

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 359/2001

Monday, this the 29th day of September, 2003

CORAM:

HON'BLE MR A.V.HARIDASAN, VICE CHAIRMAN

HON'BLE MR T.N.T.NAYAR, ADMINISTRATIVE MEMBER

H.Ganapathy Iyer,
Telephone Operator,
Telephone Exchange,
Kochi-2,
Residing at Malikayil,
44/2268A, Deshabhimani Road,
Kaloor.P.O., Kochi-17. - Applicant

By Advocate Mr MR Rajendran Nair

VS

1. The General Manager,
Telecom, Ernakulam.
2. Bharath Sanchar Nigam Ltd.
represented by the Chief General Manager,
Telecom, Kerala Circle,
Thiruvananthapuram.
3. Union of India represented by
its Secretary to Government,
Ministry of Telecommunications,
New Delhi. - Respondents

By Advocate Mr P.Vijayakumar, ACGSC

O R D E R

HON'BLE MR T.N.T.NAYAR, ADMINISTRATIVE MEMBER

The applicant who is involved in a long and highly chequered process of litigation centering round disciplinary proceedings against him; compulsory retirement, reinstatement and further compulsory retirement, has filed this O.A. aggrieved by A-6 order dated 1.8.96 restricting his pay and allowances to 75% of what is admissible for the period between

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29.8.91 and 6.8.95 during which he was kept out of service and A-11 memo dated 2.3.2001 issued by the 2nd respondent by which his claim to treat the period during which he was kept out of service as duty for all purposes and to grant him all consequential benefits including full pay and allowances for the said period was rejected.

2. The facts in brief compass: By A-1 order dated 28.8.91 the applicant, a Telephone Operator was awarded the major penalty of compulsory retirement from service. In O.A.795/95 filed by the applicant challenging A-1 order, this Bench of the Tribunal by order dated 3.8.95(A-2) quashed the order of disciplinary authority and the orders of the appellate and revisional authorities. On 7.8.95 the applicant rejoined duty in pursuance of the Tribunal's order referred to above and claimed full pay and allowances and other benefits for the period between 29.8.91 and 6.8.95 during which he was kept out of service illegally. While representations in that regard were still pending, the applicant received A-4 memorandum dated 12.12.95 proposing to restrict his pay and allowances for the period to 50% of the normal claim and to treat the period of absence as duty for pensionary benefits only. The applicant filed A-5 reply dated 20.12.95. The inaction on the part of the respondents led to filing of O.A.851/96. During the pendency of that O.A. the respondents passed A-6 order dated 1.8.96 fixing the pay and allowances for the period the applicant was kept out of work at 75% of the normal admissible amount and treating the period as duty for the purpose of pensionary benefits only. Applicant filed

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A-7 appeal dated 10.9.96 against A-6 order. Thereafter the applicant withdrew O.A.851/96 as is clear from A-8 order dated 30.9.96. The applicant's A-7 appeal was rejected by order dated 24.11.97 communicated through covering letters dated 14.1.98 and 12.3.98(A-9). A-6 and A-9 orders were challenged in O.A.342/98. This Tribunal by order dated 24.11.2000 (A-10) held that A-9 order was not a considered appellate order in conformity with Rule 27(3) of the CCS(CCA) Rules and accordingly, the same was set aside with the direction to the 2nd respondent to consider the applicant's appeal and pass appropriate orders in compliance with Rule 27(3) of the CCS(CCA) Rules. The impugned A-11 order dated 2.3.2001 is effectively in pursuance thereof though there is no mention of A-10 in the said order. It has also transpired in the meanwhile that by order dated 28.10.97 the applicant was again compulsorily retired from service. This has led to filing of yet another O.A.(O.A.No.1467/97) in which the Tribunal by order dated 25.2.2000 set aside the order of compulsory retirement and has ordered the applicant's reinstatement in service with all consequential benefits including continuity of service and attendant benefits like full back wages for the period he was kept out of service. The latter order of the Tribunal is understood to be under stay by the Hon'ble High Court of Kerala.

3. Against the above factual background the applicant prays for this Tribunal's order quashing A-6 and A-11 orders declaring that the period between 28.8.91 and 7.8.95 during which the applicant was kept out of service was to be treated

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for duty for all purposes and directing the respondents to draw and disburse full pay and allowances due to the applicant for the period during which he was kept out of service on account of illegal order of compulsory retirement together with interest at 18% per annum.

4. The respondents have filed a reply statement resisting the applicant's averments stating that the Tribunal's order in O.A.795/95 setting aside the original order of compulsory retirement was, on account of noncompliance with the requirement of Article 311 of the Constitution and not on merits. The payment of wages for the period he was kept out of work was to be considered within the purview of provisions of FR.54(A) 2 and the question of treating the period as duty for all purposes and the payment of full pay and allowances would not arise. According to the respondents, rules do not provide for granting full pay and allowances to the applicant for the period during which he remained out of service. It is pointed out that the order of the Tribunal in O.A.1467/97 setting aside the second compulsory retirement order has since been stayed by the Hon'ble High Court of Kerala. The respondents would therefore maintain that the applicant did not have a case for treatment for the period between 28.8.91 and 7.8.95 as duty for all purposes and grant of full pay and allowances for the said period and that the O.A. was, accordingly, liable to be dismissed.

5. We have heard Shri M.R.Rajendran Nair, learned counsel for the applicant and Shri P.Vijayakumar, learned ACGSC.

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According to Shri Rajendran Nair, it was held by the Tribunal in O.A.795/95 that the person who passed the order of compulsory retirement had no jurisdiction and that as such, the order was ab initio void and illegal. Hence the applicant's reinstatement in pursuance of the Tribunal's finding entailed liability to pay the entire back wages for the period during which the applicant was kept out of work illegally. Learned counsel for the applicant would rely on the Apex Court's ruling in Narotam Chopra Vs Presiding Officer, Labour Court and others [1988(4) SLR 388] and contend that the termination being void, the applicant on reinstatement, was entitled to full back wages for the period he was kept out of service. There was no order of suspension nor was the period treated as deemed suspension. According to the learned counsel, the impugned order passed after the Tribunal's order in O.A.1467/97 without considering the same is illegal, unsound and hence is liable to be set aside.

6. Shri P.Vijayakumar, learned ACGSC would maintain that the order in O.A.795/95 was not on merits. The Tribunal by that order set aside the impugned order of compulsory retirement in view of nonobservance of the procedure in terms of Article 311 of the Constitution. There was no order of reinstatement or for grant of back wages. However, when the applicant was reinstated, the payment of wages for the period during which he was out of work was considered in terms of the provisions of FR 54.A(2)(i). The order granting him wages at 75% of the basic pay and allowances for the period 29.8.91 to 6.8.95 was perfectly in accordance with law, learned ACGSC would urge.

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7. We have carefully gone through the pleadings on record and the supporting material and have also considered the arguments put forward by the rival counsel. We notice that the only issue considered in O.A.795/95 was the proposition that the 1st respondent Shri Jacob "...did not hold a valid appointment in the Indian Telegraph Service Group'A', that he is not the authority competent to impose a punishment under Article 311 of the Constitution of India and that the imposition of a punishment by him is in a clear violation of the provisions of Article 311 of the Constitution of India.." The Tribunal after due consideration of the legal position held as under:

"...we have to hold that Jacob did not hold a valid appointment, which enabled him to function as the Disciplinary Authority of applicant. We are dealing with a Constitutional provision namely Article 311 and the effect of its violation is to void the order of the Disciplinary Authority. We may also point out that the learned counsel appearing for the Union of India did not advance any argument based on the doctrine of curable illegality. It follows that Jacob who acted as the Disciplinary Authority is not seen to have been appointed as a Disciplinary Authority (Group'A' Indian Telegraph Service), that even after repeated challenge he or the other respondents could not produce any order that empowered him to act as the Disciplinary Authority, and that he stands in the position of a usurper who violated a Constitutional mandate. We quash the order of the Disciplinary Authority and the orders of the Appellate and Revisional Authorities affirming the same."

According to us, the above observations of the Tribunal make it abundantly clear that the whole exercise of keeping the applicant out of service was ab initio void and unconstitutional and that the resultant financial burden has to be borne entirely by the respondents. In our view, there

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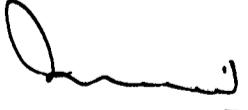
is no relevance for the question whether the Tribunal looked into the merits of the matter or not. The impugned order was non-est. The applicant could under no circumstance be kept out of duty and hence he could not be treated as having remained out of duty during the period 29.8.91 and 6.8.95. The entire blame for keeping him out of work squarely lay at the door of those who committed a breach of constitutional provision. In the circumstances, we see no force in the argument that there was no order on merits of the case or that there was no order to reinstate the applicant or to pay the back wages. Full payment of back wages in this case is automatic since the whole order of compulsory retirement is void and not voidable. We have therefore no doubt in our kind that when the applicant was reinstated in the light of this Tribunal's declaration of law as contained in the order dated 3.8.95 in O.A.795/95 the applicant was eligible to get full wages as if he never was kept away from work. The applicant affirmed that he was never gainfully engaged in any manner during the period when he was illegally kept out of work. The applicant's acquiescence or concession in regard to applicability of Rule 54.A is of no consequence with regard to the question of restricting the applicant's wages for the period when he was kept out of work by a totally illegal order. It is well settled that payment of back wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved. It is worth mentioning that when the impugned A-11 order dated 2.3.2001 was passed, this Tribunal's order in O.A.1467/97 dated 25.2.2000 was already there setting aside the second order of

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compulsory retirement dated 28.10.97 and directing reinstatement with full back wages and other service benefits. But that fact is however, not decisive as far as the matter on hand is concerned, according to us. We therefore, do not consider it necessary to refer to it any further in the context of this case. Suffice it to say that by keeping the applicant out of work by passing an order that was held to be totally void, no part of his remuneration can be curtailed. This the sum and substance of the legal consequence of this Tribunal's order in O.A.795/95.

8. In view of the facts and law discussed above, we declare that the applicant is entitled to full pay and allowances for the period between 28.8.91 and 7.8.95 during which he was kept out of service on account of the illegal order of compulsory retirement. A-6 and A-11 orders are set aside. The second respondent shall cause full pay and allowances to be drawn for the said period and the same shall be disbursed to the applicant within a period of four months from the date of receipt of copy of this order. It is also declared that the applicant is entitled to all other consequential service benefits arising therefrom. On the facts and the circumstances of the case, we do not deem it necessary to grant any interest on the amounts to be paid to the applicant. The parties shall bear their respective costs.

Monday, this the 29th day of September, 2003


T.N.T. NAYAR
ADMINISTRATIVE MEMBER


A.V. HARIDASAN
VICE CHAIRMAN

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