

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH, JAIPUR.

Jaipur, the 21st day of November, 2010

ORIGINAL APPLICATION No.303/2006

CORAM :

HON'BLE MR.M.L.CHAUHAN, JUDICIAL MEMBER
HON'BLE MR.ANIL KUMAR, ADMINISTRATIVE MEMBER

Sumat Kumar
S/o Late Shri Rajendra Verma,
R/o Flore Mill, Old Tundla,
Firozabad (UP).

... Applicant

(By Advocate : Shri P.V.Calla with Shri Jitendra Singh)

Versus

1. Union of India through
General Manager,
West Central Railway,
Jabalpur (MP).
2. Divisional Railway Manager,
Kota Division,
Kota.
3. Divisional Electrical Engineer (TRD),
Kota.

... Respondents

(By Advocate : Shri Anupam Agarwal, proxy counsel for
Shri R.G.Gupta)

ORDER

PER HON'BLE SHRI M.L.CHAUHAN

The applicant has filed this OA thereby praying for
quashing of the order dated 19.12.2003 (Ann.A/1), passed by
the disciplinary authority removing the applicant from service,

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which order has been affirmed by the appellate authority vide order dated 8/12.10.2004 (Ann.A/2). Revision petition filed by the applicant has also been rejected vide order dated 22.7.2005 (Ann.A/2A). The aforesaid orders are under challenge in this OA with a further prayer that the applicant may be reinstated in service alongwith consequential benefits.


2. Briefly stated, facts of the case so far as relate to the decision of this OA are that the applicant was granted temporary status w.e.f. 4.11.1995 and thereafter after passing screening test regularized as Khalasi [a Group-D post] w.e.f. 27.11.1996 with the railway department. A charge-sheet for major penalty (SF-5) was issued vide memo dated 22.3.2002 (Ann.A/4) thereby alleging that the applicant remained absent from duty for different spells between the period from 22.9.1998 to 12.2.2002. The applicant filed objection against the said charge-sheet justifying his absence for the period mentioned in the charge-sheet. However, being not satisfied with the explanation given by the applicant, inquiry officer was appointed. The inquiry officer submitted his report on 5.5.2003 (Ann.A/15), whereby charge against the applicant regarding absent from duty for majority of the periods mentioned in the charge-sheet was held to be proved. The applicant filed representation against the inquiry report on 22.9.2003 (Ann.A/16). The disciplinary authority, after considering the objection filed by the applicant against the inquiry report, imposed punishment of removal from service. As already stated above, appeal filed by the applicant against the order passed by the disciplinary authority was also dismissed. However, the appellate authority has recorded that except the period from 22.9.1998 to 29.9.1998 (railway sick period), 21.7.1999 to 16.8.1999 (suspension period) and 11.10.2001 to 29.10.2001 (railway sick period), the applicant remained absent from duty as is evident from the inquiry report. Further, the revisional authority has also affirmed the order passed by the appellate authority. The revisional authority has further treated the period from 12.10.1999 to 21.10.1999 under sick leave and not unauthorized absence

from duty. It is on the basis of these facts, the applicant has filed this OA thereby praying for the aforesaid relief.

3. Notice of this OA was given to the respondents, who have filed their reply. In the reply, the respondents have categorically stated that the penalty of removal from service against the applicant was not based on one, two or three instances of willful absence but the applicant was in a habit of absenting himself from duty without permission as per his sweet will, as revealed from the record. They have mentioned as many as 12 such instances between the period from 22.9.1998 to 12.2.2002. Thus, on the basis of aforesaid instances, the respondents have submitted that absence of the applicant over a long span of five years proved him to be a habitual absentee from duty without permission. Thus, the respondents have justified their action.

4. It may be stated that the applicant has also raised an additional and new plea to the effect that as per the charge-sheet (SF-5), in the list of witnesses there was no reference of PW-2 and as such it was not permissible for the inquiry officer to examine PW-2. It is further pleaded that in the inquiry report it has been categorically mentioned that the defence counsel has cross examined PW-2, who was put certain questions which were not replied to by him. It is further pleaded that no independent finding has been given by the inquiry officer that the charge has been proved.

5. The respondents in the reply have categorically stated that PW-2 was not initially included when the charge-sheet was issued. It is further stated that under Rule-9(18) of the Railway Servants (Discipline & Appeal) Rules, 1968, it was permissible for the inquiring authority to permit additional evidence not included in the list given to the railway servant or may itself call for new evidence or recall and re-examine any witness not included in the list of witnesses, if such evidence is necessary.



6. We have heard learned counsel for the parties and gone through the material placed on record. From the material placed on record, it is evident that the charge-sheet against the applicant was issued for remaining unauthorized absent from duty for different spells between the period 22.9.1998 to 12.2.2002. As can be seen from Ann.A/16, which is the representation of the applicant against the inquiry report, the applicant remained absent on 23 occasions [different spells] between the period 22.9.1998 to 12.2.2002. Out of the said 23 occasions [different spells], the inquiry officer in its report has held that absence of the applicant for some of the instances has not been proved, whereas regarding other instances the charge was held to be proved. The inquiry officer has held that for some of the period the applicant was either under suspension/sick leave or the unauthorized absence has not been proved as the applicant was permitted to leave headquarter but for the remaining period the charge of unauthorized absence held to be proved. Based upon the finding given by the inquiry officer, the disciplinary authority in the impugned order dated 19.12.2003 (Ann.A/1) has held that the charge regarding unauthorized absence of the applicant from duty on 13 occasions [instead of 23] stands proved and thus penalty of removal from service with immediate effect was awarded. Further, from the material placed on record, it is also evident that the appellate authority while upholding the order of the disciplinary authority further recorded that the period of applicant on three occasions mentioned in the order cannot be treated as unauthorized absence. Still, the revisional authority after perusing the appellate order has further recorded that the period w.e.f. 12.10.1999 to 21.10.1999, when the applicant was under private/railway sick, cannot be treated as unauthorized absence from duty. Thus, from the material placed on record, it is evident that case of the applicant was considered by the authorities objectively and where the applicant remained absent from duty on account of sick leave etc., benefit of said period was given to him and that period was not treated as unauthorized absence from duty. Thus, contention of learned counsel for the applicant that charge

against the applicant has not been proved and the applicant was under sick leave for the aforesaid period cannot be accepted. Thus, in view of what has been stated above, it cannot be said that this is a case of no evidence requiring our interference.

7. However, the fact remains that the applicant is a habitual absentee. As already noticed above, service of the applicant was regularized on 27.11.1996 and after putting less than two years service in the railway, he continued to remain absent from duty w.e.f. 22.9.1998 onwards in different spells on 23 occasions. Thus, it appears that the applicant was a habitual absentee and he was not interested in serving the department and his unauthorized absence for different spells w.e.f. 22.9.1998 till the charge-sheet was issued, according to us, constitute a grave misconduct. Thus, under these circumstances, we see no reason to interfere in the matter.

8. The contention raised by learned counsel for the applicant that as the inquiry officer also examined PW-2 as a witness, who was not cited as a witness as per the charge-sheet issued by the department, thus vitiates the inquiry, cannot be accepted for more than one reason. As already noticed above, such a course was available to the inquiry officer in terms of Rule-9(18) of the Railway Servants (Discipline & Appeal) Rules, 1968. Further, the applicant has not raised any grievance regarding this aspect during the course of inquiry and also before the disciplinary authority while filing objection to the inquiry report and subsequently before the appellate authority and revisional authority. The applicant has raised this point for the first time in this OA. That apart, the applicant has not shown as to how he has been prejudiced on this count. On the contrary, the report of the inquiry officer reveals that the applicant was granted opportunity to cross-examine the said witness, which he availed. Thus, the contention so raised by the applicant for the first time in this OA is required to be rejected.

9. Learned counsel for the applicant while relying on the judgement of the apex court in the case of **Bhagwan Lal Arya v. Commissioner of Police, Delhi & Ors.** [(2004) 4 SCC 560] submits that the penalty of removal from service, as imposed by the authorities, is harsh. We have given due consideration to the submission so made by learned counsel for the applicant. In the case of Bhagwal Lal Arya (supra) appellant before the apex court, who was a Police Constable, remained absent for more than two months on medical grounds with sanction of leave and it was under these circumstances the apex court had held that such a misconduct cannot be said to be a grave misconduct so as to warrant penalty of dismissal from service. It was under these circumstances that the penalty imposed was held to be disproportionate and excessive.

10. As already noticed above, this is a case where the applicant is habitual absentee and has remained unauthorized absent from duty for more than nine spells during the period between 22.9.1998 to 12.2.2002 out of 23 occasions for which the charge-sheet was issued. If the matter is viewed in the light of the aforesaid perspective, it is evident that for a period of less than two years from the date of entry into the regular service the applicant remained absent from duty till the date of removal of his services and has not performed the duty of the post for almost five years, though some of the period has not been treated to be unauthorized absence. Thus, the conclusion, which can be drawn from the aforesaid facts, is that the applicant is an unwilling worker and it is a case of habitual absentee. As such, the penalty of removal from service cannot be said to be harsh.

11. It may also be relevant to submit here that the applicant has not disputed his absence from duty on 23 occasions for which the charge-sheet was issued to him but his explanation is that he remained absent from duty as he was under sick leave and had also given intimation to that effect. The fact of absence from duty for the aforesaid period thus stands fully

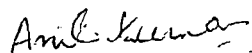
established and under these circumstances even if for argument sake it is to be held that the inquiry was not conducted properly, the matter is not required to be remitted back to the inquiry officer for conducting fresh inquiry more particularly when out of 23 occasions of absence from duty, about half of the spells have been held to be unauthorized absence from duty, as per the finding recorded in the inquiry report in view of the meticulous examination of the record by the appellate as well as revisional authority, whereby the benefit of the period for which the charge has not been held to be proved by the inquiry officer, has also been given to the applicant treating the said period as not unauthorized absence. Further, while exercising the power of judicial review, it is not permissible for this Tribunal to re-appreciate the evidence or to sit in appeal over such order to reevaluate or reassess the material to test the correctness of finding of facts.

12. At this stage, we also wish to make reference to the decision of the Apex Court in the case of **State of Rajasthan and Anr. v. Mohd. Ayub Naz** [2006 SCC (L&S) 175] whereby the penalty of removal from service for the absence for a period of about 3 years was substituted to that of compulsory retirement by converting penalty of removal from service to that of compulsory retirement. The judgement of the High Court was quashed and punishment imposed by the disciplinary authority was restored.

13. To the similar effect is the judgement of the Apex Court in the case of **L&T Komatsu Ltd. v. N.Udaykumar** [(2008) 1 SCC (L&S) 164], whereby the Apex Court held that habitual absenteeism amounts to gross violation of discipline and the judgment of the Labour Court and the High Court whereby they have interfered with the punishment of termination awarded by the disciplinary authority were set aside whereby the applicant was reinstated and absence of duty for 105 days was held harsh and the workman was ordered to be reinstated in service with continuity of service but without back wages.



14. Thus, for the foregoing reasons, we are of the view that the present OA is bereft of merit and the same stands dismissed with no order as to costs.


(ANIL KUMAR)
MEMBER (A)


(M.L. CHAUHAN)
MEMBER (J)

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