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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.449 of 2006
Cuttack, this the 28th day of February, 2007.

Y.Ajay Kumar ... Applicant
Versus
Union of India & Others ... Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? *gr*
2. Whether it be circulated to all the Benches of the CAT or not? *gr*

[Signature]
28/02/07
(N.D.RAGHAVAN)
VICE-CHAIRMAN

[Signature]
28/02/07
(B.B.MISHRA)
MEMBER(A)

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C O R A M:

THE HON'BLE MR. N.D.RAGHAVAN, VICE-CHAIRMAN
AND
THE HON'BLE MR.B.B.MISHRA, MEMBER (A)

Shri Y.Ajay Kumar, Aged about 39 years, son of Shri Y.K.Rao, C/o.Wakil Choudhury, At- B.Sector, Main Road, Bandhamunda, Dist. Sundergarh, Orissa.

..... Applicant.

By legal practitioner: M/s. A.Kanungo, S.K.Kar.C.Nayak, Advocates.

-Versus-

1. Union of India represented through General Manager, S.E. Railway, Garden Reach, Calcutta-43.
2. Divisional Railway Manager, S.E.Railway, At/Po: Chakradharpur, Dist. Singhbhum, Bihar.
3. Divisional Railway Manager, S.E. Railway, Chakradharpur, Dist. Singhbhum, Bihar.
4. Sr. Divisional Operation Manager (Sr.DOM), S.E.Railway, Chakradharpur, Dist. Singhbhum, Bihar.

...Respondents.

By legal practitioner: Mr. O.N.Ghosh, Advocate

ORDER

MR.B.B.MISHRA, MEMBER(A):

Issues involved in this case fall in a short compass and are stated that as a result of disciplinary proceedings initiated against the Applicant and other Substitute Token Porters of the Railway, Applicant along with others was removed from service. They all carried the matter in appeal and after the Appellate Authority confirmed the order of punishment imposed on them, they approached this Tribunal in different Original Applications. This Tribunal heard those cases analogously and disposed of the same in common order dated 5th January, 2004. Relevant portion of the final orders dated 5th January, 2004 are quoted herein below:

“... In this view of the matter, we hold that the Respondents have miserably failed to bring home the charge against the Applicant. We have, therefore, no hesitation to accept the submission of the learned counsel for the applicant that the inquiry report was based more on suspicion rather than on material proof. We also agree that the I.O. could not have imported his personal knowledge to substitute the requirement of concrete evidence. In view of the observations made above and in view of the fact that the applicant was denied reasonable opportunity to prove the authenticity of the service certificate produced by him, we remand the case to the disciplinary authority to start de novo inquiry into the matter from the inquiry stage. We, however, direct that this inquiry will be limited to the examination of Shri S.C.Ghosh, the then Permanent Way Inspector (Construction), Bandamundaa to prove his signature on the document produced by the applicant as service certificate issued by the said Shri Ghosh and to the production of the Live Casual Register, Bandamunda where the name of the applicant would be available. **Pending finalization of the inquiry and the disciplinary proceeding, the applicant is ordered to be reinstated in service.**”

2. Being aggrieved by the orders of this Tribunal dated 5th January, 2004, the Respondents carried the matter in Writ to the Hon'ble Orissa High Court, Cuttack in WP (C) Nos. 656, 657 and 658 of 2005. The Hon'ble Orissa High Court heard and disposed of those matter in a common judgment dated 04.05.2005. Relevant portions of the aforesaid orders are quoted herein below:

"We fail to understand the intention of the Tribunal by using the word "de novo enquiry from the enquiry stage". Any how since the Tribunal has remanded matter to the Disciplinary Authority, we are of the opinion that fresh enquiry should be started in continuance from the stage of recording of evidence meaning thereby that the charge-sheet and the reply to the charge-sheet already submitted and the evidence of witnesses and documents produced and relied upon by the respective parties which are already on record of the earlier proceedings shall form part of the enquiry proceedings. Needless to say that the prosecution as well as the defence would be free to produce as many documents and witnesses as they want, which are relevant in the opinion of the Enquiry Officer, after obtaining his permissions. It will also be open for them to make application to the Enquiry Officer to recall a witness and if such application is moved, the Enquiry Officer may pass appropriate orders thereon. It is further directed that the opposite parties shall go back to their position as it was immediately before passing of the order removing them from service meaning thereby that if the opposite parties were under suspension (as informed by the learned counsel for the parties), they shall be deemed to be continuing under suspension. However, it will be the discretion of the appointing authority to reinstate them pending continuance of the enquiry proceeding or not.

The order passed by the Tribunal shall stand modified to the above extent. Since in the meantime about six years have elapsed from the date of initiation of the Departmental proceeding, the writ petitioners/the Enquiry Officer as well as the Disciplinary Authority shall take appropriate step to conclude the proceeding as early as possible. The Opposite Parties are also directed

to cooperate for early conclusion of the proceeding. It is made clear that in case the charged official/opposite parties do not cooperate in the proceeding, the Enquiry Officer would be at liberty to proceed in the matter in accordance with law."

3. After the matter was disposed of by the Hon'ble Orissa High Court, the Divisional Operation Manager (Line), S.E.Railway/Chakradharpur issued a Memorandum dated 05.12.2005 passing the following orders:

"...Dissatisfied with the judgment of CAT/Cuttack, the Railway administration filed WP (C) No.657 & 658/05 before the Orissa High Court/Cuttack. Vide Judgment dated 04/05/05, the Orissa High Court/Cuttack remitted the case back to the disciplinary authority for holding fresh enquiry from the stage of recording of evidence. Orissa High Court further directed that pending finalization of the fresh enquiry; the opposite parties shall go back to their position as it was immediately before passing of the order removing from the service meaning thereby that if the opposite parties were under suspension (as informed by the learned counsel for the parties), they shall be deemed to be continuing under suspension.

Accordingly in compliance with the direction judgment dated 04.05.2005, in terms of the provisions of D&A Rules, 1968 governing suspension, Shri Y.Ajai Kumar, Sub TP/BNDM shall be deemed to be under suspension w.e.f. 10.09.2001 till further orders.

It is further ordered that during the period this order shall remain in force, the said Sri Y.Ajai Kumar shall not leave the headquarters without obtaining the previous permission of the competent authority."

4. Being aggrieved by the said order of suspension dated 05.12.2005(Annexure-A/5), the Applicant preferred this Original Application under Section 19 of the Administrative Tribunals Act, 1985 on the plea that though he was not under suspension before passing the order of termination, by wrong interpretation of the Rules and the orders of the

Hon'ble Orissa High Court, the Applicant has been ordered to be under deemed suspension pending fresh enquiry from the stage of recording of evidence. He has also taken the ground that though order of dismissal was passed w.e.f. 27/31.07.2001 he has been placed under deemed suspension with effect from 10.09.2001 which is bad in law.

5. Respondents in their Counter stated that in compliance with the direction given by the Hon'be High Court in WP (C) No. 657/05 dated 04.05.2005, the Disciplinary Authority issued an order dated 05.12.05 (Annexure-A/7to the OA) placing the applicant under deemed suspension with effect from 10.09.2001 i.e. the original date of removal from service. It has also been maintained that besides the orders of the Hon'ble Orissa High Court, the order of deemed suspension was issued by the Disciplinary Authority in exercise of the powers conferred in Rule 5(4) of Railway Servants (D&A) Rules, 1968. They have, therefore, prayed that there being no infirmity, the order of deemed suspension needs to be maintained.

6. During the pendency of this OA, the Applicant by filing M.A.No. 370/2006 has sought for direction to the respondents to produce the records dealing with the removal of the applicant. On receipt of the notice on the aforesaid MA, the Respondents have filed an objection stating as under:

"4. That, in compliance to the said order Dtd. 28.08.2006 passed by the Hon'ble Tribunal the deponent named above begs to submit as under:

- (a) The applicant who was working as substitute Token Porter at Bnadamunda was charge-sheeted on 12.05.99 on the allegation that he submitted forged service certificate for seeking employment of casual nature in Railway Department. On enquiry he was found to be

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guilty of charges for which the Disciplinary Authority accepting the findings of the enquiry reports passed the order of punishment and vide order Dtd. 27/31.07.01 the applicant was removed from service without any terminal benefits which was acknowledged by the applicant on 10.09.2001.

- (b) As per the Muster Roll the applicant continued as sub Token Porter and received his salary for the month of August, 2001 i.e. till he received his order of punishment of removal. It is, therefore, humbly clarified that the applicant was in service till he acknowledged the order of punishment and since the said order of punishment having been quashed by the Hon'ble Tribunal and subsequently modified by the Hon'ble High Court with certain directions, the Disciplinary Authority as per provisions of the law provided under Rule 5(4) of R.S. (D&A) Rules, 1968 has placed the applicant under deemed suspension from the date of his original order of removal."

7. By filing an affidavit applicant has brought to the notice of this Tribunal the orders of the Hon'ble High Court of Jharkhand passed in WP (S) No.1376 of 2005 (O.Madhava Rao vrs. UOI) and confirmed by the Hon'ble Supreme Court to state that 22 employees who were charge-sheeted on the self same allegations have been exonerated from the charges and as per the orders of the Hon'ble High Court of Orissa, they have been reinstated into service with full back wages. Therefore, there is no reason to keep the applicant under deemed suspension.

8. By filing MA No.767/06 it has been brought to the notice of this Tribunal that since without producing the original service certificate the fresh enquiry has been conducted and the IO closed the enquiry, the Respondents may be directed not to proceed further in the matter till final disposal of this case to which the Respondents have also filed objection.

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9. Heard rival submissions of the parties and went through the materials placed on record. It is not necessary to record all the submissions canvassed by the parties, as the validity or otherwise of the order under Annexure-A/7 dated 05.12.2005 is to be tested on the basis of the orders passed by the Hon'ble Orissa High Court which has admittedly, not been carried in appeal by either of the parties. Alto it is to be seen that exercising powers by the Disciplinary Authority was in accordance with Rules. In this connection, Rule 5 of the Railway Servants (Discipline and Appeals) Rules, 1968 is quoted herein below:

"5. Suspension-

(1) A Railway servant may be placed under suspension-

- (a) where a disciplinary proceeding against him is contemplated or is pending; or
- (b) where, in the opinion of the authority competent to place a Railway servant under suspension, he has engaged himself in activities prejudicial to the interest of the security of the state; or
- (c) where a case against him in respect of any criminal offence, is under investigation, inquiry or trial.

(2) A Railway servant shall be deemed to have been placed under suspension by an order of the competent authority-

- (a) with effect from the date of his detention, if he is detained in custody, whether on a criminal charge or otherwise, for a period exceeding forty-eight hours;
- (b) with effect from the date of his conviction, if in the event of a conviction of an offence, he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or

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compulsorily retired consequent to such conviction.

Explanation- The period of forty-eight hours referred to in clause (b) of this sub-rule, shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.

(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Railway servant under suspension, is set aside in appeal or on revision under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Railway servant, is set aside or declared or rendered void in consequence of or by a decision of a court of law and the disciplinary authority on consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement, was originally imposed, the Railway servant shall be deemed to have been placed under suspension by the competent authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders.

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the court has passed an order purely on technical grounds without going into the merits of the case.

(5)(a) An order of suspension made or deemed to have been made under this rule continue to remain in force until it is modified or revoked by the authority competent to do so;

(b) Where a Railway servant is suspended or is deemed to have been suspended in connection with any disciplinary proceeding or otherwise) and any disciplinary proceeding is commenced against him during the continuance suspension the authority competent to place him under suspension may, for reason to be recorded by him in writing, direct that

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the Railway servant shall continue under suspension until the termination of all or any of such proceedings.

- (c) An order of suspension made or deemed to have been made under this rule, any time, be modified or revoked by the authority which made or is deemed made the order or by any authority to which that authority is subordinate."

10. By taking us through the relevant portion of the Railway Board's letter No. E (D& A) 61 RG 6-43 dated 28.4.1965, Mr. Ghosh, Learned Counsel for the Respondents has submitted that since the order has been passed within the power available with the authorities, the same is liable to be maintained. He has also submitted that this OA is liable to be dismissed as the applicant approached this Tribunal without exhausting departmental remedies available to him. Relevant portion of the above letter dated 28.04.1965 is quoted herein below:

"Points raised-(3) Courts have held that an order of suspension gets merged with the order of dismissal/removal/compulsory retirement and when the latter orders are set aside by Courts the suspension orders go out of existence. The Courts have held that orders have no retrospective effect. In view of this position whether Rule 5(4) of RS (D&A) Rules, 1968 which permits a Railway servant being deemed under suspension retrospectively from the date of dismissal/removal/compulsory retirement can still be treated as valid in law.

Bard's Clarification-(3) Rule 5(4) of RS (D&A) Rules, 1968 corresponds to Rule 12(4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 on the Civil side. In regard to the latter rule, the Ministry of Home Affairs have stated as under:" The validity of Rule 12(4) has been upheld by the Punjab High Court as well as the Supreme Court in the case of Shri Khem Chand v. Union of India. A Government servant, whose dismissal, removal or compulsory retirement is held void by a court of law and it is proposed to suspend him again for holding further

inquiry, will be deemed to be under suspension with effect from the date of such dismissal, removal or compulsory retirement under Rule 12(4) or corresponding rule and will, therefore, be entitled only to subsistence allowance for the period of suspension and deemed suspension". In view of the above advice of the Ministry of Home Affairs, Rule 5(4) of the Railway Servants (Discipline and Appeal) Rules, 1968 is valid in law."

11. Fact remains that the order of the Hon'ble Orissa High Court has not been carried in appeal by any of the parties. Therefore, as per the law, not only this Tribunal but also the Respondents are bound to abide by it. Therefore, having accepted fully and implemented partly the order of the Hon'ble Orissa High Court, they cannot take a different stand. The Hon'ble High Court while ordering fresh enquiry from a particular stage have specifically directed that the opposite parties (Applicant) shall go back to their position as it was immediately before passing of the order removing them from service, meaning thereby that if the opposite parties were under suspension (as informed by the learned counsel for the parties), they shall be deemed to be continuing under suspension. However, it will be the discretion of the appointing authority to reinstate them pending continuance of the enquiry proceeding or not.

12. By placing reliance on the decision of the Hon'ble Orissa High Court made in the case of Gurunath Pradhan vs. State of Orissa and others

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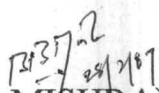
delinquent was not under suspension prior to the order of dismissal/removal, the impugned order under Annexure-A/7 is liable to be quashed. From the discussions made above, prima facie it shows that the order under Annexure-A/7 is not in consonance with the directions of the Hon'ble Orissa High Court dated 04-05-2005.

13. However, we are not inclined to transgress the power of the Appellate Authority as the Applicant has approached this Tribunal without availing of the existing opportunity by way of making appeal against the order under Annexure-A/7. The points raised by him here could have been agitated before the Appellate Authority. He is, therefore, at liberty to do it now and we are sure, the Appellate Authority shall consider and dispose of the said appeal as per Rules keeping in mind the directions of the Hon'ble Orissa High Court within a period of 45 days from the date of receipt of this order.

14. Since disciplinary proceedings restarted against the applicant pursuant to the direction of the Hon'ble High Court and is a separate cause of action, we do not want to pass any order on MA No.370/06 and the same stands not accepted.

15. In the result, this OA is accordingly disposed of. There shall be no order as to costs.


(N.D. RAGHAVAN)
VICE-CHAIRMAN


(B.B. MISHRA)
MEMBER(A)

KNM/PS.