CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 175 OF 2011

Thursday, this the 13th day of October, 2011

CORAM:

HON'BLE Mr.JUSTICE P.R.RAMAN, JUDICIAL MEMBER
HON'BLE Mr. K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

Subhashkumar S
Sub Divisional Engineer (Tech)
Bharat Sanchar Nigam Limited
Gandhi Nagar
Kottayam Secondary Switching Area
Residing at C-5, BSNL Quarters
]Kudamaloor PO, Kottayam District – 686 017 ... Applicant

(By Advocate Mr. TCG Swamy)

versus

1. The Chairman-cum-Managing Director
Bharat Sanchar Nigam Limited
New Delhi

2. The Chief General Manager (Telecom)
Bharat Sanchar Nigam Limited
Kerala Circle, Thiruvananthapuram

3, The Principal General Manager (Telecom)
Bharat Sanchar Nigam Limited
Kottayam – 686 001 ... Respondents

(By Advocate Mr.P.Padmalayan)

The application having been heard on 13.10.2011, the Tribunal on the same day delivered the following:

ORDER

HON'BLE Mr.JUSTICE P.R.RAMAN, JUDICIAL MEMBER

The applicant is presently working as Sub Divisional Engineer (Tech) in the BSNL in Kottayam District. He is aggrieved by Annexure A-1 order passed by the Disciplinary Authority treating the period of suspension pending inquiry from 26.06.2009 to 14.09.2009 as on duty only for the purpose of pensionary benefits and holding that during the period of

suspension he will be entitled for the subsistence allowance already paid.

2. Briefly stated the facts are as follows:-

The applicant was kept under suspension pending enquiry by the 3rd respondent by Annexure A-2 order dated 26.06.2009. Thereafter, the applicant was issued a charge memo for imposing a minor penalty under Rule 35 of the BSNL CDA Rules. Simultaneously, the applicant was transferred to Ettumanoor. Explanation was called for and ultimately he was imposed a minor penalty of reduction by one stage from ₹ 29,940/- to ₹ 29,060/- in the scale of pay of ₹ 20,600-46,500/- for a period of two years with immediate effect. Annexure A-3 dated 05.10.2009 is the copy of the order imposing punishment. Thereafter, the period of suspension was to be regularized for which Annexure A-1 order was passed stating that pay and allowances for the period of suspension would be restricted to subsistence allowance already paid and the same is in exercise of the power under Rule 32 of the BSNL Conduct, Discipline and Appeal Rules, 2006. A copy of therelevant extract of the rule for easy reference is produced as Annexure A-4. According to the applicant, the order treating the period of suspension as on duty for the limited purpose of pension alone is illegal, arbitrary and liable to be set aside. According to him, before passing an order under Rule 32, the authority ought to have given an opportunity of being heard in compliance with the principles of natural justice as to whether for the period of suspension in what manner the period should be treated, whether it should be treated as duty, whether he is entitled to be paid the full pay and allowances etc. It is an act of quasi judicial function and therefore it implies that he should have been given an opportunity of being heard. Reference is made to FR 54 (B) part II which is

similarly worded to the extent it is relevant to our purpose. In Rule 54 (B) also provides for such discretion to be exercised by the authority in deciding as to whether the period of suspension should be treated as on duty when ultimately he is not exonerated but imposed with some punishment. He placed reliance on the decision of the Apex Court in ***AIR 1968 SC 240 M.Gopalakrishna Naidu vs. State of Madhya Pradesh,*** which held that the discretion to be exercised is conferred by a statutory provision like FR 54(B) even though it does not provide for prior notice, which implies before passing final order, exercising discretion, an opportunity of being heard in compliance with the principles of natural justice is mandatory. It is, therefore, his contention that since no opportunity has been afforded, Annexure A-1 is vitiated as violative of principles of natural justice and liable to be set aside. It is also his contention that normally an employee is kept under suspension, only in cases where the charges are so grave and major penalty is sought to be imposed. In this case, even the procedure adopted under Rule 35 is the one prescribed for minor penalty, If so, the very suspension is not justified. Then the relevant factor in considering the period of suspension should be treated as on duty. The authority has not considered the relevant factors while deciding the period of suspension can be treated as on duty for the limited purpose of pension only as is done in the present case. He also relies upon the CAT order reported in 2010 2 CAT 24.

3. According to the respondents, suspension pending enquiry was ordered prior to the issuance of charge sheet and the charge was subsequently issued. The charge is of grave in nature and further the applicant misbehaved with a lady belonging to scheduled caste and he was

transferred to another place. Taking a lenient view, however, he was imposed penalty as per Annexure A-3 order. Though a minor penalty was imposed, it is contended that the suspension pending inquiry was justified and further the period of suspension has rightly treated as on duty for the limited purpose of pensionary benefits. It is prayed that the order of the disciplinary authority in such circumstances, is not liable to be interfered with. It is also contended that in a case where an employee is imposed with a punishment and exonerated fully, there is no way to treat the period of suspension as on duty. It is their contention that there is no discretion vested with the authority not to treat the period of suspension as duty or otherwise in a case where ultimately the punishment is imposed.

4. We have heard the counsel on both sides and also considered the relevant provisions under FR & SR and the relevant decisions cited. It is admitted fact that the applicant was imposed a minor penalty after following the procedure for imposing minor penalty under Rule 35 and he was kept under suspension pending inquiry. But no enquiry was conducted and what was imposed was only a minor penalty. There is no challenge against the order of imposing punishment. Subsequently the period of suspension from 26.06.2009 to 14.09.2009 was to be regularized by passing consequential orders. The authorities passed Annexure A-1 order treating the period of suspension as on duty for the limited purpose of pensionary benefits. The order is passed in exercise of Rule 32 (1) of BSNL CDA Rules, 2006. The said Rule is extracted below for the purpose of convenience.

> *(1) " When the employee under suspension is reinstated, the competent authority may grant him the following pay and allowance for the period of suspension;*

(a) If the employee is exonerated and not awarded any of the penalties mentioned in Rule 33, the full pay and allowances which he would have been entitled to if he had not been suspended, less the subsistence allowance already paid to him; and,

(b) If otherwise, such proportion of pay and allowances as the competent authority may prescribe.

(2) In a case falling under sub-clause (a), the period of absence from duty will be treated as a period spent on duty. In case falling under sub-clause (b) it will not be treated as a period spent on duty unless the competent authority so directs."

5. On a careful reading of the above provision, it can be seen that in cases where an employee is exonerated, he is entitled for full pay and allowances and there is no discretion, whereas the disciplinary proceedings ended in punishment and the period of suspension will not be treated as a period spent on duty unless the authority so directs. Therefore, even in cases ultimately punishment was imposed, the authority concerned can decide exercising discretion as to whether the period of suspension should be treated as on duty and if so, to what extent etc. When the decision to treat the period of suspension as duty is vested with the authority necessarily the discretion is vested in deciding this issue at the time of regularization of the suspension period. Therefore, the contention that there is no discretion vested on the face of the rule is misconceived , we reject the same.

6. Similarly FR 54 came for consideration before the Apex Court. As per Rule 54 it is extracted in Para 3 of the judgment and also under Sub Rule 2 of Rule 3 which is as follows:-

(1) "When a Government servant who has been dismissed, removed or suspended is reinstated; the authority competent to order the reinstatement shall consider and make a specific order-,

(a) Regarding the pay and allowance to be paid to the Government servant for the period of his absence from duty; and

(b) whether or not the said period shall be treated as a period spent on duty-,

(2) Where the authority 'Mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified,the Government servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or suspended as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent allowances are admissible.

Provided that the payment of allowances under clause (2)or clause (3) shall be, subject to all other conditions under which such allowances are admissible.

Provided other that such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under Rule 53.

(4) In a case falling under clause (2), the period of absence from by shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty,unless such competent authority specifically directs that it shall be so treated for any specified purpose.

Provided that if the Government servant so desired, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the, Government servant."

7. It was held in para 6 as follows:-

" It is true that the order under FR. 54 in a sense a consequential order in that it would be passed after an order of reinstatement is made. But the fact that it is a consequential order does not determine the question whether the government servant has to be given an opportunity to show cause or not. It is also true that in a case where reinstatement is ordered after a departmental inquiry the government servant would Ordinarily have had an opportunity, to show: cause. In such a case, the

authority no doubt, would have before him the entire record including the explanation given by the government servant from which all the facts and circumstances of the case would be before the authority and from which he can form the opinion as to whether he has been fully exonerated or not and in case of suspension whether such suspension was wholly unjustified or not. In such a case the order passed under a rule such as the present Fundamental Rule might be said to be a consequential order following a departmental inquiry. But there are, three classes of cases as laid down by the proviso in Art. 311 where a departmental inquiry would not be held, viz., (a) where a person is dismissed, removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, (b) where the authority empowered. to dismiss or remove person or to reduce him in rank is satisfied for reasons to be record in writing that it is not reasonably practicable to hold such an inquiry; and (c) where the President or the Governor as the case may be is satisfied, that in the interest of security of the State it is not expedient to hold such inquiry. Since there would be no inquiry in these classes of cases the authority would not have before him any explanation by the ' government servant. The authority in such cases would have to consider and pass the' order merely on such facts which might be placed before him by the department concerned The order in such a case would be ex-parte without the authority having the other side of the picture. In such cases the order that such authority would pass would not be a consequential order as where a departmental inquiry has been held. Therefore, an order passed under Fundamental Rule 54 is not always a consequential order nor is such order a continuation of the departmental proceeding taken against the employee."

8. On the basis of the above position there cannot be any doubt that when there is discretion vested with the authority to consider whether the period of suspension should be treated as on duty or otherwise, being a quasi judicial function the same has to be in conformity with the principles of natural justice. Though there is no rule as such embodied under Rule 32, it is inherent that the ultimate decision will result in civil consequence and in the light of the Apex Court decision there is no doubt that the employee is entitled to be heard before the authority exercises his discretion in the matter as to whether the period of suspension should be

treated as on duty and whether he is entitled for subsistence allowance. Therefore, in so far as Annexure A-1 is issued without compliance of natural justice is bad in law and hence we quash the same. We may however add to say that in a situation where an employee is under suspension, one has to bear in mind as held by the Apex Court in **2010 (2) SLJ 24** that the power of suspension even though it is an inherent power it has to be exercised only in appropriate case where the offence/misconduct is severe in nature and where the penalty to be imposed is one of major penalty.

9. We may refer to AIR 1994 SC 2296, **State Bank of Orissa v. Bimal Kumar Mohanty** wherein it is held as follows:-

> *" .....when an appointing authority or the disciplinary authority seeks to suspend an employee..... the order of suspension would be passed after taking into consideration the gravity of the misconduct sought to be inquired into or investigated and the nature of the evidence placed before the appointing authority and on application of the mind by disciplinary authority. Appointing authority or disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine or an automatic order to suspend an employee. It should be on consideration of the gravity of the alleged misconduct or the nature of the allegations imputed to the delinquent employee. The Court or the Tribunal must consider each case on its own facts and no general law could be laid down in that behalf. Suspension is not a punishment but is only one of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending enquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the enquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc. But as stated earlier, each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on*

the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation would be another thing if the action is by mala fides, arbitrary or for ulterior purpose. The suspension must be a step in aid to the ultimate result. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental enquiry or trial of a criminal charge."

10. In this case admittedly, he was kept under suspension but only minor proceedings were initiated and imposed. Therefore, whether the suspension is justified or not and whether the employee is entitled for full salary or only part thereof and how in such circumstances, the period of suspension is to be treated are all matters for consideration by that authority. So when the orders are passed afresh after affording an opportunity to be heard, the authorities will consider all these aspects before passing the final order. Let the authority give an opportunity to the applicant afresh in accordance with law and pass orders as early as possible, at any rate within a period of four months from today.

11. OA is **allowed** as above. No costs.

Dated, the 13th October, 2011.

K GEORGE JOSEPH
ADMINISTRATIVE MEMBER

JUSTICE P.R.RAMAN
JUDICIAL MEMBER

vs