

(2013) 03 KL CK 0144

In the High Court Of Kerala

Case No : Writ Petition (C) . No. 27511 of 2009 (S)

M.P. Joseph

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 19-03-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 19(1)(f), 31(1)

Citation : (2013) LabIC 2790 : (2013) 2 LLN 411 : (2013) 4 RCR(Civil) 601

Hon'ble Judges : Manjula Chellur, C.J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : O.V. Radhakrishnan, K. Radhamani Amma and S.S. Aravind, for the Appellant; P. Parameswaran Nair, Assistant Solicitor General of India for Respondent No. 1 and Girija Gopal, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.—The Petitioner is aggrieved by the order of the Central Administrative Tribunal (for short "CAT"), Emakulam Bench, which refused to interfere with Annexure A21 Notification, by which the Petitioner was deemed to have resigned from the Indian Administrative Service (for short "IAS") for remaining continuously absent for a period of five years; in terms of Rule 7(2) of the All India Services (Leave) Rules, 1955 (hereinafter referred to as "AIS (Leave) Rules"). The Petitioner, having been borne in the Kerala Cadre, had been deputed on foreign assignment to a project of the International Labour Organisation (for short "ILO") and after the period of deputation, had joined back for a day and then abandoned the service after putting in an Application for extraordinary leave for four years. Despite rejection of the leave sought for, repeated directions to rejoin duty and initiation of Disciplinary proceedings for "unauthorized absence to take up remunerative assignment" and "failing to report for duty"; the Petitioner refused to rejoin the cadre. The Petitioner having been unauthorizedly absent for a continuous period of five years, after giving opportunity for explanation as provided in the Note to Rule 7(2) of the AIS

(Leave) Rules, was deemed to have resigned in accordance with the said Rules. The Petitioner's contentions regarding his lien on the post in the cadre and Rule 7(2) being ultra vires having been rejected by the Tribunal, is before us.

2. The undisputed facts are that the Petitioner was an IAS Officer in the Kerala cadre, having joined the services in the year 1978. While continuing so, the Government of India, Ministry of Labour, called for appointment to the post of Project Co-ordinator for Multilateral ILO/FRG International Programme on the Elimination of Child Labour, funded by German Technical Co-operation Agency and executed by the International Labour Organization. The Government of India Notification was pursuant to a request from the ILO Office, New Delhi to recommend a panel of experts for the post. The appointment by the ILO was on a full time basis, initially for a period of one year with possibility of further extension. The Petitioner, who was then on leave and a Fellow in the University of Manchester, working towards an M.Sc. in Human Resource Development, applied for the assignment and was selected by Annexure A4 dated 1.4.1992. The Petitioner having obtained cadre clearance from the Central Government, was relieved from the State of Kerala with effect from 1.8.1992 by Annexure A5, for joining the aforementioned post of Project Co-ordinator under the ILO.

3. The Petitioner having completed five years, as was permissible under the Consolidated Instructions relating to Foreign Assignment of Indian Experts (Annexure A11), was accorded cadre clearance for one more year from August, 1997 by Annexure A6. To facilitate relief from the post of Project Coordinator, Annexure A7 dated 10.8.1998 was issued by the Department of Personnel & Training, Government of India directing the Petitioner to report back to the cadre on completion of tenure of foreign assignment. Annexure A7 specifically notices that the tenure for which cadre clearance was granted stood completed. The Petitioner joined back on 1.8.1998 and on the very next day, preferred a request for an Extraordinary Leave by Annexure A8 and abandoned his employment. The Department of Personnel and Training, Government of India has, by Annexure A10 dated 17.11.1998, written to the State pointing out the illegality in the Petitioner continuing in a foreign assignment during a spell of Extraordinary leave and without cadre clearance. On a consequent rejection of the request for leave by the State Government, the Petitioner approached the CAT, Emakulam Bench by O.A. No. 917/1999, which was dismissed as per order dated 10.11.1999. A Writ Petition therefrom was filed, which was dismissed as per Exhibit P1 with expression of "no opinion on the merits", but noticing that the Petitioner had made a fresh representation, consideration of which was directed to be proceeded with dehors the order of the CAT. Such representation dated 20.12.1999 referred to in Exhibit P1 judgment was in fact rejected by Exhibit P2 dated 20.1.2000; a day before the Original Petition was dismissed. The Petitioner rested content with that. The rejection of leave, as sustained by the CAT, has become final and there is absolutely no steps taken against the rejection of the representation too.

4. The Petitioner having failed to respond to the request of the State Government to report back, as directed by the Central Government, who is the cadre Controlling Authority, Disciplinary proceedings were initiated. The Disciplinary proceedings continued over a period of number of years, during which the Petitioner failed to report back for duty. A full-fledged enquiry was conducted and Annexure A17-Enquiry Report was forwarded to the Petitioner by Covering Letter dated 30.12.2003. A reply was also submitted by the Petitioner by Annexure A18.

5. In the meanwhile, the Petitioner having remained absent from duty for a continuous period exceeding 5 years (w.e.f. 2.9.1998 to 9.2003-5 years), an Office Memorandum was issued as per Annexure A19 dated 30.12.2003, by which the Petitioner was called upon to show cause why he should not be deemed to have resigned from IAS in terms of Rule 7(2) of AIS (Leave) Rules, for reason of having continuously remained absent from duty for a period exceeding 5 years. The Petitioner was also granted a period of one month for submitting his reply. No reply was received within the period and on 23.3.2004 the Petitioner was deemed to have resigned from the IAS with immediate effect in terms of Rule 7(2) of the AIS (Leave) Rules. A subsequent representation of the Petitioner, made as per Annexure A23 dated 14.2.2005 for withdrawal of the order of deemed resignation and for grant of pension was considered and rejected by Annexure A25. Annexure A15 - Articles of Charge, Annexure A17 - Enquiry Report as also Annexure A19 - Show Cause Notice, Annexure A21 - Notification ordering deemed resignation and Annexure A25 - order dated 21/22.3.2005 rejecting the subsequent representation; were the subject matter of challenge before the Tribunal.

6. We have heard learned Senior Counsel Sri. O.V. Radhakrishnan for the Petitioner, Sri. P. Parameswaran Nair, Assistant Solicitor General of India and Smt. Girija Gopal, Special Government Pleader for the State.

7. The fulcrum of the challenge is pivoted upon Rule 7(2) of the AIS (Leave) Rules being ultra vires and the proceedings initiated under the said Rules without concluding a Disciplinary Enquiry already initiated, being unauthorized and illegal. Though the initiation of Disciplinary proceedings and the Enquiry Report in the Disciplinary proceedings are also a subject of challenge, the learned Senior Counsel would request us to refrain from going into the merits of the disciplinary enquiry. Since, according to the learned Senior Counsel, if the Court strikes down Rule 7(2) of the AIS (Leave) Rules or at least hold the proceedings under the said Rule as being unauthorized and illegal; then the petitioner should be reserved the freedom to challenge the findings in the enquiry as by law established. Any finding on merits, it is the submission, would prejudice the Petitioner's contentions in the Disciplinary proceedings. As a corollary, we also notice that if the proceedings under Rule 7(2) and the Rule as such is upheld by us, then again there would be no purpose served in looking at the charges levelled against the Petitioner or the findings on enquiry. We accept the submissions of the learned Senior Counsel and for the above reasons, refrain

from going into any of the findings rendered by the Enquiry Officer; except, of course, with respect to some arguments on the aspect of denial of Extraordinary Leave raised by the learned Senior Counsel himself.

8. The learned Senior Counsel would place before us the following issues and take us through the decisions of the Hon'ble Supreme Court (referred to herein) to buttress his contentions.

Broadly stated, the issues raised are as under:

(i) Rule 7(2) of All India Services (Leave) Rules, 1955 results in an automatic termination of service for reason of being continuously absent for five years and the absolute discretion conferred with no procedure or guideline prescribed, visiting an Employee with gross penalty of termination from service without retirement benefits goes against the Constitutional mandate of Articles 311(2) and is further ultra vires Articles 14 & 16 of the Constitution of India.

(ii) Rule 7(2) of AIS (Leave) Rules in fact imposes a penalty for misconduct, without following the prescriptions of Articles 311(2), and the same, in the guise of deemed resignation thrust upon the Employee, is in effect termination from service without any benefits making it drastic, oppressive, unreasonable and being bad for coming within the mischief of Wednesbury Rule. With respect to the procedure followed in so much as invoking Rule 7 (2), the questions raised are as follows:

(iii) The Consolidated Instructions on Foreign Assignment of Indian Experts (Annexure A11) is not applicable to the petitioner, since the said instructions relate to deputation of Indian Experts on assignment abroad and the Petitioner had been all-through working in India as a Project Coordinator.

(iv) The Petitioner was come in a substantive post and is entitled to continue till superannuation.

(v) Rule 7(2) of AIS (Leave) Rules specifically exempts persons who are on "foreign service".

(vi) The Departmental proceedings having been initiated and the same having not been concluded; mid-way, recourse cannot be taken to Rule 7(2).

9. Briefly recapitulated, the admitted facts are that the Petitioner was initially sent on deputation after obtaining "cadre clearance" from the Competent Authority and had continued for five years thereon as permitted by the Consolidated Instructions relating to foreign assignment and had also obtained a further sanction of one year, after which the Petitioner was specifically directed to rejoin duty. The Petitioner rejoined duty on 1.2.1998 and on the very next day, without authorization, sanction and cadre clearance, abandoned his post; after submitting an Application for Extraordinary Leave, which was rejected subsequently. Despite repeated directions, he refused to join duty and Disciplinary proceedings were initiated against him. While the Enquiry Report and

the explanation offered to the findings in the report by the Petitioner was under the consideration; by efflux of time, the Petitioner had voluntarily remained absent for a continuous period of five years from his cadre. Rule 7(2) of the AIS (Leave) Rules was, hence, invoked and a Show Cause Notice was sent, to which the petitioner failed to respond in time, but later by letter dated 27.1.2004; doubted the existence of Rule 7(2). The petitioner was then deemed to have resigned under the provisions of Rule 7(2), which was in existence.

10. We shall first consider the challenge against Rule 7(2) of AIS (Leave) Rules. We have to first look at the decisions relied on by the learned Senior Counsel to understand the law on the point. As noticed, the main challenge is that the said Rule is against Articles 311 of the Constitution of India, the mandate and procedure of which has been laid down by the following decisions of the Hon'ble Supreme Court, *Khem Chand Vs. The Union of India (UOI)and Others*, ; *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, ; *Jai Shanker Vs. State of Rajasthan*, ; *Deokinandan Prasad Vs. The State of Bihar and Others*, ; *The State of Assam and Others Vs. Akshaya Kumar Deb*, ; and *D.K. Yadav Vs. J.M.A. Industries Ltd.*, ; according to the learned Senior Counsel for the Petitioner.

11. *Khem Chand Vs. The Union of India (UOI)and Others*, , considered the efficacy and reasonableness of the opportunity to show cause against the action proposed. Considering Articles 311(2), as it stood then, the Hon'ble Supreme Court set aside the order of dismissal on the ground that the delinquent was not given a further opportunity to show cause on why, that punishment should not be inflicted on him, which right was taken away by the 42nd amendment. The Constitution Bench in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, , tested Rules 148(3) and 149(3) in the Railway Establishment Code, which provided for termination; with no clear mandate for notice. While recognizing that Articles 311 within the field covered by it, is absolute and paramount, it was noticed that the protection afforded therein is limited to the three major penalties of dismissal, removal or reduction in rank. A subtle distinction was also drawn where service of an Employee is regulated by contract and a termination simpliciter as per the terms of a contract not attracting the rigor of procedure contemplated by Articles 311. A person holding a substantive post was held to have a right to continue in service subject only to the rules of superannuation and compulsory retirement. The invasion of his right to continue in service by any other means resulting in termination was held to be in the nature of a penalty, amounting to removal. Articles 311(2) was emphasized as intended to afford a sense of security to public servants who are substantively appointed to a permanent post and continuing therein to legitimately expect pension after rendering public service for the period prescribed by the Rules. Articles 311 was succinctly held to be a Constitutional protection given to Government servants who have title to office against arbitrary and summary dismissal. This ensured purity in action, not tainted by external influences.

12. Jai Shanker Vs. State of Rajasthan, , was considered to have abandoned himself from service by virtue of a rule which permitted unauthorized absence for a month or longer to be deemed as sacrificing the appointment. Despite there being discretion conferred to reinstate, with sanction from Appropriate Authority, the rule was held to go against Articles 311, since it did not provide a show cause and consideration of the explanation for such absence. Jai Sankar (supra) was followed in Deokinandan Prasad Vs. The State of Bihar and Others, , where the Employee challenged orders of censure and reversion and subsequent orders treating his service in Government to have ceased coupled with denial of pension. The earlier orders of censure and Reversion were treated as having become final. However, the cessation of service ordered by the Government relying on Rule 76 of Bihar Service Code, on the premise that the Employee refused to join in the reverted post and remained absent continuously for five years was set aside. But that was on account of a restrain order and a decree from the Munsiff Court against the reversion order. Though the injunction order was vacated in Appeal by the Sub-Court, eventually the Suit was decreed. The decree again was set aside in Appeal and confirmed by the High Court. Even during the interregnum of the restrain orders and the subsistence of the decree the Government refused to permit the Employee to join and continue in his original post. The issue which was considered was stated so:

We will now proceed on the basis that the order dated 5.8.1966 should be read in such a manner that the Petitioner was not on his duty continuously for more than five years from 11.3.1960 till 5.8.1966. If the Respondents are able to establish this circumstance it is needless to state that Rule 76 of the Service Code will come into operation irrespective of the fact whether the Petitioner was absent with or without leave. According to the Petitioner, he has not been continuously absent for over five years even during the above period as stated by the Respondents.

Hence, Rule 76 was held to be operative, but it was on facts that the order of cessation of service was held to be illegal. The contention of absence from duty was not accepted since, even when there was a restrain order from the Munsiff Court and then a decree against reversion; the Employee was allowed to join only to the reverted post. The order denying pension was also held to be violative of Articles 19(1)(f) & 31(1) of the Constitution of India; which challenge is no longer available.

13. The above decisions were referred to in The State of Assam and Others Vs. Akshaya Kumar Deb, , and it was held:

In the light of the above decisions, there can be no escape from the conclusion, that the impugned order, dated 13.2.1963 was violative of Articles 311(2) of the Constitution and as such, illegal. It was imperatively necessary to give the servant an opportunity to show cause against the proposed action, particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control.

In fact in the said Two-Judge Bench decision, in the concurring judgment, one of the learned Judges rested his decision on the ground of no opportunity to show cause, and specifically desisted from expressing a definite opinion that the cessation of service as per Rule 18 amounts to removal. *D.K. Yadav Vs. J.M.A. Industries Ltd.*, , stressed the need for bearing in mind the principle that a delinquent should have a reasonable opportunity and the authority must act fairly, justly, reasonably and impartially. Rule 7(2), as we shall presently see, does not suffer from any of the vices highlighted in the above decisions.

14. To contend Rule 7(2) of the AIS (Leave) Rules as ultra vires Articles 14 & 16 of the Constitution of India, the learned Senior Counsel relies on *State of Orissa v. Dheerendranath Das*, AIR 1961 SC 1715; *Suman Gupta and Others Vs. State of Jammu & Kashmir and Others*, ; *Senior Superintendent of Post Offices, Allahabad and Others Vs. Izhar Hussain*, ; and *V.C., Banaras Hindu University and Others Vs. Shrikant*, .

15. In *State of Orissa v. Dheerendranath Das*, AIR 1961 SC 1715, the two Rules, one called the "Tribunal Rules" and the other termed "Service Rules", were in existence and the delinquent Non-Gazetted Officer could be proceeded against under either of the said Rules. The "Tribunal Rules" were found to be more "drastic" and more prejudicial to the Employee and was, hence, held to be discriminatory. In the instant case, it is to be distinguished that the charges levelled against the Petitioner was quite distinct and independent of the action which resulted in deemed resignation under Rule 7(2). The distinct cause of action for initiation of Disciplinary proceedings and the deemed resignation should be kept in mind. It could never be mixed up and the charges alleged in the earlier Disciplinary proceedings could not be proceeded against under Rule 7(2) and vice *Suman Gupta and Others Vs. State of Jammu & Kashmir and Others*, , emphasized:

But there is a well recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether.

16. *Senior Superintendent of Post Offices, Allahabad v. Izhar Hussain*, 1989 (2) LLN 730 (SC), considered two Rules, which provided for premature retirement of Government servants whose age of superannuation was 58 Years. Fundamental Rule 56(j) permitted premature retirement of any servant after attaining 55 years of age on "public interest". Rule 2(2) of the Pension Rules provided, a servant could be retired on having completed 30 years of qualifying service. It was held that though both Rules intended chopping off dead-wood, the former was qualified with the guideline whereas the latter provided no safeguards. We are of the opinion that the said judgment is not applicable herein since Rule 7(2) of AIS (Leave) Rules is qualified with the factum of continuous absence for five years and provides for an opportunity for hearing.

17. In V.C., Banaras Hindu University and Others Vs. Shrikant, , it was held:

Proceeding on leave without the same being sanctioned or overstaying after the period of sanctioned leave is over, would undisputedly come within the purview of the term "misconduct". It is, however, true that only because the action on the part of the Employee to avail leave without any prior sanction thereof or overstay despite expiry of the period of leave, would amount to misconduct, the statutory authorities would not be denuded of power to make an appropriate statute that in certain situation the Employee would be deemed to have abandoned his services. However, such a provision could not be laid down by an executive direction. Matter relating to cessation of employment is governed by statute and by a subordinate legislation, i.e., either by framing a statute or an ordinance.

(Emphasis supplied)

There the deemed abandonment was stipulated by an executive Notification and the Supreme Court had accepted that such a provision could be made in the statute or in a subordinate legislation. Rule 7(2) has been provided for in AIS (Leave) Rules and an opportunity to explain is also provided. The Hon''ble Supreme Court also laid down in Para 57:

The matter may, however, be different in a case where despite having been given an opportunity of hearing, explanation regarding his unauthorised absence is not forthcoming or despite giving him an opportunity to join his duty, he fails to do so, as was the case in Punjab & Sind Bank v. Sakattar Singh.

18. Rule 7(2) reads as hereunder:

(2) Unless the Central Government, in view of the special circumstances of the case, determines otherwise, a member of the service who remains absent from duty for a continuous period exceeding five years, other than on foreign service, whether with or without leave, shall be deemed to have resigned from the service.

Note: Provided that reasonable opportunity for explain the reasons for such absence shall be given to the member of the service before provisions of sub-rule (2) are invoked.

The Rule has operation only when a member of the All India Service remains absent from duty for a continuous period exceeding five years, whether with or without leave, except on foreign service and the Central Government is conferred with the power to deem such person as having resigned from the service, with a further exception in so far as the Central Government, by virtue of some special circumstance, determine otherwise. Hence, if a person not being in foreign service or in the context of the Central Government having not determined any special circumstances; remains absent from duty for a period of five years, then he is deemed to have resigned from service by his voluntary conduct of absenting himself. The deeming provision, however, is subject to the note, which provides for a reasonable opportunity to explain the reasons for such absence.

19. Looking at the wide range of decisions laid before us; we cannot countenance the argument that Rule 7(2) is against the Constitutional mandate of Articles 311(2), which provides that no person shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. As has been noticed in the Supreme Court decisions, the mandate has Application only in cases of dismissal, removal or reduction in rank pursuant to allegations levelled against the said officer. True, the Supreme Court has declared that any termination from service which is not as per the rules of superannuation or rules of compulsory retirement would be removal from service. Whether the deemed resignation from service is on account of any charges of misconduct levelled against the officer and whether the same is imposed as a penalty would be the relevant question.

20. A resignation from service definitely would be a voluntary act on the part of the Petitioner and none who has opted for the same voluntarily and with eyes open can turn around to challenge the necessary consequences on the ground of such acceptance of resignation amounting to termination from service. The above Rule also postulates a situation where a member of the service absents himself from duty for a period exceeding five years. But for the absence being on foreign service or under special circumstances determined by the Central Government, the same has to be treated as a voluntary act with knowledge of the provision in the Leave Rules, of the service, in which such Employee is borne. Any explicable circumstance which explains such absence could necessarily be taken into account by the Appropriate Authority and it is to that end an opportunity to explain the reasons for absence have been provided to any member of the service who remained absent from duty for a continuous period of five years.

21. In the first place, there is no misconduct alleged against the member of the service and the factum of absence from duty is self-evident. In the instant case, we have to notice, it is admitted unequivocally. The operation of Rule 7(2) is a direct consequence of such voluntary absence from service. It cannot at all be said that this leads to arbitrariness in its operation. The Central Government has been conferred with the power to determine otherwise in the event of there being any special circumstances in the case. It is also obvious that the deeming provision could be operated only after affording a reasonable opportunity and considering the explanations offered for such absence. Rather than the Rule resulting in automatic termination, as contended by the Petitioner, we are of the opinion that it tantamount to a natural consequence of the voluntary action of the officer in remaining absent; without sufficient cause.

22. Resignation in Moti Ram Vs. Param Dev and another, , has been said to be meaning the spontaneous relinquishment of ones own right and in relation to an office it connotes giving up or relinquishing the office. In the general justice sense, to constitute resignation, the essential ingredients were held to be the

intention to relinquish and the concomitant act of giving up. Both are apparent in the instant case.

23. We pause for a moment to notice that in the instant case there is also no explanation offered and the Petitioner came out with a letter dated 27.1.2004 (Annexure A20), wherein it was contended that the Office Memorandum dated 29/30.12.2003 was received only a week before, since the Petitioner had shifted his former residence. The only contention raised was that Rule 7(2) was omitted from the Leave Rules by Notification dated 5.9.1978. The Petitioner sought confirmation as to whether the said Rule still subsists. We are surprised that an officer borne in the IAS and claiming to have a lien on his post in the cadre has thought it fit not to communicate his residential address to his Controlling Authority, especially in the circumstance of a Disciplinary Enquiry pending against him. Again, but for the above contention of Rule 7(2) being no more available in the Rules, the Petitioner had no other contention in his reply; nor was any explanation offered, before the Notification under Rule 7(2) was published by the Government.

24. Punjab and Sind Bank and Others Vs. Sakattar Singh, , fortifies the view taken by us, which decision was also quoted with approval in V.C., Banaras Hindu University and Others Vs. Shrikant, . We also garner support from the decision in Aligarh Muslim University and Others Vs. Mansoor Ali Khan, , placed before us by the Assistant Solicitor General of India, where two Rules came up for consideration; one in the "Terms and Conditions of Service Rules" and the other in "Leave Rules", both deeming vacation of office on voluntary absenteeism and over stayal of leave. The Supreme Court held that while in the former, absence of more than 5 years was the controlling factor the Leave Rules contemplated absence without leave and over stayal of sanctioned leave. The latter Rule also provided for due opportunity to the Employee. Two Employees, one proceeded under the "Terms and Conditions of Service Rules" and the other under the "Leave Rules" were before the Supreme Court. We are not concerned with the latter. In the case of the former, who was deemed to have vacated office under the "Terms and Conditions of Service Rules", which provided for no opportunity, the Employee was found to have been not covered by the said Rule since the absence was less than five years. Hence, the "Terms and Conditions of Service Rules" were held to be inapplicable in the case of that Employee and the absence of both the Employees were held to be covered by "Leave Rules", which specifically provided for an opportunity. Despite one of the Employees being not proceeded against under Leave Rules, and no opportunity being granted, it was held that even if an opportunity was granted, on facts, no other conclusion was possible from the admitted and indisputable facts and it would have been an "useless formality". The lack of notice was held to have caused "no prejudice". A note of caution was also expressed that Courts should be very careful in justifying a denial of Natural Justice lest it be described as a pre-conceived view.

25. In the above cited decision, the rule which provided for notice though

relevant, was not invoked and no notice was given before terminating the Employee. Still the Supreme Court upheld the termination. The learned Senior Counsel would alertly point out the distinction between sitting in review of an administrative decision on grounds of violation of Principles of Natural Justice and violation of Constitutional mandate. We are conscious of the same and the "useless formality" theory or even the "prejudice principle" may not strictly apply when a decision is challenged as violative of the principles enshrined in Articles 311(2). But we cannot also shut our eyes to the fact that the Principles of Natural Justice are embodied and epitomized in Articles 311. The mandate is an opportunity to explain, that too a reasonable one, the absence of which would definitely cut at the root of the exercise embarked upon. Rule 7(2) provides for an opportunity and that was granted in the instant case. Though belated, the reply of the Petitioner does not contain any explanation for the absence. The Petitioner's is not a case of over stayal, but a clear case of abandonment of employment without leave or sanction. The fact that he was granted an extension in the post in which he had originally been sent on "foreign service" with proper sanction; is no justification. The Communication dated 10.8.1998 (Annexure A7) granting sanction till 31.8.1998; categorically directed the Petitioner to report back for duty. He joined for duty on 1.9.1998 and abandoned his post on 2.9.1998. The Leave Application was rejected, and as we noticed before, that rejection cannot now be assailed. By Letter dated 11.6.1999 (Annexure A12), he was again directed to report for duty, failing which departmental enquiry was threatened and was followed by Annexure A14 (dated 3.8.1999). The Show Cause Notice under Rule 7(2) also was not responded to with any explanation for the absence.

26. We are also of the opinion that there is nothing drastic, oppressive or unreasonable in Rule 7(2) and the action taken does not come within the mischief of *Wednesbury* unreasonableness. The Hon'ble Supreme Court in *Chairman, All India Railway Rec. Board and Another Vs. K. Shyam Kumar and Others*, , has considered the proportionality test vis-?-vis unreasonableness:

Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to "assess the balance or equation" struck by the decision-maker.

Proportionality requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. The Court entrusted with the task of judicial review has to examine whether decision taken by the

authority is proportionate i.e. well balanced and harmonious, to this extent the Court may indulge in a merit review and if the Court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the Court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

27. The Rule does not impose a penalty for misconduct and the consequence of the deemed resignation is one which flows from the voluntary absence of a member of the service who has also been provided with an opportunity to put forward his explanations for such absence. There is no absolute discretion leading to arbitrariness and the procedure prescribed for granting an opportunity to consider the explanations offered evidently satisfy the Rules of fair play. On facts, in each case, according to us, on a judicial review of an order passed under Rule 7(2), what, Courts sitting in review would have to do is to test the said order; on the facts, to see whether any subterfuge was employed and whether the order in fact is one camouflaged under Rule 7(2); which, on moving side the cloak of camouflage, is actually found to be one of imposition of penalty for misconduct. We cannot on facts discern any subterfuge in the order passed. We cannot also term it as a camouflaged one, visiting the Petitioner with a penalty for a misconduct. Admittedly the Petitioner rejoined duty and on the very next day, abandoned his post after preferring an Application for Extraordinary Leave and remained absent for a continuous period of five years, callously indifferent to the rejection of leave and directions to rejoin.

28. Now we consider the contention of the learned Senior Counsel that the Petitioner was entitled to the Extraordinary Leave. According to the Petitioner, denial of leave was for reason of it being violative of the "Consolidated Instructions relating to Foreign Assignment of Indian Experts" and that ground cannot be sustained for reason of such instructions being applicable only for assignments abroad. We have to first notice that the said issue is no longer open, since the CAT had considered the rejection of his Extraordinary Leave and have found the action of the State Government as also the Cadre Controlling Authority to be perfectly justified, in an earlier O.A. (O.A. No. 917 of 1999). We cannot for a moment accept the contention of the learned Senior Counsel that Exhibit P1 set aside the findings in the order of the CAT in O.A. No. 917/1999. On going through Exhibit P1 judgment, it is clear that the Original Petition was dismissed without expressing any opinion on the merits. The dismissal was on account of the fact that the Petitioner had placed on record a fresh representation on 20.12.1999. It was only observed that the disposal of the O.A. by the CAT may not stand in the way of consideration of the representation; that is to only say that the Government, while considering the representation, could definitely come to a different conclusion. But, it is to be noticed that by Exhibit P2 the representation was rejected and no challenge was made against the said Rejection dated 20.1.2000. We cannot permit the Petitioner to rake up issues which are long settled.

29. However, to facilitate a proper adjudication, we also looked at the Consolidated Instructions referred to above. The emphasis laid on the word "abroad", according to us, is irrelevant. Paragraph 2(d) of the Consolidated Instructions refers to International assignments covering assignments to the UN and its agencies, the types of which have been further elaborated in subheading 7. Type 7(h) refers to international assignments in project-related field jobs, operated in the developing countries under the auspices of the international organizations, where the final selection is usually made by the host country/ Government in consultation with the international agency. It is as per the said Consolidated Instructions preceded by the earlier Instructions of January, 1988 that the appointment as Project Co-ordinator to a project under the auspices of the ILO was made. The same happened to be in India, admittedly categorized by the United Nations as a developing country. It is under the said Instructions that the Petitioner was selected and sent on deputation. His orders of deputation produced along with the O.A. specifically show that he is on a "deputation on foreign assignment". That his original deputation was sanctioned for one year and then further extended for four years as per the "Consolidated Instructions" is not in dispute. Para 9 of the "Consolidated Instructions" also provided that an officer maybe permitted to remain on long term assignments adding upto the maximum of five years during the first twenty-five years of his service. The Petitioner admittedly has not completed the said twenty-five year service period. We specifically Notice Annexure A10 Letter dated 17.11.1998 of the Establishment Officer and Additional Secretary of the Government of India, Department of Personnel and Training. It is stated that subsequent to the five year deputation as is permitted under the "Consolidated Instruction" the further period of one year was granted in relaxation of the policy with the approval of the then Prime Minister. The deputation having been granted as per the Consolidated Instructions and further extension granted in relaxation of the said policy, the Petitioner cannot now turn around and contend that his deputation is not regulated by the said Consolidated Instructions.

30. We are now faced with the contention of the Petitioner's absence being exempted under Rule 7(2) for reason of it being "foreign service". We immediately notice the disparity between the contention earlier noticed and now raised. The learned Senior Counsel would distinguish it on the ground that here the contention is based on the definition of "foreign service" as per the AIS (Leave) Rules. We extract the definition hereunder:

2(f) "foreign service" means service where a member of the Service receives his pay with the sanction of the Government from any source other than the Consolidated Fund of India or the Consolidated Fund of any State.

The contention of the petitioner is that his initial appointment as Project Coordinator in the ILO was with sanction and he having continued so, and having received his pay from a source other than the Consolidated Fund of India or the State, he remains to be in foreign service. We are unable to sustain such a

ground. The foreign service, in which a member of the Administrative Service receives his pay, should be with the sanction of the Government. The sanction was initially for a period of one year and the same was extended with clearance from the Cadre Controlling Authority for a further four years and as a special case, in relaxation of the policy, for another year. Subsequent to the extension up to 31.8.1998, there was no sanction/clearance from the Government of the Union or the State or the Cadre Controlling Authority. Before the period of deputation expired, the Petitioner was called upon to return for duty on expiry of the period granted, i.e., till 31.8.1998. The Petitioner also understood it as so; having joined back on 1.9.1998.

31. As we have noticed above, subsequently on the very next day he abandoned the post after making an Application for Extraordinary Leave, which was subsequently rejected and the rejection has now become final. Repeated reminders and directions were issued for rejoining duty, which were stoutly ignored by the Petitioner. Though the Petitioner might have continued in the very same post, to which he was originally deputed, by the ILO. he joined there on 2.9.1998, without sanction from his Cadre Controlling Authority. We notice from the address in the Original Petition that the Petitioner is now, at least at the time of filing of the Original Petition, in Cambodia, again on an assignment with the ILO. Even going by the Application for Extraordinary Leave, we see that the Petitioner seeks leave on the ground of public interest and for the benefit of the Government and the State of Kerala. We would think, it is for the Government to determine public interest and determine the benefits ensuring to the State and it does not at all lie in the mouth of the Petitioner.

32. The continuance of the Petitioner with the ILO was not in accordance with the Consolidated Instructions or with the junction of the Union Government or the State. The extension of contract with the ILO was an unilateral act of the Petitioner. We cannot but notice that the Petitioner has been absent from his cadre for all these years. He abandoned his cadre to seek fresh employment and the continuance in ILO cannot be treated as continuance of his earlier assignment, which was with sanction and cadre clearance. Though no leave was granted, he continued in the ILO. The Petitioner, hence, cannot claim any lien to the post in his cadre. The Petitioner also seeks leave on the ground that it does not lead to any financial obligation to the Government of Kerala. Nearing the age of superannuation the Petitioner turns around and seeks re-entry into service and setting aside of the order deeming his absence for a continuous five year period, as resignation, according to us, for obvious reasons. That at least would lead to financial obligation to the Government; in terms of Pensionary Benefits. Despite claims of public interest and benefits to the State Government, what stares at the face of the Petitioner is the simple fact that it was personal aggrandizement, that comes with an assignment with the United Nations, both monetary and status-wise; that fuelled the actions of the Petitioner. The other contention raised by the Petitioner is with respect to there being no rationale; nor specific provision for jettisoning the Disciplinary proceedings initiated at its

final stages and resorting to Rule 7(2). We have already held that Rule 7(2) is not a proceeding for imposition of penalty for a misconduct and is only a deeming provision visiting the member of a service with consequence of his voluntary action of absence from duty for a continuous period of five years. The learned Senior Counsel places before us the decisions reported in *Kanailal Bera Vs. Union of India (UOI) and Others*, ; and *State of Assam and Another Vs. J.N. Roy Biswas*, ; *Kanailal Bera Vs. Union of India (UOI) and Others*, , was a case in which Disciplinary proceeding was initiated for refusal to subject to a sentence of confinement, which concluded in dismissal from service. Then another enquiry was ordered. The very procedure of holding another enquiry was found to be absent in the Rules. The ultimate relief granted therein need not detain us since it was under Articles 142 of the Constitution of India. In *J.N. Roy Biswas (supra)*, the re-opening of an enquiry which concluded in exoneration and reinstatement of an officer was set aside on the premise only of absence of power to make such a re-visitation of concluded matters. We do not think that the above decisions advance the Petitioner's case. The facts disclosed in the above cited decisions would show that they were related to an enquiry which was initiated after the original one concluded and penalty also was imposed. What was held was, without powers of review, such procedure cannot be adopted. The facts are clearly distinguishable in the present case. The enquiry, as is evident from the Articles of Charge (Annexure A15) is for unauthorizedly taking up a remunerative assignment with the ILO and failing to report for duty with the State Government, despite repeated directions from the State Government. We desist from looking at the facts or findings in the enquiry. But, we notice that the Enquiry Report was filed and the explanations were called for. It was at this juncture that the Central Government invoked Rule 7(2) for reason of the petitioner's absence from duty having continued for more than five years. The enquiry and the deemed resignation stem from distinct causes of action. On the deemed resignation of the Petitioner, the Enquiry proceedings would not survive and the natural conclusion, of such proceedings in the context of the deemed resignation of the Petitioner, is an abrupt stop.

Having found the issues raised by the Petitioner in the Writ Petition against the Petitioner; we are unable to find any good reason to interfere with the findings of the CAT, which upheld the deemed resignation of the Petitioner and the order by which his representation was rejected. We are of the definite opinion that the Writ Petition is devoid of merit and, hence, the same is dismissed.