

In the Central Administrative Tribunal
Calcutta Bench

OA No.724 of 1997

Present : Hon'ble Mr. D. Purkayastha, Judicial Member
Hon'ble Mr. B.P. Singh, Administrative Member

Pijush Bandhyopadhyay

.... Applicant

- VS -

- 1) Union of India, General Manager, South Eastern Railway, Garden Reach, Calcutta.
- 2) The Divisional Railway Manager, South Eastern Railway, Chakradharpur.
- 3) The Senior Divisional Operating Manager, S.E. Railway, Chakradharpur.
- 4) The Divisional Operating Manager (Control) S.E. Railway, Chakradharpur.
- 5) The Sr. Divisional Personnel Officer, S.E. Railway, Chakradharpur.

.... Respondents

For the Applicant : In Person

For the Respondents: Mr. P.C. Saha, Advocate
Mr. K. Sarkar, Advocate

Heard on : 21.4.1999

29.7.1999

03.8.1999

Date of Judgement : 17.9.1999

ORDER

B. PURKAYASTHA, JM

Applicant Shri Pijush Bandhyopadhyay, a dismissed Guard/DPS of the Office of the respondent No.4, Kharagpur Division, South-Eastern Railway was charged with mis-conduct and mis-behaviour alleging that the said applicant while functioning as Guard/DPS committed a serious mis-conduct for the reason that he had been absent from duty from 20.12.92 to till date of charge-sheet and left Headquarters without sanction of leave and permission. Accordingly, charge-sheet

dated 1.11.93 (Annexure 'F') was served upon him for holding inquiry under provision of Rule 9 of the Railway ~~for~~ (D&A) Rules, 1968 for imposing major penalty. Thereafter, inquiry under Rule 9 of the Railway ~~for~~ (D&A) Rules, 1968 was held against him and Inquiry Officer submitted the report of inquiry to the Disciplinary Authority (Annexure 'H') holding that charge against Shri Bandhyopadhyay, Guard/BPS is substantially proved and he is found guilty of charges. The said inquiry report (Annexure 'G') was considered by the Disciplinary Authority ~~and~~ ^{who} cancelled the inquiry proceeding on the ground for not providing reasonable opportunity to the applicant in the said inquiry vide letter dated 17/27.5.95 (Annexure 'H'). Thereafter, the Disciplinary Authority nominated another Inquiry Officer named Shri S. Prasad, ACM/CKP for holding "fresh inquiry" into the charges levelled against the applicant. Thereafter, newly appointed Inquiry Officer informed the applicant of the date and time and venue of the inquiry and the applicant was further advised to nominate his defence helper and to be present either himself or through his counsel vide letter dated 30.5.94 (Annexure H). Despite receipt of the letter of Inquiry Officer dated 30.5.94 (Annexure H) the applicant failed to attend the inquiry and ex-parte inquiry was held on 21.6.94 and witnesses were examined. Inquiry Officer submitted his report on 30.6.94 and that was furnished to the applicant vide letter dated 5.7.94 (Annexure I) and applicant submitted his representation against the inquiry report and ultimately applicant was removed from the service vide order dated 24.4.95 (Annexure 'J') issued by the Divn.Optsns. Manager (C), Chakradharpur, South Eastern Railway and that order dated 24.4.95 has been communicated to the applicant vide letter dated 9.5.95 (Annexure J). Thereafter he preferred an appeal before the authority on 18.5.95 vide Annexure 'K' against the punishment notice dated 24.4.95 (Annexure J) and applicant was directed to appear before the Appellate Authority for personal hearing and thereafter Appellate Authority rejected the appeal and affirmed the order of removal vide letter dated 13.12.95 (Annexure 'L' to the application). Thereafter, applicant filed this application before this Tribunal for getting appropriate relief.

2. Respondents filed written reply to the O.A. and denied the allegations made by the applicant in his application. It is stated by the respondents that applicant was given sufficient and reasonable opportunity to defend his case before the Inquiry Officer. He did not avail the opportunity. It is also stated by the respondents that the departmental proceeding for preparing the major penalty charge-sheet has been issued to the applicant for unauthorised absence from duty. The Inquiry Officer submitted the inquiry report and that has been furnished to the applicant for his ~~consent~~ ^{information and consent}. He did not submit any consent. But the said inquiry report has not been accepted by the Disciplinary Authority since reasonable opportunity has not been provided to the applicant and Disciplinary Authority had cancelled the report of inquiry. Thereafter, the Disciplinary Authority in exercise of the power conferred upon him appointed another Inquiry Officer, namely, Shri S. Prasad, ACM/CKP for holding a "fresh inquiry" into the charges levelled against the applicant on the basis of charge-sheet dated 1.11.93. Thereafter, the new Inquiry Officer Shri Prasad conducted the inquiry and allowed the applicant full opportunity to defend his case; but he did not avail the opportunity. Then the Inquiry Officer submitted the report of inquiry and that has been furnished to the applicant vide letter dated 5.7.94 (Annexure I) to submit his representation within 15 days to finalise the case. The Disciplinary Authority accepted the report of punishment and forwarded the same to the applicant vide letter dated 9.5.95 (Annexure J). Thereafter, applicant made an appeal against punishment imposed upon him vide letter dated 24.4.95 which has been communicated to the applicant vide letter dated 9.5.95 (Annexure J). After considering the appeal, the Appellate Authority rejected the appeal vide letter dated 5.11.95. So, according to the respondents, there is no illegality and irregularity in the matter of removal of the applicant from service after initiation of departmental proceeding against the applicant. So, application is devoid of merit and is liable to be dismissed.

3. We have heard both the parties and we have gone through the records. The question before us is whether the Disciplinary Authority has jurisdiction to pass an order to conduct a fresh inquiry into the charges against the applicant after cancelling the inquiry report furnished by the earlier Inquiry Officer as it is evident from the letter dated 17/27.5.94 (Annexure H) and whether the punishment order removing him from service has been at all issued to the applicant after issuing the show-cause notice of punishment to the applicant vide letter dated 5.7.95 (Annexure I).

4. Applicant Shri Bandhyopadhyay appeared in person and submits that he was denied reasonable opportunity to defend his case and he further submits that he cannot be said to be unauthorised absent from duty as alleged in the charge-sheet since applicant was granted leave by the competent authority for the period from 26.12.92 to 30.12.92. Applicant contended that he was not allowed to perform his duty from 31.12.92 to till issue of charge-sheet though he repeatedly requested the authority to allow him to perform his duty after passing appropriate order in this case and respondents kept the applicant off from duty arbitrarily and illegally. Such absence from duty cannot be said to be a mis-conduct. Thereby, findings of the Inquiry Officer that applicant remained absent from duty unauthorisedly and without permission of the competent authority is not based on evidence and unwarranted from the records available in this case. So, said findings of the Inquiry Officer is perverse. Applicant submits that no findings has been made that he remained absent intentionally and without any sufficient cause. So, order of punishment for removing him from the service is illegal and inquiry report is not sustainable. He further submits no order of punishment removing him from the service after serving of show-cause notice of punishment dated 9.5.95 along with the proposal of punishment dated 24.4.95 (Annexure J) has been issued. So, in absence of punishment order removing him from service, applicant cannot be said to have been removed from the service by order dated 24.4.95 (Annexure J).

Thereby, action of the Disciplinary Authority is not sustainable in law. Appellate Authority rejected the appeal ~~mechanically~~ and without applying his mind to the records. So, order dated 13.12.95 (Annexure L) is cryptic in nature and is devoid of consideration of material facts and non-application of mind to the facts of the case. Thereby, order of the Disciplinary Authority as well as the order of the Appellate Authority are arbitrary, illegal and violative of principles of natural justice and contrary to the provisions prescribed under the D&A Rules, 1968. So, application should be allowed.

5. Lt. Advocate Mr. K. Sarkar on behalf of the railway respondents contended that applicant was given reasonable opportunity to defend his case in all phases of inquiry. But he did not avail the opportunity and the Disciplinary Authority, after considering the first ex-parte report of the Inquiry Officer, did not accept the inquiry report since applicant was denied reasonable opportunity. Thereby, the Disciplinary Authority has cancelled the first inquiry report and thereafter appointed another Inquiry Officer to hold a "fresh inquiry" into the charges levelled against the applicant vide letter dated 17/27-5-93 (Annexure H) for the interest of justice. But applicant did not attend the said inquiry and naturally the Inquiry Officer held the ex-parte inquiry and submitted the ex-parte report holding that the charge has been proved and that report of inquiry has been communicated to the applicant vide letter dated 5.7.94 (Annexure I) to furnish his statement against the inquiry report within 15 days and after receipt of the representation from the applicant, the Disciplinary Authority has considered the same and accepted the inquiry report and decided to remove him from the service with immediate effect. Accordingly, the order of removal from service has been communicated to the applicant vide letter dated 9.5.95 (Annexure J to the application) and that notice has come into effect immediately i.e. from the date of receipt of the order by the applicant. Thereafter, applicant filed appeal before the Appellate Authority and that has been rejected by the authority vide letter dated 13.12.95 (Annexure L). Thereby, no illegality and irregularity has been

committed in this matter by imposing the order of removal from the service after holding disciplinary proceeding against the applicant as provided under the Rules. So, application is devoid of merit and is liable to be dismissed.

6. It is found from the letter dated 17/27.5.94 (Annexure H) that the first report of inquiry had not been accepted by the Disciplinary Authority since it was noted by the Disciplinary Authority that reasonable opportunity had not been provided to the applicant and thereafter the Disciplinary Authority, in exercise of the power conferred upon him, appointed another Inquiry Officer Shri S. Prasad, ACM/CKP for holding of a "fresh inquiry" into the charges against the applicant on the basis of the said charge-sheet. So, he directed the applicant to contact the Inquiry Officer forthwith. In view of the aforesaid admitted position, the question arose whether respondents i.e. Disciplinary Authority is vested with power to start "fresh inquiry" into the charges after cancelling the first report of inquiry submitted by the earlier Inquiry Officer under the D&A Rules. In this context, Mr. Sarkar on behalf of the respondents contended that the respondent has authority to start fresh inquiry after cancelling the order of inquiry conducted by the earlier Inquiry Officer appointed by him for the interest of justice and that is permissible under the instruction given by the Railway Board. So, the order of the Disciplinary Authority (Annexure H) cannot be said to be invalid for non-compliance with the provision of D&A Rules, 1968.

7. Turning to the question regarding initiation of "fresh inquiry" after cancelling the first inquiry report submitted by the Inquiry Officer, we would like to refer to the provisions contained in Rule 10(2) of the Railway Servants D & A Rules, 1968 which runs as follows :

"The D/A, if it is not itself the Inquiry Authority may for reason to be recorded by it wholly, remit the case to the Inquiry Authority for "further inquiry" and report of

Inquiry Authority, shall, thereupon proceed to hold further inquiry according to the provision of Rule 9 as far as may be".

The provision had been considered by the Hon'ble Apex Court in a case of K.R. Dev - Vs- the Collector of Central Excise (AIR 1971 SC 1447) where it is held that -

"There is no provision in the CCS(CCA) Rules for setting aside an inquiry on the ground that the report of the inquiry does not appeal to the Disciplinary Authority".

It was also held that -

"There is no provision in Rule 15 of the CCS(CCA) Rules for completely setting aside the previous inquiry and further it is observed that disciplinary authority has power to re-consider the fact and come to his own conclusion under Rule 9. Rule 15 of the Act really provides for further enquiry but it may be possible if in a particular case there has been no proper inquiry because some serious defect has crept into the inquiry or some important witnesses were not available at the time of the inquiry or were not examined for other reason, the Disciplinary Authority may ask the Inquiry Officer to record further evidence. He can disagree with the assessment of evidence and of conclusion of the Inquiry Officer, make his own assessment and/or draw his own conclusion or remit the case back for 'further inquiry' depending upon the circumstances of the case".

From the said provision of Rule 10(2) of the Railway Servants (D&A) Rules, 1968 it is found that a Disciplinary Authority has no power to reject the Inquiry Officer's report in toto and to issue an order for fresh inquiry.

8. In view of the settled question of law as laid down by the Appex Court we find that there is a sharp distinction between the expression of the word 'Fresh Inquiry' and 'Further Inquiry'. So, it is clear that said inquiry was concluded against the applicant in violation of the provision of Rule 10(2) of the D&A Rules, 1968. It is apparent that the order dated 17/27.5.93 issued by the Disciplinary Authority directing the newly appointed Inquiry Officer Shri S. Prasad to hold fresh inquiry into the charges on the basis of the said charge-sheet ignored the Rule 10(2) of the D&A Rules. It may be

Shri S. Prasad vide his order dated 17/27.5.93 (Annexure 'H') is not sustainable and is liable to be quashed. And consequently the ~~supposed~~ report of the Inquiry Officer submitted by Mr. S. Prasad is not also sustainable in view of the reasons disclosed above. It is also found that the Disciplinary Authority as well as the Appellate Authority failed to consider the material facts and law in this case which affects the very jurisdiction of the Disciplinary Authority. So, in view of the aforesaid circumstances, the purported order of punishment dated 24.4.95 (Annexure 'J') on the basis of the 2nd report of inquiry is not sustainable in law. We find that in the present case the Appellate Authority had not considered the specific grounds raised by the applicant regarding absence from duty and passed order mechanically and the said order is found devoid of reason. It is an established principles of natural justice that a party is entitled to know reason for a decision. The order of the Appellate Authority (Annexure 'L') is not also sustainable in law. It is settled law that holding of inquiry in violation of prescribed Rules for such inquiry is unsustainable and consequently penalty imposed on the basis of such inquiry is also unsustainable. So, turning to the said order of penalty dated 24.4.95 (Annexure 'J') we find that the order dated 24.4.95 which had been communicated to the applicant vide letter dated 9.5.95 (Annexure 'J') is provisional and not final, wherein it is mentioned 'you should be removed from service with immediate effect'. The punishment notice (Annexure 'J') along with the decision dated 24.4.95 had been sent to the applicant vide letter dated 9.5.95 to make appeal before the Appellate Authority (Annexure 'J'). On a perusal of the said notice it is found that provisional decision regarding removal from service was served upon the applicant by the Disciplinary Authority that he should be removed from the service with immediate effect and no final order of punishment removing him from service had been issued by the respondents till date. The said order dated 24.4.95 cannot be treated as final order of removal from service. In view of the aforesaid circumstances, we are of the view that the entire enquiry proceeding including purported order of punishment dated 24.4.95 (Annexure 'J') and order of the Appellate Authority are not sustainable and are liable

9. Regarding charge of mis-conduct for alleged unauthorised absence from duty w.e.f. 26.12.92 to 31.12.92, respondents produced Attendance Register of the applicant for the relevant period. We have gone through the records produced by the respondents and from the Attendance Register it is found that applicant was kept off from duty for the relevant period from 26.12.92 to 31.12.92. It is the case of the applicant that he applied for leave from 26.12.92 to 31.12.92 and that leave was sanctioned; but respondents took plea that prayer of leave from 26.12.92 to 31.12.92 had been sanctioned by the incompetent authority. But respondents could not produce any records to show that leave sanctioned for the period from 26.12.92 to 31.12.92 by the authority has been cancelled or withdrawn. On a perusal of the records it is seen that applicant was kept off from duty. So it is the duty of the prosecutor to establish the charge by cogent evidence. Rather it is found that he was kept out of duty by the authority. It is settled law that in order to prove the mis-conduct on the ground of alleged unauthorised absence from duty, it is to be decided by the authority that such absence from duty was willful or without any sufficient reasonable cause. Mere absence from duty does not amount to mis-conduct. It is also settled law that if the leave of the Govt. employee is sanctioned and he remains absent from duty after sanction of the leave, then such absence from duty cannot be said to be unauthorised and such absence does not amount to mis-conduct. We find that neither the enquiry authority nor the disciplinary authority has considered the facts and overlooked the official records. Moreover, none of the authority has come to a definite findings that applicant remained absent from duty willfully and without sufficient reasonable cause.

10. In view of our aforesaid discussion, the application must succeed. Therefore, we set aside all the impugned order of punishment (Annexure 'J'), order of Appellate Authority (Annexure 'L') and the inquiry report in this case and we direct the respondents to re-instate the applicant forthwith treating that applicant was on duty till date. Respondents are also directed to make all payment of back salary

admissible to him from the date of removal till date of reinstatement within three months from the date of communication of this order. It be mentioned here that the leave from the period from 26.12.92 to 31.12.92 may be regularised by the respondents in accordance with the rules after obtaining fresh application from the applicant for granting leave as admissible to him. If leave is not due in his credit, he should be granted Extra Ordinary Leave or any other leave admissible to him for the said period.

With the aforesaid observation we allow the application awarding no costs. MA is disposed of accordingly.

By me
(B. P. Singh) 17/9/99
Member(A)

D. P. S.
(D. Purkayastha)
Member(J)