CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

O.A No. 4110/2013
M.A No. 3123/2013

Reserved on : 07.12.2017

Pronounced on : 13.03.2018

Hon'ble Mrs. Jasmine Ahmed, Member (J)
Hon'ble Mr. Uday Kumar Varma, Member (A)

Shri Devender Kumar
S/o. Shri Om Prakash,
Ex. Assistant Driver,
Under Divisional Railway Manager,
Central Railway, Pune,
R/o. D-14/173, Sector-3,
Rohini, New Delhi. ....Applicant

(By Advocate : Mrs. Meenu Maine)

Versus

Union of India through :

1. The General Manager,
   Central Railway, C.S.T., Mumbai.

2. The Divisional Railway Manager,
   Central Railway, Pune.

3. The Coaching Depot Manager,
   Central Railway, Pune. ...Respondents

(By Advocate : Mr. A. K. Srivastava)

O R D E R

Mrs. Jasmine Ahmed, Member (J) :

The applicant, who was appointed in the Railways as Asst. Loco Pilot, later on, under safety category post on medical de-categorization posted as Junior Clerk, was slapped with Annexure A-3 charge sheet on 01-10-2010 for alleged absence from duties for 323 days and the same was responded to

denying the charges leveled against the applicant. Reason given for the absence was stated as his father's illness, who was suffering from cancer and was admitted in the PGI hospital, Chandigarh. On denial of the charges, inquiry proceedings ensued and Annexure A-1 order dated 18-04-2012 effecting removal from service was passed by the Disciplinary Authority, and on appeal by the applicant herein, the Appellate authority by Annexure A-2 order dated 01-10-2012 upheld the order of the Disciplinary Authority. Annexure A-10 Revision petition dated 14-11-2012 filed by the applicant remained unattended to as per the applicant. Hence, this OA on the following amongst other grounds:-

(i) Initial minor penalty charge sheet was not pursued but cancelled and suddenly major penalty charge sheet was issued which is in violation of the Rules and Law.

(ii) No communication as to the holding the inquiry was received by the applicant save the order dated 18-04-2012 removing the applicant from service.

(iii) No proper inquiry was ever held before issuing the penalty order.

(iv) Appellate order is non speaking, evidencing non application of mind;

(v) The appellate authority took into consideration the so called absence from 22-02-2011 to 15-09-2012 which was not a part of the subject matter in the charge sheet and branded him

as a habitual absentee which influenced him to uphold the order of the Disciplinary Authority, which is illegal.

(vi) Revision not having been responded to.

2. The applicant has thus prayed for quashing and setting aside the penalty order and the appellate order and for a direction to the respondents to reinstate the applicant with all the consequential benefits.

3. Respondents have contested the OA with certain preliminary objections, including :-

(i) non exhaustion of departmental remedy as required under Sec 20 of the A.T. Act, inasmuch as the Revision petition stated to have been filed had not been received by the respondents,

(ii) Limitation u/s 21 of the A.T. Act

(iii) Lack of territorial jurisdiction.

4. In his rejoinder, the applicant had contended that the inquiry officer had not complied with Rule 9.12 and Rule 9.21 of the Railway Servants Discipline and Appeal Rules and thus, this serious lapse in the conducting of inquiry and the order of the Disciplinary Authority are in blatant violation of the provisions of Art. 311 of the Constitution of India.

5. Counsel for the applicant has argued that the entire proceedings suffer from the following irremediable legal lacunae:-

(a) Issue of major penalty charge sheet on the very same issue for which initially minor penalty charge sheet issued is illegal.

(b) The charge sheet issued is incomplete due to absence of statement of imputation and attendant annexures reflecting the relied upon documents and list of witnesses;

(c) The inquiry was not conduced in accordance with the Rules, especially, Rule 9.12 and 9.21 of the Railway Service(Discipline and Appeal) Rules have not been complied with;

(d) Inquiry conducted exparte without notice at various stages as required;

(e) Non supply of inquiry report and no opportunity given to represent against the inquiry report;

(f) Willful Absence from duty has to be proved which is not so in this case.

Incompetence of the Disciplinary Authority as due to medical de-categorization the applicant was appointed as a Junior Clerk by order of DRM and hence it is the DRM who is the appointing authority.

(g) Maters Extraneous to the proceedings have been taken into account by the Appellate Authority while upholding the order of penalty.

6. The following decided cases have been cited by the counsel for the applicant in support of the case of the applicant:-

(a) SLJ 2012(2) CAT 215 – Reasons for cancellation of earlier charge sheet is a pre-requisite before initiating the proceedings with the fresh charge sheet.

(b) M.D. ECIL vs B Karunakar – Non supply of the inquiry report vitiates the proceedings.

(c) ATR 1987(1) 190 (Para 6) and – ATR 1989 (1) Page 54 - Rule 9(12) of the Railway Services (Discipline and Appeal) Rules cannot be ignored

(d) SLJ 1998(2) SC 67 – Rule 9.21 of the Rules is mandatory

(e) SLJ 2014(3) Page 105 – Absence on medical ground is not unauthorized absence

(f) ATJ 1999(2) page 113

ATJ 2006(3) Page 276

ATJ 2006(3) Page 473

SLJ 2004(2) Page 41 – Penalty proceedings on charge of absence from duty would be initiated only when the absence is willful.

(g) SLJ 2006(3) 211(SC) – Non speaking orders are illegal. Extraneous matters shall not be taken into consideration.

(h) Counsel for the respondents reiterated the preliminary objections and also justified the imposition of penalty of removal in view of the lack of interest of the applicant in service. He has also contended that the Disciplinary Authority who passed the order of penalty is well competent to impose the penalty of removal. He has further submitted that no revision petition has been filed by the applicant as averred in the OA.

7. Arguments were heard and documents perused.

8. A few minor lapses in the pleadings, though may not be material to adjudicate this OA are to be pointed out at the very incipient stage. Annexure A-9 is shown as copy of the appeal of the applicant (with an addition, "has also been rejected on 01-10-2012). The said annexure is the same as Annexure A-2. Again, copy of revision petition has been shown as Annexure A-10 which is dated 28-11-2011, which precedes the very date of order dated 01-10-2012 of the appellate authority!

9. First as to preliminary objections:

(i) Non exhaustion of departmental remedy as required under Sec 20 of the A.T. Act, inasmuch as the Revision petition stated to have been filed had not been received by the respondents. Non exhaustion of the remedy of revision does not non-suit the applicant from filing the OA. Though revision against the appellate order is one of the statutory provisions contained in the Rules, it is a consuetude that on exhaustion of appeal provisions, OAs filed without resorting to revision are entertained and adjudicated. Even **S. S. Rathore Vs. State of Madhya Pradesh** relied upon by the counsel for the respondents, while discussing reckoning of the limitation period, vide para 20 of the judgment {(1989) 4 SCC 582} does not refer to Revision (though in the earlier part it does refer to the existence of Revision as a remedy in paragraph 16 thereof,)

but confines only upto the appellate stage. Para 20 of the said judgment reads as under:-

> **"20.** *We are of the view that the cause of action shall be taken to arise not from the date of the original adverse order but on the date when the order of the higher authority where a statutory remedy is provided entertaining the appeal or representation is made and where no such order is made, though the remedy has been availed of, a six months' period from the date of preferring of the appeal or making of the representation shall be taken to be the date when cause of action shall be taken to have first arisen. We, however, make it clear that this principle may not be applicable when the remedy availed of has not been provided by law. Repeated unsuccessful representations not provided by law are not governed by this principle."*

(ii) Limitation u/s 21 of the A.T. Act: Section 21 of the Administrative Tribunals Act 1985 inter alia stipulates –

21. (1) A Tribunal shall not admit an application

> *(a)* in a case where a final order such as is mentioned in clause (*a*) of sub-section (*2*) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

The above logically should mean within one year from the date of receipt of the final order, and not the date of order. Delay in delivery of the order cannot dwarf the statutory time available to the applicant. In this case, the respondents have reckoned the limitation period from 01-10-2012 and have not furnished the precise date of service of the order of appeal. And, the Stamp on the OA reflects 30 November, 2012 as the date of filing. Hence, the OA does not suffer from Limitation.

(iii) Lack of territorial jurisdiction. The applicant being without job and having given the Delhi Address, jurisdiction with the Principal Bench is intact.

10. As regards the arguments on the part of the applicant, the same are discussed as hereunder:-

(a) **Issue of major penalty charge sheet on the very same issue for which initially minor penalty charge sheet issued is illegal**: RBE No. 171/93 dated 01-12-1993 is specific that in case a charge sheet is to be cancelled with a view to issuing fresh charge sheet, the reason for cancellation of the earlier charge sheet has to be spelt out administering a word of caution that the cancellation is without prejudice to further action.

(b) The charge sheet issued is incomplete due to absence of statement of imputation and attendant annexures reflecting the relied upon documents and list of witnesses;

Rule 9(6) of the Railway Servants (Discipline and Appeal) Rules, 1968 stipulates as under:-

> (6) Where it is proposed to hold an inquiry against a Railway servant under this rule and Rule 10, the disciplinary authority shall draw up or cause to be drawn up -
>
> (i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

> (ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge which shall contain –
>
> (a) a statement of all relevant facts including any admission or confession made by the Railway servant;
>
> (b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.
>
> (7) The disciplinary authority shall deliver or cause to be delivered to the Railway servant a copy of the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the Railway servant to submit a written statement of his defence within ten days or such further time as the disciplinary authority may allow.

11. The above goes to show that all relevant facts leading to the issue of the charge sheet are available only in the Statement of imputation and the article of charge shall contain only the charge and not the facts. For giving effective reply, it is necessary that the delinquent official should be supplied with full facts leading to the issue of charge sheet and in the absence of such statement of imputations, he would be incapacitated without any due facts made known to him to defend himself. In ***South Bengal State Transport Corpn. v. Ashok Kumar Ghosh, (2010) 11 SCC 71 : (2011) 1 SCC (L&S) 58,*** the purpose of supply of statement of imputation of misconduct has been spelt out by the Apex Court and the same is as under:-

> "11. Regulation 38 of the Regulations, inter alia, provides the procedure for imposing penalties. As the High Court had held that the appointment of an enquiry officer without considering the reply submitted by the delinquent employee speaks of bias and the

punishment inflicted is in violation of Regulation 38(2) of the Regulations, we deem it expedient to reproduce not only Regulation 38(2) but also Regulation 38(3) which are relevant for the purpose:

"38. *Procedure for imposing penalties*.—(1) *

* *

(2) The disciplinary authority **shall draw up** or cause to be drawn up—

(*i*) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge,

(*ii*) a **statement of imputations** of misconduct or misbehaviour in support of each article of charge which **shall** contain

(*a*) statement of relevant facts including any admission or confession made by the employee,

(*b*) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(3) The disciplinary authority shall deliver or cause to be delivered to the employee a copy of the articles of charge and the statement of imputations of misconduct or misbehaviour prepared under clause (*ii*) of sub-regulation (2) and shall require the employee to submit to the inquiring authority within such time as may be specified a written statement of his defence and to state whether he desires to be heard in person.

(4) * * *”

12. From a plain reading of Regulation 38(2) it is evident that the disciplinary authority is required to draw or cause to be drawn up, the substance of imputation of misconduct into definite and distinct articles of charges and the statement of imputation of misconduct, to contain the statement of relevant facts including any admission or confession made by the employee. It also requires drawing up a list of documents by which and a list of witnesses by whom the articles of charges are proposed to be sustained. *Regulation 38(3) of the Regulations obliges the disciplinary authority to deliver or cause to be delivered to the employee the articles of charges and the statement of imputation of misconduct requiring the employee to submit to the enquiry officer a written statement of defence within a specified period.* Neither Regulation 38(2) nor Regulation 38(3) provides that before the appointment of the enquiry officer the reply of the delinquent employee is to be considered.

Regulation 38(2) and 38(3) as extracted above is in pari material with the provisions of Rules 9(6) and 9(7) of the Railway Servants(Discipline and Appeal) Rules 1968.

(c) The inquiry was not conduced in accordance with the Rules, especially, Rule 9.12 and 9.21 of the Railway Service(Discipline and Appeal) Rules have not been complied with; There is full substance in the contention of the counsel for the applicant. As

to the importance of complying with Rule 9.12, the decision by the Jabalpur Bench of this Tribunal cited by the counsel for the applicant supports the case of the applicant.

(d) Inquiry conducted ex parte without notice at various stages as required; When a proceeding is conducted Ex Parte, the delinquent is entitled to participate at any stage of the inquiry. Thus, at each stage, despite the ex parte inquiry, notice shall be addressed to the delinquent giving him an opportunity to participate in the proceedings. In fact, provision under Rule 9.12 also falls under this category. The counsel for the applicant relied upon the decision by the Apex Court in the case of S.B. Ramesh ***Ministry of Finance v. S.B. Ramesh, (1998) 3 SCC 227,*** upheld the reasoning given by the Tribunal in allowing the OA filed by S.B. Ramesh with reference to the entitlement of the delinquent to notice at various stage even if set ex parte. The Tribunal has in that case observed as under:

> *".....even if the Enquiry Officer has set the applicant ex parte and recorded the evidence, he should have adjourned the hearing to another date to enable the applicant to participate in the enquiry hereafter/or even if the Enquiry Authority did not choose to give the applicant an opportunity to cross-examine the witness examined in support of the charge, he should have given an opportunity to the applicant to appear and then proceeded to question him under sub-rule (18) of Rule 14 of the CCS (CCA) Rules. The omission to do this is a serious error committed .....***...** **"**

(e) Non supply of inquiry report and no opportunity given to represent against the inquiry report: It is settled law from the date of judgment of the Apex Court in the case of MD, ECIL vs

B. Karunakar relied upon by the counsel for the applicant that it is mandatory to supply a copy of inquiry report to the charged officer and give him opportunity to make a representation against the same.

(f) Willful Absence from duty has to be proved which is not so in this case. The counsel for the applicant has referred to a few judgments in regard to this contention. In the case of ***Krushnakant B. Parmar v. Union of India, (2012) 3 SCC 178,*** the Apex Court has held as under:-

15. Rules 3(1)(*ii*) and 3(1)(*iii*) of the Central Civil Services (Conduct) Rules, 1964, relates to all time maintaining integrity, devotion to duty and to do nothing which is unbecoming of a government servant and reads as follows:

"**3. *General*.**—(1) Every government servant shall at all times—

(*i*) maintain absolute integrity;

(*ii*) maintain devotion to duty; and

(*iii*) do nothing which is unbecoming of a government servant."

16. In the case of the appellant referring to unauthorised absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a government servant. The question whether "unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a government servant cannot be

decided without deciding the question whether absence is wilful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

(g)Incompetence of the Disciplinary Authority as due to medical de-categorization the applicant was appointed as a Junior Clerk by order of DRM and hence it is the DRM who is the appointing authority - This contention has no substance. As stated in para 4.14 of the counter the applicant was medically decategorized and appointed as Junior Clerk and this approval

may be by the DRM. However, the Disciplinary authority is generally one and the same for a particular post. It is trite that for sports quota, the approval is accorded by the General Manager and if a person is appointed as a group D employee under Sports Quota, he cannot claim that his appointing authority being the General Manager, it is the General Manager who should be the disciplinary authority. Similarly, when the applicant was appointed on account of medical decategorization as a junior clerk, on his appointment he joins the main stream of junior clerks and whoever is the disciplinary authority for this post. From this point of view, the proceedings do not suffer from any legal infirmity.

(h) Matters extraneous to the proceedings have been taken into account by the Appellate Authority while upholding the order of penalty.: Here again, the contention of the counsel cannot be accepted. For, holding some one as guilty of misconduct is one aspect and award of penalty is another. When it is to be decided as to whether the charged officer is guilty of misconduct or not, the Inquiry Officer or the Disciplinary Authority shall not take into any extraneous matter save those figuring in the Charge sheet and its attendant documents. However, the past conduct or subsequent events prior to imposition of penalty can be taken into consideration while assessing the quantum of penalty. In the case of Central Industrial Security Force vs Abrar Ali (2017)4 SCC 507, the Apex Court in para 18 thereof has held as under:-

In any event, past conduct of a delinquent employee can be taken into consideration while imposing penalty. We are supported in this view by a judgment of this Court in *Union of India* v. *Bishamber Das Dogra*, held as follows:

> "*30*. … 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."

Thus, if the charges are proved independent of the extraneous considerations and if there is no legal lacunae in conducting the proceedings, there is nothing wrong in taking into account the past conduct of the delinquent while assessing the quantum of penalty to be imposed. In this case, however, the various legal lacunae as pointed out earlier have vitiated the inquiry proceedings.

In view of the above, the applicant has made out a cast iron case in his favour. The impugned penalty order dated 18-04-2012 and appellate authority's order dated 01-12-2012, dismissing the appeal are hereby quashed and set aside. The applicant is entitled to reinstatement in the same post from which he had been removed as a result of the penalty imposed, but only with the limited consequential benefits as hereunder itemized:-

(a) He shall be entitled to notional fixation of pay with annual increments due as per rules and also revision of pay as

per the latest Revised Pay Rules. He shall not be entitled to any back wages;

(b) He shall be entitled to continuity in service for the purpose of seniority, accrual of leave and consequential leave encashment if any; necessary entry in the service book and seniority list shall be duly made.

The above order shall be complied with, within 8 weeks in so far as direction relating to reinstatement and fixation of notional pay is concerned and within 12 weeks thereafter as regards the other directions are concerned. No cost.

(Uday Kumar Varma)
Member (A)

(Jasmine Ahmed)
Member (J)

/Mbt/