IN THE CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR.

O.A.No.645/96 Date of order: 29.8.2002

Bhagwan Singh, S/o Sh.Khagh Singh, R/o Nagpal Petrol Pump, Vill.Dorai, Beawar Road, Ajmer, last employed as Maison Gr.III, Carriage Workshop, W.Rly, Ajmer.

...Applicant.

Vs.

1. Union of India through General Manager, Western Railway, Churchgate, Mumbai.
2. Deputy Chief Mechanical Engineer (Carriage) Workshop, Western Railway, Ajmer
3. Chief Mechanical Engineer, Carriage Workshop, Western Railway, Ajmer.

...Respondents.

Mr.Himanshu Agnihotri - Counsel for applicant.

Mr.T.P.Sharma, Counsel for respondents.

CORAM:

Hon'ble Mr.H.O.Gupta, Administrative Member

Hon'ble Mr.M.L.Chauhan, Judicial Member.

PER HON'BLE MR.M.L.CHAUHAN, JUDICIAL MEMBER.

The applicant has filed this O.A against the impugned order dated 7.10.91 (Annx.A1) passed by the Disciplinary Authority whereby the applicant was removed from service and order dated 22.10.92 (Annx.A1A) passed by the Appellate Authority dismissing the appeal of the applicant with the prayer that these orders being illegal and unconstitutional and the same may be set aside and the applicant be ordered to be treated as on duty with all consequential benefits.

2. Relevant facts leading to this case may now be noticed. The applicant was initially appointed as Cleaner on 23.2.65 by the respondents department. He was subsequently promoted as

Shunting Jamadar in the pay scale Rs.1200-1800 vide order dated 21.3.87. While he was working as such, he was served with a memorandum of charge-sheet dated 14.3.89 (Annx.A4A) for his wilful absence from duty w.e.f. 1.8.88 to 20.2.89. This was followed by an enquiry and the Enquiry Officer submitted his report dated 2.4.91 (Annx.A4D) holding the applicant guilty of the charge. The Disciplinary Authority imposed penalty of removal from service vide Annx.A1. The appeal filed by the applicant was also dismissed vide order dated 22.1.92 (Annx.A1A). Feeling aggrieved by these orders, the applicant preferred this O.A for the relief as aforesaid.

3. Alongwith the O.A, the applicant has also filed Misc. Application No.550/96 for condonation of delay in filing the O.A. Notices were issued to the respondents. On 10.5.2001 the O.A was admitted subject to limitation. The respondents have not chosen to file reply to MA No.550/96, for condonation of delay, however reply to the O.A was filed. In M.A No.550/96, the applicant has averred that the present application could not be filed in time because, after deciding the appeal, he was mentally disturbed and due to medical treatment he spent all the money in the treatment and no body was in his family as earning member. He further contended that he spent all the time in starvation because of lack of money as he was not in a position to maintain his family life. Therefore, he could not file the present O.A in time before this Tribunal. As already stated above, the respondents have not chosen to file reply to this M.A and this M.A has not been seriously opposed on behalf of the respondents during the course of argument, we are of the view that the ground mentioned by the applicant in the M.A constitute sufficient cause so as to condone the delay. We accordingly allow M.A No.550/96 and condone the delay in

preferring O.A No.645/96.

4. Now, we proceed to decide the matter on merit. The case as set out by the applicant in the O.A, on the facts as enumerated above, is that the Enquiry Officer contrary to the statement of the applicant and without any material on record has wrongly came to the conclusion that the applicant had admitted the charge and as such he is guilty. On the contrary, a perusal of the statement so made will reveal that the applicant has categorically and emphatically denied the charge and specifically mentioned that he never wilfully absented during the alleged period but the absence of the applicant was bonafide owing to the reason of his searious illness. He further stated that he was suffering from serious mental disorder due to depression and death of his two children during the period of his absence from duty. This fact, according to the applicant, can also be ascertained from the report of the Medical Board at Railway Hospital, Mumbai which was constituted at the request of the Railway authorities and thus the finding of the Enquiry Officer that the applicant was wilfully absented from duty is wholly untenable in the peculiar circumstances of this case. According to the applicant, the Railway authorities have themselves relied on this fact and he was subsequently decategorised from the post of Shunting Jamadar in the scale of Rs.1200-1800 to Mason Gr.III in the scale of Rs.950-1500. Thus, there was no occasion for the Disciplinary Authority to impose the penalty of removal from service upon the applicant. The applicant has further submitted that the impugned order of the Disciplinary Authority as well as the Appellate Authority cannot be further sustained on the ground that neither any witness was examined by the Enquiry Officer to prove the charge nor any documents were supplied to the applicant, during the

course of enquiry, as such the enquiry was held in violation of the principles of natural justice. He further submitted that the punishment imposed upon the applicant is wholly disproportionate to the gravity of the charge.

5. The respondents have contested the case by filing reply. The stand taken by the respondents can be seen from para 11.F & 11.L, which are as under:

> "11.F That the contents of para 11F of the O.A are admitted to the extent that the applicant had not followed the rules and he was wilful absent and had not followed the medical rules from the early stage and at the time of the enquiry, the Enquiry Officer has also not recorded the matter as he found not necessary to record the same but the conduct of the applicant has been seen that merely more than for one year he has been wifully absent which is against the provision.
>
> 11.L That the contents of para 11L of the O.A are admitted to the extent that the medical board had given its recommendations to change his cadre and give him light job and that is why the applicant has been allotted light job to the post of Mason Grade.III."

6. From the facts as stated above and material placed on record in this O.A, it is quite evident that the Enquiry Officer has neither examined any witness to prove the charge nor the procedure as contemplated under the Railway Servants (Discipline & Appeal) Rules, 1968, for holding enquiry was ever followed. From a perusal of the enquiry report, it is quite evident that vide letter dated 21.1.91, the applicant was intimated that in case he does not appear on 7.2.91, the enquiry will be held ex-parte. Pursuant to the said letter, the applicant appeared on 7.2.91 on which date the Enquiry Officer

questioned the applicant and in reply to question No.3, the applicant specifically stated that he never wilfully absented from duty and his absence was bonafide owing to the reason of his serious illness and he was receiving treatment from private doctor during the period 1.8.88 to 20.2.89. Copy of this statement has been placed in this O.A and marked as Annx.A4C. The Enquiry Officer, relying on this statement, has given his finding that the applicant admitted his absence and as such he is guilty of the Charge, without following due procedure as contemplated under the Rules, nor any one examined to prove the charge. According to us, the finding given by the Enquiry Officer is not be legally sustainable because, the applicant has never admitted his unauthorised/wilful absence during the period 1.8.88 to 20.2.89 and he has given explanation to his forced absence. Before a person can be held guilty of serious charge of wilful absence from duty on the basis of his admission alone it must be established that such admission is clear and unequivocal, precise and not vague or ambiguous. If the admission is capable of two interpretations, then interpretation favourable to the person making it shall be given weightage. Therefore, every such admission must be given plain, liberal and fair menaing. In departmental enquiries, admission of guilt by a government servant can be used only to corroborate independent evidence led to prove the charges against the delinquent.

7. In Jagdish Prasad Saxena Vs. State of M.P, AIR 1961 SC 1070, Hon'ble Supreme Court held as under:

> "(a) If statement made by the accused do not amount to a clear and unambiguous admission of guilt, failure to hold a formal enquiry would be a fatal infirmity in any order of punishment based on such admission.

(b) Admission not made specifically in reply to a charge-sheet, cannot be taken into account of penalising a Govt servant without formal enquiry giving a reasonable opportunity to the accused to explain his so called admission.

(c) Even if the applicant had made some statement which amounted to admission, it is open to doubt whether he could be removed from service on the strength of the said alleged admission without holding a formal enquiry as required by the rules."

8. In the instant case, the applicant has not admitted that he was wilfully absented from duty w.e.f. 1.8.88 to 20.2.89 rather he has given the explanation that his absence during the aforesaid period was on account of his serious illness as he was undergoing treatment from a private Doctor.

9. It is legally well settled that statement of a person has to be read as a whole and the person cannot be held guilty on the basis of part of the statement, without proving the charge further by examining the independent witness. In the instant case, we are of the view that the explanation given by the applicant vide Annx.A4C does not amount to admission of guilt as such the applicant could not have been held guilty of wilful absence. It is also evident from the material placed on record that no enquiry in the manner as contemplated under Rule 9 of the Railway Servants (Discipline & Appeal) Rules, 1968 was ever held and this fact has also been admitted by the respondents authority in their reply. As such, the penalty of removal from service imposed upon the applicant by the disciplinary authority and subsequently confirmed by the Appellate Authority are in violation of provision of Article 311 of the Constitution of India as no reasonable opportunity was given to

the applicant to defend his case nor any witness was examined to prove the charge and as such violative of the principles of natural justice.

10. That apart, even the Railway authorities have not disputed the fact that the applicant was suffering from mental disorder and depression. At the request of the Railway authorities themselves, a Medical Board at Railway Hospital, Mumbai was constituted and on the basis of the recommendation of the Medical Board, the cadre of the applicant was changed to light job by decategorising the applicant from the post of Shunting Jamadar scale 1200-1800 to Mason Gr.III scale Rs.950-1500. Thus, the respondents themselves have admitted the fact that the applicant was suffering from serious illness. Under such circumstances, can it be said that the absence of the applicant during the period under challenge was wilful or deliberate so as to warrant imposition of major penalty of removal from service? To this, our answer is - No. The Disciplinary Authority and Appellate Authority has acted harshly while awarding the penalty of removal from service, even if we assume that the applicant has admitted his guilty, as held by the Enquiry Officer and the enquiry was held in accordance with the rules. Further the Appellate Authority, while upholding the punishment of removal from service, has observed that "During the hearing the applicant has tried to justify his unauthorised absence due to personal difficulties including his personal sickness. Based on the discussions during the hearing there is nothing expect that he would improve his attendance in future at all because he does not have the slightest indication of realisation that his unauthorised absence is a wrong thing". It may be noticed here that the applicant has put in about 26 years of service when he was removed from service. The

applicant remained absent on account of his illness which fact is also not denied by the respondents and as such it cannot be said that he remained deliberately absent from duty. The Appellate Authority has completely lost sight of this fact while awarding the harsh punishment of removal from service which will debar the applicant from pensionary benefits. In case the Appellate Authority has found that there is no hope of any improvement of his attendance in future, the applicant could have been imposed the penalty of compulsory retirement from service in the facts and circumstances of this case.

11. Although, we have held that the statement given by the applicant does not constitute admission of wilful absence and also that he was removed from service without affording reasonable opportunity inasmuch as no procedure as contemplated under the Rules to prove the charge against the applicant was followed, yet the fact remains that the applicant remained absent from service w.e.f. 1.8.88 to 20.2.99, without permission of the authorities concerned. It was incumbent upon him to apply for leave and sought permission even if he was undergoing treatment. Thus, the fact remained that the charge stand partly proved to the extent that the applicant remained unauthorised absent from service from 1.8.88 to 20.2.89 without prior permission of the authorities concerned. At this stage, after lapse of more than 10 years, it will not be proper for us to remit this case to the respondents authorities to hold the departmental enquiry afresh against the applicant by affording him reasonable opportunity as contemplated under the Rules and by this time the applicant has also attained the age of superannuation. In the facts and circumstances of this case, we are of the view that ends of justice will meet if the penalty of removal from service, ordered on account of unauthorised

absence which is grossly disproportionate to the gravity of charge, is substituted by the penalty of compulsory retirement. We are conscious of the fact that ordinarily this Tribunal should not go into the matter so as to investigate regarding the quantum of punishment when the charge stand partly established, but it is also equally judicially established that such punishment imposed by the disciplinary authority if shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief either directing the disciplinary/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. We are also fortified by the decision of the Punjab & Haryana High Court in Kashmiri Lal Kapoor Vs. Union of India & Ors, 2000(1) ATJ 33 (PB) wherein almost identical case of absence from duty and penalty of removal from service was ordered to be substituted by the penalty of compulsory retirement by holding that a penalty of removal from service was grossly disproportionate so as to shocks the conscience of High Court.

12. At this stage, it will also be appropriate to rely few decision of the Apex Court whereby the punishment of discharge/ dismissal from service was set aside substituted as the appellants therein remained unauthorised absent from duty. One of such decision is the case of Malkiat Singh Vs. State of Punjab & Ors, 1996 (2) SLR 17, wherein the appellant was discharged from service on the ground that he remained absent from duty for more than one month 9 days on account of his wife's illness. The Apex Court set aside the order of discharge and the respondents were directed to take the appellant into service forthwith. It was observed by the Apex Court that though it is true that

discipline is required to be maintained. However, absence may sometimes be inevitable. Yet in another case as reported in AIR 1999 SC 3367, Syed Zaheer Hussain Vs. Union of India & Ors, wherein the punishment of dismissal from service was held too harsh and quashed and substituted by lesser punishment i.e. reinstatement with withdrawing 50% of back wages. This was also a case of unauthorised absence from duty.

13. Thus, for the reasons stated above and the peculiar facts and circumstances of this case, we feel that it will be just and proper if the penalty of removal as ordered by the Disciplinary Authority and confirmed by the Appellate Authority, is substituted by the penalty of Compulsory Retirement. Accordingly so ordered. Let the respondents disburse the retiral dues including arrears of pension and the pension as admissible to the applicant under Rules within six months from tody. The O.A as well as the M.A stand disposed of accordingly with no order as to costs.

(M.L.Chauhan)
Member (J).

(H.O.Gupta)
Member (A).