19.10.1989

CENTRAL ADMINISTRATIVE TRIBUNAL

ERNAKULAM BENCH

Dated thursday the nineteenth October nineteen hundred eighty nine

PRESENT

Hon'ble Shri S.P. Mukerji, Vice Chairman

and

Hon'ble Shri N. Dharmadan, Judicial Member

ORIGINAL APPLICATION No.243/87

M. Asirvatham ....the applicant

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1. The Union of India represented by the General Manager, Southern Railway, Madras.
2. The Senior Divisional Personnel Officer, Southern Railways, Palghat.
3. The Inspector of Works, Southern Railways, Tirupattur..... the respondents

Mr. Gopakumar : the applicant's counsel

M/s. M.C. Cherian, Saramma Cherian and TA Rajan : the respondents' counsel

JUDGMENT

Shri N. Dharmadan, Judicial Member

This application is filed under section 19 of the Administrative Tribunals Act 1985 by a CLR worker in the Palghat Division of the Southern Railways for a

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declaration that he is entitled to continue in service without any break in service.

2. The applicant entered service under the third respondent on 21.9.1978.and he was granted temporary status with effect from 21.1.1979. Thereafter, he was continuously working under the third respondent till 4.2.1984 on which date he entered on medical leave which was sanctioned upto 01.03.1984. According to the applicant he could not join duty on the expiry of the period of leave because of his continued illness and treatment thereof. The applicant applied for grant of further leave producing medical certificate, but it was not sanctioned. The applicant further contended that he was found fit for employment and he appeared before the third respondent on 09.09.1985 for joining duty. But the third respondent wanted a written representation for joining duty and the same was filed. Then the applicant contacted the second respondent, the superior officer and requested to allow him to join duty. He xxx also submitted a written representation dated 9.9.1985. Inspite of the representations, the second and third

respondents did not allow the applicant to join duty. Hence, the applicant approached the Tribunal with the contention that the denial of employment to the applicant is violative of the provisions of Chapter V-A of the Industrial Disputes Act and Indian Railway Establishment Manual.

3. The learned counsel for the respondents opposed the contention of the applicant and submitted that the applicant was placed under sick list by the Assistant Medical Officer, Jolarpet, from 04.02.1984 to 01.03.1984. Subsequently, he was discharged on 01.03.1984 certifying that the applicant was fit for duty on 2.3.1984 but he did not join duty and remained absent unauthorisedly. In the meanwhile he filed O.P.1169/84 before the High Court of Kerala challenging his posting as Gangman and claimed to be posted as skilled worker in the scale of Rs.260-400. The said case was disposed of at the admission stage itself on 12.3.1984 directing the respondents to dispose of the representation of the applicant. Since this order was not complied with

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the applicant sent a lawyer's notice dated 04.05.1984 threatening contempt proceedings for not complying with the directions of the High Court. Then the applicant filed O.P.4675/84 (Contempt) on 25.5.1984, but it was dismissed on 11.6.1984 on the submission of the Railway counsel that the respondents have already complied with the directions. Thereupon, the applicant filed O.P.8094/84 challenging the order rejecting the claim for absorption as skilled Artisan which was transferred to this Tribunal and the same was dismissed by the Tribunal on 30.1.1989.

4. The applicant has filed this application while the above transferred application was pending before the Bench, with the prayer to declare the denial of employment to him as illegal and the applicant is entitled to continue in service without any break in service and to reinstate him with all back wages and other consequential benefits.

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5. According to the respondents when the applicant came to the office of the respondent, he was served with an order relieving him from service from 23.3.1984 with the instructions to report to Permanent Way Inspector. A photostat copy of the order is produced as Exhibit R.1(d). The applicant refused to receive the said order. Hence the third respondent issued another communication dated 28.4.1984. It is evidenced from Exhibit R.1(e). This states that the petitioner is deemed to have been relieved on the FN of 23.3.1984, since the applicant was unauthorisedly absent inspite of these letters. The learned counsel for the respondents contended that after the discharge by the Medical Officer on 1.3.1984 the applicant did not report for duty, and he absented himself from duty. Hence, the proceedings have been taken against the applicant for the unauthorised absence. Accordingly, the Railway administration treated the applicant as having resigned the post and left the service as per Rule 732 of the Indian Railway Establishment Code Vol.I.

6. In answer to above contention the learned counsel for the applicant submitted that the applicant

has submitted his application for extension of leave supported by Medical Certificate from the Medical Officer who treated him, for sanctioning leave from 1.3.1984. But the respondents have not sanctioned leave so that there is no unauthorised absence. There is no default on the part of the applicant for invoking the rule 732 of the Indian Railway Establishment Code as submitted by the learned counsel for the applicants. The counsel also submitted that the said rule will not stand scrutiny of law because it contemplates automatic termination of railway employee without any prior notice or intimation before taking such a drastic action of putting an end to the service of an employee in the Railway department.

7. The learned counsel for the Railways brought to our notice in this connection a decision of the Madras Bench of the Tribunal in TA 3/87 and submitted that in a similar case the Tribunal accepted the contention of the Railways based on the above rule 732 of the Indian Railway Establishment Code and held that

the absence from duty of the applicant in that case from 21.9.1980 was not covered by any sanction of the Railway authorities and that the case of the applicant therein is governed by rule 732 of the Indian Railway Establishment Code and the applicant ceased to be a Railway employee. Accordingly, the petition was dismissed. We have gone through the judgment but we are not inclined to follow the decision in TA 3/87. The above rule as extracted from the judgment in TA 3/87 reads as follows:

> "....Such a Railway servant shall not be entitled to any notice of termination of service when he is deemed to have resigned his appointment and ceased to be a Railway employee in the circumstances detailed under Note 2 below Exception II to Rule 732 (1) of the Indian Railway Establishment Code (Volume I). The note referred to above reads as follows:
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> 'Note 2 - Where a temporary railway servant fails to resume duty on the expiry of the maximum period of extra-ordinary leave granted to him or where he is granted a lesser amount of estraordinary leave than the maximum amount admissible, and remains absent from duty for period which together with the period of extraordinary leave granted exceeds the limit upto which he could have been granted such leave under sub-rule(1) above, he shall, unless the President in view of the exceptional cirdumstande of the case otherwise determines, be deemed to have resigned his appointment and shall, accordingly, cease to be a railway employee."

This rule imports the idea of automatic deemed termination of the employee when he fails to resume duty on the expiry of the maximum period of leave sanctioned by the authority. The power given to the respondents under this rule is so drastic that it would be unconscionable and inequitable to sustain the arguments based on the same. Before taking a decision which affects the civil right of a citizen it is fundamental that the said person should be told about the action proposed to be taken. The basic principle of natural justice is ~~that~~ 'audi alteram partem'. This should be read in statutes, rules or the provisions, if there is no provision for issue of notice in the circumstance such as mentioned above in the interest of justice unless it is inconsistant with the provision as has been pointed out by the Supreme Court in Union of India V. J.N. Sinha and another, AIR 1971 SC 40,. The court held as follows:

> "Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in Kraipak V. Union of India, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put in negatively to prevent miscarriage of justice. These rules can operate only in areas not covered

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> by any law validly made. In other words they do not supplant the law but supplement it." It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a staturory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the expresswords of the provision conferring the power, the purpose for which it is conferred and the effect of the exercise of that power."

Thus the principles of natural justice have paramount importance in considering the scope and nature of the rules which specify deemed termination of service of an employee. In Deokinandan Prasad V. State of Bihar, AIR 1971 SC 1409 the Supreme Court held that even though the rule prescribes automatic termination of service for continuous absence for five years an order passed to that effect without giving opportunity to Government servant offends Article 311 of the Constitution. The Court laid down the principles as follows:

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"24. It was contended on behalf of the State of Rajasthan that the above regulation operated automatically and there was no question of removal from service because the officer ceased to be in service after the period mentioned in the regulation. The Court rejected the said contention and held that an opportunity must be given to a person against whom such an order was proposed to be passed, no matter how the regulation described it. It was further held to give no opportunity isto go against Art. 311 and this is what has happened here.

25. In the case before us even according to the respondents a continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of the Pension Rules disentitling the said officer to receive pension. It is admitted by the respondents that no opportunity was given against the order proposed. Hence there is a clear violation of Article 311. Therefore, it follows even on this ground the order has to be quashed."

The Supreme Court has taken this view as early in 1966 inJai Shanker V. State of Rajast-an, AIR 1966 SC 492, and held that removal of Government servant from service without giving an opportunity to show cause for overstaying his leave is illegal even though it is provided by the service regulations. In that case the Supreme Court held as follows:

"The short question in this appeal is whether Jai Shanker was entitled to an opportunity to show cause against the proposed punishment as required by Cl. (2) of the Art.311. It is

admitted that no charge was framed against him. Nor was he given any opportunity of showing cause. The case for the State Government isthat Government did not terminate Jai ShankerIs service, and that it was Jai shanker who gave up the employment by remaining absent. It is submitted that such a case is not covered by Art.311. In support of this contention certain Regulations are relied upon and we shall now refer to them. Regulation 7 lays down..... The Regulation 13 is important because it forms the basis of contention that Art.311 does not apply to this case. That Regulation may be reproduced here:

> '13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority.
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> Note:-The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission.'

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The Regulation involves a punishment for over-staying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his leave, but we do not think that Government can order a person to be discharge from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no questionof reinstatement will arise..... A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to theperson against whom such an order is proposed, no matter how the regulation describes it. To give no opportunity is to go against Art.311 and that is what has happened here.

(7) In our judgment, Jai Shanker was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him his removal from service was illegal...."

8. Following the dictum laid down in the Jai Shanker's case the Supreme Court in the State of Assam and others V, Akshaya Kumar Deb, AIR 1976 SC 37, held that it is imperative and necessary to give the servant an opportunity to show cause against the proposed action particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control. The Court further held that the impugned order was violative of Art.311(2) of the Constitution and as such illegal. The Mysore High Court in State of Mysore V. Anthony Benedict 1969 SLR(3) 21 taken the same view and held that the order of removal is void as the same was repuganant to Article 311 of the Constitution of India. In that case the government servant was shifted from one place to another but he did not join at new place and instead applied for leave on medical grounds. The Court arrived at this conclusion following the judgment in Jai Shanker's case referred to above. The rule considered in Jai Shanker's case is very similar to Rule 732 of the

Indian Railway Establishment Code under consideration, in this case. The words'should be considered to have sacrificed his appointment' in Regulation 13 substantially correspond to the words'deemed to have resigned his appointment and ceased to be a Railway employee' in rule 732 of the Railway Establishment Code. The ratio of Jai Shanker's case will squarely apply to the facts of the case in hand.

9. Thus in the light of the settled preposition that the rule which provide automatic deemed termination of service of an employee cannot be upheld. So, we are not justified in accepting the contention of the learned counsel for the Railway and follow the decision in the judgment of TA 3/87 of the Madras Bench.

10. In the instant application the specific case of the applicant is that he has been granted leave by the third respondent from 4.2.1984 till 1.3.1984 but subsequently the applicant applied for extension of leave supported by valid medical certificate. But the leave was not granted by the third respondent nor did he consider the medical certificate and the requests made by the applicant with the same. The respondents

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are relying on the rule and taking up the stand that the petitioner is unauthorisedly absent himself from duty from the expiry of the sanctioned leave. In the light of the above we cannot assume that there is unauthorised absence on the part of the applicant so as to warrant invoking the aforesaid rule even if we accept that the said rule referred to above as applied in this case, because before applying the said rule it would have been fair on the part of the third respondent to tell him by issuing a notice about his default in this behalf and take a decision. Justice and fair play demand such a step to be taken before taking any decision which involves the civil consequence. Admittedly such a notice has not been issued. So, the action that was taken by the respondents against the petitioner without a prior notice or intimation will be bad and illegal. It is also violative of the principles of natural justice.

11. Under these circumstances the petitioner's contention based on principles of natural justice bereft of all other facts and circumstances would prevail and he is entitled to succeed. We are inclined to hold that the action of terminating the service of petitioner without any notice, enquiry or other proceedings is illegal and unsustainable.

12. Having regard to the facts and circumstances of the case, we allow the application and declare that the termination of the services of the applicant is illegal. The point which remains further to be decided is whether during the period of his forced absence from the date of his illegal termination of service the applicant is entitled to any back wages or salary. It has been held by the Supreme Court in Nawabkhan Abbaskhan v. State of Gujarat, AIR 1974 SC 1480 that if by violation of the principle of natural justice an order is declared to be null and void, it has to be held as if the order had never been passed. A similar view was expressed by the Supreme Court in Surinder Nath Kapoor v. Union of India and others (AIR 1988 SC 1777). In Union of India v. Shri Babu Ram Lalla, AIR 1988 SC 344, the Supreme Court held that if the order of termination is a nullity, full pay and arrears have to be paid as if there was no termination. In A.L Kalra v. Project and Equipment Corporation of India Ltd,(1984) 3 SCC 316, it has held by the Supreme Court that when removal from service is bad in law, no other punishment in the guise of denial of back wages can be imposed. Even in the case of Jai Shanker, cited above (AIR 1966 SC 492) where the services of Shri Jai Shanker were terminated for overstaying his leave without any show cause notice, the Supreme Court held that the order of discharge was illegal being violative of Article 311 of the Constitution. As regards the back salary, the Supreme Court did not disallow back salary, but directed that "the question of what back salary is due to Jai Shanker must now be determined by the trial Judge in accordance with the rules applicable, for which purpose there shall be a remit of this case to the civil Judge, Jodhpur". Relying on this judgment, the Supreme Court in another case, State of Mysore v. Anthony Benedict, 1966 SLR (3) SC 21, in a case where the lien of a

Government servant was cancelled without notice when he had been applying for leave to avoid a transfer order, the Supreme Court held the cancellation of lien to be illegal and set aside the order of the Sub Judge who had refused to decree the suit for arrears of salary. The Supreme Court remitted the case to the lower Court for determination of salary admissible to the employee from the date he became medically fit to join service. In Charan Das Chadha v. State of Punjab and another, 1980(3) SLR 702 the High Court of Punjab and Haryana held that once a promotion is made with retrospective effect, the employee cannot be deprived of the benefit of pay and other benefits and that Government cannot take advantage of its own wrong or illegal order in not promoting the employee. In K.K.Jaggia v. State of Haryana and another, 1972 SLR 578 the same High Court held that on retrospective promotion the employee is entitled to arrears of pay even though he did not work against the higher post because he did not work in the higher post for no fault of his. In J.S Arora v. Union of India and others, 1982(3) SLR 589 the High Court of Delhi held that on exoneration in disciplinary proceedings and promotion with retrospective effect the employee should get arrears where the disciplinary proceedings have been held to be illegal. In Maharaja Sayaji Rao University of Baroda and others v. R.S Thakkar, I(1988) ATLT SC 267 the Supreme Court upheld the order of the High Court whereby claim of back wages had been allowed on order of termination being held illegal. In Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh and others, AIR 1962 SC 1334 the Supreme Court held that where the order of dismissal is set aside as void, order of reinstatement is superfluous and the employee is entitled to all benefits as if the employee was never dismissed.

13. In view of the clear rulings of the Supreme Court and the High Courts and keeping in view the fact that in the instant case before us the applicant has been trying his level best to join duty ever since 9.9.85 when he became medically fit but was not allowed to do so, we feel that he is entitled to leave salary on medical grounds upto 9.9.85 and thereafter salary and allowances as due to him in accordance with rules as if the order of termination had not been passed.

14. In the result, after considering the facts of the case the Original Application is allowed with the direction to the respondents that the applicant should be reinstated forthwith with all consequential benefits of leave salary and arrears of back wages admissible to him in accordance with the relevant rules and instructions. There will be no order as to costs.

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(N.DHARMADAN)
JUDICIAL MEMBER
19.10.89

19.X.89

(S.P MUKERJI)
VICE CHAIRMAN
19.10.89