

Reserved

**CENTRAL ADMINISTRATIVE TRIBUNAL ALLAHABAD
BENCH
ALLAHABAD**

ORIGINAL APPLICATION NO. 1240/2005

ALLAHABAD this the 4th day of Nov. 2011

Present:

HON'BLE MR. JUSTICE S.C. SHARMA, MEMBER- J
HON'BLE MR. D.C. LAKHA, MEMBER -A

Ashraf Khan, aged about 34 years D/o Musa Khan,
Presently posted as Diesel Cleaner, Diesel Loco Shed,
North Central Railway, Jhansi, U.P.
.....Applicant

V E R S U S

1. Union of India through General Manager, North Central Railway, Allahabad.
2. Divisional Railway Manager, Jhansi.
3. A.D.R.M., North Central Railway, Jhansi.
4. Divisional Commercial Manager, North Central Railway, Jhansi.
5. Senior Divisional Commercial Manager, North Central Railway, Jhansi.
.....Respondents

Present for the Applicant: Jaswant Singh brief holder
of Shri S. Narayan

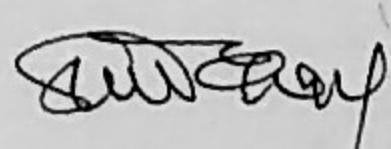
Present for the Respondents: Sri Bashist Tewari.

O R D E R

(Delivered by Hon'ble Mr. Justice S.C. Sharma, J.M.)

The instant O.A. has been instituted for the following
relief:

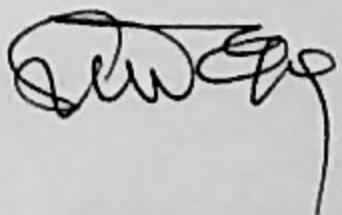
"To set aside the order of Disciplinary Authority, Appellate Authority and Revision Authority (Annexure No. 1,2 and 3) and applicant be put to his original post of T.C. alongwith all



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consequential benefit of pay, promotion and seniority from the date he was removed from service."

2. Pleadings of the parties may be summarized as follows. It has been alleged by the applicant that he was appointed initially under the Sports quota on 27.4.93 in the grade of 2550-3200 (RSRP), a class IV employee and in due course he was promoted in Group C and posted as T.C. w.e.f. 1.8.2002. The respondent served a Memorandum of charge sheet dated 29.10.2003 with the allegations of unauthorized absence on 20.9.2003 and 7.10.2003, served on 29.10.2003. A preliminary enquiry was conducted on 7.1.2004 and the applicant was found guilty of the charges leveled against him. Thereafter, the oral evidence was recorded of Sri R.K. Tewari, Head T.C. without affording any opportunity to the applicant to cross examine the witness. Thereafter a show cause notice dated 10.5.2004 was served alongwith enquiry report dated 7.5.2004. A reply was submitted of the notice dated 15.5.2004, but the disciplinary authority passed an order dated 25.4.2004 for removal of the applicant from service. Against the order of removal, a representation was submitted narrating all the facts and that no opportunity was provided to cross examine the witness and produce the defence witnesses. That the applicant was unable to attend the enquiry due to illness, but the request of the applicant was not entertained by the enquiry officer and exparte proceedings were initiated. Application was moved for setting aside exparte order. Thereafter, the appeal was submitted to the appellate authority on



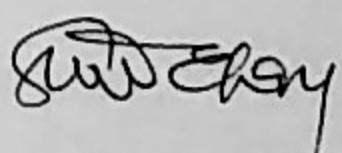
2.6.2004. But the appeal was rejected vide order dated 25.6.2004. Thereafter, a revision was filed on 17.8.2004 and the revisional authority A.D.R.M. modified the order of appellate authority and reduced the punishment of removal from service to that of reversion in the initial grade of Rs. 2550-3200 fixing the pay at Rs. 2720/- for a period of 11 years with cumulative effect. That the appellate authority as well as the revisional authority failed to consider the circumstances due to which the applicant could not attend the enquiry proceedings and the applicant was denied reasonable opportunity to defend his case and produce the defence. Wrong interpretation was drawn by the enquiry officer regarding the signature of the applicant on muster roll on the disputed days. Even the modified order of punishment dated 6.10.2004 was disproportionate to the gravity of the offence. The appellate authority has not recorded any finding regarding the forged signature of the applicant. Moreover, the salary was paid to the applicant of the disputed days regarding which it has been alleged that the applicant was absent. This fact itself is sufficient to establish that the applicant was present. That all the facts were not taken into consideration by the Enquiry officer, the appellate authority and the revisional authority, hence the O.A.

3. The respondents contested the case and filed Counter reply and denied all the allegations made in the O.A. It has further been alleged that the work and conduct of the applicant had never been found satisfactory by the superior officers. That a charge sheet was

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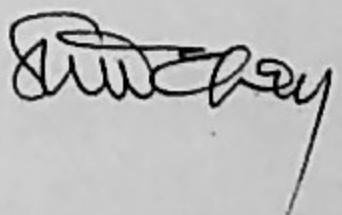
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served on the applicant of major penalty for committing gross misconduct for interpolating and manipulating the official record by inserting his name in the Head T.C office Diary between Sl. No. 14 and 15 and later on signed muster roll on back dates. That the applicant absented himself unauthorizedly and also committed gross misconduct of service rules. Full opportunity was provided by the Enquiry Officer to the applicant to defend himself during the enquiry proceedings. But the applicant deliberately and intentionally did not appear before the E.O. and sought time to file his reply. Several notices were sent to the applicant to remain present in the enquiry proceedings and he remained absent, hence enquiry officer proceeded ex parte as there was no other option. On 15.12.23003, the applicant appeared and desired to nominate A.R.E. (Assistant Railway Employee) for his defence. Thereafter also adjournment was sought by the applicant on the pretext that A.R.E. is not available and he continued to seek time. But inspite of providing several opportunities, the applicant failed to appear before the enquiry officer. After receipt of enquiry report, the disciplinary authority passed very detailed, reasoned and speaking order after giving full opportunity to the applicant to forward his defence and D.A. considered all the facts and thereafter passed the order of punishment. That the penalty imposed by the D.A. was commensurate with the gravity of the charges leveled against him. But the revisional authority, taking into account the young age of the applicant, that a long career is ahead provided him an



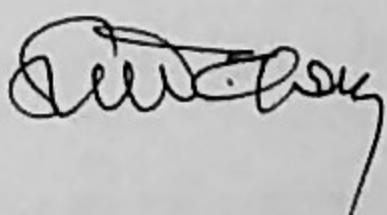
opportunity to improve his conduct, although upheld the charges leveled against the applicant, but a lenient view was taken by modifying the order of removal to that of reversion in D grade and fixing his pay at Rs. 2720/- for a period of 11 years with cumulative effect. Opportunities were provided to the applicant to put his defence but the defence was not produced. The allegations made against the applicant were of serious nature of interpolating the muster roll by putting his signature over the cross (X) marked on absent dates and regarding it a charge sheet was served. Thus the record has also been tampered with by the applicant. Sufficient opportunity was available to the applicant to defend himself but intentionally he failed to appear. It is wrong to allege that sufficient opportunity was not provided to the applicant to defend himself. The O.A. lacks merit and is liable to be dismissed.

4 We have heard Shri Jaswant Singh brief holder of Shri Shyamal Narain learned counsel for the applicant and Shri Bashist Tewari, learned counsel for the respondents. However, a request was also made on behalf of the parties for filing written statement alongwith citations within a period of 10 days. Arguments were concluded on 10.10.2011. Written arguments ought to have been submitted by both the parties latest by 25th October, 2011. The written submissions were filed by Shri Bashist Ttewari Advocate for the respondents on 17.10.2011. On 25.10.2011 a request was made by Shri Jaswant Singh Advocate to submit the written arguments after Deepawali holidays. But even upto 31.10.2011 written



arguments were not submitted, hence whatever has been argued by the learned counsel for the parties, has been taken into consideration.

5. It is admitted that w.e.f. 1.8.202 the applicant had been working on a group C post and working as T.C. That the applicant was posted at Jhansi Railway Station under the control of respondent No.2. It has been alleged by the respondents that the applicant remained absent on 20.9.2003 and 7.10.2003 and with these allegations a charge sheet was served on the applicant for unauthorized absence. The allegations were also made against the applicant for interpolating his signature on a cross (X) mark in the muster roll of these dates and under these circumstances, the applicant was not only absent unauthorizedly on these dates but he manipulated and interpolated the railway records which was taken seriously. Admittedly, an enquiry was conducted by the respondents. It has been alleged by the respondents that sufficient opportunity was provided to the applicant to participate in the enquiry and assistance was also provided in order to assist during the enquiry. But inspite of providing several opportunities, the applicant failed to participate in the enquiry proceedings and after providing several opportunities to the applicant to appear there was no option for the E.O. except proceeding ex parte and hence the enquiry was conducted ex parte and the report was submitted holding that the applicant guilty of the charges framed against him. The disciplinary authority also served a show cause notice to the applicant alongwith a copy of the enquiry



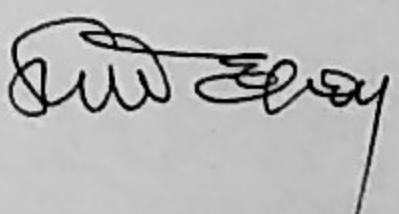
report on 10.5.2004. After receipt of the reply of the applicant and after considering all the facts and circumstances of the case, the disciplinary authority passed the order of punishment of removal from service.

6. It has mainly been argued by the learned counsel for the applicant that sufficient opportunity was not provided to the applicant during the enquiry proceedings to defend himself and the enquiry was conducted ex parte. That no opportunity was provided to the applicant to produce his defence evidence and whatever evidence was recorded, it was manipulated evidence. That firstly, the disciplinary authority, after considering the facts of the case awarded the disproportionate order of punishment. The allegations against the applicant was that he was on unauthorized absence on 20.9.2003 and 7.10.2003 and some lesser punishment could have been awarded of this allegation. But without considering the gravity of the act, the respondent disciplinary authority passed the order of removal of the applicant from service. It was most unjust on the part of the respondents to award disproportionate punishment for a mere light allegation against the applicant. It has also been alleged by the learned counsel for the applicant that the salary was paid to the applicant of these two days i.e. 20.9.2003 and 7.10.2003, hence it cannot be said that the applicant was absent on these two dates. It has also been argued by the learned counsel for the applicant that the enquiry was conducted malafidely at the initiative of Shri Ajit Saxena, Senior D.C.M. and entire proceedings including the order of

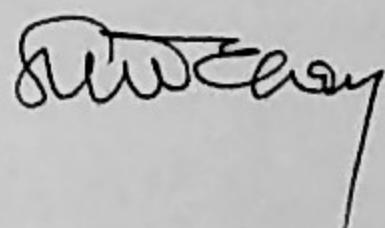
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punishment against the applicant was due to prejudice of Shri Ajit Saxena.

7. It is the established position of law that the judicial forums in a writ petition or the O.A. cannot sit as appellate authority over the enquiry report in order to decide the truthfulness and veracity of the allegations made against the delinquent employee. The scope for interference for judicial forum is very limited and it can only look into whether sufficient and reasonable opportunity was provided to the official concerned during the enquiry and whether all the facts were taken into consideration. Otherwise, the enquiry report cannot be quashed or set aside holding that the charges framed against the charged officer have been proved. We are concerned about the procedural lapses committed by the respondents during the enquiry. As is evident from the facts of the case that the enquiry was conducted by the respondent disciplinary authority exparte. It has been alleged by the applicant that opportunity was provided to him ^{not} ^{to} to cross examine the witness and to produce the defence. Whereas the learned counsel for the respondents argued that sufficient opportunity was provided to the applicant to cross examine the witness but the applicant was not cooperating during the enquiry, irrespective of the fact that sufficient opportunity was provided to him to defend himself but his conduct was not of participating into the enquiry. It is an admitted fact that the charge sheet was served on the applicant on 29.10.2003. It has been alleged by the respondents that the enquiry commenced w.e.f. 15.12.2003 and on these dates the



applicant appeared and expressed the desire to nominate A.R.E. for his defence. That E.O. provided the A.R.E. to the applicant in order to defend him during the enquiry proceedings and thereafter the next date was fixed 20.12.2003, but on this date the applicant sought time on the ground that A.R.E. is not available. Thereafter, on the next date 7.1.2004, the applicant alongwith his A.R.E. appeared and inspected the original record/document and again sought time to submit his reply and list of witnesses. Afterwards, on 16.1.2004, the applicant absented himself and did not appear and only A.R.E. appeared. The enquiry was adjourned on that date and a notice was served on the applicant informing him about the next date i.e. 23.2.2004. But on this adjourned date neither the applicant, nor his A.R.E. appeared in the enquiry and no intimation was received from them of remaining absent hence there was no option for the E.O. except to proceed with the enquiry. The statement of witness was recorded. As the applicant was absent during the enquiry, hence no defence was produced by him and enquiry was concluded ex parte. Documents have been filed on behalf of the respondents to show that proper intimation was given to the applicant about the dates fixed in the enquiry and it is evident from the perusal of these documents that due intimation was given to the applicant about the next date fixed in the enquiry proceedings. As the applicant failed to participate in the enquiry, hence it cannot be said that sufficient opportunity was not provided to the applicant to produce witness and cross examine the witnesses. We disagree with the argument of the learned counsel for



the applicant that sufficient opportunity was not provided to the applicant.

8. It has also been argued by the learned counsel for the applicant that allegation against the applicant was only of unauthorized absence on 20.9.2003 and 7.10.2003. It has also been argued that this allegation also stands misproved on the ground that salary was paid to the applicant of these days. Whereas the punishment was awarded against the applicant by the disciplinary authority of removal from service merely due to the charge of unauthorized absence of two days and that this punishment by the disciplinary authority was disproportionate to the charge leveled against the applicant. Firstly, it will be material to state that the allegation against the applicant was not only of unauthorized absence on 20.9.2003 and 7.10.2003 but there was allegation of manipulation and interpolation in the railway record also. Regarding unauthorized absence of these two days leave could have been deducted or he could have been treated as absent without leave, but as there was allegation of interpolation and manipulation in the railway record, hence the punishment awarded is in proportionate to the allegations made against the applicant. And even the modified order of punishment by the revisional authority is in proportion to the act of misconduct of the applicant. It has been alleged by the learned counsel for the respondent that the applicant was absent on these two days and cross (X) marked was put up in the Register to show him absent but later on the applicant put his signature over the cross (X) mark and he tried to show himself

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present on these two days. From other records, it is evident that the applicant was absent on these two dates. So far as the order of punishment being disproportionate is concerned, the learned counsel for the respondents cited the judgment of Hon. Supreme Court reported in (1989) 10, A.T.C. at page 30, Union of India vs. Parma Nanda. The Hon. Apex court held as under:

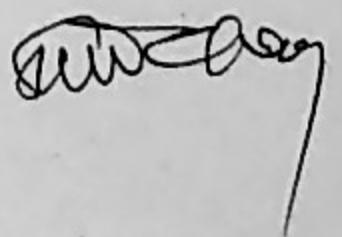
The jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Inquiry Officer or competent authority where they are not arbitrary or utterly perverse. The power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of legislature or rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter for the Tribunal to concern itself with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter."

Hence in view of the judgment of the Hon. Apex court, if the penalty can lawfully be imposed and is imposed on proved misconduct, the Tribunal has no power to substitute its own discretion for that of the authority. The adequacy of penalty unless it is mala fide is certainly not a matter for the Tribunal to concern itself with. We will have to consider the matter of malafide later on as there are allegations of malafide. But in view of the judgment of Hon. Apex court, this Tribunal is not competent to substitute its own finding regarding the

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punishment. As there was allegation of manipulation and interpolation, against the applicant in the railway records, hence it cannot be said that the punishment awarded against the applicant is disproportionate to the charges framed against him. And moreover this Tribunal is not competent to substitute its finding. Under these circumstances, it cannot be said that the respondents awarded disproportionate punishment which is not in proportion to the allegations made against him.

9. It has been alleged in paragraph 4(18) that "so far theory of the sickness which has been discarded by the disciplinary authority and appellate authority, the considerable point is that despite the applicant was sick even though he was discharged from Railway Hospital on the influence of Sri Ajit Saxena, Sr. D.C.M. who had personal prejudice against the applicant and the applicant was charged sheeted for unauthorized absence for the period from 23.1.2004 to 10.2.2004 by charge sheet dated 17.02.2004 but the applicant was later on exonerated from the charge." In the subsequent paragraphs of the O.A., there are allegations of malafide of Mr. Ajit Saxena, Sr. D.C.M. and alleged that he was so personally prejudiced and interested to remove the applicant that he influenced the disciplinary authority, appellate authority as well as revisional authority to award the punishment against the applicant. That the revisional authority has not taken into consideration nature of allegations against the applicant. It has been argued by the learned counsel for the respondents that if an allegation has been made of malafide against



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an officer/employee, then such an employee or officer must be impleaded as a respondent by name and notice must be issued to such an officer so that he may explain the nature of allegations made against him by the applicant. In the present case there are allegations of malafide against Ajit Saxena Sr. D.C.M. and it has also been alleged that he was prejudiced and interested in removal of the applicant from service and all the proceedings were conducted at the initiative of Shri Ajit Saxena. But Shri Ajit Saxena has not been impleaded as respondent in this O.A. and no opportunity was provided to him to explain the allegations made against him in the O.A. In this connection, the learned counsel for the respondents cited a judgment of Hon. Supreme Court reported in JT 2009 (10) SC, 472 Airports Authority of India vs. Rajeev Ratan Pandey and others. And in this connection para 5 will be relevant which is reproduced below:

"5. In the case of State of U.P. vs. Gobardhan Lal (JT 2004 (5) SC 454: (2004) 11 SCC 402), while dealing with a matter of transfer, this Court while dealing with a matter of transfer, this Court observed that allegations of mala-fides must inspire confidence of the Court and ought not to be entertained on the mere asking of it or on consideration borne out of conjunctures or surmises and except for strong and convincing reasons, no interference would ordinarily be made with an order of transfer. That the burden of proving malafide is on a person leveling such allegations and the burden is heavy, admits of no legal ambiguity. Mere assertion or bald statement is not enough to discharge the heavy burden that the law imposes upon the person leveling allegations, of malafides; it must be supported by requisite materials."

10. Hence, in view of the judgment of Hon. Apex court mere ^{inferred} allegations of malafide is not sufficient to ~~interfere~~ the element of malafide and it must not be entertained on mere asking. That burden

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of proof of malafide is on the person leveling such allegations and mere allegation is not sufficient to discharge the heavy burden that law imposed upon such a person. Under these circumstances although the allegation has been made of malafide against Shri Ajit Saxena, but no evidence has been given to prove this fact. As we have stated above, that Shri Ajit Saxena has not been impleaded in the O.A. to rebut the allegations made against him, whereas he ought to have been arrayed as a respondent. In this connection the learned counsel for the respondents also cited the case reported in 1992 Supp (1) SCC, 222, State of Bihar and another vs. P.P. Sharma, IAS and another. In this judgment also the Hon. Apex court held that malafide must be clearly admitted or proved. Mere assertion or bald statement is not enough. Whereas in the present case only the allegation has been made against Shri Ajit Saxena Sr. D.C.M. ^{but in order} ~~and~~ to prove malafide, no cogent evidence has been produced to prove it. Moreover, Mr. Ajit Saxena has not been arrayed as respondent in this O.A. to rebut the allegations made against him and it cannot be said that all the proceedings which were initiated against the applicant were due to malafide of Mr. Ajit Saxena.

11. It has been argued by the learned counsel for the respondents that admittedly the disciplinary authority awarded the punishment of removal from service on 24.5.2004. Annexure -1 is the copy of order of punishment. He further argued that the appeal was preferred by the applicant against the order of punishment before the ~~appellate~~ authority and even the appellate authority dismissed the appeal by

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reasoned and speaking order Annexure A-2 on 25.6.2004 and the appeal was dismissed. The orders passed by the disciplinary authority as well as by the appellate authority were ~~not~~ challenged before the revisional authority and the revisional authority modified the order of punishment with that of order of reversion in D Grade Rs. 2550-3200 (RSRP) fixing his pay at Rs. 2720/- for a period of 11 years with cumulative effect and that this modified ~~order~~ of punishment was acted upon by the applicant and in pursuance of the modified order, the applicant resumed his duty and that this fact has been admitted by the applicant himself. The learned counsel for the respondents argued that it is the established position of law that in case the applicant resumed the duties after modification of the ~~order~~, then he has accepted the modified order of punishment and he is estopped now to question the validity of the modified order. In support of his argument the learned counsel for the respondents cited (1997) 9 SCC, page 31, State of Punjab and others vs. Krishan Niwas wherein it has been held by the apex court "the respondents accepted the reduced penalty and he joined duty but subsequently filed a suit for declaration that his removal from service, reduction in rank and denial of back wages were illegal." The Hon. Apex court held "the respondent having accepted the order of appellate authority and joined the post, it was not open to him to challenge the ~~order~~ subsequently. By his conduct, he has accepted the correctness of the order and acted upon it. Under these circumstances, the civil court should not have gone into the merits and decided the matter against

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the appellants." Under these circumstances, in view of the judgment of the Hon. Apex court, if the applicant resumed the duty in pursuance of the modified order of punishment of revisional authority, then now the applicant is barred from challenging the correctness of the order. The same position has also been reiterated by the Hon. Apex court in the subsequent judgment reported in (2001) 9 SCC 402 Sanat Kumar Dwivedi vs. Dhar Jila Sahkari Bhoomi Vikas Bank Maryadit and others. Hence, in view of the above judgments of the Hon. Apex court, the applicant once accepted the modified order of punishment and resumed the duty, he cannot challenge the correctness and legality of the order and the applicant is barred by the subsequent act of the respondents. In this connection the learned counsel for the applicant cited the orders of C.A.T. Allahabad Bench in O.A. 304/2001 dated 5th May, 2005 and O.A. No. 391/05 dated 5th July, 2011. In these judgments reliance has also been placed on the above mentioned judgments of Hon. Supreme Court.

12. For the reasons mentioned above, we are of the opinion that the applicant was found guilty of misconduct and he manipulated and interpolated the railway record by putting his signature on the cross (X) in the muster roll. The order of punishment of the disciplinary authority was modified by the revisional authority ADRM in the revision and the order of removal from service was modified to the extent of reduction/reversion in D grade Rs. 2550-3200 (RSRP) fixing his pay at Rs. 2720/- for a period of 11 years

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with cumulative effect and the applicant had accepted the modified order of the revisional authority and hence now, he is not entitled to challenge the validity and correctness of the order. In our opinion, the O.A. lacks merit and is liable to be dismissed. The O.A. is dismissed. No order as to costs.

Member (A)

Surjan Singh
Member (J)

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