CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A No. 167 / 2008

Wednesday, this the 15th day of July, 2009.

CORAM

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

HON'BLE Ms. K NOORJEHAN, ADMINISTRATIVE MEMBER

A.P.Pushkarakshan,
(Ex-Cabin Master, Sankaridurg Railway Station,
Southern Railway, Palghat Division),
Parakkunnath House,
Manjakad, Shornur-679 121. ....Applicant

(By Advocate Mr TC Govindaswamy)

v.

1. Union of India represented by
the General Manager,
Southern Railway, Headquarters Office,
Park Town.P.O., Chennai-3.

2. The Senior Divisional Operations Manager,
Southern Railway,
Palghat Division, Palghat.

3. The Additional Divisional Railway Manager,
Southern Railway,
Palghat Division, Palghat.

4. The Chief Passenger Transportation Manager,
Southern Railway, Headquarters Office,
Park Town.P.O., Chennai-3. ....Respondents

(By Advocate Mr Thomas Mathew Nellimoottil)

This application having been finally heard on 22.6.2009, the Tribunal on 15.7.2009 delivered the following:

ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

The applicant is aggrieved by (i) the Annexure A-1 penalty advice dated

14.11.2005 issued by the 2nd respondent by which he was imposed with the penalty of "removal from service with immediate effect", (ii) the Annexure A-2 appellate order dated 3.2.2006 issued by the 3rd respondent rejecting his appeal dated 23.12.2005 against the aforesaid penalty advice dated 14.11.2005 and (iii) the Annexure A-3 revisional order dated 11.7.2006 issued by the 4th respondent rejecting his revision petition dated 30.4.2006.

2. Brief facts of the case are that by the Annexure A-5 memorandum dated 23.3.2004, the disciplinary authority proposed to hold an enquiry against the applicant under Rule 9 of the Railway Servants (Discipline & Appeal), Rules, 1968 against the charges involving lack of devotion to duty and behaving in a manner unbecoming of a Railway servant thus violating Rule 3 (I), (ii) and (iii) of the Railway Services (Conduct) Rules, 1966 for absenting himself from duty unauthorizedly from 11.10.2001 to 4.12.2001, 7.2.2002 to 9.2.2002 and from 14.11.2003 to 24.2.2004 for which he had neither applied for leave nor reported sick at any of the Railway hospital or health unit.

3. The applicant vide his Annexure A-6 defence statement submitted that he had an operation on 10.5.2003 at Railway Hospital, Palghat on his right leg as pain continued intermittently. He again reported sick on 6.11.2003 at Railway Hospital, Shornur where his native place is also situated. On examination, the DMO, Shornur noticed that the reason for continuing the pain was the infection which has developed after he had an operation at Railway Hospital, Palghat and transferred him to Railway Hospital, Erode. However, because he was bedridden, he did not report to the Railway Doctor and remained absent till he reported for duty on 6.7.2004 with a Private Medical Certificate (PMC for short) and later with the fitness certificate issued by the DMO, Erode. As regards the absence for the period from 11.10.2001 to 4.12.2001, applicant has submitted

that he was sanctioned 3 days leave from 8.10.2001 and he was due for reporting back on 11.10.2001. However, his son was suddenly hospitalised and therefore, he could not report for duty because of his mental agony. He reported for duty at 20.00 hours on 11.10.2001 but the Station Master did not permit him to join duty because there was instruction from TI/ED that no duty should be given to him without his permission. Since he could not meet the TI/ED on that day he went on PMC till 4.12.2001 as his son was hospitalised. As regards the absence of leave from 7.2.2002 to 9.2.2002, he submitted that due to some urgent work at his native place, he requested the Station Master for 3 days leave on "managing duties" but his colleagues told the Station Master that if he was granted leave, they would not work on "managing duties" as they may not get over time allowance. Therefore, he was forced to absent from duties as his presence was urgently required at his home. Having not satisfied with the aforesaid defence statement given by the applicant, an enquiry was conducted and enquiry officer submitted his report on 2.3.2005. The finding of the enquiry officer was that the applicant has absented himself from duty from 11.10.2001 to 4.12.2001, 7.2.2002 to 9.2.2002 and from 14.11.2003 to 24.2.2004 without any prior permission from his superior. During the aforesaid period, he had also not reported sick at any of the Railway Hospitals/Health Unit but he was under "private sick" from 14.11.2003 to 5.7.2004. Accordingly, the enquiry officer held that the charges levelled against the applicant have been proved. A copy of the said enquiry report was furnished to the applicant vide the Annexure A-8 letter dated 25.7.2005 inviting his representation, if any, on it. The applicant, however, did not submit any representation against the Enquiry Report. Thereafter, considering the aforesaid enquiry report, the disciplinary authority, vide Annexure A-1 impugned order dated 14.11.2005, held that the applicant might have been actually sick due to some problems but as a disciplined Railway servant he failed to obey the rules and norms prescribed in the Medical Manual. The disciplinary

authority has also observed that the applicant used to absent himself from duty spot frequently and reported sick and such frequent absence has created "*unnecessary problems like over working to other colleagues and payment of OTA etc*". The disciplinary authority has also observed that the action of the applicant deserting from the sick list of the DMO/Erode and going to his native place Shornur and then reporting sick privately showed his indisciplined behaviour clearly. It has also observed that the applicant himself admitted that he had absented himself from duty. Thus the disciplinary authority has come to the conclusion that employees like the applicant who is indisciplined is a burden to the Railways and imposed on him the penalty of "removal from service with immediate effect" vide Annexure A-1 order dated 14.11.2005. Applicant filed the Annexure A-9 appeal dated 23.12.2005 wherein he has pointed out that he was permitted to avail 3 days casual leave from 8.10.2001 and on expiry of the same, he could not pickup 10-20 hours duty since he had to hospitalise his son who suddenly fell ill. However, he was prepared to to pick up night duty but was not allowed by the Station Master. While returning home and on attending his son who was under the care of a private doctor, he had to stay back since his condition was not stable. Subsequently, he too fell ill and had to take treatment from the same doctor and on being declared fit after a period of nearly two months, he reported for duty on 8.12.2001. He has also submitted that on 7.2.2002 he proceeded to his native place on 3 days casual leave to attend some urgent domestic matter but on returning, he found that he was marked absent and requested the SMR/SGE to regularise his absence and to arrange to claim salary for the said period. He was also under the sick list of Sr.DMO/SRR from 6.11.2003 but the case was transferred to ED on 13.11.2003 as his headquarters under DMO/ED. As he had received a message from his native place Shornur informing him that his aged father was seriously ill, he rushed back to Shornur. After attending his father, he himself fell ill and because of the

infection on his right foot, an operation was conducted for which he underwent treatment at his native place and he was declared fit only on 6.7.2004. His submission was that his absence was due to his prolonged illness and the surgery on his right foot conducted on 1.12.2005 and it was not deliberate. He has also pointed out that he was the only bread winner of the family consisting of aged parents, one unmarried sister and his wife and two children. He has, therefore, requested the appellate authority to pardon for his lapse on his part and to pass favourable orders permitting him to continue in service. The appellate authority however, vide Annexure A-2 order dated 3.2.2006 considered his aforesaid appeal dated 23.12.2005 but on humanitarian consideration, modified the penalty of removal from service to that of "compulsory retirement from service". The applicant has filed the Annexure A-10 revision petition but the same was dismissed by Annexure A-3 letter dated 11.7.2006 observing that the penalty of removal from service by the disciplinary authority has already been reduced by the appellate authority to compulsory retirement and there was no further scope for any reduction in penalty.

4. The applicant has challenged the aforesaid disciplinary authority's order dated 14.11.2005, the appellate order dated 3.2.2005 and the revisional order dated 11.7.2006 on the ground that they are arbitrary, discriminatory, contrary to law and hence violative of the constitutional guarantees enshrined under Articles 14 and 16. He has submitted that he did not attend his duties on the days mentioned in the charge sheet not because of any wilful negligence but for the reasons beyond his control and therefore there is no justification in removing or compulsory retiring him from service. He has also submitted that the penalty imposed on him on the ground of alleged past misconduct but there was no mention about it in the charge memo. He claimed that he has been honestly, meticulously and most efficiently discharging his duties and he was duly

rewarded for it by promoting as Goods Driver. He has, therefore, argued that the penalty of removal from service or even the modified penalty of compulsory retirement is unjust, inequitable and disproportionate to the gravity of the offence committed and it was shocking to the conscience of any person of ordinary prudence.

5. The respondents in the reply statement have submitted that as the applicant unauthorizedly absented himself from duty from 11.10.2001 to 4.12.2001, from 7.2.2002 to 9.2.2002 and from 14.11.2003 to 24.2.2004 without making his whereabouts known to them, the charge sheet could not be served upon him but it had to be pasted at his Railway Quarters and Station Notice Board. They have also pointed out that when the applicant reported sick at Railway Hospital Shornur on 6.11.2003, he was transferred to Railway Hospital Erode on 13.11.2003, but he did not attend the Railway Hospital, Erode and he had not taken any permission from the Railway Doctor at Erode to go to his native place at Shornur. Later, he reported for duty on 6.7.2004 with two Private Medical Certificates dated 14.11.2003 and 6.7.2004 issued by Dr U.S.Mukundakshan, Medical Practitioner, Shornur (Annexure R-2 and R-3) but as per the existing instructions regarding reporting "Private Sick", the employee concerned is required to intimate about it to the Railway within 48 hours his falling sick. They have also submitted that the applicant himself has admitted the charge framed against him. Even after the charge sheet was issued to him on 23.2.2003, he continued to remain absent from duty till 5.7.2004. The applicant was afforded adequate opportunity to cross examine the witness but he did not avail the same. Thereafter, the enquiry officer submitted his report rightly holding that the charges were proved. Even though copy of the enquiry report was sent to him on 6.9.2005 to enable him to make the representation, he did not respond. The respondents have also pointed out that since the applicant

was working in a safety related post, a more responsible conduct was expected of him. Therefore, the disciplinary authority has imposed upon him the penalty of removal from service. However, the appellate authority has duly considered his appeal and reduced the punishment to that of compulsory retirement with 2/3rd of pension and gratuity. As far as the quantum of punishment is concerned, they have submitted that it is well settled law that the disciplinary and appellate authorities are the only competent authorities vested with the power to decide the same after assessing the evidence on record. Accordingly, the disciplinary authority's order of removal from service has been duly modified to that of compulsory retirement by the appellate authority. They have also denied the contention of the applicant that he had been working honestly and meticulously discharging his duties and submitted that he was imposed with penalty of withholding of increment for 6 months earlier also, on the charge that while he was working as Cabinmaster at Sankaridurg (SGE)'B' Cabin on 30.4/1.5.1999 from 2-24/00.06 hours, he failed to clear reception signal in time for train No.6525 which resulted in 20 minutes detention to the train at SGE home signal.

6. We have heard Shri TC Govindaswamy, learned counsel for applicant and Shri Thomas Mathew Nellimoottil, learned counsel for respondents. We have also carefully gone through the pleadings. The applicant has also filed M.A274/2008 for condonation of delay of 250 days in filing this O.A. It was stated therein that he is hailing from a poor family, he is a member of the Scheduled Caste Community and his family is solely depending upon his monthly income and they are in deep penury. It is seen that even though the revisional authority rejecting his petition was passed way back on 11.7.2006, the applicant has filed the present O.A only on 14.2.2008. Though the delay in filing the O.A cannot be termed as undue or inordinate, it shows that the applicant was not

prompt enough to even challenge the penalty imposed upon him. The reason given by the applicant in the M.A is also not convincing. Accordingly the M.A is dismissed.

7. As regards the merit of the case is concerned, the allegation against the applicant was that he was on unauthorized absence from duty on 3 spells during the enquiry. The applicant has himself admitted that he was on unauthorized leave. However, the main argument of the learned counsel for applicant is that the penalties imposed upon the applicant by the disciplinary authority and the appellate authority were extremely shocking and disproportionate to the gravity of the offence committed by him. We do not agree with the learned counsel for the applicant in this regard. There is no doubt that absentism is a grave misconduct in the case of Railway employees and more particularly when the employee concerned like the applicant has been posted against safety related post. The Apex Court in **State of Rajasthan v. Mohd. Ayub Naz**, [(2006) 1 SCC 589] has held as under:

> "**9.** Absenteeism from office for a prolonged period of time without prior permission by government servants has become a principal cause of indiscipline which has greatly affected various government services. In order to mitigate the rampant absenteeism and wilful absence from service without intimation to the Government, the Government of Rajasthan inserted Rule 86(3) in the Rajasthan Service Rules which contemplated that if a government servant remains wilfully absent for a period exceeding one month and if the charge of wilful absence from duty is proved against him, he may be removed from service. In the instant case, opportunity was given to the respondent to contest the disciplinary proceedings. He also attended the enquiry. After going through the records, the learned Single Judge held that the admitted fact of absence was borne out from the record and that the respondent himself had admitted that he was absent for about 3 years. After holding so, the learned Single Judge committed a grave error that the respondent can be deemed to have retired after rendering of service of 20 years with all retiral benefits which may be available to him. In our opinion, the impugned order of removal from service is the only proper punishment to be awarded to the respondent herein who was wilfully absent for 3 years without intimation to the Government. The facts and circumstances and the admission

made by the respondent would clearly go to show that Rule 86(3) of the Rajasthan Service Rules is proved against him and, therefore, he may be removed from service.

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18. For the foregoing reasons, we are of the opinion that a Government servant who has wilfully been absent for a period of about 3 years and which fact is not disputed even by the learned Single Judge of the High Court, has no right to receive the monetary/retiral benefits during the period in question. The High Court has given all retiral benefits which shall mean that a lump sum money of lakhs of rupees shall have to be given to the respondent. In our opinion, considering the totality of the circumstances, and the admission made by the respondent himself that he was wilfully absent for 3 years, the punishment of removal imposed on him is absolutely correct and not disproportionate as alleged by the respondent. The orders passed by the learned Single Judge in SB Civil Writ Petition No. 2239 of 1991 dated 24-8-2001 and of the order passed by the Division Bench in LPA No. 1073 of 2001 dated 13-12-2001 are set aside and the punishment imposed by the disciplinary authority is restored. However, there shall be no order as to costs."

The reasons given by the applicant for absence are also very flimsy. When the applicant was allegedly unwell and admitted in the Railway Hospital, Shornur and later referred to the Railway Hospital at Erode, he preferred not to go there and went to his native place at Shornur on his own and got his treatment from a private hospital. The charge on unauthorized absence from duty has been fully proved during the enquiry and the applicant has no complaint against the manner in which the enquiry was held. The disciplinary authority had accepted the enquiry report based on the evidence and imposed one of the severest penalty of removal from service upon him. However, finding that the said penalty of removal from service was extreme, the appellate authority has taken a very lenient view and modified the penalty to that of compulsory retirement from service so that the applicant could get the some monetary benefits for the service rendered by him. In view of the aforesaid judgment of the Apex Court in the case of **Mohd. Ayub Naz** (supra), the appellate authority's order was not, in

fact, called for. In any case, it is not for the Court or Tribunal to decide the type of punishment to be imposed upon a delinquent Government servant. It is entirely upto the disciplinary authority and the appellate authority/revisional authority to take appropriate decision in the matter. In this case, even though the disciplinary authority has imposed upon him an extreme penalty of removal from service, the appellate authority has reduced it. Therefore, it is not for this Tribunal to again reduce the punishment or to direct the respondent to reduce the punishment further and to impose some other punishment. As regards the quantum of punishment is concerned, a three Judge Bench of the Apex Court has held in **B.C.Chaturvedi v. Union of India** [JT 1995(8) SC 65] as follows:

> "18. ... The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate Authority *shocks* the *conscience* of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary authority/Appellate Authority to *reconsider* the penalty imposed, or to shorten the litigation, it may itself, *in exceptional* and *rare* cases, impose appropriate punishment with cogent reasons in support thereof."

Again, Om Kumar and others v. Union of India [2001(2) SCC 386], the Apex Court held as under:

> "Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the court is confined to *Wednesbury* principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that *Wednesbury* principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment."

9. In the above facts and circumstances of the case, we dismiss this case on merit as well. There shall be no order as to costs.

K NOORJEHAN
ADMINISTRATIVE MEMBER

GEORGE PARACKEN
JUDICIAL MEMBER

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