

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 6TH DAY OF APRIL 2015/16TH CHAITHRA, 1937

OP (CAT).No. 71 of 2015 (Z)

AGAINST THE ORDER IN OA 124/2013 of CENTRAL
ADMINISTRATIVE TRIBUNAL,ERNAKULAM BENCH DATED 14-10-2014.

PETITIONER(S)/RESPONDENTS IN OA :

1. THE SENIOR DIVISIONAL ENGINEER
(SR. DEN., EAST), AGED 33 YEARS,
PALGHAT DIVISION,
SOUTHERN RAILWAY, PALAKKAD-678 002.

2. THE ADDITIONAL RAILWAY MANAGER,
SOUTHERN RAILWAY, PALAKKAD DIVISION,
PALAKKAD-678 002.

3. SR. DIVISIONAL PERSONNEL OFFICER,
SOUTHERN RAILWAY, PALAKKAD DIVISION,
PALAKKAD-678 002.

BY ADV. SRI.TOJAN J.VATHIKULAM,SC,RAILWAYS

RESPONDENT(S)/APPLICANT IN OA :

V.PADMAVATHY, AGED 50 YEARS,
W/O. LATE K.THANKAMANI, (EX-ST.TRACKMAN,
DTM/3 ENGINEERING DEPT., PALAKKAD DIVISION,
SOUTHERN RAILWAY), RESIDING AT 21,
MURANDAMMAAN KOIL STREET, GANESAPURAM,
PODANNUR-23,
COIMBATORE, TAMIL NADU.

THIS OP (CAT) HAVING COME UP FOR ADMISSION ON
06-04-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

OP (CAT).No. 71 of 2015 (Z)

APPENDIX

PETITIONER(S) ' EXHIBITS

P1 : COPY OF THE OA NO.124/2013 ON THE FILES OF THE CAT.
(ERNAKULAM BENCH) .

P2 : COPY OF THE REPLY STATEMENT FILED IN OA 124/2013.

P3 : COPY OF THE ORDER OF THE CAT (ERNAKULAM) BENCH IN OA
124/2013 DTD.14.10.2014.

P4 : COPY OF THE RAILWAY BOARD'S LETTER NO.E(D & A) RG
6-29 DTD.17.11.1970.

P5 : COPY OF THE RAILWAY BOARD'S LETTER NO.E(D & A) RG
6-29 DTD.19.11.1971.

P5 : A COPY OF THE RAILWAY BOARDS LETTER NO.E(D&A)83 RG
6-47 DTD.30.8.1984.

EXT.P6: COPY OF THE ORDER IN O.A.NO.141/2011 DATED
11/4/2012 OF THE CAT, ERNAKULAM BENCH.

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P.S. to Judge

“CR”

**THOTTATHIL B. RADHAKRISHNAN &
K. HARILAL, JJ.**

O.P.(CAT) No.71 of 2015

Dated this the 6th day of April, 2015

JUDGMENT

Harilal, J.

1. Railway establishment has invoked Article 227 of the Constitution of India challenging the decision of the Central Administrative Tribunal, Ernakulam Bench (for short, 'the Tribunal'), on O.A.No.124 of 2013.
2. The proceedings from which this matter arises was filed by the wife of K.Thankamani, a deceased railway servant. She challenged the order removing her husband from the service on the ground of unauthorised absence. She pleaded that the said order was passed without affording to him, an opportunity of being heard. Her husband was

working as Senior Trackman in the Engineering Department of Railway in the Palakkad Division. He became HIV infected and could not be present at the office from 24/6/2006 onwards on account of that. That part, thereafter, due to societal, social, moral and personal stigma, he had been staying away from his residence due to withdrawal psychosis; going by his wife's contentions. His wife was under the *bona fide* impression that he was attending the office, away from the house and he was staying away due to his difficulty to face relatives and neighbours and the fear of infecting the family members with that dreaded illness. He was being treated at Assisi Snehalaya, Coimbatore, a Centre for HIV/ AIDS patients; however that, his condition worsened and he breathed his last on 6/3/2011.

3. Thereafter, the respondent, the wife of K.Thankamani received Annexure-A4 communication from the

establishment stating that her deceased husband was sanctioned compassionate allowance of Rs.3,500/- per month with effect from the date of his death. However, on discreet enquiry, the widow came to know that her late husband was removed from service as per Annexure-A5 penalty advice, without affording to him, an opportunity of being heard.

4. Aggrieved by Annexure-A5 penalty advice, she preferred Annexure-A7 appeal before the 2nd respondent. The 2nd respondent rejected that appeal by Annexure-A8 order. Aggrieved by Annexure-A8 order, the deceased employee's widow challenged the removal of her husband from service, alleging that the said order is *ex facie* arbitrary, illegal and unsustainable under law. It is the decision rendered thereon; by the Tribunal, that is impugned before us.

5. Establishment filed a reply statement resisting the reliefs claimed before the Tribunal and contended that the late K.Thankamani was imposed with penalty of removal from service, after holding departmental enquiry as provided under Railway Servants (Discipline and Appeal) Rules, 1968; for short the 'Rules'. It was pleaded that all the communications pertaining to the enquiry were sent to his residential address; but the communications were returned with the postal endorsement that the 'addressee left without instructions' or 'unclaimed' as can be seen from Annexure-R2 and R2(b). Notices were pasted on the Notice Boards at the work place of the employee concerned, in compliance with the relevant Rules. Annexure-A5 penalty advice was also returned with the endorsement that 'addressee left without intimation'. According to the establishment, late Thankamani attended duty on 23/6/2006 and is alleged to be on unauthorised

absence from 24/6/2006. Hence, the establishment was constrained to initiate disciplinary proceedings, culminating in Annexure-A5 penalty advice which was passed in compliance with the relevant Rules. Thus, the establishment sought that the Original Application be dismissed by the Tribunal.

6. Considering the rival contentions and examining all the records pertaining to the disciplinary proceedings that culminated in the removal of the late Thankamani from service as per Annexure-A5 penalty advice, the Tribunal set aside Annexure-A5 penalty advice and Annexure-A8 order passed in appeal and thereby allowed the Original Application before it. The legality and propriety of the findings whereby the Tribunal allowed the Original Application are under challenge before us.

7. The learned Standing Counsel for the establishment

advanced arguments *in extenso* challenging the findings of the Tribunal that the absence of the deceased employee was not willful, amounting to misconduct and argued that the procedure laid down in the Rules was duly followed in the proceedings whereby the deceased employee was removed from service. He drew our attention to the relevant provisions of the aforesaid Rules and the records pertaining to the disciplinary proceedings, to substantiate due compliance with procedure, before passing Annexure-A5 penalty advice.

8. We have given our anxious consideration to the arguments advanced, in view of the relevant provisions of the Rules, governing the removal of an employee from service.

9. In view of the arguments advanced by the learned counsel for the establishment, the question to be considered is as to whether there is any legal infirmity or jurisdictional

error in the findings of the Tribunal that the absence of the deceased employee was not willful, amounting to misconduct and the procedure laid down by the Rules has not been followed before passing Annexure-A5 penalty advice imposing removal of that employee from service. Broadly, the question is as to whether an opportunity of being heard was given to that employee, before removing him from service.

10. In view of the facts in issue in this case, the decision in ***Krushnakant B. Parmar v. Union of India and Another*** (2012 KHC 4118) is relevant and the proposition laid down in the above decision is extracted below:

“In a Departmental proceedings, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not

amount to misconduct.”

11.In the instant case, it is an admitted fact that the deceased employee was suffering from HIV/AIDS and he remained absent presumably for his treatment from 23/6/2006, till he breathed his last in March, 2011. It is also true that the deceased employee remained absent from duty without informing the authorities in terms of the relevant service rules. Respondent, his widow, states that her husband was missing from 24/6/2006 onwards and that his whereabouts were not known until he was traced in February, 2011, from the Coimbatore Medical College where he was admitted when his health condition worsened in March, 2011, while being treated at Assisi Snehalaya, Coimbatore, from where he died on 6/3/2011. These facts are evidenced by Annexures-A1 to A3.

12.It is not disputed that late Thankamani was placed under

sick list from 22/5/2006 to 22/6/2006. He joined duty on 23/6/2006 and was absent from 24/6/2006. His death on 6/3/2011 due to HIV infection is also not disputed by the establishment. The establishment's case is that he remained absent without intimating the reason for his absence. In short, the charge was confined only to unauthorised absence from duty.

13. In our view, the conduct alleged as against the delinquent and the explanation given by his wife are to be considered in the backdrop of the unsurmountable social stigma and the attitude of the general public towards an HIV infected patient that prevails in the society. Even now, the society is too much afraid of HIV infected patients and those patients are constrained to live in isolation, despite the awareness programmes which are being frequently imparted by the official authorities in the health sector. We would be failing in our constitutional duty if we do

not take judicial notice of that ground reality. We therefore take judicial notice of it.

14.As rightly pointed out by the Tribunal; may be out of fear of social stigma or delicacy to face relatives, neighbours, colleagues and friends, late Thankamani would have left his home, without informing his relatives and inmates, and got himself admitted to a Centre for HIV/AIDS patients. Due to fear, even the close relatives might have stayed away from tracing him out so as to avoid contact with him. In such a circumstance, he might have remained aloof rather than informing the authorities about his dreaded disease, which would then be known to all in the establishment.

15. No material had been brought on record by the establishment to controvert the facts revealed from Annexures-A1 to A3. Thus, indisputably, the absence of

late Thankamani from office, for which he was proceeded against was on account of HIV/AIDS infection which ultimately resulted in his death. Considering the social stigma and fear attached with an HIV patient, even now, the Tribunal is justified in finding that his absence from duty was not willful. The establishment has miserably failed to prove otherwise.

16. Coming to the issue of due opportunity of hearing, in accordance with the Rules and principles of natural justice, the case of the late employee's widow was that neither the copy of the charge memo; nor the penalty advice was served on her late husband. *Per contra*, the establishment contended that formalities laid down in the Rules had been complied with, before removing that employee from service. Though the charge memo and penalty advice were despatched to his residential address by registered post, the same had been returned undelivered

stating that 'the addressee left'. So, the charge memo and the penalty advice were pasted on the notice board in compliance with the Rules, it is contended by the establishment. In this context, the decision in *Union of India and Others v. Dinanath Shantaram Karekar and Others* (1998 KHC 1207) assumes significance. There, the court considered the question as to whether actual service of notice must be proved and established, where disciplinary proceedings are intended to be initiated by issuing charge sheet and held as follows:

“10. Where the disciplinary proceedings are intended to be initiated by issuing a charge sheet, its actual service is essential as the person to whom the charge sheet is issued is required to submit his reply and, thereafter, to participate in the disciplinary proceedings. So also, when the show cause notice is issued, the employee is called upon to submit

his reply to the action proposed to be taken against him. Since in both the situations, the employee is given an opportunity to submit his reply, the theory of "Communication" cannot be invoked and "Actual Service" must be proved and established. It has already been found that neither the charge sheet nor the show cause notice were ever served upon the original respondent. ***Dinanath Shantaram Karekar***. Consequently, the entire proceedings were vitiated.”

17. In the case in hand, according to the establishment, the charge memo and other notices had been returned with endorsement 'addressee left'. The Tribunal examined all records pertaining to the disciplinary proceedings as produced by the establishment before the Tribunal and held that it is evident from the office notings in the records that there is no document on the file to show as to

whether the enquiry report or proceedings were actually served on the charged employee and how it was served; and the disciplinary authority has not looked into those aspects before passing Annexure-A5 penalty advice and had simply signed the file when the penalty advice was put up to him for his signature. The DAR and AOEN proposed penalty of removal from service and put up the file only for the signature of the competent authority. As rightly observed by the Tribunal, that conduct indicates non-application of mind of the authority, who passed Annexure-A5 penalty advice. Yet, the fact remains that the establishment failed to establish actual service of the copy of the charge sheet and penalty advice on the charged employee. More importantly, the establishment has no case that the charged employee deliberately avoided service of notice and the charge memo. That apart, the establishment had no case that after return of the copy of the charge memo and penalty advice as

undelivered, they were pasted at the employee's habitual residence. Had it been pasted at his habitual residence, in compliance with the Rules, the family members would have come to know about the same and they would have taken measures to locate the missing employee so as to defend the disciplinary proceedings. In the case of unauthorised absence, no purpose would be served by pasting communications on the notice board at the premises in which the employee was working alone. When the penalty of removal from service was imposed on the deceased employee, the disciplinary authority ought to have made sure that there was no procedural laches and that the delinquent employee had been given an opportunity of being heard. Here, no such attempt was made to rule out the possibility of procedural irregularities or flaws. Needless to say, due opportunity of being heard was not given to the respondent's late husband before passing the penalty advice removing him from service.

18. Moreover, after perusing the records, the Tribunal further observed that there is no record of the copies of enquiry report and proceedings or even the order imposing the penalty having been served on the charged employee as per the provisions of the Rules on the files.

19. In view of the above analysis, the Tribunal is justified in setting aside Annexure-A5 penalty advice and Annexure-A8 order confirming it in appeal, on the finding that Railway Servants (Discipline and Appeal) Rules, 1968 had not been followed in the instant case, before passing the penalty advice removing the respondent's late husband from service.

20. We do not find any legal infirmity or jurisdictional error in the findings whereby the Tribunal passed the impugned order. No interference is called for under Article 227 of the Constitution of India. The Original

Petition is devoid of merits.

In the result, this petition is dismissed *in limine*.

Sd/-

(THOTTATHIL B. RADHAKRISHNAN, JUDGE)

Sd/-

(K. HARILAL, JUDGE)

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P.S. to Judge