Central Administrative Tribunal
Principal Bench

OA No.4353/2014

Orders Reserved on 22.08.2019
Pronounced on: 30.08.2019

Hon'ble Mr. S.N. Terdal, Member (J)
Hon'ble Mr. Pradeep Kumar, Member (A)

Shri Mahendra Kumar,
S/o Shri Ram Charan,
O/o Sub. Fitter Khalasi,
Under SSE (Loco),
N. Rly. Moradabad.

-Applicant

(By Advocate Shri H.K. Gangwani)

Versus

Union of India through

1. The General Manager,
   Northern Railways,
   Baroda House,
   New Delhi.

2. The Divl. Railway Manager,
   Northern Railways,
   Moradabad, UP.

-Respondents

(By Advocate Shri Shailendra Tiwary)

O R D E R

Hon'ble Mr. Pradeep Kumar, Member (A):

The applicant claims that he had worked as a casual labour under Inspector of Works Balamau, Moradabad Division in various spells during the period 15.09.1978 to

31.03.1982. The casual labour card testifying such working was issued to him. During the year 1987, applications were invited to fill the posts of substitute loco cleaner in grade Rs.750-940 under loco shed, Moradabad division, Northern Railway and he was appointed on the said post and had continued to work. He was suspended on 07.09.1990 and a major penalty charge-sheet was issued on that very date charging that he had secured the employment as substitute loco cleaner by producing a fake casual labour card. A disciplinary enquiry was held against him and charge was proved. The Disciplinary Authority (DA) passed an order on 15.01.1992 and punishment of removal was imposed. He preferred an appeal to the Appellate Authority (Senior DME) which was rejected vide orders dated 06.04.1992.

2. Feeling aggrieved, he filed OA No.769/1994 in the Tribunal. A common order was passed on 31.12.1997 in OA Nos.1670/92, 759/94 and 712/94 and all OAs were dismissed. Dismissal of this OA, was assailed by the applicants by filing Civil Writ Petition No.6493/1998 before the Hon'ble High Court of Delhi. The Writ was allowed vide orders dated 31.03.2003. The operative part of these orders read as follows:

> "For the foregoing reasons, we are of the opinion that the Tribunal was not justified in sustaining the

> orders passed by the appellate authority in all the three cases and dismissing petitioner's application.
>
> However, having regard to the facts and circumstances of the case and bearing in mind the fact that the disciplinary proceedings were initiated some time in the year 1991, we feel that no useful purpose would be served by remitting the matter back to the Tribunal for reconsideration. Instead, while setting aside the order of the Tribunal, we remit the matter back to the appellate authority for reconsideration of the appeals filed by the petitioners afresh. We would further direct that the appeals shall be heard and disposed of by the authority concerned as expeditiously as practicable but in any case not later than four months from the date of receipt of this order. An opportunity of hearing shall also be provided to the petitioners.
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> The writ petition as well as the applications for interim relief stand disposed of in the above terms with no orders as to costs."

3. In compliance, the Appellate Authority (Sr. DME) considered the appeal and applicant was reinstated in service and the intervening period of absence from 15.01.1992 to 14.07.2003 was directed to be treated as without pay and dies non. The operative part of the said order reads as under:

> "After going through the points raised by Shri Mahendra Kumar in personal hearing, considering the appeal of the employee, case file and documents on record, I am of the opinion that sufficient grounds have not been established to warrant removal from service of the employee, Shri Mahendra Kumar. I therefore set-aside the penalty of removal from service awarded to Shri Mahendra Kumar. The intervening period from date of removal till date of taken back in service may be treated as without pay and dies non. Shri Mahendra Kumar may be taken back on duty with immediate effect as

> no fresh D&AR enquiry can be conducted at this late stage in absence of relied upon documents.
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> Since at present there is no cadre of Sub Loco Cleaner exists in Mechanical branch therefore Shri Mahendra Kumar may be posted as Sub. Call man against existing vacancy in Mechanical branch."

4. Thereafter, the applicant preferred a revision petition to ADRM, who is a superior authority to Senior DME. The Revising Authority, vide orders dated 08.04.2005, modified the order of Appellate Authority to the extent that for the intervening period the applicant be paid subsistence allowance. However, as regards treating the period as dies no, the order was silent. Therefore, this part of the order by the Appellate Authority continued to remain in force. This order by the Revising Authority reads as follows:

> "I have considered your appeal. You may be paid subsistence allowance for the intervening period from 15/1/92 to 14/7/03."

4.1 Thereafter the applicant made another representation to the Revising Authority (ADRM) on 20.09.2005. By this time there was change of incumbency in the post of ADRM and a new ADRM passed the order on 28.12.2005, which reads as under:

> "I have considered your above revision appeal. Intervening period may be treated as 'dies-non'.

4.2 The applicant preferred another representation to the Divisional Railway Manager, who is superior to ADRM. This representation was replied vide letter dated 23.04.2012 when he was advised as under:

> "In reference to your above representation it is to inform that on your appeal it was ordered by ADRM/Moradabad that you should be paid subsistence allowance for the period of absence from duty i.e. from 15.01.1992 to 14.07.2003 vide this office letter on even no. Dt. 08.04.2005 and further the above said period has been treated as Dies-non vide this office letter of even no. 28.12.2005.
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> Orders have been passed according to rules and no further revision lies to DRM against the orders of ADRM. Hence no action may be taken on your above said representation."

4.3 Applicant is aggrieved that since subsistence allowance has been paid for the period of absence between the date of removal and the date of reinstatement (15.01.1992 to 14.07.2003), this period needs to be counted as spent on duty. Since the respondents are still treating this period to be dies non, he had filed the instant OA, seeking relief to quash the letter dated 23.04.2012 and release full pay for the said period of absence after adjusting the subsistence allowance and to treat the period as spent on duty.

4.4 The applicant has relied upon a judgment by the Tribunal in another case OA No.3945/2011 (**Mahendra Pal & Anr. v. Union of India & Anr.**) wherein judgment was delivered on17.02.2014. It is claimed that this judgment is in respect of a similarly placed employee where the Tribunal has ordered the relief sought by the applicant. The operative part of the Tribunal's order reads as under:

> "6. Thus, this O.A. is allowed and orders of the respondents dated 08.04.2005, 30.12.2005 and 05.04.2010 are set aside. We also quash that portion of the order of the AA dated 14.07.2003 which lays down that the intervening period from the date of suspension to the date of taking the applicants back in service be treated as dies non. We direct that the intervening period will be treated as duty for all intents and purposes. The applicants will be entitled to payment of full pay and allowances after deducting the subsistence allowance already paid for this period. Payment will be made within a period of eight weeks from receipt of a certified copy of this order. No costs."

4.5 The applicant has also relied upon another order passed by the Tribunal in OA No.2507/2002 (**Udaiveer v. Union of India & Anr.**) delivered on 10.07.2003.

5. The respondents opposed the OA. A preliminary objection of limitation was raised and it was pleaded that the Hon'ble Supreme Court in **Arun Kumar Agarwal v. Nagreeka Exports Pvt. Ltd. & Anr.**, [(2002) 10 SCC 101] has held that when a preliminary objection is taken, it is required to be decided first. The instant OA has been filed

beyond the period of one year from the date of original cause of action and hence not maintainable due to limitation.

Many other judgments have also been relied upon in respect of the OA being barred by limitation. Some of them are as follows:

i) **Dhiru Mohan Vs Union of India [**Full Bench CAT 1989-1991 Vol. II Page 448] it has been held by the Tribunal that as the Administrative Tribunal Act is special law and provides specific limitation, the Limitation Act cannot be invoked for deciding the question of limitation under this Act.

ii) **D.C.S. Negi Vs Union of India & Ors. [SLP (Civil) No 7956/2011 decide on 07.03.2011** (OA No. 1316/2006 Principal Bench, New Delhi) where the Hon'ble Apex Court, while dismissing the Appeal, has observed that the Administrative Tribunal established under the Act is duty bound to first consider whether the application is within limitation and application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21 (3). The Hon'ble Apex Court has further observed that "Learned counsel for the petitioner tried to explain this omission by pointing out that in the reply filed on behalf of

respondents, no such objection was raised but we have not felt impressed. In our view, the Tribunal cannot abdicate its duty to act in accordance within statute under which it is established and the fact that an objection of limitation is not raised by the respondent/non applicant, is not at all relevant."

5.1 In this regard, it has also been pleaded that the repeated representations by the applicant will also not extend the period of limitation and in this regard relied upon the following judgments:

i) In this regard Hon'ble Apex Court Constitution Bench in the case of **Rattan Chand Samanta Vs Union of India**, [(1994 SCC (L&S) 182)] ruled that "Delay deprives the person of remedy available in law. A person, who has lost his remedy by lapse of time, loses his right as well."

ii) **S.S. Rathore Vs Union of India & Others,** [AIR 1990 SC 10] it has been held by the Hon'ble Apex Court that "the repeated representation does not extend the period of representation."

iii) **Karnataka Power Corporation Ltd through Its CMD and Another Vs K Thangappan and Another**, [(2006) 4 SCC 322], where the Hon'ble Supreme Court held that mere making of representations cannot justify delay.

iv) **Jai Dev Gupta Vs State of Himachal Pradesh and Another** [1999 (1) AISLJ SC 110], wherein it has been held by the Hon'ble Supreme Court that continued representations do not keep the limitation alive.

v) **Shri Bhoop Singh Vs Union of India & others**, [(1992) 3 SCC 136) (Para 8)] decided by a three Judges Bench where it has been held by the Hon'ble Supreme Court that "Inordinate & unexplained delay or latches is by itself a ground to refuse relief to the petitioner, irrespective of the merit of his claim. If a person entitled to a relief chooses to remain silent long, he thereby gives rise to a reasonable belief in the mind of others that he is not interested in claiming that relief."

6. Even on merits also, the respondents brought out that the relevant rules under which the Competent Authority has to order as to how to treat such a period. These rules are contained in Rule 1343 of Indian Railway Establishment Code, Volume-II (IREC-II). This rule reads as under:

> "**1343. (F.R.54)**.--(1) When a railway servant who has been dismissed, removed or compulsorily retired is re-instated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension preceding the dismissal, removal or compulsory retirement, the authority competent to order reinstatement shall consider and make a specific order-
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> (a) regarding the pay and allowances to be paid to the railway servant for the period of his absence from duty

including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and

(b) Whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority competent to order re-instatement is of opinion that the railway servant who had been dismissed, removed or compulsorily retired has been fully exonerated the railway servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the railway servant had been delayed due to reasons directly attributable to the railway servant, it may, after giving him an opportunity to make his representation and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the railway servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay only such amount of such pay and allowances as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In cases other than those covered by sub-rule (2) (including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held) the railway servant shall, subject to the provisions of sub-rules (6) and (7), be paid such amount to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the railway servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed 60 days from the date on which the notice has been served as may be specified in the notice.

Provided that any payment under this sub-rule to a railway servant (other than a railway servant who is governed by the provisions of the Payment of Wages Act,

1936 (4 of 1936), shall be restricted to a period of three years immediately preceding the date on which orders for re-instatement of such railway servant are passed by the appellate authority or reviewing authority or immediately preceding the date of retirement on superannuation of such railway servant, as the case may be.

(Rly. Board's letter No. F(E)III 68 SPN/3 dt. 16-10-74.)

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding the dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specific purpose; provided that if the railway servant so desires, such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be , shall be converted into leave of any kind due and admissible to the railway servant.

NOTE:-- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of—

(a) extraordinary leave in excess of three months in the case of temporary railway servant; and

(b) leave of any kind in excess of five years in the case of permanent railway servant.

(6) The payment of allowances under Sub-rule(2) or sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The amount determined under the proviso of sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 1342 (F.R. 53).

(8) Any payment made under this rule to a railway servant on his re-instatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of re-instatement. Where the emoluments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the railway servant."

6.1 It was pleaded that in the instant OA, punishment of removal from service was imposed after holding a proper enquiry wherein charges were proved. Thereafter appeal against the punishment of removal was considered by the competent Appellate Authority (Sr. DME) and he passed a detailed and speaking order on 14.07.2003 (para 3 supra). In this order the period of absence was treated as without pay and dies non.

A close reading of this order passed by the Appellate Authority makes it abundantly clear that it was not a case of full exoneration but in the circumstances since no fresh enquiry could be conducted at that stage as relied upon documents would not be available at that late stage (the said documents, viz. causal labour card pertained to his claimed casual service during the period 1978-1982). Keeping in view this situation, it was Rule 1343 (1) that gets attracted (para 6 supra). The applicant's claim that his case to be treated under Rule 1343 (2) is not acceptable as his case is not that of full exoneration.

6.2 Accordingly, the Appellate Authority (Sr. DME) had decided the issue on 14.07.2003 and a clear order to treat the period as without pay and as dies non was passed. This cannot be faulted.

Thereafter the Revising Authority (ADRM) had decided on 08.04.2005 that instead of “no payment”, subsistence allowance be paid for the said period. This order had not mentioned anything about the period treating the period as dies non and hence this part of the order by the Appellate Authority continued to be in force.

6.3 Subsequent order of the Revising Authority (ADRM) issued on 28.12.2005, is only reiteration of the earlier orders by ADRM for treating the period as dies non.

6.4 The order dated 23.04.2012, which is impugned in this OA, was issued after a representation was sent to the Divisional Railway Manager, who is superior to ADRM and at that stage the applicant was advised that once the issue has already been decided by the Revising Authority (ADRM), no further revision lies to DRM.

6.5 In view of this, the action taken by the respondents is as per the rules, which are statutory in nature and there being no fault, the OA needs to be dismissed.

7. The matter has been heard at length. Shri H.K. Gangwani, learned counsel represented the applicant and Shri Shailendra Tiwary, learned counsel represented the respondents.

8. The facts of this case are not in doubt. The applicant was imposed the punishment of removal from service after following the due process of holding an enquiry where the charges were proved. In terms of the statutory rule 1343 (1), IREC Vol. II, the competent authority was also required to specify how to treat the period of absence and he has decided the period in a manner that subsistence allowance be paid for the same and to treat the period as dies non. This cannot be faulted.

8.1 The applicant has also relied upon a judgment by Hon'ble Supreme Court in **Union of Inida v. Madhusudan Prasad**, [(2004) 1 SCC 43]. In this the Hon'ble Apex Court has held as follows:

> "It is true that when a reinstatement is ordered in appeal or review, the authorities can pass specific order regarding the pay and allowances to be paid to the government servant for the period of his absence from duty preceding the dismissal, removal or compulsory retirement, as the case may be in view of Fundamental Rule 54. In the instant case, the Appellate Authority directed reinstatement of the respondent and held that he was not entitled to get back wages for the period he was out of service. **But the respondent was removed from service without any enquiry and he was not even given a show-cause notice prior to his dismissal from service. There was fault on the part of the employer in not following the principle of natural justice**. Therefore Fundamental Rule 54 cannot be invoked by the authorities to deny him back wages from the date of dismissal to reinstatement."
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> (Emphasis supplied)

It is clear from the observations made by the Hon'ble Apex Court that the respondent therein was removed from service without any enquiry and he was not even issued a show cause notice prior to his dismissal from service.

It was perhaps in this context that the Tribunal while passing the judgment in OA No.3945/2011 (para 4.4 supra), has quoted rule 1343 of IREC Vol-II and allowed the OA.

Therefore, the context of the said decision by the Tribunal is the judgment by Hon'ble Apex Court which is in a case wherein the applicant was fully exonerated.

In the instant case it is not a case of full exoneration. Accordingly, the relied upon decision in OA No.3945/2011 is of no help to the applicant.

8.2 The applicant has also relied upon another order by the Tribunal in OA No.2507/2002 (para 4.6 supra). The circumstances of this order are also very different. In this relied upon case, the disciplinary proceedings were initiated but at some stage they were dropped. However, no orders were passed in respect of the intervening period of absence.

It is obvious that the factual matrix of the instant case is entirely different in that the proceedings were concluded, enquiry was held, charges were proved and punishment

order was issued along with clear orders about how to treat the intervening period. Accordingly, the ratio of OA No.2507/2002 is of no help to the instant applicant.

8.3 The OA is severely barred by limitation also as the decisions of payment of subsistence allowance and to treat the period as dies non were taken on 8.4.2005 and 14.07.2003 respectively (paras 3&4 supra). And the instant OA has been filed in the year 2014.

9. In view of the foregoing, the pleas put-forth by the applicant are not gaining acceptability. Hence the OA is dismissed, being without any merit and being barred by limitation. No costs.

(Pradeep Kumar)
Member (A)

(S.N. Terdal)
Member (J)

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