CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 562/92
~~Transfer Application No.~~

Date of Decision : 3.7.95

Smt. S.G. Chandnani — Petitioner

Shri M.S. Ramamurthy — Advocate for the Petitioners

Versus

Union of India & Others — Respondents

Shri N.K. Srinivasan — Advocate for the respondents

C O R A M :

The Hon'ble Shri B.S. Hegde, Member (J)

The Hon'ble Shri P.P. Srivastava, Member (A)

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

(2) Whether it needs to be circulated to other Benches of the Tribunal? ✗

(B.S. Hegde)
Member (J)

ssp.

BEFORE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A. 562/92

Smt. S.G. Chandnani ... Applicant

v/s

Union of India & Others ... Respondents

CORAM : 1) Hon'ble Shri B.S. Hegde, Member (J)

2) Hon'ble Shri P.P. Srivastava, Member (A)

APPEARANCE:

1) Shri M.S. Ramamurthy, Counsel for the Applicant.

2) Shri N.K. Srinivasan, Counsel for the Respondents.

JUDGEMENT Dated: 3.7.95

(Per: Hon'ble Shri B.S. Hegde, M(J)).

1. The Applicant has filed this Application under section 19 of the C.A.T. Rules challenging the rejection orders of the Respondents vide dated 4th July 1991 and 17th January 1992 refusing to regularise the absence of the Applicant from 16-8-1982 to 12-1-1984 and prayed for quashing the rejection orders. The Applicant also prayed that her absence from 16-8-1982 to 12-1-1984 be directed to be treated as 'dies non' or 'extra ordinary leave' without pay etc.

2. The brief facts are :-

The Applicant has joined service in the Western Railway on 13-1-1963 in the Commercial Department as a Clerk and she worked in the Department till 1977 uninterruptedly and she has become a permanent employee. She proceeded on Ex-India sanctioned leave for one year

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with effect from 16th August 1977 till 1978. After expiry of the leave, she did not resume duty. It is stated in the O.A. that she has sent medical certificate from Dubai; however, the said medical certificate has not been annexed to the O.A. and no proof has been adduced for having sent the medical certificate for her continued absence on the ground of sickness. In the O.A. it is stated that she returned to Bombay in May 1982; however, in view of her sickness she joined duty on 13-1-1984 as she was declared fit by the medical authorities in Bombay. The Respondents vide their letter dated 5-5-1984 after joining duty treated her service as fresh for all purposes. Since she was absence for more than five years, she was intimated that her regularisation would be referred to the Railway Board for regularisation of leave from 16-8-1982 to 12-1-1984 etc. In reply, the Respondents have stated that the Applicant has herself to blame for all the consequences of not reporting for duty after expiry of her leave. Further, though disciplinary action was taken against the Applicant, the removal order though passed was not served on the Applicant. However, she was taken back on re-employment and the Competent Authority has also rejected to regularise the period of her unauthorised absence exceeding five years etc. The learned counsel for the Applicant Shri Ramamurthy urged that the action of the Respondents is illegal and it is not open to the Respondents to give break in service without conducting enquiry and pass an appropriate order pursuant to the enquiry. In this connection, he draws our attention to para 2014 (F.R. 18) contained in the Indian Railway Establishment Code, Volume 2 which reads as follows :-

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> "No railway servant shall be granted leave of any kind for a continuous period exceeding five years. Where a railway servant does not resume duty after remaining on leave for a continuous period of five years or where a railway servant after the expiry of his leave remains absent from duty, otherwise than on foreign service or on account of suspension, for any period, which together with the period of leave granted to him, exceeds five years, he shall, unless the President, in view of the exceptional circumstances of the case, otherwise determines, be removed from service after following the procedure laid down in the Discipline and Appeal Rules for railway servants."

Further, he draws our attention to the Railway Board's instructions dated 6th December 1989 addressed to various General Managers of Indian Railways in the matter of regularisation of period of unauthorised absence. It has been clarified in the said letter that the period of absence in cases where employees are allowed to re-join after the period of absence and is imposed a punishment other than compulsory retirement, removal or dismissal under the D & A Rules may be treated only as extra-ordinary leave subject to provisions contained in para 510 of the Indian Railways Establishment Code. Para 510 envisages that "unless the President, in view of the exceptional circumstances of the case otherwise determines, no Railway servant shall be granted leave of any kind for a continuous period exceeding five years. In the above matter, the learned counsel for the Applicant submits that in order to treat her services as a fresh one, she should have been given a charge-sheet for a major penalty for remaining unauthorisedly absent; that was not done.

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It is a well established principle that break in service amounts to removal/dismissal from service. The Applicant was a permanent employee before she proceeded on Ex-India leave. Without following the provisions of Discipline & Appeal Rules and without compliance with the 'reasonable opportunities, provision' under Article 311 (2) of the Constitution of India, the services of a permanent employee like the applicant cannot be treated as having come to an end prior to the date of superannuation or compulsory retirement. Hence, the Memorandum issued by the Respondents vide dated 5-5-1984 treating her services as a fresh entrant is bad in law.

3. Further, the learned counsel for the Applicant contended that the Respondents have regularised her services from 16-8-1978 to 15-8-1982 and only a portion of absence i.e. 1982 to 1984 requires to be regularised. As such, if the Respondents have not rejected the entire period of absence and no removal order has been passed and thus treating her services as fresh for all purposes is bad in law. It is an admitted fact that the Applicant was not re-employed and appointed as fresh by any orders passed to that effect. She was given the same service benefit in which she was working before proceeding on Ex-India leave and deductions towards Provident Fund continued to be effected from the very first day of her joining and not after completion of one year as is done in the case of fresh appointees etc. Therefore, forfeiture of past service without following procedure as laid down in the Constitution is not valid in law. Besides that, the Railway Board's rejection order is not a speaking one and they have not considered the entire facts of the case.

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4. On perusal of the pleadings, we find that there is nothing on record to show that she has sent a medical certificate for the period of absence for which she was away while she was at Dubai and no proof has been adduced and her extension of leave was rejected as early as 21-2-1985. Nevertheless, she remained absent till 12-1-1984. It is incorrect to state that the Zonal Officer has not recommended her case for condonation and regularisation of her absence. The learned counsel for the Applicant also referred to various similar cases wherein the Railway Board has treated the period of absence beyond the period of five years which was treated either as extra ordinary leave or as 'dies non' viz. Smt. I.T. Raisinghani, Smt. S.P. Thanewala etc. To this, the Respondents vide their letter dated 20-1-1990 denied the contention of the Applicant stating that Smt. Raisinghani sought for further extension from time to time with the approval of the competent authority; therefore, the Railway Board treated the period of absence as dies-non; whereas the Applicant though she was sanctioned Ex-India leave for one year, she did not resume her duty and she requested for extension of leave for one and half years; her request has not been agreed to and she was replied accordingly. Therefore, the comparison between the two is not justified. The Zonal Officer considering her case addressed a letter to the Rly. Board reiterating the entire background of the case of the Applicant and requested the Board to review the case of the Applicant and treat the period as dies-non. Nevertheless, the Board vide its order dated 4-7-1991 and 17-1-1992 did not find it sufficient to agree to the recommendations of the Zonal Office and rejected the claim of the Applicant. In this connection, the learned counsel for the Applicant Shri Ramamurthy draws our

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attention to the Supreme Court decision in Moti Ram Deka v/s General Manager, North East Frontier Railway AIR 1964 SC 600 wherein the Apex Court has held that"it is clear from the relevant rules in the Railway Code that a permanent post carries a definite rate of pay without a limit of time, and a servant who substantively holds a permanent post has a title to hold the post to which he is substantively appointed, and that, in terms, means that a permanent servant has a right to hold the post until, of course, he reaches the age of superannuation, or until he is compulsorily retired under the relevant rule. If for any other reason that right is invaded and he is asked to leave his service, the termination of his services must inevitably mean the defeat of his right to continue in service and as such, it is in the nature of a penalty and amounts to removal. In other words, termination of the services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement, must per se amount to his removal within the meaning of Art. 311 of the Constitution." In the light of the above, the learned counsel for the Applicant submits that since no removal order has been issued by the Respondents, any break in service without following the due process of law is not valid. As stated earlier, the Respondents in their reply stated that an action was taken against the Applicant, and removal order though passed was not served upon her. It is a mischievous statement on the part of the Respondents. Presumably perhaps because of not joining duty after a long period - more than five years i.e. seven years without sanctioned leave, the Respondents were handicapped in conducting enquiry in accordance

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with the rules. Failure to join duty after the expiry of sanctioned leave and further on not approving the alleged medical leave, the only course open to the Respondents is to initiate disciplinary proceedings against the Applicant as laid down in the Discipline & Appeal Rules for Railway servants. In the absence of Applicant's address at Dubai where she had gone to join her husband, in such circumstances, the Respondents should have sent a notice to the Applicant at her last known address as well as original address and complete the enquiry, as the case may be. Though the Applicant came to Bombay in 1982, she did not care to approach the Respondents for her continued sickness and did not intimate that she had come back to Bombay and intends to seek further leave on the ground of her sickness. On resuming duty, the Respondents were negligent to allow her to join duty; on the other hand, they should have issued the removal order already passed and then taken necessary action in allowing her to join afresh in accordance with the rules which is not done in this case. There is a gross negligence on the part of the Respondents in not adhering to the guidelines of the Board and in regularisation of her services till 1982.

5. It is true, that it is not open to the Respondents to effect the break in service without following the due process of law, which in the instant case is apparently not done. They have not served the removal order and passed a non-speaking order treating her services as a fresh one for all purposes. Considering the facts and circumstances of the case, the Respondents ought to have served the removal order already passed and then take consequential action allowing her to resume duty as a

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fresh entrant. The Applicant has prayed for quashing the rejection orders as also her absence from 1982 to 1984 be treated as dies-non or extra ordinary leave without pay etc. Since the Respondents have already rejected the request of the Applicant as also of the Zonal Office for regularisation of her services from 1982 to 1984 for reasons best known to them, however, the Respondents have not issued the removal order and treated her as a fresh entrant for all purposes which does not fit into the scheme of the appointment order because admittedly she is a permanent employee.

6. It is true that the Applicant has not approached the Tribunal with clean hands, nevertheless, her 'break in service' effected is neither in accordance with the Rules nor can be sustainable in law. Since the Applicant is a permanent employee and acquires the legal right to continue in that post until she is superannuated or dismissed or removed from service. Therefore, termination of the services of a permanent Government servant otherwise than in accordance with the Rules itself offends Art. 311 (2) and must be struck down as invalid for the premature termination of the services of a person who has a legal right to hold a post itself amounts to a penalty so as to attract the operation of Art. 311 (2) of the Constitution so that termination cannot be ordered without offering an opportunity to show cause as required.

7. In the facts and circumstances of the case, the only relief we can grant to the Applicant is to direct

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the Respondents to consider her second prayer i.e. prayer (b) treating her absence from 1982 to 1984 as 'dies-non' or 'extra ordinary leave' without pay as was done in other similar cases.

8. In the result, we are of the view, that break in service of the Applicant is invalid and is not in consonance with Art. 311 (2) of the Constitution and the same is liable to be set aside. Accordingly, the O.A. is partly allowed to the extent referred to above and the Respondents are directed to treat the period of her absence from 16-8-1982 to 12-1-1984 as 'dies-non' within three months from the date of receipt of this order and pass an appropriate speaking order accordingly.

No order as to costs.

(P.P. Srivastava)
Member (A)

(B.S. Hegde)
Member (J)

ssp.