

11

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 593 of 2004

Friday....., this the 22nd day of September, 2006.

CORAM :

**HON'BLE MR. K B S' RAJAN, JUDICIAL MEMBER
HON'BLE MR. N. RAMAKRISHNAN, ADMINISTRATIVE MEMBER**

C.T. Abraham,
S/o. Shri C.G. Thomas, Ex-Land Surveyor and
Head Draftsman, Central Arid Zone Research Institute,
Jodhpur, Residing at Chakkuthara House,
Kuriannur P.O., Thiruvalla, Pathanamthitta District ... Applicant.

(By Advocate Mr. P. Gopinath Menon)

v e r s u s

1. Union of India, represented by its
Secretary to Government of India,
Ministry of Agriculture, New Delhi.
2. Indian Council of Agricultural Research,
Represented by the Secretary,
Krishi Bhawan, New Delhi.
3. The Director General,
Indian Council of Agricultural Research,
Krishi Bhawan, New Delhi.
4. The Director,
Indian Council of Agricultural Research,
Central Arid Zone Research Institute,
Jodhpur, Rajasthan. ... Respondents.

[By Advocate Mr. P. Jacob Varghese (R2-4)]

ORDER
HON'BLE MR. K B S' RAJAN, JUDICIAL MEMBER

The legal issues involved in this case are as under:-

h

(a) Whether a government servant, who has crossed the age of superannuation, could be visited with the penalty of dismissal as a culmination of Disciplinary Proceedings.

(b) Whether the jural relationship of master and servant survives even after the age of superannuation?

2. The facts as contained in the OA are summarized as hereunder:

(a) The applicant, initially appointed in 1958 as T II-3 (Land Surveyor and Head Draughtsman) in the office of Respondent No. 4, was granted two years leave in November, 1975 to visit Sultanate of Oman. On the expiry of the sanctioned leave, for his request for extension of leave, there was no response.

(b) The applicant on 23-09-1981 was informed that his services stood terminated on the expiry of 5 years i.e. w.e.f. 25-11-1980 in accordance with the provisions of Rule 12 of the CCS(Leave) Rules.

(c) The applicant had challenged the above said order of termination before the High Court of Rajasthan and the case, having been transferred to the Jodhpur Bench of the Tribunal as TA No. 12/89 came to be allowed vide order dated 22nd October, 1992 and the impugned order dated 23-09-1981 was quashed and set aside, with liberty to the respondents to take any appropriate action on the ground of unauthorized absence after expiry of leave, by following the relevant rules. Result, **the applicant was placed under deemed suspension w.e.f. 25-11-1980** (the date of termination

of service) and a charge sheet under rule 14 of the CCS (CCA) Rules, 1965 issued. The inquiry officer rendered his finding as charges 'partly proved'. The Disciplinary authority had, by order dated 02-08-1996 (Annexure A-5) passed the order of dismissal from service. This penalty order was challenged by the applicant before the Principal Bench of the Tribunal through OA No. 1832/1997. During the pendency of the OA, the applicant had reached the age of superannuation on 31-01-1998. The OA was decided by the Principal Bench, vide order dated 07-08-2000, whereby the Tribunal had quashed and set aside the order of penalty and remitted the matter back to the Disciplinary authority to consider the finding of the Inquiry officer and other materials on the record and pass a final order.

(c) In pursuance of the aforesaid order of the Principal Bench, the Respondents had issued a show cause notice dated 07-04-2001 (Annexure A-8) to the applicant calling him to furnish his defence statement to the inquiry report. The applicant filed the same vide representation dated 20-04-2002 (Annexure A-10). (In the meantime, the applicant had approached the Jodhpur Bench of the Tribunal by way of OA No. 80/2001 which was disposed of by the Tribunal by order dated 12-04-2002, observing that the respondents may consider the reply, if filed by the applicant to the show cause notice and take appropriate action.) After considering the reply, the disciplinary authority passed the impugned dismissal order dated 20-05-2002 (Annexure A-1).

(d) The applicant had challenged the aforesaid order of penalty of dismissal from service before the Jodhpur Bench by filing OA No. 248/02 and the same was decided on 03-12-2002 vide Annexure

A-11, whereby the Tribunal permitted the applicant to withdraw the OA with liberty to file appeal, which, if and when filed, would be considered by the respondents on merits, ignoring the limitation aspect. And, the applicant zealously availed of the opportunity of filing the appeal dated 09-12-2002 before the appellate authority, challenging the order of dismissal dated 20-05-2002. The same was considered but rejected by the appellate authority vide order dated 30-10-2003 (Annexure A-2).

(e) Undaunted by the successive failures, the applicant filed revision petition dated 15-12-2003 challenging the order of the appellate authority and that too, by order dated 25-05-2004 (annexure A 3) was dismissed.

(f) Thus, having exhausted the departmental remedies, ultimately, the applicant has approached the Tribunal with the present O.A.

3. The applicant had raised a number of grounds in challenging the impugned orders. These are, in nutshell, as under:-

(a) After 31-01-1998, when the applicant had crossed the age of superannuation, the jural relationship between the respondents and the applicant respectively as Master and servant having ceased, provisions of CCS (CC&A) Rules cannot apply for imposing penalty under Rule 11 of the said Rules and as such Annexure A-1 order imposing the penalty of dismissal from service is without jurisdiction, illegal, arbitrary and unjust, apart from being unreasonable and irrational.

- (b) Annexure A-1 order was passed on the basis of 'no evidence' and none of the contentions of the applicant has been considered while passing the said order.
 - (c) Orders of the Appellate and Revisional Authorities are perverse.
 - (d) The respondents had not resorted to the provisions of Rule 9 of the CCS (Pension) Rules.
 - (e) The purport of the orders of the Principal Bench and the Jodhpur Bench had not been properly understood by the respondents.
 - (f) The applicant had not been paid any Subsistence Allowance to which he was entitled during the period he was kept under deemed suspension.
 - (g) The issue involved is covered by a Full Bench Decision of the Hon'ble High Court of Kerala reported in AIR 1979 Ker 135.
4. The Retort of the respondents as contained in their counter could be summarized as under:-

- (a) The applicant had requested for two years study leave on the ground of completing his Masters Degree so as to enable him to compete for ASRB and he was accordingly sanctioned leave w.e.f. 26-11-1975 to 25-11-1977. However, he did not resume duty after the expiry of the leave but sent from Muscat an application dated 26-10-1977 for extension of leave w.e.f. 26-11-1977 to 25-11-1979 and no reason for such extension of leave was reflected in the

leave application. By a communication dated 09-12-1977 he was issued with a memorandum at his known address of Oman calling upon the applicant to furnish the reasons for extension of leave but there was no response to the same. Thus, the leave so applied for even without indicating the reasons not having been sanctioned, the applicant's absence was treated as unauthorized and willful. His services were terminated w.e.f. 25-11-1980, i.e. after expiry of five years of absence. Of course, subsequently, on the basis of the order of the Jodhpur Bench, the applicant was kept under deemed suspension and disciplinary proceedings continued thereafter and the applicant was dismissed from service as a matter of penalty.

(b) As regards the ground that after retirement jural relationship of Master and Servant does not survive and as such CCS (CC&A) Rules cannot be invoked, the respondents' contention is that the proceedings were in continuation of the original charge sheet, which was issued while the applicant was in service and that it is the applicant who had been moving the Tribunal because of which only the proceedings were to continue beyond the date he reached the age of superannuation. The contention that the jural relationship ceased after the applicant had reached the age of superannuation is untenable.

(c) The impugned orders are perfectly legal and valid and that the order of dismissal is based on materials on records. The authorities have correctly understood the import of the orders of the Tribunal and the decision relied upon by the applicant is not applicable in the facts and circumstances of this case.

5.

Arguments by the Counsel for Applicant: The counsel for the applicant

argued that once the applicant had reached the age of superannuation, thereafter, there does not subsist the jural relationship between Master and Servant. As such, CCS (CCA) Rules do not apply. In this regard, he has referred to the following provisions of the Rules:-

- (a) Definition of the term Government Servant:
- (b) Applicability of the CCS (CC&A) Rules
- (c) Provisions of Rule 9 of the CCS (Pension) Rules

6. Case law cited in support of arguments: The learned counsel for the applicant relied upon the following portions of the Full Bench Judgment of the Hon'ble High Court of Kerala reported in AIR 1979 Ker 135:

"The Rule does not authorise the continuance of disciplinary proceedings as such, against a Government servant after his retirement. Both on principle and on authority, such a position cannot be easily countenanced. It allows only a limited type of enquiry to be proceeded with, namely an enquiry in regard to withholding or withdrawing pension, or of ordering recovery from pension by reason of any misconduct or negligence during the period in service of the employee. Under clause (a) of the proviso to Rule, the departmental proceeding, if instituted during the service of the employee is to be deemed to be a proceeding under the Rule and may be continued and completed even after his retirement. To this limited extent alone is provision made under the rule for continuance of a disciplinary enquiry beyond retirement. That too is by transmuting it by fiction to be an enquiry under the Rule. Beyond this, we cannot understand the rule as in any way permitting the authorities either to launch or to continue disciplinary proceedings after the retirement of the employee. That would be destructive of the concept of relationship of employer and employee which has come to an end by reason of the retirement of the employee, beyond which disciplinary control cannot extend. In *S. Pratap Singh vs. State of Punjab*

(AIR 1964 SC 72) it was pointed out by the Supreme Court (at p. 81):

" We should, however, add that we should not be taken to have accepted the interpretation which Dayal, J. has placed on each one of the several rules which he has considered. Besides, we should not be taken to have accepted to the submission of the learned Attorney-General who appeared for the respondent-State, that the provision in Article 310(1) of the Constitution that "members of a Civil Service of a State hold office *during the pleasure of the Governor*", conferred a power on the State Government to compel an officer to continue in service of the State against his will apart from service rules which might govern the matter even after the age of superannuation was reached, or where he was employed for a defined term, even after the term of his appointment was over. We consider that to construe the expression "the pleasure of the Governor" in that manner would be patently unwarranted besides being contrary to what this Court said in *State of Bihar v. Abdul Majid (1954 SCR 786 at 799)*" ."

7. The applicant has also relied upon AIR 1964 SC 72.

8. Likewise, the applicant has relied upon the decision reported in 1994

(1) KLJ 945, and invited our reference to paras 8 and 12 and extract of the same is as under:-

"8. It is now well settled that the disciplinary proceedings initiated prior to the retirement of an employee can be continued after his retirement only for the limited purpose of Rule 3 Part III KSR and not for any other purpose.
xxxxx.

12. The contention of the learned Government Pleader in this connection was that every departmental proceedings can be continued under Rule 3 Part III KSR as it is only on the basis of the ultimate finding that one can say whether any loss has been occasioned as a result of any acts or omissions on the part of the delinquent employee.



Whether certain charges will lead to a finding that the delinquent employee has occasioned loss to the Government cannot be decided till the enquiry is completed and as such there is no scope for dropping any disciplinary proceedings before it is fully terminated, was the submission. It is difficult to accept the above contention of the learned Government Pleader in the light of the principles laid down in Xavier's case (1979 KLT 80 F.B) as well as in Kolappa Pillai's case (1982 KLT 551). It is only in cases where charges can reasonably lead to a finding of loss there will be justification to continue the disciplinary proceedings initiated prior to the retirement of the petitioner under Rule 3 Part III KSR"

9. Arguments by the counsel for respondents: The learned counsel for the respondents argued that the applicant, all along, resisted the inquiry officers' report or for that matter the orders of the disciplinary authority and the higher authority only with reference to the facts of the case and never whispered about the non applicability of the provisions of CCS (CCA) Rules, and even before the Tribunal in the past, either before the Principal Bench or Jodhpur Bench, wherein hearing took place only after the applicant crossed 60 years, the applicant never raised this question. Thus, he cannot be permitted to raise this ground at this stage. Again, the proceedings were in accordance with the directions issued by the Principal Bench and the Jodhpur Bench and is only a continuous action initiated when the applicant was in service. As such, the applicant's contention that CCS (CC&A) Rules cannot apply to his case is liable to be rejected.

10. Though no decisions have been cited at the time of arguments, in the

very reply itself, the respondents have relied upon certain judgments and the same are as under:-

(a) Eastern Electric & Trading Co., vs Baldev Lal (1975) 4 SCC 684 :
The ratio relating to restriction of Tribunal's power in interfering with the quantum of punishment has been relied upon by the counsel for the respondents. The judgment of the Apex Court inter alia reads as under:-

5. In Hind Construction & Engg. Co. Ltd. v. Workmen (AIR 1965 SC 917) this Court observed:

"It is now settled law that the tribunal is not to examine the finding or the quantum of punishment because the whole of the dispute is not really open before the tribunal as it is ordinarily before a court of appeal. The tribunal's powers have been stated by this Court in a large number of cases and it has been ruled that the tribunal can only interfere if the conduct of the employer shows lack of bona fides or victimization of employee or employees or unfair labour practice. The tribunal may in a strong case interfere with the basic error on a point of fact or a perverse finding, but it cannot substitute its own appraisal of the evidence for that of the officer conducting the domestic enquiry though it may interfere where the principles of natural justice or fair play have not been followed or where the enquiry is so perverted in its procedure as to amount to no enquiry at all. In respect of punishment it has been ruled that the award of punishment for misconduct under the standing orders, if any, is a matter for the management to decide and if there is any justification for the punishment imposed, the tribunal should not interfere. The tribunal is not required to consider the propriety or adequacy of the punishment or whether it is excessive or too severe. But where the punishment is shockingly disproportionate, regard being had to the particular conduct and the past record or is such, as no reasonable employer would ever impose in like circumstances, the tribunal may treat the imposition of such punishment as itself showing victimization or unfair labour practice."

(b) Om Kumar vs Union of India (2001) 2 SCC 386: Reliance is placed by the respondents on this judgment over the proportionality of penalty.

11. Arguments were heard and documents perused. Question for consideration is whether the contention of the applicant that after retirement, no relationship as Master and servant subsists under any circumstances and for any purpose, and consequently, the order of penalty of dismissal is illegal, is legally tenable.

12. To answer the above question of law, certain other satellite questions are first to be answered and the same are as under:-

(i) Whether CCS (CC&A) Rules are applicable to a government servant, even after retirement.

(ii) If answer to (i) above is in affirmative, whether such application of rules is fettered by any restriction? And, if the answer is in negative, whether there is any exception

(iii) Whether the penalty of dismissal after the individual had reached the age of superannuation cannot be inflicted at all?

13. An analysis of the provisions of CCS(CC&A) Rules, 1965 is relevant at this juncture. The rules are applicable, vide Rule 3, to "every **Government servant**, including every civilian **Government servant** in the Defence services". Rule 11 deals with penalties under which, penalties as provided

for therein (including dismissal) may, for good and sufficient reasons be imposed on a **Government Servant**". Rule 14 which deals with the procedure for imposing major penalty, relates to misconduct or misbehaviour of a **"Government servant"** Rule 23 of the CCS (CC&A) Rules deals with 'Appeals' under which, subject to the provisions of Rule 22, a **Government servant** may prefer an appeal against all or any of the orders mentioned in the said rule. The term **"government servant"** has been interpreted in rule 2(h) of the Rules as under:-

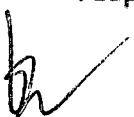
"Government servant means a person who -

- (i) is a member of a Service or holds a civil post under the Union and includes any such person on foreign service or whose services are temporarily placed at the disposal of a State Government, or a local or other authority.
- (ii) is a member of a Service or holds a civil post under a State Government and whose services are temporarily placed at the disposal of the Central Government.
- (iii) is in the service of a local or other authority and whose services are temporarily placed at the disposal of the Central Government."

14. The contention of the applicant's counsel is that invocation of the provisions of CCS (CC&A) Rules, can be made only as long as the relationship as master and servant subsists and the moment the said relationship ceases, then there is no provision for application of the rules, save as provided for in Rule 9 of the CCS (Pension) Rules.




15. The above argument cannot be accepted in toto. For, suppose, a penalty, under the CCS (CC&A) Rules is imposed upon a government servant, say, on the last working day (for definition of the term last working day, see Rule 5(2) of the CCS (Pension) Rules), and the individual reaching the age of superannuation on the next day ceases to be a government servant. Rule 23 of the CCS (CCA) Rules which deals with appeal, provides for only "a government servant" to prefer an appeal. As such, if the contention of the applicant's counsel is accepted, then, the individual cannot have the right to appeal against the order imposed on the last day of his service career. But it is trite ~~that~~ that right of appeal against the order of the disciplinary authority is available even when the affected person had attained the age of superannuation. Similarly, if the relationship as aforesaid ceases to exist on and from the date of retirement, there can be no 'appointing authority' to the applicant; and after such retirement and in such case, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct, then the provisions of Rule 5 of the CCS (Pension) Rules, 1972 would become otiose, for, the said rule empowers only the appointing authority to take action in the wake of such conviction. Thus, the contention of the counsel for the applicant in regard to this aspect (i.e. After retirement, the relationship of master and servant ceases to exist) cannot be accepted in its entirety. It is certainly true to a certain extent. At the same time, the same extent of power and authority available in CCS (CC&A) Rules, 1965 in respect of the proceedings against a serving government servant cannot be



said to be available to the authorities while dealing with the proceedings in respect of a person who retired, or is retired, or resigned from service. The question then reduces to 'as to what extent such power to proceed against the persons who have crossed age of superannuation is available?' Rule 9 of the CCS (Pension) Rules both confines and defines the extent of such power. Rule 9 gives to the President the right of — (1) withholding or withdrawing a pension or part thereof, (2) either permanently or for a specified period, and (3) ordering recovery from a pension of the whole or part of any pecuniary loss caused to the Government. This power can be exercised if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service. The power, therefore, can be exercised in all cases where the pensioner is found guilty of grave misconduct or negligence during the period of his service. One of the powers of the President is to recover from pension, in a case where any pecuniary loss is caused to the Government, that loss. This is an independent power in addition to the power of withdrawing or withholding pension.

16. It is the above rule that applies in so far as a person who retired or is retired or who had resigned from service is concerned.

17. The question that crops for further consideration is as to whether there is any restriction in respect of penalties to be imposed? For, when



proceedings after retirement are initiated or continued, by that time, penalties relating to pay, etc., are incapable of implementation. All that could be possible is cut in pension full or in part and at best withholding or forfeiture of gratuity, if not already paid. In other words, whether any of the penalties that could be imposed under Rule 11 could be levied when the charged officer crosses the age of superannuation. Here exactly, the reliance placed by the counsel for the applicant in the case of ***R.P. Nair vs Kerala State Electricity Board AIR 1979 Ker 135*** extracted earlier, is pressed into service.

18. While the reliance placed by the applicant's counsel may assist him to some extent, the said judgment has not considered provisions relating to deemed suspension and the extent of power of the authorities to keep the suspension continued even after the age of superannuation. This aspect, which is relevant to the case of this OA has been discussed in the Full Bench judgment of the Principal Bench of the Tribunal in the case of ***Amarjit Singh vs Union of India (1988) 8 ATC 532***. The above decision of Hon'ble High Court of Kerala had also been referred to in that judgment and the following questions were considered:-

- (i) Whether the disciplinary proceedings can be continued against a Government servant even after his retirement under the CCS (Pension) Rules or the corresponding provisions of the Railway Pension Rules, even where the officer had not been suspended but allowed to retire during the pendency of the disciplinary



proceedings; and

(ii) Whether the disciplinary proceedings as in (i) above can be continued or initiated after retirement even where there has been no pecuniary loss for the Government by the alleged misconduct of the Government servant on which the disciplinary proceedings are based.

19. The Tribunal had also taken into account the decision of the Hon'ble Madras High Court in the case of Government of Tamil Nadu vs G. Kalyanam (1985 WLR 197) and held as under:-

"4. The Madras Bench of the Central Administrative Tribunal considering the case of Head Postmaster (HSG-I) who was governed by same Rule 9 of the CCS (Pension) Rules, purporting to follow the Full Bench judgement of the Kerala High Court in R.P. Nair vs. Kerala State Electricity Board (AIR 1979 KER 135) and judgement of the Madras High Court in Government of Tamil Nadu v. G. Kalyanam (1985 WLR 197) held:

... If a pensioner is to be proceeded against for any grave misconduct or negligence during his service, it cannot be for the purpose of establishing that his past service under Government was not satisfactory and on that account, for making a reduction or even withholding pension but can only be for the purpose of withholding the pension or for recovering from the pension if pecuniary loss had been caused, but at the same time it would merely render his service as unsatisfactory, action cannot be taken under Rule 9 of the Pension Rules inasmuch as Rule 6 which previously made satisfactory record of service as condition for grant of pension, has been deleted.

It may be pertinent to note that the Madras Bench in coming to that conclusion has referred to the observations made by the High Court in Government of Tamil Nadu v. G. Kalyanam, which are in the following words:



It is now well settled that if disciplinary action is to be taken against an employee it must be taken before he retires from service and if the disciplinary enquiry cannot be completed if one initiated already, the only course open to the Government is to pass an order of suspension and refuse to permit the concerned Government servant to retire and permit him to continue in service till final orders are passed thereon.

The Bench also observed that the same view taken by the Full Bench of Kerala High Court as reported in R.P. Nair's case. However, it did not positively hold that if the proceedings are not completed before the public servant retires, they cannot be continued thereafter. The Bench only said that they can be continued only if there is a pecuniary loss on account of the grave misconduct or negligence."

20. The Full Bench answered the questions as contained above as under:-

"21. We, therefore, hold that so long as there is a charge of grave misconduct and negligence, disciplinary proceedings initiated while the officer was in service could be continued under Article 2308 after he has retired from service on attaining the age of superannuation even if he was not placed under suspension before retirement. In the instant case, the charge sheet was served on the applicant before he retired. The applicant was not served with any order of suspension before his retirement. Therefore, for the purpose of Article 2308, in view of the explanation, the disciplinary proceedings would be deemed to have been commenced on the date the charge-sheet was served on him. The proceedings so deemed to have been initiated may be continued against the applicant under Article 2308 even after his retirement. If in such a proceeding he is found guilty of grave misconduct or negligence, an order either withholding or withdrawing whole or part of the pension permanently or for a specified period could be ordered. For continuing such proceedings, it is not necessary that there should be an allegation or charge of causing pecuniary loss to the Government. But if pecuniary loss is caused, the pecuniary loss also could be ordered to be recovered. However, in any such proceedings, none of the penalties



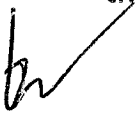
mentioned in Railway Servants (Discipline and Appeal) Rules or CCS (CCA) Rules or the corresponding rules can be imposed. Only an order withholding or withdrawing whole or part of pension and/or directing the recovery of pecuniary loss caused to the Government, if any, can be made."

21. The above decision had been accepted by the Government and the Ministry of Personnel had, in pursuance thereof, passed the following order based on the above said judgment:-

"Disciplinary proceedings can continue after retirement even in case where there is no pecuniary loss:- The question whether disciplinary proceedings pertaining to a serious or grave act of misconduct/negligence committed by a Government servant can be continued or instituted in terms of Rule 9 of CCS (Pension) Rules, 1972, or other corresponding rules, even if no pecuniary loss was caused to the Government, has been the subject matter of a number of Court/Tribunal cases. Because of the fact that divergent views were expressed by different Courts and the Benches of the Central Administrative Tribunal, this issue was referred to a Full Bench of the Central Administrative Tribunal, in case of Amarjit Singh v. Union of India (Administrative Tribunal Reporter 1988 (2) CAT 637. The Full Bench after examining the matter at length, have held that institution/continuance of the proceedings is not dependent upon any pecuniary loss being occasioned to the Government. Even in the absence of any pecuniary loss, the pension of a pensioner can be withheld or withdrawn in whole or part, after following the prescribed procedure, for an act of misconduct/negligence committed while in service.

2. Ministry of Agriculture, etc., are requested to bring the above ruling of the Full Bench of CAT to the notice of all concerned so that the same is appropriately referred to in all those cases where interpretation of Rule 9 of CCS (Pension) Rules, 1972 and other analogous rules is involved."

[G.I., Dept. Of Per. & Trg., O.M. No. 28027/3/87-Est.(A), dated the 29th June, 1990.]



22. The Full Bench also expressed in one of the paragraphs as under:-

"If the disciplinary proceedings were initiated while the officer was still in service, he could have been visited with any of the penalties mentioned in the Discipline and Appeal Rules. In such a case, for imposing the appropriate penalties specified in the Rules, it was enough he was found guilty of 'misconduct'. But if these proceedings are continued after retirement of the public servant concerned for ordering withholding or withdrawing of pension or any part thereof, whether permanently or for a specified period, and for ordering the recovery from pension of the whole or part of any pecuniary loss caused to Government, the officer must be found to be guilty of 'grave misconduct' or negligence. A mere finding of misconduct may not be sufficient; it must be 'grave misconduct' or negligence. And for ordering the recovery from pension any pecuniary loss caused to the Government, there should be a further finding that it was caused on account of grave misconduct or negligence. Continuance of the proceedings already initiated do not in that sense constitute disciplinary proceedings. They are only deemed to be proceedings under this article. The former disciplinary proceedings which are deemed to be proceedings under Article 2308 are to be continued and concluded by the same officer who commenced them in the same manner as the disciplinary proceedings. The procedure laid down for the conduct of disciplinary proceedings is intended to ensure a fair and reasonable opportunity to the officer concerned consistent with the Rules and principles of natural justice to defend himself. It is for that purpose that those proceedings are required to be continued in the same manner as the disciplinary proceeding; but thereby they do not constitute disciplinary proceedings as such which may lead to the imposition of any of the penalties specified in the Railway Servants (Discipline & Appeal) Rules or corresponding CCS (CCA) Rules. The only consequence of the continuance of these proceedings and a finding that the officer is guilty of grave misconduct or negligence is that the competent authority may order withholding or withdrawing of pension and/or recovery of pecuniary loss caused to the Government. Neither Articles

2308 and 2308-A, nor Rule 9 of CCS (Pension) Rules lay down that for continuance of proceedings under these provisions, the public servant concerned should have been placed under suspension. If a public servant is placed under suspension and is not allowed to retire, he continues in service. In such an event, the disciplinary proceedings already initiated may not only continue but any of the penalties specified in the Rules may be imposed. If a public servant against whom disciplinary proceedings are initiated was not placed under suspension, such public servant, on attaining the age of superannuation automatically ceases to be in service and therefore, by continuing the proceedings no penalty can be imposed. Having retired, such officer is entitled to receive pension for his past service. The above referred provisions empower the competent authorities to continue these departmental proceedings for the purpose of ordering withholding or withdrawing whole or part of pension and for recovering pecuniary loss. These provisions proceed upon the postulate that the public servant who is no longer in service, having retired is only entitled to pension; but if he is found to guilty of grave misconduct or negligence only his pension can be touched and no other penalty can be imposed. Article 2308 does not prescribe that if it is intended to continue the disciplinary proceedings, a public servant should not be allowed to retire on attaining the age of superannuation or that he should be placed under suspension before retirement. Neither on the wording of these provisions nor on principle can it be said that unless a public servant is placed under suspension, disciplinary proceedings already initiated cannot be continued after retirement even for the purpose of ordering whole or part of the pension to be withheld or withdrawn or for ordering recovery of whole or part of the pecuniary loss occasioned to the Government. These proceedings can be continued only for the aforesaid purpose even after retirement of public servant although he was not placed under suspension and was allowed to retire."

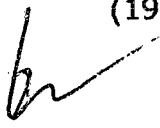
23. It may be seen therefrom that when an individual had been placed under suspension and was not allowed to retire, he continues in service. In

bn

such an event, the disciplinary proceedings already initiated may not only continue but any of the penalties specified in the Rules may be imposed.

24. In the instant case, there was no suspension but by operation of law, there was a deemed suspension. For, Rule 10 (4) of the CCS(CC&A) Rules would spring up and operate once the order of dismissal had been set aside on technical grounds by the Court. As stated in para 2(c) above, the respondents had, in pursuance of order dated 22-10-1992 in TA No. 12/89 placed the applicant under '**deemed suspension**' w.e.f. 25-11-1980. And, the applicant was dismissed from service while in service vide order dated 2nd August, 1996 (Annexure A 5). It was this order that was set aside by order dated 7th August, 2000 in OA 1832 of 1997 (Annexure A-6) of the Principal Bench and this decision is posterior to the date when the applicant had reached the age of superannuation. Once the penalty order of dismissal from service is set aside, again, the provisions of deemed suspension from the date of dismissal till the conclusion of the proceedings would come into play. Thus, that the applicant had attained the age of superannuation by the time the order was passed would not in any way make any change, as suspension could continue even after retirement as per the full bench judgment as cited above.

25. At this juncture, facts in the case of Union of India v. V.B. Hajela, (1997) 10 SCC 531 which resemble the case of the applicant in this O.A. to



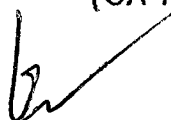
a certain extent with identical situation upto a certain stage and may be considered. The facts of the case therein and the decision therein by the Apex Court are as under:-

1. The respondent was employed as Inspecting Officer (Textiles) in the Department of Supply of the Government of India. Disciplinary proceedings were initiated against him on the basis of a charge-sheet dated 27-2-1987. After holding an inquiry into the charges the penalty of compulsory retirement from service with effect from 27-5-1988, was imposed on the respondent by order dated 26-5-1988. The respondent filed an application (OA No. 604 of 1988) challenging the said order of compulsory retirement before the Central Administrative Tribunal, (hereinafter referred to as "the Tribunal"). The said application of the respondent was allowed by the Tribunal by judgment dated 8-8-1991 on the ground that the copy of the report of the Inquiry Officer had not been furnished to the respondent before the disciplinary authority passed the order of punishment. While setting aside the order of punishment the Tribunal gave the following directions:

"Accordingly this application is allowed and the impugned punishment order dated 26-5-1988 is quashed and set aside. However, we clarify that this decision will not preclude the disciplinary authority from revising the proceedings and continuing with it in accordance with law from the stage of supplying the Inquiry Report."

During the pendency of the said proceedings before the Tribunal the respondent had attained the age of superannuation and stood retired on 28-2-1991.

2. Thereafter by order dated 19-2-1992, the respondent was treated as deemed to have been placed under suspension from the date of compulsory retirement with effect from 27-5-1988 to 28-2-1991, under Rule 10(4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter referred to as "the Rules") and sanction was accorded by the President under Rule 9(2)(a) of the Central Civil Services (Pension) Rules, to continue the proceedings against the respondent. The respondent filed a second petition (OA No. 321 of 1992) before the Tribunal challenging the said



order dated 19-2-1992 regarding his deemed suspension. The said application has been allowed by the Tribunal by the impugned judgment dated 5-8-1992. The Tribunal has held that sub-rule (4) of Rule 10 could not be invoked against the respondent because he had not been suspended from service at any stage during the pendency of the earlier disciplinary proceedings. The Tribunal has, therefore, directed that the order of suspension shall not be enforced as against the respondent. Feeling aggrieved by the said decision of the Tribunal the appellants have filed this appeal.

3. Sub-Rules (3) and (4) of Rule 10 of the Rules read as under:

"(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a government servant under suspension is set aside in appeal or on review 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 government 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 a 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 government servant shall be deemed to have been placed under suspension by the appointing 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."

4. A perusal of the said provisions shows that sub-rule (3) deals with a situation where the penalty of dismissal, removal or compulsory retirement from service is set aside in appeal or on review and provides that if the government servant was under



suspension the order of suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement. Sub-rule (4) deals with a situation where the penalty of dismissal, removal or compulsory retirement from service is set aside or declared null and void in consequence of or by a decision of a Court of Law and provides that in such a case if the disciplinary authority, on a consideration of the circumstance of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement has been imposed, the government servant shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, removal or compulsory retirement.

5. In *Nelson Motis v. Union of India* (1992) 4 SCC 711 this Court has noticed this difference between language used in sub-rules (3) and (4) and has held: (SCC p.716, para 8)

"8. ... The comparison of the language with that of sub-rule (3) reinforces the conclusion that sub-rule (4) has to be understood in the natural sense. It will be observed that in sub-rule (3) the reference is to 'a government servant under suspension' while the words 'under suspension' are omitted in sub-rule (4). Also sub-rule (3) directs that on the order of punishment being set aside, 'the order of his suspension shall be deemed to have continued in force' but in sub-rule (4) it has been said that 'the government servant shall be deemed to have been placed under suspension'. The departure made by the author in the language of sub-rule (4) from that of sub-rule (3) is conscious and there is no scope for attributing the artificial and strained meaning thereto. In the circumstances it is not permissible to read down the provisions as suggested. We, therefore, hold that as a result of sub-rule (4) a government servant, though not earlier under suspension, shall also be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, provided of course, that the other conditions mentioned therein are satisfied."

In view of said decision in *Nelson Motis* it must be held that the Tribunal was in error in holding that sub-rule (4) of Rule 10 could not be invoked because the respondent was not placed

bn

under suspension earlier.

6. *Shri M.N. Shroff, the learned counsel appearing for the respondent, has, however, submitted that in the present case the respondent had already retired prior to the judgment of the Tribunal in the earlier proceedings setting aside the order of compulsory retirement and that since the respondent had already retired from service the provisions of sub-rule (4) of Rule 10 were not applicable and the respondent could not be deemed to have been placed under suspension. Shri Shroff has placed reliance on the decisions of this Court in V.P. Gidroniya v. State of M.P. (1970) 1 SCC 362 and H.L. Mehra v. Union of India (1974) 4 SCC 396 .*

7. *It is no doubt true that the respondent stood retired on 28-2-1991 prior to the judgment of the Tribunal dated 8-8-1991 in the earlier proceedings whereby the order of compulsory retirement was set aside. But by the said judgment the Tribunal had only set aside the order imposing the penalty of compulsory retirement. The disciplinary proceedings that had been initiated against the respondent under the charge-sheet dated 27-2-1987 were not quashed and remained still pending. By its judgment dated 8-8-1991 the Tribunal had indicated that the said decision would not preclude the disciplinary authority from reviving the disciplinary proceedings and continuing with it in accordance with law from the stage of supplying the Inquiry Report. In these circumstances, it was open to the disciplinary authority to continue the said proceedings from the stage of supplying the Inquiry Report. The disciplinary authority decided to do so and the necessary sanction under Rule 9(2)(a) of the Central Civil Services (Pension) Rules was accorded by the President, as is evident from the order dated 19-2-1992. Thus both the requirements for the applicability of sub-rule (4) of Rule 10 were satisfied in the present case and the respondent has to be treated as deemed to have been placed under suspension with effect from 27-5-1988, the date of the passing of the original order of compulsory retirement, in view of sub-rule (4) of Rule 10 of the Rules. The decisions on which reliance has been placed by Shri Shroff have no application in the present case.*

8. *In V.P. Gidroniya v. State of M.P. this Court has laid down the principle that if the master has a power to suspend his servant pending an enquiry into his misconduct, either in the*

contract of service or in the statute or the rules framed thereunder governing the service, an order of suspension passed by the master has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay any wages during the period of suspension. Such a power to suspend the contract of service cannot be implied and therefore, if in the absence of such a power in the contract, statute or rules, an order of suspension is passed by the master, it only forbids the servant to work without affecting the relationship of master and servant, and the master will have to pay the servant's wages. As indicated by this Court in *H.L. Mehra v. Union of India* the said principle stands modified by sub-rules (3) and (4) of Rule 10 of the Rules. In *H.L. Mehra* this Court has considered whether the impugned order of suspension could be sustained under sub-rule (4) of Rule 10 and it was found that out of the two conditions which are required to be satisfied for the application of sub-rule (4) the second condition was not satisfied in that case because the subsequent inquiry was not conducted on allegations on which the penalty of dismissal was originally imposed. In the instant case, as mentioned earlier, both the conditions that are required for application of sub-rule (4) of Rule 10 are satisfied.

9. In the result, the appeal is allowed, the impugned judgment of the Tribunal dated 5-8-1991 is set aside and OA No. 321 of 1992 filed by the respondent is dismissed. No order as to costs."

26. The difference in the above case and the instant case is that after the order of dismissal was set aside, the respondents had by a positive action, invoked the provisions of rule 9(2) of the CCS (pension) Rules. In the instant case, the provisions of Rule 10(4) was impliedly invoked. The question then arises for consideration is whether non issue of an order to the effect that the continuance of the proceedings after age of superannuation would amount to waiver or estoppel of the respondents to continue with the

proceedings. The answer is in negative, in view of the fact that when the Tribunal had set aside the order, provisions of Rule 10(4) automatically apply and it cannot, therefore, be argued that there is an element of estoppel for, as held by the Apex Court in the case of **MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd., (2004) 9 SCC 619**, "*There is no estoppel against a statute.*"

27. Once the proceedings continue and the individual is under deemed suspension even beyond the age of superannuation, as held by the Full Bench, the proceedings may not only continue but any of the penalties specified in the Rules may be imposed. Since dismissal is one of the penalties specified, the same was imposed in this case, vide the order of the disciplinary authority dated 20-05-2002. Thus, the applicant is deemed to be under suspension till the date of passing of the final order and the dismissal order is effective with effect from the date of issue of the same, for, it is trite law that an order of dismissal cannot but have prospective effect, vide decision of the Apex Court in the case of R. Jeevaratnam v. State of Madras, (1966) 2 SCR 204 wherein the Apex Court has held as under:-

"An order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The Court cannot

pass a new order of dismissal, but surely it can give effect to the valid and severable part of the order."

28. Also see order dated 10th June, 1933 read with P.M.G. Madras letter dated 31st December, 1957 which reads as under:-

"Dismissal with retrospective effect not permissible.-
An order of dismissal cannot be given effect to retrospectively from the date of commencement of suspension but only from the date on which the order of dismissal is passed.

Whenever orders of dismissal/ removal are passed on a Government servant, consequent on his desertion or conviction in a Court of Law or for any other reason, the orders should be made effective only from the date of issue of the orders and not from an earlier date.

{D.G., P&T's Memo No. ESB III-7/32, dated the 10th June, 1933 and P.M.G., Madras, Letter No. IC/N-168/50, dated the 31st December, 1957.}"

29. Dismissal from service even after the age of retirement is permissible in the Defence Forces, vide *Union of India v. R.K.L.D. Azad*, 1995 Supp (3) SCC 426. Of course, in that case there has been a specific provision to continue the Court Martial Proceedings even after retirement, for an offence committed by the defence personnel during their service.

30. That continued unauthorised absence has been held to be a grave misconduct vide the Apex Court's judgment in the case of ***Union of India v. B. Dev*, (1998) 7 SCC 691**. Counsel for the applicant argued that provisions of Rule 9 of the Pension Rules can be pressed into service

when there is an element of loss to the exchequer on account of the misconduct of the applicant. This is not correct. It has been held by the Apex Court in the case of ***Union of India v. B. Dev, (1998) 7 SCC 691*** that provisions of Rule 9 could be invoked even if there is no pecuniary loss to the exchequer. The Apex Court had held therein, "*The contention of the respondent, therefore, that Rule 9 cannot be invoked even in cases of grave misconduct unless pecuniary loss is caused to the Government, is unsustainable.*"

31. Thus, in so far as dismissal order is concerned, the same cannot be faulted with on the basis of the contention that the same was passed after retirement. However, the applicant ~~was~~ was under deemed suspension from the date of order dated 25-11-1980 to 20th May, 2002 and he is entitled to subsistence allowance for the said period at the rates applicable. The cause of action in regard to claim of subsistence allowance is one of recurring nature, as held by the Apex Court in the case of ***P.L. Shah v. Union of India, (1989) 1 SCC 546***, wherein the Apex Court has held, "*...we feel that the cause of action in respect of such prayer arises every month in which the subsistence allowance at the reduced rate is paid.*"

32. Considering the above provisions of law and the decisions of the Court, it is clear that the authorities have acted within their powers in passing the order of dismissal of the applicant vide order dated 20th May, 2002.

However, their failure to make payment of subsistence allowance during the period of deemed suspension is illegal. If the respondents have already paid subsistence allowance during the period of deemed suspension when the applicant was in service i.e. Between 25-11-1980 till 05-08-1996, the applicant would be eligible for subsistence allowance thereafter till 20-05-2002 and if no amount has been paid as subsistence allowance, the applicant is entitled to the same right from the first day of deemed suspension till 20-05-2002.

33. The OA is, therefore, partly allowed. While upholding the orders dated 20th May, 2002 and subsequent orders of the appellate and reivisional authority, it is held that the applicant is entitled to the grant of subsistence allowance for the period from date of his initial dismissal order i.e. 25.11.1980 (date of order of the disciplinary authority dismissing the applicant from service which stood set aside by the Tribunal's order dated 23-09-1981 in TA 12/89) and 20-05-2002, the date of order of dismissal passed in pursuance of the above subsequent order of the Tribunal. Any amount already paid as subsistence allowance in respect of this period would be adjusted from this amount. However, it is made clear to the respondents that the subsistence allowance shall be worked out on the pay of the applicant, taking into account the revisions for the pay scale of the applicant in the wake of Pay Commission Recommendations, in 1986 and 1996, as held by the Apex Court in the case of **Umesh Chandra Misra v. Union of**

India, 1993 Supp (2) SCC 210, wherein the Apex Court has held as under:-

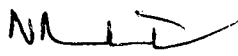
"We further direct that the subsistence allowance be paid on the basis of the revised scale of salary, if any, which was prevalent and due to the appellant during the relevant period for which the subsistence allowance is directed to be paid. "

34. Further, the amount due to the applicant shall be worked out in accordance with the provisions FR 53 and attendant government orders (eg Ministry of Finance OM dated 17th June, 1958 relating to certificate for making payment etc., as well as fact of gainful employment during the period of suspension etc.,) as well as the ratio in the above judgment of the Apex Court. While making the payment, provisions of Sec. 89 of the I.T. Act (Staggering of the income to various years when the amount accrued to be paid) or any other provisions as applicable shall also be kept in view.

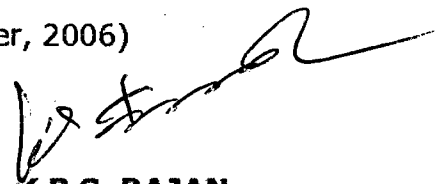
35. This order shall be complied with, within a period of four months from the date of communication of this order.

36. No costs.

(Dated, the 22nd September, 2006)



N. RAMAKRISHNAN
ADMINISTRATIVE MEMBER



K B S RAJAN
JUDICIAL MEMBER