

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

O.A. No.919 of 2014

**Present: Hon'ble Mr. Swarup Kumar Mishra, Member (J)
Hon'ble Mr. T.Jacob, Member (A)**

Peri Srinivasa Sarma, aged about 44 years, S/O P.Suryanarayana Murty, At-1-2-45 Ramalayam Street, Gandhinagaram, Chodavaram Road, Ankapalli, Dist-Visakhapatnam.

.....Applicant

VERSUS

1. Union of India represented through the General Manager, East Coast Railway, Rail Vihar, Chandrasekharapur, Bhubaneswar, Dist.-Khurda.
2. Chief Mechanical Engineer, East Coast Railway, G.M.'s Office Complex, Chandrasekharapur, Bhubaneswar, Dist-Khurda.
3. Chief Personnel Officer, East Coast Railway, Rail Sadan, 2nd Floor, Chandrasekharapur, Bhubaneswar, Dist-Khurda.
4. Addl. Div. Railway Manager, East Coast Railway, Waltair.
5. Sr. Divisional Personnel Officer, East Coast Railway, Waltair.
6. Sr.Divisional Mechanical Engineer (D), East Coast Railway, Visakhapatnam.

.....Respondents

For the applicant : Mr.B.Dash, counsel

For the respondents: Mr.T.Rath, counsel

Heard & reserved on : 17.3.2021

Order on :16.06.2021

O R D E R

Per Mr.Swarup Kumar Mishra, J.M.

The applicant has filed the present OA under Section 19 of the Administrative Tribunals' Act, 1985 seeking the following reliefs :

- “(a) The original application may be allowed.
- (b) The operation of order under Annexure A/10 may kindly be modified and the applicant be re-instated in service in his former post in the same department with full seniority.
- (c) Treatment of the period in question as “Dies non” may kindly be quashed.
- (d) The respondents may be directed to treat the period from the date of compulsory retirement up to the date of re-instatement be treated as period spent on duty and to give all consequential benefits to the applicant.
- (e) And such other Order(s)/direction(s) may be given in giving complete relief to the applicant.”

2. Since the applicant remained absent unauthorisedly, therefore a charge memo dated 07.11.2006 (Annexure-A/1) was issued against him. In pursuance to the said show cause, he had submitted representation dated 25.01.2007(Annexure-A/2). In the said representation, he had mentioned that he may be given compulsory retirement. Against the order of punishment of compulsory retirement passed by the Disciplinary Authority, the applicant submitted an appeal dated 12.07.2007 (Annexure-A/5). Although it was the claim of the applicant that he had filed an appeal on 12.07.07, the concerned authority found that no such appeal has been received by the respondents and subsequently an appeal was filed by the applicant after a lapse of four years. Thereafter, Appellate Authority passed the order dated 03.03.2012 (Annexure-A/6) which is reproduced as under:-

“I have gone through the case carefully. To access the personnel problem of the C.O. the undersigned called the C.O. for personnel interview.

DA has imposed the penalty of compulsory retirement on 25.06.2007 and the C.O. having the pension and dues has been settled. The C.O. making an appeal after 04 years of compulsory retirement for re-instatement, as such the appeal is time barred. Though the C.O. appealing that he has submitted appeal on 12.07.2007, there is no copy received by the Rly. Administration. And also, the CO made no attempt for re-appeal or verify his case. Apparently, CO not serious about his service at the point of compulsory retirement till Sept-2011.

I don't see any merit in his appeal and as such, I decide to "Confirm the punishment imposed by the DA"

However, if he desires so he may submit a revision application to CME/BBS, within 45 days of the receipt of this letter under the provision of Rule 25 of RS (D&A) Rules 1968.

Please acknowledge the receipt of the order."

3. Thereafter, the applicant preferred revision by filing revision petition dated 16.04.2012 (Annexure-A/7). The said revision petition was disposed of by the Revisional Authority vide order dated 08.08.2013 (Annexure-A/10). It has been mentioned in the said order that Para-3:- "And whereas Sr. DME (D)/VSKY(DA) appointed Sri B. Prasad Rao, SSE/DLS/WAT as the Inquiry Officer to enquire into the charges leveled against CO vide SF-7 dated 31.01.2007. Accordingly, D&A inquiry was conducted on 01.05.2007. Since the CO admitted his mistake of unauthorised absence from 21.03.2006 to 07.11.2006 (i.e., the date of issuing major penalty charge sheet) due to his ill health and did not require any additional documents to keep his side nor wanted to go for further enquiry by nominating Defence Counsel, the Inquiry officer concluded the D&A inquiry and submitted his report dated 15.05.2007 to the Sr. DME(D)WAT (DA) holding Sri P.S. Sharma (CO) guilty of the charges framed

against him. page 34, Para-7(iv):- “Disciplinary Authority’s findings are based on the evidence taken on record during the inquiry and the quantum of punishment as compulsory retirement, commensurate to the gravity of offence”.

4. It was submitted by Ld. Counsel for the applicant that although applicant had mentioned in his representation dated 25.01.2007 (Annexure-A/2) that he may be given compulsory retirement. It is the duty and legal opinion of the concerned authority to give the finding by conducting the regular inquiry as to whether the absence of the applicant is willful or not and that appropriate order should have been passed basing upon the materials based on record.

5. Ld. Counsel for the applicant had further submitted that the mere mentioning of the punishment after retirement should have been given to the applicant as mentioned by him in the annexure and representation should have been treated as admission of misconduct by the applicant.

6. In this regard, the Ld. Counsel for the respondents submitted that Annexure-R/2 page-19 Q No.5:- “Did you join the duties or not?” Ans:- Not joined, because my health conditions are not fully supported to perform my duties. This is the reason I became sick N- no of times. There is no alternation for me to take any option, so I requested for Compulsory Retirement as per the provided establishment rules and regulations.” Q. No.7:- “Do you accept the charges?” Ans:- Yes, I accepted, and also I have submitted my defence

immediately.” and it is submitted that in the said answer given by the applicant coupled with the request made at Annexure-A/2 that he may be given compulsory retirement would clearly show that he had admitted the misconduct at Annexure-A/1. Ld. Counsel for the respondents submitted that the applicant had accepted the pension and other retirement dues granted in his favour and that he has accepted the punishment imposed on him and therefore, the applicant is stopped from challenging the order for modification of punishment as imposed by the Revisional Authority at Annexure-A/10.

7. Ld. Counsel for the applicant submitted that the report of the I.O. has not been furnished to the applicant.

8. Ld. Counsel for the respondents has drawn the attention of this Tribunal to the letter dated 15.05.2007(Annexure-A/3) which shows that in order to support this submission in para (v) of the order dated 8.8.2013 (Annexure A/10) that subsequently, the petitioner stated to have submitted his Appeal in Sr. DME/DsI/VSKP's office on 12.07.2007, but there was no acknowledgement, and office record shows that only 05 letters i.e. from Srl. No.1989 to 1993 were received in Sr. DME/DsI/VSKYP's office on 12.07.2007, but there was no such appeal of the petitioner, in Para -11 of the rejoinder it is stated as follows:-

“That in response to Para-4 it is submitted that the Inquiry Officer did not conduct any enquiry rather basing on the request of the applicant the Inquiry Officer held the applicant guilty of the charges but the aforesaid finding was based on the opinion of the applicant only. When the Inquiry Officer did not whisper a single word about willful absence of

the applicant, the same cannot be treated to be a misconduct to be imposed with punishment. Catena of judgments is there with the observation that unauthorized absence, if not willful, cannot constitute a case of misconduct to be imposed with punishment. The applicant undertakes to produce authority at the time of hearing.

Basing on the aforesaid enquiry report, the Disciplinary authority imposed penalty of compulsory retirement from service. The order at Annexure-A/4 clearly substantiates that the order was passed basing on the request of the applicant. In the aforesaid circumstances, the award of compulsory retirement cannot be treated to have been as a measure of penalty. The claim of the respondents that the enquiry was conducted on 15.02.2007, 13.04.2007 and 01.05.2007 is entirely incorrect and thoroughly misconceived since basing on the request of the applicant, the order of compulsory retirement was imposed. Only on 01.05.2007, the Inquiry Officer started and ended the proceeding which is sufficient to prove that no procedure had been followed in the Disciplinary proceeding. It is equally not correct to say that the applicant accepted his guilt and requested for imposition of compulsory retirement as a measure of punishment.

The respondents may be directed to substantiate as to how they followed all the procedures and extended reasonable opportunity while conducting the Disciplinary proceeding. Taking the benefit of the simplicity of the applicant, the respondents have manipulated the words suitable to them.”

9. It was inter alia submitted by the Ld. Counsel for the applicant that the punishment as imposed by the Revisional Authority is contemplated under rules and therefore, the modified order as passed by the Revisional authority as Annexure-A/10 is illegal.

10. In this regard, Ld. Counsel for the applicant had drawn the attention of this Tribunal to Rule 65(1) of CCS(CCA) Rules. In spite of such submission no such punishment is contemplated or could have been imposed on the applicant as imposed by the Revisional Authority vide Annexure-A/10.

11. Ld. Counsel for the respondents submitted that the total period of absence of the applicant was 171 days and therefore, it is apparent that the absence of the applicant is willful. In reply to the contention of the applicant, that no finding is there against the applicant that the absence in question was willful, it was submitted by Ld. Counsel for the respondents that in all cases nothing was taken as finding that the absence is willful and the circumstances of the case was disclosed as to whether the absence is willful or not.

12. Ld. Counsel for the applicant had submitted that the modified punishment as imposed on the applicant by the Revisional Authority is not as per the provision of the Railway Servant Discipline and Appeal Rules. In this regard, he has drawn attention of the Tribunal to the punishment order passed by the Revisional Authority that the applicant will have bottom seniority in the rank of Helper-II. In this regard, he had relied upon the decision of the Hon'ble Supreme Court in the case of Vijay Singh Vs. State of UP & Ors. disposed of on 13.04.2012. In the said case Hon'ble Supreme Court while dealing with the matter in which 'the impugned order dated 08.07.2010 withholding integrity certificate for the year 2010 and all subsequent orders in this regard are quashed. Respondents are directed to consider the case of the applicant for all consequential benefits including promotion etc., if any, afresh taking into consideration the service record of the applicant in accordance with law'. The authority had directed to with-hold of integrity certificate and it was held by the

Hon'ble Supreme Court in the fact and circumstances of the said case that the said punishment so imposed was not permissible under the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991.

13. Ld. Counsel for the applicant further submitted that once the Revisional Authority had passed the order of punishment directing for reinstatement of the applicant, then the punishment of reduction in lower rank scale could not have been passed as the said is not permissible. In order to buttress the said submission he had further submitted that "to reinstate" implies that the applicant is reinstated to the post which he was holding at the time of punishment order was passed at the time that the departmental proceeding was started against him. Therefore, the said punishment order is illegal.

14. Ld. Counsel for the respondents on the other hand had submitted that, although the punishment order is within the scope of the rules and is permissible the wording as used in the said order may not be strictly constitute to come to a conclusion that the order of reinstatement and order of reduction of pay cannot be passed at the same time. He further submitted that the applicant will be reinstated in service to the post which he was holding at the relevant time.

15. Ld. Counsel for the applicant submitted that there was no allegation in the charge memo and no finding of the Inquiry Officer, Disciplinary Authority, Appellate Authority as well as Revisional Authority that the period of absence of the applicant was willful. He further submitted that in

the absence of finding the absence was willful, the applicant cannot be held to have committed any misconduct and therefore, he is not liable to be imposed any punishment order at all. In this regard, Ld. Counsel for the applicant relied on the decision of the Hon'ble High Court of Orissa in W.P(C) No.4074/2004 passed in the case of Jaydev Padhi Vs. State of Orissa and others disposed of on 16.07.2015.

16. Ld. Counsel for the respondents submitted that taking into consideration the nature of the job of the applicant and the fact that the Railway service is essential service, therefore, the absence of the applicant is treated as willful and no specific findings are required to be given that the absence of the applicant was willful.

17. Ld. Counsel for the respondents further submitted by relying on the show cause explanation given by the applicant vide Annexure-A/2 and the answer given by the applicant to the question Nos.5 & 7 at Annexure-R/2 that the applicant had admitted that he had not joined, because of his health conditions are not fully supported him to perform his duties. This is the reason he became sick N-no of times and there was no alternation for him to take any option, so he requested for compulsory retirement as per rule.

18. Heard learned counsel for both sides and have carefully gone through their pleadings, materials on record and citations relied upon by both the parties. Admittedly the applicant had remained on un-authorized absence for a period of

171 days. It is also seen from Annexure A/2 that the applicant had himself requested for “compulsory retirement”. The respondents after completion of inquiry had held the applicant to have remained on unauthorized absence, which is a misconduct attracting a major penalty, thus imposing the penalty of “compulsory retirement” on the applicant. After the applicant’s appeal to the appellate authority was dismissed by the appellate authority, he had preferred an appeal to the revisionary authority who vide his order even though found the DA’s finding are based on evidence taken on record during the enquiry and the quantum of punishment commensurate to the gravity of the offence but took a lenient view and reinstated the applicant as Helper II on bottom seniority. In his order the revisionary authority had also ordered that the intervening period from date of compulsory retirement to reinstatement shall be treated as dies non, the applicant should pay back all the pensionary benefit paid to him as a result of compulsory retirement prior to reinstatement.

19. The Supreme Court of India in the case of *Krushnakant B. Parmar Versus Union of India* and another reported in 2012(2) Supreme 254 held as under :

“17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful.

18. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident,

hospitalisation etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant”.

20. In various judgments on the subject of willful absence it has been held that In a departmental proceeding, if allegation of unauthorised **absence** from duty is made, the disciplinary authority is required to prove that the **absence** is **willful**, in **absence** of such finding, the **absence will** not amount to misconduct. In the instant case the applicant remained on unauthorized absence for a period of 171 days. In the departmental inquiry, the inquiry officer in his finding categorically submitted that no authentic medical certificates were produced by the applicant at the time of inquiry on his claim of being repeatedly sick not to attend the duties.

21. Hon’ble Supreme Court in the case of Chennai Metropolitan Water Supply and Sewerage Board and others v T. T. Murali Babu (2014) 4 SCC had held that:

“22. XXXX It cannot be stated as an absolute proposition in law that whenever there is long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent.”

22. Hon’ble High Court of Odisha in WP (C) No. 11328/2009 (Minaketan Das v UoI) had held:

“10 On the first issue regarding willful absence or merely an unauthorized one, the specific charge was that the petitioner was absent unauthorizedly for 37 days. Neither he had taken a plea nor filed any reply nor there is any defence in the

*disciplinary proceeding to the effect that the absence was not willful. No question was put to any witness to that effect. Even certificates which is now sought to be produced today was never produced before the enquiry officer. **However, Service Rules of the Railway Contemplates that 'unauthorized absence' is also a misconduct attracting major penalty.***"

23. In view of the above observation, we do not find any procedural lapses on the part of the respondent department in conducting the inquiry or afterwards. The applicant was given full opportunity to defend himself in the enquiry, there is no violation of principle of natural justice and no malafide was established. The applicant sat over the punishment of the Disciplinary Authority for a period of more than 4 years and didn't pursue the matter. The Revisional Authority even though agreed with the findings of the inquiry officer, punishment given by disciplinary authority, took a lenient view of the applicant's situation and modified the order of punishment reinstating him subject to fulfillment of certain conditions. We do not find any illegality or irregularity in the order of the Revisional Authority and accordingly do not find any scope for interference in the same.

21. Accordingly, the OA being devoid of merit is dismissed. No costs.

(T. JACOB)
MEMBER (A)

(SWARUP KUMAR MISHRA)
MEMBER (J)