CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.NO. 129/2004

Tuesday, this the 5th day of July, 2005.

CORAM:

HON'BLE MR K.V.SACHIDANANDAN, JUDICIAL MEMBER
HON'BLE MR N.RAMAKRISHNAN, ADMINISTRATIVE MEMBER

C.Sasidharan Pillai,
Ex. C&W Khalasi,
Southern Railway,
Divisional Office, Mechanical Branch,
Madras.
(Residing at: Nediyathu Vadakethil,
Thazham Ward, East Kallada.P.O,.
Kollam). - Applicant

By Advocate Mrs Daya Panicker

vs

1. Union of India represented by
the Secretary,
Ministry of Railways,
New Delhi.

2. The Chairman,
Railway Board,
Railway Bhavan,
New Delhi.

3. The Chief Rolling Stock Engineer,
Southern Railway, Headquarters,
Personnel Branch, Chennai.

4. Additional Divisional Railway Manager,
Divisional Railway Manager's Office,
Southern Railway, Personnel Branch,
Madras.

5. Senior Divisional Mechanical Engineer,
Divisional Office, Southern Railway,
Mechanical Branch, Madras. - Respondents

By Advocate Mr P Haridas

The application having been heard on 17.5.2005, the Tribunal on 5.7.2005 delivered the following:

ORDER

HON'BLE MR K.V.SACHIDANANDAN, JUDICIAL MEMBER

The, applicant a regular C&W Khalasi under the 5th respondent averred in the O.A. that he received a telegraphic message (A-1) from his home town that his wife was admitted in the hospital. Immediately thereafter, the applicant left for his home town after submitting leave application for 15 days on 22.8.94 to the first respondent. After the leave period, the applicant was not allowed to rejoin duty. He made several representations, including a representation through Member of Parliament. Then he received A-2 letter informing that after conducting an enquiry, the competent authority imposed a penalty of removal from service for his unauthorised absence. The applicant preferred an appeal and revision which were dismissed by nonspeaking orders. Aggrieved, the applicant has filed this application for the following relief:

i) To call for the records leading to A-2, A-3 and A-4 and quash the same and reinstate the applicant in service with all consequential service benefits.

ii) To declare that impugned orders are arbitrary, malafide and violative of the provisions contained in the Railway Servants (Discipline & Appeal) Rules 1968 and Article 14, 16 and 311(2) of the Constitution of India and the applicant is eligible for reinstatement in service with all consequential benefits.

2. The respondents have filed a reply statement contending that while the applicant was working as C&W Khalasi Helper he was frequently and unauthorisedly absent from duty on various spells and continuously absented from 12.10.93 to 18.5.94 and till the removal from service i.e. 25.5.95. A major penalty charge memo dated 10.8.94 was issued for his

unauthorised absence from 12.10.93 to 18.5.94 and after conducting an enquiry as provided under Rule 9 of the Railway Servants (Discipline & Appeal) Rules 1968, he was removed from service. The communications were sent to the last known address at Tambaram. The charge memo was served by registered post, but the same was returned by the Postal authorities with the remark "party left without instruction, returned to sender". The same fate happened to the notice of enquiry and finally it was pasted on the notice board on 12.9.94 in the presence of two railway employees in the office of Assistant Mechanical Engineer, Coach Maintenance, Madras. Since the applicant failed to attend the enquiry and the communications sent to the applicant were unanswered, an exparte enquiry was conducted on 26.12.94 complying and finally he was removed from service by the disciplinary authority considering the facts and circumstances of the case. His whereabouts were not known which would indicate that the employee had alternate source of earning his livelihood and he was no more in need of railway service. R-II is the penalty advice. The averment in the O.A. that the telegram dated 22.8.94 informing "Divya hospitalised. Start immediately" is a cooked up document only to cover the misconduct of unauthorised absence. It was the duty of the applicant to ensure whether the has been granted or not. Mere submission of leave cannot be deemed to be a permission to leave the headquarters. The applicant had purposefully avoided receiving the communications sent by the respondents. It was the duty of the applicant to declare the present address whenever he leaves the headquarters. He had not fulfilled this obligation, instead chose to make grievance before the Member of Parliament, before exhausting the departmental remedies. The allegation that he was not served with the order of penalty order is incorrect. The communications were sent to the latest address furnished by him on 1.1.94 (R-I). The grounds taken in the

O.A. Are not substantiated. In Railway Board letter dated 19.11.71 (R-V), last known address means, 'the local address of the employee, i.e. The premises which the employee had been occupying before he proceeded on leave'. A Railway employee who is unauthorisedly absent for a long period is very much aware that he will be taken up under Railway Servants (Discipline & Appeal) Rules 1968. On earlier three occasions, the applicant was charge sheeted for unauthorised absence and imposed minor penalties. Only after removal from service he has stated about his wife's sickness and he was throughout attending her at the hospital.

3. The applicant has filed a rejoinder contending that he has applied for leave and when he reported for duty, the respondents did not permit him to join duty. When the notice was returned to the sender, the respondents could have serve the notice through paper publication. Dismissal or removal from service is a very severe punishment and the same can be imposed on an employee only if the charge(s) levelled against him/her are proved beyond doubt on completion of a full fledged enquiry conduced by complying with the provisions contained in Railway Servants (Discipline & Appeal) Rules 1968 and Article 311 of the Constitution of India.

4. Shri K.Karthikeya Panicker appeared for the applicant and Shri P Haridas appeared for the respondents. Counsel for the applicant argued that the procedure that should have been followed is Rule 9 of Railway Servants (Discipline & Appeal) Rules 1968, was not complied with in conducting the enquiry and the appellate and revisional orders were passed without application of mind. The procedure of service of notice is mandatory in the Railway rules. A notice in the last known address of the applicant has not admittedly been issued in this case, as laid down in R-V,

their own document and also for unauthorised absence. Assuming that the applicant was unauthorisedly absent, even then such harsh punishment like removal from service is not warranted. Counsel for the respondents on the other hand strenuously argued that having put in more than 20 years of service, the applicant should have known that he should inform the respondents his correct address and he should have proceeded on leave after due sanction of the same. Mere submission of leave application will not per se entitle him to proceed on leave on the presumption that the leave will be granted. Therefore, there is no procedural irregularity in conducting an exparte enquiry and the impugned orders cannot be faulted.

5. We heard the learned counsel on both sides. We have also gone through the pleadings and the enquiry report file submitted by the respondents. We find that the applicant has submitted leave application and medical fitness certificate to rejoin duty.

6. It is an admitted fact that the applicant was removed from service after an exparte enquiry for unauthorised absence from 12.10.93 to 18.5.94. It is also brought in evidence that the respondents had attempted to serve all communications in the last known address at Tamparam. But the case of the applicant is that since his wife was hospitalised and received a telegram on 22.8.94 he was constrained to proceed for his native place duly making an application for leave under the impression that the leave would be sanctioned and when he came back to join duty, he was not permitted to do so. Without issuing any notice or communication, disciplinary proceedings has been initiated and admittedly no steps have been taken by the respondents to take out substituted service for such enquiry and harsh punishment imposed. Had

he received notice, he would have definitely participated in the enquiry which would have proved that he is innocent and he had no intention of making himself for unauthorized absence.

7. The Hon'ble Supreme Court in a catena of decisions, particularly, in Tata Cellular v. Union of India [(1994) 6 SCC 651] declared that the scope in a judicial review not the merits of the decision in support of which the application for judicial review is made, but the decision making process to be evaluated. The court has to analise as to whether the action is violated by arbitrariness, unfairness, illegality, irrationality and procedural fault. Therefore, this court will be evaluating as to whether there is any procedural irregularity in this case. Admittedly the case of the respondents is that they could not issue any communication/notice as contemplated in the enquiry proceedings with special reference to Rule 9 of Railway Servants (Discipline & Appeal) Rules 1968. Their case is that all the communications were returned by the Postal authorities saying that "party left". Our attention is taken to R-V which is reproduced below:

> "Copy of Railway Board's letter No.E(D&A) 69RG6-29 dt.19.11.1971 addressed to the General Managers, All Indian Railways.
>
> Sub: Railway Servants (Discipline and Appeal) Rules, 1968 – Notice of Imposition of Penalty.
>
> It has been laid down in para 2(2) (iii) of Board's letter of even number dated 17.11.1970 on the above subject that in case the railway servant concerned does not accept the order/notice, and the same is returned undelivered by the postal authorities with the endorsement, such as, 'addressee not found', 'refused to accept',. Etc. it should be pasted on the Notice Board of the Railway premises in which the employee concerned was working, last as well as in a place in the last noted address of the railway employee.
>
> 2. It has been represented to the Railway Board that it is difficult to paste the order/notice in a place in the last noted addressed of the railway servant, who resides far

away from the place of his work, especially when such address given by the railway servant at time of proceeding on leave happens to be a far away village/town/city.

3. In this connection it is clarified that the "last noted address" used in para 2(2) (iii) of Board's letter referred to in the preceding para means the local address of the employee, i.e. The premises which the employee had been occupying before he proceeded on leave. In cases, where the last noted address of the employee who has proceeded on leave is in a distant town/village, the proper mode of serving would be to send the order/notice on the address of his home town/village by registered post and the question of pasting it in that place does not arise."

(emphasis supplied)

8. In the case before us, the argument that no such refusal of notice is borne out. But it was returned unserved as the party left the place. In such circumstance, the contention of the applicant is that respondents could have initiated substituted service/process through publication which is not done in this case, which is guaranteed under Article 311(2). This argument has considerable force. On going through the provisions of Rule 9 Railway Servants (Discipline & Appeal) Rules 1968, we find that the failure to adhere to the unauthorised procedure and wilful absence whether that constitute gross misconduct. An instance of absence without prior sanction or prior intimation under certain compelling circumstances would at worst be an instance of human failure, pardonable in best of times by regularisation with displeasure and when unpardonable treated with a break in service. There is nothing gross in the act of unauthorised absence and there is also no motive as a ground of illness has not even been questioned far from being assailed. The contention of the respondents that on many earlier occasions on the ground of unauthorised absence the applicant was subjected to minor penalties without conducting any enquiry. Only in this case charges were framed under the rule for major penalty. Annexure to Rule 9 of Railway

Servants (Discipline & Appeal) Rules 1968 governs the cases of imposition of major penalty is as follows:

> "9. PROCEDURE FOR IMPOSING MAJOR PENALTIES
>
> (1)No order imposing any of the penalties specified in clauses (v) to (ix) of Rule 6 shall be made except after an inquiry held, as far as may be, in the manner provided in this Rule and Rule 10, or in the manner provided by the Public Servants(Inquiries) Act, 1850 (37 of 1850) where such inquiry is held under that Act.
>
> (2)Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Railway servant, it may itself inquire into, or appoint under this Rule or under the provision of the Public Servants (Inquiries) Act, 1850, as the case may be a Board of Inquiry or other authority to inquire into the truth thereof."

9. Whether unauthorised absence constitute a punishable offence of any of the types detailed in the rules?. Under the said rules unauthorised absence should be deemed to cause an interruption or break in service of an employee. A reasonable opportunity is to be given before invoking the penalty. Admittedly, the exparte enquiry was ordered without any service of notice. In the absence of a dishonest motive, it cannot be deemed that the absence was unauthorised and wilfully. Respondents has not contributed any fact finding aspect in the enquiry as to the contention of the applicant that it was due to the sickness of his wife, he was constrained to go to his native place. It is also the respondents case that the applicant had made an application for leave. He was not absconding. Therefore, we are of the view that the enquiry conducted by the respondents is vitiated by procedural lapse and the punishment imposed is excessive and unwarranted as laid down by the Hon'ble Supreme Court in the decision in B.C.Chaturvedi v. Union of India, [JT 1995 (8) SC 65].

10. We are therefore of the view that while the enquiry process was vitiated, the very act of imposing the major penalty of removal from service for unauthorised absence was unwarranted, inappropriate, disproportionate and arbitrary and there was no reasonable ground to believe that the applicant had committed any gross irregularity or negligence in the discharge of official duties with a dishonest motive by remaining unauthorisedly absent from duty, convinces us that the order of penalty of removal from service was perverse in the sense that no reasonable person would form the requisite opinion on the given material, especially when the appeal and revisional orders seems to be mechanical and lack of application of mind.

11. We, therefore, set aside the impugned orders and direct the respondents to re-instate the applicant within two months from the date of receipt of copy of this order and the period intervening between the date of removal and the date of reinstatement be treated as duty notionally without any monetary benefit and with an opportunity to the respondents to treat the period of unauthorised absence as break in service or as leave of the kind due as they deem fit under the rules governing the matter. There is no order as to costs.

Dated, the 5th July, 2005.

N.RAMAKRISHNAN
ADMINISTRATIVE MEMBER

K.V.SACHIDANANDAN
JUDICIAL MEMBER

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