

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH

THIS THE 30th DAY OF APRIL, 2003

Original Application No. 69 of 2003

CORAM:

HON.MR.JUSTICE R.R.K.TRIVEDI,V.C.

HON.MAJ.GEN.K.K.SRIVASTAVA, MEMBER(A)

Kripa Shanker Srivastava,
Son of Late M.S.Srivastava, resident
of 397 E/4F, Meerapur, Allahabad

.. Applicant

(By Adv: S/Shri T.P.Singh/Vikas Budhwar)

Versus

1. Union of India through Controller and Auditor General of India, 10 Bahadur Shah Jafar, New Delhi.
2. Accountant General Audit-1, U.P. Allahabad.
3. Deputy Accountant General (Administration) in the office of the A.G.(Audit-1), U.P. Allahabad.

.. Respondents

Along with OA No.70 of 2003


Ramendra Kumar Malviya, son of Shri Chandra Kishor Malviya, resident of 46, Katju ka Bagh, Post office Teliarganj, Allahabad, posted as Senior Auditor in Accountants General Officer (Audit-1) Allahabad.

.. Applicant

Versus

1. Union of India through Controller and Auditor General of India, 10 Bahadur Shah Jafar Marg, New Delhi.
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3. Deputy Accountant General
(Admn) in the office of the
A.G.(Audit-1), U.P. Allahabad.

.. Respondents

(By Adv: Shri Amit Sthalekar)

O R D E R (Reserved)

JUSTICE R.R.K.TRIVEDI, V.C.

The questions of fact and law in both the above OAs are similar and both the OAs can be considered and decided by a common order against which learned counsel for the parties have no objection. OA.No.69/03 shall be the leading case.

The facts giving rise to this application are that applicant K.S.Srivastava was appointed as Auditor on 2.5.1963. At the relevant time i.e. in the month of August 2002 applicant was serving as Senior Auditor under Accountant General Audit-1, U.P. Allahabad, respondent no.2. Applicant is Vice President of of All India Audit & Accounts Association and holding the charge of the post in Central Committee. It appears that on 23.8.02 a resolution was passed by members of the three recognised associations namely, Section officers, Assistant Auditors and Senior Auditors and C&D Non-gazetted staff association that Shri N.K.Sharma Convenor of the associations shall submit a memorandum to respondent no.2 on 27.8.02. It was also decided that on the said date the members of the said associations shall conduct the mass demonstration before respondent no.2 for apprising him about the difficulties faced by the members of the three associations. A letter dated



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23.8.02 was addressed to respondent no.2 requesting him to receive the memorandum out of the chamber on 27.8.02 at 2.30 p.m. A copy of the letter together with copy of the resolution has been filed as (Annexure 3 to the OA). On 27.8.02 members of the three associations assembled during lunch hours. It is stated that applicant alongwith office bearers and members of the associations went to the chamber of respondent no.2 but he refused to receive the memorandum by the Union leaders. The office bearers and the ~~members~~^{members} of the three aforesaid associations continued their demonstration until 6.15 p.m. when the Accountant General came out of his chamber to receive the memorandum from the Convenor of the unions Shri N.K.Sharma. The applicant was served a memorandum dated 29.8.02(Annexure 4) asking him to explain by 2.9.02 explaining his conduct of not attending to his own duties from 2 p.m. to 6 p.m. whereby attracting the provisions F.R.-17 involving Diesnon and break in service. Notice also stated that the above action on his part, that he alongwith others sat in dharna in front of Accountant General's chamber from 3.45 p.m to 6 p.m. whereby ^{he caused} hampering office work and hindering duties of others besides creating indiscipline in the office. His action to continue with the demonstration beyond lunch hours was not in order as ^{under Rules} they were not allowed to do so beyond lunch hours. The applicant resorted to ~~completely~~^{completely} in-decorous behaviour as well as abusive language during the dharna period while threatening the Accountant General and the other Deputy Accountant Generals present in the office of Accountant General. The action on his part therefore

constituted a conduct which is unbecoming of a government servant. The applicant submitted his reply/objection on 2.9.02(Annexure 5) and also sought for some clarification from respondent no.2. On 2.9.02 another letter was addressed to applicant for submitting his final and conclusive reply by 5.9.02. It is also indicated that he may request for personal hearing. Then applicant submitted his final reply on 5.9.02(Annexure 7). The applicant was given personal hearing on 6.9.02 at 3 p.m. Thereafter respondent no.3 Deputy Accountant General(Admn) passed the order dated 9.9.02 holding the applicant liable to be proceeded against as per the provisions of F.R. 17-A and as Disciplinary Authority respondent no.3, directed an entry to be made in the service book of the applicant regarding diesnon with break in service with effect from the date of joining service i.e. 2.5.1963 to 27.8.02. The order further stated that the applicant will not be eligible for any of his retirement benefits like pension, gratuity, leave encashment etc for the period in question. It may be noted here that the applicant attained the age of superannuation on 31.8.02. Aggrieved by the said order applicant filed appeal before respondent no.2 which has been dismissed on 9.12.02(Annexure 1), aggrieved by which applicant has approached this Tribunal.

For the same incident applicant Ramendra Kumar Malaviya, a Senior Auditor, in OA No.70/03, was also served with a memorandum dated 29.8.02 asking for his explanation on account of his participation in dharna/strike. Applicant submitted his reply on 9.9.02. The Disciplinary Authority respondent no.3 then passed order on 11.9.02(Annexure 2) holding him liable to be proceeded against as per the Provisions of F.R. 17-A and directed that an entry will be made in his service book

regarding the diesnon with break in service with effect from the date of joining of service i.e. 9.10.1979 to 27.8.02 and he will not be eligible for his retiral benefits like pension, gratuity, leave encashment etc for the period in question. Against the order of respondent no.3 applicant filed appeal which has been dismissed by order dated 9.12.02, a copy of which has been filed as (Annexure 1).

Counter and rejoinder have been exchanged in both the OAs. We have heard Shri T.P.Singh and Shri Vikas Budhwar learned counsel for the applicants and Shri Amit Sthalekar learned counsel appearing for the respondents.

Counsel for the applicants has submitted that as clear from the memorandum served on the applicant the allegations made therein were that applicants resorted to an undecorous behaviour and used abusive language which was a conduct unbecoming to the government servant and as such for such misconduct they were liable to be proceeded against under Rule 14 of CCS(CCA) Rules 1965. As respondent no.2 and 3 have passed the impugned order under influence by the above facts alleged against the applicants the orders suffer from manifest illegality and cannot be sustained. That the intention of the Legislature ⁱⁿ enacting F.R.17 and F.R. 17-A is not to bypass the normal disciplinary action against the employee guilty of misconduct. F.R. 17 and F.R.17-A have been illegally resorted to for punishing ^{applicants} ~~respondents~~ for their ⁱⁿ alleged misbehaviour and misconduct. The action is ⁱⁿ clear violation of Article 311 of the Constitution. It is further submitted that even assuming that F.R.17-A was applicable in the facts and circumstances mentioned in the notice. Opportunity ought to have been given that the action shall be taken under F.R. 17-A. It is submitted that the notice served



on the applicants was only under F.R.17 and no notice was served under F.R.17-A. It is submitted that the two provisions contemplate different action and consequences. It is also submitted that the diesnon and break in service both could not be invoked simultaneously for the same period. The two operate in different spheres. F.R. 17 covers 'diesnon', whereas F.R.17-A is applicable in case of unauthorised absence. It is further submitted that the applicant could not be held to be ^{own} unauthorised ^{absence} from duty as a previous notice was already given to respondent no.2 by the office bearers of the association that employees including applicant will assemble during lunch hours and shall hand over a memorandum to respondent no.2. The employees assembled there, they were compelled to continue their demonstration beyond lunch hours as respondent no.2 refused to come out from his chamber to receive the memorandum. It is submitted that his own inaction could not be used for awarding drastic punishment to applicants, they have been deprived of the entire services rendered from date of joining to the date of incident. It is submitted that the action of the employees including applicant was not in violating of any of the provisions. To form associations, or unions, and to raise grievances by demonstrations and picketing etc, are constitutionally recognised modes of placing grievance before the authorities, the applicants could not be punished for such peaceful demonstration. The applicants have been incorrectly described as main leader and speaker and that were instrumental in extending the strike/dharna beyond lunch hours. It is submitted that the applicants were neither leaders nor they were responsible in any manner for extending strike/dharna beyond lunch hours. It is

submitted that the punishment awarded is too harsh and the view taken is arbitrary and orders are liable to be quashed. Reliance has been placed on a judgment of a Division Bench of Bombay High court in case of 'Vishwanath Sadashiv Deshpande & Ors Vs. Comptroller and Auditor General of India, New Delhi & Ors, 1976 LAB.I.C 934, Bhanwar Lal and Ors Vs. Union of India & Ors, 1999(3) A.T.J pg 498.

Shri Amit Sthalekar learned counsel appearing for the respondents, on the other hand, submitted that on admitted facts, that applicants participated in the demonstration which continued from 2.30pm to 6.15 p.m. They had absented from their normal duties for which no permission was granted by the controlling authority. Thus the absence from the seat was unauthorised and it attracted provisions contained in F.R.-17 and F.R. 17-A, the orders passed by respondent no.2 &3 are justified in the facts and circumstances of the case. The orders do not suffer from any error of law calling for intereference by this Tribunal. Reliance has been placed on following judgments:

1. Hukum Chand Malhotra Vs. Union of India
AIR 1959 Supreme Court 536
2. Union of India Vs. Tulsi Ram Patel
AIR 1985 Supreme Court pg 1416
3. All India Railway Mail Service & MMS Employees Union Class III Nagpur & Ors Vs. Union of India & Ors, (1992) 21 A.T.C pg 645
4. Village Papers Mazdoor Sangh, Mehatpur Vs. State of H.P. & Ors, 1995 Supp (1) Supreme Court Cases 291.

We have carefully considered the submissions made by the counsel for parties and also perused the material on record. In our opinion, the important question for determination in these two OAs is the scope of F.R.-17 and F.R.17-A of Fundamental Rules. Division Bench^h of Bombay High Court in case of 'Vishwanath Sadashiv Deshpande(Supra) considered similar action taken by Comptroller and Auditor General of India against the employees for participating in the strike^s by central government employees 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:-

"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 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

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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. The provision was inserted with retrospective effect from 26.7.1965. F.R. 17-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 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".

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-permanency 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 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. In our opinion, the order of the nature impugned in these OAs could not be passed by


respondents either under FR-17 or F.R 17-A.

The another reason for which the orders cannot be sustained is that the respondents 2 & 3 have taken terms diesnon and unauthorised absence as same thing which is not correct. Division Bench of Jodhpur bench of this Tribunal in case of 'Bhanwar Lal(Supra) has held that diesnon and unauthorised absence are different terminologies used in service jurisprudence denoting different consequences. In para 7 of the order the division bench held as under:

"Secondly, it is seen that the order of Disciplinary authority imposing punishment on the applicant is self contradictory. At one place, it was mentioned that the period of unauthorised absence would be treated as diesnon. Simultaneously, it has been mentioned that the period of unauthorised absence would constitute a break in service. The implication of diesnon is that the delinquent official on whom a penalty has been imposed does not loose the right to count the past service, whereas break in service takes away the benefit of the past service rendered by the delinquent official. It can be either be diesnon or break in service. Both diesnon and break in service cannot be applied to the same case. Thus, the order of Disciplinary Authority imposing the penalty is self contradictory and cannot be sustained in law."

From the aforesaid it is clear that diesnon does not effect

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the past services rendered by the employee. It only provides that a day cannot be reckoned as a day for payment of wages and allowances.

In the present case, it has been seen that the notices dated 29.8.02(Annexure 4) served on applicants were under F.R.17. There is no mention of F.R.17-A. As seen above, if diesnon and break in service have different consequences it was not open to the respondents to pass impugned orders having consequences of unauthorised absence from duty which is provided under FR-17-A. The applicants could not know the mind of the respondents that they are going to pass orders under F.R.17-A having consequences of unauthorised absence. In the circumstances, the orders impugned are liable to be quashed as they have been passed without affording opportunity in violation of principles of natural justice. Observations in the order and the findings recorded by the respondents 2 and 3 are such, as if, they were dealing with the case of full fledged inquiry as contemplated under Rule 14 of CCS(CCA) Rules, 1965. F.R.17 and F.R.17-A could not be substitute of disciplinary proceedings provided under above rules. They are not meant for passing the drastic order of the nature passed in the present case against the applicants. The orders are in clear violation of Article 311 and cannot be sustained.

Applicant Shri K.S.Srivastava attained the age of superannuation on 31.8.02. The incident took place on 27.8.02. Thus, only three days before his retirement, for alleged absence from duty for few hours, he was deprived of the entire benefits of his service rendered. This could not be the ^{intention} ~~incident~~ of law to ^{empower} ~~enable~~ respondents to pass such orders

under F.R.17 and F.R.17-A, which may destroy the entire protection provided under Article 311 of the Constitution to the government employees, where they could have better chance to defend themselves. In the present case, both the Appellate Authority and Disciplinary Authority were themselves witnesses of the incident. In other words, allegedly they were victims of the demonstration. In such circumstances, the element of bias could not be ruled out. The Appellate Authority, the respondent has admitted this aspect of the case while deciding the case. The Appellate Authority in the order dated 9.12.02 passed against Shri R.K.Malviya in para 6 (iii) has observed as under:-

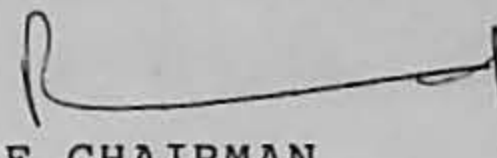
"That in concert with a large number of employees, he became instrumental in creating chaos, terror and indiscipline in the office and used abusive, indecorous and derogatory language against the AG and his officers and threatened the AG to come out his room to receive their memorandum failing which he would be subjected to face the consequences thereof. He could not give any plausible explanation in this regard. This, in fact, had happened which was also witnessed by the undersigned. My group of officers were also witness to this sordid episode on that fateful day."

In the above facts as the Disciplinary Authority and Appellate Authority were themselves witnesses of the incident, in the interest of justice and fair play they should have handed over this matter to some other Competent officer to decide independently without there being any bias in mind. Thus the impugned orders suffer from a very serious lapse and are violative of principles of natural justice and cannot be sustained.

For the reasons stated above, both the OAs are allowed. The impugned orders passed by the Disciplinary Authority dated 09.12.2002(Annexure 1) and the Appellate Authority dated 09.09.2002(Annexure 2) challenged in O.A. No.69/03 and disciplinary authority order dated 9.12.2002(Annexure 1) and Appellate Authority order dated 11.9.2002(Annexure 2) challenged in OA No.70/03 are quashed. The respondents no.2 and 3 are directed to pay all retiral benefits to applicant in OA No.69/03 within a period of two months from the date a copy of the order is filed. If any entry has been made in the service book of the applicants in pursuance of the impugned orders, the entries shall be expunged. There will be no order as to costs.



MEMBER(A)



VICE CHAIRMAN

Dated: 30th April, 2003.

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