

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

MONDAY, THE 21ST DAY OF DECEMBER 2015/30TH AGRAHAYANA, 1937

OP (CAT).No. 2928 of 2011 (Z)

AGAINST THE ORDER IN OA 1005/2010 of CENTRAL ADMINISTRATIVE
TRIBUNAL,ERNAKULAM BENCH DATED 21.02.2011.

PETITIONERS:

1. THE DIRECTOR GENERAL, NATIONAL COUNCIL OF SCIENCE
MUSEUMS,SECTOR V,BLOCK GH, BIDHAN, NAGAR, CALCUTTA-700091
2. THE DIRECTOR
NEHRU SCIENCE CENTRE, DR.E.MOSSES ROAD, WORLI, MUMBAI
3. THE PRIJECT CO-ORDINATOR,
REGIONAL SCIENCE CENTRE, CALICUT-673006

BY ADV.SRI.SUNIL JACOB JOSE

RESPONDENTS:

M.RAJENDRAN, DRIVER, REGIONAL NEHRU SCIENCE CENTRE,
CALICUT-673006.

R1 BY ADVS. SRI.R.RAJASEKHARAN PILLAI
SRI.R.SREEDHARAN NAIR
SMT.SABINA JAYAN
SMT.MINI.V.A.

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 21-12-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (CAT) .No. 2928 of 2011

APPENDIX

PETITIONERS' EXHIBITS:

P1 : PHOTOCOPY OF O.A.NO.1005/10 FILED BY THE RESPONDENT, ALONG WITH ANNEXURES.

P2 : PHOTOCOPY OF THE REPLY STATEMENT FILED BY THE PETITIONERS.

P3 : PHOTOCOPY COPY OF THE ORDER DATED 21.2.2011 OF THE TRIBUNAL.

RESPONDENT'S EXHIBITS: NIL

//TRUE COPY//

P.A. TO JUDGE

Smv

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(CAT) No.2928 of 2011

Dated this the 21st day of December, 2015

JUDGMENT

Surendra Mohan,J.

The respondents in O.A. No.1005 of 2010 of the Central Administrative Tribunal ("CAT" for short), Ernakulam Bench are before us challenging Ext.P3 order of the CAT allowing the Original Application. According to the petitioners, the CAT seriously went wrong in quashing the Government Order below the Fundamental Rule 54-B No. G.I., M.F., O.M.No.15(14) E. IV (59) dated the 25th May, 1962 and the 9th August, 1962.

2. The brief facts necessary for the purpose of deciding the case are the following:

3. The respondent was working as a driver under the 3rd petitioner. Disciplinary proceedings were initiated against him by the 2nd petitioner as per Annexure A1, that forms part of Ext.P1. A domestic enquiry was conducted. All the 4 charges levelled against the respondent were established at the domestic enquiry. Therefore, as per Annexure AII order dated 20.03.2003

the respondent was removed from service. The said order was the subject matter of an appeal before the Appellate Authority, at the instance of the respondent. As per Annexure AIII order dated 01.07.2003, the Appellate Authority found that, the punishment imposed on the respondent was justified but, on humanitarian grounds, the punishment of dismissal was converted to compulsory retirement. Against Annexure AIII, there was a revision at the instance of the respondent. As per Annexure AIV order dated 25.08.2005, the Revisional Authority further modified the punishment. Accordingly, his pay was reduced to the lowest stage of Rs.3050/-for 5 years during which he was held not entitled to any increment of pay, with cumulative effect. He was also posted at Kolkatta. Accordingly, he rejoined duty on 24.10.2005 at Kolkatta.

4. Respondent was aggrieved by the proceedings for the reason that, no orders have been issued regarding the manner in which the period during which he had been kept out of the service should be treated. He submitted Annexure AXI representation dated 04.10.2010 seeking regularisation of period from 04.05.2001 to 24.10.2005, from the date of his suspension to the date of rejoining duty. However, there was no response to

Annexure XI. Therefore, respondent approached the CAT by filing the Original Application.

5. The contentions of the respondent were opposed by the petitioners. According to them, where no orders are passed by the Appellate/Revisional Authority regarding the manner in which the period of his absence should be treated as per the Office Memorandum dated 25.5.1962, such period has to be treated as a 'non-duty'.

6. After considering the rival contentions, the Tribunal as per Ext.P3 order found that, this was a case in which the Rule FR 54-B applies. Since the Rule mandated that the authorities should pass a specific order regarding the manner in which the period should be treated, it was incumbent on the authority to have considered the representation and passed appropriate orders thereon. The Office Memorandum on which reliance was placed by the petitioners was found to be in conflict with the Rule and therefore, the same has been quashed and set aside to the extent it was inconsistent with FR 54-B. The petitioners challenge the said order.

7. According to Adv.Sunil Jacob Jose who appears for the petitioners, there is no conflict between the Rule FR 54-B and

the Office Memorandum. The Office Memorandum is only clarificatory of the rule position. Therefore, the CAT went wrong in setting aside the Office Memorandum.

8. It is also contended that, in the present case, the respondent has been found guilty by all the authorities. It was only on humanitarian considerations that the punishment has been interfered with. Since he has been found guilty of the charges levelled against him, according to the learned counsel, there are absolutely no grounds available for treating his period as duty, entitling him to various benefits. It is also contended that, since the Union of India was not a party to the proceedings before the CAT, there was no justification for quashing the order without hearing a necessary party.

9. Adv.Rajasekharan Pillai appears for the respondent. According to the learned counsel, the Rule FR 54-B has no application to the facts of the present case. The proper Rule that applies is FR 54. As per the said Rule, when a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review, the authority competent is obliged to pass specific orders regarding the pay and allowances to be paid to the said person 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. Reliance is placed on sub-rule 7 of FR 54(1) to contend that, the amount determined under the proviso to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 53. According to the learned counsel, the authorities were under the obligation to determine the amount to be paid to the respondent under the above provisions. Therefore, it is contended that, no interference with the order of the CAT is called for.

10. Heard. A perusal of Rule FR 54-B on which reliance has been placed by the CAT shows that, the said Rule applies only to a case where the Government servant who was suspended was reinstated in service. In the present case, admittedly the respondent was dismissed from service and was later on reinstated. Therefore, the proper rule that applies to the present case is FR 54. The said Rule is reproduced hereunder for convenience of reference:

“F.R.54 (1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the

authority competent to order reinstatement shall consider and make a specific order--

(a) regarding the pay and allowance to be paid to the Government 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 reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government 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 Government servant had been delayed due to reasons directly, attributable to the Government servant it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) 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 (1) or Clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held) the Government servant shall, subject to the provisions of sub-rules (5) and (7), be paid such amount (not being the whole) of the 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, as the competent authority may determine, after giving notice to the Government 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 sixty days from the date on which the notice has been served) as may be specified in the notice.

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his 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 treated

so for any specified purpose:

Provided that, if the Government 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 Government 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 Government servant; and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government 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 to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(8) Any payment made under this rule to Government servant on his reinstatement 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 reinstatement. 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 Government servant."

11. Sub-rule (1) of the above Rule, contemplates the situation where a Government servant who has been dismissed, removed or compulsorily retired is reinstated in service as a result of appeal or revision, after his retirement on superannuation. In such case, the authority competent is obliged to pass specific order regarding the pay and allowances to be paid to the said person for the period of his absence from duty. Sub-rule (2) deals with the situation where a Government servant under similar circumstances has been fully exonerated. In such cases he is to 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. Sub-rule (3) specifies that in such cases, the period of absence from duty of the said person shall be treated as period spent on duty for all purposes. Sub-rule (4) deals with cases other than those covered by sub-rule (2) including cases where dismissal is set aside for non-compliance with the requirement of Article 311 of the Constitution and where no further enquiry is proposed to be conducted. In such cases, the said Government servant is to be

paid such amount as may be determined by the competent authority, subject to the provisions of sub-rules (5) and (7). As per sub-rule (5), the period of absence of such an employee shall not be treated as duty unless the competent authority specifically directs that it shall be treated so for any specified purpose. Sub-rule (7) provides that the amount determined under the proviso to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 53. The cumulative effect of the above provisions is that, in the case of an employee who has been reinstated in service under situations that are not contemplated by sub-rules (1) or (2), sub-rules (4), (5) and (7) shall apply. In other words, such an employee would have to be paid amounts to be determined by the competent authority which shall not be less than the subsistence allowance and other allowances admissible under Rule 53. Since sub-rule (7) stipulates that the amount shall not be less than the subsistence allowance and other allowances, it is obligatory on the part of the competent authority to consider each case, in the context of the peculiar facts and circumstances obtaining and to determine the amount to be paid to the employee upon reinstatement. Therefore, in

cases to which sub-rule (7) applies, the Office Memorandum dated 25.05.1962 can have no application. It is trite that the executive instructions cannot limit the scope of the rule. Therefore, the stand of the petitioners that in the absence of any specific directions or orders, the period of absence of the respondent from 04.05.2001 to 25.10.2005 should be treated as "non-duty" cannot be accepted. Specific orders would have to be passed on his representation Annexure A11 that is pending before the competent authority fixing the amount that is actually due and payable to him. We notice that the CAT has also directed the competent authority only to consider the claim of the petitioner and to pass appropriate orders thereon in accordance with law. Therefore, we do not find any infirmity in the said direction that has been issued.

12. However, the CAT went wrong in quashing the O.M. dated 25.05.1962. This is for the reason that, the said O.M. would apply to the cases under FR 54-A and FR 54-B where no provision like sub-rule (7) in FR 54 is available. Therefore, the order of the CAT to the extent it has set aside the said Office Memorandum is unsustainable. The said portion of Ext.P3 order of the CAT is set aside. The reference made by the CAT to

FR 53-B is also erroneous, the proper rule that is applicable is FR 54. The above aspect is also clarified.

For the foregoing reasons, this Original Petition is allowed to the limited extent of setting aside that portion of Ext.P3 order dated 21.02.2011 in O.A. No.1005 of 2010 by which the O.M. dated 25.5.1962 below FR 54-B has been set aside. The said O.M. is restored. The rest of the order of the CAT is sustained.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv
22.12.2015