

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH,

JAIPUR

Dated of order: 06.10.2003

OA No.447/2003

Ismail s/c Shri Nanhe Khan r/o Purohitji Ki Tapri, Kota Junction, Kota, last employed on the post of Helper Khallasi, Workshop, Western Railway, Kota.

.. Applicant

Versus

1. Union of India through General Manager, West-Central Railway, Jabalpur.
2. C.R.S.E., West-Central Railway, Jabalpur.
3. Chief Works Manager, West-Central Railway, Kota.
4. Assistant Works Manager (Repair), West-Central Railway, Kota.

.. Respondents

Mr. C.B.Sharma - counsel for the applicant.

CORAM:

HON'BLE MR. M.L.CHAUHAN, MEMBER (JUDICIAL)

HON'BLE MR. A.K.BHANDARI, MEMBER (ADMINISTRATIVE)

O R D E R (ORAL)

The applicant while working on the post of Helper Khallasi in the Workshop at Kota was implicated in a criminal case and FIR No.262/95 under Sections 307, 147, 148 and 149 of IPC was registered against him. After completion of the investigation and filing of the challan, the applicant was convicted by the learned Additional Session Judge No.2, Fast Track, Kota vide judgment dated 22.1.2002 and sentenced for 10 years and 2 years rigorous imprisonment under Section 307 and 148 of the IPC. The applicant filed an appeal before the Hon'ble High Court

which was registered as SB Criminal Appeal No.134/2002 and the Hon'ble High Court suspended the sentence awarded by the Additional Session Judge No.2, Fast Track, Kota, vide order dated 3.4.2002.

1.1 The applicant was issued a show-cause notice on 5.6.2002 (Ann.A6) by the Disciplinary Authority under Rule 14 (1) (a) of the Railway Servants (Discipline and Appeal) Rules, 1968. The applicant submitted reply to the show-cause notice and the Disciplinary Authority after considering the reply submitted by the applicant passed the order of removal from service w.e.f. 6.8.2002. The removal order was passed on the ground that the applicant was convicted ~~by~~<sup>by</sup> the criminal court.

1.2 From the material placed on record, it appears that the applicant also moved a second stay application before the Hon'ble High Court which was registered as SB Criminal Miscellaneous Second Stay Application No.1253/2002 in SB Criminal Appeal No.134/2002. The said application was finally disposed of by the learned Single Judge vide order dated 21.10.2002 (Ann.A7) allowing the stay application and the impugned order/judgment of conviction dated 22.1.2002 passed by the Trial Court in so far as it relates to the applicant was stayed till the disposal of the appeal.

1.3 From the material placed on record it is also clear that the applicant has also challenged the order of his removal dated 6.8.2002 by filing OA in this Tribunal which was registered as OA No. 14/2003. The said OA was finally disposed of by this Tribunal vide order dated 23.4.2003 by holding that the applicant has approached this Tribunal without availing the remedy of appeal available under Railway Servants (Discipline and Appeal)

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Rules, 1968. This Tribunal permitted the applicant to file appeal against the order of removal within three weeks from the date of passing of the order and the Appellate Authority was directed to decide the same on merits within three months from the date of presentation of the appeal without taking objection of limitation. The Appellate Authority vide the impugned order dated 29.7.2003 (Ann.A1) has rejected the appeal of the applicant. Hence, the applicant has filed this OA thereby praying that the impugned orders dated 29.7.2003 (Ann.A1), 6.8.2002 (Ann.A2) and show cause notice dated 5.6.2002 (Ann.A6) be quashed and set-aside and the respondents be directed to reinstate the applicant in service. Further prayer made by the applicant is that the respondents be directed to treat the suspension period as spent on duty by quashing the order dated 22.4.2002 (Ann.A5) and letter dated 8.7.2003 (Ann.A13).

2. We have heard the learned counsel for the applicant at admission stage.

2.1 The only point argued by the learned counsel for the applicant is that since the order of conviction has been stayed by the Hon'ble High Court vide order dated 21.10.2002 (Ann.A7), as such the order of removal dated 6.8.2002 (Ann.A2) passed by the Disciplinary Authority on the ground of conviction and also the order dated 29.7.2003 (Ann.A1) passed by the Appellate Authority rejecting the appeal, be quashed and set aside.

2.2 We have given our thoughtful consideration to the submissions made by the learned counsel for the applicant. We are of the view that the applicant is not entitled to any relief whatsoever. The competency of the Disciplinary

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Authority to pass order of removal from service on account of his conviction by the competent court under Rule 14(1) of the Railway Servants (Disciplinary and Appeal) Rules, 1968 is not disputed. When the order of removal was <sup>passed on</sup> ~~of~~ 6.8.2002, the Hon'ble High Court has only granted bail to the applicant and also suspended the sentence awarded to him during the pendency of the appeal. Thus, there was no prohibition for the Disciplinary Authority to remove the applicant from service on the ground of conviction in terms of Rule 14(1) of the Railway Servants (Disciplinary and Appeal) Rules, 1968. Much emphasis has been placed by the learned counsel for the applicant on the order of the learned Single Judge passed in SB Criminal Misc. IInd Stay Application No.1253/2002 whereby conviction awarded vide order/judgment dated 22.1.2002 was stayed till the disposal of the appeal. We are of the view that this order of the learned Single Judge is of no avail to the applicant. It may be added that this order was procured by the applicant without bringing to the notice of the Hon'ble High Court that the order of removal pursuant to the show-cause notice had already been passed on 6.8.2002. The Hon'ble High Court was <sup>given</sup> ~~ing~~ the impression that only show-cause notice was issued against the removal from service and no final order has been passed by the competent authority till 21.10.02 on which date the learned Single Judge stayed the operation of impugned order/judgment dated 21.1.2002 as can be seen from the paras extracted below :-

"... In the case at hand, the appellant apprehends that because of passing of judgment of conviction, his services shall be terminated and the concerned railway authorities have already

issued notice to the appellant on 5.6.2002, requiring him to show cause as to why his services should not be terminated due to conviction in a criminal case. It is thus evident that the department have initiated proceedings to dispense with the services of the appellant. In this view of the matter, the prayer of the appellant, in my considered opinion, appears to be reasonable inasmuch as his services shall be terminated as a consequence of order of conviction by a criminal court. Thus the order of conviction deserves to be suspended.

For the reasons aforesaid, this application for staying the order of conviction is allowed. The impugned order/judgment of conviction dated 22.1.2002 passed by the trial court in so far it relates to the appellant Ismail shall remained stayed till the disposal of appeal."

Thus, a person who has obtained an order by supressing the material fact from the court <sup>is not</sup> ~~cannot be made~~ entitled to be heard and the OA is liable to be dismissed on this score also.

2.3 That apart, the fact remains that when the order of removal dated 6.8.02 was passed by the Disciplinary Authority, there was no stay regarding conviction as awarded vide the impugned order/judgment dated 22.1.02 and as such no infirmity can be found in the order of removal dated 6.8.2002 which was passed in terms of Rule 14(1) of the Railway Servants (Discipline and Appeal) Rules, 1968. Even otherwise also, no infirmity can be found in the order of removal which was confirmed by the Appellate

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Authority vide the impugned order dated 29.7.2003. In that order, the Appellate Authority was required to examine the validity of the order dated 6.8.02 passed by the Disciplinary Authority. The Appellate Authority was not required to go into the question regarding the order passed by the Hon'ble High Court in SB Misc. IInd Stay Application No.1253/2002. This fact can be seen from the order dated 23.4.2003 passed by this Tribunal in OA No.14/2003 whereby this Tribunal has given opportunity to the applicant to file a fresh appeal against the order of removal within three weeks from the date of passing of the order and the Appellate Authority was directed to decide the same on merits within three months from the date of presentation of the appeal without taking objection regarding limitation. The Appellate Authority has decided the appeal thereby examining the validity of the order dated 6.8.2002 passed by the Disciplinary Authority. The Appellate Authority has specifically stated that the crime committed by the applicant is of very grave nature and the court of law has found the applicant guilty and inflicted punishment and thus the punishment of removal from service given to him by the CWM-Kota is justified and necessary and no change is required in the order and the penalty awarded by the Disciplinary Authority was maintained.

2.4 At this stage stage, we may also refer the decision of the Apex Court in the case of B.F.Kapur vs. State of Tamil Nadu and Anr., 2001 (5) SLE 749. In that case the second respondent, Ms.J Jayalalitha, who was Chief Minister of the State of Tamil Nadu between 1991 and 1996 was convicted for offence punishable under section 120B of the Indian Penal Code read with Section 13(1)(c), 13(1)(d) and 13(2) of the Prevention of Corruption Act,

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1988 and for the offence under section 409 of the Indian Penal Code. She was sentenced to undergo 3 years' rigorous imprisonment and a fine of Rs. 10,000 in the first case and to undergo 2 years rigorous imprisonment and pay a fine of Rs. 5000 in the second case. She preferred ~~an~~ appeals against the conviction before the High Court at Madras. On an application filed by her in the two appeals, the High Court by an order suspended the sentences of imprisonment. Thereafter, she filed petitions in two appeals seeking the stay of operation of the judgment in the two criminal cases. On April, 2001 the second respondent filed nomination papers for four constituencies in respect of the general election to be held to the Tamil Nadu Assembly. On 24th April, 2001 three nomination papers were rejected on account of her disqualification under Section 8(3) of the Representation of People Act, 1951 by reason of her conviction and sentence in the two criminal cases. The fourth nomination paper was rejected for the reason that she had filed her nomination for more than two seats. The correctness of the order of rejection was not called in question. On 13th May, 2001 results of the election to the Tamil Nadu Assembly were announced and the AIADMF party which had projected the second respondent as its chief ministerial nominee, won by a large majority. On 14th May, 2001 the second respondent was sworn in as Chief Minister of Tamil Nadu. Her appointment as Chief Minister was challenged by filing a writ petition before the Madras High Court on the ground that the applicant could not have been sworn as Chief Minister on account of her conviction. The Writ Petition was dismissed and ultimately the matter was carried to the Supreme Court. The Hon'ble Supreme Court

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after analysing the various provisions in paras 33 and 34 held as under:-

"33. Section 389 of the Code of Criminal Procedure on the basis of which the second respondent was released on bail by the Madras High Court reads, so far as is relevant, as follows:-

"389. Suspension of sentence pending the appeal; release of appellant on bail-

(1) Pending any appeal by a convicted person, the appellant court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and also, if he is in confinement, that he be released on bail, or on his own bond."

34. It is true that the order of the High Court at Madras on the application of the second respondent states, "Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be released on bail..." but this has to be read in the context of section 389 under which the power was exercised. Under Section 389 an appellate court may order that "the execution of the sentence or order appealed against be suspended...". It is not within the power of the appellate court to suspend the sentence; it can only suspend the execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the

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execution of the sentences, therefore, does not remove the disqualification against the second respondent. The suspension of the sentence, as the Madras High Court erroneously called it, was in fact only the suspension of the execution of the sentences pending the disposal of the appeals filed by the second respondent. The fact that she secured the suspension of the execution of the sentence against her did not alter or affect the convictions and the sentences imposed on her and she remained disqualified from seeking legislative office under Section 9(3).

Thus from the portion as quoted above, the Apex Court has held that the Appellate Court cannot suspend the sentence but it can only suspend "execution of sentence". It is further made clear that the suspension of execution of sentence does not alter or affect the fact that the offender has been convicted of a grave offence and under these circumstances it was held that suspension of execution of the sentence does not remove the disqualification against the second respondent.

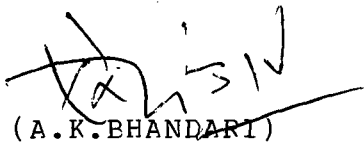
2.5 In the instant case also, the applicant has been convicted by the competent court for grave offence. The effect of conviction can only be obliterated <sup>ed</sup>, <sup>4</sup> the judgement of the trial court is ~~not otherwise~~ <sup>ultimately</sup> set-aside by the appellate court. So long as the judgment is not set-aside, the fact remains that the accused stands convicted though execution of sentence has been suspended by the appellate court in appropriate cases. The appellate court has no power to suspend the conviction as already laid

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down by the Hon'ble Apex Court in B.R.Kapur case (supra) and also in terms of Section 389 of the Code of Civil Procedure, relevant portion of which has been reproduced above.

3. For the reasons stated above, the present OA is dismissed at the admission stage with no order as to costs.

  
(A.K.BHANDARI)

Member (A)

  
(M.L.CHAUHAN)

Member (A)