

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A No. 180/00610/2017

Friday, this the 9th day of August, 2019.

CORAM:

**HON'BLE Mr. E.K. BHARAT BHUSHAN, ADMINISTRATIVE MEMBER
HON'BLE Mr. ASHISH KALIA, JUDICIAL MEMBER**

Tonymon Joseph, 28 years,
S/o. Joseph,
[Ex-Track Maintainer-IV, O/o. Senior Section Engineer,
Permanent Way, Tindivanam, Southern Railway),
Residing at Kandanattu, No. 159, Kaniakad,
Vallichara (P.O), via Arunapuram,
Kottayam – 686 592. - Applicant

[By Advocate M/s. Varkey & Martin]

Versus

1. General Manager,
South Railway, Park Town,
Chennai – 600 003.
2. Senior Divisional Personnel Officer,
South Railway, Park Town, Chennai - 600 003.
3. Assistant Divisional Engineer,
Southern Railway, Changalpattu,
Tamil Nadu. - Respondents

[By Advocate : Mr. Mathews K.G]

The application having been heard on 06.08.2019, the Tribunal on 09.08.2019 delivered the following:

O R D E R

Per: Ashish Kalia, Judicial Member

The applicant was selected for the post of Track Maintainer IV by Railway Recruitment Commission, Chennai and appointed as Group 'D' as such in Engineering Department in the pay scale of Rs. 5200-

20200 plus Grade pay of Rs. 1800/- and posted to Tindivanam under Changalpattu Sub-Division by Senior Divisional Personnel Officer, Chennai Division. The applicant joined service on 27.06.2014. He was slipped down and fell back on the railway track, injuring his back and was taken to Railway Hospital at Changalpattu. He was taken to ordinary sick list because he was only a probationer according to the Doctor. He was advised to go to native place and get treated, if he wished. So being unfamiliar with the medical rules, the applicant went to his native place and get treated from Puthiyedom Hospital, Paika. The matter was informed to his immediate superior. Though, there was no fracture, the applicant was feeling severe back pain even while breathing. On 01.08.2015, the applicant was received a show cause notice dated 14.07.2015 alleging that he had not turned up for duty from 29.10.2014 to 21.06.2015 and to show cause as to why his service may not be terminated, granting 10 days time to represent against the proposed termination. Applicant submitted a representation dated 02.08.2015 through proper channel to the said show cause notice with medical certificates showing his treatment was with effect from 29.10.2014 onwards. On 06.09.2015, he was given fitness by Doctor and applicant reported for duty before Senior Section Engineer on 08.09.2015, but he was directed to go to the 3rd respondent, who did not take him for duty and told to return to his native place, and wait for further written orders. The applicant did so. The applicant was shocked to receive a termination order terminating his service with effect from 26.10.2015. Being a new

employee of the Railway, he is not aware of any other authority and the procedures, the applicant made a representation dated 02.11.2015 (Annexure A-6) to the 3rd respondent, Assistant Divisional Engineer. The respondents terminated him due to the expiry of the sanction to the post or due to removal or dismissal in compliance with the provisions of clause 2 of Article 311 of the Constitution of India and without jurisdiction. The applicant approached this Tribunal for redressal of his grievances by seeking the following reliefs:-

- “1) Call for the records leading to the issuance of Annexure A-5 and quash the same.*
- 2) Direct the respondents to reinstate the applicant back to the service with all consequential benefits as if Annexure A-5 order has not been issued.*
- 3) Grant such other relief, which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.”*

2. Notices were issued and reply statement was filed by respondents through Mr. K.G Mathews, Standing Counsel for the Railways.

3. From the reply statement, it is submitted that the appointment of the applicant was temporary and the same was subject to be terminated due to the expiry of the sanction to the post or due to removal or dismissal in compliance with the provisions of Clause 2 of Article 311 of the Constitution of India. The applicant accepted the terms and conditions of the service and he was appointed as Track Maintainer Grade IV on 27.06.2014. It is submitted that all the Railway servants are extended the medical facilities available in the Railway Hospitals and in case, the applicant being not well, to be reported to the Railway Hospital

available near his home town. It was further submitted that the applicant reported sick on 28.10.2014 but did not report further in the Health Unit at Chengalpattu. A Railway servant injured while on duty is kept under sick list and leave under Workmen's Compensation Act is granted. In the present case, the applicant was not injured on duty. He was not advised to go to his native place, the same is only imaginary on the part of the applicant; the respondents submit. He also submitted that the applicant did not send any medical report or any intimation regarding his alleged sickness. It is only after the show cause notice terminating his service that the applicant has taken steps to procure the medical certificate. Even the applicant could have reported to the Railway Hospital at Kottayam, Alleppey, Quilon or Ernakulam to get treatment. The Senior Section Engineer, Trivandrum reported that the applicant had been on unauthorised absence from duty from 29.10.2014 to 04.05.2015 without getting any prior sanction. Despite many calls from his supervisor to join his duty, he has not responded. It was only after the show cause notice, the applicant produced Annexure A-3 medical certificate. Applicant cannot plead ignorance of rules or procedures and the same is not a defence for staying away from work. If such a plea were to be accepted, then for every misconduct or procedural violation, then the ignorance of rule or law could be a defence. The termination order is simple and does not cast any stigma on the applicant and therefore, the applicant has been rightly terminated from service. The facts of the unauthorised absence and the unsatisfactory performance are

the motive for such termination, therefore, there is no infirmity in the termination order. Even otherwise, the applicant has approached this Tribunal after a lapse of two years. The respondents have cited the judgement in ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences reported in 2002 (1) SCC 520*** after considering the various decisions and to wriggle out the struggle of the Courts with semantically and indistinguishable concepts, like 'motive' and 'foundation' and termination founded on a probationer's misconduct and motivation evolved certain judicial tests to determine whether in substance and order of termination is punitive or simplicity, the Supreme Court at paragraph 21, mandated that the Courts should see whether prior to the termination there was (a) a full scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in finding of guilt. If all three factors are present, then the termination has been upheld. Therefore, the Supreme Court held that whenever a probationer challenges his termination the Court's first task will be to apply the test of stigma or the "form" test. If the order survives this examination the "substance" of the termination will have to be found out. In para 29, the Supreme Court held as follows:-

" Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although, strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."

In this case, no enquiry was contemplated and therefore the termination cannot be termed to be punitive. It is further submitted that the applicant was not appointed by the 2nd respondent and he was only appointed by the Additional Divisional Engineer/Changalpattu namely the 3rd respondent, who was competent to appoint the applicant. Moreover, the appointment letter dated 24.06.2014 was issued only by the Assistant Personnel Officer, who is equivalent in rank to the Additional Divisional Engineer, Changalpattu. Therefore, there is no infirmity in the termination order. In ***Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others (1999) 3 SCC 60***, the Supreme Court explained the meaning of the words 'motive' and 'foundation' on which innocuous order of termination is passed. If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as founded on the allegations and will be bad. Similar is the position, if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid. In this case, no enquiry was held and therefore, the simple termination cannot be termed as illegal. It is submitted that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory

will not be punitive in as much as the above facts are merely the motive and not the foundation.

4. Heard Mr. Martin, learned counsel for the applicant and Mr. Mathews K.G, learned counsel for the respondents at length.

5. The applicant has raised an issue that whether termination order passed by respondent No. 3 is valid or not or having lack of jurisdiction. The learned counsel for the applicant has submitted that the termination was made by the incompetent authority. The Indian Railway Establishment Code Vol. I 2003 Rule 301 (5) reads:

“(5) The notice of termination of service or order of forthwith termination of service as the case may be, under this rule should be given by an authority not lower than the appointing authority.”

6. On the contrary, respondents have submitted that appointment order was issued by Assistant Divisional Personnel Officer and termination order was issued by Assistant Divisional Engineer, who are of the same rank as that of Appointing Authority. Therefore, there is no infirmity in the order at Annexure A-5. Therefore, we are of this view that, if appointing authority has passed an order, nothing wrong in it. Though, the Rule 301 definition too has clearly stipulated, which having authorities direction, but that does not mean appointing authority cannot pass the order. So, this contention failed to convince us and same is not accepted. Learned counsel for the applicant has relied upon the judgment of Apex Court in ***Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and another (2002) 1 SCC 520***. The termination whether simpliciter or punitive three factor tests to be

determined has been discussed. He has drawn our attention to para 12, 13 and 14 and tried to convince that termination order passed because the applicant is punitive in nature and without holding enquiry. Lastly, the main contention made by the applicant that order passed by the respondents is punitive in nature. This has been discussed in recent judgment of the Hon'ble Apex Court in the matter of ***Dipti Prakash Banerjee v. Satyendra Nath Bose National Centre for Basic Sciences, Calcutta and others in Civil Appeal No. 750/1999 [1999 (3) SCC 60]***

The Apex Court has considered the following points :

- (1) *In what circumstances, the termination of a probationer's services can be said to be founded on misconduct and in what circumstances could it be said that the allegations were only the motive?*
- (2) *When can an order of termination of a probationer be said to contain an express stigma?*
- 3) *Can the stigma be gathered by referring back to proceedings referred to in the order of termination order and*
- 4) *Whether the applicant was entitled to any relief.*

And held:

“Point No. 1: If findings were arrived at an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. If, however, the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.”

7. If we apply the judgment of the Apex Court in the present case, there was no enquiry held by the employer neither any intention to hold, at the same time, did not want to continue the employee against whom there was a complaint. Thus, the ratio of above said judgment is

squarely covering the case in hand, because the termination order is a simpliciter without holding any investigation or enquiry against the allegation or content of the misconduct. As regards the contention raised by the learned counsel for the applicant, Mr. Martin that it would stigma against the applicant for future employment. The Apex Court has also dealt with this aspect and held that “material which amounts to stigma need not be contained in termination order of a probationer but might be contained in documents referred to in the termination order or in its annexures. Such documents can be asked for, or called for, by any future employer of the probationer. In such a case, employee's interests would be harmed and therefore termination order would stand vitiated on the ground that no regular enquiry was conducted”. In the present case also, the respondents have not terminated the service of the applicant on the basis of any material as envisaged in the above judgment which can be looked for by the future employer of the probationer. Thus, the order can be found as not stigmatic.

8. In view of the above discussion, present O.A lacks merit and is liable to be rejected. We do so. There shall be no order as to costs.

(Dated, 9th August, 2019.)

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K. BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

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Applicant's Annexures

- Annexure A-1 - True copy of the Office Order No. O.O.M/P.1(W) 129/2014 dated 24.06.2014 by Senior Divisional Personnel Officer, Chennai Division.
- Annexure A-2 - True copy of the show cause notice No. ES/ 76/ DAR/TMV dated 14.07.2015.
- Annexure A-3 - True copy of the representation dated 02.08.15 submitted by the applicant.
- Annexure A-3(a) - True copy of the medical certificate dated 01.08.15 issued by Puthiyedom Hospital, Paika.
- Annexure A-4 - True copy of the fitness certificate dated 6.9.2015 issued by Puthiyedom Hospital, Paika.
- Annexure A-5 - True copy of the termination order No. ES/ 76/ DAR/TMV dated 26.10.2015 issued by the 3rd respondent.
- Annexure A-6 - True copy of the representation dated 02.11.2015 submitted by the applicant.
- Annexure A-7 - True copy of the letter dated 07.07.2017 issued by the Senior Superintendent of Post Offices, Kottayam Division, Kottayam.

Annexures of Respondents

- Annexure R-1 - True copy of the order in O.A Nos. 832, 833 and 850 of 1977 of the CAT, Madras Bench.
- Annexure R-1 - True copy of the Schedule of Power 2014.
