

**CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH**

**Miscellaneous Application No.180/00350/2015
& Original Application No.180/00286/2015**

Tuesday, this the 22nd day of May, 2018

C O R A M :

HON'BLE Mr. U. SARATHCHANDRAN, JUDICIAL MEMBER
HON'BLE Mr.E.K.BHARAT BHUSHAN, ADMINISTRATIVE MEMBER

K.K.Sunilkumar, S/o.K.V.Kesavan,
Ex-Loco Khalasi Helper (Mechanical Department),
Southern Railway, Palakkad Division, Palakkad.
Permanent Address : Kayaramkode House,
Mundur P.O., Palakkad District – 678 592.

...Applicant

(By Advocate – Mr.T.C.Govindaswamy)

V e r s u s

1. Union of India represented by the General Manager,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 600 003.
2. The Additional Divisional Railway Manager,
Southern Railway, Palghat Division,
Palghat – 678 002.
3. The Sr. Divisional Mechanical Engineer,
Southern Railway, Palghat Division,
Palghat – 678 002.
4. The Divisional Mechanical Engineer,
Southern Railway, Palghat Division,
Palghat – 678 002.
5. The Chief Personnel Officer,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 600 003.

...Respondents

(By Advocate – Mrs.K.Girija)

This Original Application having been heard on 16th May 2018, the
Tribunal on 22nd May 2018 delivered the following :

ORDER

HON'BLE Mr. U. SARATHCHANDRAN, JUDICIAL MEMBER

While the applicant was working as Loco Khalasi Helper in the Palghat Division of the Southern Railway he was removed from service vide Annexure A-1 Penalty Advice. His appeal was rejected vide Annexure A-2 Appellate Order and the Revision Petition was also rejected vide Annexure A-3 order. The mercy petition he submitted to the General Manager of the Southern Railway also was rejected. According to the applicant Annexure A-1 to Annexure A-3 are without application of mind, non-speaking, arbitrary, discriminatory and hence unconstitutional.

2. Applicant states that the absence from duty for which he was penalised was for reasons beyond his control and was mainly due to his mental illness for which he was under continuous treatment. He swears that there was no willful misconduct or deliberate negligence and therefore the authorities while passing Annexure A-1 to Annexure A-3 orders have not applied their minds to the applicant's mental conditions and hence such orders require interference by this Tribunal.

3. In M.A.No.180/350/2015 he states that the delay of 1414 days occurred for filing the O.A was on account of his mental illness and also because of the circumstances that the case record he was in possession were destroyed in a fire accident for which he has produced Annexure A-13 certificate from the Railway Police at Nellore, Andhra Pradesh. It is also stated that he has been living without any means of livelihood.

4. Respondents resisted the O.A and the M.A for condoning delay mainly on the ground that the applicant has approached this Tribunal highly belated. The respondents further states that the impugned orders passed by the authorities are well reasoned and based on the admission of the applicant of his delinquency; hence such orders cannot be set aside only on sympathy or sentiments. According to the respondents the applicant was a habitual absentee and has been imposed with minor punishment on charges of unauthorised absence on earlier occasions also but he had shown scant regard to such minor penalties. He never adhered to the rules and procedures to be followed in terms of the Indian Railway Medical Manual, if at all he was really sick. Respondents state that the applicant remained absent from duty from 11.2.2004 without intimating any reason. When the applicant reported for duty on 4.11.2004 along with Annexure A-5 medical certificate issued by the Psychiatrist of the District Hospital, Palghat he was referred to the Senior Divisional Medical Officer of Railway Hospital who had initially kept the applicant in the sick list from 4.11.2004 to 15.11.2004 and finally issued a fitness certificate with effect from 16.11.2004 with remarks that “period of absence is not covered, to be dealt departmentally”. Accordingly, the applicant's absence from 11.2.2004 to 3.11.2004 becomes unauthorised. The applicant was residing in the Railway Quarters during the relevant time. The Revisionary Authority also had taken note of the service record of the employee that he has been absenting unauthorisedly quite frequently and has been punished on earlier occasions ie. from 16.6.2001 to 26.7.2001 (47 days) and from 14.12.2001 to 18.3.2002 (95

.4.

days) also. Respondents pray for dismissing the O.A.

5. We have heard Shri.T.C.Govindaswamy, learned counsel for the applicant and Smt.K.Girija, learned standing counsel for the Railways at length. Perused the records.

6. It has to be noted at the outset that the charge against the applicant is that 'while he was working as Helper II/Loco/Palghat he unauthorisedly absented himself from duty from 11.2.2004 onwards without intimating reasons for his absence'. Annexure A-6 is the proceedings of the inquiry ensued wherein the applicant seems to have participated fully. It is seen that in the beginning of the inquiry itself the applicant has admitted the charge. There was no dispute regarding the charge of unauthorised absence. Yet the inquiry proceeded to record a departmental witness to testify the days of absence of the applicant and his non compliance of the requirement of he being medically examined by a Railway Medical Officer. The departmental witness has clearly stated that the applicant had indeed produced medical certificates issued by a private Psychiatrist and also by another Psychiatrist who is the Assistant Surgeon, District Hospital, Palghat stating fitness for duty. Based on the inquiry so conducted the Inquiry Authority submitted Annexure A-7 report finding that the charge against the applicant was proved. Accordingly, Annexure A-1 Penalty Advice was issued by the Disciplinary Authority removing the applicant from service. Annexure A-9 is the appeal preferred by the applicant which was turned down by the Appellate Authority vide Annexure A-2 order. Annexure A-10

Revision Petition filed by the applicant was rejected by the Revisionary Authority vide Annexure A-3 order.

7. The thrust of the argument of Shri.T.C.Govindaswamy, learned counsel for the applicant is that the absence of the applicant for the period mentioned in Annexure A-5 charge sheet was for the reasons beyond the his control and was on account of his mental illness and therefore such absence was not a willful or negligent act on his part. Relying on Annexure A-12 series medical certificates issued by different doctors, Shri.T.C.Govindaswamy, learned counsel for the applicant submitted that the applicant was suffering from mental illness “Reactive Depression” from February, 2004 onwards and was unable to attend his duties. One of the Annexure A-12 series certificate is issued by Assistant Surgeon, Government District Hospital, Palghat. The other two certificates produced are issued by a private Psychiatrist who also stated that the applicant was suffering from depressive disorder “Bipolar Effective Disorder and Depression” and that he had suicidal tendency.

8. The respondents contend in their pleadings that whatever be the nature of his illness the applicant ought to have reported the matter to the railway authorities and got himself treated and dealt with as per the provisions of Indian Railway Medical Manual. The respondents do not dispute that Annexure A-12 medical certificate was issued by a Psychiatrist of the District Hospital, Palghat. They state that when the applicant produced Annexure A-12 on 4.11.2004 the applicant was referred to the

Senior Divisional Medical Officer who kept the applicant in a sick list from 4.11.2004 to 15.11.2004 and later issued a fitness certificate with remarks that “period of absence is not covered, to be dealt departmentally”. There is nothing on record about the medical opinion of the Railway Medical Officer regarding the mental illness the applicant had suffered. It is also not clear from the pleadings of the respondents as to why the Railway Medical Officer had ignored and kept mum about the medical condition the applicant had as indicated in Annexure A-12 medical certificate issued by the Psychiatrist of the District Hospital, Palghat.

9. Annexure A-12 series medical certificates do really show that the applicant was suffering from a depressive disorder indicating that he was mentally ill. It is difficult to understand the arguments of the respondents that in such a state of affairs how a patient with mental illness can behave like a normal employee and go to the Railway Medical Officer in accordance with the Indian Railway Medical Manual. Mental illness is a debilitating illness which reduce the mental faculties of a person who cannot be expected to behave in a normal manner obeying all departmental rules and instructions. In Annexure A-11 mercy petition submitted by the applicant to the General Manager of the Southern Railway the applicant states that he was employed in the Railways on compassionate ground on the demise of his father who was a Peon in the Works Branch, Palghat. It is further stated that his family consists of his widowed mother, wife and two school going children and that he is hailing from a very poor family and that having married on a inter-caste basis, his wife being a member of the

Scheduled Caste, he could not get any support from the side of his wife's family also. These facts stated in Annexure A-11 mercy petition - though not a statutory measure- are not seen considered by the authorities or disputed anywhere in the pleadings. If the financial and social background and the mental iess suffered by the applicant is as stated in Annexure A-11 mercy petition are, undisputedly, within the knowledge of his superior railway officials, it is clear that when he became affected with mental illness there was no proper guidance for him to be taken to the Railway Hospital or to get himself treated from the railway medical facility. It is common knowledge that the family of the mentally ill person would not normally wish to make such illness public and wish to get it treated in discreet manner without the other members of the society coming to know of it. No wonder that the applicant resorted to the private / non-railway hospitals for such treatment. According to the applicant he was not in a position to attend the duties during the period mentioned in the charge sheet on account of his mental illness.

10. The inquiry proceedings in which he had fully participated clearly shows that the applicant has neither raised a little finger against the charges nor has he contested the imputation. He was cooperative during the inquiry. Examination of his immediate superior who seemed to be aware of Annexure A12 series non- railway medical certificates shows that the respondents somehow or other were eager to remove him from service on the charge of unauthorised absence which they were quite sure that the applicant could not dispute. But in their eagerness to remove the applicant

from service they conveniently ignored the element of 'willful absence' in the imputation. The railway authorities turned a Nelson's eye to the facts and circumstances of his mental illness! No doubt, after the order imposing the penalty of removal he, being a low level employee of the Railways with a family background as stated above, would have certainly suffered a financial disaster as well.

11. In *Krushnakant B Parmar v. Union of India & anr.* (2012) 3 SCC 178 the Apex Court was dealing with the misconduct of absence from duty / unauthorised absence. The Apex Court in that case found that neither the Inquiry Officer nor the Appellate Authority found absence of the employee “willful” despite his specific defence that he was prevented from duty and was not allowed to sign attendance register. Observing that the question whether “unauthorized absence from duty” amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be contested without deciding the question whether the absence is willful or because of compelling circumstances the Supreme Court observed :

“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 willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. 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 unauthorized 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.”
[underlining supplied]

12. Unfortunately, in this case, none of the impugned orders issued by the Inquiry Authority, Disciplinary Authority, Appellate Authority or the Revisionary Authority deliberates the issue as to whether the absence of the applicant from duty was willful or not. In such circumstances and in the absence of such a clear finding by the authorities, the applicant cannot be punished for the misconduct of unauthorised absence.

13. Smt.K.Girija, learned standing counsel for the Railways was emphatic when she argued that the O.A has been filed highly belatedly. The applicant's states that after his dismissal and after the rejection of his Revision Petition vide Annexure A-3 order he was not in a position to approach this Tribunal on account of the financial condition as well as on account of the destruction of his case records in a fire accident occurred while he was travelling from New Delhi to Chennai. Annexure A-13 is the Police Certificate dated 31.7.2012 issued by the Railway Police, Nellore, Andhra Pradesh. Shri.T.C.Govindaswamy, learned counsel for the applicant submitted that after the dismissal from service the applicant was wandering here and there in search of a job and it was only after securing the records produced in this case by invoking the provisions of the Right to Information Act the applicant could approach this Tribunal.

14. Referring to the impugned orders passed by the railway authorities regarding the penalty imposed on the applicant, Shri.T.C.Govindaswamy, learned counsel for the applicant submitted that the orders are not speaking orders and are not taking into account the mental illness suffered by the

applicant during the period mentioned in the charge sheet. On examination of Annexure A-1, Annexure A-2 and Annexure A-3 it can be seen that the authorities have proceeded on the basis of the admission of misconduct as admitted by the applicant at the time of the inquiry proceeding and have only exemplified the circumstance that he had neither taken prior permission nor intimated the office regarding his absence even though he was staying in a Railway Quarters. In Annexure A-3 the Revisionary Authority had gone further ahead by stating that while going through the service records the applicant was seen absenting unauthorizedly quite frequently and has been punished in earlier occasions also. We note that such an allegation is not finding a place in Annexure A-5 charge sheet. Nevertheless Annexure A-2 also is, sadly, not taking into account of the fact whether the unauthorized absence on the part of the applicant was 'willful' or not.

15. As per the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, PWD Act) mental illness is also treated as a disability. Section 2(a)(i) of the PWD Act gives the meaning of the term 'disability' as under :

“Disability” means -

- (i) blindness;
- (ii) low vision;
- (iii) leprosy-cured;
- (iv) hearing impairment;
- (v) locomotor disability;
- (vi) mental retardation;
- (vii) mental illness”

It appears that the railway authorities have consciously ignored Annexure

A-12 series medical certificates produced by the applicant in order to escape from the mandatory provisions under Section 47 of the PWD Act and to escape from the obligation of keeping the applicant in a supernumerary post or providing alternative employment. Instead, taking advantage of the applicant's obeisant admission of the charge in the inquiry proceedings the respondents found it more convenient to dispense with him by dismissing from service in order to obviate the onerous obligations under the mandatory provisions of the PWD Act.

16. Respondents state that the applicant was residing in the railway quarters all the while during his unauthorised absence. In our view, if the railway had sent their Welfare Officer to enquire the reasons for his absence and had come to his assistance, the applicant would have been given treatment under the provisions of the Railway Medical Manual, rather than dismissing him for absence from duty, picturising that the same was unauthorised.

17. It is settled law that administrative decisions are justiciable if they are tainted by (i) illegality (ii) irrationality and (iii) procedural impropriety [see *Council of Civil Service Unions v. Minister for the Civil Service* (1984)3 All.ER 935]. If the administrator has left out relevant factors or taken into account irrelevant factors his decision would suffer from irrationality [see *Indian Railway Construction Co v. V. Ajay Kumar* 2003(2) SCR 387] which would be antithetical to Art. 14 of the Constitution of India. We are of the view that Annexure A-1 to Annexure A-3 orders passed by the respondent

authorities do not take into account the relevant facts and circumstances and that the disciplinary proceedings conducted also were not reckoning the real facts and circumstances. The essential element of 'willful absence' was not at all examined by any of the authorities. For this reason we hold that the impugned Annexures A-1 to A-3 need to be quashed and set aside. We do so. Needless to say Annexure A-4 also deserves the same fate.

18. In the light of the above discussion, we are inclined to condone the delay in filing the O.A.

19. In the result, while quashing and setting aside Annexure A-1 to Annexure A-4 we direct the respondents to reinstate the applicant within two months from the date of receipt of a copy of this order. It is made clear that the applicant will not be entitled to any backwages / increments from the date of his dismissal till the date of his reinstatement. However, his service from the date of initial appointment shall be taken into account only for the purpose of pensionary/retiral benefits. No order as to costs. M.A stands allowed.

(Dated this the 22nd day of May 2018)

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

(U.SARATHCHANDRAN)
JUDICIAL MEMBER

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List of Annexures in O.A.No.180/00286/2015

- 1. Annexure A-1** – True copy of Penalty Advice bearing No.J/M226/Abs/J/M4872/PGT/102 dated 12.7.2007 issued by the 4th respondent.
 - 2. Annexure A-2** – True copy of Appellate order bearing No. No.J/M226/Abs/J/M4872/PGT/102 dated 19.9.2008 issued by the 3rd respondent.
 - 3. Annexure A-3** – True copy of Revisional order bearing No. No.J/P227/Abs/J/M4872/PGT/102 dated 17.12.2009 issued by the 2nd respondent.
 - 4. Annexure A-4** – True copy of Letter bearing No.P(A)90/2010/555 dated 17.5.2010 issued by the 5th respondent.
 - 5. Annexure A-5** – True copy of Major Penalty Memorandum of Charges bearing No. No.J/M226/Abs/J/M4872/PGT/102 dated 23.6.2004, issued by the 4th respondent.
 - 6. Annexure A-6** – True copy of proceedings of the inquiry held in connection with A5 Charge Memorandum.
 - 7. Annexure A-7** – True extract of report of the inquiry held into the allegations in A5 Charge Memo.
 - 8. Annexure A-8** – True copy of objections, dated nil December 2005 submitted to the 4th respondent.
 - 9. Annexure A-9** – True copy of appeal, dated 4.6.2008, addressed to the 3rd respondent.
 - 10. Annexure A-10** – True copy of revision petition addressed to the 2nd respondent, Additional Divisional Railway Manager, dated 22.5.2009.
 - 11. Annexure A-11** – True copy of Mercy Petition to the 1st respondent, dated 6.1.2010.
 - 12. Annexure A-12** – True copies of Medical Certificates dated 4.11.2004, 28.2.2006 and 28.3.2007 issued by the competent authority.
 - 13. Annexure A-13** – True copy of certificate dated 31.7.2012 issued by the Sub Inspector of Police, Railways, Nellore.
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