IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

JAIPUR, this the 10th day November, 2010

ORIGINAL APPLICATION No.398/2006

CORAM:

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

Radhey Shyam
s/o Shri Mangiya,
r/o New Railway Colony,
Near Sofiya School,
Q.No.34-A, Thane-Ke-Peechha,
Kota Junction, Kota.

.. Applicant

(By Advocate: Shri Bhanwar Bagri)

Versus

1. Union of India
through General Manager,
WCR (HQ), Jabalpur

2. The Divisional Railway Manager,
Western Railway,
Kota (Raj.)

3. The Senior Mechanical Engineer (Estt.),
Divisional Office,
Western Railway,
Kota (Raj.)

.. Respondents

(By Advocate: Shri N.C.Goyal)

O R D E R

Per Hon'ble Mr. M.L.Chauhan, M(J)

The applicant while working as Safaiwala in the office of Senior Mechanical Engineer, Divisional Office, Western Railway, Kota was served a chargement dated 13.10.2004 under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1961 alongwith statement of allegation. The applicant did not submit any defence statement within the prescribed period, as such, Enquiry Officer was nominated by the competent authority. The charge against the applicant is that he unauthorisedly remained absent from duty w.e.f. 7.3.2004 to 16.8.2004, as such, he has violated the provisions of Rule 3(ii) and (iii) of Railway Conduct Rules. The applicant did not engage his defence assistant and he himself agreed to defend his case. Copy of the enquiry report was also made available to the applicant by the Disciplinary Authority and he was granted 15 days time to make representation against the enquiry report. The applicant did not file any objection to the enquiry report. Rather, he accepted the allegations levelled in the enquiry report and asked the appropriate authority to pass final order in the aforesaid disciplinary case. The Disciplinary Authority vide order dated 30.9.2005 (Ann.A/1) imposed penalty of removal from service. The appeal filed against the order of removal dated 30.9.2005 was also rejected by the Appellate Authority vide order dated 20.4.2006 (Ann.A/2.) It is these orders which are under challenge in this OA.

2. The challenge has been made mainly on the ground that (i) the applicant was not afforded due and proper opportunity to submit his defence and ii) the applicant was not given proper opportunity to submit his defence against the report of the Enquiry Officer. It is further stated that during the course of enquiry it was made clear to the Enquiry Officer that he remained absent from office on account of serious illness of his father who ultimately died on 6.3.2004. The applicant has further averred that on account of death of his father he sent application for leave but the Enquiry Officer without verifying the fact as to whether the applicant send such applications for leave under UPC or not held the applicant guilty for willful absence from duty w.e.f. 7.3.2004 to 16.8.2004. In order to substantiate this plea, the applicant has placed on record photocopies of UPC receipts dated 27.4.2004, 30.6.2004 and 2.8.2004 as Ann.A/7 to A/9. Further ground taken by the applicant is that the Disciplinary Authority committed serious illegality in taking past conduct into consideration which was not the subject matter of current enquiry. The applicant has also averred that the penalty of removal from service is grossly disproportionate to the gravity of charge of absence from duty. It is on the basis of these facts, the applicant has filed this OA.

3. Notice of this application was given to the respondents. The respondents have filed reply. The facts as stated above have not been disputed. The respondents have categorically stated that during the course of enquiry on 31.12.2004, the Enquiry Officer asked the applicant for nominating the defence advisor but the

applicant refused for the same and stated that "मै अपना बचाव स्वयं कर लूंगा" (I myself will defend). The respondents have also placed on record copy of letter received on 11.5.2005 as Ann.R/1 whereby the applicant has stated that he is satisfied with the enquiry report given to him vide letter dated 28.3.2005 and did not want to say anything in this regard. Thus, according to the respondents, since the applicant has accepted the charges against him, as such, the appropriate authority was justified in passing the order of removal from service. The respondents have also categorically stated that the explanation given by the applicant in this OA for unauthorized absence from duty due to illness of his father and thereafter his death and for that purpose he had also sent application is contrary to the certificate submitted by the applicant from a private Doctor regarding his illness during the period of unauthorized absence. The respondents have categorically stated that the applicant has failed to prove that he has sent any application for leave w.e.f. 7.3.2004 to 16.8.2004. It is further stated that the applicant has also not submitted any certificate in order to decide whether absence from duty was for justified reason. It is further stated that it has come in evidence from the prosecution witness Shri E.P.John during the course of inquiry that the applicant was also served earlier chargesheet (SF-11) for his unauthorized absence and for which the applicant was also punished. Thus, according to the respondents, the applicant is habitual absentee, as such, penalty of removal was warranted in the facts and circumstances of the case.

4. The applicant has filed rejoinder thereby reiterating the submissions made in the OA and refuted the allegation that he has ever made any statement before the Enquiry Officer that he will defend himself. The applicant has also placed reliance upon the decision of the Apex Court in B.C.Chaturvedi vs. Union of India (1995) 6 SCC 749 to contend that if punishment imposed by the Disciplinary Authority shocks the conscience of the High Court/Tribunal it would appropriately mould the relief.

5. We have heard the learned counsel for the parties. The learned counsel for the applicant has also submitted written arguments. The main contention raised by the applicant in the written argument, is that the applicant has been chargesheeted for unauthorized absence and not for willful absence from duty, as such, in the absence of any charge of willful absence, the applicant cannot be held guilty of misconduct. The second contention raised by the learned counsel for the applicant is that the order passed by the Appellate Authority as well as Disciplinary Authority shows non-application of mind and are non-speaking orders and have been passed for extraneous consideration. Third submission is that the punishment imposed is shockingly disproportionate to the gravity of the offence committed.

6. We have given due consideration to the submissions made by the learned counsel for the applicant and we are not at all impressed with the submissions so made. The applicant has placed on record copy of the chargesheet (Ann.A/3) and statement of allegation (Ann.A/4). The charges against the applicant are clear

and not vague. It has been categorically stated that the applicant remained absent from duty w.e.f. 7.3.2004 to 16.8.2004 unauthorisedly. Thus, contention of the applicant regarding charge for willful absence is of no consequence. It is admitted position that a railway servant cannot proceed on leave without submitting an application and getting the same sanctioned from the competent authority. The applicant being a railway servant was duty bound to submit medical certificate from Railway Doctor in case due to his illeness he could not attend duty. Rather the applicant has produced a medical certificate from a private Doctor for the aforesaid period regarding his illness whereas the case set up by the applicant in this OA and before the Enquiry Officer was that he could not attend duty due to illness of his father. It may be stated that as per version of the applicant, father of the applicant died on 6.3.2004 whereas charge of unauthorized absence against the applicant was for subsequent date i.e. with effect form 7.3.2004 to 16.8.2004. In any case, it was incumbent upon the applicant to submit an application immediately thereafter in case he could not attend the office due to unavoidable circumstances.

7. The applicant has not produced any contemporaneous record before the authorities to show that he has made an application for his absence from duty. It is for the first time in this OA that the applicant has placed on record UPC receipts dated 27.4.2004, 30.6.2004 and 2.8.2004 to show that he has in fact sent application to the authorities for the aforesaid period. We have given due consideration to these documents which have been

placed on record as Ann.A/7 to A/9. Except mentioning the date, the address given in the receipt i.e. 'To CWS, Kota Carriage', does nor appear to be complete address of the authority concerned.

8. Be that as it may, in any case, the first intimation was given by the applicant on 27.4.2004 after a lapse of about 40 days. The Enquiry Officer has categorically given finding that charges against the applicant have been fully proved. As per the enquiry report under Para 4.2.6 it has come on record that the applicant is habitual absentee and also remained absent from duty for a period w.e.f. 10.10.2002 to 9.12.2002, 27.2.2003 to 1.4.2003, 11.7.203 to 26.7.2003 and 22.10.2003 to 8.12.2003 for which minor penalty chargesheet was issued and penalty was imposed. Besides, chargesheet for major penalty issued for the period w.e.f. 7.3.2004 to 16.8.2004. It has also come on record that copy of the enquiry report was sent to the applicant and the applicant has admitted the charge which has been held to be proved by saying the he has nothing to say in the matter and appropriate order may be passed. Thus, in view of the aforesaid fact, the contention of the applicant that he has not been afforded opportunity of engaging defence assistance and also not given opportunity to file objection against the enquiry report is without any substance when the applicant has himself declined to avail such opportunity.

9. Law on this point is well settled. The Hon'ble Apex Court in the case of Indra Bhanu Gaur vs. Committee, Management of M.M.Degree College and Ors. 2004 (1) SCSLJ 3, has held that it is only a person who was ready and willing to avail of opportunity

given can make a grievance about denial of opportunity but if a person despite giving adequate opportunity failed to avail the same, the final order passed in the enquiry proceedings cannot be challenged on the ground of violation of principles of natural justice.

10. That apart, the matter can also be viewed from another angle. The applicant has neither submitted any certificate from the Railway Doctor nor submitted any proof of submitting any leave application for the aforesaid period. Thus in view of the aforesaid circumstances, even if for arguments sake it is assumed that the enquiry has not been conducted properly and reasonable opportunity has not been given to the applicant, the fact remains that the charge of remaining absent from duty stands fully proved and the matter is not required to be remitted back to the Enquiry Officer for conducting fresh enquiry.

11. So far as submission of the applicant that his past conduct has been taken into consideration while imposing penalty, which was not a subject matte of the chargesheet, suffice it to say that the reference made by the Disciplinary and Appellate Authority regarding past conduct was in order to reinforce the order of removal from service and to give additional weight to the decision already arrived at. Such a view was permissible in view of the law laid down by the Apex Court in the case of India Marine Service (P) Ltd. v. Workmen, AIR 1963 SC 528, whereby the Apex Court while considering similar issue in para-6 has held as under:-

> "6.....It is true that the last sentence suggests that the past record of Bose has also been taken into consideration. But it does not follow from this that that was the effective reason for dismissing him. The Managing Director having arrived at the conclusion that Bose's services must be terminated in the interest of discipline, he added one sentence to give additional weight to the decision already arrived at. Upon this view it would follow that the Tribunal was not competent to go behind the finding of the Managing Director and consider for itself the evidence adduced before him. The order of the Tribunal quashing the dismissal of Bose and directing his reinstatement is, therefore, set aside as being contrary to law."

12. A similar view was also taken by the Apex Court in the case of Union of India & ors. vs. Bishamber Das Dogra, (2010) 1 SCC (L&S) 212. That was a case where respondent before the High Court has deserted the Line for the period from 6.3.1986 to 16.3.1986 and was imposed punishment of removal from service. While passing the punishment order, the Disciplinary Authority also took into consideration the past conduct of the respondent. The learned Single Judge quashed the order of punishment on the ground that copy of the enquiry report was not furnished and the respondent employee was not given opportunity to file objection to the same. It was further observed that his past conduct could not have been taken into consideration while imposing punishment. However, the appeal filed before the Division Bench was also dismissed. The matter was carried to the Apex Court. The Apex Court framed two questions for consideration- i) whether the delinquent employee Is not supposed to establish de facto prejudice in case the enquiry report is not supplied to him before awarding punishment and ii) whether the order of punishment would be vitiated if the disciplinary authority takes into consideration the past conduct of the

delinquent employee for the purpose of punishment. Regarding point no. i) the Hon'ble Apex Court held that the delinquent employee has to show a prejudice in case enquiry report is not supplied to him. Regarding second point, it is held that in the case of misconduct of grave nature or indiscipline, even in the absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record of the employee for adding the weight to the decision of imposing the punishment, if the facts of the case so require. At this stage, it will be useful to quote para-30 of the judgment, which thus reads:-

> "30. In view of the above, it is evident that it is desirable that the delinquent employee may be informed by the disciplinary authority that his past conduct would be taken into consideration while imposing the punishment. But in case of misconduct of grave nature or indiscipline, even in the absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record of the employee for adding the weight to the decision of imposing the punishment if the facts of the case so require." (emphasis ours)

13. The ratio as laid down by the Apex Court in the case of Bishamber Das Dogra (supra) is squarely applicable in the facts and circumstances of this case. Admittedly, for the absence of the applicant for the period from 10.1.2002 to 9.12.2002, from 27.2.2003 to 1.4.2003, from 11.7.2003 to 26.7.2004 and from 22.10.2003 to 8.12.2003, the applicant was issued chargesheet for minor penalty and punishment was imposed. Thus, this undisputed past conduct/service record of the applicant for his absence for the aforesaid period stands already established and required no further opportunity. Further, the charge against the applicant for his

absence from 7.3.2004 to 16.8.2004 for which major penalty chargesheet was issued and which is subject matter of this OA stands also proved. Thus, fact remains that the applicant is habitual absentee and he has remained absent unauthorisedly from duty for more than 5 spells during the period from October, 2002 till August, 2004. As such, we are of the view that imposition of penalty of removal from service under these circumstance cannot be said to be harsh.

14. 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. vs. 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 judgment of the High court was quashed and punishment imposed by the Disciplinary Authority was restored.

15. To the similar effect is the judgment of the Apex Court in the case of L&T Komatsu Ltd. Vs. 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 reinstatement in service with continuity of service but without back wages.

16. On the contrary, the learned counsel has placed reliance on the decision of the Apex Court in the case of Hussaini vs. the Hon'ble the Chief Justice of High Court of Judicature at Allahabad and Ors., AIR 1985 SC 75, whereby the appellant who was a Safai Jamadar was dismissed from service. The Apex Court held that appellant has put in 20 years of service as such lenient view should be taken and the punishment of dismissal from service was converted to that of compulsory retirement so that the appellant can get retiral benefits. The learned counsel for the applicant argued that in the instant case also the applicant was engaged as Safaiwala on 17.2.1983 and his services were terminated in the year 2005, as such, on the basis of the law laid down by the Apex Court, the order of removal from service can be converted to that of compulsory retirement. We have given due consideration to the submissions made by the learned counsel for the applicant. We are of the view that the ratio as laid down by the Apex Court is not attracted in the facts and circumstances of this case.

17. The learned counsel for the applicant further placed reliance on the following judgments of the Apex Court/High Court/this Tribunal in order to show that the Disciplinary Authority and Appellate Authority have not passed speaking order, the charge is based on extraneous consideration and also that the penalty of removal imposed is harsh.

1987 (3) SLR 403; AIR 1964 SC 506;
2009 Lab.I.C. 2981 (Raj.); AIR 1972 SC 2535;
1985 (2) SLR 708; 2003 (3) SCT 126;
SBC W.P. No.349/98; AIR 1999 SC 3367;
SBCWP No.6192/1998; 1970 SLR 494;

AIR 1986 SC 1173; 1977 (2) SLR 270;
2008 (3) SLR 745; 1970 SLR 125;
2006 SCC (L&S) 640; 1990 (1) WLN 338;
OA No.363/1996; 2010 (2) SCC 772;
2001 (2) ATJ 592; 1992 (2) ATJ 313;

The reliance so placed by the learned counsel for the applicant on the aforesaid judgments is not applicable in the facts and circumstances of this case. It is not a case of such nature where the charge against the applicant has not been proved and the finding is based on conjuctures and also that the Disciplinary Authority and Appellate Authority has not passed the speaking order thereby giving reasons. Regarding quantum, suffice it to say that the judgment so cited by the learned counsel for the applicant does not deal with the cases where the penalty of removal/dismissal from service has been substituted to lesser penalty in a case where the delinquent employee is habitual absentee and are the cases which deal with one incident of remaining absent and not in respect of persons who are habitual absentee.

At this stage, we may also wish to mention the judgment of the Constitution Bench of the Apex Court as reported in AIR 1964 SC 506 ~~was~~ rendered in the facts and circumstances of that case and the applicant cannot take any assistance from this judgment. That was a case where the Apex Court was considering the question regarding second show-cause notice which was required to be given with respect to proposed punishment and it was held that the punishing authority can take previous record into consideration though previous record is not made subject matter of he

chargesheet while issuing second show cause notice. It may be stated that the requirement of issuing the second show-cause notice is no longer necessary now in view of the Larger Bench decision of the Apex Court in the case of Union of India vs. Tulsi Ram Patel, AIR 1984 SC 1416.

18. For the foregoing reasons, we find no merit in this application, which is accordingly dismissed with no order as to costs.

(ANIL KUMAR)
Admv. Member

(M.L.CHAUHAN)
Judl. Member

R/