IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO: 1275/92

Date of Decision: 13.7.98

S.R.Shevale .. Applicant

Shri D.V.Gangal .. Advocate for Applicant

-versus-

Union of India & Ors. .. Respondent(s)

Shri S.C.Dhawan .. Advocate for Respondent(s)

CORAM:

The Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman,

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

(1) To be referred to the Reporter or not ? Yes

(2) Whether it needs to be circulated to other Benches of the Tribunal ? No

(R.G.VAIDYANATHA)
VICE -CHAIRMAN.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,

MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION NO. 1275 /1992.

Pronounced, this the 13th day of July 1998.

Coram: Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman,
Hon'ble Shri D.S.Baweja, Member(A).

S.R.Shevale,
B/15, Ramji Niwas,
3rd Floor,
Vishnu Nagar,
Dombivli(W). ... Applicant.

(By Advocate Shri D.V.Gangal)

V/s.

1. The Union of India through
The General Manager,
Central Railway,
Bombay V.T. - 400 001.

2. The Divisional Railway Manager,
Central Railway,
Bombay V.T. - 400 001.

3. The Chief Yard Master,
Bombay V.T. Yard,
Central Railway,
Bombay V.T. - 400 001. ... Respondents.

(By Advocate Shri S.C.Dhawan)

O R D E R

(Per Shri Justice R.G.Vaidyanatha, Vice-Chairman)

This is an application filed under section 19 of the Administrative Tribunals Act, 1985. The respondents have filed their reply. We have heard the learned counsels appearing on both sides.

2. The applicant has filed this O.A. challenging the order of termination dt. 1.9.1992. His case is that he was working as an Assistant Pointsman in the Central Railway for 10 months from 31.7.1991 to 26.6.1992. The applicant is a workman within the meaning of Industrial Disputes Act. The applicant had gained temporary status for working continuously for more than four months. He is therefore governed by the Railway Servants Discipline

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& Appeal Rules. The applicants services cannot be terminated except by holding a regular enquiry under the said rules, but suddenly he was orally stopped from coming to office from 1.9.1992. The order of oral termination is unknown to law. The order is also bad under the provisions of the Industrial Disputes Act. The order of termination is illegal and void. He has therefore filed this O.A. for quashing of the order of termination and for a direction to the respondents to reinstate the applicant with full backwages and continuity of service and for other consequential reliefs

3. The respondents in their original reply filed in this case have contended that applicant had been engaged illegally as a substitute Assistant Pointsman by one Senior Clerk of the Railways, without any order from the Office of the Divisional Railway Manager. It is, therefore, alleged that the applicant gained entry into service by manipulation, fraud and in an illegal way. He has not been appointed by the competent person in the Railway Administration. There was no contract of employment/service between the applicant and the Railway Administration. Hence this Tribunal has no jurisdiction to decide this case. That the applicant and one Senior Clerk of the Railway Administration A.R.Solanki had joined together and committed fraud in taking the applicant in service as a substitute Pointsman. Since the applicant has gained entry by a fraudulent means he cannot invoke the Railway Rules for protection. Since the applicant was never appointed by the Railways, the question of holding enquiry does not arise.

In the additional reply filed by the respondents,

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it is now stated that the modus operandi under which the applicant came to gain entry into service. It is stated that one Ashok Gunaji was working as a substitute Assistant Pointsman from 1990. He remained absent for a long time prior to July, 1991. The applicant was never appointed as a substitute by the Competent Authority. But it is alleged that with the connivance of Senior Clerk A.R.Solanki the applicant's name was fraudulently entered in the muster-cum-roll-cum-pay sheet in the place where Ashok Gunaji's name had been written by scratching the name of Ashok Gunaji in the month of July, 1991. In subsequent months, the applicant is shown as substitute in the said Register. Similarly, one more candidate P.L.Malunjkar was fraudulently substituted in the place of another employee Arvind Babubhai with the collusion of A.R.Solanki. Even P.L.Malunjkar was also stopped from working when the fraud was detected. The applicant being a party to the fraud, he is not entitled to take any advantage of his own fraud. It is also stated that two officials Ghorpade and Pingle have given statements as to how the applicant was allowed to work by A.R.Solanki. If really the applicant had been appointed in the usual course, his name should have been entered in the Muster-cum-Pay sheet at the end and not by scratching or striking out the name of another official.

It is therefore stated that the applicant is not entitled to any relief and the O.A. be dismissed with costs.

4. The learned counsel for the applicant contended that since the applicant was working for more than 4 months, he had gained temporary status and therefore, his services could not have been terminated by an oral

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order except after holding a regular departmental enquiry under the rules. It was also argued that even if A.R.Solanki had committed a fraud, the applicant cannot be penalised since there is nothing to show that the applicant was a party to the alleged fraud. He further submitted that even now the respondents can reinstate the applicant and hold a regular enquiry as per rules. On the other hand, the learned counsel for the respondents contended that the applicant was never appointed by the Railway Administration and he had gained entry into service by fraudulently, illegally with the collusion of A.R.Solanki and therefore the question of holding a regular enquiry does not arise. It was argued that there was no relationship of employer and employee between the applicant and respondents and hence the Disciplinary Rules are not attracted to this case. Alternatively, it was submitted that the applicant had gained entry by ~~a~~ fraudulent means, this Tribunal at this distance of time should not order reinstatement with a direction to hold enquiry since it will be perpetuating a fraud and it is not a fit case where this Tribunal should exercise its discretion in favour of the applicant.

5. In the light of the arguments addressed before us, the point for consideration is whether the applicant has made out a case for quashing of the impugned order of termination ~~for~~ and getting reinstatement.

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6. The learned counsel for the applicant invited our attention to number of authorities and also relevant Railway Rules to point out that the applicant had acquired temporary status and therefore, his services cannot be terminated except after holding a regular enquiry.

There is no dispute that if the applicant had acquired temporary status then as per the Railway Rules a regular departmental enquiry has to be held.

But the respondents's contention is that the applicant was never an employee of the Railways and he was found working by impersonation and when it came to light he was asked not to come for duty from the next date. If there is no relationship of employer and employee between the applicant and the respondents, then strictly speaking the question of holding a regular enquiry may not arise.

The learned counsel for the respondents invited our attention to a decision of the Apex Court reported in 1997(1) SLJ 118 (Pramod L.Meshram V/s. State of Maharashtra & Ors.), where services of some employees who had already put in 9 months of service came to be terminated. The contention before the Supreme Court was that no enquiry was held and no show cause notice was given before the order of termination. The Supreme Court found that the appointment orders were based on forged letter of recommendation and therefore it was held that the very appointment was illegal and no enquiry was necessary. The learned counsel for the respondents contended on the basis of this authority that even in the present case the

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applicant had not been appointed in the Railways and there is no order of appointment in his favour and since he was working by impersonation by a fraudulent means, his services came to be terminated. It was therefore argued that no enquiry was necessary.

7. We are not much impressed about the argument of the learned counsel for the applicant that this is a case of dispensing with the enquiry and ~~unless necessary~~ no orders are passed in the file dispensing with the enquiry under Rule 14 of the Railway Servants (Discipline & Appeal) Rules, 1968; it is nobodys case that this is a case of dispensing with the enquiry under Rule 14. The respondents contention is that no enquiry is called for since there is no relationship of employer and employee between the parties. Therefore, if we accept the respondents contention that the applicant was never appointed in the Railways and he was found working by impersonation by fraudulently getting his name entered in the concerned register with the collusion of Senior Clerk A.R.Solanki then the respondents contention that no enquiry was necessary appears to be well founded.

8. Now let us for a moment accept the applicant's contentions that he was an employee who had acquired temporary status and therefore, regularly enquiry under the rules was necessary and in view of the violation of principles of natural justice for not holding the enquiry as per rules, the order of termination will not be sustainable. Even if we accept this contention, the question is whether in the facts and circumstances of this case this is a fit case for this Tribunal to

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interfere and set aside the order of termination and direct reinstatement of the applicant by giving liberty to the respondents to hold a regular enquiry. After having given serious consideration to this problem, in the facts and circumstances of the case, we have come to the conclusion that this is not a fit case wherein such direction is called for.

Now let us see what are the equities in favour of the applicant on the one side and the equities in favour of the respondents on the other.

9. The applicant has not produced his order of appointment. The respondents have taken a clear stand that the applicant was never appointed by the Railway Administration. It may be that the applicant was found working as a substitute. The question is as to under what circumstances the applicant was found working as a substitute in the Railways. The learned counsel for the respondents has produced the original muster-cum-roll-pay sheet for the month of July, 1991.

A perusal of the original muster-roll-pay sheet shows that at Sl.No.11 there is an entry of some name which has been made unreadable by striking off by pen number of times. Inspite of this overwriting and striking marks we can still with difficulty read that the original writing was the name of Ashok Gunaji. The entry shows that he was absent throughout the month. Then we find that the applicant's name is inserted below the erased name. This clearly shows that an attempt is made to put the applicant in service since the original substitute Ashok Gunaji had remained absent due to sickness. The overwriting and striking marks are apparent to the naked eye and then there is an insertion

of the name of the applicant. This circumstance fully supports the respondents theory that applicant had never been appointed, but had been inducted by A.R.Solanki in the place of Ashok Gunaji by striking his name. Then it is interesting to notice that at Sl.No.17 there ~~are~~ was some other earlier name which is again struck off and striking marks are put to make the original entry unreadable. Then below that,name of one Pandarinath Laxman Malunskar is entered. This Pandarinath Laxman Malunskar was also removed from service on the same ground that he had not been appointed at all by the Railway Administration, but he had gained entry into service by this back door entry method of fraudulent means through the collusion of A.R.Solanki. Then this Pandarinath Laxman Malunskar also filed an application in this Tribunal challenging his termination in O.A. No.1288/92. That application came to be dismissed by a Division Bench of this Tribunal by order dt. 7.4.1998 to which one of us (Justice R.G.Vaidyanatha, Vice-Chairman) was a party.

10. In O.A. 1288/92 Sh.D.V.Gangal,learned counsel appeared for Pandarinath Laxman Malunskar, the same counsel is appearing for the present applicant in the present O.A. He raised similar contentions there and the main ground ~~is~~ was that the order of termination is bad for violation of principles of natural justice and for not holding a regular departmental enquiry. The Division Bench in that case went into the question in detail and then observed that assuming that departmental enquiry was necessary and for want of that the order of termination is bad, the Tribunal examined the question

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whether it was a fit case for interference by this Tribunal. This Tribunal referred to number of decisions on this point and came to the conclusion that since the applicant's entry into the service was by impersonation by fraudulent means with the collusion of Railway Official, he cannot be reinstated and the Tribunal should not exercise its discretion in ordering reinstatement and directing further enquiry. The Division Bench in that case (O.A. 1288/92 - Pandarinath Laxman Malunskar) observed in paras 10 to 13 as follows :

> "10. We have considered the rival contentions with all seriousness it deserves. No doubt there is some force in the contentions of the applicant's counsel that prima facie the oral order of termination is bad since it is not preceded by a show cause notice or a regular departmental enquiry. But we must bear in mind the peculiar facts and circumstances of this case where according to the respondents the applicant was never appointed to this job and no appointment order was issued to him, but since he was found working as an impostor or by impersonation in the place of another official by tampering with his appointment order, the respondents told him orally not to come to office from a particular day. In such a situation what is the role of this Tribunal? Should this Tribunal mechanically interfere with the order and direct the department to reinstate the applicant and pay back wages for all these six years and then if necessary hold a fresh enquiry according to law? After giving our anxious and serious consideration, we feel that this is not a fit case in which this Tribunal should exercise its discretion in interfering with the order of termination even if it is shown that it is not according to law. If we accept the argument of the learned counsel for the applicant and set aside the impugned order and direct the reinstatement and payment of backwages for six years, it would be restoring an illegal appointment, which is not the intention of the law. The judicial review given to this Tribunal has been held by many decisions including the Supreme Court as akin to or similar to the jurisdiction exercised by the High Court under Article 226 of the Constitution of India. Even if an order is found to be illegal, the High Court or Tribunal may decline to exercise jurisdiction on the ground of delay and laches or on the ground of the applicant

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not coming to Court with clean hands. Another ground of not interfering with such an order even if it is prima facie illegal is when interference with an illegal appointment order is restored or some other inequitable situation occurs. We are fortified in our view by a decision of the Supreme Court and a decision of the Principal Bench of our Tribunal.

11. In AIR 1966 SC 828 (Gadde Venkateswara Rao V/s. Government of Andhra Pradesh and Ors.), the Supreme Court had considered the validity of an order of Government of Andhra Pradesh dt. 18.4.1963. The High Court had refused to quash that order and the matter came on appeal before the Supreme Court. The facts of the case are not relevant for our purpose. In para 16 of the reported Judgment, the Supreme Court noticed that the order of Government is bad since it was passed without giving an opportunity to the aggrieved party who is prejudicially affected by the said order. In other words, the order was bad for violating the principles of natural justice and it is the same argument which is pressed before us in the present case to challenge the order of termination. Even after having noted that the impugned order of the Government was bad since it was passed without hearing the affected party as observed in paras 16 and 17 of the reported judgment, the Supreme Court posed a question in para 17 whether in these circumstances was the High Court justified in its discretion in not interfering with the impugned order ? Then the Supreme Court observed as follows :

> "If the High Court had quashed the said order, it would have restored an illegal order - it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

Therefore, we see that even after having come to the conclusion that the Government order is bad for violation of principles of natural justice, the Supreme Court held that the High Court was right in not interfering with the order since the setting aside of the order would amount to restoring an illegal order.

Similarly, in the present case if we now set aside the order of termination and direct the applicant to be reinstated we would be restoring an illegal position viz. continuing the applicant in appointment though he had none and the one which was on record is manipulated and forged appointment order.

12. Then we come to a decision of the Principal Bench in the case of Sanjiv Kumar Aggarwal and 3 Ors. V/s. Union of India & Ors. reported at (1987(3)(SLJ)353), which was decided by a Division Bench which consisted of the then Chairman of the CAT and another Member. There also, it was found that the applicants had obtained appointment by fraudulent means and the appointments came to be terminated. There also the

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contention was that the order of termination is bad for non-compliance with the principles of natural justice. After going through the facts of the case the Tribunal found that the appointment orders had been obtained by fraudulent means. It was therefore, held that no enquiry was necessary, since it was not a mis-conduct during employment, but it is something preceding the date of appointment. Then the Tribunal further held that even if the order of termination is bad, still it was not a case for interfering with the order of termination by exercising the discretionary jurisdiction of the Tribunal. For our present purpose, the following observations of the Division Bench at page 375 of the reported Judgment are very relevant:

> "Assuming that such termination order should have been preceded by an inquiry in accordance with the CCS(CCA) Rules (which, in our opinion, is not required) and such an inquiry not having been held, the orders of termination are bad, even then if the Tribunal finds that quashing these orders would result in reviving appointments which should never have been made, would not issue any writ, direction or order. Granting any relief to the applicants would amount to allowing them to abuse the process of court. The Tribunal, therefore, decline to grant any relief to the applicants. For the aforesaid reasons, the impugned orders do not call for interference. These applications therefore, fail and are accordingly dismissed, but in the circumstances, without costs."

13. We are also fortified in our view by a decision of the Chandigarh Bench of this Tribunal in the case of Brij Mohan & Ors. V/s. Union of India & Ors. (1995(1) ATJ 1), where also it is observed that in the case of an appointment based on forged/faked/fabricated selection panels no enquiry is necessary before terminating the services. In particular the said Bench has observed that no Court or Tribunal can be taken assistance of with a view to perpetuate an illegality and thereby defeat the ends of justice. It is further observed at page 15 of the reported Judgment that the Tribunal would not be a party to encourage any act or omission which perpetuates a wrong."

11. We adopt the above reasoning as a reasoning in the present case also. If we now set aside the order of termination and give liberty to the respondents to hold an enquiry as per rules, then the applicant will have to be immediately reinstated. He will have to be rewarded back wages from 1991 till to day, which will be for a period of 7 years. Then the applicant will have to continue in service till regular enquiry is concluded. In our view, in the facts and circumstances of the case and for the

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reasons mentioned above this is not a fit case in which this Tribunal should exercise its discretion in interfering with the impugned order. If we now order that the applicant should be reinstated and be rewarded back wages for the last 7 years, it will be like giving premium on dis-honesty and fraud. No Court or Tribunal can allow fraud to be perpetuated. This Tribunal cannot lend its hands in favour of litigant who has not come to this Tribunal with clean hands and on the face of the record his very entry into the service was by impersonation and by fraudulent means. As pointed out in some of the decisions mentioned above, the Court or Tribunal need not interfere even if a particular order is illegal when the result of interfering with the order would be continuing an illegal or fraudulent appointment or restoring a fraudulent appointment. Hence in the peculiar facts and circumstances of the case and for the reasons mentioned by the Division Bench of this Tribunal in O.A. No.1288/92 we decline to exercise our discretion in interfering with the impugned order of termination of service.

12. In the result, the O.A. is dismissed, but in the circumstances of the case there will be no order as to costs.

(D.S.BAWEJA) 13/7/98
MEMBER(A)

(R.G.VAIDYANATHA) 13/7/98
VICE - CHAIRMAN

B.