CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD

LUCKNOW CIRCUIT BENCH, LUCKNOW

Registration O.A. No.135 of 1990.

Pratap ..... Applicant

Versus

Union of India & Others ..... Respondents

Hon.Mr.Justice Kamleshwar Nath, V.C.
Hon. Mr. M.M. Singh, Member (A)

(By Hon.Mr.Justice K.Nath, V.C.)

This application under Section 19 of the Administrative Tribunals Act, 1985 is for quashing of the order of removal passed on 17.5.89 contained in Annexure-A1 with benefits of salary.

2. The respondents have filed counter; Shri A.K. Dixit for the applicant says that no rejoinder is to be filed. The case involves very short matter and therefore as agreed by the parties this petition is disposed of finally.

3. According to the applicant he was working as Casual Labour since the year 1965 but according to the respondents the applicant started working since 1973 and after completing 120 days in continuous working he was treated as a "decasualised labour". On 2.1.1984 he was subjected to a medical fitness examination and was declared medically unfit. It does not however appear that any order of termination of his service on that basis was passed in that context. According to the

respondents the applicant colluded with the concerned staff and continued to remain in employment despite his medical unfitness. In the screening done in 1988, it came to light that the applicant had failed in medical examination but he continued in service. On 29.7.84 he was sent for medical examination before D.M.O. where he was declared unfit on 2.8.84 and under the Rules he should have been terminated from the service. He was also served with a show cause notice on 6.1.89 to which the applicant replied on 3.2.89 after emphatically denying the contents. The reply was unsatisfactory. He was never sent for medical re-examination in 1988.

4. Annexure-A4 is the reply dated 3.2.89 in which he admitted that he had been declared medically unfit but added that he made an appeal and on a re-examination in consequence of the appeal he was found fit; he prayed that he may be retained in service.

5. However, the applicant, according to the respondents, vide para 12 of the written statement absconded from his duty from 6.1.89 and never joined duty. Ultimately, the impugned order of removal contained in Annexure-A1 dated 17.5.89 was passed in which it was mentioned that the applicant's reply to the show cause notice had been carefully considered but was found unsatisfactory because he had been found medically unfit. The order mentions that for the charge of being medically unfit, the applicant was found guilty and therefore he was removed from service with effect from 18.5.89. This order was undoubtedly passed under the Railway Servants (Discipline & Appeal) Rules, 1968 as clearly mentioned on the top of impugned order Annexure-A1.

6. The simple grievance of the applicant is that the impugned order of termination by way of penalty, is wholly misconceived, unsustainable in the eyes of law and deserves to be quashed.

7. The learned counsel for the respondents urged in the first instance that the applicant had filed a departmental appeal against the termination order and that appeal is still pending and therefore this petition may not be entertained. The provision of requiring the applicant to exhaust departmental remedy before approaching the Tribunal is not a total bar to the entertaining of the application filed before this Tribunal. Where there is a violation of the principles of natural justice, this Tribunal is well within its competence to entertain the petition even during the pendency of the alternative remedy. In this connection it may also be mentioned that the appellate authority is expected to dispose of the appeal within six months and if it is not done within six months, the applicant who is aggrieved is at liberty to approach this Tribunal.

8. The learned counsel for the respondents has laid emphasis upon the conduct of the applicant after he was found medically unfit on 2.4.84. He says that the record held by the Department shows that in the medical certificate the expression 'Unfit' had been surreptitiously rectified to read as 'Fit' and it was for that reason that the applicant continued to remain in employment despite his unfitness. He therefore says that according

to the fairness and justice the applicant is not entitled to claim remaining in service. Without making any further comment upon this point we should only say that the Department should have enquired about the facts after instituting an enquiry against the applicant in accordance with the provisions of the Railway Servants (Discipline & Appeal) Rules, 1968. That has not been done. There can be no presumption that any surreptitious act has been done by the applicant. It requires proof. The adequacy or quantum of proof is a matter to be determined by the disciplinary authority. The learned counsel for the respondents then said that ever since 1989 the applicant had been absconding and did not report for duty and therefore is not entitled for any salary. The learned counsel for the respondents referred to the reply dated 3.2.89 to the show cause notice in which he had complained that despite furnishing a reply dated 3.2.89 to the show cause notice dated 6.1.89 he was not being paid salary although he was reporting for duty and he was wrongly marked absent. The best course for the respondents was to institute a fresh enquiry against the applicant about his collusion with the concerned staff in continuing in the service.

9. We see no reason why the applicant may be refused his salary for the period from 17.5.89. If on the one hand the applicant had not approached the Department with clean hands, on the other hand the Department itself had acted with reckless negligence

about the case of the applicant. They ought to know the proper Rules under which a complaint or an act of misconduct as alleged by the learned counsel for the respondents ought to be investigated, tried and ultimately determined. If despite this knowledge they have chosen to act in an arbitrary manner in flagrant violation of the applicable rules, there is no reason to deny salary to the applicant from the date of removal from service. It is self evident that mere failure in medical test is not misconduct so as to attract disciplinary proceedings.

10. For the reasons indicated above, this petition is allowed and the order of removal contained in Annexure-A1 dated 17.9.89 is quashed. The applicant will be deemed to have continued in service and will be paid back wages as admissible under the Rules. It is open for the respondents to institute a fresh enquiry against the applicant under the applicable provisions. Parties shall bear their costs.

Member (A) Vice Chairman

Dated the 13th Sept., 1990.

RKM