CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

(18)

O.A. NO. 1326/95

New Delhi, this the 24th day of August, 1999

HON'BLE MR. JUSTICE R.G.VAIDYANATHA, VICE CHAIRMAN (J)
HON'BLE MR. J.L.NEGI, MEMBER (A)

Sh. Kashmeri Lal Kapoor, S/O Sh. R.C.Kapoor, Ex-Chief Controller, Northern Railway, DRM Office, State Entry Road, New Delhi.

R/O H-33/4, Sector 3, MIG Flats, Rohini.

---Applicant.

(By Advocate Sh. B.S.Mainee)

Versus

Union of India: Through:

1. The General Manager, Northern Railway, BarodaHouse, New Delhi.

2. The Divl. Rly. Manager, Northern Railway, State Entry Road, New Delhi.

---Respondents.

(By Advocate Sh. O.P.Kshatriya)

O R D E R (ORAL)

By Hon'ble Mr. Justice R.G.Vaidyanatha, VC (J)

This is an Original Application under Section 19 of the Administrative Tribunal's Act. Respondents have filed their counter. We have heard Sh. B.S.Mainee, learned counsel for the applicant and Sh. O.P.Kshatriya, learned counsel for the respondents.

2. The applicant at the relevant time was working as Deputy Chief Controller of Railways at New Delhi. It appears that he fell sick on 19.3.1987 and was on sick list for about two months. He was discharged from the sick list on 15.5.1987. The applicant did not join duty even after 15.5.87. He submitted two more leave applications subsequently. Then, the

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department issued a charge sheet against the applicant alleging that he remained unauthorisedly absent from the duty either from 15.5.87 or atleast from 31.7.87 without submitting the medical certificate and thereby he has committed misconduct.

3. The applicant on an interim reply stated that he was absent from duty due to sickness and was got medically checked from a private doctor and he wanted extension of time to file a detailed reply in view of his contunuing illness. Then the enquiry officer was appointed by the disciplinary authority. The enquiry officer fixed hearing of the case 4/5 times but the applicant did not attend the enquiry proceedings and wanted that the case be adjourned since he was undergoing some treatment. Then enquiry officer gave a final notice to the applicant to appear failing which the proceedings will be conducted ex-parte, the enquiry officer proceeded to examine witnesses and then prepared a report on 18.3.88 and submitted the same to the disciplinary authority holding the charge of unauthorised absence proved. On the basis of this report, the disciplinary authority vide order dated 30.8.88 imposed a penalty of removal from service.

4. The applicant preferred an appeal before the competent authority but the appellate authority did not dispose of the appeal for quite some time. Then, the applicant approached this Tribunal by filing OA No.667/90 which was, after hearing both sides, disposed by the Tribunal by order dated 3.3.1994

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directing the appellate authority to dispose of the appeal expeditiously and in particular he was also asked to consider the question of proper penalty. Then, the appellate authority passed the impugned order dated 30.5.94 under which the appeal came to be dismissed. Being aggrieved by the orders of the disciplinary authority and the appellate authority, the applicant has approached this Tribunal by filing this present application.

5. In the application, the applicant has pleaded about his continued illness right from 19.3.87 and he was directed to explain about his absence from duty and submit medical certificate from a private doctor. He was taking treatment from Ayurvedic Doctor. That enquiry has been conducted ex-parte inspite of his request that the enquiry should be postponed till he is completely recovered from illness. It is, therefore, alleged that the ex-parte enquiry conducted by the enquiry officer is illegal and contrary to the rules. On merits, the applicant's stand is that it is not a case of unauthorised absence but it is a case of absence due to illness of the applicant. Then, the other contention of the applicant is that the punishment of removal from service is grossly disproportionate to the alleged misconduct of unauthorised absence from duty for a few months. The applicant, therefore, wants that the orders of the repsondents' authority be quashed and he may be ordered to be reinstated in service with all consequential benefits.

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6. The respondents, in the reply, have stated that the applicant remained absent unauthorisedly after 15.7.87. Due to his unauthorised absence, major penalty chargesheet was issued. The applicant did not participate in the enquiry. He refused to attend the enquiry inspite of number of notices. The enquiry officer had no other option but to proceed ex-parte and the enquiry has been conducted as per rules. The disciplinary authority and the appellate authority have passed the orders as per rules and no case is made out for interferring with the impugned orders. It is, therefore, prayed that the application be dismissed.

7. Before going to the merits of the case, we find that there is some delay in filing this application and applicant has also filed an M.A. 1898/95 for Condonation of Delay. It is not known as to on which date appellate order was served on the applicant. The applicant has preferred this application within one year and 2/3 months after service of the order of the appellate authority. Actually, the OA was filed on 8.5.95. There is delay of two months in filing this case. The applicant has stated that he is being a Heart patient and indoor patient in Batra Hospital for a very long time where Bye-pass surgery was done upon him and in the circumstances he could not file the application in time.

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8. After going through the record and facts & circustances of the present case, we feel that this is a fit case in which delay should be condoned. Accordingly, MA No. 1898/95 is allowed.

9. Now coming to the merit of the case. The main contention of the learned counsel for the applicant is that the request of the applicant for adjournment for consistingly ill which was refused by the enquiry officer and hence there was no fair opportunity for the applicant to defend himself in the enquiry. He further submitted that even after examination of prosecution witnesses, 30 days time should have been given to the applicant to produce his evidence defence as provided in Rule 9 (12) of the Railways Service (Discipine & Appeal) Rules, 1965. He also invited our attention to 2/3 decisions on this point.

10. On a matter like this, each case has to depend on its' own facts and circumstances. Hear this is a case where the enquiry officer had issued 4/5 notices and in the last notice he was warned that in case applicant does not attend the enquiry, the enquiry will be proceeded ex-parte. But the applicant did not come. Then the enquiry officer gave a final notice and proceeded ex-parte as indicated in the last notice. We cannot find fault with the enquiry officer and in those circumstances, the question of giving further opportunity under Rule 9 (12) of the Railways Rules will not arise. Therefore, we cannot find fault with the procedure followed by the enquiry officer.

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11. The fact that the applicant remained absent from duty even after 15.5.87 is an admitted fact. The question is whether absence of the applicant is due to sickness or not? Applicant had sufficient time and opportunity to prove that due to illness he could not attend. But the applicant did not produce any evidence before the enquiry officer but sought time which ultimately ended in an ex-parte report against him. Hence, in the circumstances, we do not find any illegality or irregularity in the enquiry conducted in the present case.

12. Then we come to ~~the~~ another contention of the learned counsel for the applicant that agreeing everything the penalty of removal from service is grossely disproportionate to the alleged misconduct. On the other hand, learned counsel for the respondents has maintained that having regard to the applicant's unauthorised absence, the penalty of removal from service is not disproportionate. Even on the point like this each case has to depend on its own facts and circumstances.

13. In the present case, even admittedly, according to the administration, the applicant was not well from 19.3.87 till 15.5.87. Therefore, it is not a case where the applicant has come with false theory of illness as an afterthought. The allegation in the charge sheet itself is that after the applicant was discharged from the sick list, he failed to attend the office on or after 15.5.87. Therefore, illness of the

applicant is not disputed in this case. Then, further it is admitted in the charge sheet that applicant did submit medical certificates from a private doctor to cover the period upto 2.8.87. Though as per rules, one has to produce the medical certificate from a private doctor and the rules cannot insist that one should always get treatment in Govt. hospital or nowhereelse. It is an individual choice of a person. Therefore, stand of the administration that applicant should have taken treatment in the Railway Hospital, cannot be accepted. They can only insist that a certificate from Railway Doctor is necessary for grant of leave and nothing more. To prove the illness, one can produce private medical certificate and the question is whether the certificate could be accepted in a given case or not, is purely on a question of fact. As already stated the applicant was suffering from illness atleast from certain period, is not in dispute but it is an admitted fact.

14. The charge sheet itself states that the applicant has no documents to support his absence after 31.7.87 and hence the period after 31.8.87 should be treated as an unauthorised absence. The charge sheet was issued only on 21.9.87 that means the charge sheet alleged that the applicant was unauthorised absent from 21.9.87 till the date of issuance of charge sheet, namely, 21.7.87, the period comes to hardly one month and 20 days only. The question is whether for such a short period of absence from duty of one month and 20 days, when applicant was

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pleadings that he is still unwell, penalty of removal from service can be called as a just punishment in the case.

15. We are aware of our limitation even in interferring on the question of penalty. It is well settled that it is for the disciplinary authority and the appellate authority who can take the proper decision about the proper penalty in a given case. The scope of judicial interference is very limited. In a recent judgement of Hon'ble Supreme Court, it is stated that normally the Tribunal and Courts should not interfere with the question of penalty. But if the penalty is disproportionate so as to shock the conscience of the Courts or Tribunal, then the Courts or Tribunal can interfere regarding the quantum of penalty. Learned counsel for the applicant has cited 2/3 judgements on this point but we refer only one in the case of Union of India & Another Vs. B.C.Chaturvedi, (1995) 6 SCC 750 where the Hon'ble Supreme Court has ruled that where penalty is disproportionately excessive so as to shock the judicial conscience, then the Court can interfere and modify the penalty. In view of the law laid down by the Apex Court, we have to see, in the facts and circumstances of the present case, the penalty is disproportionate so as to shock the conscience of the Tribunal or not?

16. We have already seen that admittedly the applicant was sick for sometime. Admittedly, the

applicant did not join duties even after 15.5.87 and submitted two more leave applications subsequently. Then the period of unauthorised absence prior to the date of charge sheet was only one month and 20 days. Hence, in the facts and the circumstance of the case, we have no hesitation to hold that the penalty of removal from service is wholly disproportionate to the gravity of the misconduct. We are fortified in our view by the judgement of the Rajasthan High Court reported in 1998 (1) ATJ 496 (Smt.Shashi Agarwal & Ors. Vs. Life Insurance Corporation of India & Anr. where an identical case of unauthorised absence, the disciplinary authority had imposed penalty of removal from service which came to be set aside by the Rajasthan High Court.

17. Therefore, in the facts and the circumstances of this case, we hold that the penalty of removal from service is grossly disproportionate so as to shock the conscience of the Tribunal and accordingly liable to be set aside.

18. Now the question is as to what would be the proper punishment in a matter like this? Even on this matter, normally, the matter should be remanded either to the appellate authority or to the disciplinary authority to pass appropriate punishment other than removal from service. But in the present case, since the applicant has already crossed the age of superannuation, now the question of imposing the minor penalty or some other penalty other than compulsory

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retirement will not arise. This is a charge sheet of 1987. Applicant has since attained the age of superannuation. OA is pending since 1995. To avoid further delay in the matter and in the facts and the circumstances, we are inclined to substitute the punishment of compulsory retirement in place of removal from service.

19. In the result, this application is allowed. While confirming the finding of the misconduct against the applicant, we are modifying the penalty of removal from service w.e.f. 30.8.1988 by substituting penalty of compulsory retirement w.e.f. 30.8.88. As a consequence the respondents should grant pension and all other retiral benefits to the applicant w.e.f. 30.8.88 onwards. In the circumstances of the case, the respondents are directed to comply with this order of the Tribunal within four months from the date of receipt of a copy of this order. No order as to costs.

(J.L.Negi)
Member (A)

(R.G.Vaidyanatha)
Vice Chairman (J)

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