

(1999) 11 MAD CK 0070

In the Madras High Court

Case No : Writ Petition No. 7428 of 1992 and W.M.P. No. 10692 of 1992

Kumaravel A.

APPELLANT

Vs

Tamil Nadu Minerals Ltd. and Another

RESPONDENT

Date of Decision : 15-11-1999

Acts Referred:

Citation : (2000) 3 LLJ 783

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—The action of the second respondent, viz., Managing Director, TAMIL Limited, Chepauk, Madras dated May 23, 1990 terminating the services of the petitioner herein, the Assistant Manager, I/C, (Cost and Production Control) in Tamil Nadu Minerals Limited, with effect from January 1, 1990 which was confirmed by the first respondent, viz., Tamil Nadu Minerals Limited Board of Directors, Chepauk, Madras, by the order dated April 15, 1991 rejecting the appeal filed by him is called in question in this writ petition.

2. A. Kumaravel, the petitioner herein, after completion of his M.Sc. in Geology, joined the Tamil Nadu Minerals Limited (TAMIL) as a Project Officer Trainee by the order of the second Respondent dated July 24, 1985. After his training, he became a temporary Project Officer. After he completed his probation period on January 31, 1988, by the proceedings dated November 1, 1988 of the Chairman and Managing Director, it was declared that he had completed the probation. Thereafter, on a revised scale, he was appointed as an Assistant Manager, I/C, (Cost and Production Control) and working from the year 1989.

3. During the end of December 1989, he suffered serious domestic turmoils. His wife who was in the stage of advanced pregnancy required urgent medical care to avert a miscarriage. His father-in-law also was in death bed. Therefore, through his letter dated December 30, 1989, he applied for leave from 12, 1990

to January 6, 1990. Again on January 8, 1990, he sought for extension of leave for 9 more days from January 8, 1990 to January 16, 1990. While he was attending on his wife, his elder father-in-law died on February 2, 1990. Under these circumstances, he could not rejoin duty, since he had to look after the whole family.

4. In the meantime, the Managing Director, the second respondent issued a memo dated February 7, 1990 seeking explanation for his unauthorised absence from January 17, 1990 within 10 days from the date of receipt of the memo. In response to the said memo, the petitioner sent a detailed reply dated February 15, 1990 setting out his predicament and also enclosed a leave letter making a passionate appeal to second respondent to grant him leave on loss of pay from January 17, 1990 to June 30, 1990.

5. To his surprise, he received a charge memo dated April 16, 1990 issued by the second respondent imputing two charges regarding his unauthorised absence from January 17, 1990 and wilful disobedience of instructions by having failed to submit his explanation to the memo dated February 7, 1990 within 10 days. On receipt of this charge memo, the petitioner sent a reply on May 4, 1990 stating the circumstances under which he could not join duty and intimating about the explanation having been already sent on February 15, 1990 itself.

6. Without referring to the explanation and the leave application dated February 15, 1990 and the reply to the charge memo sent on May 4, 1990 and without conducting any enquiry by giving an opportunity of being heard to the petitioner, the second respondent by the order dated May 23, 1990 terminating his services retrospectively from January 1, 1990.

7. On receipt of this order copy, the petitioner filed an appeal before the Board, the first respondent herein, who in turn missed the same. Again the petitioner filed a review petition. But, his review also was rejected by the first respondent on the ground that there is no provision in the TAMIN Service Rules to reconsider the order of the appellate authority. Hence, the present writ petition.

8. The above contention by the petitioner is refuted by the respondents through the counter. The gist of the same is as follows:

"The petitioner joined the service as a Project Officer Trainee on July 24, 1985 and became a temporary Project Officer. Later in the year 1989, he was working as Assistant Manager I/C (Cost and Production Control). He is only a temporary person. On December 30, 1989 he submitted an application seeking 5 days earned leave from January 2, 1990 to January 6, 1990. Thereafter, he applied for extension of leave on January 8, 1990 for the period from January 8, 1990 to January 16, 1990. Since he did not join the duty on January 17, 1990, an explanation was called for through the memo dated February 7, 1990. As there was no explanation, the charges were framed under TAMIN Conduct, Discipline and Appeal Rules on April 16, 1990 and sent to him. On April 21, 1990, the said intimation was received by him. He neither submitted his explanation nor

reported for duty. Therefore, on May 23, 1990 the order was passed by the second respondent under Rule 15.3.1 of TAMIN Service Rules terminating the petitioner from service with effect from January 1, 1990. But, his reply dated May 4, 1990 was received by the second respondent only on May 31, 1990, well after the order of termination dated May 23, 1990. Therefore, the date mentioned in his letter as May 4, 1990 is an ante-date. The order has been passed by invoking Rule 15.3.1 of TAMIN Rules after giving adequate opportunity. The order terminating the petitioner would also list out the reasons for the same. Therefore, further enquiry is not needed and consequently, the writ petition is liable to be dismissed."

9. On the strength of the rival contentions taken in the affidavit and the counter-affidavit filed by the parties, both the counsel would argue the matter at a great length.

10. It is the contention of Mr. Prakash, the learned counsel for the petitioner, that despite the leave letter and reply dated February 15, 1990 giving explanation for the memo dated February 7, 1990 and the detailed reply dated May 4, 1990 for the charge memo dated April 16, 1990, the second respondent without considering the same terminated the service of the petitioner by invoking Rule 15.3.1 of the Service Rules without any further enquiry even though the charge memo was issued to the petitioner under Disciplinary Rules.

11. On the other hand, it is the submission of Mr. Viduthalai, the learned counsel for the respondents that no reply was received from the petitioner either for the memo dated February 7, 1990 or for the charge memo dated April 16, 1990, that invoking Rule 15.3.1 of TAMIN Service Rules would be a proper one to terminate the services of the petitioner, as he has abandoned the job from January 17, 1990 and that therefore, no further opportunity need be given in an enquiry, as the adequate opportunity was given by the second respondent through the memo dated February 7, 1990 and the charge memo dated April 16, 1990.

12. It is the further contention of the counsel for the respondents that only for taking disciplinary action under the Conduct, Discipline and Appeal Rules of TAMIN, the enquiry is needed and for invoking Rule 15.3.1 of TAMIN Service Rules, there need not be any enquiry at all, as the said Rule does not provide for the same.

13. In the light of the rival contentions, let us now look into the impugned order dated May 23, 1991, which was confirmed by the appellate authority on April 15, 1991:

"Procs. No. 31552/EA1/89 dated May 23, 1990

Sub: Estt-TAMIN-Thiru A. Kumaravel, Asst. Manager, I/C (CPC) - Unauthorised absence - explanation called for - final orders passed.

Ref: This Office Memo No. 31552/EA1/89 dated, February 7, 1990.

(2) This office letter No. 31552/EA1/90 dated April 16, 1990.

Thiru A. Kumaravel, Assistant Manager, I/C, (Cost and Production Control) of this Office applied Earned Leave for 15 days from January 2, 1990 to January 16, 1990. The individual has not rejoined duty on January 17, 1990 on the expiry of leave, nor submitted application extending his leave.

A charge memo was issued to Thiru A. Kumaravel, Assistant Manager. I/C (CPC) for his unauthorised absence in this office RC.No. 31552/EA1/89 dated April 16, 1990. He was also directed to submit his explanation within 15 days from the date of receipt of the charge memo. Though he has received the charge memo on April 21, 1990, he has not reported for duty till date nor submitted his explanation and re-submitted the Questionnaire.

As per the TAMIN Service Rule 15.3.1, if an Officer/Staff absents himself unauthorisedly from duty for a continuous period of eight days excluding Sunday and Holidays, he shall be deemed to have abandoned the service of the company voluntarily.

Thiru A. Kumaravel though received the charge memo has not chosen to give his explanations and presumably he has no explanation to offer and admit the charges. It is very clear that the charges are held proved since he has not rejoined duty after the expiry of the leave.

In the above circumstances, I hereby order that the services of Thiru A. Kumaravel, Assistant Manager, I/C (Cost and Production Control) in Tamil Nadu Minerals Limited is terminated from January 1, 1990."

14. The reading of the above order would give out the following factors:

(1) The delinquent has not rejoined duty on January 17, 1990 on the expiry of leave nor submitted any application extending the leave.

(2) Charge memo dated April 16, 1990 for unauthorised absence was issued and the same was received on April 21, 1990. But, the delinquent did not submit his explanation nor reported for duty.

(3) As per TAMIN Service Rule 15.3.1, if an officer was absent unauthorisedly for a continuous period of eight days, he shall be deemed to have abandoned the service.

(4) Since there was no reply for the charge memo by the delinquent, the charges shall be held to be proved.

(5) The service was terminated with effect from January 1, 1990.

15. The above factors would reveal that on May 23, 1990, the impugned order has been passed since it was concluded that the charges mentioned in the charge memo dated April 16, 1990 were proved.

16. Let us now go to charge memo dated April 16, 1990:

"CHARGE MEMO

Sub: Establishment - TAMIN - Thiru A. Kumaravel, Assistant Manager -
Unauthorisedly absent - Charges framed.

Ref: This Office Memo No.91552/EAl/89 dated February 7, 1990.

Thiru A. Kumaravel, Assistant Manager (CPC) of this office applied Earned Leave for 15 days from January 2, 1990 to January 16, 1990. The individual has not rejoined duty on January 17, 1990 on the expiry of leave nor submitted application extending his leave. In this Office Memo No. 31552/EA1/89 dated February 7, 1990 he was asked to explain for his unauthorised absence within 10 days. But he has not submitted his explanation so far. Thus it was clearly established that he was unauthorisedly absenting from duty from January 17, 1990.

Therefore, the following charges are framed against Thiru A. Kumaravel, Assistant Manager for his acts of commissions and omissions of unauthorised absence without prior sanction of leave from January 17, 1990. He is also further charged for his wilful disobedience of the orders of the organisation in not replying to this office letter dated February 7, 1990.

Charge No. 1: Inasmuch as Thiru A. Kumaravel is indulging in habitual and unauthorised absence without prior sanction of leave from January 17, 1990 he is charged under Rule 3.29(viii) of the Conduct, Discipline and Appeal Rules of TAMIN.

Charge No. 2: That he was asked to submit his explanation for his unauthorised absence from January 17, 1990 in this office Memo No. 31552/EA1/89 dated February 7, 1990 within 10 days from which he has not submitted his explanation till date. He is charged under Rule 3.29(iv) of the conduct for his wilful insubordination and disobedience of instructions.

Therefore, Thiru A. Kumaravel is directed to submit his written statement of defence if any under Rule 4.3 of the above mentioned Rules with an option to state whether he desires to have any oral enquiry. The said written statement of defence shall be submitted to this office within 15 days from the date of receipt of this charge Memo failing which it will be presumed that he has no explanation to offer and further action will be proceeded on merits. He is informed that no extension of time will be granted beyond the time limit of 15 days given herein. A questionnaire form is enclosed for resubmission by duly filling up all the columns.

Sd/- MANAGING DIRECTOR"

17. The complete reading of the charge memo dated April 16, 1990 would reveal that prior to the issue of the said charge memo, explanation was called for the unauthorised absence from January 17, 1990 on the expiry of the leave through memo dated February 7, 1990.

18. The perusal of the memo dated February 7, 1990 would show that the delinquent was directed to give an explanation within 10 days from the date of receipt of the memo for his unauthorised absence from January 17, 1990 after the expiry of the leave period from January 2, 1990 to January 16, 1990.

19. Evidently, in both the memos dated February 7, 1990 and April 16, 1990, there was no reference about TAMIN Service Rule 15.3.1. On the other hand, as it is mentioned above, the delinquent was charged under Rules 3.29(viii) and 3.29(iv) of the Conduct, Discipline and Appeal Rules of TAMIN and directed to submit his written statement of defence, if any, under Rule 4.3 of the said Rules.

20. Rules 3.29(iv) and 3.29(viii) provide as follows:

"3.29. Without prejudice to the general meaning of the term misconduct the following acts of commission and omission shall be termed as misconduct.

(iv) Wilful insubordination or disobedience whether alone or in combination with another or others, of any lawful and reasonable order of a superior.

(viii) Habitual absence without prior sanction of leave."

21. The reading of the above Rules and the charges 1 and 2 as contained in memo dated April 16, 1990 would make it obvious that the delinquent was charged for indulging in habitual and unauthorised absence without prior sanction of leave and for wilful insubordination and disobedience of instructions of the superiors by not having submitted this explanation to the memo dated February 7, 1990. These things would show that the action has been initiated by the second respondent considering the above acts of commission having been termed as misconduct as per Rule 3.29.

22. Rule 4.3 of the Conduct, Discipline and Appeal Rules of TAMIN would provide thus:

"4.3. In every case where it is proposed to impose on any Officer/Staff of the Company any of the penalties specified in items (vii) to (xi) in Rule 4.1 the grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged, together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required within a reasonable time, to put in a written statement of his defence and to state whether he desires an oral enquiry. The oral enquiry shall be held if such an enquiry is desired by the person charged or is directed by the authority concerned. At that enquiry oral evidence shall be heard as to such of the allegations as are not admitted and the person charged shall be entitled to cross-examine the witnesses called, as he may wish, provided that the officer conducting the enquiry may, for special and sufficient reasons to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and on statement of the findings and the grounds thereof.

The authority imposing any penalty under these Rules shall maintain a record showing:

- (i) The allegations on which action was taken against the period punished;
- (ii) The charges framed, if any.
- (iii) The persons representations, if any, and the evidence taken if any and
- (iv) The finding and the grounds thereof, if any.

All orders of punishment shall also state the grounds on which they are based and shall be communicated in writing to the person against whom they are passed."

23. The perusal of the last para of the charge memo coupled with the Rule 4.3 would reveal that the action was initiated under the Conduct, Discipline and Appeal Rules of TAMIN and oral enquiry would be conducted if so desired as per the Rules and the proposed punishment after the enquiry as provided under Rule 4.1(b), namely, major penalties, would be communicated after giving full opportunity for adducing evidence during the enquiry. Thus, it is clear that the memo dated February 7, 1990 and the charge memo dated April 16, 1990 were issued, while initiating the enquiry proceedings, under relevant Rules of Conduct, Discipline and Appeal Rules of TAMIN.

24. As indicated above, there was nothing to indicate that this action was resorted to by the second respondent for invoking Rule 15.3.1 of the Service Rules of TAMIN. But, only for the first time, the second respondent, while passing the impugned order dated May 23, 1990, mentioned the Service Rule 15.3.1, that too, incidentally.

25. A careful reading of the impugned order dated May 23, 1990 would show that the delinquent was terminated only on the ground that the charges framed against the delinquent under Rule 3.29(iv) and 3.29(viii), namely misconduct, were proved.

26. In para 3 of the order, it is merely stated that as per the TAMIN Service Rule 15.3.1, if an Officer/Staff absents himself unauthorisedly for a continuous period of eight days, he shall be deemed to have abandoned the service. But, in the final portion of the order, the second respondent did not mention that the delinquent has abandoned and his abandonment was not condoned by the competent authority at its discretion and as such, he shall be ceased to be in service of the Company. On the other hand, it is mentioned that the petitioner was terminated from January 1, 1990, since the charges mentioned in the charge memo dated April 16, 1990 were proved.

27. Under, those circumstances, it cannot be contended that the second respondent invoked only Rule 15.3.1 of TAMIN Service Rules and consequently, enquiry is needed for terminating the service of the petitioner.

28. This may be viewed from yet another angle as well.

29. Let us now look into the Rule 15.3.1 of the Service Rules of TAMIN.

30. Rule 15.3 deals with voluntary abandonment of services. Rule 15.3.1 provides thus :

"An Officer/Staff who absents himself unauthorisedly from duty for a continuous period of eight days excluding Sundays and holidays shall be deemed to have abandoned the services of the Company voluntarily unless condoned by the competent authority at its discretion and he shall cease to be in the services of the Company with effect from the afternoon of the day on which he last attended duties."

31. The Rule, which has been extracted above, significantly does not say that the services of an Officer or Staff, who overstays the leave for a continuous period of eight days, shall stand automatically terminated. What it says that "shall be deemed to have abandoned the services of the Company voluntarily unless condoned by the competent authority at its discretion". This Rule, therefore, confers a discretion whether the said unauthorised absence is to be condoned or not.

32. It is certain that this discretion cannot be exercised, or permitted to be exercised, criciously. It cannot be debated that the discretion has to be based on an objective consideration of all the circumstances and material which may be available on record. The respondent has to consider the following:

- (1) What are the circumstances which compelled the Officer to proceed on leave?
- (2) Why he overstayed the leave?
- (3) Was there any just and reasonable cause for overstaying the leave?
- (4) Whether he gave further application for extention of leave?
- (5) Whether any medical certificate was sent if he had, in the meantime, fallen ill?
- (6) Whether he is not found in mysterious circumstances?
- (7) Whether he is alive?

These are all the questions which would naturally arise while deciding to terminate the services of the employee for overstaying the leave.

33. For answering these questions and for deciding whether to terminate or not, necessarily the employee against whom action on the basis of this provision is proposed to be taken must be given an opportunity of hearing.

34. Unless effort by the management is made to know about the real reason for absence of the employee, it may not be possible for the management to decide whether the absence was authorised or not or even if it is unauthorised, whether to condone the said unathorised absence or not.

35. Under those circumstances, there must be an enquiry even while invoking Rule 15.3.1 in order to satisfy the ingredients of the said Rule.

36. In *Uptron India Limited Vs. Shammi Bhan and Another, and D.K. Yadav Vs. J.M.A. Industries Ltd.*, , while narrating the necessity of the enquiry for considering the voluntary abandonment of the job in dealing with the analogous provisions, it has been held that if any action was taken on the basis of a particular Rule without giving any opportunity of hearing to the employee, it would be wholly unjust, arbitrary and unfair and that the principles of natural justice would have to be read into the provision relating to automatic termination of services.

37. In the present case, the petitioner joined service as a Trainee Project Officer on July 24, 1985 and after his training he became temporary Project Officer and by the order dated November 1, 1988, his probation period was completed on August 31, 1988 and the same has been confirmed and thus the petitioner acquired the status of a permanent employee. Though in the counter filed by the respondents, it is stated that he is only a temporary person the files produced by the respondents before this Court would reveal that he was treated as a permanent after completion of probation period as declared on August 31, 1988.

38. In this context, it is relevant to note the observation of the Supreme Court made in *Uptron India's case* (supra), which is as under 1998 I LLJ 1165 :

"15. It is now well settled that the services of a permanent employee, whether employed by the Government, or Government company or Government instrumentality or statutory corporations or any other "authority" within the meaning of Article 12, cannot be terminated abruptly and arbitrarily either by giving him a month or three months" notice or pay in lieu thereof or even without notice, notwithstanding that there may be a stipulation to that effect either in the contract of service or in the Certified Standing Orders."

39. In the same decision, the Apex Court, while dealing with the similar provision namely 17(g) of Certified Standing Orders providing for automatic termination of services of a permanent employee on overstaying without permission, would hold as follows 1998 I LLJ 1165 :

"25. In view of the above, we are of the positive opinion that any clause in the Certified Standing Orders providing for automatic termination of service of a permanent employee, not directly related to "production" in a factory or industrial establishment, would be bad if it does not purport to provide an opportunity of hearing to the employee whose services are treated to have come to an end automatically."

40. The above judgment was rendered by the Apex Court following *D.K. Yadav's case* (supra). In the said case, a similar provision, viz., Clause 13(2) (iv) of the Certified Standing Order relating to the automatic abandonment of the job on unauthorised absence was dealt with. The observation is as follows in *D.K.*

Yadav Vs. J.M.A. Industries Ltd., :

"It is thus well settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that a reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, , the Constitution Bench, per majority, held that termination of the service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside."

41. These authorities show that even for invoking the provision relating to termination on the reason of the abandonment of job by way of unauthorised absence for certain domestic problems, there must be some enquiry and the employee has to be heard necessarily, in order to decide whether the absence was unauthorised or not and if unauthorised, it can be condoned or not.

42. In the present case, even according to the respondents, no enquiry was conducted and no opportunity of hearing was given to the delinquent. However, as indicated above, in the present case, I am not inclined to hold that the action taken by the second respondent terminating the services of the petitioner was under Rule 15.3.1 of the Service Rules of TAMIN.

43. At the risk of repetition, I would reiterate that even assuming mat Rule 15.3.1 has been invoked in this case, the failure to send the reply for the memo dated February 7, 1990 and the charge memo dated April 16, 1990 would not be a ground to cause cessation of service as provided under Rule 15.3.1 to hold that the absence was unauthorised and the said abandonment cannot be condoned, as the same can be found out only in the enquiry and only after hearing the employee.

44. In this context, it is contended by the counsel for the respondents that the above decisions would relate to workman and not to the Officer. This submission, in my view, does not merit acceptance, in view of the fact that both the decisions would refer employee-cum-workman. It cannot be disputed mat the petitioner is an employee working under the respondents and as such, the contention that the second respondent invoked Rule 15.3.1 of the Service Rules, does not appeal to me.

45. It is my considered opinion that in the present case, the second respondent had initiated action only under the Conduct, Discipline and Appeal Rules by issuing charge memo dated April 16, 1990 and passed final order dated May 23, 1990 on the ground that the said charges with reference to the alleged misconduct have been proved. All the more reason, there must be a domestic

enquiry with reference to the specific charges framed and an opportunity ought to have been given to the delinquent as provided under Rule 4.3 of the Conduct, Discipline and Appeal Rules. This was not admittedly done, in view of the stand taken by the respondents that they have invoked Rule 15.3.1 of the Service Rules.

46. Yet another feature is noticed in the file produced by the respondents. The perusal of the file would show that the petitioner sent two applications, one on December 30, 1989 applying for leave for 5 days till January 6, 1990 and Anr. on January 8, 1990 applying for leave till January 16, 1990 mentioning the family problem and periodic checkup for his wife's pregnancy.

47. Office Note dated January 25, 1990 was put up intimating that the petitioner has not joined duty on January 17, 1990 subsequent to the availing of leave till January 16, 1990. It is written in the said note directing the office to call for explanation from him for his unauthorised absence from January 17, 1990. On March 2, 1990 again Note was put up for the issue of memo.

48. Below the Office Note dated March 2, 1990, the observation dated March 20, 1990 for the issue of orders of removal as contained in 15.3.1 has been made, which is as follows:

"Discussed with the Manager (Prof). It has been observed that inasmuch as the individual has abandoned the services from January 17, 1990, we may straightaway issue orders of removal of his name from the roll of this Office estt. as contained in 15.3.1 of TAMIN Service Rule."

49. However, by the Note dated April 11, 1990 the Department decided to issue charge memo instead of invoking 15.3.1. The said reference is as follows:

"As per the instruction of the M.D. the draft charge memo to Thiru A. Kumaravel AM (CPC) is put up for approval."

Thereafter, the charge memo was issued on April 16, 1990.

50. Thus, it is clear that the second respondent did not intend to invoke Rule 15.3.1 of the TAMIN Service Rules, but chose to issue a charge memo framing two charges and seeking for explanation. This also would show that the contention of the respondents through the counter that the final order had been passed on the basis of Rule 15.3.1, is wrong.

51. Under those circumstances, the second respondent having chosen to initiate the enquiry by issuing charge memo under Conduct, Discipline and Appeal Rules, he should have given an opportunity as per the procedure contemplated under Rule 4.3 and also by applying the principles of natural justice.

52. The aim of the Rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. As held by the Apex Court, particular statute or statutory Rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or necessary

implication.

53. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case, in other words, the application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

54. The learned counsel for the respondents would cite the authorities in B.V. Ramnarayan Vs. State Bank of India, Hyderabad and Others, and Laxmi Kant Vs. Presiding Officer, Industrial Tribunal-cum-Labour Court and Another, in order to show that no enquiry need be conducted for passing order of termination on the reason of the unauthorised absence.

55. The view expressed by the Andhra Pradesh and Punjab and Haryana High Courts in those decisions is quite contrary to the Yadav's case (supra). Moreover, in these cases, the person concerned was absent for more than 10 years. Further, the facts of these cases would reveal that in spite of several opportunities given by the department for rejoining the job, those opportunities were not availed of by the delinquents. Under those circumstances, on facts, it was held that there need not be any elaborate enquiry.

56. But, even in the decision of the Andhra Pradesh High Court reported in B.V. Ramnarayan Vs. State Bank of India, Hyderabad and Others, , it is held that the question whether an employee has abandoned the employment or not is a question of fact which is required to be resolved in the light of the facts and circumstances of each case, that the temporary or short absence may not constitute an abandonment of the office and that the length of absence and other attending facts and circumstances of the case may lead to an inference that the employee has voluntarily abandoned the employment.

57. Therefore, it cannot be contended by the counsel for the respondents that the explanation of the delinquent did not reach in time and so, he is liable to be terminated from service.

58. That apart, as I discussed earlier, the proceedings had been initiated only under the Conduct, Discipline and Aypaal Rules, impugned order also shows that the termination order was passed on the basis of the said charge memo issued under the said Rules as the charges have been proved. On this ground also, the decisions cited by the learned counsel for the respondents would not be of any use.

59. Thus, the second respondent having elected to proceed for unauthorised absence and insubordination by invoking relevant Rules under the Conduct, Discipline and Appeal Rules on the basis of which the impugned order was

passed, cannot turn round and contend now taking advantage of the fact that there is some reference about 15.3.1 in the impugned order, that he invoked Rule 15.3.1 only and not Disciplinary Rules.

60. In such circumstances before taking an action putting an end to the tenure of any employee/workman, a reasonable opportunity to put forth his case is to be given and necessarily an enquiry should be held, particularly when the act of the employee in this case in overstaying the leave is considered to be a misconduct as per the charge memo dated April 16, 1990. In other words, fair play requires that a reasonable "opportunity to put forth his case is to be given to him by complying with the principles of natural justice.

61. It is categorically held by the Supreme Court that the Management cannot put an end to the tenure of an employee/workman straightaway acting under the enabling provisions of the Service Rules and before taking a decision under such Service Rules, the principles of natural justice are required to be complied with. Thus, the affected employee against whom an adverse action is proposed, should be given a right of hearing by conducting an enquiry.

62. The legal consequences of abandonment of job by an employee may be different from removal or dismissal or termination of an employee as a disciplinary measure. If it is a case of abandonment, it will not disentitle the employee to seek fresh employment under the same employer or elsewhere. On the contrary, the dismissal or termination of an employee as a disciplinary measure would disentitle him to seek employment not only under the same employer but also anywhere.

63. The words in the impugned order dated May 23, 1990, as explained above, would not show that he was relieved of the job merely because of the abandonment of the job and as such, he would be entitled to seek fresh employment under the respondents. On the other hand, it would clearly reveal that the petitioner was dismissed from service on the charges of misconduct stated to have been proved. This would certainly indicate that the petitioner whose services have been terminated would be disentitled to seek employment under the same employer or elsewhere.

64. Even on the admitted facts, it is not as if the petitioner simply abandoned the job even without prior intimation to the respondent. As a matter of fact, he sent a letter on December 30, 1969 seeking leave for 5 days till January 6, 1990 stating the reason that his wife needs periodic medical checkup due to pregnancy. Through another letter dated January 8, 1990. he sought for the extension of leave till January 16, 1990 indicating that he was constrained to seek for extension due to family problem.

65. It is true that thereafter there was no letter sent by the petitioner seeking for extension of leave. According to the petitioner, on receipt of the memo dated February 7, 1990 he sent a reply on February 15, 1990 giving explanation for his inability to join duty immediately after the expiry of leave granted enclosing

along with a letter seeking for extension of leave till June 30, 1990 intimating that his father-in-law died on February 5, 1990 and as such, he had to look after the entire family.

66. Thereafter, on receipt of the charge memo dated April 16, 1990, he had also sent a reply on May 4, 1990 explaining the situation. But, according to the second respondent, the reply letters dated February 15, 1990 and May 4, 1990 were not received and so, in the absence of any explanation received from the petitioner he had to pass an order on May 23, 1990 terminating the services of the petitioner.

67. It is also the case of the second respondent that the letter dated May 4, 1990 was received by the second respondent only on May 31, 1990 and as such, the petitioner want .. only put the ante--date as May 4, 1990 and sent the reply after knowing the fact of the final order having been passed on May 3, 1990 itself. According to the respondents, it is a fabrication of the record on the part of the petitioner.

68. The above contention of the respondents seems to be quite monstrous. The perusal of the file produced before me would show that the order passed by the second respondent on May 23, 1990 was despatched to the petitioner to Erode address and since it was returned as he was not available, it was directed to be served on him in Athur address through the subordinate officer of the second respondent. Ultimately, the impugned order dated May 23, 1990 was received by the petitioner only on July 23, 1990.

69. In such a situation, it is quite, preposterous on the part of the second respondent to contend that the petitioner sent a letter of reply for the charge memo only after knowing the impugned order dated May 23, 1990 by putting the false date as May 4, 1990. This contention has been specifically controverted by the additional affidavit filed by the petitioner.

70. That apart, the counsel for the petitioner has also filed xerox copy of the Certificate of Posting to show that the reply dated May 4, 1990 was sent to the second respondent on May 4, 1990 itself. Under these circumstances, it cannot be held that the petitioner intended to avoid sending the reply or to abandon the job.

71. The term "abandonment of service"" has not been defined either in the Conduct, Discipline and Appeal Rules of TAMIN or in the Service Rules of TAMIN. According to the dictionary, the word abandonment has been explained to mean to leave completely and finally forsake utterly, voluntary relinquishment.

72. Thus, in order to constitute abandonment, there must be complete giving up of duties so as to indicate an intention not to resume the same. Abandonment must be total. The circumstances surrounding the abandonment of job should clearly indicate an absolute relinquishment. Abandonment or relinquishment of service is a question of intention. Normally, such an intention cannot be

attributed to an employee in the absence of adequate and substantial material for the same.

73. In the present case, the abandonment of the job without seeking for leave was framed as a charge of misconduct. Under those circumstances, the management has to really find out as to what was the actual reason for the continued absence of the petitioner.- In the instant case, as stated above, he applied for leave from January 1, 1990 to January 16, 1990.

74. It is not disputed that the said leave applied for was sanctioned. Even the memo dated February 7, 1990 and the charge memo dated April 16, 1990 would indicate that he was absent unauthorisedly only from January 17, 1990. Even assuming that the explanation given by the petitioner on February 15, 1990 and May 4, 1990 did not reach the management-respondent in time, no inference could be drawn from the failure to give explanation that the charge of abandonment is proved or established.

75. It is noticed, in this context, that the impugned order dated May 23, 1990 does not indicate that the charge memo dated April 16, 1990 was actually served on the petitioner. Though it is admitted by the petitioner that the said charge memo dated April 16, 1990 was received by him, the second respondent on the date of the service of the charge memo on the petitioner. From this, it is obvious that the management did not care to know as to what was the real reason for continuous absence of the petitioner who had originally applied for leave for 15 days and the same was granted.

76. The perusal of the file would indicate that after the reply dated May 4, 1990 from the petitioner was received on May 31, 1990, so much of anxiety was shown by the second respondent to see to it that the impugned order of termination is served on the petitioner either at the Erode address or at the Athur address. Since the attempts taken by them through postal department to serve the impugned order failed, the second respondent directed his subordinate officer at Athur to serve the impugned order in person. That was how the service of the. impugned order on the petitioner was effected at Athur address.

77. This anxiety for the speedy service of the impugned order should have also been shown by the second respondent to know the reason for absence by giving the petitioner an opportunity of being heard in a proper enquiry. Had the petitioner been heard and the management applied its mind for considering the various unfortunate incidents which took place in the family of the petitioner, certainly, the explanation would have been accepted by the management and his continued absence could have been condoned, unless there is any other motive.

78. The management having sanctioned the leave for the two periods, one from January 1, 1990 to January 6, 1990 and Anr. from January 8, 1990 to January 16, 1990, would have definitely considered the case of the petitioner sympathetically and allowed him to join back either by condoning his absence or by giving some nominal punishment such as warning etc. This opportunity has

not been obviously given.

79. On the other hand, the management has hastened to pass an order putting an end to the tenure of the employment of the petitioner through termination holding that the charges were proved. It is not known as to why the second respondent has shown such a "haste".

80. Yet another peculiar feature is noticed in this case. The memo dated February 7, 1990 asking for the explanation and the charge memo dated April 16, 1990 would show that the petitioner was accused of having been absent unauthorisedly only from January 17, 1990. As indicated above, the leave was sanctioned for the earlier period from January 1, 1990 to January 16, 1990. When such is the accusation, it is quite strange to notice that in the impugned order, it is stated that since the charges are held proved and he did not rejoin duty after the expiry of the leave, the service of the delinquent is terminated from January 1, 1990. The relevant extract of the impugned order is as follows:

"It is very clear that the charges are held proved since he has not rejoined duty after the expiry of the leave. In the above circumstances, I hereby order that the services of Thiru A. Kumaravel, Assistant Manager, I/C (Cost and Production Control) in Tamil Nadu Minerals Limited is terminated from January 1, 1990."

Having sanctioned leave from January 1, 1990 to January 16, 1990 there is no valid reason to terminate the services with effect from January 1, 1990 itself. This also would show that the management for the reasons best known to it, without application of mind, has shown some anxiety to pass an order of termination at the earliest by giving some ground or the other.

81. Under those circumstances, I cannot but hold that the impugned order terminating the services of the petitioner is ex facie illegal and the same is liable to be struck down.

82. In short, the impugned order terminating the services of the petitioner is nothing but capital punishment without trial.

83. TO SUM UP:

(1) The impugned order dated May 23, 1990 shall be treated as an order of dismissal under Conduct, Discipline and Appeal Rules of TAMIN and not under Service Rules of TAMIN, since the impugned order shows that the dismissal on the basis of the charges framed under the Disciplinary Rules having been proved.

(2) While taking action under the Conduct, Discipline and Appeal Rules, the enquiry must have been conducted by giving an opportunity to the delinquent. If he does not attend the enquiry despite service of notice, there must be ex parte enquiry by the Enquiry Officer. Admittedly, this enquiry has not been done.

(3) If the enquiry report sent by the Enquiry Officer after such enquiry shows that the charges are proved, then the delinquent must be issued a second show cause notice for the proposed punishment. Only after getting his reply, the

punishment has to be imposed. In this case, these procedures have not been admittedly followed.

(4) Even assuming that Rule 15.3.1 of the Service Rules has been invoked, while passing the impugned order, as contended by the management, even then an opportunity should have been given to the delinquent officer at least for personal hearing, so as to decide whether the absence was unauthorised, and if so, the said unauthorised absence could be condoned exercising the discretionary powers vested with the second respondent. This also was not done.

84. Under the above circumstances, the impugned order, which has been passed with undue haste without following the procedures, without giving an opportunity and without conducting proper enquiry, shall be held to be illegal and liable to be quashed. Accordingly, the impugned order dated May 23, 1990 is quashed and the second respondent is directed to reinstate the petitioner with continuity of service.

85. In view of the fact that after January 16, 1990, the petitioner, even according to him has not applied for leave and he set leave application only on February 15, 1990 and thereafter on May 4, 1990 to the management giving explanation and seeking for the extension of leave, I am of the view that he need not be given full back wages. Therefore, in view of the said slackness, it would be proper to direct the second respondent to pay 50 per cent of the back wages and accordingly directed.

86. However, it is open to the management to conduct fresh enquiry in respect of the accusation contained in the charge memo dated April 16, 1990 after giving opportunity to the petitioner, in the light of the observations made above by adhering to the principles of natural justice.

87. Thus, the writ petition is allowed with the above directions. Consequently. W.M.P. No. 10692 of 1992 is closed. No costs.