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CAT/112

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

~~NEW DELHI~~
HYDERABAD

O.A. No. 488/91.

~~xxx~~

~~xxxx No.~~

DATE OF DECISION

10/1/92

V. Lohidas

Petitioner

Shri K. Sudhakar Reddy

Advocate for the Petitioner(s)

Versus

Divisional Railway Manager,

Respondent

Personnel Branch, Vijayawada & anor.

~~Shri N.V.~~ Ramana

Advocate for the Respondent(s)

CORAM :


The Hon'ble Mr. Shri R. BALASUBRAMANIAN, Member (Admn.)

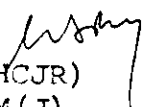
The Hon'ble Mr. Shri C.J. ROY, Member (Judl.)

1. Whether Reporters of local papers may be allowed to see the Judgement?
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement?
4. Whether it needs to be circulated to other Benches of the Tribunal?

No

MGIPRRND-12 CAT/86-3-12-86-15,000


(HRBS)
M(A)


(HCJR)
M(J)

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL :: HYDERABAD BENCH ::
AT HYDERABAD.

O.A.No. 488/91.

Date of Judgment: 10-1-92.

BETWEEN:

V. Lohidas

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Applicant

Vs.

1. Divisional Railway Manager,
Personnel Branch, Vijayawada.
2. A.P.O.(T), Senior Divisional
Personnel Officer,
Vijayawada.

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Respondents

Counsel for the Applicant : Shri K.Sudhakar Reddy.

Counsel for the Respondents : Shri N.V.Ramana

CORAM:

HON'BLE SHRI R. BALASUBRAMANIAN, MEMBER (ADMN.)

HON'BLE SHRI C.J. ROY, MEMBER (JUDL.)

(Judgment of the Division Bench delivered by the
Hon'ble Shri C.J. ROY, Member(J))

This is an application filed under section 19 of the
Central Administrative Tribunals Act, 1985 to quash the
order No. B/P-578/IV/1/Vol.2 dated 8th March 1991 issued
by the 2nd respondent as illegal, arbitrary, void,
ab initio and without jurisdiction, and to direct the
first respondent to retire the applicant herein with

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effect from 1-5-1991 with proportionate pension and other retirement benefits admissible under the Rules and pass such other order or orders.

2. The applicant is initially appointed on 18-3-1958 in the Indian Railways, put up more than 33 years of unblemished service to his credit and is due to retire on 30-6-1993. The applicant, at present is working as Office Superintendent, Personnel Branch, D.P.M. Office, S.C. D-11 and his age is 56 years as on the date of application. The applicant alleges that on 23-9-1990 he was admitted to the Railway Hospital, Vijayawada due to severe attack of Jaundice and High B.P. and is undergoing the treatment, and his health is deteriorating day by day due to his old age. Having decided to retire from service due to his health conditions, the applicant gave 3 months prior notice to the respondents under Railway Establishment Code, 2046(i), before going on voluntary retirement. The Indian Railway Establishment Code, Volume-II Rule 2046 (i) is reproduced below:

"Rule-2046 (i): Any railway servant may by giving notice of not less than three months in writing to the appointing authority retire from service after he has attained the age of fifty years if he is in Class-I or Class-II service or post and had entered Government service before attaining the age of thirty five years, after he has attained the age of fifty years, and in all other cases after he has attained the age of fifty five years.

Provided that it shall be open to the appointing authority to withhold permission to a railway servant under suspension who seeks to retire under this clause."

Applicant states that in accordance with the rule supra, he completed 33 years of service. He has completed 55 years of age and is entitled to go on voluntary retirement after serving the railways for more than 3 decades. He alleges that he gave 3 months prior notice on 1-2-1991 and this period will expire on 1-5-1991. He states that the respondents, after receiving the notice from the applicant, issued an office order No. B/P-578/IV/1/Vol.2 dated 8-3-1991 which reads -

"Your request for voluntary retirement is not accepted since SPE/CBI case is pending against you."

3. The applicant alleges that as on the date of issuing the notice i.e. 1-2-1991 no case is pending against him and that he was never informed earlier about the pending of the SPE/CBI case and further alleged that the impugned order is non-speaking order. He states that no enquiry was pending against him nor he was kept under suspension as on the date of notice viz. 1-2-1991. The applicant alleges that the Divisional Railway Manager is the competent authority to pass orders on the notices given for voluntary retirement in respect of Group 'C' & 'D' Officers, as per the rules and that he is employed as Office Superintendent which is a Group 'C' post, but whereas the impugned order is issued by the respondents herein is without jurisdiction, as the same was issued by the A.P.O.(T) Senior Divisional Personnel Officer. The Divisional Railway Manager must pass orders within 3 months from the date of issue of notice in respect of Group 'C' staff and therefore order issued by the A.P.O(T), Sr.Divisional Personnel Officer is without jurisdiction, arbitrary, void ~~and~~ ab initio and is liable to be set aside.

4. The applicant alleges that as per rules he had submitted 3 months prior notice and fulfilled all the conditions required under the rule. The appointing authority can withhold permission to a railway servant under suspension. The applicant states that he was kept under suspension, and therefore, the appointing authority or any other authority cannot refuse or reject the request of the applicant for voluntary retirement. He alleges that the impugned order is, therefore, deliberately issued with ulterior motive and to defeat his right to retirement. He also alleges that the applicant's fundamental rights guaranteed under Articles 14 & 16 of the Constitution of India are affected, in view of the action of respondents. The applicant further stated that the competent authority did not pass any orders on his notice dt. 1-2-1991 within three months, and hence retirement shall become effective from the date of expiry of the said period. He alleges that he must be deemed to have retired with effect from 1-5-1991 on the expiry of the notice period of 90 days from 1-2-1991. The applicant is entitled to proportionate pension and other retirement benefits admissible under the Rules.

5. The respondents filed Reply Affidavit with their verification, and the copy of the same was received by the learned counsel for the applicant on 23-8-1991. The respondents countered the allegations that the applicant was appointed as Junior Clerk with effect from 18-3-1958 and promoted to higher grades as Senior Clerk, Head Clerk, Chief Clerk and Office Superintendent, and that while he was working as Office Superintendent he was

sanctioned Leave on Average pay from 17-9-1990 and after availing two days Leave on Average Pay has reported sick in Railway Hospital/BZA on 19-9-1990 and that he is still on sick leave. The respondents state that the applicant was transferred to Guntakal Division on administrative grounds vide Office Order P.EST.220/90 dated 4-10-1990, but he could not be relieved to Division as he was under sick list. The respondents state that the applicant applied for the acceptance of voluntary retirement with effect from 31-3-1991 vide his application dated 1-2-1991 through proper channel requesting to waive the notice period. The respondents further state that FIR was lodged against the applicant by SP/SPE/CBI/Vishakapatnam while the applicant was working as Office Superintendent, Divisional Railway Manager's Office/Vijayawada, as he was caught red-handed by CBI/Vishakapatnam while demanding and accepting an amount of Rs.600/- from an employee promising to provide an alternative job. The respondents allege that the applicant was well aware of the SPE case from 13-7-1990 onwards and the assertion of the applicant that no enquiry was pending against him is false and denied. They state that the applicant was under the notice of the SPE case not only from 1-2-1991 but from 13-7-1990 itself.

6. The respondents submit that as the applicant was transferred to Guntakal Division, the papers were sent to DRM(P)GTL (Divisional Railway Manager (Personnel)/Guntakal to initiate regular departmental action. Since the departmental action is pending and also SPE case against the applicant, the request of the applicant for voluntary retirement was rejected by the respondents vide their letter dated 8-3-1991 issued by Divl. Railway Manager's office.

The applicants' request for voluntary retirement was rejected when a DAR/SPE/Vigilance case is either pending or contemplation against him, and even when a DAR/SPE/Vigilance case is contemplated within the 3 months notice period. The respondents state that the applicant was duly informed at early date rejecting his request for voluntary retirement the question of the applicant deemed to have retired on 1-5-1991 does not arise and denied. The respondents denied the allegations of violation of any rules concerning the matter or fundamental rights of the applicant guaranteed under Articles 14 & 16 of the Constitution, and desired the application be dismissed.

7. The applicant, on 26-12-1991 filed rejoinder the copy of which is served on the learned counsel for respondents on 26-12-1991 itself. The applicant denied the allegation of respondents that he demanded or accepted Rs.600-00 as alleged and is unfound and untrue. The applicant state that had the allegation been a fact, he would have been placed under suspension while he was on duty viz. 13-7-90 till 22-9-1990 and state that the said allegation is invented to circumvent the present application. He further state that a Railway servant who is not under suspension suffers from no disability to exercise his right of voluntary retirement giving 3 months notice to the appointing authority, and according to the clarification issued by the Railway Board (Lr.No.E(D&A) 65 RG6-54 dated 18-8-1966, Railway servant who is under suspension can also exercise the right of voluntary retirement subject to the prior approval of the appointing authority, and therefore, he is free to exercise his right of voluntary retirement as he is not under suspension.

The applicant also allege that as per Item No.XI at page 11 of D & A Rules 1968 Brochure - 1976) in respect of promotion of a Railway servant during pendency of inquiries against complaints received against him by the department, or by S.P.E. etc. should not stand in the way of his promotion if he is otherwise eligible for promotion. The applicant also allege that CPO/SC is the competent authority to decide whether to initiate disciplinary proceedings or whether there is prima facie case against an employee, and not the respondents. The applicant states that the information with regard to sending of relevant papers by the respondent to Guntakal Division for departmental action is not specific but vague. The applicant further state that the respondents did not mention in paras-3 or 4 of the reply affidavit that the charges were levelled against the applicant or memorandum of charges was prepared, and therefore, the question of pending inquiry or departmental action does not arise; and it is the subject matter falling within the jurisdiction of the CPO/SC who is the competent disciplinary authority being the appointing authority in respect of the grade of post held by the applicant. As on the date of application dated 1-2-1991 of applicant, or on the date of voluntary retirement sought for 1-5-1991 the applicant suffered from no disability to exercise his right of voluntary retirement, and therefore the date 1-5-1991 may be declared as date of retirement for all retirement benefits.

8. The applicant filed two annexures, Annexure-A.1 at page-9 is the letter dt. 8-3-1991 issued by the APO(T), Sr.Divisional Personnel Officer, Vijayawada to the applicant,

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and Annex. A-2 at pages 10 & 11 is the letter ~~of the~~ applicant dated 1-2-1991 addressed to the Chief Personnel Officer, South Central Railways, Secunderabad. Respondents have filed a photo copy of the Estt. Serial Circular No.140/77, Circular Letter No.P(R)579 dated 29-11-1977 with regard to Scheme of Voluntary Retirement for Railway Employees; and also cited a decision of this Tribunal in O.A.No.395 of 1987 dated 11.9.1987 in a case between Shri K.Venkata Ratnam Vs. The Divisional Engineer, Telecommunications, Rajamundry and others, in support of their contentions in the Reply Affidavit.

9. We heard the learned counsel for the applicant Shri K.Sudhakar Reddy, and learned counsel for respondents Sri N.V.Ramana, Standing Counsel for Railways and perused the records carefully.

10. The short point here is, whether the applicant is allowed to voluntarily retire or not when the Rule 2046(i) read with proviso says "Provided that it shall be open to the appointing authority to withhold permission to a railway servant under suspension who seeks to retire under this clause." This provision has very important bearing on the case. It may be pertinent to note that so far, the respondents except stating that from 13-7-1990 onwards the applicant must be aware that FIR was lodged against him by the SP/SPE/CBI, Vishakapatnam in connection with demand and acceptance of Rs.600-00 as stated in para-5 supra. Neither the applicant nor the respondents come out with full facts before us. From 1-2-1991 when he sought for voluntary retirement, he was replied by a letter

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dt. 8-3-1991 rejecting his request on the ground that SPE/CBI case is pending against him. There is a vast difference between contemplation and initiation. Mere contemplation does not over-ride this proviso. There must be an initiation which involves issue of charge sheet either in departmental or judicial proceedings respectively. Even, at the time of arguments ~~xx xx~~ no material ~~was~~ placed before us by the respondents wherein the applicant was suspended or whether any charge-sheet/memo is issued. The Judgment cited by the learned counsel for the respondent in O.A.No. 395 of 1987 is based on the fact that a charge memo was issued with two or three charges mentioned in page-2 in Articles-I and II. Since a memo was issued and proceedings of departmental enquiry was delayed and therefore the voluntary retirement was not allowed in the said case. This Judgment has no application in the instant case as the facts differ, since from 1-2-1991 till today, there is no initiation of any proceedings except mere contemplation.

11. The Rule 2046(i) Proviso categorically states that this applies only to a Railway servant 'under suspension' emphasis added. Therefore, we have no hesitation in holding that mere contemplation will not give a ground to the respondents to deny the operation of the law under which the applicant sought voluntary retirement. The only snag appears in this case may be that if he is retired, the sanction of the President has to be obtained to initiate any action while touching his pensionary benefits after his retirement. Except that, the department is not precluded ~~from~~ taking action even if he is allowed to retire.

Under the circumstances, we hold that the applicant has to succeed on the ground of the Proviso of Rule 2046(i) of Indian Railway Establishment Code in the absence of any charge memo or charge sheet or suspension. The respondents are ~~xx~~ at liberty to take action as per law at any time even after his retirement if the so called FIR fructifies into a trial and he gets convicted.

The respondents can always take action even after his retirement after obtaining necessary permission from the President of India.

12. Coming to the Circular placed by the learned ~~xxx~~ counsel for the respondents bearing Estt. Serial Circular No.140/77, Lr.No.P(R)579 dt. 29.11.1977 regarding Scheme of voluntary retirement for railway employees, the relevant portion reads as follows:

"Such acceptance may be generally given in all cases except those (a) in which disciplinary proceedings are pending; or contemplated against the Railway Servant concerned for the imposition of major penalty and the disciplinary authority, having regard to the circumstances of case, is of the view that the imposition of the penalty of removal or dismissal from service would be warranted in the case; "

Here, it may be pertinent to note that, here it is not the case wherein disciplinary proceedings are pending; that the respondents are not coming out with any reasons or details or any other particulars in fulfilment of second part of above clause (a), except saying in riddle that the applicant is aware of the fact from 13-7-90 onwards about the lodging of FIR against by SPE/CBI, Visakapatnam.

(B9)

13. It is also relevant to mention here an identical rule viz. F.R. 56(k) ^{which is para materia with rule 2046, p. 11} applicable in case of Central ^{9.1.82 and} Government servants which reads -

"F.R. 56(k) (1) - Any Government servant may by giving notice of not less than three months in writing to the appropriate authority retire from service after he has attained the age of fifty years, if he is in Group 'A' or Group 'B' service, or post, (and had entered Government service before attaining the age of thirty-five years), and in all other cases after he has attained the age of fifty-five years:

- Provided that - (a)
(b)
(c) it shall be open to the appropriate authority to withhold permission to a Government servant under suspension who seeks to retire under this clause."

So, it can be seen that the appointing authority can hold the Government servant from retiring voluntarily when he is placed under suspension.

14. It can also be seen from the Judgment of the Full Bench of this Tribunal decided on 2-3-1987 and reported in Full Bench Judgments (CAT) 1986-89 page 158 between Sri K.Ch.Venkata Reddy & others Vs. Union of India and others, the Hon'ble Bench held "notwithstanding the pendency of the departmental or criminal proceedings against a Government servant, he is to be considered for promotion along with other eligible persons is by now well-established. "
In the same Judgment in para-31, page-179, in the last three lines discussing the sealed cover procedure, they observed that -

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"Whose conduct is under investigation". An Officer can be said to be under investigation only when a charge sheet filed in a Criminal Court or charge memo under CCA Rules is issued to the official."

In this case, as observed supra, neither a charge memo is issued nor charge sheet is filed. FR 56(k)(1), proviso (c) are in paramateria with the Indian Railway Establishment Code - Rule 2046(i).

15. In a recent decision reported in AIR(SC) 1991, pg.2010 between Union of India Vs. Sri K.V.Jankiraman Their Lordships of the Hon'ble Supreme Court of India, in para-6 held that -

" It is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. The plea that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., would not be tenable. The preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily, it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits to resort to the sealed cover procedure. The authorities thus are not without a remedy.

The promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee."

Besides this, the circular bearing No.140/77 is issued only by Railway Board, which is not having any sanction of law

overriding the main Indian Railway Establishment Code Rules and which is still in the process of being made into law. Para-4 of the said circular reads as follows:

"Para-4 + In the light of the provisions of this letter suitable amendments to Railway Fund Rules and Leave Rules, 1949 will be taken up separately."

Para-5 says that the "The above has the approval of the President.

However, it is nowhere stated this recommendation of Administrative Reforms Commission overrides Indian Railway Establishment Code/Rules.

16. The competent authority to accept the notice of voluntary retirement in respect of Group 'C' and 'D' employees the General Manager. Applying the principles laid down by their Lordships in "Sri K.V.Jankiraman's case" and 'Sri K.Ch.Venkat Reddy's case', cited supra, there must be a charge memo for disciplinary proceedings or charge-sheet for judicial proceedings. Though the word 'contemplated' is used in the Circular, ^{we} ~~we~~ have no hesitation to hold, in view of the above decisions the initiation of the proceedings has not been started. With the result even today the applicant is not kept under suspension in accordance with rules.

17. Keeping him under suspension, sine qua non for denying him the benefit of voluntary retirement. Under the circumstances, we have no hesitation as cited supra the voluntary retirement as claimed by the applicant should be allowed. However, this is not a preclusion for the

respondents to proceed against the applicant in case the said FIR fructifies into a trial, and he gets convicted. ~~_____~~

~~_____~~ The respondents can take action against the applicant, even if he is retired, by obtaining the permission of the President. For this formality, the ~~_____~~ when he sought retirement on health grounds. Under these circumstances, we ~~direct the respondents to~~ quash the order No.B/P-578/IV/1/Vol.2 dated 8th March, 1991 issued by the 2nd respondent and direct the respondents to voluntarily retire him with effect from 1-5-1991 with all consequential benefits as per rules, within ~~two~~^{four} months from the date of communication of this order. As observed earlier the department is entitled to take action at a later date if it is warranted by subsequent events. Under the circumstances the application is allowed with no costs.

R. Balasubramanian

(R. BALASUBRAMANIAN)
MEMBER (A)

C. J. Roy
(C. J. ROY)
MEMBER (J)

L
Dy. Registrar(Judl.)
17/92

grh.

Copy to:-

1. Divisional Railway Manager, Personnel Branch, Vijayawada.
2. A.P.O.(T), Senior Divisional Personnel Officer, Vijayawada.
3. One copy to Shri. K.Sudhakar Reddy advocate, H.No.2-2-1132/5, New Nallakunta, Hyderabad.
4. One copy to Shri. N.V.Ramana, SC for Rlys, C.A.T. Hydbad.
5. One spare copy.

Rsm/-