the part of the respondents to deny him the service benefits of about 19 years by not condoning the break in service. The applicant has retired and in these hard days such a punishment is bound to affect the applicant financially. Learned counsel further submitted that once the break in service has been condoned in respect of persons who did not apply in time there is no justified reason for the respondents to deny the same to the applicant. Besides the respondents ought to have given notice to the applicant regarding break in service. Not giving the notice either orally or in writing is denial of principles of natural justice as the provisions of Article 311 of Consititution of India have to be complied with. Learned counsel for the applicant has placed reliance on the judgment of Hon'ble Supreme Court

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in case of Shiv Shanker and others Vs. Union of India and others AIR 1985 SC 514 and has also placed reliance on the judgment of Hon'ble Mumbai High Court (at Nagpur) Vishwanath Sadashiv Deshpande Vs. Comptroller Auditor General of India, 1976 LAB IC 934. Learned counsel for the applicant has further submitted that this Tribunal while allowing the OA no. 69 of 2003, Kripa Shanker Srivastava Vs. Union of India & Ors alongwith OA 70 of 2003, Ramendra Kumar Malviya Vs. Union of India & Ors, by order dated 30.4.2003 gave the relief to the applicants in respect of break in service and the order of this Tribunal has attained finality by order of Hon'ble High Court dated 07.07.2003.

6. Resisting the claim of the applicant, Sri A C Mishra learned counsel for the respondents submitted that the contention of the learned counsel for the applicant cannot be accepted as it has been presented. The fact is that 258 persons requested for condonation of break in service in 1982 and 1983 itself. Even in case of others who had not applied in time as indicated in the letter dated 29.05.2003 (Ann A6). Learned counsel submitted that they applied for condonation of break in service within reasonable time, whereas the applicant has applied only after superannuation i.e. after about 20 years. The cause of action arose to him in the year 1981 and he cannot agitate the matter now. Respondent's counsel further submitted that as stated in para 23 of the counter affidavit the notice was circulated to all concerned.

7. I have heard learned counsel for the parties, considered their submissions and perused records aswell as pleadings.

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8. It is admitted fact that there is a break in service in respect of the applicant from 12.3.1981 to 14.3.1981 resulting into forfeiture of service from 01.06.1962 to 14.03.1981. The respondents counsel has come out with two arguments which are firstly that all the employees in whose cases the break in service was condoned, had applied within reasonable time and secondly, the notice was circulated to all concerned and, therefore, the applicant should have woken up within time for redressal of his grievance, if any. I have seen the notice dated 22.06.1981 (Ann CA1). It is true that the notice was issued on 22.06.1981 but the respondents have not been able to establish that the same was circulated to the applicant and his acquittance was obtained. It might be that notice dated 22.06.1981 escaped applicant's notice. I would like to observe here that since a notice of this type entailed serious consequences as regards the applicant, it was expected of the respondents, as an ideal employer, to have issued separate notices to those employees in whose cases break in service were not condoned. This Tribunal while allowing OA no. 69/03 alongwith OA 70/03 (supra) vide order dated 30.4.2003 has observed as under :-

> ".....Division Bench of Bombay High Court in case of 'Vishwanath Sadashiv Deshpande (supra) considered similar action taken by Comtroller and Auditor General of India against the employees for participating in strike by central government emplboyees on May 10, 1974. After considering the provisions contained in F.R.17, Rule 27 of the Pension Rules 1972 in the light of Art. 311 of the Constitution of India High Court held as under;
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> > "The nature of civil service being such that it is a tenure and a status, our constitution thought it fit to put it under the protective umbrella, as is available in Article 311 of the Constitution enabling States to make Rules under Articles 309 and 310 for specified purposes. No

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rule however would be valid if it runs counter to what is provided for by Article 311. If we were to assume that there is any implication that the service rendered by a civil servant in a civil post would stand automatically determined, in that he will cease to be the civil servant by a contingency of wilful absence, it is clear that we may be inferring quite contrary to the constitutional contemplation with regard to the protections afforded to the civil servants, for we would, by accepting imposition of 'break in service' as canvassed for involving forfeiture of past service, be sanctioning a process of determination of service for cause and as such a dismissal from the tenure already undergone and served. Such a drastic consequence surely cannot be merely implied. If break introduces determination of past service for cause of a given civil servant and re-employment afresh, can the first result be less penal than what is contemplated by 'dismissal' of a civil servant ? Even as a major penalty Government servant can be subjected to removal not affecting his chance to reappointment. For meting out that punishment protection of Article 311 would be available and punishment imposed contrary to it would be void. We fail to see how the same result can be reached by changing mere label though the content and effect is the same. The matter is not being put on par with 'resignation' or its resultant consequences of termination, effacement and of re-entry. The first two elements having result of punitive determination of services cannot but be reached except following the procedure prescribed for imposing penalty nor can be meted out contrary to Art. 311 of the Constitution."

The Division bench ultimately held that there is no implication possible to be worked out from the terms of F.R. 17 much less that of forfeiture of past services rendered by civil servant. After the aforesaid judgment of the division bench Fundamental Rules were amended and present F.R. 17-A was inserted by notification No. 33011/3/75 Estt (B) dated 16.4.1979.

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The provision was inserted with retrospective effect from 26.7.1965. F.R. 10-A is being reproduced below :-

"F.R. 17-A. Without prejudice to the provisions of Rule 27 of the Central Civil Services (Pension) Rules, 1972, a period of an unauthorised absence-

(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 forced;

(ii) in the case of other employees as a result of acting in combination or in concerned manner, such as during a strike, without any authority from, or valid reason to the satisfaction of, the competent authority; and

(iii) in the case of an individual employee, remaining absent unauthorisedly or deserting the post;

shall be deemed to cause an interruption or break in service of the employee, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required.

Explanation 1- For purposes of this rule, "strike" includes 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".

From perusal of F.R. 17-A quoted above, it is clear that the consequences for unauthorised absence mentioned in clauses I, II & III, shall cause an interruption or break in service of the employee, for the purpose of leave travel concession, quasi-permanancy and eligibility for appearing in departmental examinations unless otherwise decided by competent authority. While considering the scope of F.R. 17-A the observations of the Division Bench in case of V.S. Deshpande (supra) are to be kept in mind. The legislative authority has only provided that interruption or break in

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service shall effect the normal service benefits like LTC etc. This rule nowhere provides that for unauthorised absence the entire past service shall be forfeited. If such interpretation as suggested by learned counsel for the respondents is accepted, it shall be a punishment given in violation of Article 311 of the Constitution. The findings and observations of the Division Bench are thus equally applicable to FR-17-A....."

I am in respectful agreement with the same.

9. The respondents have filed Writ Petition no. 27951 of 2003 challenging the order of this Tribunal dated 30.4.2003. The Hon'ble Allahabad High Court vide order dated 07.07.2003 upheld the judgment of this Tribunal dated 30.04.2003. Similar ratio has been laid down by the Hon'ble Mumbai High Court (at Nagpur) in the case of Vishwanath Sadashiv Deshpande(supra). The Hon'ble Supreme Court in case of Shiv Shanker (supra) in regard to order of break in service has held as under :-

> "Admittedly this order was made without any notice to the petitioners and without giving them any opportunity to show cause against the action. The contention of the petitioners before us is that there was a violation of the principles of natural justice and for that reason alone, the order was liable to be quashed. In Dayal Saran Vs. Union of India (supra), this Court had pointed out that an order of forfeiture of past service cannot be made without observing the principles of natural justice. The principle of the case was applied by the High Court of Rajasthan to cases of break in service on account of particpation in illegal strike also. In one of the cases, namely, Karan Singh V. Union of India, (Civil Writ Petn No. 1889 of 1981), S.C. Agarwal, J., after referring to the decision of Court in Dayal Saran V. Union of India (supra), observed :
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> "In view of the decisions aforesaid, it must be held that an order with regard to the break in service which results in forfeiture of the past service of a railway employee, cannot be made without observing the principles of natural justice."

> The learned counsel for the respondents urged that para 1301 of the Railway Establishment Manual read with para 1304 enabled the Railway authorities to forfeit the service of a Railway servant for participation in an illegal strike unless condoned by the competent authority. We are not now on the question of competence of the Railway authority to make an order of forfeiture of service. The question before us is whether the principles of natural justice should be observed when an order of forfeiture of service on the ground of participation in an illegal strike is to be made. Neither para 1301 of the Railway Establishment Manual excludes the observance of the principles of natural justice either expressly or by necessary implication. We, therefore, allow the writ petitions and quash the order dated February 19, 1981, February 21, 1981 and February 18, 1981 which have been filed as annexures I, II and III of the writ petition. The writ petitions are allowed as indicated."

In view of the above judgment of Hon'ble Supreme Court I have no hesitation to hold that there has been violation of principles of natural justice in this case also and, therefore, on this ground alone the OA is liable to be allowed.

10. Since the applicant has already retired it would be a futile exercise to remit the matter back to the respondents to take afresh look in view of the legal positions by the Superior Courts.

11. In the facts and circumstances and our aforesaid discussions the OA is allowed. Impugned order dated 5.8/09/2003 is quashed. The respondents are directed not to treat the period from 12.3.1981 to 14.3.1981 as break in service in

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respect of the applicant which inter alia means that the applicant is entitled for all the service benefits from 01.06.1962 till 30.06.2002, the date on which he superannuated. The applicant shall be entitled for all consequential benefits including the post retiral benefits.

12. With the above direction the OA is disposed of with no order as to costs.

Member (A)

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