

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

OA No.124/2013

Tuesday, 14th day of this the day of October, 2014.

CORAM

Hon'ble Mr.M.Kanthaiah Member (J)
Hon'ble Mr.P.K.Pradhan, Member (A)

V. Padmavathy, age 50 years
 W/o Late K.Thangamani
 (Ex.Sr.Trackman, DTM/3 Engineering Dept.,
 Palakkad Division, Southern Railway)
 Residing at 21 Murandammaan Koil Street
 Ganesapuram, Podannur-23
 Coimbatore.

Applicant

(By Advocate: Mr.U.Balagangadharan)

Versus

1. The Senior Divisional Engineer (Sr.DEN, East)
 Palghat Division, Southern Railway,
 Palakkad-678 001.
2. The Additional Railway Manager
 Southern Railway
 Palakkad Division
 Palakkad-678 001.
3. Sr. Divisional Personnel Officer
 Southern Railway, Palakkad Division
 Palakkad-678 001

Respondents

(By Advocate: Mr.Thomas Mathew Nellimoottil)

The Original Application having been heard on 24th September, 2014,
 this Tribunal delivered the following order on 14.10.2014.

ORDER

Hon'ble Mr.P.K.Pradhan, Member (A)

The applicant has filed this Original Application u/s 19 of the
 Administrative Tribunals Act, 1985 seeking the following reliefs:-

[Signature]

a. Call for the records leading to Annexure A5 and A8 and set aside the same as legally unsustainable.

b. Direct the first respondent to issue orders reinstating the husband of the applicant notionally and treat him to have passed away while in service.

c. Direct the first respondent to grant enhanced family pension and other benefits treating that the husband of the petitioner died while in service.

d. Declare that the husband of the applicant died while in service due to ailment and he remained on the rolls of Railways till his death.

2. Brief facts of the case are as follows:-

The husband of the applicant Late Sri K. Thankamani was working as Sr. Track man under Engineering Department of the Railways in the Palakkad Division. On account of his suffering from HIV infection, he stopped attending the office from 24.6.2006 onwards. Due to his unauthorized absence, the respondent authorities initiated disciplinary proceedings against him, which was held ex-parte since he did not attend the inquiry and the inquiry officer found the charges as proved. Thereafter, based on the inquiry report, an order of removal from service was imposed on him. According to the applicant, she was not aware of the development as she was under the bonafide impression that he was attending office away from the house due to lack of self-confidence and difficulty to face relatives and neighbours on account of the illness. The applicant came to know that her husband was being treated at Assisi Snehalaya, Coimbatore, a centre for HIV/AIDS patients. The condition of Thankamani deteriorated in March, 2011 and as such he had to be admitted to Coimbatore Medical College where he breathed his last on 6.3.2011. The applicant has produced documents relating to her husband's illness and death (Annexures A1,A2 & A3). According to the applicant, she received a communication in the month of March, 2012 stating that her husband was sanctioned compassionate allowance of Rs.3500/- per month with effect from the date of death (Annexure A4). On inquiries, it was revealed to the applicant that her husband was removed from service as per the penalty advice dated 1.10.2009 (Annexure A5). The applicant being the legal



representative of the deceased Railway servant submitted an appeal under Rule 17 of the Railway Servants (Discipline and Appeal) Rules (Annexure A7). Since the appeal was not considered, she approached this Tribunal in OA No.569/2012 which was disposed of with directions to the second respondent to consider and pass orders on the pending appeal. Thereafter, the second respondent considered the appeal and rejected the same by order dated 14.1.2013 (Annexure A8). Hence the present OA.

3. In their reply, the respondents have submitted that the deceased employee was placed under sick list from 22.5.2006 to 22.6.2006 and was declared fit on 23.6.2006 by the Senior Divisional Medical Officer, Southern Railway, Podanur. (Annexure R-1). If the applicant's husband had any serious health problem on that day, he would not have been declared fit. After working on 23.6.2006, the applicant's husband went on unauthorized absence with effect from 24.6.2006 without intimating the reasons for his absence. When the applicant knew that her husband was ill and not in a position to report for duty, she should have informed the controlling officer of the same and taken proper course of action in the matter of producing medical certificates etc. In view of the fact that the applicant and her two children were depending on the deceased for their livelihood, the contention made by the applicant in the OA that she was under the bona fide impression that the deceased was attending the office seemed absurd. The applicant's deceased husband was proceeded against by issuing a charge memo, a copy of which was sent to his residential address by registered post. This had been returned undelivered stating that the "addressee left". Thereafter, a copy of the charge memo was exhibited on the notice board of the employee's workplace in the presence of two co-workers, as per the laid down procedure. Similarly, all the communications like appointment of inquiry officer, fixing date and time for conducting the inquiry, forwarding of inquiry report etc had been sent to the employee's residential address at the appropriate time and received back undelivered. Thus all the formalities laid down in the Railway Servants (Discipline & Appeal) Rules, 1968 had been followed before imposing the penalty of removal from service



on the applicant's husband. The Disciplinary Authority after considering the case with due regard to the family and dependents of the ex-employee and in exercise of the discretionary powers vested in him had sanctioned compassionate allowance to the deceased at the rate of two third of pension from 27.10.2009 vide communication dated 8.3.2010 (Annexure R-3). However, no claim was preferred by the employee for sanction of pension. According to the respondents, the applicant never bothered to inquire about the details of the postal letters sent to her house by the Railway Administration even when she was aware that her husband was not available at home for a long period. Only after the death of her husband, the applicant submitted a representation (Annexure R4) to the third respondent stating that her husband was missing from 24.6.2006 onwards and that his whereabouts were traced from Coimbatore Medical College in February 2011. In response to her representation, she was informed that her husband was sanctioned compassionate allowance as he was removed from service. Further she was advised to submit the required documents for sanctioning family pension and other admissible benefits. The contention of the applicant that she was informed that her husband was sanctioned compassionate allowance only through Annexure A4, is not true. Further, the contention of the applicant that her husband died while in service is also not tenable as her husband had remained unauthorizedly absent for years together. The OA lacks merit and deserves to be dismissed, contend the respondents.

4. Heard learned counsel for the parties. Learned counsel for the applicant highlighted the points made in the OA and submitted that the entire disciplinary proceedings was done without the knowledge of the deceased railway servant. He further contended that the order removing the deceased employee was passed without following due procedure. No notice was served on the employee. Simply by sending notice under registered post cannot be stated to be a proper and complete service of notice. Though the employee did not attend the office, yet it cannot be construed as misconduct or willful absence. The appeal of the applicant was also disposed of in a routine manner



without application of mind. He emphasized that neither the absence was willful nor the service of notice at any stage of the proceedings was proper. He referred to provision relating to communication of orders, wherein it has been stated thus:

"In case the railway servant concerned does not accept the Order/Notice and the same is returned undelivered by the Postal Authorities with the remarks such as "Addressee not found" or Refused to Accept" etc, it shall be pasted on the Notice Board of the railway premises in which the employee concerned was working last, as well as in a place in the last noted address of the railway servant."

5. He further submitted that though the authorities claim that they had pasted the notice on the Notice Board of the applicant's husband's workplace, they had never pasted such notice on the last known address of the applicant. Had that been done, the applicant would have come to know about the development. Learned counsel for the applicant also referred to the following decisions of the Apex Court to buttress his argument:-

[1] *"In a Departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct."* [2012 KHC 4118 – Krushnakant B. Parmar v. Union of India and another]. CA No.2106 of 2012.

[2] *"7. As would appear from the perusal of that decision, the law with regard to "Communication" and not "Actual Service" was laid down in the context of the order by which services were terminated. It was based on a consideration of the earlier decisions in State of Punjab v. Khemi Ram, AIR 1970 SC 214; Bachhittar Singh vs. State of Punjab, 1962 Supp (3) SCR 713: AIR 1963 SC 395: State of Punjab vs. Amr Singh Harika, AIR 1966 SC 1313 and S. Partap Singh vs. State of Punjab, 1964 (4) SCR 733, AIR 1964 SC 72. The following passage was quoted from S. Pratap Singh's judgment (supra):*

"It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned Government Servant, it must be held to have been communicated to him, no matter when he actually received it."

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10. Where the disciplinary proceedings are intended to be initiated by issuing a charge sheet, its actual service is essential as the person to whom the charge sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show cause notice is issued, the employee is called upon to submit his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "communication" cannot be invoked and "Actual Service" must be proved and established. It has already been found that neither the charge sheet nor the show cause notice were ever served upon the original respondent, *Dinanath Shantaram Karekar*. Consequently, the entire proceedings were vitiated." [1998 KHC 1207 – Union of India and Others v. *Dinanath Shantaram Karekar and Others*] C.A.No.1477 of 1993.

[3] "4. After hearing learned counsel for the parties and on perusal of the record, we find merit in the appellant's contention. The report of the Enquiring Authority was sent to the appellant at his Ahmedabad address by the Ministry of Home Affairs of the Union Government under a covering letter dated August 6, 1987 under Registered Acknowledgment Due, and the same was received back in the Ministry on August 24, 1987 with an endorsement that the appellant was not found at the address. These facts are clear from Annexure C. it is evident that the inquiry report was not received by the appellant till August 24, 1987, but meanwhile the order of dismissal was passed on August 14, 1987. The order of dismissal was thus passed before the postal cover was received back in the Ministry. In these circumstances, it is not possible to uphold the finding of the Central Administrative Tribunal. No doubt when a registered cover with acknowledgment due is served on the addressee a presumption would arise about its service but that presumption is rebuttable. In the instant case, Annexure C itself shows that the postal cover was returned back and the same was received back in the Ministry on August 24, 1987. There is no material on record to show that the registered cover was tendered to the appellant before August 14 or that he deliberately avoided service of the letter. Admittedly, the postal cover could not be served on the appellant and he has stated on oath that the registered cover was never tendered to him. In these circumstances, no presumption could ever arise. It, therefore, follows that the copy of the enquiry report was not supplied to the appellant prior to the imposition of penalty of dismissal." [1993 KHC 1008 – *R.K.Vashisht v. Union of India and Others*] C.A.No.3161 of 1991.

6. Learned counsel for the applicant contends that neither the copy of the inquiry report nor the penalty order was served on the applicant's husband as provided for under the rules. Therefore, the entire proceedings are flawed both on account of actual service not being done and because of the fact that the absence of the deceased employee was not willful as he was suffering from a serious ailment. Because of the social stigma, he remained away from home



and silently suffered till his death. Therefore, the applicant is entitled to the reliefs as sought for, contends the counsel for applicant.

7. Learned counsel for the respondents highlighted the points made in the reply statement and submitted that the applicant's husband was given all opportunities in the disciplinary proceedings before the order of removal was passed. If the employee was missing, then she could have lodged a complaint with the police. Rather she remained under the impression that her husband was away from home. The applicant did not bother to report to the office about his whereabouts for long 5 years. The applicant could have ascertained what were all the communications sent to her local address on several occasions and tried to contact the railway authorities. She did not do any of these. The respondent authorities have followed due procedure in the disciplinary proceedings and have also sanctioned compassionate allowance out of compassion for the family. There is no merit in the OA and the same needs to be dismissed, contends the counsel for the respondents.

8. We have carefully considered the facts of the case and also perused the records. We have also perused the records pertaining to the disciplinary proceedings, submitted by the respondents. It is an admitted fact that the deceased husband of the applicant stopped attending the office from 24.6.2006 onwards, for which he was proceeded against by the respondent authorities, leading to imposition of penalty of removal from service. From the documents submitted, it is clearly evident that the deceased employee was suffering from HIV. Initially, he was on sick leave from 22.5.2006 to 22.6.2006 and attended office on 23.6.2006. Thereafter he remained absent presumably for his treatment till he breathed his last in March 2011.

9. The issue that arises here is whether the absence from duty by the deceased employee was willful and whether the disciplinary proceeding which was held ex parte, is proper in the absence of actual service of notice on the charged official. On the issue as to whether the absence was willful or not, it is



true that the deceased husband of the applicant remained absent from duty without informing the respondent authority. The applicant claims to be ignorant of his whereabouts till she was informed at his last stage i.e. In Feb, 2011. In this context, one has to appreciate the circumstances leading to the unauthorized absence. In spite of all the advocacy and awareness created in the society, HIV disease is still considered a social stigma in many places now, not to speak of the year 2006, i.e. eight years back when the deceased employee fell sick suffering from HIV, a dreaded disease. May be out of fear of the social stigma or being unable to face the society, neighbours, colleagues, the deceased employee might have gone out and got himself admitted for treatment in an HIV Counseling Centre quietly. It might also be possible that the applicant or the family members had an idea about his whereabouts but preferred to remain quite considering the social stigma. Nevertheless, the absence for which he was proceeded against was on account of the illness which ultimately resulted in his death. Considering the nature of the ailment and the stigma attached to it in society at that point of time, notwithstanding the awareness created, the employee might have preferred to remain quite rather than informing the authorities about his ailment which would then be known to all. Therefore, whether the absence from duty was a willful absence or not is debatable. It is true that the entire facts were not known to the disciplinary authority when he passed the penalty order in 2009. But these facts were known to the appellate authority who considered the appeal preferred by the applicant subsequent to the death of the employee. He could have considered the issue in its proper perspective.

10. On the second issue of actual service of various notices right from charge memo to penalty advice, the rules as highlighted by the applicant provides for pasting of notice on railway premises in which the employee concerned was working last as well as in the last known address of the railway servant if the notice sent to the railway servant is returned undelivered with remarks such as "addressee not found" or "refused to accept". In this case, on each occasion, the notice sent was received back unserved. The notices were



pasted on the tool box. On none of the occasion, it was pasted on an appropriate place in the last known address of the railway servant. Had it been done, the family of the deceased railway servant would have come to know of the same. The notice of imposition of penalty was also not served by pasting it at the last known address though it was clearly mandated by Railway Board's circular No.E.(D&A) 69 RG-6-29 dated 19.11.1971 as mentioned in Part VII of The Railway Servants (Discipline & Appeal) Rules, 1968.

11. From the records pertaining to the disciplinary proceedings, submitted by the respondents, it appears that a note was put up by the office of ADEN, which reads thus:

"Seen copy of the enquiry proceedings of all the sittings, and the DAR enquiry report to CE, through SE/PW/PTJ directing CE to submit his reply/explanation thereon, within a week of the receipt.

ADEN(PGT)

OS/AEN/PGT"

Then a communication was sent to Sri K.Thangamani through SE/PW/W/PTJ dated 1.12.2008 which reads thus:-

"Sub: Unauthorized absence of Sri K.Thngamano, Track man under SE/PWay/W/PTJ.

Ref: SF.5 No.PGT/38/DAR/KT dt.26.4.2007.

Further to the above, copies of the inquiry report and proceedings are sent herewith. Please offer your remarks, if any, within a week on receipt of this letter.

Encl: Copies of three sittings of the inquiry proceedings and report.

Sd/-

ADEN/PGT

Copy to: SE/PWay/W/PTJ. He is requested to serve the same to the party and send the acknowledgment to this office.

Noting made in ink.

Received.

Sd/-

3/12/2008

Viswanathan

Store Watchman

PW1/W/PTJ

as

Encl: Handed over to P.Paneer Selvam, Sr T/M on 4/12/08"

Thereafter, the next office noting reads as follows:-

"Sub: vetting of Penalty Advice.

Ref: F111/110

Sri K.Thangamani has been appointed as Track man by an order issued by DPO vide D.O. No. DP 564/Screening/87 dt. 25.1.88. In this case, DPO is the appointing authority. Hence DEN/Sr.DEN can only impose the penalty of removal from service on this employee.

Hence the draft penalty is not vetted. The case file may please be put up to the competent authority for passing fresh orders please.

*Sd/-
OS/DAR/20.5.09.*

*APO-I/
Sd/- 20.5.09*

21.5.09

ADEN/PGT

Sr.DEN/PGT to kindly see the above observations and to pass suitable orders please.

*Sd/-
ADEN/PGT*

Sr.DEN/PGT.

.....
"Sub:DAR action against Sr.K.Thangamani, Track man(West/PT)
Ref: Charge memo No.PGT/38/DAR/KT of 26.4.07 (F.17)

Sri K.Thangamani, Track man who was under unauthorized absence from 24.6.2006 to till date was taken up . DAR and ADEN/PGT proposed a penalty of "Removal from Service".

As ADEN/PGT is not empowered to issue the proposed penalty, penalty advice is put up for Sr.DEN/E/PGT's signature pl. (Folio No.116)

The speaking order is at Folio No.113.

Put up pl.

*Sd/-
OS/Estt 23.8.09*

Sr.DEN/East

Sd/-

25.8.09."

12. It is evident from the above notings that there is no record in the file to show whether the inquiry report and proceedings were actually served on the charged employee and how it was served. The disciplinary authority should have looked into this aspect before passing any order. But it seems that he

[Signature]

simply signed the file when proposed penalty was put up to him for signature. The office noting also shows that in the case of the charged official the DPO is the appointing authority. But since the office of the DEN initiated proceedings, it was pointed out by the office that he can impose only the penalty of removal from service on the employee, being a higher authority. Further the DAR and AOEN proposed the penalty of removal from service and also the penalty advice was put up for his signature. This indicates a clear lack of application of mind. It is clearly evident that there is no record of the inquiry report having been served on the charged employee and this aspect was completely overlooked by the disciplinary authority. Therefore, the contention made by the learned counsel for the applicant that the actual service on the charged employee has not been proved and established appears justified. If the inquiry report and copy of the proceedings had been served on the charged employee, even by pasting at his residence, at least the family would have come to know about the same and could have taken measures to locate the employee and informed the office. In any case, the charged employee was not given an opportunity to defend himself. This aspect ought to have been considered especially when the authorities were considering imposition of penalty of removal from service on the deceased employee.

13. Considering all the facts and circumstances of the case and perusal of the records relating to the disciplinary proceedings, we are of the view that the procedure laid down in the Railway Servants (Discipline & Appeal) Rules, 1968 has not been properly followed in this case as there is no record of the copies of the inquiry report and proceedings or even the order imposing the penalty having been served on the charged employee as per the provisions of rules. This would amount to denial of natural justice. Moreover, in circumstances explained earlier, it would be difficult to conclude that the absence was willful amounting to misconduct. Therefore, we are inclined to set aside the order imposing penalty of removal from service, dated 1.10.2009 (Annexure A5) and also the order of the appellate authority dated 14.1.2013 (Annexure A8). As the railway servant (husband of the applicant) is no more,



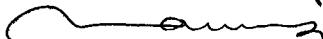
the question of his reinstatement would not arise. The deceased employee would also not be entitled for salary during the period of absence since he did not actually perform the duties, except for the period which can be regularized by sanction of leave at his credit. However, he would be entitled to normal pension and other admissible benefits available to him as per rules upon his death.

14. In view of the foregoing discussions, we set aside orders at Annexure A5 & Annexure A8 and direct the respondents to treat the deceased employee as being in service under the respondents authority till his death. His family is entitled to family pension and other pensionary benefits admissible under the rules. Necessary orders sanctioning the pension and other benefits as well as payment of the admissible amounts shall be made to the applicant/legal heir(s) of the deceased employee within a period of three months from the date of receipt of a copy of this order.

15. Accordingly, OA is allowed in terms of above directions. No order as to costs.



(P.K. PRADHAN)
Administrative Member



(M. KANTHAIAH)
Judicial Member

aa.