

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: July 08,, 2013

+ **W.P.(C) 1745/2012**

MAHANAGAR TELEPHONE NIGAM LTD AND ORS

..... Petitioners

Represented by:Mr.R.V.Sinha,Mr.R.S.Singh and
Mr.A.S.Singh, Advocates

versus

RAKESH KULSHRESHTHA AND ANR Respondents

Represented by:Mr.Saurabh Kulshreshtha for
Mr.Rakesh Kulshreshtha, R-1
Ms.Saroj Bidawat with Mr.A.S.Trisem Shimray,
Advocates for R-2

+ **W.P.(C) 1746/2012**

MAHANAGAR TELEPHONE NIGAM LTD AND ORS

..... Petitioners

Represented by:Mr.R.V.Sinha,Mr.R.S.Singh and
Mr.A.S.Singh, Advocates

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RAKESH KULSHRESHTHA AND ANR Respondents

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Mr.Rakesh Kulshreshtha, R-1
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Advocates for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. The aforesaid three writ petitions arise from a common order dated October 11, 2011 in three Transfer Applications Nos. 12/2009, 16/2009 and 1241/2009, which were initially initiated as writ petitions before this Court and later transferred to the Central Administrative Tribunal, Principal Bench, New Delhi whereby the Tribunal set aside the impugned orders in the Transfer Applications with an observation that consequences in accordance with law would flow.

2. The issue in all three Transfer Applications, before the Tribunal was identical, although relate to different periods, as to whether the period of alleged unauthorised absence, was rightly declared as *dies non*.

3. For purpose of convenience we cull out the facts in the three writ petitions separately.

WP(C) 1746/2012 (T.A. No. 12/2009)

4. This petition arises from T.A. No. 12/2009 wherein a case was set up by the respondent No. 1 that on his promotion as Telephone Technical

Assistant he was posted, on September 12, 1995, to the office of General Manager (West-I). According to him when he reported for duty he was not allowed to join. Despite his representations no posting order was given. After about four years in the year 1999, he filed WP(C) No.3217/1999 in this Court wherein an interim order was passed by this Court permitting him to join his duties, which he did on September 22, 1999. According to him despite joining duties he was not given his arrears of pay. He was placed under suspension on February 02, 1996 which was later revoked on October 13, 1997. No departmental proceedings were initiated against him. He later came to know that without any notice the period in question was treated as *dies non* without pay and allowances and without break in service for the purpose of pension and other service benefits vide order dated March 13, 2002. This order was challenged by him in WP(C) No.7506/2004 on the ground that the order is in violation of principles of natural justice. Without determining after hearing him that he was unauthorisedly absent such an action could not have been taken. Suffice would it be to state that the petitioner/MTNL has opposed the claim of the respondent No.1 herein and justify their action on the ground that he has absented for 4 years and 12 days and did not perform any duty in spite of several letters asking him to join his duties.

WP(C) No.1747/2012 (T.A. No.16/2009)

5. In this writ petition we are concerned with a show cause noticed issued by the petitioners to the respondent No.1 dated March 18/2002 alleging that the respondent was unauthorisedly absent between the period August 08, 2000 to February 21, 2001 and as to why the period be not treated as *dies non*. In his reply to the show cause dated march 23, 2002

the respondent No.1 inter alia submitted that the Sub-Divisional Officer (SDO) did not allow him to join duty on August 08, 2000 for which he made a number of representations to various authorities. The show cause notice culminated in an order dated March 30, 2002 whereby the petitioners had treated the period as *dies non*. The appeal filed by the respondent No.1 was dismissed by the Appellate Authority on June 28, 2002. He filed a writ petition challenging the said action of the petitioners in WP(C) No.5766/2002 wherein it was contended by him that he was not given reasonable opportunity to be heard before passing the impugned order of *dies non*. The question as to whether the applicant was unauthorisedly absent could be decided in an appropriate enquiry and the same has not been held in this case. The petitioners herein opposed the case of the respondent No.1. According to them vide letter dated August 07, 2000 he was relieved from the office where he was working to report to the General Manager (West-II). The respondent refused to accept the order. Later the copy of the order was sent to the respondent through Registered Post. In any case, it is the case of the petitioners that they were willing to allow the respondent No.1 to join his duties. He was unauthorisedly absent without prior sanction.

WP(C) No.1745/2012 (T.A. 1241/2009)

6. In this writ petition we are concerned with period from June 15, 2000 to August 07, 2000 which was directed to be treated as *dies non* with break in service in terms of office memo dated February 21, 2002. The appeal against the said order was rejected by the Appellate Authority vide order dated December 12, 2002. The respondent No.1 claims that he was actually on duty during this period. The grounds in regard to this period

also are similar to the one which have been taken for the earlier periods. The sum and substance of the submission of the respondent No.1 was that there was no proper enquiry held to be determined if the respondent No.1 was unauthorisedly absent during the period.

7. The Tribunal on the basis of the pleadings and arguments had come to the following conclusion:-

“8. *The dispute between the parties revolves around three spells of absence, namely, 15.9.1995 to 26.9.1999, 8.8.2000 to 21.2.2011 and 15.7.2000 to 7.8.2000 respectively in the three Applications. All the three spells of absence have been ordered to be treated as dies non. The first one without break in service, second one as dies non simpliciter without clarifying as to whether it would cause break in service or not and the third one with break in service. No show-cause notice has been given for the first and the third spells. In all the cases, the period of absence has been treated as dies non for the reason of having not performed any duty. The impugned orders do not reveal the reasons for treating the period of dies non as causing break in service in two cases and not in the third one.*

9. *The applicant upon appointment to the Department of Telecommunications is governed by CCS (Leave) Rules, 1972 being a Government servant. Rule 4 of the said Rules provides that Government servants to whom these rules apply shall continue to be governed by these rules while on temporary transfer to the Indian Railways or to a State Government or while on foreign service within India. Under F.R. 17, the Government Servant shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post and shall cease to draw them as soon as*

he ceased to discharge those duties. However, an officer who is absent from duty without any authority shall not be entitled to any pay and allowance during the period of such absence in terms of FR 17. An unauthorized absence is deemed to cause an interruption or break in service of the employees, unless otherwise decided by the competent authority for the purpose of leave travel concession, quasi-permanency and eligibility for appearing in departmental examinations, for which a minimum period of continuous service is required as is provided in FR 17A. For the purpose of this Rule, the term Competent Authority means the Appointing Authority as explained in Explanation II to FR 17A. Thus, it may be seen that whereas an unauthorized absence will entail denial of pay and allowances during the period of such absence as provided in FR 17. Such unauthorized absence period operates to cause an interruption and break in service of employee by operation of law in terms of FR 17A, subject to the rider that Competent Authority has the powers to decide otherwise either in general or for a limited purpose as provided therein. The provisions of FR 17A are in the nature of penal provisions. Therefore, it has been held that issue of an order under this Rule without giving a reasonable opportunity of representation and being heard in person, if so desired by the person concerned, would be against the principles of natural justice. Accordingly, it has been administratively advised to all the Ministries and Departments to keep in mind the procedural requirement that an order under FR 17-A should be preceded by extending to the person concerned a reasonable opportunity of representation and being heard in person if so desired by him/her. The term dies non has not been used in the said provision yet quite often the term is used in official parlance. The

term is latin in its origin and is a short form for dies non juridicus meaning non judicial day, i.e., the day on which no legal business could be done. Over a period of time, it assumes connotation indicating that it does not count for legal purposes. Accordingly, it not only denotes the period of unauthorized absence in which the employee concerned is not entitled to pay and allowances but it also becomes indicative of such absence causing break in service resulting in forfeiture of past service, unless the competent authority decides otherwise. Thus denial of pay and allowances during the period of an unauthorized absence is one thing and its operation as causing break in service leading to forfeiture of past service is another. We are concerned herein with the second aspect of the matter when the respondents have ordered this period to be treated as dies non.

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- 12. In view of the aforesaid, especially having regard to its penal nature, the order directing to treat the period of absence as dies non is not sustainable in the absence of any show cause notice to the applicant before passing these orders. In view of this, the orders of dies non in TA 12/2009 and TA 1241/2009 cannot be sustained in law. As regards TA 16/2009 in which show cause notice has indeed been issued to the applicant before passing the impugned order, it is seen that the same has not been passed by the appointing authority of the applicant in terms of the FR 17A. The same is the position in other two TAs on this aspect of the matter. We have earlier observed that even while being on deemed deputation to MTNL, the applicant continued to be governed by the provisions of CCS (Leave) Rules, 1972. The respondents have not brought to our notice any document indicating delegation of powers of the appointing authority in*

Department of Telecommunications to the MTNL authorities in the matter. Besides the impugned orders of disciplinary authority in the present case is vitiated on account of being non-speaking and non-reasoned order without referring to the points raised by the applicant in his reply to the show cause notice in any manner. Consequently, the order of the appellate authority in this case also falls with the order of the disciplinary authority.

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- 14. It is relevant to note that in two of these cases the applicant has joined duties in terms of the judicial orders passed in the pending Writ Petitions whereas in one case, the period of absence for more than 4 years has not been treated as break in service and in other cases, the period of absence of shorter spells have been ordered to be treated as break in service. The reason for passing different orders in similar set of circumstances is not discernible from the impugned orders. Nonetheless, the fact that the period has been treated as dies non by itself would result in break in service in the absence of any order of the respondents to the contrary. There is conspicuous absence of uniform common link in the orders passed by the respondents in similar sets of circumstances leading to varying and conflicting results of not treating the period of absence as break in service in one case while similar absence being treated as break in service without any plausible justification and explanation. To this extent, the varying impugned orders insofar as their effect on continuity of service of the applicant is concerned, there is apparently arbitrariness in the action of the respondents vitiating the impugned orders on this count as well.*
- 15. In the result, though absence from duty without any authority disentitled the applicant to any pay and*

allowances during the period of such absence yet the orders of dies non are not sustainable for the reasons of not giving requisite show cause notice to the applicant, lack of necessary competency in passing these orders, non-speaking order and arbitrariness in passing the orders as a matter of course without recording any finding as to the exceptional and grave nature of the circumstances of the case.

16. *In the facts and circumstances of the case and for the reasons stated above, the impugned orders directing the three spells as dies non are not sustainable and are accordingly quashed and set aside. Consequences in accordance with law will follow. All the three TAs are allowed in the above terms. No order as to costs”.*

8. Mr.R.V.Sinha, learned counsel for the petitioners would submit that the Tribunal has erred in allowing these Transfer Applications by setting aside the orders impugned by the respondent No.1. He would submit that the petitioners have rightly treated the period of absence as *dies non* and should not be interfered with. Mr.Saurabh Kulshreshtha appeared for the respondent No.1 and justified the impugned order.

9. We have seen that the Tribunal has held that against three spells, the first spell between September 15, 1995 to September 26, 1999 and July 15, 2000 to August 07, 2000 no show cause notice was issued to the respondent No.1. The period was treated as *dies non* only for the reason that he has not performed his duties. Merely because the officer had not performed duties would not entail the period be treated as *dies non*. *Dies non* becomes indicative that such absence cause break in service resulting in forfeiture of service. It becomes obligatory on the part of the competent

authority to first decide as to whether the officer was unauthorizedly absent. Since no show cause notice was issued to the respondent No.1 in so far as period 1 and 3 are concerned, the impugned orders have been rightly set aside by the Tribunal in T.A.No.12/2009 and T.A.No.1249/2009. In so far as T.A.No.16/2009 is concerned, the Tribunal also set aside the impugned orders in the said T.A. holding the same being non-speaking and non-reasoned order without referring to the points raised by the respondent No.1.

10. We agree with the conclusion of the Tribunal on the interpretation of F.R 17A and also with regard to denial of proper opportunity to the respondent No.1 before passing the impugned orders but would not agree in so far as the observation that necessary consequence pursuant to the quashing of orders shall follow, in as much as we see the periods in question relating to alleged absence is for several months. In one case it is for 4 years and 12 days. If the absence is not justified then surely it is a serious issue. F.R 17A and the instructions issued thereunder stipulates procedure before an action is taken for treating the period as *dies non*. The same need to be followed in letter and spirit. Appropriate would have been that the Tribunal should have remanded the matter to the competent authority calling upon him to issue show cause notice to the respondent No.1 as to why the periods in question be not treated as *dies non* and on receipt of the reply pass appropriate speaking and reasoned order. This would be in conformity with the law laid down by the Supreme Court wherein the Supreme Court was of the view that when departmental enquiry conducted against an officer found defective then the Court ought to have directed fresh proceedings from the stage of alleged illegality.

Reference in this regard be made to the opinion of the Supreme Court reported as 2008 (12) SCC 30 Union of India v. Y.S.Sadhu Ex-Inspector.

11. Accordingly we dispose of the writ petitions setting aside the impugned order dated October 11, 2011 and remand the matter to the competent authority giving liberty to it to issue show cause notice to the respondent No.1 as to why the periods in question be not treated as dies non. Upon receipt of reply it shall pass reasoned and speaking order.

12. We have been told that the respondent No.1 has since retired. Before the competent authority initiates the action as directed by us above it must consider the aspect that the respondent No.1 has since retired and whether the department would be justified to take any further action in that regard. If the competent authority decides to take action as directed by us, the same be completed as expeditiously as possible but not beyond a period of six months.

13. No costs.

C.M No.3841/2012 in W.P.(C)1745/2012

C.M No.3842/2012 in W.P.(C)1746/2012

C.M No.3843/2012 in W.P.(C)1747/2012

Dismissed as infructuous.

**(V.KAMESWAR RAO)
JUDGE**

**(PRADEEP NANDRAJOG)
JUDGE**

JULY 08, 2013/mm