

Reserved

CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD
BENCH ALLAHABAD

(THIS THE 13¹⁵ DAY OF April, 2011)

Hon'ble Dr.K.B.S. Rajan, Member (J)
Hon'ble Mr. S.N. Shukla, Member (A)

Original Application No.579 of 2004
(U/s 19, Administrative Tribunal Act, 1985)

Ashok Kumar Mishra, aged about 37 years, S/o Shri Shiv Kumar Mishra, Resident of Village - Khanapur, Post Ramganj, District - Sultanpur.

..... Applicant

By Advocate : Shri M.K.Upadhyay

Versus

1. Union of India, through the General Manager, Baroda House, Northern Railway, New Delhi.
2. Deputy Chief Commercial Manager (C), Northern Railway Station Building, Varanasi.
3. Chief Claim Officer, Northern Railway, N.D.C.R. Building, New Delhi.

..... Respondents

By Advocate: Shri P. Mathur

ORDER

(Delivered by Hon. Dr. K. B. S. Rajan, Member-J)

1. The Case of the applicant is that he was functioning in the Clerk of respondents' organization. He was issued with a chare-sheet on 13.01.2001 for unauthorized absence from 04.05.2001. Sometime, in November 2001 to January 2002, the applicant sent his medical leave application through telegrams. An inquiry was conduced and the Inquiry Officer had given his report on 17.12.2002 and the applicant was removed from service by the order of Disciplinary Authority dated 07.04.2003. Appeal filed by the applicant was unsuccessful when the Appellate Authority rejected his appeal.

2. The grounds adduced in the Original Application was that Rule 9 (17) and Rule 9 (25) of the Railway Servant (Disciplinary and Appeal), Rules 1968 have not been followed. In addition, Rule 22 was not adhered to by the Appellate Authority.

3. Respondents have contested the O.A., they have stated that this is not the first time that the applicant had been charged with unauthorized absence. Earlier, the applicant was

absconding from duty for 722 days and he was initially served with a major charge-sheet. An Inquiry Officer was nominated. The applicant was asked to nominate defence assistance, if so desired. The applicant did not cooperate, as a result of it, *ex parte* inquiry was conducted and the applicant was removed from service by the Disciplinary Authority. The applicant preferred an Appeal against the order of Disciplinary Authority and the Appellate Authority took a lenient view and reinstated the applicant as Senior Clerk for a period of six months during which the performance of the applicant was to be closely watched so that in the event of satisfactory performance his services were to be regularized. After joining on 09.07.1996, the applicant had in all, worked just for nine full days and three half days. As such, he was once again issued with a charge-sheet on 20.05.1997, which was duly delivered to the applicant. Adopting the earlier non cooperative method, the applicant failed to attend the inquiry and as such once again *ex parte* inquiry took place. Result, the penalty of removal from service was imposed. Once again on appeal, the Appellate Authority took a lenient view and on humanitarian ground this time, he had reduced the penalty from removal to reduction to a lower rank in the post of clerk in the grade of 3050-

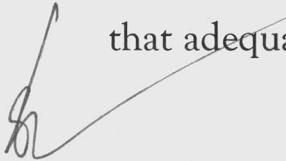


4590 and fixing the pay at Rs.3050 for three years. The usual watching of performance continued this time also.

4. This time as well, the applicant was thoroughly irregular in his attendance and during the period from December 2000 to May 2001 he had attended the Office only for 71 days. When a communication was sent to him through special messenger on 11.07.2001 asking him to resume duties, he refused to receive the same and verbally informed the messenger that he would attend the office; but did not.

5. The above act of the applicant forced the respondents to proceed against the applicant by issuing a charge sheet for major penalty. This time again on his failure to attend the inquiry, the inquiry was completed *ex parte* and Disciplinary Authority has removed the applicant from service vide order dated 07.04.2003. The applicant filed his Appeal but this time the Appellate Authority rejected the Appeal.

6. As regards, the grounds of the application especially non-adherence to the respective Rules, the respondents have stated that adequate opportunity was given to the applicant and yet since



he had not availed of the same, penalty of removal from service was rightly passed.

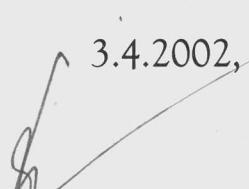
7. Applicant has filed his Rejoinder Affidavit, reiterating his contentions as raised in the O.A.

8. Original record of Disciplinary proceeding was called for and the same was made available. The charge sheet issued to the applicant reads as under:-

“श्री अशोक कुमार मिश्रा, लिपिक को प्राप्ति एवं प्रेषक अनुभाग में माह दिसम्बर 2000 को कार्य पर नियुक्ति किया गया। दिनांक 04.05.2001 को अपराह्न 14:00 बजे से ये बिना किसी पूर्व सूचना के कार्यालय से अनुपस्थित हो गये और कार्य पर नहीं लौटे। इन्हें कार्यालय में उपस्थित होने के सम्बन्ध में एक सूचना पत्र दिनांक 11-7-2001 को स्टाफ द्वारा इनके घर के पते पर भेजा गया जिसे प्राप्त करने के उपरान्त ये कार्यालय में दिनांक 16.07.2001 को उपस्थित होने के लिए कहा। परन्तु ये न तो कार्यालय हुए ओर न ही कोई सूचना भिजवाया।

श्री मिश्रा का उपरोक्त आचरण कार्य के प्रति घोर लापरवाही का घोतक है। और ऐसा करके इन्होने रेल सेवा (आचरण) नियम 1966 की धारा 3.1 (I, II एवं III) का स्पष्ट उल्लंघन किया है।”

9. The applicant had been sending telegrams over telegrams and by letter dated 03.04.2002 he had informed the authority in response to letter dated 21.03.2002 that he had been keeping unwell. Similarly, on 19.4.2002, to another letter dated 3.4.2002, he had informed about his illness.



10. Since, the applicant had not participated in the inquiry. The Inquiry Authority conducted the inquiry. The inquiry officer has given the report *inter alia* as hereunder:-

“विषय:- श्री अशोक कुमार मिश्रा, लिपिक को जारी किया गया
मानक फार्म-5 दिनांक 13.8.2001

प्रस्तावना:-

श्री अशोक कुमार मिश्रा, लिपिक, प्राप्ति एवं प्रेषक अनुभाग जो कि
दिनांक 4.5.2001 से बिना किसी पूर्व सूचना के डूयटी से हो गये इस
सम्बन्ध में इन्हें दिनांक 13.08.2001 को मानक फार्म-5 जारी किया
गया।

अनुशासनिक प्रधिकारी उप मु0बा0प्र0/दावा ने केस में जाँच
हेतु तत्कालीन स0बा0प्र0/दावा श्री एल0पी0 सिंह को जांच अधिकारी
नियुक्त करते हुए अपनी रिपोर्ट शीघ्र प्रस्तुत करने का आदेश दिया।

जाँच अधिकारी

1. जांच अधिकारी द्वारा केस में जाँच की पहली तिथि दिनांक 27.11.01 निर्धारित की गयी जिसकी सूचना कर्मचारी को पंजीकृत डाक द्वारा उसके निवास स्थान के पाते पद दिया गया जिसकी पावती कर्मचारी द्वारा प्राप्त की गयी हैं पुनः जांच की तिथि दिनांक 20.12.2001, 28.1.2002, 22.02.2002 एवं 20.03.2002 निश्चित किया गया। परन्तु आरोपी जांच कार्यवाही में उपस्थित नहीं हुआ।
2. उपरोक्त सम्बन्ध में कर्मचारी ने टेलीग्राम द्वारा सूचना दिया कि वह बीमार होने के कारण जांच में उपस्थित नहीं हो सकता।
3. जांच अधिकारी श्री एलपी0सिंह, स0बा0प्र0/दावा का स्थानान्तर फिरोजाबाद मंडल पर हो गया। तदुपरान्त अनुशासनिक प्रधिकारी द्वारा अधोहस्ताक्षरी को जाँच अधिकारी नियुक्त किया गया।
4. जांच कार्यवाही की तिथि दिनांक 3.4.2002 को पुनः निर्धारित किया गया। श्री मिश्रा इस तिथि को कार्यालय में उपस्थित हुए तथा उन्होंने एक प्रार्थना पत्र प्रस्तुत किया कि उनका इलाज प्राईवेट चिकित्सक के अधीन चल रहा है अतः उन्हें 10 दिन बाद अगली जांच कार्यवाही में उपस्थित होने का समय दिया जाये। कर्मचारी के अनुरोध पर अगली जांच की तिथि 19.04.2002 निर्धारित की गयी परन्तु श्री मिश्रा जांच कार्यवाही में उपस्थित नहीं हुए।
5. इस प्रकार क्रमशः जांच की तिथि 20.05.02, 18.06.02, 8.7.02 एवं 7.8.02 निर्धारित की गयी। इसकी सूचना कर्मचारी को

प्राप्त होने के बाद भी वह जांच कार्यवाही में उपस्थित नहीं हुआ। और न ही अपनी बीमारी के संबंध में चिकित्सा प्रमाण पत्र प्रस्तुत किया।

6. जांच की अगली तिथि दिनांक 14.11.02 एवं 10.12.02 निर्धारित करते हुए आरोपी श्री मिश्रा को सूचित किया गया। कवह अपनी बीमारी के सम्बन्धमें रेलवे चिकित्सक का आवश्यक प्रमाण पत्र प्रस्तुत करते हुए जांच कार्यवाही में उपस्थित होते। परन्तु वह पत्र प्राप्त करने के उपरान्त न तो जांच कार्यवाही में उपस्थित हुआ और न ही अपनी बीमारी के सम्बन्ध में रेलवे चिकित्सक का प्रमाण पत्र ही प्रस्तुत किया।

मुख्य तथ्य

श्री मिश्रा को उसके आरोप के सम्बन्ध में जांच हेतु सभी तरह के अवसर प्रदान किये गये और उसे प्रशासन की आरे से अपना बचाव प्रस्तुत करने के लिए काफी समय दिया गया। इसके बावजूद भी वह न तो अपनी बीमारी का संबंध में कोई वांछित प्रमाण पत्र प्रस्तुत किया और न ही अपने ड्यूटी के प्रति रुची दिखलयी। प्रशासन के प्रति उसका व्यवहार असहयोगात्मक रहा।

निष्कर्ष

प्रकरण से सम्बन्धित तथ्यों एवं सभी साक्ष्यों का अवलोकन करने के उपरान्त कर्मचारी के ऊपर लगाये गये आरोप सिद्ध होते हैं।

11. A copy of the inquiry report was sent to the applicant, which was acknowledged by the applicant on 07.12.2002. The Disciplinary Authority considered the Inquiry report and penalty of removal from service was passed on 07.04.2003. Appeal filed by the applicant was this time rejected.

12. From the facts of the case, certainly it would appear that the applicant has been a regular absentee and despite lenient views taken in the past in two disciplinary proceedings, he was not showing any improvement. Perhaps, this would prompt one to

hold that the penalty of removal from service is justified. However, while conducting inquiry proceedings, the mandatory provisions as contained in the Rules cannot be overlooked and they have to be necessary followed. Again, even if it is *ex parte* all care must be taken to follow the Rules strictly. Each day's proceedings should be communicated to the delinquent official even if the proceedings were *ex parte*. The purpose for such communication is that the applicant could join the proceedings at any time he desires. The respondents have in this regard issued necessary instructions and the same is as under:-

"How to hold ex-partie inquiry - For holding an *ex parte* inquiry the articles of charges must be properly served on the Railway employee either in person, or as per registered post, or by pasting at the working place, as the case may be. If the employee does not give the defence despite being served with the memorandum of charges; or after having given the defence, does not turn up, or having turned up, does not sit in the inquiry then the *ex parte* inquiry can be held. An *ex parte* inquiry demands all the formalities of the normal inquiry e.g. (a) if the inquiry must be appointed unless the disciplinary authority may decide to inquire himself; (b) he must fix the date and place for inquiry (c) he must hold the inquiry and call all the witnesses and call all the witnesses and documents as cited in the memorandum of charges; (d) get the documents duly proved and record the evidence of witnesses so as to prove the charge (e) where the delinquent had not turned up in the inquiry and adjournment has been given with a view to hold *ex parte* inquiry, if he does not turn up on the next occasion, then notice of intention to hold *ex parte* inquiry should be given; (f) findings of inquiry must be duly drawn.



Ex parte procedure - Ex parte proceeding does not mean than all the witnesses should be recorded strictly as per Evidence Act. This proceeding means that Inquiry Officer can proceed on the basis of the material available to him in absence of delinquent. If at any stage the Inquiry Officer comes to the conclusion that further inquiry is necessary, it is open to him to do so. But his discretion cannot be fettered by the Evidence Act, Article 311(2) principles cannot be interpreted to reduce the principles of natural justice to a ration ad absurdum. If the delinquent waives his right of hearing, he has to blame himself. He cannot be allowed, after the completion of enquiry, to turn round and say that the principles of natural justice have been infringed since no oral inquiry was held. He cannot be allowed to pay fast and loose with the Inquiry Officer.

Where he did not appear in inquiry which was decided without getting his written brief, no fault can be found on this Court. The question of filing a written brief in such a case does not arise and there is no need to ask the delinquent to file a written brief.

[E(D&A) 69 RG - 20 of 18.6.69 (SE 189/69/SC 152/69)]

However, the record of day to day proceedings of the enquiry and notices of hearing should be sent to the delinquent regularly, this enables him to join proceedings at any stage.

[E(D&A) 90 RG 6-4 of 18-4-90] "

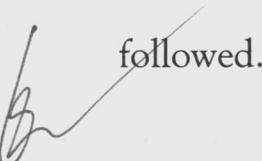
13. A perusal of the inquiry report shows that the Inquiry Officer did not consider any of the relied upon documents, much less examined the witnesses which is evident from the fact that there has been no discussion about the relied upon documents (Attendance Register 2001 letter dated 11.7.01) nor is there any reference to the two witnesses mentioned in Annexure A-4 to the

charge sheet having been examined. It has been held by the Apex Court in the case of *State of U.P. v. Saroj Kumar Sinha, (2010) 2 SCC 772*

27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry *ex parte*. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

Thus, the prosecution's obligation to prove the charges cannot be waived in an *ex parte* proceeding.

14. The above serious lacuna cannot be rectified save by continuing the Disciplinary proceedings from the stage of examination of prosecution witnesses and providing opportunity to the applicant for cross examining them. Thus, the applicant is right when he contended in his O.A. that the mandatory provisions of the Disciplinary Proceedings Rules have not been followed.



15. As regards, the Appellate Authority's responsibility in dealing with an Appeal, the Apex Court in the following two cases clearly held that a duty is cast upon the Appellate Authority to ensure that the proceedings have been conducted as prescribed in the Rules:-

(1) *Ram Chander v. Union of India*, (1986) 3 SCC 103 ,

"4. The duty to give reasons is an incident of the judicial process. So, in *R.P. Bhatt v. Union of India* (1986) 2 SCC 651 this Court, in somewhat similar circumstances, interpreting Rule 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 which provision is in *pari materia* with Rule 22(2) of the Railway Servants (Discipline and Appeal) Rules, 1968, observed:

It is clear upon the terms of Rule 27(2) that the appellate authority is required to consider (1) whether the procedure laid down in the rules has been complied with; and if not, whether such non-compliance has resulted in violation of any of the provisions of the Constitution of India or in failure of justice : (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or remit back the case to the authority which imposed the same.

It was held that the word consider in Rule 27(2) of the Rules implied due application of mind. The Court emphasized that the appellate authority discharging quasi-judicial functions in accordance with natural justice must give reasons for its decision. There was in that case, as here, no indication in the impugned order that the Director General, Border Road Organisation, New Delhi was satisfied as to the aforesaid requirements. The Court observed that he had not recorded any finding on the crucial question as to whether the findings



of the disciplinary authority were warranted by the evidence on record."

(2) *Narinder Mohan Arya v. United India Insurance Co. Ltd.*, (2006) 4 SCC 713

37. Consideration of appeals .(1) In case of an appeal against an order of suspension, the Appellate Authority shall consider whether in the light of the provisions of Rule 20 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the order accordingly.

(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 23, the Appellate Authority shall consider:

(a) whether the procedure prescribed in these Rules has been complied with and if not, whether such non-compliance has resulted in failure of justice;

(b) whether the findings are justified; and

(c) whether the penalty imposed is excessive, adequate or inadequate, and pass orders:

I. setting aside, reducing, confirming or enhancing the penalty; or II. remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case. * * *

32. The Appellate Authority, therefore, while disposing of the appeal is required to apply his mind with regard to the factors enumerated in sub-rule (2) of Rule 37 of the Rules. He was required to show that he applied his mind to the relevant facts. He could not have without expressing his mind simply ignored the same.

33. An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regards the

compliance with the requirements of law while exercising his jurisdiction under Rule 37 of the Rules. "

16. The above requirement is also lacking in this case.

17. The applicant, who perhaps may not deserve the sympathy which the discretionary power of the Appellate Authority enjoys as he had been shown earlier. But, he has certainly the right to demand a proper inquiry and this is what exactly the applicant has claimed through this O.A.. The Rules and the Apex Court decision as elaborated above do make the case of the applicant stronger.

18. In view of the above, the O.A. has to succeed. The order of the Disciplinary Authority vide Annexure A-1 dated 7.4.2003 and of the Appellate Authority 01.09.2003 are hereby quashed and set aside. The respondents shall proceed from the stage of issue of notice to the applicant to appear before the inquiry officer and the prosecution case may be first dealt with, where-after the applicant's defence may be heard and the finding rendered by the Inquiry Officer. The same shall be communicated to the applicant and the Disciplinary Authority may take a

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judicious decision on the basis of the finding as well as the representation of the applicant against the Inquiry report.

19. The interregnum period shall be regularized in accordance with the provisions of Rule ~~11~~(4) of the Railway

Servants (Discipline and Appeal) Rules, ¹⁹⁶⁸ 1868.. No costs.

~~Cancelled and
order dated 4.11.11.~~

Ans
4.11.11.

20. Before parting with the case, we cannot control our temptation but to remind ourselves of the observation made by the Apex Court in the case of *Lakshmi Ram Bhuyan v. Hari Prasad Bhuyan*, (2003) 1 SCC 197,, which is as under:-

An inadvertent error emanating from non-adherence to rules of procedure prolongs the life of litigation and gives rise to avoidable complexities. The present one is a typical example wherein a stitch in time would have saved nine.


(S.N. Shukla)

Member-A


(Dr. K.B.S. Rajan)

Member-J

Sushil