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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 10TH DAY OF FEBRUARY 2020 / 21ST MAGHA, 1941

OP (CAT).No.229 OF 2019

AGAINST THE ORDER/JUDGMENT IN OA 610/2017 DATED 09-08-2019
OF CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH

PETITIONER/S:

TONYMON JOSEPH
AGED 30 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

BY ADV. SRI.MARTIN G.THOTTAN

RESPONDENT/S:

- 1 GENERAL MANAGER, SOUTHERN RAILWAY
SOUTHERN RAILWAY, PARK TOWN, CHENNAI - 600 003
- 2 SENIOR DIVISIONAL PERSONNEL OFFICER
SOUTHERN RAILWAY, PARK TOWN, CHENNAI - 600 003
- 3 ASSISTANT DIVISIONAL ENGINEER
SOUTHERN RAILWAY, CHANGALPATTU, TAMIL NADU -
603 002

R1-3 BY SRI.MATHEW BOBBY KURIAN, SC, RAILWAYS

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 10.02.2020,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 10th day of February, 2020

Vinod Chandran, J.

The appellant was the applicant before the Tribunal, who challenged Annexure A5 order of termination. The Tribunal found that the applicant alleging physical illness had absented from duty from 29.10.2014 to 04.05.2015 without any sanction. He was found to have not attended the health unit of Railways at Chenkalpett where he was working or even the Railway hospitals in Kerala at Kottayam, Alleppy, Quilon and Ernakulam. The Tribunal found that the termination order was an order simplicitor without any allegation of misconduct. There was hence no requirement for a full fledged domestic enquiry; was the finding.

2. Sri.Martin G Thottan, the learned Counsel appearing for the petitioner submits at the

outset that the termination order was passed by an officer who did not have jurisdiction. It was pointed out from the appointment order that the appointment was made by the Senior Divisional Personnel Officer while the termination was by the Assistant Divisional Engineer, a person lower in rank to the officer who issued the appointment order. The learned Counsel also relied on the Indian Railway Establishment Code and the Railway Servants (Discipline and Appeal) Rules, 1968 to submit that the appointing authority as seen from the Rules of 1968 is the highest authority among those indicated in Rule 2(1)(a). It is further argued that notice as required in the Railway Establishment Code, for termination for unsatisfactory service is not one in the nature of a show cause notice. The fact that a show cause notice was issued indicates an allegation of

misconduct; which can only be culminated with an enquiry. Termination order is also said to be one for unauthorised absence and there is an imputation of something more than mere unsuitability. The learned Counsel also relies on the decisions in 1999(3) SCC 60 [Dipti Prakash Banerjee v Satyendra Bose National Centre for Basic Sciences] and (2002)1 SCC 520[Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences and another]. It is submitted that the language of the termination order has to be specifically looked at to find the existence of stigma. Though it is conceded that a probationer can be terminated for reason of unsatisfactory service, if the termination is found to be in the nature of a punishment the same has to be set aside, if there is no enquiry conducted, argues Counsel.

3. The learned Standing Counsel Sri Thomas

took us through the 'Schedule of Powers' to contend that the appointing authority and the authority which terminated the appellant are in the same stage. Though the appointment shows that the Assistant Personnel Officer (APO) has issued the order for the Senior Divisional Personnel Officer (SDPO), in fact the APO is competent to issue such appointment order. Only because the SDPO had approved the appointment, the order was issued in that manner, which was only due to a bonafide mistake. It is also argued that there is no stigma attached to the termination of the applicant.

4. We will first consider the aspect of jurisdiction based on the Establishment Code, the Rules of 1968 and the Schedule of Powers. The Rules of 1968 define appointing authority under Section 2(1)(a). Different authorities are specified in clauses (i) to (iv) and in the end it

is stated "whichever authority is the highest authority". The submission of the learned Counsel for the petitioner is that when termination is ordered, it can only be by the highest authority. We agree with the said submission, but however, notice that such definition applies only in the context of termination in accordance with the Rules of 1968. In the present case, admittedly, there is no allegation of misconduct or a disciplinary enquiry conducted. The petitioner was terminated from service as per Paragraph 301 of Chapter III-'Termination of Service' under the Indian Railway Establishment Code Vol.I.

5. Para 301(3) of the Establishment Code speaks of Termination of Service of "Certain other railway servants", which includes Group C and Group D railway servants on probation with one month's notice. Clause (5) also speaks of notice of

termination of service or order of termination being issued by an authority not lower than the appointing authority. In this context, we have to look at the definition of the "appointing authority" as available from the General Conditions of Service. Paragraph 215 of Chapter 2 has the nominal heading of "Authorities competent to make first appointment" insofar as the Indian Railway and other Railway Administration. Under clause (c) the General Manager or lower authority to whom he may delegate the power is the appointing authority. Now we look at the Schedule of Powers of the Southern Railway as produced by the learned Standing Counsel across the Bar. Initial appointments to Group C and Group D posts can be made by Junior Scale Assistant Officer. As has been pointed out by the learned Standing Counsel Annexure AI is issued by the APO. Though it has

the recital that it is for the SDPO we accept the contention that the said recital is only on the ground of the approval being required by the SDPO. The APO, who is the Junior Scale Assistant Officer is entitled to make appointments to Group C. The termination at Annexure A5 is also by Assistant Divisional Engineer, a Junior Scale Assistant Officer. The argument raised on the question of jurisdiction of the officer who issued the termination order is hence rejected.

6. The next contention is of no notice being required under paragraph 131 of the Establishment Code. We are unable to accept the said contention since 301(4) speaks of termination forthwith even without a notice when the Railway Establishment is liable to pay a sum equivalent to the amount of Pay plus Allowances for the stipulated period. We do not find that merely

because a show cause notice was issued there could be a contention that it is a punitive termination. Even the decisions cited by the petitioner speaks of instances where notice of enquiry on misconduct alleged, were issued; but later there was a termination simpliciter made, which was upheld by the Court.

7. Now we look at the ground of stigma having been cast on the applicant. But before we look at the termination order as such we would just refer to the decisions cited by the petitioner. Dipti Prakash Banerjee (supra) is a case in which the Hon'ble Supreme Court found the termination order, refusing to declare the probation as stigmatic, for reason of the termination order having referred to various other orders wherein allegations were levelled against the probationer. That was a case in which, in the course of the

period of probation as also during the extended period, the employer had issued communications to the probationer as to his specific conduct and pointing out serious deficiencies in the work discharged. He was also warned many a time, that if his performance did not improve, his probation would not be declared. The termination order had referred to the earlier communications. Further it was also issued for reason of the conduct, performance, ability and capacity of the appellant being deficient; which clearly implied that the allegations were the foundation of the termination. The learned Judges drew a distinction insofar as the allegations being the motive or the foundation for termination. If it were the mere motive it was held, the use of the words 'unsatisfactory work and conduct' in the termination order will not amount to a stigma [State of Orissa v Ram Narayan Das (AIR

1961 SC 177].

8. The examination, as held by the Hon'ble Supreme Court, has to be whether the allegations are the motive for termination of a probationer or the foundation itself. The decision also looked at the seemingly intractable area relating to, 'What language in a termination order would amount to a stigma?' It was held that when termination of a probationer is carried out, it definitely indicates that he is unfit for the job whether by reason of misconduct or ineptitude. Whatever the language used in the termination order, there is an element of stigma, but still a termination simpliciter cannot be vitiated for such words employed; which again is the reason for not declaring the probation of an individual whose work is found to be lacking. There should be at least a statement of unsatisfactory work, in the absence of which it may

invite criticism of being devoid of reasons. For an order to be held vitiated for reason of a stigma being cast on the employee, the language employed should be imputing something over and above mere unsuitability for the job.

9. Pavanendra Narayan Verma(supra) is a case in which the termination was upheld which merely found the work and conduct of the probationer to be unsatisfactory. The learned Judges held so in paragraph 14 which is extracted below:

14. If "punishment" were restricted to "evil consequences", the court's task in deciding the nature of an order of termination would have been easier. Courts would only have to scan the termination order to see whether it ex facie contains the stigma or refers to a document which stigmatises the officer, in which case the termination order would have to be set aside

on the ground that it is punitive. In these cases the "evil consequences" must be assessed in relation to the blemish on the employee's reputation so as to render him unfit for service elsewhere and not in relation to the post temporarily occupied by him. This perhaps is the underlying rationale of several of the decisions on the issue.

In considering whether there is a stigmatic termination we have to necessarily look at and assess the evil consequences, the termination order would visit with, on the probationer and his reputation, thus frustrating his attempts for another job. Evil consequences, definitely a termination order inherently carries with it, but cannot be vitiated solely for that and there should be something more than the mere consequence of termination.

10. In the above case, the petitioner was appointed as Track Maintainer-IV by Annexure A1

order dated 24.06.2014. Admittedly he absented himself without any notice and show cause notice was issued as per Annexure A2. Annexure A2 found that he had not turned up for duty from 29.10.2014 to 21.06.2015 and was continuing to be absent without any prior intimation to the administration. It was also stated that the appointment order clearly indicate the stipulation of probation period of two years. The petitioner was directed to show cause as to why his service shall not be terminated. Admittedly, he did not furnish any explanation and the termination order at Annexure A5 was passed. The termination order only referred to the show cause notice and his failure to submit any representation, upon which his services were terminated. The show cause notice specifically referred to in the order of termination, only speaks of continued absence from a prior date till

the show cause notice was issued; without even an allegation of unauthorised absence, which alone would require an enquiry. As was noticed by the Hon'ble Supreme Court a termination order is implicitly stigmatic for reason of the probationer being found liable to be terminated on account of his unsatisfactory work. The issue has to be looked at on the basis of whether the allegation is the motive or foundation and whether it results in any evil consequences to the terminated probationer.

11. Looking at the termination order, we are of the opinion that it is the continued absence of the petitioner, admitted by the petitioner, which is the motive for finding him liable to be terminated. It is not the foundation of the order nor is it levelled as an allegation or charged as a misconduct. The petitioner has various contentions raised in the O.A for the absence, which were not

raised before the authority nor have they been substantiated. The order also does not visit the petitioner with any evil consequences other than his termination on the ground of continued absence; which results in unsuitability for the work.

We are of the opinion that there could be no interference caused to the order of the Tribunal. We reject the Original Petition. There is no order as to costs.

Sd/-
K. VINOD CHANDRAN,
JUDGE.

Sd/-
V.G. ARUN,
JUDGE.

Jma/

APPENDIX

PETITIONER'S/S EXHIBITS:

EXHIBIT P1	TRUE COPY OF THE OA/180/00610/2016 FILED BY THE CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH
EXHIBIT P1 (A5)	TRUE COPY OF THE TERMINATION ORDER NO.ES/76/DAR/TMV DATED 26.10.2015 ISSUED BY THE 3RD RESPONDENT
EXHIBIT P1 (A1)	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
EXHIBIT P1 (A2)	TRUE COPY OF THE SHOW CAUSE NOTICE NO.ES/76/DAR/TMV DATED 14.07.2015
EXHIBIT P1 (A3)	TRUE COPY OF THE REPRESENTATION DATED 02.08.2015 SUBMITTED BY THE APPLICANT
EXHIBIT P1 (A3 (A))	TRUE COPY OF THE MEDICAL CERTIFICATE DATED 01.08.2015 ISSUED BY PUTHIYEDOM HOSPITAL, PAIKA
EXHIBIT P1 (A4)	TRUE COPY OF THE FITNESS CERTIFICATE DATED 6.9.2015 ISSUED BY PUTHIYEDOM HOSPITAL, PAIKA
EXHIBIT P1 (A6)	TRUE COPY OF THE REPRESENTATION DATED 2.11.2015 SUBMITTED BY THE APPLICANT
EXHIBIT P1 (A7)	TRUE COPY OF THE LETTER DATED 07.07.2017 ISSUED BY THE SENIOR SUPERINTENDENT POST OFFICES, KOTTAYAM DIVISION, KOTTAYAM

EXHIBIT P2	A TRUE COPY OF REPLY STATEMENT FILED ON BEHALF OF THE RESPONDENTS IN OA/180/00610/2017
EXHIBIT P2 (R1)	TRUE COPY OF THE ORDER IN OA NOS. 832, 833 OF 850 OF 1997
EXHIBIT P3	TRUE COPY OF THE REJOINDER FILED BY THE PETITIONER IN OA/180/00610/2017
EXHIBIT P4	A TRUE COPY OF ADDITIONAL REPLY STATEMENT FILED ON BEHALF OF THE RESPONDENTS IN OA/180/00610/2017
EXHIBIT P4 (R2)	TRUE EXTRACT COPY OF THE SCHEDULE OF POWER 2014
EXHIBIT P5	TRUE COPY OF THE ORDER DATED 09.08.2019 IN OA/180/00610/2017