

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 258
T. A. No.

1991

DATE OF DECISION 14.8.91

Chacko Pillai _____ Applicant (s)

Mr. M R Rajendran Nair _____ Advocate for the Applicant (s)

Versus

Union of India represented by Respondent (s)
Secretary to Govt. of India,
Ministry of Communications, New Delhi and others

Mr. Mathews J. Nedumpara, ACGSC Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. S. P. MUKERJI, VICE CHAIRMAN

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? As

JUDGEMENT

MR. N. DHARMADAN, JUDICIAL MEMBER

The grievance of the applicant arises from a strange and unusual situation. Applicant admittedly absented from duty from 1981 onwards. His leave applications were not granted. He was proceeded against for unauthorised absence from duty. All notices and orders sent to him in his known address were returned with the postal endorsement "addressee left India without instruction; returned to sender." After long lapse of time, the applicant claims reinstatement in service in October, 1990 on the ground that no disciplinary proceedings were initiated against

him nor was any order removing him from service served on him.

2. The applicant commenced service in the Telephone Department as Engineering Supervisor (re-designated as Junior Engineer) from 30.4.1974. He was declared quasi-permanent on 1.5.1977 and confirmed in service in 1979. After obtaining passport, he applied for 120 days leave from 10.8.1981. He also sought permission to leave the headquarters and applied for extension of leave on various occasions. He received no communication granting extension of leave. According to the applicant, though he wanted to report for duty after the expiry of five years, he was not allowed to join on the ground that he has been removed from service. But he did not receive any communication in connection with such proceedings. Finally on 20.10.90 he approached the third respondent and requested xxxx to permit him to resume duty. Then he was informed that his service was already terminated w.e.f. 31.8.1984. But no order was served on him in spite of the request. He submitted Annexure-I representation on 20.10.1990. This was followed by fresh representations. Since they did not invoke any response, he filed this Application for a declaration that his removal is void and that he is entitled to continue in service. He also seeks for a direction to the respondents to allow him to resume duty with all consequential benefits.

3. The third respondent filed a statement and a counter affidavit. He has submitted that Ext. R-3 (1) application for leave for a period of 120 days was submitted by the applicant at the time when he was not having any leave in his credit. The reason given for leave was "urgent domestic affairs." Though the said leave was not granted he absented himself from duty from 10.8.1981 to 8.12.1981. Thereafter, he sought further extension of leave from 8.12.1981 to 6.4.1982, 7.4.1982 to 11.4.1982, 12.4.1982 to 26.11.1982 and 10.8.1982 to 8.10.1982. Ext. R-3 (2) to R-3 (5) are leave applications. Since the applicant himself absented from duty from 10.8.1981 to 26.7.1982 and 27.8.1982 to 8.10.1982, the Addl. Engineer (Phones), Ernakulam by proceedings Ext. R-3 (6) and R-3 (7) ordered to treat the said period as dies non and break xx in service. He was also issued Ext. R-3 (8) indicating that if the applicant fails to report for duty, appropriate disciplinary action would be initiated against him. Since the applicant failed to join duty, disciplinary proceedings under section 14 of the CCS (CCA) Rules, 1965 were taken against him by issuing Ext. R-3 (17) notice. But all the notices and orders sent to the applicant by registered post were returned with the endorsement "addressee left India without instruction, so returned to sender." The applicant

after sending leave applications without indicating his correct address to which he can be contacted, left India in an irresponsible manner and hence it was not practicable for the respondents to proceed with the disciplinary proceedings after serving notice. Due to the impossibility of serving notices on the applicant, enquiry authority by his proceedings No. 14/CKP/6 dated 5.8.1983 decided to hold the proceedings ex parte. The decision Ext. R-3 (15) was sent to the applicant but it was also returned with the postal endorsement "the addressee left India without instruction." Ultimately, he was removed from service w.e.f. 31.1.1984. This was also sent to him by registered post with acknowledgement due. It was returned with the note "addressee left India without instruction, returned to sender." The order was sent by ordinary post as well. But it was not received back. A copy of the order was also displayed on the notice board where the applicant was working. The following entry was made in his service book after his removal from service:

"removed from service with immediate effect. But this penalty shall not be a disqualification for further employment under the Government vide DMT Ekm No. Q 1897/Dis/11 dated 31.1.1984."

The respondents have stated in reply statement that "Now the file containing the said order is not traceable and the third respondent apprehends that it might have been removed in a clandestine manner at the instance of the applicant. This fact came to the notice of the respondents only recently. The third respondent has

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taken the issue with seriousness the same calls for and appropriate steps are being taken to find out and whosoever is responsible for the said missing of the file and locate it wherever it is misplaced. Needless to say, the matter has received due notice of concerned authorities and it is expected that the enquiry initiated will bring out the truth. It is xxxxxxxxxxxx submitted that it will prejudisely affect the functioning of the office as well as public interest if the applicant is allowed to take advantage of the said situation."

4. We have heard the arguments of the learned counsel for both sides and perused the records. The only averment advanced by Sri M. R. Rajendran Nair, the learned counsel for the applicant is that the applicant still continues in service because of the relation of employer and employee between the applicant and the Department has not yet been severed by communication of an order of removal. He has relied on Annexure-3 All India Eligible list of JTOs for promotion to TES Group-C against 1200 posts of the year 1990 in which the name of the applicant has been included at Sl. No. 362, which according to the respondent is a mistaken entry made without advertizing to the removal order already passed with effect from 31.1.1984 and endorsed in the Service Book. It was also published and displayed in the notice board where the applicant was working.

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5. The sole question turns upon the grant of leave and service of notices and orders issued in connection with the disciplinary proceedings, on the applicant. Admittedly, the applicant submitted his first application for leave from 10.8.1981 for a period of 120 days when no leave was in his credit. He had also applied for passport and permission for leaving headquarters from 8.8.1981. In none of the leave applications, he has given his address where he will be available during the period of leave so as to enable the Department to contact him.

6. A Government servant is not entitled to leave as of right. Under Rule 7 of CCS(Leave) Rules, 1972, the competent authority has discretion to refuse leave of any kind. Rule 14 says that a leave application for extension shall be in Form I, which provides a column to be filled by the Government servant giving details of his address where he can be contacted during leave period. Further, it is obligatory on the part of the Government employee who applies for leave to find out whether it is in proper form and the same has been granted by the competent authority. If it is not in form, he has the further duty to be present in the office for work in order to avoid break in service. Since the applicant did not discharge any of these obligations, Annexure R-3(6) and (7) orders have been passed. One of the orders reads as follows:

"Whereas Shri C. K. Chacko Pillai, JE was absent from duty from 10.8.81 to 26.7.82 without prior permission from the competent authority and whereas he has failed to satisfy the competent authority

about the necessity of such absence without permission.

Now, therefore, it is hereby ordered that the said period viz. 10.8.81 to 26.7.82 be treated as 'Dies-non' with break in service.

This is without prejudice to any other disciplinary action that may be taken for his unauthorised absence."

7. 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 correct address so as to enable the Department to contact him, it is to be presumed that he is not very serious about maintaining his relationship with the 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 of 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 27.7.1982.

8. 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 address were returned with the endorsement "addressee left India without instruction, so returned to sender."

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

" Every order, notice and other process made or issued under these rules shall 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 Govt. 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 his 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 Vs. Atmaram Sungowal Poshani*, (1989) 2 SCC 602 held as follows:

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"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 rebuttable 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 sent through post. If the party is not available in India and his address is not known, it becomes impossible to send 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. In the instant case all these methods are not available to the respondents because of the default and calculated failure of the applicant to furnish his address to the Government/Department so as to enable the respondents to contact him while he was on leave for a long period.

Really the applicant ^{was} ~~is~~ absconding and his whereabouts ^{were} ~~are~~ not known to the respondents from 10.8.1981 to 20.10.1990.

In such cases Rule 63 of the P & T Manual Vol. III applies.

It reads as follows:

"Whenever an official continues to remain absent from duty or overstays leave without permission and his movements are not known, or he fails to reply to official communications, the disciplinary

authority may initiate action under Rule 14 of the CCS (CCA) Rules, 1965. In all such cases, the competent authority should, by a registered A.D. letter addressed to the official at his last known address, issue a charge-sheet in the form prescribed for the purpose and call upon the official to submit a written statement of defence within a reasonable period to be specified by that authority. If the letter is received undelivered or if the letter having been delivered, the official does not submit a written statement of defence on or before the specified date or at a subsequent stage does not appear in person before the Inquiry Officer, or otherwise fails or refuses to comply with the provisions of CCS (CCA) Rules, the inquiring authority may hold an ex parte inquiry."

An ex parte enquiry is permissible and a return of a notice undelivered to the delinquent which was sent through post to his known address is sufficient to satisfy the authorities to proceed with the enquiry proceedings in a valid manner. This has been satisfied in this case. Hence, there cannot be complaint that the applicant has no notice of the enquiry proceedings.

10. It appears that the respondents have made all efforts to inform the applicant about the proceedings to be initiated against him for his unauthorised absence. But as indicated above it became impossible to contact him since he was admittedly out of India. He was in foreign employment and he failed to inform his whereabouts to the Department. He is estopped from contending under these circumstances that the enquiry proceedings are vitiated by the violation of the principles of natural justice. In fact there is no scope to examine on the facts of this case as to whether there is violation of principles of natural justice

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on account of the non-service of notice to his address.

11. The Supreme Court in Board of Mining Examination Vs. 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 fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt—that is the conscience of thematter."

Again in R. S. Dass Vs. 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 of right which may be affected 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 of disciplinary proceedings against an employee of the State Bank; and their Lordships had observed:

...it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. 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, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth."

Two things seem to be important; one, the statutory prescription governing the procedure, and two, the suffering of some prejudice by the delinquent..."

12. Having regard to the facts and circumstances of this case it cannot be said that there is violation of principles of natural justice. In fact the applicant himself is in default on account of his failure to furnish the address to the Department. Such person cannot complain about the infraction of his right. He has not suffered any prejudice. The applicant re-appeared before the third respondent only in October, 1990 after his disappearance from duty in 1981. Because of his absence for an unduly long period without intimating the details of his whereabouts, it would be inequitable to grant him any benefit under the cover of principles of natural justice and direct the respondents to reinstate him in service particularly when the files discloses that all attempts have been made by the respondents to communicate all notices to the applicant in his known address at the appropriate stages. The order of removal was sent to the applicant in the ordinary post, in the registered post and it was also affixed at the place where he is expected to work. This is sufficient for communicating the order on the applicant particularly when there is an allegation that the files containing the order had been removed by the applicant and a departmental search also is xxxx going on in this behalf.

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13. In the result we are of the view that this application is only to be dismissed. Accordingly, we dismiss the same. There will be no order as to costs.

N. Dharmadan

14.8.91.

(N. DHARMADAN)
JUDICIAL MEMBER

S. P. Mukerji

14.8.91

(S. P. MUKERJI)
VICE CHAIRMAN

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