

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 649 of 2016

**Present : Hon'ble Mr. Gokul Chandra Pati, Member(A)
 Hon'ble Mr. Swarup Kumar Mishra, Member(J)**

Gulshan Sharma, aged about 28 yers, S/o Jogarath Sharma, Substitute Bungalow Peon attached to Dy.CEE (HQ)/RE/Bhubaneswar, permanent resident of Chakgokul, PO-Jakhabar, Dist-Khatua, Jammu & Kashmir.

.....Applicant

VERSUS

1. Union of India, represented through the General Manager, Central Organisation Railway Electrification (CORE), Nawab Yusuf Road, Allahabad, Uttar Pradesh.
2. Chief Personnel Officer, Central Organisation Railway Electrification (CORE), Nawab Yusuf Road, Allahabad, Uttar Pradesh.
3. Senior Personnel Officer, Railway Electrification, B-22, Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist.- Khurda.
4. Mr.Anil Kumar, Deputy Chief Electrical Engineer/RE (Head Quarter), B-22, Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist.- Khurda.
5. Chief Project Manager, Railway Electrification, B-22, Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist.- Khurda.

.....Respondents.

For the applicant : Mr.N.R.Routray, counsel

For the respondents: Mr.M.B.K.Rao, counsel

Heard & reserved on : 15.7.2019 Order on : 27.8.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A) :-

The applicant has filed this OA with the prayer for following reliefs:-

- “(a) To quash the order of termination dtd. 2.8.2016 and letter dtd. 5.7.2016 under Ann. A/5 series.
- (b) And to direct the respondents to reinstate the applicant in service with full back wages.

And pass any other order as this Hon'ble Tribunal deems fit and proper in the interest of justice.

And for which act of your kindness the applicant as in duty bound shall ever pray.”

2. The facts in brief are that the applicant was initially engaged by the respondent No. 4 as his Bungalow since 31.12.2012. He was engaged as a

Substitute TADK with the Grade Pay of Rs. 1800/- w.e.f. 24.1.2014 and he joined on the new assignment on 3.2.2014. He was granted temporary status on 21.7.2014 (vide order at Annexure-A/3). When he was marked absent on duty for some dates, he submitted representations, copy at Annexure-A/4 series. The respondent No. 4 did not recommend further renewal of the applicant's engagement on 5.7.2016 (Annexure-A/5 series). Vide order dated 2.8.2016 (Annexure-A/5 series), the respondent no. 3 passed order to terminate the service of the applicant. The applicant, after receipt of the termination order dated 2.8.2016, submitted an appeal dated 3.8.2016 (Annexure-A/6) and since no decision has been taken, the applicant has filed this OA stating that he is entitled for the relief in the light of the order dated 22.9.2014 of this Tribunal in OA No. 499/2011 (Annexure-A/7).

3. The grounds advanced in the OA are that although he was attending to the duty, he was marked absent for which he had submitted a series of applications to the respondent No. 4 and 5 but no action was taken by the authorities. Then the applicant received the letter dated 5.7.2016 (A/5 series) of the respondent No. 4 by which, he did not recommend continuance of his service and then the order dated 2.8.2016 (A/5 series) terminating his service on the ground of unsatisfactory performance. Thereafter, he submitted the letter dated 3.8.2016 (A/6) to the respondent No. 1 mentioning all the details of the case. It is also mentioned that the applicant had paid a bribe of Rs. 100000/- to the respondent No. 4 and since he could not pay additional amount, he had not recommended his continuation of service.

4. Counter has been filed by the respondents. In reply to the averments in para 4.5 of the OA regarding his attendance being marked absent on some days although he was on duty and his series of applications to the authorities about such incidents, the para 7 of the Counter stated as under:-

"That the assertions made in paras 4.4 and 4.5 are hereby denied as false. It is unfair on the part of the applicant to blame the authorities for his own latches with regard to absenteeism,. As a matter of fact, the applicant remained absent unauthorisedly from duty on different occasions i.e. from 15.4.2015 to 20.4.2015, 12.8.2015 to 17.8.2015, 2.12.2015, 7.12.2015 and from 9.5.2016 onwards as brought out in the quarterly report dated 5.7.2016 under Annexure A/5 series. Though on earlier occasions, he was absent for few days, however, after 9.5.2016, the applicant remained continually absent from duty unauthorisedly till 2.8.2016. Copy of muster roll in respect of applicant is filed herewith as Annexure R/6 series.

It is humbly submitted that when the applicant discharged his duties during his two years of working as Sub TADK, he was marked as 'present' and duly received his salary and temporary status as per rules. Thus, now the claim of the applicant that he was unduly marked 'absent' intentionally is an afterthought for the purpose of drawing sympathy from this Hon'ble Court. As a matter of fact, he was marked 'absent' from duty when he failed to attend his assigned duties. Though the applicant submitted representations to cover up his latches but he has failed to turn up for duty."

5. Regarding the contention in the OA about the bribe demanded by the respondent no. 4 and bribe paid by the applicant as stated in para 4.7 of the OA and as stated by the applicant in his letter dated 3.8.2016 (Annexure-A/6) addressed to the respondent no.1, we take note of the following averments in para 9 of the Counter, which stated as under:-

"That the allegations of bribery made in para 4.7 are hereby denied as false. It is not fair on the part of the applicant make malicious allegations against respondent No.4 without any material foundation. On the other hand, it throws light on the conduct of the applicant. Never before the applicant made any bribery allegation nor has filed any police complaint. It is really unfortunate that the applicant is making bribery allegations against the respondent No.4 which are hereby strongly refuted and denied."

6. Regarding applicability of the OA No. 499/2011 order dated 22.9.2014 (A/7), the averments in para 12 of the Counter are as under:-

"That the assertions made in para 4.10 are incorrect and hence denied. The order of this Hon'ble Court dated 22.9.2014 passed OA No. 499/2011 is inapplicable to the fact situation of this case and hence can be differentiated from. This Hon'ble Court has not adjudicated the effect of Policy Decision as contained in GM(P)/CORE/ALD's Lr.No.E/O/38/Policy Dt. 4.7.,2007 in the referred case. The respondents reserve their right to advance further arguments with regard to inapplicability of the order passed in the said case at the time of hearing of the OA."

7. It is further averred in the Counter that the impugned termination order has been issued as per the terms and conditions of the applicant's service before completion of 3 years of service for unsatisfactory performance. It is stated that such terms and conditions are stipulated as per the circular dated 4.7.2007 (Annexure-R/4) under which the applicant was engaged as a Substitute TADK. The said circular at R/4, provides for termination of service of a TADK with one month notice for unsatisfactory service. It is also stated that the applicant has received the payments as per the order without any demur and thereby acquiescing the impugned termination order.

8. We heard learned counsels for both the parties reiterating the contentions in their respective pleadings. The applicant's counsel drew our attention to the order dated 16.4.2019 passed in the OA No. 730/2014 on the similar issue and he further stated that the applicant has not received any terminal benefits as claimed by the respondents. Learned counsel for the respondents submitted his written submissions reiterating the averments in the Counter. It is stated that the applicant has been disbursed the termination benefits as per the sanction order at Annexure-R/5, which has been paid to the bank account of the applicant. It is stated that the termination order has been issued as per the terms and conditions of his appointment. The judgment of Hon'ble Apex Court in the case of State of Maharashtra vs. Anita & another reported in 2015(8) SCC 293 has been enclosed with the written submissions.

9. Taking into accounts the factual aspects of the case, the relevant issues to be decided are:-

(i) Whether the order dated 22.9.2014 of the Tribunal passed in OA No. 499/2011 is applicable to the present OA before us.

(ii) Whether the impugned termination order dated 2.8.2016 (A/5 series) issued to the applicant is sustainable under law.

10. It is seen that in the OA No. 499/2011, the concerned TADK's service was terminated for the reason that the TADK had remained on unauthorized absence (vide para 9 of the order dated 22.9.2014), which is undoubtedly a misconduct, which should have been dealt in accordance with the rules applicable for the disciplinary proceedings. In the present OA, the ground for termination as mentioned in the impugned order dated 2.8.2016 is unsatisfactory performance of the within the period for 3 years of service as per appointment order dated 24.1.2014 (Annexure-A/1). In addition to the wages for one month, retrenchment compensation has been allowed to the applicant vide order dated 2.8.2016. Similarly, in OA No. 730/2014 vide order dated 16.4.2019, the termination was on account of unauthorized absence and the order dated 22.9.2014 in OA No. 499/2011 was followed while passing the order dated 16.4.2009. Further, as pointed out in the Counter, while passing the order dated 22.9.2014, the Tribunal has not considered the circular dated 4.7.2007 (Annexure-R/4) regarding the policy guidelines for engagement of substitute Bungalow Khalasi.

11. For the reasons as mentioned in the preceding paragraph, we are of the view that the facts of this OA are different from the facts of the OA No. 499/2011 or OA No.730/2014, for which, the cited order dated 22.4.2019 of this Tribunal will not apply to the present OA. The issue (i) of para 9 is decided accordingly.

12. We take note of the fact that nothing has been mentioned in the Counter about consideration of the letter/representation dated 3.8.2016 addressed to the respondent no.1 containing serious allegations against the respondent no. 4. It is noted that the circular dated 4.7.2007 (R/4) allows appointment to the railway service of persons as B/Khalasi for which no advertisement or no selection procedure has been specified. Such appointments are purely on personal consideration of the individual officers who are in need of the service of a Khalasi in his residence. A person appointed by an officer can be taken as a regular railway service on fulfilling certain criteria. But the fact remains that their initial appointment is not on the basis of any objective criteria. Such a

policy has resulted in a situation in which the applicant has made a serious allegation of bribe against the respondent no. 4, which has been simply brushed aside by the respondents in the Counter by stating that the applicant never brought the allegation earlier. There is nothing on record to show if any enquiry has been conducted based on the letter dated 3.8.2016 of the applicant. On what basis the respondents have assumed the allegation of the applicant to be baseless has not been stated in the Counter and there is no whisper if any enquiry was ordered by the competent authority.

13. We also take note of the fact that prior to the allegation of bribe against the respondent no. 4, the applicant had also written letters to the authorities about the allegation that although he was attending the duty, he was being marked absent. Nothing has been mentioned in the Counter if any action was taken on such allegations of the applicant, which are also considered to be serious. There is no whisper in the Counter if any enquiry was conducted on such serious allegations of the applicant. While deciding the issue (ii) of para 9, we need to take into consideration the background of allegations of the applicant prior to termination of his service, on which no action appears to have been taken by the respondents.

14. In this regard, we take note of the judgment of Hon'ble Apex Court in the case of **Pavanendra Narayan Verma vs Sanjay Gandhi P.G.I. Of Medical Science, reported in 2002 SCC (L&S) 170**, in which it was held as under:-

"It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or the inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service the motive operating on the mind of the Government is, as Chagla, C.J. has said in [Shrinivas Ganesh v. Union of India \(N\)](#) (supra), wholly irrelevant. In short, if the termination of service is founded on the right flowing from contract or the service rules then prima facie, the termination is not a punishment and carries with it no evil consequences and so [Art. 311](#) is not attracted. But even if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of [Art. 311](#) must be complied with."

15. Applying the ratio of the above judgment to the present case, it is seen that although the impugned termination order is issued in terms of the terms and conditions of the appointment order, the letter dated 5.7.2016 of the respondent No. 4 (A/5 series) was based on the allegation of unauthorized absence of the applicant from 9.5.2016. It was therefore, based on the allegation of unauthorized absence although it was not mentioned as such in

the order dated 2.8.2016. Hence, the impugned termination order is founded on the allegation of unauthorized absence. In addition, as discussed earlier, there were serious allegations of the applicant against the respondent no. 4 which were not examined properly by the respondents. Therefore, we are of the considered view that in view of the background to the case as discussed above, the impugned order dated 2.8.2016 (A/5 series) is punitive, although it has been worded as a simple termination order and it has been issued without following the procedure as applicable for the disciplinary proceedings to prove the allegations of unauthorized absence against the applicant. The issue at (ii) of para 9 is answered accordingly.

16. The judgment in the case of Anita (*supra*) cited by the respondents' counsel in his written submissions, has considered whether the terms and conditions of the appointment as decided by the Government as a policy decision can be interfered by the Court. It was held that the appointees cannot question the appointment terms and claim it to be a regular appointment. The judgment has no application at all to the present OA since the terms and conditions of the applicant's engagement is not under challenge.

17. In view of the reasons as discussed above, we set aside the impugned order dated 2.8.2016 (Annexure-A/5 series) and direct the respondents to reinstate the applicant in service. However, as per the principle of 'no work no pay', the applicant will not be entitled to payment of back wages. Respondents will be at liberty to consider the applicant's letters at Annexure-A/4 series and take necessary action as deemed appropriate in the matter in the interest of administration.

18. The OA is allowed as above, with no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath

