

Reserved.

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD.

Original Application No.281 of 2003.

ALLAHABAD THIS THE 5th DAY OF APRIL 2005.

Hon'ble Mr.A.K. Bhatnagar, Member-J.

Hon'ble Mr. D.R. Tiwari, Member-A

Bhism Giri
son of late Sri R.R. Giri,
Resident of Village Biriganj,
Baluhava, Post Chhitauni,
District Padrauna.

.....Applicant.

(By Advocate : Sri Satish Dwivedi)

Versus.

1. Union of India
through General Manager, (Railway)
North Eastern Railway, Gorakhpur.
2. Divisional Railway Manager,
North Eastern Railway,
Varanasi Division, Varanasi.
3. Senior Divisional Operating Manager,
North Eastern Railway,
Varanasi.

.....Respondents.

(By Advocate: Sri Anil Kumar)

O R D E R

(By Hon'ble Mr.D.R. Tiwari, Member-A)

By this O.A. filed under section 19 of A.T Act, 1985 the applicant impugns the order of removal dated 20.11.2001 and the appellate order dated 19.08.2002 confirming the order of removal (Annexure Nos. A-13 and A-15). He further prays for issuance of direction to the respondent to allow the applicant to join his duties and treat the applicant in continuous service and release

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all the benefits available to him in law with interest.

2. Filtering out the details, the relevant factual matrix to adjudicate the controversy is, while working as Assistant Station Master of Panihawa Railway Station in Varanasi Division, North Eastern Railway, was served with a major penalty charge-sheet SF-5 under Railway Servants (Discipline and Appeal) Rules 1968. The charge memo dated 3.8.2000 (Annexure No A-2) contained the following article of charge:-

“श्री भीष्म गिरी सस्टेमा० पनियहवा दिनांक 27-5-2000 से 22/7/2000 तक बिना किसी पूर्व सूचना के अनाधिकृत रूप से ड्यूटी से अनुपस्थित रहें तथा स्टेशन कार्यालय पर ताला बन्द करके सभी अभिलेख अपने कब्जे में रखे हुए थे जिसके कारण परिचालन कार्य में काफी व्यवधान उत्पन्न हुआ है। ये बिना कक्ष सक्षम अधिकारी तथा कार्यरत सस्टेमा की अनुमति के बिना ड्यूटी से गायब हो जाना और सक्षम अधिकारी से अवकाश स्वीकृत कराये बिना मंडल कार्यालय से वेतन का भुगतान प्राप्त करना तथा अन्य कई अनियमितताओं में लिप्त पाये गये हैं। इस प्रकार उपरोक्त कार्य कर श्री भीष्म गिरी सस्टेमा० ने रेल कर्मचारी आचार संहिता 1966 के नियम 3.1 (1) (ii) एवं (iii) का उल्लंघन किया है”

3. Since the memo of charge-sheet mentioned above did not contain the relied upon documents mentioned in the charge-sheet, the applicant wrote to the Disciplinary Authority for supply of the same vide his letter dated 14.09.2000 and also sent a reminder dated 20.09.2000 (Annexures A-5 and A-6). He emphasized that the relied upon documents were necessary so as to enable him to make the effective reply/statement of defence on the charge-sheet issued to him.

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4. Close on the heels of issuance of charge-sheet, the applicant was suspended vide order dated 3.8.2000 with the stipulation that during the period of suspension, the applicant will not leave the Headquarter without permission of the Competent Authority (Annexure No.A-3). Meanwhile he was transferred to Laxmigungj Railway Station by order dated 11.08.2000 (Annexure A-4). Transfer during the period of suspension was unusual and he suffered great mental agony. Ultimately he made a fervent request to the Competent Authority for revocation of the suspension order on the ground that he was not keeping good health and he had serious heart problems. The Competent Authority, considering the request, revoked the suspension by order dated 29.09.2000 (Annexure Nos.A-7 and A-8).

5. Even after the revocation of suspension, he was not being allowed to have actual charges as such he was harassed much at the instruction of his immediate superior. These circumstances overwhelmed him and he fell seriously ill. He submitted an application dated 02.01.2001 along with the medical certificate for sanction of leave. In that application, he submitted that he may be granted leave till he recovers from the illness (Annexure A-9).

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6. During the period of his treatment, he received the copy of ex-parte inquiry report dated 19.06.2001 at his home address. After receipt of the inquiry report, he requested the Competent Authority for supply of legible copy of the enquiry report. On receipt of the legible copies, he submitted the representation against the enquiry report by his letter dated 23.08.2000 (Annexure Nos.10, 11 and 12 respectively). The Disciplinary Authority passed the order of removal from service which was confirmed by the Appellate Authority.

7. Aggrieved by the above impugned orders, the instant O.A. was filed and is being challenged on various grounds mentioned in Para 5 of the O.A. Main grounds of challenge are enumerated as under:-

- (i) *Issue of minor penalty charge-sheet and its subsequent withdrawal coupled with suspension order followed by revocation of the suspension order betrays the biased attitude and malafide intention on the part of the respondents. Para 6 and 9 of the O.A. may be referred to.*
- (ii) *Non supply of relied upon documents mentioned in Annexure 3 of the charge-sheet has caused prejudice to his case and he could not submit the explanation to the charge-sheet. He has made specific averments for this purpose in Para 11 and 12 of the O.A.*
- (iii) *Decision of ex-parte enquiry and report of the enquiry officer is against the Rule 9 (23) of the Rules ibid, coupled with the Railway Board Instruction on this subject. In this connection, Paras*

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17 to 19 along with 21 to 23 of the O.A. are relevant.

- (iv) Order of removal from service is non speaking, cryptic and sketchy. The order has been passed in a cursory manner without application of mind out of malafide design for extraneous reason and it is wholly a colorable exercise of power.
- (v) Appellate order is equally cryptic and the appellate authority has not adverted to any of the points raised in the memo of appeal dated 6.3.2002 (Annexure A-14).

The applicant has submitted that in view of the above grounds, the O.A is full of merit and may be allowed.

8. The respondents, on the other hand, have resisted the O.A. by filing the detailed counter affidavit. They have pleaded that allegation of malafides against the authority without impleading them as respondents is highly objectionable and it is mandatory under law to implead them by name as respondents. They have further argued that the applicant was supplied documents on 29.09.2000 and his contention about non-supply of relied upon documents is misconceived. They have pleaded that the Enquiry Officer has given adequate opportunity and followed the enquiry proceedings as per provisions laid down in Rule 9 of the Railway Servant (D & A) Rules 1968 and in spite of that the applicant did not appear before the Enquiry Officer. It has been argued that after the service of the charge sheet, the respondents have informed

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the applicant about the appointment of enquiry officer by letter dated 29.10.2000 and by another letter dated 02.02.2001; he was informed that he may nominate his defence helper. These letters were pasted on board at Laxmigungj Station in presence of two witnesses where the applicant was posted. This was done as the applicant was absent from duty. They have further argued that after giving full opportunity to the applicant at various stages of enquiry the order was passed and there is no infirmity in the punishment order as after considering all the facts, enquiry report etc., the Disciplinary Authority imposed the penalty of removal from service. The appellate order was also valid as the appellate authority passed the order after considering the points made in his memo of appeal.

9. During the course of argument, learned counsel for the applicant, Sri S. Dwivedi argued very forcefully that the decision for ex-parte enquiry is in violation of rule 9 (23) of the Rules ibid. He has submitted that after the service of charge-sheet, the respondents never informed about the appointment of enquiry officer, date fixed for inquiry and letter about the nomination of defence helper. He has submitted that pasting of letters on the board of Laxmigungj Railway Station where he was posted is not proper service to the applicant,

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particularly in view of the fact that applicant was absent and under treatment for his ailments. He has further argued that his suspension was equally illegal and reflects the malafide intention of the respondents. His transfer during the period of suspension is illegal particularly when the suspension order stipulated that during the suspension period his Headquarters would be at Panihawa Railway Station. He has also challenged the enquiry report which is totally in violation of the Railway Board instructions as well as the Rule 9 of the Rules *ibid*.

10. Learned counsel for the respondents, Sri Anil Kumar hotly contested the contentions/claims made by the counsel for applicant. He submitted that malafide cannot be alleged without impleading the officer by name as respondent. He argued that all possible opportunity of hearing was provided to the applicant and efforts were made to associate the applicant at every stage of the enquiry but he intentionally avoided to appear before the Enquiry Officer and in such a situation the Enquiry Officer was left with no choice but to hold the ex-parte enquiry and submit the report. He has also submitted that the applicant did not even submit the statement of defence in reply to the charge-sheet which was duly served on him. He concluded his argument by saying that the impugned

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orders are perfectly legal and the O.A. may be dismissed.

11. We have heard the counsel for the parties at a considerable length and considered the rival submissions made by them. We have also perused the records very carefully.

12. Having regard to the rival submissions made across the bar and taking into account the fact situation of the instant case, there are some issues which survive and require elaborate examination and adjudication. These issues are as under:-

- (I) The first question is regarding the allegation of malafide against the respondents. The contention of the counsel for the respondents that it is mandatory in law to implead the officer by name as party respondent cannot be accepted as full truth. It is true that preponderance of the decision of the Apex Court support the contention of counsel for respondents. However, it is equally true that 'malafides' violating the proceeding may be legal or factual. The former arises as a matter of law when a public functionary acts deliberately in defiance of law without any malice intention or improper motive whereas the latter is actuated by extraneous consideration. In this case, issue of a minor penalty charge-sheet to the applicant followed by subsequent withdrawal indicates that the respondents had no case for imposing a minor penalty on the applicant. The transfer during the currency of the suspension period despite the stipulation in the suspension order that his Headquarters would remain at Panihawa appear to us a clear defiance of procedure. It clearly shows that

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there is legal malice if not the factual malafides. We get support for our view from the decision of the Apex Court in 1993 (3) S.C.C 71. Similar view was taken by the Apex Court in the case of Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation-1993 (2) S.C.C 278, as such the contention of the applicant cannot be accepted as full truth and his contentions fails on this score.

- (II) The second question which is of crucial importance is regarding the decision to hold the ex-parte enquiry and the preparation of inquiry report along with relevant rules/procedures to be followed during the inquiry, we would like to extract the Railway Board instructions contained in letter No.SE 189/69/SC152/69 issued on 18.06.1969 which reads as under:

"What is an ex parte enquiry- An ex parte inquiry means an inquiry held in absence of the delinquent official or his defence helper. It is held under Rule 9 (23) of DAR which says that "If a Railway Servant to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear before the inquiry authority or otherwise fails or refuses to comply with the provisions of this rule, the inquiring authority may hold the inquiry ex parte"

Thus the essential ingredients of an ex-parte inquiry are:

- (a) The articles of charges must be delivered to the delinquent,
- (b) He should either-
 - (i) not submit his defence, or
 - (ii) otherwise fail or refuse to comply with the provisions of Rule 9

How to hold ex-parte 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

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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) the inquiry officer 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 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."

If one has regard to the proceedings of ex-parte inquiry and the inquiry report in the fact situation of the instant case in hand, one can safely conclude that the decision to hold ex-parte inquiry and the final inquiry report drawn by the Inquiry Officer are contrary to the provisions contained in rule 9(23) of the Rules *ibid* and the instructions of Railway Board Circular cited *supra*. The decision to hold the ex-parte inquiry was taken by the Inquiry Officer on the grounds (a) No defence statement on the charge-sheet was received within the specified time. (b) The applicant did not turn up for oral inquiry in spite of the fact that the communication about the appointment of the Inquiry Officer, request for

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nomination of Defence Helper by letters dated 19.10.2000 and 2.2.2001 respectively were pasted at the Notice Board of Laxmiganj Station in presence of two witnesses and (c) None response from the applicant. In this connection, it may be stated that the applicant could not respond to the charge-sheet as he wanted certain documents so as to enable him to give a reply which was not responded to by the respondents inspite of his repeated requests. We fail to understand as to why the Respondents resorted to the method of pasting the necessary information about the inquiry proceeding when they were fully aware that the applicant was absent. They were aware of the permanent address of the applicant as they have sent the inquiry report by registered post to his permanent address which has been received by the applicant and was duly responded to. Pasting of the communication about the appointment of Inquiry Officer, dates of holding inquiry and communication about the nomination of Defence Helper does not seem to be bonafide action on the part of the Respondents particularly, when the Inquiry Officer, in his report, has admitted that they were pasted because the applicant was absent from the duty. It is true that this is one of the methods prescribed under the Railway Board instructions cited supra but this act of the Respondents is not bonafide and has been resorted

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to complete the empty formality. On this basis, the contention of the Respondents that he was given reasonable opportunity as provided in the rules, cannot be accepted as they could have sent these communications to his permanent address as they have done in case of furnishing the inquiry report. Railway Board instructions, mentioned above, clearly provides that all the formalities of normal inquiry should be followed in the ex-parte inquiry also. From the inquiry report, the Inquiry Officer did not call any witness and he did not prove any document as prescribed in the circular cited supra. He does not record the evidence of witnesses and the inquiry report does not give any information about the adjournment, if any, in this case. The findings of the inquiry report have not been duly drawn. The inquiry report indicates that the Inquiry Officer has presumed the charges as proved as the applicant has not responded to his communication. As such, he concluded that the charges have been proved. Para 14 of the inquiry report is extracted below :-

“निष्कर्ष :-

दीर्घ आरोप पत्र के मद सं० 6 के अनुसार एकपक्षीय निर्णय किया जाता है कि श्री भीष्म गिरी स०स्टे०मा० लक्ष्मीगंज के विरुद्ध लगाये गये आरोप सिद्ध होते हैं और उन्होंने साधारण नियम 2.06, 207 2,082.10, 2.11, तथा रेल कर्मचारी आचरण संहिता 1966 के नियम 3.1 {1} {2} तथा {3} का उल्लंघन किया है ।”

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From the above, we have no hesitation in holding that the Inquiry Officer has failed to follow the procedures prescribed in the Railway Board Circular (supra) and the analysis of his report is not valid in the light of rule 9(23) of the Rules ibid. We get support of our views from the decision of the High Court of Calcutta in Ram Darash Dosad Vs. Union of India, 2004(2) ATJ 48 (HC Cal.). In the similar facts situation of the case in Ram Darash Dosad (supra), the Court has held as under:-

"In our opinion, the Enquiry Officer has miserably failed to discharge his statutory obligation and duties under the said Rules and submitted an enquiry report, which is wholly de hors the said rule and is not a proper enquiry report at all. In other words, we hold that no person who is acting bonafide and in accordance with rules can impose any punishment on the basis of such a report".

In view of the above, the contention of the Respondents that the ex-parte inquiry and its reports were in accordance with the rule and law cannot be accepted.

III. Another question, which falls for our consideration is the allegation of unauthorised absence from 27.5.2000 to 22.7.2000 without any prior intimation which affected the functioning of the station. There is no allegation that he has absented himself willfully and deliberately. The only allegation is that without information, he was absent from duty. For want of any allegation of willful absence mere unauthorised absence without prior information would not per se constitute a grave misconduct to

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warrant a major punishment of removal from service. We get support for our view from the decision of the Apex Court in Bhagwan Lal Arya Vs. Commissioner of Police, 2004 SCC (L&S) 661. The only point which remains to be considered is regarding the medical certificate about which the Respondents have stated in Para 16 of their counter that the so called medical certificate is not a medical certificate. Same is simple application, moved by the applicant by which it could not be ascertained that the applicant was under treatment of Railway Doctor or private Doctor. In this connection, the counsel for the applicant has submitted that in case of doubt, the applicant would have been referred to D.M.O. We are inclined to agree with this contention of the applicant's counsel and the applicant succeeds on this score also.

IV. The only question which survives for adjudication relate to the impugned punishment order as well as the appellate order. The order of the Disciplinary Authority is not at all a speaking order and it is in violation of the Railway Board circular No.E(D&A) 78 RG 6-11 of 3.3.78 (NF/DAC 326, SE 106/78, NR 6966 which reads as under :-

"Speaking order - It has been observed in some of the disciplinary cases that there is an omission on the part of the disciplinary authority while imposing any of the penalties to pass speaking order indicating the reasons for imposing a particular penalty. These orders have been held by the courts as not in accordance with the D & A Rules. It is therefore, desired that in all disciplinary cases, the disciplinary authority should invariably pass a speaking order. The same procedure also should be adopted by the Appellate Authority while passing orders on the appeals."


13. With regard to the appellate order, we have no hesitation in holding that the Appellate Authority proceeded not on reason, not on facts, not on predictable principles but on undisclosed,

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undisguised discretion and such order cannot be upheld. The Appellate Authority has not at all adverted to the points raised in the memo of appeal of the applicant. He has failed to follow the provisions laid down in Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968. We get support for our views from the decision of the Apex Court in case of Ram Chander Vs. Union of India and others - AIR 1986 SC 1173. Under the circumstances, both the impugned orders are bound to fail.

14. In the light of reasons recorded above, the O.A. succeeds on merit and is allowed. Impugned orders dated ^{20.11.2001} 20.11.2000 and the Appellate order dated ^{19.08.2002} 19.8.2000 are quashed and set aside. The Respondents are directed to reinstate forthwith the applicant in service with all consequential benefits as per law and the Rules on this subject, with the liberty reserved to them, if so advised, to initiate the disciplinary proceedings a fresh in accordance with law, rules and instructions in this regard.

No order as to costs.


Member-A


Member-J.

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Corrected.

AM. 24/5/2005
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