

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Original Application No: 1039/96

2. 9.99
Date of Decision:

D.G.Bhopi

Applicant.

Shri S.M.Dharap

Advocate for
Applicant.

Versus

G.M.C.Riy, Mumbai & Anr.

Respondent(s)

Shri V.S.Masurkar

Advocate for
Respondent(s)

CORAM:

Hon'ble Shri. D.S.Baweja, Member (A)

Hon'ble Shri. S.L.Jain, Member (J)

- (1) To be referred to the Reporter or not? ✓
- (2) Whether it needs to be circulated to other Benches of the Tribunal?

D.S.Baweja
(D.S.BAWEJA)

MEMBER (A)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

OA.NO. 1039/96

DATED this the 2nd day of Sept 1999

CORAM : Hon'ble Shri D.S.Baweja, Member (A)
Hon'ble Shri S.L.Jain, Member (J)

Dattatreya Ganpat Bhopi,
At & P.O. Badlapur,
Shivaji Chowk,
Taluka Ulhasnagar,
Dist. Thane.

... Applicant

By Advocate Shri S.M.Dharap

V/S.

1. The General Manager,
Central Railway,
CST, Mumbai.

2. Assistant Engineer (Engineering),
I.O.W.(H), Byculla Hospital, C.R.,
Byculla, Mumbai.

... Respondents

By Advocate Shri V.S.Masurkar

O R D E R

(Per: Shri D.S.Baweja, Member (A))

Applicant has filed the present OA. on
being aggrieved by oral termination of his services
w.e.f. 28.9.1995.

2. The case of the applicant is as follows :-
The applicant states that he came to understand that
there were some vacancies in Group 'D' in Central
Railway at Byculla. The applicant made an application
enclosing the School Leaving Certificate and medical
certificate. Thereon the applicant kept making enquiries
about his appointment and then finally he was asked to
join duty and he actually joined on 6.7.1992 as Khalasi
under Inspector of Works at Byculla where the office is

situated at the back of Byculla Hospital, Central Railway. The applicant was paid salary in the regular pay scale and also allowed increments.
Necessary deductions towards provident fund and professional tax were also made from the applicant till his services were orally terminated from 28.9.1995. The applicant was issued an Identity Card No. 019248. The applicant was also issued residential card pass No. 03430. However, all of a sudden, the applicant was called by one Shri B.S. Juneja and he was informed that his services were terminated from 28.9.1995. No reasons were intimated to the applicant. However, he was orally informed that documents required for appointment of the applicant were not available on record and therefore the applicant was asked to produce the copy of the appointment order as well as the medical certificate. The applicant informed the concerned Supervisor that he was not in possession of any of the documents demanded, therefore, he could not produce the same. After oral termination of his services, the applicant approach through the Union to take up his case for appointment. He also approached in person the office of Inspector of Works, Byculla. But did not get any response. Thereafter, he represented on 4.4.1996 to the Assistant Engineer, Central Railway Byculla. But he did not received any reply to his representation. Feeling aggrieved the present OA. has been filed by the applicant on 27.9.1996. The applicant has challenged his oral termination mainly on two grounds :-

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(a) Since the applicant had worked continuously for more than $3\frac{1}{2}$ years, the services of the applicant could not be terminated without issuing charge-sheet and issue of show cause notice and therefore the termination is in violation of Article 14 of Constitution of India and bad in law. (b) The applicant while working as a Khalasi is a workman and having completed 240 days of working in a year, termination of his services was in violation of provisions of Section 25 (f) of Industrial Dispute Act.

3. The applicant has sought the following reliefs :- (a) to hold that the action of respondents in termination of his services from 28.9.1995 is bad in law and direct the respondents to forthwith employ the applicant in service in continuity of his earlier service with full back wages from the date of termination with interest on the payments of arrears. (b) hold and declare that the termination of services is in violation of provisions of Section 25-F of Industrial Dispute Act.

4. The respondents have opposed the application by filing the written statement. The respondents at the outset strongly refute the contention of the applicant that his services are orally terminated but have contended that the applicant himself had failed to attend his duty and therefore abandoned the services.

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The respondents have further stated that the matter with regard to appointment of applicant had been investigated by Chief Inspector of Works (M), Mumbai who had submitted his report on 15.7.1996 to Assistant Engineer (W), Mumbai. On enquiry, it is revealed that in the record of the month ending August, 1992, on 6.7.1992, the name of one Shri Dhondu Ganpat was replaced by the name of the applicant, i.e. Dattatraya Ganpat in the Muster-sheet by the then Inspector of Works, Shri O.M. Bhilwade. It is further stated that Shri Dhondu Ganpat has since expired. When this fact was noticed, the applicant was asked to produce his service card and other relevant documents like offer of appointment to ascertain his source of appointment in the Railway. The applicant thereafter neither produced any documents nor he turned up for duty. Since the applicant had abandoned his duty, the present application has no merit and the same deserves to be dismissed. The respondents have also taken a technical objection that Union of India has not been made a party and therefore the present OA. be dismissed on this ground alone.

5. The applicant has filed a rejoinder reply contesting the averments of the respondents. As regards the Union of India being not made as a party, the applicant has contended that the General Manager, the principal employer is made as a party who represents the Union of India. The applicant has strongly contested

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the claim of the respondents that he abandoned his service stating that the applicant has been repeatedly representing about his termination of services and seeking appointment. If the applicant had abandoned the services, he would not have followed up the matter at various levels with regard to his termination and filed the present OA.

6. We have heard the arguments of Shri S.M. Dharap, learned counsel for the applicant and Shri V.S. Masurkar, learned counsel for the respondents. Arguments advanced during the hearing have been carefully considered.

7. The applicant's case is that he was appointed as Khalasi from 6.7.1992 in the office of Inspector of Works, Byculla, Central Railway and thereafter he continued in employment till his services were terminated orally w.e.f. 20.8.1995. The applicant has submitted that contribution towards Provident Fund and Professional Tax were regularly deducted from his pay. He was issued pay slips regularly for every month which have been brought on record. He was issued an identity card and also a residential card pass for travelling between his place of residence and place of work. The respondents in the written statement have not denied these facts with regard to appointment of the applicant on the Railway. Therefore, we proceed further with the admitted fact that the applicant was appointed as



a Khalasi from 6.7.1992 and continued in service till 28.9.1995. The respondents claim that the applicant did not report for duty and abandoned his service. While the applicant, on the other hand, has contended that his services were terminated orally. Therefore, the short question which needs to be answered is whether the applicant abandoned the services or his services were terminated by the respondents.

8. With regard to issue of abandonment of service, we cite the following two judgements of the Hon'ble Supreme Court where this aspect has been examined. (a) Buckingham & Carnatic Co.Ltd. vs. Venkatian, AIR 1964 SC 1272. (b) G.T.Lad vs. Chemical and Fibres of India, 1979 SCC (L&S) 76. In the case of Buckingham & Carnatic Co.Ltd., the Hon'ble Supreme Court has held as under :-

"Normally such an intention cannot be attributed to an employee without adequate evidence. Under the common Law, an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances and inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service."

In the case of G.T.Lad, the Hon'ble Supreme Court has held as under :-

"question as to whether a job in fact had been abandoned by an employee is always a question of fact which is to be determined in the light of the surrounding circumstances of each case."

Keeping in view what is held by the Hon'ble Supreme Court above, an inference and abandonment of service in a given case has to be drawn based on the sufficient evidence and proof regarding the concerned employee or other surrounding circumstances. In the present case, we have carefully considered the rival contentions and the material brought on record. We have no hesitation to conclude that we are unable to subscribe to the plea of abandonment of service by the applicant advanced by the respondents. The respondents have not brought any material on record, leave aside sufficient evidence and proof which could indicate the intention of the applicant to abandon his service. The respondents have merely made a statement that the applicant failed to attend his duties and therefore abandoned his service. The respondents have not made any averment that they had sent any notice to the applicant in case he was absent from service calling upon him to join his duty within a particular period failing which his services would be terminated. In the absence of any such action taken by the respondents, the respondents cannot presume that the applicant has abandoned his service. The burden of proof of abandonment is on the part of the party who has relied upon it. The respondents in the present case have not discharged this burden. On the other hand, from the conduct of the applicant, we do not find that he was not ready to work on the post he was

appointed. The applicant has brought on record the material which shows that his case was taken up by the recognised union with the concerned authorities. The applicant has also brought on record a representation which he had sent to the controlling officer of ^{the} Inspector of Works where he was appointed. Further, the applicant has filed the present OA. challenging his termination. All these facts indicate that the applicant had not abandoned his service and he was ready and willing to work. In the light of these observations, we hold that the plea of the respondents that the applicant had abandoned his service is not tenable and it is to be concluded that the services of the applicant were terminated orally from 28.9.1995. As indicated earlier, the applicant has worked more than $3\frac{1}{2}$ years on regular basis and therefore the services of the applicant could not be terminated orally without following the procedure for termination of services as per the laid down rules.

9. With our findings recorded above that the termination of services of the applicant is illegal, ^{have been} the termination should normally set aside and direction given to the respondents to put back the applicant in service. However, keeping in view the peculiar facts and circumstances of the case, we decline to give such a direction and grant relief



to the applicant as prayed for. After careful consideration of the material brought on record by the respondents in the OA., we have no hesitation to arrive at the conclusion that the applicant is beneficiary of fraudulent action by some of the staff who managed to show the applicant as being appointed. The appointment of the applicant was in violation of the rules and therefore illegal. In case the relief is granted to the applicant and he is directed to be reinstated in service, then such an order would put only a stamp on entry in public service by unlawful and unfair means. In ^a such case, even if the termination of services is found to be illegal and done without following the extant rules, the Court/Tribunal may refuse to grant a relief. In this connection, we derive support from the view taken by the Hon'ble Supreme Court in the case of M/s. Orissa Cement Ltd. vs. State of Orissa, AIR 1991 SC 1717 as under :-

" It is well-settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It will be appreciated that it is not always possible in all situations to give a logical and complete effect to a finding. Many situations of this type arise in actual practice. For instance, there are cases where a Court comes to the conclusion that the termination of the services of an employee is invalid, yet it refrains from giving him the benefit of "reinstatement" (i.e. continuity in service) of "backwages".

In such cases, the direction of the Court does result in a person being denied the benefits that should flow to him as a logical consequence of a declaration in his favour."

In the present case, on going through Ex. 'R-1' filed by the respondents with the written statement with regard to appointment of the applicant, it is noted from this report that the name of the applicant had been inserted in the Muster-roll for the month of August in place of Dhondu Ganpat by writing the name of the applicant as Dattatraya Ganpat. Dhondu Ganpat had since expired. The report further brings out that when the concerned staff was asked to furnish the details of the applicant with regard to appointment of the applicant, the same were not produced and the issue was avoided. The respondents have brought on record a copy of the Muster-sheet and on going through the same, we note that the name of the applicant has been inserted in place of Dhondu Ganpat. The report brings out that the applicant had been appointed by a fraudulent action on the part of the Supervisor and his staff. From the averments of the applicant himself, it can be said that the applicant's appointment was not done by following the laid down procedure. The applicant has brought out that he came to know of existence of some vacancies at Byculla and made an application for appointment. He has further stated that ^{after sometime} he was asked to report for duty and he joined accordingly.

The applicant has nowhere stated that he was subjected to any selection process or any appointment order was issued. The applicant was asked by the concerned Supervisor to produce a copy of the appointment order but the applicant has expressed his inability to furnish the same. If the applicant had undergone the selection process and was given an offer of appointment on regular basis, ^{then} he should have been able to produce the copy of the appointment order to support his appointment. In the absence of any documentary evidence with the applicant, it is to be concluded that what is brought out in Ex. 'R-1' to the written statement confirms that the applicant is a beneficiary of the fraudulent action on the part of the Supervisor and concerned staff. In view of this position and the law laid down by the Hon'ble Supreme Court in the above referred judgements, we would decline to give any direction to reinstate the applicant in service even though we hold that the termination of his services were illegal.

10. The applicant has also challenged his termination of services stating that the same are in violation of Section 25-F of the Industrial Dispute Act. The Tribunal has no jurisdiction to deal with the matters which are covered by the Industrial Dispute Act. The applicant during the hearing stated that he does not press for this ground.

11. The respondents have taken a plea that the present application is not maintainable as the Union of India has not been made as a party. The applicant has contested this statement stating that the Union of India is being represented by General Manager who has been made as a party. We find merit in the contention of the applicant and hold that there is no infirmity by not making Union of India as a party as advanced by the respondents.

12. In the result of the above, we are unable to allow the relief prayed for and the OA. is accordingly dismissed with no order as to costs.

S.L.JAIN
(S.L.JAIN)
MEMBER (J)

D.S.BAWEJA
(D.S.BAWEJA)
MEMBER (A)

mrj.