RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD.

Original Application No.1348 of 1998.

ALLAHABAD THIS THE 25th DAY OF MAY. 2006.

Hon'ble Mr. K. B.S. Rajan, Member-J
Hon'ble Mr. A.K. Singh, Member-A.

Prem Shankar, aged about 36 years, S/o late Sri Sunder Lal, R/o House No. 629, Chitragupta Colony, Mohalla Mohanganj, Kasganj, District Etah.

.....Applicant.

By Advocate : Sri Rakesh Verma

Versus.

1. Union of India through the General Manager, North Central Railway, Gorakhpur.

2. The Divisional Railway Manager, (Yantrik), North Eastern Railway, Izzatnagar.

3. The Assistant Mechanical Engineer, (Power), North Eastern Railway, Izzatnagar.

.....Respondents.

By Advocate: Mr. A.K. Gaur

O R D E R

BY K.B.S. RAJAN, MEMBER-J

Disciplinary proceedings are the main issue involved in this case.

2. The applicant's version of the case is as under:-

(a) The order dated 17.4.1998 imposing punishment of removal from service as well as appellate order dated 14.9.1998 rejecting the appeal are being challenged.

(b) The applicant had fallen ill seriously on 14.1.1992 and admitted in the Jai Hospital. The applicant continued on bed till 2.11.1997. In the medical certificate, the Doctor certified that the applicant was under his treatment w.e.f. 14.1.1992 till 2.11.1997 and also disclosed the nature of disease.

(c) The applicant reported for duty on 7.11.1997. The applicant was referred to the Chief Medical Superintendent for fitness an endorsement on the duty fit proforma dated 7.11.1997. The authorities prepared Chargesheet dated 17.9.1997 served upon the petitioner on 18.11.1997 through registered post. If had the Chargesheet been issued on 17.9.1997, the respondents would not have sent the petitioner for medical examination on 7.11.1997. The applicant on 18.11.1997 itself submitted reply to the Chargesheet. The respondent started disciplinary proceedings.

(d) Enquiry officer maliciously and with ill motive and under duress, took the consent of the applicant in writing that he shall defend himself in the enquiry and he is not in need of any Defence Assistant. The applicant was not permitted to engage Defence Assistant of his choice as provided under the Rule under the aforesaid conspiracy and thereby he was denied reasonable opportunity of being heard which vitiated the entire departmental enquiry and as such the punishment of removal from service passed on the basis of such enquiry is liable to be quashed.

(e) The enquiry started on 10.1.98 and was not concluded also on the same day without giving any opportunity to the applicant to produce his Defence witnesses. The Enquiry Officer submitted its reply

report dated 8.2.1998 a copy of which was served upon the applicant with a direction to the applicant to make representation against the enquiry report. The applicant submitted his representation dated 10.3.1998 against the enquiry report and stated that during the alleged period of absence from duty, the applicant was actually seriously ill and he could not intimate the administration. However, respondent no. 3 by means of the impugned order dated 17.4.1998 imposed the punishment of the removal from service upon the applicant.

(f) The applicant submitted an appeal to the Divisional Mechanical Engineer (Power), which the Appellate authority on 10.8.1998. The applicant took the stand that the Enquiry Officer has acted partially and did not permit the applicant to engage his defence Assistant under pressure. It was also stated in the aforesaid appeal that the statement of the applicant has not been taken by the Enquiry Officer and the applicant has not been given any opportunity to cross examine the case. The Prosecution witness was not produced nor any document as relied upon in the Chargesheet were produced by the Enquiry Officer during the course of enquiry.

(g) The absence from duty itself is not a misconduct unless it is proved in the enquiry that the absence from duty was willful. The appeal was, however, rejected.

(h) Under Rule 22 of Railway Servants (Discipline & Appeal) Rules 1968, the appellate authority is obliged to consider whether the procedure laid down under the rules, has been complied with, whether the finding of the disciplinary authority are

warranted by the evidence on record and whether the penalty imposed is adequate, inadequate or serve and then it has to pass orders on the appeal. None of the aforesaid conditions of Rule 22 have been complied with the appellate authority and as such the appeal is liable to be set aside and quashed being illegal and violative to departmental rules.

(i) In any case, the applicant cannot be punished with the severe punishment of removal from service. The appellate authority has not afforded any opportunity to the applicant alongwith the applicant demanded personal hearing. There is no finding of the Enquiry Officer or of the Disciplinary Authority or of the appellate authority that the applicant not actually ill.

3. Respondents have contested the OA and their version is as under:

(a) The applicant was absent from duty w.e.f. 14.1.92 without seeking any permission and did not report about his absence upto five years. The applicant in support of his claim attached the medical certificate of a Private Doctor.

(b) To remain absent for more than 5 years without any information is a serious charge and the applicant was provided with all the facilities.

4. Rejoinder reiterating the contentions as raised in the OA had been filed. It has also been contended that there is no rule that in emergent circumstances, the Railway employee cannot have the treatment with a private doctor.

5. Arguments were heard and the documents perused.

6. The charge as contained in the Charge Sheet is as under:

"श्री प्रेम शंकर पुत्र श्री सुन्दर लाल पद हे0 खा0 स्टेशन बरेली सिटी के आधीन कार्यरत है दिनांक 14.1.92 ने अब तक अपने कार्य से अनाधिकृत रूप से लगातार अनुपस्थित चल रहे है उन्होने अपनी अनुपस्थिति की सूचना न तो मंडल कार्यालय को दी और ना ही अपने पर्चे बेकाक को दी। इस प्रकार वह अपने कार्य के प्रति लापरवाह रहे है। तथा कर्तव्यनिष्ठ भी नही रहे जो एक घोर कदाचार है तथा रेल सेवा आचरण नियम 1966 के 3 (1) के उपनियम (2) एवं (3) के उल्लघन के दोषी है।"

7. The reply given by him is as under:

"प्रार्थी के उपर लगाये गये आरोप के सम्बन्ध में निवेदन है कि दि0 13.1.92 की रात्रि में प्रार्थी की हालत गम्भीर रूप से खराब हो गई इस कारण प्रार्थी को जय नार्सिग होम, सोरो गेट कालगंज (हा0) जय प्रकाश अग्रवाल के यहां भर्ती होना पडा डाक्टर के अनुसार प्रार्थी की लम्बी अवधि तक चलना फिरना दुश्वार हो गया था और डाक्टर ने भी चलने फिरने तथा किसी प्रकार का कार्य करने के लिए मना कर दिया था। और इसी अवधि मे प्रार्थी के पिता जी स्वर्गवास हो गया था। इन्ही कारणों से प्रार्थी दिनांक 14.1.1992 को 2.11.97 तक अपने कार्य पर उपस्थित नही हो सका।

अतः प्रार्थी श्रीमान जी से सअनुरोध निवेदन करता है और पूर्ण अपेक्षा रखता है कि आप एक न्याय एवं अधिकारी है अतः प्रार्थी के उपर लगाये गये आरोपो को निरस्त करने की कृपा करेगें यदि प्रशासनिक के दृष्टि में प्रार्थी अगर दोषी है तो प्रार्थी आपको पूर्ण विश्वास दिलाता है कि भविष्य मे इस प्रकार की पुनरावृरित नही होगी।"

8. After the receipt of inquiry report, the response of the applicant is as under:-

"निवेदन इस प्रकार है कि प्रार्थी ने जॉच रिपोर्ट में जो भी बयान दिया है वह यधपि असत्य प्रतीत होते है। परन्तु प्रार्थी शपथपूर्वक विश्वास दिलाता है कि वह सवतः सत्य हैं। इस सम्बन्ध में पुनः अनुरोध है कि प्रार्थी अपनी परिस्थितियों के कारण प्रशासन को सूचित नहीं कर सका, इसके लिए प्रार्थी अपने आपको दोषी महसूस करता है और आनुरोध प्रार्थना करता है कि आप एक न्यायप्रिय अधिकारी है अतः प्रार्थी की गलतियों को क्षमा करते हुए सेवा का एक अवसर अवश्य देगें।

प्रार्थी आपको पूर्ण विश्वास दिलाता है कि भविष्य में इस प्रकार की पुनरावृत्ति नही होगी एवं प्रार्थी पूर्ण निष्ठा एवं लगन से अपने कार्यो के प्रति समर्पित

रहेगा। श्रीमान जी इस कृपा के लिए प्रार्थी का परिवार जीवन पर्यन्त आभारी रहेगा।"

9. Certain important points are to be considered. The charge is one of unauthorized absence for over five years. That the charge sheet was ante dated etc., need not dilate us as mainly what the department was at was that there was a continuous absence of a pretty long period without due notice, much less due permission from the competent authority. The applicant submitted that he was seriously ill and hence he could not, therefore, inform the authorities. Has the applicant acted in a responsible manner is the question. It could not be that he was not at all in a position to move from the bed. First of all, it is not that he had been an in patient in the nursing home from where he had taken the treatment. Secondly, a helper khallasi, who has the facility for treatment at Railway Hospital would normally prefer to have the treatment free of cost from the Railway Hospital, save for certain emergency situation. And once, the stage of emergency was over, he would switch over to Railway hospital, for, one cannot afford to have continuous treatment in a private hospital for years together, that too, when one was not earning. The purpose of narration of these aspects is not to re-appreciate the evidence but to hammer home the point that in departmental proceedings, preponderance of probability is the standard of proof required to have the charges proved (see ***Ajit Kumar Nag v. G.M. (PJ), Indian Oil Corpn. Ltd.,(2005) 7 SCC 764,*** wherein it has been observed, "*In a departmental enquiry, on the other hand,*

penalty can be imposed on the delinquent officer on a finding recorded on the basis of "preponderance of probability".)

10. Again, that the applicant was unwell or had been taking treatment from a private institution was not the charge. The charge was unauthorized absence. Could he not have been able to even inform the department about his physical condition at one stage or the other, i.e. either at the beginning, or at the middle so that the Department could be in a position to make alternate arrangements to have a smooth functioning in the organization? The applicant has realized his mistake and it is on account of the same that he had given an assurance that he would not in future repeat the same mistake.

11. Punishments are for correction of mistake. The clear conceding of the mistake by the applicant even at the time when he represented against the Inquiry Report goes to show that there has been a sense of responsibility in the mind of the applicant. In that event, what should have been the reaction of the disciplinary authority? Should he punish the applicant with that severe penalty of dismissal or removal? Could he be considerate, taking into account the fact that the applicant has realized his mistake? These questions need honest heart searching.

12. Absence with a justified cause is one aspect and absence without any justifiable explanation is another. The former reflects genuineness and the latter callousness. The two

cannot be equated as such. If the absence of the applicant was due to any other factor than the one i.e. serious illness, which aspect has not been disproved by the respondents, perhaps the punishment awarded would be fully justified, as held in the case of ***State of Rajasthan v. Mohd. Ayub Naz,(2006) 1 SCC 589*** wherein the Apex Court has held as under:-

> *The learned Single Judge of the High Court though endorses that the respondent did remain absent for about 3 years and that there was no satisfactory explanation to justify the absence of 3 years, still proceeded to reduce the punishment of removal to compulsory retirement with consequential retiral benefits.*
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> ***9.*** *Absenteeism from office for a prolonged period of time without prior permission by government servants has become a principal cause of indiscipline which has greatly affected various government services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86(3) in the Rajasthan Service Rules which contemplated that if a government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself had admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after rendering of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission made by the respondent would clearly go to show that Rule 86(3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.*

13. The case in hand is not analogous to the above. It is not the case of the respondents that the applicant was well and yet he absented himself. The only fault is that he had absented un-authorizedly. As he had already repented for this mistake and

pleaded mercy, in our opinion, punishment of removal from service is disproportionate. To that extent, the impugned orders requires reconsideration. Beyond this decision, the Tribunal too cannot travel in view of the decision of the Apex Court in the case of ***V. Ramana v. A.P. SRTC,(2005) 7 SCC 338,*** wherein the Apex Court has held as under:

> ***7.*** *Lord Greene said in 1948 in the famous Wednesbury case[4] that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely, the order was contrary to law, or relevant factors were not considered, or irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service[5] (called the CCSU case) summarised the principles of judicial review of administrative action as based upon one or other of the following viz. illegality, procedural irregularity and irrationality. He, however, opined that "proportionality" was a "future p*
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> .....
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> *In view of what has been stated in Wednesbury case[4] the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not the decision.*
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> ***12.*** *To put it differently* ***unless the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed.***

14. In view of the above, the OA is disposed of with a direction to the respondents to reconsider as to the quantum of punishment. The authorities may take into account certain ground realities in this regard viz., that the applicant had got

the treatment from a private doctor, the doctor had issued a valid certificate, that the applicant had sincerely realized his mistake in not informing the authorities, that he had accordingly sought mercy from the authorities, etc., In case they come to a conclusion to vary the extent of penalty, the same may be passed. In case, however, they decide, after reconsideration, to stick to the penalty already imposed, they may inform the applicant accordingly.

MEMBER-A MEMBER-J

GIRISH/-