IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. / T. A. No. 186 1990

DATE OF DECISION 27.9.91

K. N. Ahamed Sharif — Applicant (s)

Mr. K. Ramakumar — Advocate for the Applicant (s)

Versus

Union of India represented by the General Manager, Southern Railway, Madras and others — Respondent (s)

Mr. M. C. Cheriam, — Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. N. V. KRISHNAN, ADMINISTRATIVE MEMBER

The Hon'ble Mr. N. DHARMADAN, JUDICIAL MEMBER

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

MR. N. DHARMADAN, JUDICIAL MEMBER

Order of removal from service, Annexure-D dated 20.8.1982 and Annexure-H a further order passed by Chief Personnel Officer of Railway rejecting the revision petition against the order of removal of the applicant from the Railway service are under challenge in this application filed on 8.3.1990 under section 19 of the Administrative Tribunals' Act, 1985.

2. The applicant, while working as Permanent Way Inspector (Grade-III) took leave in 1976 upto 9th November and and gone abroad. Prior to the expiry of leave on

on 23.10.76 he applied for extension of leave on medical ground./ According to the applicant this was not rejected. Hence he believed that he can continue on leave and hence he did not report for duty. He sent letters for extension of leave. Annexure-B dated 4.8.1982 is the latest application for extension of leave from 8.8.1982. While so he received, Annexure-C letter dated 7.4.1985 with Annexure-D penalty order dated 20.8.1982 removing him from service. Then he sent Annexure-E from Doha requesting to reconsider the matter and cancel the punishment. He sent reminders and Annexure-F from Doha on 20.5.1989. Annexure-G revision was also forwarded from Doha to The General Manager (Personnel) for a review and cancellation of the penalty order. This was rejected on 28.12.1989 by Annexure-H order.

3. The orders are challenged on two grounds:

(i) The punishment order was not passed by the competent authority having jurisdiction over the applicant and

(ii) The orders are null and void as they are against the principles of natural justice, for there was no notice of enquiry and imposition of punishment.

4. The submission of the learned counsel Sri K. Ramakumar, appearing on behalf of the applicant on the first ground is that the applicant was appointed by the General Manager. xxxxxxxxxxxxxxxxxxxxxxxxx of the Railway and that the penalty order was passed

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by a lower authority viz. Senior Divisional Engineer-I, Palghat Division, who is neither the appointing authority nor the disciplinary authority of the applicant. He produced Annexure_A original appointment order and subsequent orders Annexures I and J. He also filed M.P. 555/91 for a direction to the respondents to produce the following documents to prove his case:

> "i. G.M.(P) Madras letter No. P(P) 563/1/15 dated 20.3.1958 referred to in Ext. R(3)) of the counter affidavit.
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> ii. GM(P) Madras letter No. P(RT) 563/1/29 of 3.1.1959 referred to in para (2) of Annexure-J of the Rejoinder submitted on 14.3.1991
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> iii) GM(P) Madras letter No. P.563/1/29 of 10.7.58 regarding appointment of the applicant as AIOW
>
> iv) Chairman Railway Service Commission T. Nagar Madras letter No. RG 57 SR/25 of 30.7.1957."

But the Railway filed a memo dated 5.8.1991 stating that the documents pertaining to the period from 1957 to 1959 could not be traced.

5. The available documents in this case show that the applicant was not appointed by the Sr. Divisional Engineer-I, who had initiated the disciplinary actions against the applicant. The respondents contended that the applicant was originally appointed as P.W.1 by Divisional Personnel Officer, Trichy by Ext. R-1. Later he was selected by Railway Service Commission, Madras and posted as Asst. Inspector of Works by D.P.O.,Madurai by Ext. R-4 order. Further order Annexure-5 was also passed by the same officer. The postof D.P.O. is in a 'senior scale' grade and is equivalant to the post of Sr. Divisional Engineer(Disiciplinary authority) though

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the latter is in the 'junior administrative' grade. Both the officers are in the same rank and position. So the Sr. Divisional Engineer-I is an authorised officer competant to impose any penalty on the applicant. According to the respondents Annexure-I and Annexure-J orders are only orders transferring and posting of the applicant on the basis of appointment orders and instructions issued by the competant authority. Hence, they cannot be relied on for deciding the issue.

6. An investigation into this controversy has only an academic interest andwe are of the view that it is not relevant for deciding the real issue arising in this case. On the facts and circumstances of this case, after the Supreme Court judgment in Scientific Adviser to the Ministry of Defence Vs. S. Daniel, 1990(2)SLR 724, the applicant's contention is only to be rejected. The respondents' case that the Sr. Divisional Engineer-I has been empowered as per the Schedule of powers and Disicipline and Appeal Rule for the Railway Servants 1986 and that he is in the same rank of Divisional Personnel Officer having authority and competance to impose any penalty on the applicant has not been denied by the rejoinders./The Supreme Court considered We accept the case of the respondent

the issue and held as follows:

> " Still the basic question that remain is, whether in the context of rule 2(a) read with rule 9(1) the reference tothe authority empowered to make the appointment is to the authority mentioned in the proviso to rule 9 or to both the authorities falling under the main part of rule 9(1) as well as the proviso....."

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"We agree with the respondents that the expression 'appointing authority' in rule 12 should have the meaning attributed to it in rule 2(a). But what is the real and true interpretation of Rule 2(a)? What does that sub-rule talk of when it refers to a person empowered to make the appointment' in question? These words clearly constitute a reference to rule 9. Does rule 2(a) refer then to the authority empowered to whom he has delegated that power or book? We think, on a proper and harmonious reading of rules 2(a) and rule 9, that sub rule (a) of rule 2 only envisages theauthority to whom the powerof appointment has been delegated under rule 9 and not both thedelegator and the delegate. We have come to this conclusion for a number of reasons..."

7. Now let us deal with the second ground of the learned counsel based on principles of natural justice. The case of the applicant is that he has no notice of enquiry and punishment. He only received the penalty order in 1986 along with Annexure-C. Till then he was on leave, for, after the sanctioned leave to go abroad upto 9.11.1976 he was never informed that his applications for extension of leave had been rejected nor did he receive any communication connected with enquiry before the penalty order Annexure-D dated 20.8.1982. According to the applicant no attempt was ever made by the Railway to serve any notice intimating the steps of disciplinary action initated against him on his local address available with the respondents in the service records. Hence, the entire disciplinary proceedings are vitiated and violative of the principles of natural justice.

8. Ext. R-6 is the first application submitted by the applicant on 4.12.1976 for the issue of a no objection

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certificate for his visit to Qutar, Saudi Arabia. This was sanctioned by Ext. R-7. Then he applied for three months leave from 10.5.1976 which was also extended upto 9.11.1976. Thereafter, his requests for further extension of leave were not sanctioned by the Railway. This is clear from Exts. R-8 and R-9. The applicant did not care to join duty after the expiry of sanctioned leave. It is seen from enquiry files produced for perusal and the records produced by the respondents with the reply that all the letters including Annexure-E,F & G were sent by the applicant from Doha. He has no case that after the sanctioned leave in 1976 he ever stayed in India for any specific period. Under these circumstances from correspondence it is only to be presumed that the applicant was not available in India at any time after 1976 enabling the Railway to serve notices on him in India in his home address. Moreover, the applicant has no case that in the leave applications he has furnished his address so as to enable the respondents to contact him in case of necessity during the leave period.

9. The Asst. Engineer, Cannanore has sent Ext. R-13 on 2.5.1978 to Quatar, Doha, intimating the applicant that the leave sought from 10.11.1976 has not been sanctioned and he should report for duty forthwith. He also submitted Ext. R-14 report on 4.10.1979 to

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take action against the applicant for his unauthorised absence for he is employed at Qatar. Ext. R-15 information was issued. This was followed by Ext. R-17 charges for unauthorised absence from 10.11.1976. It appears that various letters sent to Doha addressed to the applicant except the charges, were received by him. However, charge memo was exhibited in the station notice board where the applicant worked before he left India and conducted ex parte enquiry. All the notices of enquiry were also sent to the applicant in his Doha address. They were not received back. After the enquiry the penalty of removal was imposed. This was also sent to the applicant and exhibited in the notice board. Pretending ignorance of all the proceedings the applicant used to sent repeated requests for extension of leave even in 1984. Ultimately he filed appeal against the penalty and Annexure-G application for the review from Doha. They were also rejected and concluded the matter in 1982 itself.

10. The present attempt of the applicant is to re-open all closed and settled penal proceedings at this belated stage on the plea of violation of principles of natural justice. From the facts and circumstances of the case it cannot be doubted that the applicant was fully aware of the fact that his requests for extension of leave from 10.11.1976 were not granted by the competent authority and on

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account of his continued unauthorised absence from service he was removed from service after due enquiry as contemplated under the Rules. But he pretended ignorance of all the proceedings and submitted that respondents never attempted to serve notice in his house address at Ponnani which was available in the service records. Hence, according to him there is infraction of principles of natural justice.

11. Admittedly the applicant was on leave from 10.5.76 to 9.11.1976. Thereafter all his requests for extension of leave were rejected and communicated to xxxxxxxx xxxx the applicant xxxxxx in his foreign address as given in the leave applications. Under Rule 7 of the CCS (Leave) Rules 1972 the grant of leave to a Government servant is discritionary. No Government servant can claim extension of leave as of right. Leave application for extension shall be in Form-I, as provided under Rule 14, which has a column to be filled up by the Government servant giving details of his address where he can be contacted during leave period in the case of necessity. There is also a further duty on the Government servant who applies for extension of leave to verify whether it had been sanctioned or not and in case it is not sanctioned by the competent authority to report for duty on the expiry of sanctioned leave to avoid break in service or disciplinary action on that account. The failure on the part of the applicant to discharge all the above obligations makes him a defaulter

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when considering his plea of violation of principles of natural justice on the part of the respondents. No abstract principles of natural justice can be invoked without reference to the facts of each case and irrespective of the circumstance and the relationship of the parties leading to the alleged grievance of the applicant in a given case. Natural justice is not a one sided bargain. The party who invokes it must also be prepared to play his part fully. It has been held from time to time that how far and in what manner the principles of natural justice be applied would depend on various factors such as the the conduct of the parties, the background of the case, and the circumstance in each case. In this case the applicant's part in this score is completely negative and he is not entitled to any protection from this Tribunal on this ground.

12. The principles of natural justice is not uniformly applicable in all situations. The Supreme Court in Board of Mining Examination V. Ramjee, AIR 1977 SC 965 observed as follows:

> "Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor be fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt: that is the conscience of the matter."

Again in R. S. Dass V. Union of India, AIR 1987 SC 593, the Supreme Court said as follows:

> "It is well settled that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature ofright which may beaffected and consequences of each case. These principles do not apply to all cases and situations."

The Kerala High Court in Subramonia Sharma Vs. State Bank of Travancore, 1987 (2) KLT 632 held as follows:

> "In Tripathi v. State Bank of India (1984 I LLJ 2) a bench of three Judges of the Supreme Court had occasion to consider the scope of the rules of natural justice in the context ofdisciplinary proceedings against an employee of the State Bank, and their Lordships had observed:
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> "...It is not possible to lay down rigid rules as to when the principlesof natural justice are to apply, nor as to their scope andextent. Everything depends on the subject matter, the application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice.
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> The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, therules under which the tribunal is acting, the subjectmatter to be dealt with, and so forth."
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> Two things seem to be important; one, the statutory prescription governing the procedure, and two, the suffering of some prejudice by the delinquent..."

13. We have, (the Ernakulam Bench in which one of us, N. Dharmadan was a party) considered the issue in a more or less similar circumstances in O.A. 258/91 and held as follows:

> From the conduct of the applicant, who had no leave in his credit in 1981 but applied for long leave after taking passport and seeking permission to leave station and left India without leaving at least his whereabouts and correctaddress so as to enable the Department to contacthim, it is to be presumed that he is not very serious about maintaining his relationship withthe employer without any rupture.

He, in fact, has acted recklessly in having proceeded to foreign country without ascertaining whether leave had been sanctioned. This is probably because his job security and availability of better monetary benefits elsewhere. It seems he is not very much bothered about the job in India under these circumstances and that may probably be the reason why he did not make enquiries as to whether his leave was sanctioned by the authority before he left India. Under these circumstances, having regard to the facts of this case, it can be concluded that there is a break in service as far as the applicant is concerned as indicated in Ext. R-3(6) dated 27.7.82.

Because of his continued absence, which was unauthorised, disciplinary proceedings under provisions of the CCS(CCA) Rules had been initiated; but all communications sent to the applicant in connection with such proceedings in his known addresswere returnedwith the endorsement "addressee left India without instruction, so returned to sender."

Now we may proceed to examine whether there is proper service of notice and other proceedings on the applicant. Notices are to be served as provided in Rule 30 of CCS(CCA) Ruleswhich reads as follows:

> "Every order, notice and other process made or issued under these rulesshall be served in person on the Government servant concerned or communicated to him by registered post."

This rule provides that all notices and other process shall be served on the Government servant or communicated to him by registered post. The manner of service contemplated in this rule is possible only if the Government servant is available in India or he has furnished his correct address to the department as indicated in the Form-I when the Govt. servant applies for extension of leave under Rule 14 of the CCS (Leave) Rules, 1972. If service is attempted through post and a notice is returned with the postal endorsement "refused" or "unclaimed" a presumption can be drawn under section 114 of the Indian Evidence Act, 1872 that the notice has been served. The Supreme Court in Gujarat Electricity Board and another V. Atmaram Sungowal Poshani, (1989) 2 SCC 602 held as follows:

> There is a presumption of service of letter sent under registered cover if the same is returned back with the postal endorsement that the addressee refused to accept the same. No doubt, the presumption is rebutable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the Postal authorities never tendered the registered letter to him or that there was no occasion for the same. The burden to rebut the presumption lies on the party, challenging the factum of service."

> The presumption referred to in the above case is available only if there is a known address to which a letter can be sentthrough post. If the party is not available in India and his address is not known it becomes impossible to sent notice either through post or attempt substituted service by affixture of the notice on the outer door of the house in which the officer ordinarily resides or carries business or personally work for gain as provided in order V Rule 17 of the Civil Procedure Code 1908."

14. Thus, on a consideration of the case of the applicant from all aspects, placed before us for consideration by the learned counsel on both sides, the irresistible conclusion is that the applicant is not entitled to any reliefs that he asked for in this application.

15. The result is that the application fails and it is dismissed; but without any order of costs which the parties will bear.

27.14.'91.

(N. DHARMADAN)
JUDICIAL MEMBER

27/8/91

(N. V. KRISHNAN)
ADMINISTRATIVE MEMBER

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