Orig. in OA 232/90

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, 'GULESTAN' BUILDING NO.6
PRESCOT ROAD, MUMBAI 400001

O.A.Nos. 232/90 AND 391/95

DATED : 15.10.1997

CORAM : Hon. Shri Justice R G Vaidyanatha, V.C.
Hon. Shri M R Kolhatkar, Member(A)

O.A.No. 232/90

M.S. Gaikwad
Ex.Electrical Fitter Gr.I
C/o. Adv. D V Gangal
(By Adv. D V Gangal) ..Applicant
in O.A.No. 232/90

V/s.

1. Union of India
through General Manager
Central Railway
Bombay VT

2. Divisional Railway Manager
Bombay Division
Central Railway
Bombay V T

3. Sr.D.E.(TRS)
Electric Loco Shed
Central Railway
Kalyan

4. Assistant Electrical
Engineer(TRS)
Central Railway
Kalyan
(By Adv. Mr. S C Dhawan) ..Respondents

O.A.No. 391/95

Shri Machhindra S. Gaikwad
Electrical Fitter-II
C/o. Adv. Mr. D V Gangal
(By Adv. Mr. D V Gangal) ..Applicant
in O.A.No.391/95

V/s.

1. Union of India
through General Manager
Central Railway
Bombay VT

2. Divisional Railway Manager
Bombay Division
Central Railway
Bombay V T

3. Sr.D.E.(TRS)
Electric Loco Shed
Central Railway
Kalyan

4. Assistant Electrical
Engineer(TRS)
Central Railway
Kalyan
(By Adv. Mr. S C Dhawan) ..Respondents

OPEN COURT ORDER

[Per: R G Vaidyanatha, Vice Chairman]

1. These are two applications filed under section 19 of the Administrative Tribunals Act 1985. Respondents have filed their reply in both the applications. It may be noted that the first application viz., 232/90 was filed challenging order of removal from service dated 29.3.89. After hearing both the sides this Tribunal by its order dated 16.8.91 allowed the application and set aside the order of removal for not furnishing the inquiry report to the delinquent employee in view of law laid down by the Apex Court in Md. Ramzan Khan's case (AIR 1991 SC 471). The respondents carried the matter in SLP before the Supreme Court. The Supreme Court by order daed 11.10.1996 allowed the appeal and set aside the order passed by this Tribunal in view of the decision of the Constitutional Bench 1993(4) SCC 727 and directed this Tribunal to dispose of the case in the light of the

observations of the Constitutional Bench Judgment. Both the parties were notified. We have heard lengthy arguments advanced by both the counsel and perused all the material on record.

2. As already stated OA 232/90 is filed challenging the order of removal passed by the Respondents in the departmental inquiry. It appears the respondents initiated disciplinary inquiry against the applicant for misconduct as a result of an incident which took place on 19.11.1988. According to the applicant he was not served with a copy of the charge sheet and he was not permitted to participate in the departmental inquiry and therefore the ex-parte inquiry is bad in law. His case is that he has been removed from service in violation of principles of natural justice. He therefore wants his order of removal should be set aside.

3. The respondents have filed a reply asserting that notices were sent to the applicant by Registered Post and they were returned unclaimed and the applicant has refused the notices and therefore the department ~~was~~ had powers to proceed with the ex-parte inquiry. It is stated that after regular ex-parte inquiry the applicant was held guilty and the disciplinary authority has passed the order of removal from service and there is no ground made out to challenge the same.

4. It is also an admitted fact that applicant was under suspension from November 1988 though there is some dispute about the actual date.

5. We have already seen that after the order passed by this Tribunal setting aside the punishment imposed by the disciplinary authority and remanding the matter to the authority to proceed from the stage after furnishing a copy of the inquiry report, the competent authority has reinstated the applicant by taking him on duty on 6.8.92 as per the orders of the Tribunal. Though the department succeeded before the Supreme Court and order of the Tribunal was set aside, the department has not taken further action regarding continuation in service. When the SLP was still pending in the Supreme Court and being aggrieved that he has not been paid full wages etc., the applicant filed the second application which is O.A.No. 391/95. His case is that he has not been paid full back wages from 1.11.1982 to 6.8.92. Therefore his prayer is for a direction to the respondents to pay full pay and allowances for that period. He has also claimed interest on the unpaid amount till the date of payment. His further grievance in this application is that he was subject to three transfers viz., to Pune, Byculla, Kurla, but he has not been paid transfer allowance and T.A./D.A. for these three transfers. He has claimed this amount also in this O.A.

6. In this case the respondents have stated that as per rules the applicant is entitled to only 50% of wages during the period from November 1992 till the date of reinstatement and he is not entitled to claim further back wages. They have also stated that there is no question of payment of interest on the said amount. As for as the T.A./D.A. are concerned, it is the respondent's case that the applicant has not preferred claim as required under the Rules and therefore that claim cannot be enforced now after period of limitation.

7. In the light of the arguments addressed before us the points that call for determination both these O.As. are as follows:

1) Whether the disciplinary inquiry is vitiated by not observing the principles of natural justice and consequently the order of removal from service dated 29.3.1989 is liable to be set aside?

2) If Point No.1 is answered in affirmative what is the nature of consequential relief to be passed?

3) Whether the applicant is entitled to full back wages for the period from 1.11.1988 till the date of reinstatement viz., 5.8.1992?

4) Whether the applicant is entitled to interest on the arrears of back wages to be paid to him as claimed?

5) Whether the applicant has made out a case for a direction for payment of Transfer Allowance, T.A./D.A. as claimed in the application ?

6) What order ?

POINT 1:

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8. The learned counsel for the applicant Mr. Gangal contended that for the past cases instituted against the applicant no inquiry was held as required by law, since no charge sheet was given to the applicant. On the other hand Mr. Dhawan, learned counsel appearing for the railway administration contended that the scope of judicial review is limited and this Tribunal cannot go into the realm of appreciation of evidence. As far as the service of charge sheet is concerned, he argued that the charge sheet was sent to the applicant by Registered Post and he has evaded the same.

9. It is an admitted case that the applicant has not received charge sheet, he has not filed in written statement and he has not participated in the departmental inquiry. If the respondents can show that the charge sheet was served on the applicant then the department might conduct an ex-parte inquiry and the applicant will have no say in the matter.

10. The inquiry officer in his report, which is page 27 of the paper book, has observed that the charge sheet was sent to the applicant by registered post but was returned with the remark "not found". Then he again further

observes that after the inquiry was fixed the date of inquiry was intimated to the applicant by registered post, but the postal envelope was returned with an endorsement "Addressee Not Found". We, therefore, see that both the postal cover containing the charge sheet and subsequent intimation of the departmental inquiry were returned as the addressee was not found. There is no material to show that the applicant was evading the notice. Mere return of postal cover with the remarks "addressee not found" cannot by itself amount to service of notice.

11. Even under the Railway Servants (Discipline and Appeal) Rules 1968 there is a clear provision that charge sheet must be delivered to the delinquent official. In this case there is no material to show that the charge sheet was delivered to the applicant.

12. Learned counsel for the respondents invited our attention to some authorities.

.. In 1996(1)SC SLJ 404, KARNATAKA PUBLIC SERVICE COMMISSION Vs. P.S. RAMAKRISHNA, it is pointed out that where the conduct of a candidate was improper there is no necessity to give opportunity of hearing. The facts of the case are not mentioned in the reported judgement. It is a very short judgment of few sentences. However, the

judgment says that the point is covered by an earlier decision of the Apex Court reported in 1992(2) SCC 206 KARNATAKA PUBLIC SERVICE COMMISSION & ORS. Vs. B.M. VIJAYA SHANKER & ORS. We have gone through the said reported judgment and found that that does not pertain to a disciplinary inquiry at all. That was a case where KPSC had conducted required competitive examination. One of the rules mentioned on the answer book was that the candidate should not write the Roll Number in the answer sheets but should write the number only on the outer page. But since some candidates had mentioned their Roll Numbers in the pages of their answer books they were not valid as per rules. This was challenged by those candidates before the Bangalore Bench of this Tribunal. The Tribunal allowed the application on the sole ground of violation of principles of natural justice. Then Karnataka Public Service Commission took the matter in appeal before the Supreme Court. It is not a case of disciplinary inquiry at all, but this is a case of violation of rule which is mentioned in the answer sheet and therefore there was no necessity to issue show cause notice to the candidates before taking a decision of not subjecting the answer sheets for valuation. In our view the said decision has no bearing on the question about notice in a disciplinary inquiry.

.. In 1995(1) ATJ 108 V.V.PATIL Vs. UNION OF INDIA & ORS., the question was service of notice on the

delinquent official during departmental inquiry. This Tribunal held that the service was sufficient. A perusal of the facts of the case show that notices were issued during inquiry on seven occasions by registered letters and all of them were refused. it is therefore a case where on seven occasions the applicant in that case had refused notices and therefore it was held that it amounts to service of notice. In the present case there is no allegation, much less proof, that the applicant had refused receipt of notice. As already stated the inquiry record shows that the notices were sent on two occasions and they were returned as addressee was not found. By no stretch of imagination we can hold that it amounts to service of notice on the applicant. There was an allegation that the notice was published on the notice board. No material is placed before this Tribunal to substantiate this allegation. Even otherwise according to the respondents the applicant has been suspended from service. Mere publication of the notice on the notice board cannot amount to personal service.

13. It is well settled that service of notice is not a mere empty formality as already stated. The 1968 rules clearly provides that the charge sheet should be served/delivered to the delinquent official, then the general principles of natural justice provide that no action can be taken without hearing the person concerned which necessarily means that a notice must be issued to

him. In addition to this there is a Constitutional ~~Amendment~~ mandate incorporated in Article 311 of the Constitution of India which clearly provides that no person shall be dismissed or removed or reduced in rank except after giving a reasonable opportunity of being heard in respect of the charges. Therefore, the principles of natural justice have been statutorily and constitutionally recognized and it is one of the basic principles in conducting a disciplinary inquiry. Once such a condition is not fulfilled then there is no difficulty to hold that the disciplinary proceedings are vitiated. Any order passed in such a disciplinary inquiry is not sustainable in law. There is also some intrinsic material on record to show that the applicant had no reason to evade the disciplinary enquiry or he was keeping away from the disciplinary inquiry. At Page 25 of the paper book the applicant has produced a typed copy of his letter dated 26.1.89 which is addressed to Senior Divisional Engineer wherein he has shown his anxiety to appear and participate in the departmental inquiry and then has stated that he has not received the charge sheet and he has come to know that some inquiry is going on.

14. Learned counsel for the respondents pointed out that ~~in~~ the postman had taken the registered cover for service and he has made on the postal cover an endorsement that the addressee was not there but has left intimation in the house. In our view even if we accept this as an

admitted fact it does not amount to service of notice. The letter dated 26.1.89 clearly shows the understanding of the applicant that something is going on behind his back and he wanted an opportunity to participate in the inquiry. If he really wanted to evade the inquiry and boycott the same there was no necessity for the applicant to write this letter dated 26.1.89. What is more this letter further finds a reference in the legal notice issued by Mr. G S Walia, Advocate, which is dated 11.2.1989, where there is a clear reference that the applicant has sent a representation dated 27.1.89.

15. There is one more letter dated 27.1.88 in the bottom portion of letter dated 26.1.89. The learned counsel for the applicant to day produced the original letter which bears the signature of some official for receiving this letter on 27.1.89 with the rubber stamp of the office. If once we hold that the applicant had sent such a letter there is no escaping from the conclusion that the applicant had no intention of boycotting the inquiry or evading the inquiry. If really he was aware of the postal cover he would have certainly gone to the office and collected the charge sheet. The fact that the letter is addressed to Senior Officer and not to the inquiry officer is not relevant when we are trying ~~is~~ to find out the intention on the part of the applicant ~~is~~ whether to evade the enquiry or to participate in the inquiry. The argument of the learned counsel for the Respondents that

this letter was sent after the inquiry was completed has also no merit because the applicant had no knowledge whether the inquiry is concluded or still pending. The disciplinary proceedings were still pending and no final order has been passed when this letter was sent.

16. From the ~~following~~ above material on record we are satisfied that the notice of inquiry was not given to the applicant and he was not served with the charge sheet and he had no opportunity of participating in the inquiry. We are ~~concerned~~ constrained to hold that the departmental inquiry is vitiated for not serving the charge sheet on the applicant and depriving him of an opportunity to participate in the inquiry. Hence the inquiry proceedings and the punishment inflicted in the inquiry are liable to be quashed. Point (1) is answered accordingly.

POINT 2:

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17. Now remains the question as to what direction should be given in the matter when disciplinary inquiry is set aside on the ground of violation of principles of natural justice. Learned counsel for the respondents contended that in case the Tribunal comes to the conclusion that the disciplinary enquiry should be set aside on any technical ground then liberty must be given to the

respondents to proceed with the inquiry from the stage of serving the charge sheet on the applicant. On the other hand the learned counsel for the Applicant submitted that having regard to the age of the applicant and the time lag between the date of incidence and to-day, it may not be desirable to direct fresh inquiry. In our view this is a matter which should be left to the Administration to hold the inquiry or not depending upon the age of the applicant and the time lag between the date of incidence and to-day. If the administration feels of initiating a fresh inquiry must be conducted then it is open to them to serve a charge sheet on the applicant and given him an opportunity to participate in the inquiry proceedings and then conduct the inquiry according to law. If the administration comes to a decision not to proceed with a fresh inquiry then nothing more need to be said. Hence we are not expressing any opinion, one way or the other, about the right of the administration to proceed with the inquiry or not.

.. In view of answer to Point (1) the applicant is entitled to be reinstated in service forthwith. However, no direction need to be given since by virtue of the previous order passed by this Tribunal the applicant has already been reinstated in service with effect from 5.8.1992.

POINT 3:

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18. According to the applicant he is entitled to full back wages from 1.11.1988 till he was reinstated on 5.8.92. During the pendency of the case the administration has paid him 50% of wages by relying on Rule 2054. When the previous order was set aside by this Tribunal the respondents reinstated the applicant and paid him 50% of the wages by having recourse to Rule 2054. Now, to-day, we are setting aside the order of termination on technical ground that there was no service of charge sheet on the applicant. It is now left to the administration to consider as to how much back wages be paid to the applicant as per rules. The administration shall issue a show cause notice to the applicant and then pass an appropriate order as to how much back wages should be paid to the applicant for the period from 1.11.1988 to 5.8.1992.

POINT 4:

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19. The claim of the applicant for interest on the arrears of back wages does not appeal to us because whether the applicant would be getting back wages of 50% or 100% for the period for which he had not done any

work. Since the inquiry is set aside on a technical ground and it is not a case that the applicant has been exonerated on merits and Therefore, the claim for interest is misconceived and not tenable in law. Point (4) is answered accordingly.

POINT 5:

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20. The next and last grievance of the applicant is for the non-payment of transfer grant, transfer allowance and daily allowance, when he was transferred to three different places viz., Pune, Byculla and Kurla. But the applicant has not produced any material before this Tribunal about the amount he is entitled to and about preferring the claim within the time as provided in the rules. The respondents have denied about the applicant making any claim before the administration claiming these amounts. The learned counsel for the respondents brought to our notice that T.A. claim has to be made within one year from the date of journey. We do not have any material whether the applicant has preferred any such claim at all. Therefore, we cannot give any direction to the respondents to grant or sanction any amount on this ground. However, we observe that if the applicant had made any such claim giving all particulars with in the time provided in the rules then the respondents to consider the same and grant whatever amount that is permissible in

law. If, however, no such claim is made within one year then the applicant will not be entitled to claim any amount.

21. In the result both the O.As. are partly allowed as follows:

i) Order of removal from service dated 29.3.89 and further order of appellate authority dated 5.7.89 and the order of the revisional authority dated 5.1.90 are hereby quashed, however, without any prejudice to the right of the Railway administration to hold fresh inquiry against the applicant, if they so desire, by ~~sending~~ serving a copy of the charge-sheet on the applicant and giving an opportunity to the applicant to participate in the departmental inquiry as per rules.

ii) The applicant is entitled to so much of wages as is permissible in law for the period from 1.11.88 to 5.8.92, to be determined by the competent authority after hearing the applicant by issuing a notice.

iii) The applicant's claim for interest on back wages is rejected.

iv) No order is passed regarding applicant's claim for payment of transfer grant and T.A./D.A. However, if in case the applicant has made any claim within the prescribed time claiming the amounts, respondents may pass appropriate orders according to law.

v) In the circumstances of the case there would be no order as to costs.

(M.R.Kolhatkar)
Member(A)

(R G Vaidyanatha)
Vice Chairman

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