

CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH

Original Application No. 174 of 2011

Monday, this the 13th day of August, 2012

CORAM:

Hon'ble Mr. Justice P.R. Raman, Judicial Member

Hon'ble Mr. K. George Joseph, Administrative Member

K. Bhasmakara Rao IFS, (presently under suspension), aged 50 years,
S/o. K. Kumar Chowdhary, Forest Offices Quarters,
Vazhuthacaud, Trivandrum.

Applicant

**(By Advocates – Mr. O.V. Radhakrishnan, Sr.
Mr. P. Sanjay – Not present)**

V e r s u s

1. Union of India, represented by the Secretary, Ministry of Environment and Forest, Paryavaran Bhavan, Lodhi Road, New Delhi – 110 011.
2. The Union Public Service Commission, represented by the Secretary, UPSC, New Delhi – 110 001.
3. State of Kerala represented by Chief Secretary, General Administration (Sp. C Dept.), Govt. of Kerala, Secretariat, Trivandrum.
4. Principal Chief Conservator of Forests,
Forest Head Quarters, Vazhuthacaud, Trivandrum.
5. Mr. P.K. Surendran Asary (now retired), the then Principal
Chief Conservator of Forest, Forest and wildlife Department,
Vazhuthacaud, Thiruvananthapuram.

Respondents

**[By Advocates – Mr. A.D. Raveendraprasad, ACGSC (R1),
Mr. T.M. Nellimoottil, Nodal Counsel (R2) &
Mr. M. Rajeev, GP (R3&4)]**

This application having been heard on 13.08.2012, the Tribunal on the same day delivered the following:

ORDER

By Hon'ble Mr. Justice P.R. Raman, Judicial Member-

When the case was called upon today, none appeared on behalf of the applicant. Respondents counsel present. In the circumstances party's name was called. Absent. Original Application is dismissed for default.


**(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER**


**(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER**

"SA"

CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH

Original Application No. 174 of 2011

Friday, this the 12th day of April, 2013

CORAM:

Hon'ble Mr. Justice P.R. Raman, Judicial Member

Hon'ble Mr. K. George Joseph, Administrative Member

K. Bhasmakara Rao IFS, (presently under suspension), aged 50 years,
S/o. K. Kumar Chowdhary, Forest Offices Quarters,
Vazhuthacaud, Trivandrum.

..... **Applicant**

(By Advocates – Mr. O.V. Radhakrishnan, Sr., Mr. P. Sanjay – Not present)

V e r s u s

1. Union of India, represented by the Secretary, Ministry of Environment and Forest, Paryavaran Bhavan, Lodhi Road, New Delhi – 110 011.
2. The Union Public Service Commission, represented by the Secretary, UPSC, New Delhi – 110 001.
3. State of Kerala represented by Chief Secretary, General Administration (Sp. C Dept.), Govt. of Kerala, Secretariat, Trivandrum.
4. Principal Chief Conservator of Forests,
Forest Head Quarters, Vazhuthacaud, Trivandrum.
5. Mr. P.K. Surendran Asary (now retired), the then Principal
Chief Conservator of Forest, Forest and wildlife Department,
Vazhuthacaud, Thiruvananthapuram.

..... **Respondents**

**[By Advocates – Mr. A.D. Raveendraprasad, ACGSC (R1),
Mr. T.M. Nellimoottil, Nodal Counsel (R2) &
Mr. M. Rajeev, GP (R3&4)]**

This application having been heard on 12.04.2013, the Tribunal on the same day delivered the following:

ORDER

By Hon'ble Mr. Justice P.R. Raman, Judicial Member-

This case was dismissed for default once and thereafter it was restored. Today when the case was called upon, none appeared on behalf of the applicant. Respondents counsel present. In the circumstances party's name was called. Absent. Original Application is dismissed for default.

**(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER
"SA"**

**(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER**

1

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 174 of 2011

TUESDAY, this the 16th day of July, 2013

CORAM:

**HON'BLE Dr. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

K. Bhasmakara Rao IFS
(Presently under suspension),
S/o. K. Kumar Chowdhary,
Forest Officers Quarters,
Vazhuthacaud, Trivandrum.

... Applicant

(By Advocate Mr. O.V. Radhakrishnan, Senior with
Mr. P. Sanjay)

versus

1. Union of India, represented by the Secretary,
Ministry of Environment and Forest,
Paryavaran Bhavan, Lodhi Road,
New Delhi – 110 011.
 2. The Union Public Service Commission,
Represented by the Secretary, UPSC,
New Delhi – 110 001.
 3. State of Kerala represented by Chief Secretary,
General Administration (Spl. C Department),
Government of Kerala, Secretariat, Trivandrum.
 4. Principal Chief Conservator of Forests,
Forest Headquarters, Vazhuthacaud,
Trivandrum.
 5. Mr. P.K. Surendran Asary (Now retired),
The then Principal Chief Conservator of Forests,
Forest and Wildlife Department,
Vazhuthacaud, Thiruvananthapuram.
- ... Respondents

(By Advocate Mr. A.D. Raveendraprasad, ACGSC for R-1
By Advocate Mr. Thomas Mathew Nellimootil for R-2
By Advocate Mr. A. Renjith, Sr. GP with Mr. M. Rajeev, GP for R3&4)

This application having been heard on 01.07.2013, the Tribunal on
16-07-13 delivered the following:

1

ORDER**HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

The applicant, an IFS Officer of 1985 batch belonging to the Kerala cadre, while holding the post of Deputy Conservator of Forests (Marketing) at Forest Headquarters, Thiruvananthapuram, absented himself from duty from 13.08.2001 to 21.02.2005 (03 years, 06 months and 03 days). He had left Headquarters after submitting casual leave for five days from 13.08.2001 to 18.08.2001 to attend to his ailing father in Andhra Pradesh. This was followed by a number of applications / telegrams for extension of leave on personal and medical grounds upto 30.01.2005. Vide letters dated 06.06.2002 and 16.09.2002, the Government of Kerala directed the applicant to report for duty forthwith. As he failed to report for duty, disciplinary action was initiated under All India Service (Discipline & Appeal) Rules, 1969 [AIS (D&A) Rules, 1969], by issuing a charge memorandum dated 18.11.2002 which culminated in Annexure A-18 order dated 14.02.2011 imposing on the applicant the penalty of removal from service. Meanwhile, the applicant reported for duty on 22.02.2005 and waited for posting orders till 10.07.2007 when he was placed under suspension on registering a case for amassing disproportionate wealth, while he was on inter cadre deputation under the Government of Andhra Pradesh. The applicant also had failed to attend the Medical Board at Trivandrum General Hospital on 24.03.2003, to assess his medical fitness. The applicant has filed this O.A for the following reliefs :

- (i) To declare that the applicant was not removed from service lawfully and he is entitled to full pay and allowances for the period he was removed from service unlawfully till the date of his reinstatement into service;



- (ii) To call for the records leading to Annexure A-4 Articles of charges communicated to the applicant along with the covering letter dated 22.11.2002, Annexure A-10 Enquiry Report dated 05.08.2005, Annexure A-12 G.O. dated 10.07.2007 placing the applicant under suspension, Annexure A-16 Advice Memo dated 28.07.2010 of the 2nd respondent UPSC, Annexure A-17 Government letter dated 02.09.2010 and Annexure A-18 order dated 14.02.2011 of the 1st respondent and to set aside the same;
- (iii) To direct the respondents to reinstate the applicant into service consequent on the setting aside the order of removal passed against him as per Annexure A-18;
- (iv) To direct the respondents to treat the period between the date of his reporting for duty before the Additional Principal chief Conservator of Forest (Forest & Wildlife) Department, Thiruvananthapuram, on 22.02.2005 and the date of his suspension on 10.07.2007 as per Annexure A-12 as waiting period entitling full pay and allowances and to disburse full pay and allowances admissible to the applicant during the above period expeditiously and at any rate, within a period that may be fixed by this Hon'ble Tribunal;
- (v) To direct the respondents to grant the applicant full pay and allowances for the period he was removed from service unlawfully from 14.02.2011 till he is reinstated into service forthwith;
- (vi) Issue such other orders or directions that this Hon'ble Court may deem fit in the facts and circumstances of the case.


2. The applicant contended that the Enquiry Officer travelled beyond the scope of the enquiry ordered as per Annexure A-4 articles of charge dated 18.11.2002 and found guilty of charge not covered by the said Articles of charge. Therefore, Annexure A-10 enquiry report is illegal and one made without the authority of law. The Enquiry Officer appointed to enquire into the articles of charge is competent to make enquiry into the allegations contained in the articles of charge alone and he cannot expand the scope of the enquiry or to enquire into charges which are not covered by the articles of charge. The applicant had no opportunity to meet at any stage the charges framed by the Enquiry Officer in addition to those framed by the Government. The



applicant was not furnished with the documents sought by him in Annexure A-8 and he was disabled to defend himself properly. The articles of charge as framed in Annexure A-4 do not disclose any misconduct as such, but only disclose minor lapse of not applying in the prescribed proforma for leave. He had submitted formal leave applications on 21.06.2002 and supporting medical certificates on 29.06.2002. The findings recorded by the Enquiry Officer at (iv) and (vii) to (x) are outside the scope of enquiry initiated. Annexure A-4 articles of charge do not disclose any misconduct warranting penalty of removal from service on the applicant. Any enquiry conducted by the enquiring authority as per the articles of charge modified by it cannot properly form the foundation for the imposition of a punishment upon the applicant. Therefore, Annexure A-18 order of removal passed on the basis of Annexure A-10 enquiry report which is inherently indefensible and non est in the eye of law, is liable to be set aside. As he had reported for duty on 22.02.2005 with fitness certificate, there is no justification for not treating the period from 22.02.2005 to 10.07.2007, when he was placed under suspension, as waiting period which is to be treated as duty. As per Annexure A-13, the Government of Kerala on the basis of the enquiry report and the explanation submitted by the applicant tentatively decided to impose a minor penalty of 'censure' under Rule 8(2) of AIS (D&A) Rules, 1969 and the matter was placed before the Union Public Service Commission (UPSC) for advice. In the advice at Annexure A-16 tendered by the UPSC, reliance is placed on Rule 7(2) of All India Service (Leave) Rules, 1955 [AIS (Leave) Rules, 1955] as amended and concluded that all the documents clearly prove that the applicant had abstained from duty for a longer period than mentioned therein without any sanctioned leave. The UPSC was in the wrong in placing




reliance on Rule 7(2) of AIS (Leave) Rules, 1955, as Annexure A-4 articles of charge was not based on AIS (Leave) Rules, 1955. Rule 7(2) was amended on 19.10.2004 after Annexure A-4 charge was served on the applicant. Therefore, based on Rule 7(2) as amended and its conclusion that the action of the applicant is quite unbecoming of a responsible officer in the cadre of IFS and tantamount to grave dereliction of duty and misconduct overlooking the fact that the applicant remained absent due to illness of his father and on his medical ground is liable to be discounted as perverse. The State Government did not apply its mind independently and was acting mechanically on the opinion of the UPSC to impose the penalty of removal from service on the applicant. Annexure A-18 order dated 14.02.2011 of the 1st respondent ordering removal of the applicant from service is equally bad in law and void for non-application of mind. The penalty of removal from service imposed on the applicant is shockingly disproportionate to the lapses found against him that he did not apply for leave in the prescribed proforma and the applications for leave were not supported by the medical certificates. The genuineness of the medical certificates submitted by the applicant was not challenged or doubted. The representation made by the applicant was not considered by the UPSC resulting in violation of principles of natural justice. The action of the 5th respondent in not recommending the leave sought by him and non-intimation of the same to the applicant has caused serious prejudice and injury to him. The UPSC has erroneously arrived at the final conclusion of invoking sub-rule 7(2) of AIS (Leave) Rules, 1955, that deals with absence which tantamounts to deemed resignation. The State Government had never made a case of exigencies of public service at any point during the period from 13.08.2001 to 21.02.2005 under Rule 3 of AIS (Leave) Rules, 1955, to



refuse his leave. The enquiry report on which the disciplinary proceedings were concluded itself was vitiated with the appointment of Chief Conservator of Forests (P) as enquiry authority, who was the applicant's immediate superior and complainant against him. That the leave applications for the period from 13.08.2001 to 31.12.2002 were recommended by the Additional Principal Conservator of Forests to the Government proves the genuineness of the leave applied for. The UPSC had taken two and a half years to give their advice. It took almost six years to finalise the case after submission of the enquiry report in 2005 to the Disciplinary Authority.

3. The 3rd respondent (the State of Kerala) submitted that the applicant was not granted the leave for want of proper form of leave application and other supporting documents. The applicant has been removed from service with effect from 14.02.2011 following due procedures and after due consideration of the entire facts of the case. As required under the rules and based on the recommendations of the CBI, the Government of Kerala had placed the applicant under suspension vide Government Order dated 10.07.2007. Even though the applicant reported for duty on 22.02.2005 before the Principal Chief Conservator of Forest, he had not admitted him to do so because the Government at that time had decided to impose a major penalty under Rule 6 of AIS (D&A) Rules, 1969, on him.

4. In the rejoinder statement, the applicant submitted that there is no authority for the respondents not to accept the duty report. The fact that the Additional Principal Chief Conservator of Forests had recommended vide his letter dated 25.06.2002 leave for the period 13.08.2001 to 31.12.2002



(506 days) shows that the leave applications were in order. The applicant was kept on waiting for posting for two and a half years. There is a clear provision under the amended AIS (Leave) Rules that a reasonable opportunity to explain the reason for absence shall be given to the member of the Service before the provisions of sub-rule 7(2) of the AIS (Leave) Rules are invoked. No such opportunity was given to the applicant before invoking this sub-rule. The enquiry initiated under AIS (D&A) Rules in 2002 cannot be concluded under the penal provisions of AIS (Leave) Rules which came into existence only on 19.10.2004. No new material facts have come up between the period from the proposed punishment of 'censure' to the ultimate imposed punishment of 'removal from service'.

5. In the reply statement filed by the 1st respondent (the Union of India), it was submitted that the articles of charge framed against the applicant are fully proved and hence agreeing with the advice rendered by the UPSC, the major penalty of removal from service was imposed on the applicant. The respondent No.1 had taken into account the submission made by the applicant in his representation before the decision to impose the such penalty was taken. As a matter of policy, the UPSC does not entertain any direct representation from the charged official in case any disciplinary proceedings preferred against him. Article 320 (3)(C) of the Constitution of India stipulates that the UPSC shall be consulted on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity. The UPSC has a definite role in assessing each case independently with the prime focus on upholding the principles of natural justice. However, the Commission's advice is not binding upon the



Disciplinary Authority, who arrives at his own conclusion after taking into consideration of the advice of the Commission.

6. In the rejoinder to the reply statement filed by the respondent No.1, the applicant submitted that the Enquiry Officer did not make out a case of wilful negligence and disobedience. It has not been proved or established in the enquiry that the medical certificates and leave applications submitted by the applicant were photo copies and not genuine, which was the reason for the then Principal Chief Conservator of Forests not forwarding them to the Government for sanction. In the judgement dated 15.02.2012 in **Krushnakant B. Parmar vs. Union of India and Another**, (2012) 3 SCC 178, Hon'ble Supreme Court held that the question whether unauthorized absence amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances. The Disciplinary Authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

7. In the rejoinder to the reply statement filed by the respondent No.3, the applicant submitted that he had co-operated with the Enquiry Officer after reporting for duty on 22.02.2005. The reasons for the 3rd respondent to change the proposed minor penalty of 'censure' to the major penalty of removal from service are not explained. There were no new facts that compelled him to change his first decision.

8. In the additional reply statement filed on behalf of the 3rd respondent



(the State of Kerala), it was submitted that when the applicant reported for duty on 22.02.2005, the Rule 7(2) of AIS (Leave) Rules existed. At the time of reporting, the disciplinary action initiated against the applicant for unauthorized absence was pending and he was on unauthorized absence for long period of about 04 years and the State Government could not admit him for duty. For violation of AIS (Leave) Rules, 1955, action was initiated against the applicant as per the provisions of AIS (D&A) Rules, 1969 and he was removed from service in accordance with the said rules.

9. We have heard Mr. O.V. Radhakrishnan (Sr.) with Mr. P. Sanjay, learned counsel for the applicant, Mr. A.D. Raveendra Prasad, ACGSC for R-1, Mr. Thomas Mathew Nellimoottil for R-2 and Mr. A. Ranjith, Sr. G.P. with Mr. M. Rajeev, G.P. for R3-4 and perused the records.

10. The articles of charge dated 18.11.2002 against the applicant reads as under :

“GOVERNMENT OF KERALA

No. 96992/Spl.C1/01/GAD

General Administration
(Special C) Department,
Thiruvananthapuram,

Dated : 18-11-2002.

ARTICLES OF CHARGE

That you Shri. K. Bhasmakara Rao, IFS (KL 86) while holding the post of Deputy Conservator of Forests Marketing left the office without obtaining permission from the competent authorities by simply putting an application for casual leave for 5 days from 13-8-2001 to 18-8-2001. In spite of repeated direction from Government vide letter dated 6-6-2002 and 1-9-2002 you have neither reported for duty so far nor submitted formal leave application with Medical Certificate.

This Action of yourself is highly irregular and not expected from a Senior IFS Officer.



You are, therefore, requested to show cause why disciplinary action as contemplated under All India Service (Disciplinary and Appeal) Rule, 1969 should not be taken against you. You are allowed 15 days time from the date of receipt of this communication to submit your written statement of defence. If your written statement is not received within specified time, the matter will be proceeded with on the presumption that you have no explanation to offer in the matter.

A statement of Imputation which the above charges are based is herewith attached.

Sd/-

E.X. Bharat Bhushan
SECRETARY,
FOREST & WILD LIFE.

To :

Sri K.B. RAO, IFS,
X/196-14 D, Elura Road,
Gudivada Krishna District,
Andraparadesh"

(emphasis supplied)

11. The period of absence of the applicant from duty as per the charge memo is from 13.08.2001 to 18.11.2002. The enquiry officer has modified the articles of charge to extend the period of absence upto 21.02.2005, as per the enquiry report dated 05.08.2005 at Annexure A-10. Although it was submitted by the respondents that the said modification was done with the acknowledgement of the applicant, he refuted it and also contended that the said amendment was illegal as the Enquiry Officer had no authority to do so and that the principles of natural justice were violated in as much as he is deprived of defending the amended articles of charge. Section 8(4) of AIS (D&A) Rules, 1969, is reproduced as under:

"Where it is proposed to hold an inquiry against a member of the Service under this rule and / or Rule 10, the disciplinary authority shall draw up or caused to be drawn up -

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge ;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain -

(a) a statement of all relevant facts including any admission or confession made by the member of the Service;

(b) a list of documents by which, and a list of witnesses by whom the articles of charge are proposed to be sustained.”

(emphasis supplied)

It is the Disciplinary Authority who has to frame the articles of charge. There is no provision in the AIS (D&A) Rules, 1955, which empowers the enquiry officer to amend the articles of charge. The enquiry which started in 2002 was speeded up and was concluded after the applicant reported for duty on 22.02.2005. It was open to the Disciplinary Authority to amend the articles of charge during the pendency of the enquiry, but he did not do so. Howsoever expedient it may appear, the Enquiry Officer has no power to amend the articles of charge. He cannot overreach to assume the power of the Disciplinary Authority. As per the Explanation to Rule 8(24) of AIS (D&A) Rules, 1969, the Inquiring Authority can record its findings on any established article of charge different from the original articles of charge subject to the proviso therein. In the instant case, the Enquiry Officer has assumed the powers of the Disciplinary Authority and modified the articles of charge which is not permissible in law. He should have confined himself to Rule 8 (24) with its proviso. Hence we hold that the enquiry and the findings of the Enquiry Officer, to the extent they go beyond the articles of charge dated 18.11.2002 framed by the Disciplinary authority, are bad in law.

12. During the enquiry, The applicant had sought copies of certain



documents. A reference was made to the Government seeking direction in the matter. The documents sought vide Annexure A-9 dated 03.01.2009 have not been supplied to the applicant nor the reasons for not providing the documents have been recorded. This is a lapse which should not have occurred. But as the facts of the case are not disputed and the applicant has not substantiated how this lapse prejudiced him, we hold it as not fatal to the enquiry.

13. The finding of the Enquiry Officer is reproduced as under :

“10. The Accused Officer failed to establish beyond doubt that he could not attend duty as directed by Government due to his illness.

The article of charge No. 96992/Spl.C1/01/GAD dated 18.11.2002 as modified by the Inquiry Authority stands proved to the above extent.

Though, the charges are proved as indicated above, it is a fact that the Accused Officer had been sending letters/telegrams/applications for leave on a regular basis during the entire period of absence. It is also a fact that the Principal Chief Conservator of Forests had recommended eligible leave for the initial period. The disciplinary authority may take the above factors also into consideration while finalizing the disciplinary proceedings based on the articles of charge.”

The above finding implies that doubt exists as to illness of the applicant as justification for his absence from duty. The Enquiry Officer does not hold that the articles of charge against the applicant that inspite of repeated directions from the Government, he did not report for duty and that he did not submit formal leave application with medical certificate, are proved. The articles of charge as modified by the Inquiring Authority stand proved only to the extent of the applicant not establishing beyond doubt that he could not



attend duty as directed by the Government due to his illness. The fact that the applicant had been sending letters/telegrams for leave on a regular basis during the entire period of his absence and the Additional Principal Chief Conservator of Forests had recommended leave for the period 13.08.2001 to 31.12.2002 (506 days), are to be taken into account by the Disciplinary Authority while finalising the disciplinary proceedings, as per the enquiry report.

14. As against this, the finding and advice of the UPSC dated 28.07.2010 are as under :

“3.8. As per Rule 3(1) of AIS (Leave) Rules, 1955, the “Leave cannot be claimed as of right and when the exigencies of public service, so demand, leave of any description may be refused or revoked by the Govt.”. The leaves availed by the MOS are completely in violation of the above quoted leave rule.

3.9. Government of India in Notification No. 11019/15/2003-AIS-III dated 19.10.2004 had amended the AIS (Leave) Rules, 1955 and Sub-Rule (2) in Rule 7. The following rules were substituted :

(a) is absent without authorization for a period of one year or

(b) Remains absent from duty for a continuous period of five years with or without leave.

3.10. All the documents clearly prove that the MOS has abstained from duty for a longer period without any sanctioned leave. In the light of the above facts and observations, the Article of charge relating to unauthorized absence from duty w.e.f. 13.08.2001 onwards, without prior permission of the competent authority, stands established beyond any doubt. The grounds/reasons put forward by the MOS for his absence from duty do not justify his absence for prolonged spell of unauthorized absence.

3.11. The Commission is of the opinion that the action of MOS is quite unbecoming of a responsible officer in the cadre of IFS and tantamount to grave dereliction of duty and misconduct. Thus, the charge stands established against the MOS.



4. In the light of their findings as discussed above, and after taking into account all other aspects relevant to the case, the Commission consider that the ends of justice would be met in this case if the penalty of removal from service which shall not be a disqualification for future employment under the Government is imposed on the MOS, Shri K. Bhasmakara Rao by an order of the Central Government in terms of Rule 7(2) of AIS (D&A) Rules, 1969. They advise accordingly."

The finding of the UPSC is at variance with the finding of the Enquiry Officer which was accepted by the Disciplinary Authority, who having regard to all the relevant facts of the case and the representation of the applicant against the report of the Enquiry Officer, initially proposed to inflict the punishment of 'censure' on him in respect of which alone, the advice of the UPSC was sought. The UPSC reapprised the facts of the case and concluded that the applicant was absent from duty for almost 04 years and is liable to be treated under Rule 7(2) of AIS (Leave) Rules, 1955, and advised imposition of the penalty of removal from service on the applicant. Apart from the telling delay of 2 ½ years on the part of the UPSC in tendering its advice, it is noteworthy that the advice did not take into account that the applicant had been sending letters/telegrams for grant of leave and that the Additional Principal Chief Conservator of Forests had recommended to the Government to sanction leave for the period from 13.08.2001 to 31.12.2002; that there was no justification for keeping the applications/telegrams for extension of leave for the period beyond 31.12.2002 without taking appropriate action and that the respondents did not refuse leave to the applicant at any time during the period 18.11.2002 to 21.02.2005; that there was no exigency of public service to refuse leave, that the respondents had no intention to invoke the amended provisions of Rule 7 (2) of AIS (Leave) Rules, 1955, to deem that



the applicant had voluntarily resigned, as they did not give him an opportunity of being heard as provided in the said rule, that the documents sought by the applicants were not supplied nor the reasons for non-supplying the same were recorded, that the Enquiry Officer had amended the articles of charge without any authority, that he did not find the charges against the applicant proved fully and that he stated certain alleviating factors for consideration while imposing penalty. There is no material on record to prove that the medical / personal ground for which the leave sought is false or the medical certificates are not genuine. The advice to impose the severe penalty of 'removal from service' instead of 'censure' proposed by the Disciplinary Authority thus does not take into account all the relevant aspects of the case.

15. The 3rd respondent had initiated disciplinary action against the applicant in the year 2002. Following the failure of the applicant to attend the medical board, formal enquiry under Rule 8(2) of AIS (D&A) Rules, 1969 was ordered vide order dated 24.02.2004. The amended Rule 7(2) of AIS (Leave) Rules, 1955, came into force on 19.10.2004. After the applicant reported for duty on 22.02.2005, it was open to the State Government to continue with the disciplinary action as per AIS (D&A) Rules or to drop it and proceed under Rule 7(2) of AIS (Leave) Rules, 1955. By the time, the UPSC gave its advice dated 28.07.2010, Rule 7(2) *ibid* was further amended to read as under:

"7(2) A member of the Service shall be deemed to have resigned from the service if he -

(a) is absent without authorization for a period exceeding one year from the date of expiry of sanctioned or permission, or"

The applicant is absent from duty from 13.08.2001 to 21.02.2005. No leave is sanctioned. He is absent without authorization for a period exceeding one

year but not from the date of expiry of sanctioned leave or permission. As the unauthorised absence of the applicant is not preceded by sanctioned leave or permission, Rule 7(2) *ibid* is not relevant to the case of the applicant. Deemed resignation under Rule 7(2) of AIS (Leave) Rules, 1955, like *dies non*, is not a penalty under AIS (D&A) Rules, 1969. The procedure for imposition of penalty under AIS (D&A) Rules, 1969, is different from the procedure for deeming a member of Service to have resigned from the service if his absence is for a period of one year from the date of expiry of sanctioned leave or permission. Therefore, the advice of the UPSC is not correct and proper in as much as it relies on Rule 7(2) of AIS (Leave) Rules, 1955 in the instant case.

16. Leave cannot be claimed as of right but normally it is refused only when exigencies of public service demand so. In the instant case, the respondents have not made out a case for refusing the applicant leave in the exigency of public service nor did they grant it.

17. Unauthorised absence from duty amounts to behaviour unbecoming of a Government servant only if it is proved that the absence is wilful, as held by the Hon'ble Supreme Court in **Krushnakant B. Parma vs. Union of India and Another**, (2012) 3 SCC 178. There is no finding either in the report of the Enquiry Officer or in the advice of the UPSC that the applicant had wilfully absented himself from duty.

18. Article 320, Sub Section 3(C) of the Constitution of India, reads as under:

“320. Functions of Public Service Commissions

.....

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted

(a)



(b)

(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters; “

19. The case of the applicant was forwarded to the UPSC vide letter dated 29.01.2008 for advice. The advice of the UPSC was received vide letter dated 28.07.2010 suggesting major penalty of removal from service. Consultation prescribed in the above Article is only to advise the Government in assessing the guilt or otherwise of the delinquent officer as well as the suitability of the penalty imposed. The advice of the UPSC is not binding upon the Government. The Government cannot act mechanically on the advice of the UPSC without applying its mind in the matter of taking disciplinary action against the Government servant. As per the decision of the Hon'ble Supreme Court in AIR 1984 SC 1850 and AIR 1992 SC 749, if the Government acts blindly the order would be vitiated by malafides. The 3rd respondent i.e, the State of Kerala, considered the advice of the UPSC and recommended removal of the applicant from service as per Rule 7(2) of AIS (D&A) Rules, 1969, to the Central Government vide letter dated 02.09.2010 (Annexure A-17). There is nothing on record to show that the State Government had applied its mind to the advice of the UPSC. No reason is given for changing the tentative decision to impose the minor penalty of 'censure' to 'removal of the applicant from service'. It is apparent that the advice of the UPSC is the sole reason for converting the penalty of censure to a major penalty of removal from service. In doing so, the State Government has acted mechanically without applying its mind. In the order of the Central Government, for and on behalf of the President, dated 14.02.2011 (Annexure R-1) it is stated that the Ministry of Environment and Forests has examined

the case of the applicant with reference to the charge sheet, enquiry report, representation of the member of Service and advice of the UPSC and found that the articles of charge framed against him are fully proved and that the Ministry has accepted the advice tendered by the UPSC to impose the major penalty of removal from service on the applicant. But application of mind on the part of the Central Government is not evident in the order. If the respondents had applied their mind to the case on hand, the infirmities mentioned earlier in this order could easily have been noticed. The State Government could have differed with the advice of the UPSC and placed the matter before the Central Government for its decision under Rule 11 of the AI (D&A) Rules, 1969, which reads as under:

"11. Cases of difference of opinion to be referred to Central Government.— When there is any difference of opinion between a State Government and the Commission on any matter covered by these rules such matter shall be referred to the Central Government for its decision."

As the respondents 1 and 3 have acted mechanically and blindly upon the advice of the UPSC, the order dated 14.02.2011 removing the applicant from service is vitiated by malafides.

20. The applicant had reported for duty on 22.02.2005, but he was not admitted to duty because of the pendency of the disciplinary proceedings. There is no logic in the action of the respondents who proceeded against the applicant for not reporting for duty forthwith in not giving him a posting when he reported for duty. That he reported for duty, almost 03 years after the Government had directed him to do so, is not the reason for not giving him a posting. The pendency of the disciplinary proceedings is the reason is not a




justification for not admitting the applicant to duty. If the disciplinary proceedings against the applicant warranted keeping him out of duty, the right course of action for the respondents was to suspend him as per rules. In the instant case, the respondents will have to treat the period from 22.02.2005 till 10.07.2007 as per rules. There is no provision under AIS (D&A) Rules, 1969, to keep an employee without a posting for years together.

21. The applicant who belongs to 1985 batch of IFS cannot pretend that he is to be directed to apply in the prescribed format for leave with appropriate documents. Nothing prevented him from telephoning his immediate available superior to apprise him of the situation requiring him to proceed to his native place on 13.08.2001. His behaviour in the instant case is unbecoming of a Government servant and should not be countenanced. His case got prolonged for 9 ½ years. The respondents could have acted firmly and speedily against the applicant in the interest of discipline in much less time.

22. The order of suspension dated 10.07.2007 gives rise to a separate cause of action for the applicant which cannot be taken up here for consideration, as plural remedies are not available as per Rule 10 of the CAT (Procedure) Rules, 1987.

23. The contention of the applicant that the enquiry was vitiated with the appointment of the Chief Conservator of Forests (P) as Inquiring Authority, because he had brought the absence of the applicant from duty to the notice of the Government lacks merit. The Chief Conservator of Forests would have failed in discharging his duty, had he not reported the unauthorised absence



of the applicant to the Government. He has conducted the enquiry impartially and properly except for the lapses already pointed out.

24. In the result, it is ordered as under. The impugned order dated 14.02.2011 at Annexure A-18 is set aside. The enquiry and the enquiry report to the extent they cover the period beyond what was shown in the charge memo dated 18.11.2002 are quashed. To the extent the charge in the memo dated 18.11.2002 is proved, the respondents are directed to proceed further from the stage of receipt of the advice of the UPSC with due application of mind as per law and consider imposing of a penalty commensurate with the gravity of charges proved against the applicant. The respondents are at liberty to proceed against the applicant for the period of unauthorised absence from 19.11.2002 to 21.02.2005 or regularise the same as deemed fit. Appropriate consequential orders should be issued by the State Government within a period of 04 months from the date of receipt of a copy of this order.

25. The O.A. is disposed of as above with no order as to costs.

(Dated, the 16th July, 2013)



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(Dr. K B S RAJAN)
JUDICIAL MEMBER

cvt.