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**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH**

O.A. No.62/2012

Jodhpur this the 1st January,2013

Coram

Hon'ble Shri B.K. Sinha, Administrative Member

Dinesh M. Nagar S/o Sh. Mahesh Kant Nagar
R/o 16-B, Ambedkar Colony, Near Mahaveer Cinema,
Abu Road, Dist. Sirohi (Raj)

(Through Adv. Mr. Vivek Shah)

.....Applicant

Versus

1. Union of India through General Manager, North Western Railway, Jaipur
2. Divisional Railway Manager, Divisional Office, Ajmer (Raj)
3. Senior Divisional Engineer, Divisional Railway Officer, Ajmer (Raj)

(Through Adv. Mr. Salil Trivedi)

.....Respondents

ORDER

This OA is directed against the Order No.S.EDP/Dr.Nagar/637/Leave dated 18.10.2011 treating the period from 9.10.2009 to 31.07.2011 as unauthorized absence in respect of the applicant Dinesh M Nagar.

2.Relief(s) sought:

"In view of the above submissions, the applicant most respectfully prays that this Original Application may kindly be allowed with costs and by issuance of an appropriate order or direction the impugned order Annexure.A1 dated 18.10.2011 may kindly be quashed and set aside and the entire period from 26.9.2009 till 31.9.2011 may kindly be treated as sick leave or any other authorized leave.

Any other order favourable to the applicant may also kindly be passed."



Case of the applicant:

3. This is the third round of litigation by the applicant. Earlier when he was transferred from Abu Road to Ajmer vide order dated 16.9.2009 applicant filed OA 228/2010 in which an interim order was passed in his favour. This order continued in force till 04.03.2011. That OA was decided vide the order dated 15.07.2011 and applicant was directed to join at Ajmer within a period of one week while the respondents were asked to determine as to how the period in the interregnum till his joining was to be treated. The case of the applicant is that when he was working as JE II/Drawing Estimator, Abu Road he had a fall and became sick and was under treatment of medical doctor till 26.9.2009. He was regularly sending medical certificates to the authorities praying for extension of leave. The applicant submits that he being sick, he could not join the transferred place and he could not have been relieved in absentia and there is no provision for relieving a person once he is sick. The applicant was subjected to a special medical examination by a Railway Doctor one Dr.Tanwar who found problem with L3 nerve root compression in the lumber spine and pain in the right lower link and opined that the job being sedentary, he might resume his duty and a letter was sent to that effect. The contents of the letter were, however, not disclosed to the applicant. During the proceedings of OA 228/2010 applicant became medically fit and he reported for duty on 20.8.2010 at Abu Road Office submitting medical fitness, however, he was not taken on duties. Hence, the applicant sent a letter to Respondent No. 2 on 21.8.2010 for a direction to take him on duty. He made another representation on 31.8.2010 for which also

there was no reply and he remained on sick leave till he was permitted to join at Ajmer pursuant to the order dated 15.7.2011. The applicant joined at Ajmer on 25.7.2011, enclosing a fitness certificate from the Railway Medical Authorities on 29.7.2011 [A/15] to the Senior Divisional Engineer, Ajmer. Applicant was served with a charge sheet for being absent from duty from 9.10.2009 onwards. The applicant moved OA 244/2010 in which a stay was granted vide order dated 20.8.2010 and the Tribunal directed a medical examination by the Superintendent MDM Hospital, Jodhpur which was not carried out as the respondents refused to issue railway pass to the applicant. He made representation to R2 stating that he was sick from 26.9.2009 to 20.8.2010 and that he was waiting for the orders of the Hon'ble Tribunal in OA 228/2010 requesting that period 26.09.2009 to 20.8.2010 should be treated as sick leave and from 21.8.2010 to 31.7.2011 should be treated as duty. However the respondents issued the impugned order treating the entire period from 26.09.2009 to 31.7.2011 as unauthorized absence. Hence, the applicant has filed this OA for a declaration that the impugned order is illegal, unjust and arbitrary and to quash the same. The applicant states that the authentic and valid medical certificates issued by medical authorities testifying the sickness of applicant have not been considered by the respondents and passing of the impugned order is illegal. The direction of the Tribunal in OA 228/2010 to consider the interregnum period of absence has not been properly considered by the respondents.

Stand of the respondents:

4. The respondents have filed a detailed reply statement opposing the prayers of the applicant. The respondents submit that the applicant was transferred from Abu Road to Ajmer vide order dated 16.9.2009 on administrative grounds. In order to avoid the transfer applicant produced sick certificate from a private doctor on 26.9.2009. However, he was relieved from Abu Road vide order dated 9.10.2009. The order relieving the applicant was personally taken to his house, but he refused to accept delivery of the same. Since the applicant was continuously absent, Chief Medical Superintendent Ajmer directed Dr.Anand Tanwar, Medical Superintendent Abu Road to visit the applicant. Dr.Anand Tanwar visited the applicant at his residence on 10.4.2010 and 12.4.2010 and found him fit to resume his duties. However, the applicant remained absent and raised the issue of his transfer as a PNM item. The necessity of having a draftsman/estimator is at Divisional Office Ajmer was explained to the Union while expressing inability of cancelling the order of transfer [R/2&R/3]. The applicant, thereupon, filed OA 228/2010 and an ex parte interim order was obtained without disclosing the full facts relating to his being relieved from Abu Road. The applicant filed another OA 244/2010 against the chargesheet in which a similar stay order was passed. The applicant filed a Contempt Petition 24/2010 for non-compliance of the interim order in OA 228/2010. On hearing both sides, the contempt petition was dismissed by order dated 18.1.2011 [R/4] stating that since the petitioner had knowledge about his getting relieved from Abu Road, he should have brought the same to the knowledge of the Tribunal. Costs were

awarded in the CP for not divulging the actual facts. The interim order passed in OA 228/2010 was also vacated. The OA 228/2010 was disposed of on 15.7.2011 directing the applicant to join at the transferred place ie., Ajmer permitting him to agitate his case afresh for transfer to Western Railway and respondents were directed to determine the interregnum period till the period of his joining. The respondents decided the issue and informed the applicant vide letter dated 18.10.2011 that his absence cannot be treated as duty and leave cannot be granted. OA No. 244/2010 filed against the Charge sheet was also dismissed vide order dated 9.8.2012. [R/7]. In view of the decision in both the above cases, respondents submit that relief prayed for by the applicant for treating the entire period as sick leave or any authorized leave cannot be granted, and that if the relief is granted in this case, that will negate the very finding given by the Tribunal while dismissing OA No. 244/2010. The disciplinary proceedings initiated against the applicant for unauthorized absence is still pending. The applicant has got full opportunity to represent against the charge sheet. The respondents submit that the contention of the applicant is wholly contrary to the settled preposition of law and the same deserves to be rejected at the threshold.

Facts-in-issue

5. I have carefully perused the pleadings of the parties and have listened to their arguments made at some length. The only issue that emerges is that whether the period in consideration from 09/10/2009 to 31/07/2011 is to be treated as one on unauthorised absence or on leave in its entirety on his part. The arguments of the parties have already

been noted and need not be repeated. The applicant sought information under RTI as to whether an employee on continuous sick leave could be relieved during such leave and where he was to report. The answer provided that there appears to be no instruction to this effect (A/10). In the meantime the applicant approached this Bench of the CAT which vide order dated 20/06/2011 in OA no. 228/2010 directed:

- (i) *"The applicant is allowed to re-agitate his representation, which he had, apparently, made in 2003 for his transfer to Western Railway, Ahmedabad Division. This energizing shall be initiated by the applicant by another properly elucidative representation within the next two weeks.*
- (ii) *On receipt of such representation, the concerned authority shall examine it, and by recommending for its implementation, send it to the Western Railway, Ahmedabad Division in view of practical difficulties in implementing Annexure A/2.*
- (iii) *During the course of hearing, in the presence of the learned counsel for the respondents, it is submitted by the applicant's counsel that the applicant will be agreeable for bottom seniority, but he prays that if it is possible for the Western Railway to consider his past service also, an opportunity may be made available to them to consider it in all its aspects. The Western Railway is not a party to this litigation, therefore, for the purpose of implementation of this order, we hereby implead them, *suo motu*, as respondent no. 4. The Western Railway on receipt of such recommendation from the respondents herein; shall consider the representation of the applicant within a time frame of next six months in all its aspects.*
- (iv) *In the meanwhile, within a period of one week, the applicant is allowed to join at Ajmer, and the respondents are directed to consider the issue in all its aspects and also the resolution of determination of the interregnum period till his joining, within a period of three months next."*

6. Accordingly on 20/08/2010 the applicant reported for duty at Abu Road stating that he is fit now and he has recovered to join duties. However, the applicant complained that he was not allowed to sign on the attendance register. He further applied for leave from 20.8.2010 to 20/08/2010. Subsequently, the applicant claims to have made several representations including one at A/13. Since he had not been taken back on duty he was permitted to join at Ajmer in pursuance to the order dated 15/07/2011(A/14). During the proceeding of OA 228/2010 the applicant was served chargesheet for absence from duty on

09/10/2009 against which the applicant approached this Tribunal vide OA 244/2010 and the Tribunal granted stay on the proceeding vide its order dated 20/08/2010. The Tribunal also directed the Superintendent of Mathura Das Mathur Hospital, Jodhpur to carry out medical tests that whether he was having compression in the lumber spine in the presence of Dr Anand Tanwar (A/16) who had examined him earlier. The applicant alleges that he could not be present as the railway pass was refused to him (A/16). The applicant submitted that the stay on his relieving order was in operation till 04/03/2011 and from 05/03/2011 to 15/07/2011 should be treated as on duty as he was waiting for the order of the Tribunal in OA no.228/2010. (A-17)

7. The applicant questioned the justification for treating the entire period from 26/09/2009 to 31/07/2011 as one of absence. The learned counsel for the respondents on the other hand have strongly contested the case on the ground that while the transfer has taken place on 16/09/2009, the applicant diplomatically fell sick and did not avail medical facilities of the Railways. Instead he preferred to be treated by private doctors and presented certificates to that effect. The contempt petition filed by the applicant against the respondents for not allowing him to function was dismissed vide CP No. 24/2010 in OA 228/2010 vide the order dated January, 2011 rejecting the plea of the applicant that relieving order was passed after the order of the Tribunal. The challenge to the charge made to the respondents was also defeated in OA no. 244/2010 vide order dated 09/10/2012.

"As held by the Hon'ble Supreme Court the charge memo can be challenged, if an incompetent authority has issued the charge memo, the charges are vague, the charge-sheet is issued with mala fide intention and in violation of the statutory provisions. In facts and circumstances of this

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case, none of the abovementioned grounds are established by the applicant, hence, the applicant has not made out a case for grant of relief. The respondents have justified in their reply statement relying on the judgment of the Hon'ble Supreme Court. Accordingly, the O.A. is liable to be dismissed."

8. The learned counsel for the respondents has strongly asserted that the applicant had only feigned illness and that is why he avoided going to the Railway doctors and instead had obtained certificates from private doctors while medical facilities of the Railways undeniably the best in the town. That was the reason why he also omitted to appear before the Superintendent of MDM Medical College as directed by the Tribunal. Assuming that pass was not issued he never made attempts to obtain the pass or as pass could not be issued he could go on his own expense for the examination by the Medical Superintendent of MDM Medical College. This also shows that he was fit to resume duty and was malingering in order to avoid his transfer. It is an agreed position that in a contest of opinions between Railway doctors and private doctors, the opinion of the Railway doctors shall prevail. Hence, it has rightly ordered that the entire period from 09/10/2009 to 31/07/2011 is fit to be treated as unauthorized absence. Further, it is also equally true that the applicant was found fit for duty on 24/10/2010 but he declined to report at Ajmer. The applicant reported for duty on 15/07/2011 at Ajmer without duty certificate from the Railway doctors. Therefore, he was asked to produce certificate from Railway doctor. He subsequently joined on 25.7.2011.

9. Thus, it is clear from above narration of events that the sickness of the applicant appears to have been feigned in order to avoid the transfer to Ajmer. The agreed position is that one must come to the

court with his hands clean. Any attempt to use the instrumentality of the court or court's process for defeating the purpose of laws/rules is to be strongly deprecated.

10. A cognizance has also to be taken of fact that the OA 244/2010 seeking quashing of the chargesheet was decided by this Tribunal and has been dismissed on 09/08/2012. A departmental proceeding is progressing against the applicant. Therefore, I find substance in the argument of the learned counsel for the respondents that to regularize the leave as prayed for by the applicant would tantamount to undoing judgment of the Division Bench.

11. In this regard, it is submitted that a similar case had come up with the Full Bench of the CAT reported in (1994) 27 Administrative Tribunal Cases (FB) 637 *All India Guards' Council & Ors vs UOI & Ors*. The issue before the Full Bench was that whether a certificate of private registered medical practitioner can be accepted from Railway servants. In this regard Hon'ble Full Bench relied upon Rule 521 of Indian Railway Establishment Code Volume I fifth edition Chapter 5. Rule 521:

"The Indian Railway Establishment Code contains statutory provisions framed by the President under the proviso of Article 309 of the Constitution of India: Chapter 5 of Volume I, Fifth Edition – 1985 contains the Leave Rules. Rule 503 says that leave cannot be claimed as of right. Rule 521 is relevant for our discussion as it deals with grant of leave on medical certificate to Group 'C' & Group 'D' railway servants. As the Guards admittedly belong to this Group, for the sake of convenience, the rule is extracted as follows:

"521. Grant of leave on medical certificate to Group 'C' & Group 'D' railway servants. – (1) Subject to the provisions contained in sub-rules(2) to (5) of Rule 520, an application for leave on medical certificate made by a railway servant in Group 'C' and Group 'D' shall be accompanied by a medical certificate given by a Railway Medical Officer, defining as clearly as possible the nature and duration of the illness.

(2) When a railway servant residing out side the jurisdiction of a Railway Medical Officer requires leave on medical certificate, he should submit, within 48 hours, a sick certificate from a registered medical practitioner. Such a certificate should be submitted, as early as possible, in the

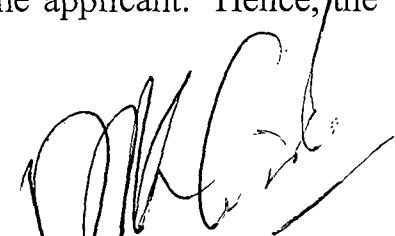
prescribed form as given in Annexure III, and should state the nature of the illness and the period for which the railway servant is likely to be unable to perform his duties. The competent authority may, at its discretion accept the certificate or, in cases where it has reasons to suspect the bona fides, refer the case to the Divisional Medical Officer for advice or investigation. The medical certificate from registered private practitioners produced by railway servants in support of their application for leave may be rejected by the competent authority only after a Railway Medical Officer has conducted the necessary verifications and on the basis of the advice tendered by him after such verifications.

Note:- Ordinarily, the jurisdiction of a Railway Medical Officer will be taken to cover railway servant residing within a radius of 2.5 kilometres of the railway hospital or health unit to which the doctor is attached, and within a radius of one kilometer of a railway station of the doctor's beat." Sub-rule (1) of Rule 521 says that subject to the provisions contained in sub-rule (2) to (5) of Rule 520, every application for leave on medical grounds by railway servant in Group 'C' and Group 'D' has to be accompanied by a medical certificate given by a Railway Medical Officer. Sub-rule (2) is in the nature of exception to sub-rule (1). It exempts the production of medical certificate by a Railway Medical Officer and permits a medical certificate being furnished from a registered private medical practitioner, if the railway servant belonging to Group 'C' and Group 'D' resides outside the jurisdiction of a Railway Medical Officer. The competent authority, however, has discretion to accept the certificate from the registered private medical practitioner and if he suspects the bona fides, to refer the case for the opinion of the Division Medical Officer for advice or investigation"

12. It is clear from the above pronouncement that the Railway Board has the rule making powers and that under special circumstances the right to proceed on sick leave on the basis of certificates submitted by the medical registered private practitioners have already been curtailed. The position that now emerges is that certificates of private medical practitioners would only be relied upon when the applicant residing outside the jurisdiction of the Railway Medical Officer which is not the fact in the instant case. In the instant case, the applicant was clearly residing within the jurisdiction of the Railway Medical Officer. He proceeded on leave after the order of transfer had been issued and did not report to authorized Railway Medical Officer for the certificates. Cognizance has also to be taken of the fact that when Dr Anand Tanwar came for the first time he was found absent and when he examined him second time he found him fit for duty.

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13. Under the circumstances mentioned above, the question before this Tribunal is very simple. Are the Railway authorities going to be mere spectators to such acts of malingering and willful disregard of the provisions by adopting dubious means? It is also very clear that when there is a conflict between opinions of the private practitioners and Railway Medical Officer, the later shall prevail. Hence, I find respondent authorities have rightly treated this period as one of unauthorized absence. At this present moment regularization of this period would undermine proceeding against the applicant. Hence, the OA is disallowed without costs.



(B.K.Sinha)
Administrative member

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