Central Administrative Tribunal
Principal Bench

OA No.51/2004

New Delhi this the 25th day of May, 2006.

(31)

Hon'ble Mr. Shanker Raju, Member (J)
Hon'ble Mr. N.D. Dayal, Member (A)

Shri Naresh Kumar Batra,
S/o Shri B.R. Batra,
Ex. Head Clerk,
Operating Branch,
Northern Railway,
Baroda House,
New Delhi. -Applicant

(By Advocate Shri B.S. Mainee with Ms. Meenu Mainee)

-Versus-

Union of India through:

1. The General Manager,
   Northern Railway,
   Baroda House,
   New Delhi.

2. The Chief Passenger Traffic Manager (G),
   Northern Railway,
   Baroda House,
   New Delhi. -Respondents

(By Advocates Shri V.S.R. Krishna and Shri A.P. Sahay)

1. To be referred to the Reporters or ~~not~~? yes

2. To be circulated to Outlying Benches? yes.

S. Raju
(Shanker Raju)
Member(J)

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O R D E R

Mr. Shanker Raju, Hon'ble Member (J):

By virtue of this OA applicant, an erstwhile railway servant, impugns respondents' orders dated 22.3.1999 and 6.4.1999, imposing upon him a penalty of dismissal as well as an order passed in appeal on 2.1.2003, rejecting the appeal against the dismissal.

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2. Applicant while working in Railways was served with SF-5, a major penalty chargesheet, for habitual absenteeism from working, without permission or notice, causing official work to suffer and in the imputation it is alleged that he is habitual of unauthorized absence, as absented himself on 15 occasions from 9.5.1996 to 2.11.1998. An enquiry was proceeded against applicant wherein he had requested for production of additional documents, including his leave applications and attendance register, which was rejected and the enquiry officer (EO) held him guilty of the charge on 22.3.1999. In reply to the aforesaid order passed when not communicated with reasons led to a proceeding before the Tribunal, which culminated into an order passed in appeal, which when assailed in OA-2770/99, by an order passed on 5.9.2002, was quashed and accordingly an order passed in appeal on 2.1.2003 upheld the punishment of dismissal, gives rise to the present OA.

3. Shri B.S. Mainee, learned counsel with Ms. Meenu Mainee, appearing for applicant, contended that applicant has been prejudiced during the course of the enquiry, which deprives him of a reasonable opportunity to defend, in so far as his request for leave applications to be produced on record of the enquiry is concerned, which were in possession of respondents, would have indicated his applications and sanction of leave on all the occasions, which are shown to be unauthorized absence of applicant. It is in this conspectus stated that the attendance register was also not furnished to applicant. This

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according to the learned counsel is in violation of the principles of natural justice.

4. Learned counsel would also contend that though it is incumbent upon the appellate authority to go into proportionality of punishment as per Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968, yet no finding on proportionality of punishment has been recorded by the appellate authority. Having regard to the long service of applicant of 24 years his right of pension and clean service record in the past, the punishment of dismissal imposed is not commensurate with the misconduct and is disproportionate. Learned counsel has taken us to the various documents on record to establish that whenever applicant has applied for leave the same has been sanctioned and accordingly while referring to the counter-reply of respondents where it is admitted that after the cross marked in the attendance register as to absence of applicant there has been an over-writing of the kind of the leave due sanctioned, which clearly shows that he has been sanctioned leave during the period he is alleged to have been on unauthorized absence and in such an event on such sanctioned leave one cannot be treated as an absentee. As such, the charge is baseless and there is no evidence to establish the charge.

5. Shri Mainee stated that the attendance register is maintained by the supervisory officer and in absence of any charge to the effect of manipulation in the attendance register the same cannot be imputed against applicant.

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6. Learned counsel would contend that during the period of suspension from 16.4.1998 to 16.10.1998 applicant cannot be shown to be unauthorizedly absent, as, as per the railway instructions one is not supposed to perform any sort of duty. As such, there is lack of application of mind by the disciplinary as well as appellate authorities.

7. Learned counsel would also contend that extraneous matter has been taken into consideration by the EO, in so far as absence posterior to memorandum issued upon applicant is concerned, which was not incorporated in the charge.

8. Shri Mainee stated that in the appellate order now passed in compliance, there has been an imputation of manipulation of attendance register upon applicant, which is unsubstantiated and amounts to consideration of an extraneous matter, which is not permissible and against which no reasonable opportunity to defend has been afforded to applicant.

9. On the other hand, Shri V.S.R. Krishna and Shri A.P. Sahay, learned counsel appearing for respondents vehemently opposed the contentions and stated that in the light of the decision of the Apex Court in ***State of Bihar v. S.K. Verma***, 2002 (3) PLJR 255, oral evidence is not necessary to be adduced when charges are established through documentary evidence. It is stated that applicant by his absence had not performed duty and the official work had been adversely affected. Applicant who had been marked absent having

not objected to the cross marks in the attendance register, mere issue of a certificate by a private Doctor is not sufficient to justify the action.

10. Learned counsel would contend that applicant had overwritten leave of the kind due on several occasions on the attendance register whereas he has not applied for the leave, due procedure was adopted and a reasonable opportunity has been accorded to him before the punishment is imposed.

11. On the question of proportionality of punishment it is fairly contended that the same has not been considered by the appellate authority, for which law shall take its own course.

12. On careful consideration of the rival contentions of the parties and perusal of the material on record, we are of the considered view that in a disciplinary proceeding the power of the Tribunal in judicial review is limited to the extent that when there is a legal error or deficiency in decision-making process or the conclusion of the authorities is based on 'no evidence' and is baseless, which does not pass the test of a common reasonable prudent man. What is precluded from consideration is re-appreciation of evidence or correctness of the charge. However, to ensure that the case does not fall within the parameters of 'no evidence', it is allowed to see the evidence and in the matter of a grievance of 'no misconduct' to examine the allegations in the context of its being a misconduct.

13. Misconduct is a generic term. What is against the norms and makes a government servant unbecoming is misconduct. Remaining absent willfully and unauthorizedly is certainly misconduct. It is trite law that simultaneous grant of leave regulating the period of absence in the order of dismissal has no effect of condoning the charge and taking off the sting of punishment of dismissal or removal.

14. In the light of the above, it is also trite that whenever allegations are to be examined an isolated reading of the summary or article of allegations is not sufficient, imputation and other annexures are to be accorded a co-joint reading on cumulative basis to derive at the allegations constituting misconduct.

15. The following are the allegations of misconduct against applicant in Annexure-I of the memorandum:

> "Shri Naresh Kumar Batra is habitual of absenting from work without permission or notice thereby causing official work to suffer. He has frequently remained absent from duty unauthorizedly for long periods from 1995 to November 1998. Thus he has violated Rule No.3.1 (ii) and (iii) of Railway Service Conduct Rules which is unbecoming of a Railway Servant."

16. A detailed statement of imputation in support of articles of charge is reproduced as under:

> "1. Shri Naresh Kumar Batra is habitual of unauthorized absence as he absented during the following periods without permission.

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a) From 9-5-96 to 10-5-96

b) From 17-5-96 to 1-9-96

c) From 11-9-96 to 18-9-96, 23-9 and 27/9/96.

d) From 11-10-96.

e) From 15-10-96 to 17-10-96

f) From 24-10-96 to 29-10-96

g) On 1-11-96, 6-11-96

h) From 11-11-96 to 15-11-96

i) From 27-11-96 to 29-11-96

j) On 3-12-96

k) From 9-12-96 to 23-12-96

l) From 26-12-96 to 30-12-96

m) From 8-1-97 to 16-1-97

n) From 7-3-97 to 31-3-97

o) From 1-1-98 to 2-11-98

The absentee shows that Shri Naresh Kumar Batra is a habitual offender and thus has violated Rule No.3-1(ii) and (iii) of Railway Service Conduct Rule."

17. If one has regard to the above, what has been alleged as a misconduct to refer applicant as habitual offender is his habitual absenteeism unauthorizedly without permission, which ultimately affected the official work. The relied upon documents are the attendance register of operating branch for the period 9.5.96 to 2.11.98. The plea of applicant is that whenever he remained absent either before he was sanctioned leave or after he came back leave was

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sanctioned with appropriate entries in the attendance register of the leave of the kind due. The aforesaid fact, as contended by applicant, is not rebutted by respondents and rather in reply to para 4.8 it is stated that there has been an overwriting in all the registers as to the absence period of applicant over the cross marked which signifies absence. The imputation as to this overwriting has been levelled against applicant though indirectly by the EO and the disciplinary as well as appellate authorities by observing that there has been a manipulation in the relevant column of the register as to marking of the leave of the kind due, the aforesaid part of the charge is neither levelled in the imputation nor reasonable opportunity to effectively defend against the charge has been accorded to applicant. This extraneous charge has, in effect, diluted his defence of sanctioned leave, which was not at all considered by the authorities. The consideration of such an extraneous charge when there is no other charge independently establishing the guilt without affording an reasonable opportunity to defend, vitiates the order, as held by the Apex Court in ***Krishnakali Tea Estate v. Akhil Bhartiya Chah Mazdoor Sangh***, (2004) 8 SCC 200=2004 SCC (L&S) 1067.

18. Moreover, if an absence has been sanctioned as leave of the kind due, it cannot be treated as an unauthorized one. Habitual absenteeism from work when read in the context that the imputation in the present case refers to that absenteeism on 15 occasions, which is unauthorized without permission. If post facto permission by

sanction of leave is through a legal fiction is presumed then whatever be the absence, having been regularized, cannot be treated as unauthorized absence, which is the backbone of the charge alleged against applicant. It cannot be observed legally that once the respondents have sanctioned leave to applicant of the kind due for the period as shown in the memorandum, the same cannot be considered to be an unauthorized absence, to be a part of habitual absenteeism against applicant. This aspect of the matter has not at all been taken into consideration either by the disciplinary or by the appellate authorities though cognizance of this fact was taken that casual leave has been sanctioned, yet on the ground that for want of supporting evidence or genuineness of reasons of remaining absent applicant is held guilty of unauthorized absence, cannot be countenanced in law, being illogical as well as irrational. Once respondents have sanctioned leave and made certain entries, which are not established to be manipulated by applicant during the course of enquiry and no such charge has been framed against applicant, respondents are estopped from levelling such charge against him of remaining absent willfully without permission though may be a misconduct, but once the leave is sanctioned, as per the rules, the aforesaid period cannot be reckoned for alleging unauthorized absence or habitual absenteeism against applicant. If there was an intention to hold an enquiry the competent authority would not have sanctioned leave. By sanction of leave it is to be legally presumed that the government servant has been on justifiable genuine grounds has been granted leave and the charge

of remaining absent without permission is obliterated. It becomes leave of the kind due, with permission, duly granted by the competent authority. As such, we have no hesitation to hold that in the case of applicant when all these absences are admitted to be sanctioned as leave of the kind due, no misconduct can be attributed to applicant on this habitual absenteeism. Whether it should have been sanctioned or not, is not the arena to which we travel or in question.

19. Another aspect of the matter which draws our attention is Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968, which obligates upon the appellate authority in case of punishment of dismissal or removal to record a specific finding as to proportionality of punishment. When rule mandates a quasi judicial authority to record a finding on proportionality of punishment, non-recording of such a finding vitiates the order passed by the appellate authority. However, in the matter of proportionality of punishment on application of *wednusbury principle* of reasonableness and as per the decision of the Apex Court in ***Damoh Panna Sagar Rural Bank v. Munna Lal Jain***, 2005 SCC (L&S) 567, in a judicial review on proportionality of punishment, it is deficiency in decision-making process which is to be explored. If in the wisdom of the Court when the punishment shocks judicial conscience, by recording reasons on both sides, i.e., pros and cons and on a fine balance it is within the prerogative of the judicial forum to substitute the punishment, if it is shockingly disproportionate.

20. Applying the aforesaid principle, though we are convinced that applicant has been punished on 'no misconduct', yet keeping in light the longer service of applicant of 24 years with a clean service record and the fact that he has been branded as a habitual absentee on absences which had been regularized, the punishment imposed is not only shockingly disproportionate, but also, arbitrary and not commensurate with the misconduct alleged. We could have remitted back this matter to the appellate authority or could have substituted the punishment ourselves, but the fact that what has been established against applicant is not misconduct, the aforesaid exercise would be an exercise in futility.

21. In the result, for the foregoing reasons, we partly allow this OA and set aside the impugned orders. Respondents are directed to forthwith re-instate applicant in service. He would be entitled to all consequential benefits, including continuity of service.

22. In so far as back wages are concerned, which is at the discretion of the Court, keeping in light the circumstances, we do not find any justification to award back wages to applicant in full. Accordingly he is entitled to 50% of the back wages, which shall be disbursed to him, within a period of two months from the date of receipt of a copy of this order. No costs.

(N.D. Dayal)
Member (A)

(Shanker Raju)
Member (J)

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