IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH

Original Application No: **699 OF 1995**

Date of Decision: 31.03.1999.

Subhash Bhivaji Khadase, Applicant.

Shri V. K. Pradhan, Advocate for Applicant.

Versus

Union Of India & 2 Others, Respondent(s)

Shri R. R. Shetty, Advocate for Respondent(s)

CORAM:

Hon'ble Shri. **Justice R. G. Vaidyanatha, Vice-Chairman.**

Hon'ble Shri. **D. S. Baweja, Member (A).**

(1) To be referred to the Reporter or not? N/O

(2) Whether it needs to be circulated to other Benches of the Tribunal? N/O

(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

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CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO.: 699 OF 1995

Dated this Wednesday, the 31st day of MARCH, 1999.

CORAM : HON'BLE SHRI JUSTICE R. G. VAIDYANATHA, VICE-CHAIRMAN.

HON'BLE SHRI D. S. BAWEJA, MEMBER (A).

Subhash Bhivaji Khadase,
Mukam Post, Sirsoli,
Sirsoli Rly. Station,
Taluka & Dist. Jalgaon. ... Applicant

(By Advocate Shri V. K. Pradhan)

VERSUS

1. Union Of India through
The Secretary,
Ministry of Railways,
Railway Board,
New Delhi.

2. Asstt. Engineer (Railways)
AEN(T), AEN(T)'s Office,
Central Railway, Bhusaval.

3. Divisional Engineer (H.Q), ... Respondents.
Central Railway,
(Bhusaval).

(By Advocate Shri R.R. Shetty)

OPEN COURT ORDER

PER.: SHRI R. G. VAIDYANATHA, VICE-CHAIRMAN

This is an application challenging the order of the Disciplinary Authority and the Appellate Authority under Section 19 of the Administrative Tribunals Act, 1985. The respondents have filed reply opposing the application. We have heard the Learned Counsels appearing on both sides.

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2. The applicant at the relevant time was working as a Gangman in the Central Railway. He was charge-sheeted for unauthorised absence for the period from 18.08.1992 to 03.10.1993. The applicant did not submit any written statement. The Disciplinary Authority appointed an Inquiry Officer who held the enquiry and examined the applicant and then one witness and gave a report that the charge is proved. Based on that enquiry report, the Disciplinary Authority passed an order dated 21.02.1994 holding that the charged is proved and imposed the penalty of removal from service. The applicant preferred an appeal before the Disciplinary Authority who dismissed the appeal by a cryptic order dated 11.07.1994. Therefore, the applicant has approached this Tribunal challenging the two orders on number of grounds. It is alleged that no enquiry has been held as required by the rules and that what is held is contrary to the rules. It is stated that the applicant's absence for the period mentioned above was due to the fact that he was kept under suspension by the competent authority. It is also alleged that the applicant did not receive any order of suspension and he was not paid any subsistence allowance. That the appellate authority has passed the order mechanically without considering the grounds urged by the applicant in the appeal. The very issuance of the charge-sheet for alleged unauthorised absence is illegal since during that period the applicant had been placed under suspension. It is also alleged that the disciplinary enquiry was in violation of the principles of natural justice. It is also alleged that the

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findings of the Inquiry Officer are perverse. It is also alleged that the Inquiry Officer has taken into consideration extraneous matter for which there was no allegation in the charge-sheet. Therefore, the applicant prays that the impugned orders of the Disciplinary Authority and the Appellate Authority be quashed and he may be reinstated in service with all consequential benefits including backwages, etc.

3. The respondents in their reply have justified the action taken against the applicant. It is alleged that the applicant has pleaded guilty to the charge of unauthorised absence. As far as the applicant's explanation that he was kept under suspension, it is stated that the order of suspension was never served on the applicant and, therefore, it never came into operation. Since the enquiry is based on the admission of the applicant, there is nothing illegal in the disciplinary enquiry. The enquiry has been done as per rules. That the order passed by the Disciplinary Authority and the Appellate Authority are as per rules and are not vitiated in any manner. It is, therefore, prayed that the application be dismissed with cost.

4. At the time of argument, the Learned Counsel for the applicant questioned the correctness and legality of the procedure adopted by the Inquiry Officer in putting leading questions to the applicant and then acting on his alleged admission without taking into consideration his explanation for alleged unauthorised absence. Then he commented on the examination of one witness behind the back of the applicant and the witness being not offered for cross-examination by the applicant. He also

commented on the report of the Inquiry Officer being perverse, since he has taken into consideration the extraneous matters which were not subject matters of charge. He also commented on the violation of number of provisions under Rule 9 of the Railway Servants (Discipline & Appeal) Rules, 1968. He maintained that since the applicant was kept under suspension or an order of suspension had been passed, the absence of the applicant during the period in question, cannot be said to be unauthorised absence. On the other hand, the Learned Counsel for the respondents maintained that the order of suspension was not served on the applicant and therefore it has not been given effect to and hence the applicant cannot take any advantage of the order of suspension for his unauthorised absence. He argued that the enquiry has been done as per rules and action is taken in view of the admission of the applicant about his unauthorised absence. He supported the orders of the Disciplinary Authority and the Appellate Authority being passed as per rules.

5. In the light of the arguments addressed before us, the only question that falls for determination is whether the disciplinary enquiry is vitiated and the punishment imposed is not sustainable ?

6. The Inquiry Officer has given a finding that the charge is proved on the admission of the applicant, being answers to Question Nos. 1, 6 and 10. The relevant answer is to question No. 6, where nodoubt the applicant has accepted the charge. But unfortunately,

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the Inquiry Officer has not taken cognizance
the answer of the applicant to question no. 7. It is
well settled that the admission should be read as a
whole or not at all. The admission of the applicant is
that he was no doubt absent for the period from 10.07.1992
to 03.10.1992 but he gives an explanation that this was
because he was kept under suspension. The other, if
read the entire answer as a whole, there is no admission
as such or it is a qualified admission. If that admission
is accepted, namely - that he did not attend the office
because of the order of suspension, then it cannot be
said that it amounts to unauthorised absence.

The fact that the communication issued on
order of suspension is not disputed. Even the counsel on
administration is, that the order was not actually served
on the applicant and it was returned unserved after several
when once an order is passed and it has been sent out from
the competent authority, then the fact that it was not
actually served on the applicant is not very material.
for a moment, we are not concerned about the validity
of the order of suspension or the consequential actions
due to that. We are only concerned with the question,
when an order of suspension has been issued against him,
whether actually served or not, if the applicant was in
absent, whether it amounts to unauthorised absence so
as to be punished in a disciplinary enquiry.

7. We may also notice that admittedly the
applicant came to be arrested in a theft case
instituted by the Police. The applicant was in jail for
nearly a month or so. Even under such circumstances

the Inquiry Officer has not taken into consideration the answer of the applicant to Question No. 7. It is well settled that the admission should be read as a whole or not at all. The admission of the applicant is, that he was no doubt absent for the period from 18.08.1992 to 03.10.1993 but he gives an explanation that this was because he was kept under suspension. Therefore, if we read the entire answer as a whole, there is no admission as such or it is a qualified admission. If that admission is accepted, namely - that he did not attend the office because of the order of suspension, then it cannot be said that it amounts to unauthorised absence.

The fact that the administration issued an order of suspension is not disputed. But the stand of the administration is, that the order was not actually served on the applicant and it was returned unserved after sometime. When once an order is passed and it has been sent out from the competent authority, then the fact that it was not actually served on the applicant is not very material. For a moment, we are not concerned about the validity of the order of suspension or the consequential effect due to that. We are only concerned with the question, when an order of suspension has been issued against him, whether actually served or not, if the applicant remains absent, whether it amounts to unauthorised absence so as to be punished in a departmental enquiry.

7. We may also notice that admittedly the applicant came to be arrested in a theft case which was instituted by the R.P.F. The applicant was in jail for nearly a month or so. Even under such case, deemed

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suspension comes into effect and even if there is no actual order of suspension, the fact that he has been arrested and kept in custody for more than 48 hours, it amounts to deemed suspension and subsequently, there is also an order of suspension issued and because of that the applicant did not attend the office and therefore it cannot be said that it amounts to unauthorised absence so as to call for any penal action under the disciplinary rules.

8. We also find much force in the contention of the applicant's counsel that the Inquiring Authority has taken into consideration extraneous matters in forming an opinion against the applicant. In the report of the Inquiring Authority which is at page 32 of the Paper Book, it is mentioned that the applicant had misbehaved with the P.W.I. and theft case was issued against him. The allegation of theft was not the subject matter of charge and no charge was framed against the applicant for the alleged theft. That was in a criminal case before the criminal court where the applicant was acquitted. Therefore, the Inquiring Authority should not have taken into consideration the alleged misbehaviour of the applicant in his duty or about the theft case and did so because his mind was prejudiced against the applicant and that is how the extraneous matter has been brought on record.

The Disciplinary Authority has not given any reason in the impugned order dated 21.02.1994. Then what is more, the Appellate Authority by a cryptic one sentence order rejected the appeal without applying his mind to the facts of the case and without passing a

speaking order, as required under the rules. Therefore, we find that the order of the Appellate Authority cannot be sustained at all.

9. Then we find that there is one more glaring ~~effect~~ defect in the conduct of the enquiry. After recording the plea of the applicant, if the enquiry officer had proceeded on the assumption that the applicant had pleaded guilty, there was no necessity of examining any witness. Recording of witnesses arises only when the delinquent official does not admits the charge. If the applicant had made an unconditional plea of guilt, then there was no necessity for recording ~~the~~ any evidence at all. Further, we find that one witness - Shri N.A. Khan, was examined on 04.03.1994 and three questions were put to him and his answers were recorded. Unfortunately, this has been done behind the back of the applicant and in his absence. No opportunity has been given to the applicant to be present and to cross examine the witness. Therefore, this recording of evidence behind the back of the applicant is also a serious lacuna in the case and is certainly contrary to the principles of natural justice. Even on this ~~accord~~ ground, we find that the enquiry is vitiated.

10. The Learned Counsel for the applicant submitted that the very questioning of the applicant before recording the evidence was contrary to rules, since there is no such provision for putting preliminary questions and recording the statement of the applicant. However, we do not find any force in the submission of the applicant that the Inquiry Officer has cross-examined the applicant.

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Then he also commented that the enquiry is vitiated for not following the provisions of Rules 9, 19, 20, 21 and 22 of the Railway Servants (Discipline & Appeal) Rules, 1968. In particular, he commented that after recording the evidence of one witness on behalf of the administration, no opportunity was given to the applicant to produce his defence evidence.

11. In view of the above discussions, we have no hesitation to hold that the departmental enquiry is vitiated in this case and, therefore, consequently the orders passed by the Disciplinary Authority and the Appellate Authority are not sustainable. The question is, whether we should now remand the matter for recording fresh evidence during the enquiry. We have also seen that the alleged misconduct is unauthorised absence from 18.08.1992 to 03.10.1993. The absence is admitted. The applicant has given an explanation that his absence was due to his being placed under suspension. The fact that an order of suspension was issued, is not and cannot be disputed. Therefore, the applicant's explanation that he did not attend the duty due to the order of suspension is fully justified from the admitted facts of the case. Hence, it would be an empty formality now to remand the matter for a fresh enquiry when on admitted facts the explanation given by the applicant appears to be plausible and acceptable. Further, five years have lapsed after the issuance of charge-sheet. The only misconduct is unauthorised absence for a certain period. Due to distance of time and other circumstances mentioned above and the plausible explanation given by the applicant, we find that there is no necessity for directing the administration to hold an enquiry again against the

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applicant. When once the order of the Disciplinary Authority and the Appellate Authority are liable to be quashed, then naturally, the applicant is entitled to be reinstated with backwages from the date he was removed from service. But for the period from 18.08.1992 to 03.10.1993 we find that rightly or wrongly, the applicant has not attended the office, whether he was served with the suspension order or not. Therefore, the applicant is not entitled to any wages for the period from 18.08.1992 to 03.10.1993, though the said period will count for the service of the applicant for other benefits, except actual salary for that period.

At this stage, the Respondents' Counsel submits that the department may be given liberty to take whatever action it deems fit against the applicant on the charge of theft, though he has been acquitted in the criminal case by giving benefit of doubt. We need not express any view on this point, since the present case is not concerned with the charge of theft. We are only concerned with the question of removal from service due to unauthorised absence. If the department has any independent right to take action against the applicant, it may have to exercise that right according to law.

12. In the result, the application is allowed. The impugned order of the disciplinary authority dated 21.02.1994 removing the applicant from service and the order of the Appellate Authority dated 11.07.1994 confirming the order of the Disciplinary Authority, are hereby quashed. The respondents are directed to reinstate the applicant in service with consequential

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full backwages from 21.02.1994 till today and till the date of actual reinstatement. On the request of respondents' counsel, time granted to the respondents to comply with this order within two months from the date of receipt of a copy of this order. In the circumstances of the case, there will be no order as to costs.

(D. S. BAWEJA)
MEMBER (A).

(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

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