

OA No. 050/00443 of 2014

Order pronounced on 06.04.2018

(Patna, this the day of March, 2017)

Hon'ble Shri A.K. Upadhyay, Member [A]
Hon'ble Shri Jayesh V. Bhairavia, Member [J]

.....Applicant

Versus

1. The Union of India through the General Manager, E.C. Railway, Hajipur, District – Vaishali.
2. The Chief Commercial Manager, E.C. Railway, Hajipur, District – Vaishali.
3. The Divisional Railway Manager, E.C. Railway, Dhanbad.
4. The Additional Divisional Railway Manager, E.C. Railway, Dhanbad.
5. The Senior Divisional Personnel Officer, E.C. Railway, Dhanbad.
6. The Coal Area Manager, E.C. Railway, Dhanbad.
7. The Senior Divisional Financial Manager, E.C. Railway, Dhanbad.
8. The Transport Inspector (Load), E.C. Railway, Dhanbad.

.....Respondents

By Advocate: Shri B.K. Choudhary and Shri Sheo Jee Prasad.

ORDER

Jayesh V. Bhairavia, M [J]:- The present OA has been filed by the widow of the deceased Government employee late Akhilesh Prasad for the following reliefs:-

“(i) That Your Lordships may graciously be pleased to quash and set aside the impugned order of removal from service dated 5.10.2006 together with appellate order dated 13.3.2008 and Inquiry Report dated 7.9.2007, 19.1.2011 and 12.8.2011 as contained in Annexure A/4 , A/8 and A/6 respectively.

(ii) That the respondents further be directed to pay the arrears of salary in favour of the applicant from the date of removal from service of her husband till his death without any delay with all consequential benefit including all settlement dues and family pension with its arrear and interest thereon.

(iii) Any other relief or reliefs including the cost of the proceeding may be allowed in favour of the applicant.

Or

In case of any difficulty in granting relief as prayed in para 8.1 to 8.2, this Hon'ble Tribunal may be pleased to direct the respondents to release the compassionate pension of 2/3rd pension + Gratuity in view of Annexure A/4 dated 5.10.2006 along with arrears and statutory interest thereon. "

2. The brief facts of the case are as under:-

(i) Late Akhilesh Prasad who was working as Head Clerk Ray Weigh Bridge, E.C. Railway, Dhanbad remained absent from his duty without any information to the competent authority. He was served with charge sheet under Rule 9 of the Railway Servants (Discipline & Appeal) Rules 1968 (Standard form No. 5) dated 25.4.2006 (Annexure A/1 series) for a major penalty. The charge levelled against the said deceased employee was that he was granted Earned Leave for 15 days from 2.2.2006 to 16.2.2006. He was due to resume duty on 17.2.2006, but instead of resuming duty on 17.2.2006, he has been overstaying from 17.2.2006 till date unauthorizedly without any information to the competent authority. It is alleged that Shri Akhilesh Prasad, was habitual in overstaying after availing sanctioned leave. Previously, he overstayed from 3.4.2005 to 28.5.2005 i.e 56 days after availing LAP from 16.3.2005 to 2.4.2005. This is tantamount to gross negligence of duty on the part of Shri Akhilesh Prasad, H.C and he is liable for disciplinary action for contravention of Railway Rules 3/1(i) (ii) (iii) of Railway Servants (Conduct) Rules, 1966.

(ii) That the said Shri Prasad was suspended on 15.5.2006. Thereafter, the Disciplinary Authority appointed I.O on 25.5.2006. The Charged Official

had submitted his defence reply on 2.6.2006 against the charge memo and denied the allegations. On 11.8.2006, the Enquiry Officer submitted his report in which he concluded that the charges were proved, and the reason for absence of applicant from his duty was attributed to his illness. The copy of the said inquiry report was given to the delinquent on 11.8.2016 and defence reply was called for from the delinquent. In response to it, the delinquent had submitted his reply. The delinquent had explained the reasons for his absence by giving details of medical treatment undergone by him in various hospital and medical health centres and also produced the proof of the same.

(iii) After considering the I.O report and the reply of the delinquent, the Disciplinary Authority, vide his order dated 5.10.2006, held that" the delinquent is guilty of absenting himself unauthorizedly from 17.2.2006 to 13.5.2006 i.e 86 days and at three different occasions without informing any one concerned ; hence order for removal from Railway Service with immediate effect from 5.10.2006 with benefit of compassionate pension may be given i.e. 2/ 3rd of pension plus gratuity" . It was also observed in the said order that if the delinquent wishes to file appeal against the penalty, then he can do so within a period of 45 days to Additional Divisional Railway Manager. (Annexure A/4 refers).

(iv) The delinquent had preferred an appeal on 30.11.2006 against the punishment order dated 5.10.2006. He had raised the grievance that he was not given due opportunity for cross-examination of the witnesses by the I.O and in absence of delinquent and his defence assistant, the I.O had conducted the proceedings at certain occasions. He had not been provided relevant document also and thereby deprived the delinquent of his right to defend his case properly.

(v) On receipt of the appeal from the delinquent, the appellate authority had directed the I.O to provide proper opportunity to the appellant

/applicant and to re-inquire the matter. Therefore, the delinquent appellant was called by the I.O to put his defence and submission on 17.3.2007. However, on that day, the defence assistant did not turn up, therefore, due to his absence, he had not submitted anything before the I.O. Next hearing took place on 31.4.2007 and on that day, the applicant had demanded the relevant documents from the I.O. Thereafter, on 6.8.2007, the applicant was provided the copy of inquiry order and other documents which were demanded by him. The applicant had objected to the continuance of the inquiry in absence of the documents which were not attested or certified. Moreover, without providing due opportunity, the Disciplinary Authority, vide his order dated 5.10.2006, imposed the punishment which is illegal and without withdrawing the said order within 15 days, the delinquent cannot participate in the proceedings. On the submission of the applicant, the I.O had had submitted his report on 4.9.2007 and on the said report, the Coal Area Manager, E.C. Railway, Dhanbad, the DA, vide his notice dated 7.9.2007, called upon the applicant to submit his representation with regard to I.O report and findings dated 4.9.2007 in connection with major penalty charge sheet dated 25.4.2006 (Annexure A/6 refers).

(vi) Thereafter, the applicant through his representation dated 20.9.2007 requested the D.A that findings of the I.O is vague inasmuch as the conclusion drawn in the last para by the I.O/EO is just demand of the delinquent applicant, and requested that the removal order should be quashed to meet the justice and fair play. (Annexure A/7 refers).

(vii) The D.A had not passed any order on the representation which was submitted in pursuance of notice dated 7.9.2007.

(viii) The delinquent applicant had received the order dated 13.3.2008 passed by the appellate authority whereby appellate authority had rejected the appeal of the applicant which was submitted on 30.11.2006. It is further stated in the said order that the entire DA case had been considered, the

then ADRM had ordered to extend an opportunity to the applicant for cross-examining the witnesses who had been examined by I.O. in absence of the applicant and his defence helper. Since the appellant had insisted that first, the penalty imposed against him be withdrawn before his participation in the inquiry proceedings otherwise he will seek justice in the court of law. It is further stated in the said order that since that office cannot stop delinquent to go to court of law to seek justice, but his threat to inquiry officer for withdrawal of penalty imposed cannot be agreed to. The appellate authority has, therefore, invited the applicant for personal hearing vide letter dated 8.10.2007 but he did not turn up on that date and even after that date. Under these circumstances, the appellate was forced to maintain the penalty imposed on him by the DA. It is further stated in the said order that if the delinquent wish to make a revision petition against the penalty, he may do so within 45 days of the receipt of this letter. (Annexure A/8 refers).

(ix) After the order dated 13.3.2008 passed by the appellate authority, on 7.6.2008 due to serious illness, the delinquent applicant died, leaving behind a large size of family i.e his widow (applicant herein), five daughters and five sons.

(x) The son of the deceased delinquent, being legal heir, had filed OA 152 of 2008 and challenged the order dated 13.3.2008 passed by the appellate authority. This Tribunal, vide its order dated 21.10.2008, dismissed the OA. This Tribunal further, inter alia, observed in para 3 of the said order that "*..... the applicant has approached this Tribunal directly without filing the revision petition before the competent authority, his contention is that since his father died, he (the applicant) did not file the revision petition before the competent authority and directly approached this Tribunal for redressal of his grievance. If he has right as legal representative of the deceased to file OA before the Tribunal, would have right as well to*

file a revision petition also. Therefore, it is open to him to file a revision petition, if he is entitled to file the same”.

(xi) Thereafter, the present applicant, i.e the widow of the deceased delinquent had submitted the revision petition before the Revisionary Authority on 5.2.2009 and contended that the punishment imposed on the husband of the applicant is harsh and disproportionate. The deceased delinquent was suffering from heart disease and therefore, he was under continuous medical treatment till he expired. The applicant further submitted that all the medical bills and prescriptions issued by the various hospitals and health centres from 22.2.2006 were annexed along with the revision petition and prayed for cancelling the order of removal of her late husband. The applicant had also requested the respondent authorities to consider the case for providing compassionate appointment (Annexure A/9 series).

(xii) Thereafter, the applicant had not received any response from the respondents in respect to the revision petition. Therefore, she had approached this Tribunal by way of OA No. 17 of 2010, challenging the order of appellate authority dated 13.3.2008. The said OA was dismissed vide order dated 2.2.2010. The operative part of the order is as under:-“ ” *para 6 :- Since the reliefs sought at para 8.1 and 8.2 have already been exhausted on behalf of the deceased by his son in filing OA 152 of 2008, the only relief prayed for that survives is at para 8.3, that she may be allowed to file a petition before the competent authority to consider her case for appointment on compassionate ground, but it is seen that even that application for compassionate appointment has been filed through Annexure A/8.*

Para 7:- In view of the above, this OA does not survive as regards all the reliefs sought for, and is dismissed as not maintainable. No costs.”

(xiii) The applicant had filed another revision petition on 30.10.2010 and reiterated her request that the decision of the DA and Appellate Authority are perverse and during the period from 22.2.2006 to 17.3.2006, the deceased employee was sick and was under medical treatment. The said details were not considered by the competent authority before imposing penalty of removal. Therefore, a grave injustice has been caused to the family of the deceased employee. (Annexure A/12 refers).

(xiv) The learned counsel for the applicant vehemently submitted that action of the respondents are against the principles of natural justice. The I.O had not provided proper documents to the delinquent, not only that, in absence of delinquent and his defence assistant, the I.O had examined the witnesses without extending opportunity to the delinquent to cross-examine the witnesses and concluded the inquiry. The delinquent applicant had submitted his reply to the disciplinary authority in response to the first show cause dated 11.8.2006 vide his reply dated 3.9.2006. However, without considering the same, vide order dated 5.10.2006, the disciplinary authority imposed a major penalty of removal from the service with 2 /3 rd pension and gratuity. As against the said order, the delinquent applicant had preferred appeal and it can be seen that the appellate authority had accepted the grievance of the delinquent applicant about lacuna in inquiry, and therefore, order of re-inquiry was passed and in pursuance to, re-inquiry was conducted without passing any order of suspension or cancellation of the punishment order dated 5.10.2006. It is submitted that after the re-inquiry the delinquent applicant was provided the I.O report on 5.9.2007 and delinquent had submitted his defence reply to it, but DA had not passed any order on the re-inquiry, instead, the appellate authority had passed order dated 13.3.2008, confirming the punishment imposed vide order dated 5.10.2006 by the DA whereas after the order of re-inquiry / fresh inquiry, the said punishment order dated 5.10.2006 does not exist, and therefore,

the respondents have violated the provisions of rule 9 and 10 under the Railway Servant (D&A) Rules, 1968.

It is further submitted that the report of the inquiry officer dated 5.9.2007 in re-inquiry was provided on 7.9.2007, no order passed by the DA. However, the inquiry conducted in the year 2006 and order passed on 5.10.2006 by the disciplinary authority had been relied upon and punishment had been imposed by the appellate authority, the said action is totally against the settled principle of law. Therefore it is submitted that Once the initial action is illegal, the action that follows is illegal. To substantiate his submission, the learned counsel for the applicant has placed reliance on the following judgment passed by Hon'ble Apex Court in the case (i) M/s Lokmat News Papers Pvt. Ltd. Vs. Shankar Prasad, reported in AISLJ 2000 (2) page 114, (ii) the judgment passed in V.C. Baranas Hindu University and Ors vs Shri Kant passed by the Hon'ble Apex Court in 2006 (3), AISLJ SC 275. (iii) 2012 (3) PLJR 854 (Laxmi Mandal vs. State of Bihar

It is further submitted that the applicant and her son had filed OA before this Tribunal in past, however, due to non-filing of the revision petition as also same was pending before authority, the said O.As were dismissed, In the said OAs, the order passed by the DA dated 5.10.2006 was never challenged and at present, the respondents had not passed any order on the revision filed by the applicant nor they have released the 2/ 3 rd pension in favour of the family of the deceased employee, and the family are starving. Therefore, this OA.

3. The respondents have filed their reply the denied the contentions of the applicant. The learned counsel for the respondents mainly submitted that all due opportunities were provided to the delinquent applicant by the concerned authorities at every stage of the proceedings. The DA came to the conclusion that the delinquent applicant was on sanctioned leave from

2.2.2006 to 16.2.2006, and thereafter, overstayed unauthorizedly from 17.2.2006 till the issuance of the charge sheet. The appellate authority had provided due opportunity to the delinquent applicant for cross-examining the witnesses. However, the delinquent applicant insisted upon the authority for withdrawal of order of punishment dated 5.10.2006 first before his participation in the inquiry proceedings, otherwise he would seek justice in the court of law. Therefore, the findings of the I.O dated 4.9.2007 was sent to the charged officer vide communication dated 7.9.2007 for obtaining his representation against the same. Again, the appellate authority invited him for personal hearing vide letter 8.10.2007, but he did not turn up on that date and even after that date, and ultimately, the appellate authority & ADRM/DHN passed an order dated 13.3.2008 to maintain penalty imposed on him by the D.A with an instruction that if he wishes to make revision petition, the same can be filed within 45 days of the receipt of the order through proper channel. The said order was received by the delinquent applicant on 29.3.2008 but he did not file revision petition within stipulated time and expired on 7.6.2008.

(i) Thereafter, the son of the deceased delinquent had filed OA No. 152 of 2008 before this Tribunal which was dismissed as per the order dated 21.10.2008, the present applicant had filed revision petition before the revisionary authority on 18.2.2009 for quashing the order of appellate authority dated 13.3.2008 and prayed for treating the applicant's husband as a regular employee for death cum retirement benefit and allowed to file petition before the competent authority for compassionate appointment. The said revision was put to CCM/ECR/HJP for consideration but revision petition was not disposed of due to pendency of court case and revision being time barred as well as as per provisions of 21 of Railway Servant (D&A) rules, 1968 i.e every person preferring an appeal shall do so separately in his own name. Therefore, revision petition could be processed any further. It is

further submitted that all the reliefs prayed in the present OA were sought by the son of the applicant as well as the applicant in his previous OA before this Tribunal and both OA were dismissed by this Tribunal. Therefore, now it is not open for the applicant to pray the same reliefs which are already denied by this Tribunal in earlier point of time, hence the applicant is not entitled for any reliefs.

4. Heard the parties and perused the records.

5. It is noticed that this is a third round of litigation. It reveals that the husband of the present applicant, late Akhilesh Prasad while he was working as Head Weigh Clerk, E.C. Railway, Dhanbad, a major penalty charge sheet dated 25.4.2006 was issued to him for his unauthorized absence for the period from 17.2.2006 till the issuance of the memo charge dated 25.4.2006. He was also charged with overstaying for the period from 3.4.2005 to 28.5.2005 and according to the respondents, this conduct of the deceased delinquent is tantamount to contravention of provisions of Rule 3 (i), (ii) (iii) of Railway Service (Conduct) Rules, 1966. The deceased delinquent had submitted his defence reply dated 2.6.2006 to the disciplinary authority and he had denied the charges. The D.A had ordered to initiate disciplinary proceedings. The inquiry was conducted and concluded on 11.8.2006 and the I.O had submitted his inquiry report by observing that the charges for unauthorized absence for the period from 17.2.2006 to 13.5.2006 i.e 86 were found to be proved and the reasons for his overstaying was shown as his illness. The delinquent employee was provided the said report for counter reply to it and he had submitted his reply on 3.9.2006. Thereafter, the D.A had passed an order dated 5.10.2006 whereby the delinquent was found to be guilty of absenting himself unauthorizedly from 17.2.2006 to 13.5.2006 i.e. 86 days and at three different occasion, without informing any one concerned, hence he was ordered to be removed from Railway service with immediate effect from

5.10.2006 with benefit of compassionate pension i.e 2 /3 rd of pension plus gratuity. Along with the said order, copies of findings of the I.O, speaking order of DA has been provided and it was directed to delinquent applicant in the said order that if he wishes to make an appeal against the above penalty, he can do so within a period of 45 days to the Additional Divisional Railway Manager, E.C. Railway, Dhanbad through proper channel.

(a) The deceased delinquent had preferred an appeal before the appellate authority on 30.11.2006 and submitted that delinquent was not given due opportunity to cross-examine the witnesses as I.O had examined the witnesses in his absence and also he was not provided relevant document by the I.O. The appellate authority had accepted the grievance of the delinquent with regard to lacuna in conduct of the inquiry proceedings and extended the opportunity to the delinquent to cross-examine the witnesses by directing the disciplinary authority as well as inquiry officer to re-inquire the case of the delinquent. Accordingly, re-inquiry was held wherein the delinquent participated and demanded certain copies of the relevant documents as well as copies of order for re-inquiry passed by the appellate authority. However, some of the documents were provided and some were not. Thereafter, the delinquent had requested the I.O during re-inquiry that let the first order dated 5.10.2006 whereby penalty of removal from service was imposed on him be withdrawn otherwise he will seek justice in the court of law and if the said penalty order is not withdrawn, he will not participate in the re-inquiry. The I.O had submitted his report to D.A on 4.10.2007 and thereafter, the appellate authority had called upon the delinquent vide notice dated 7.9.2007 to respond to the report of the I.O, the copy of report of I.O was served on delinquent. The delinquent had submitted his reply on 20.9.2007 and denied the findings of the I.O and requested that he had simply requested that the previous order of punishment be withdrawn, that is his just and fair request, if not accepted,

he will seek justice in the court of law. The appellate authority considering the said reply of the delinquent as well as case papers of the disciplinary proceedings passed an order dated 13.8.2008 whereby the punishment / penalty imposed vide order dated 5.10.2006 upon the delinquent was ordered to be maintained and instructed the delinquent that if he desires, he can make a revision petition against the said order of penalty.

6. At this juncture, it is seen that the delinquent expired on 7.6.2008 due to his serious heart disease. The delinquent could not file revision petition against the order dated 13.3.2008 passed by the appellate authority. It is also noticed the first punishment dated 5.10.2006 was challenged by way of departmental appeal and the appellate authority, without withdrawing the penalty order, remanded the matter to the inquiry officer for re-inquiry with a view to provide opportunity to the delinquent employee for cross-examining the witnesses. This action of the appellate authority amounts to acceptance of the grievance of the delinquent that inquiry suffers from certain infirmities i.e. denial of natural justice.

7. It is evident from the record that the so –called unauthorised absence of the deceased delinquent was attributable to his prolonged illness. There is no dispute over the fact that the deceased delinquent was not under continuous medical treatment from 17.2.2006 till he expired. The material on record substantially corroborate the said facts, which were overlooked by the concerned disciplinary authority as well as appellate authority.

8. The question whether “unauthorized 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 the absence is wilful or because of compelling circumstances. 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.

In the present case, the deceased delinquent's absence was due to his prolonged illness and therefore, he was not able to report for duty after completion of his sanctioned leave. The delinquent deceased was absenting himself due to his continuous medical treatment and hospitalization and these compelling circumstances were beyond his control. This fact was totally overlooked by the respondents. Hence, the absence of the deceased delinquent from his duty was not wilful. Secondly, the charge levelled against the deceased delinquent was for unauthorized absence for 86 days and the penalty of removal imposed upon him cannot be said to be proportionate. In fact, it is on higher side and disproportionate to the alleged unauthorized absence which was not wilful.

9. It is noted that previously, this tribunal has decided the earlier O.As filed by the legal heir of the deceased delinquent on merit. The first OA i.e OA 152 of 2008 was dismissed on the ground that revision petition had not been filed. The second OA No. 17 of 2010 was dismissed on the ground that reliefs prayed for was already exhausted in the earlier OA. It is clear that on both occasion the case of the deceased delinquent was not examined on merit with regard to legality and propriety of the penalty order passed by Disciplinary authority dated 5.10.2006 and the order dated 13.3.2008 passed by the appellate authority. It is unfortunate that the revision petition filed by the present applicant has been kept pending by the respondents due to pendency of the court case. The said revision petition was filed on 5.2.2009 and reminder to that has been filed on 30.10.2010, whereas the present OA was filed by the applicant on 30.6.2014. During this period, there was no legal bar restraining the respondents to decide the said revision petition.

10. Considering the factual matrix of the present case, we are of the opinion that there is a miscarriage of justice in the case of the applicant. The disciplinary authority passed the removal order against the husband of the

applicant for his absence of 86 days which was not accepted by the appellate authority who remanded the case of re-inquiry. However, the penalty order dated 5.10.2006 was kept alive. The re-inquiry was held and without any cogent reason, the appellate authority affirmed the penalty order dated 5.10.2006. In fact, there is nothing on record to suggest that after re-inquiry, the Disciplinary Authority had passed any order on the report of the I.O and it also reveals that without there being any order of D.A, the appellate authority had straightway considered the I.O second report dated 5.9.2007. This action of the respondents are in violation of principles of natural justice and provisions of Rule No. 9 and 10 of the Railway Servant (D&A), Rules, 1968. The disciplinary proceedings initiated and conducted against the deceased employee stands vitiated due to admitted lacuna in the conduct of the said inquiry, the appellate authority had also affirmed the said lacuna and directed for re-inquiry. The impugned order dated 5.10.2006 passed by the Disciplinary Authority and order dated 13.3.2008 of the appellate authority suffer from various infirmities and cannot be allowed to sustain, as the alleged absence of the deceased employee which was the basis of his removal from service is not wilful which has emerged from the record of the case. This material fact was totally overlooked by the Disciplinary Authority as well as Appellate Authority.

11. In the result, this Tribunal finds that the disciplinary proceedings initiated and conducted against the deceased employee suffer from the certain infirmities which were not corrected up to the stage of appeal. Secondly, the penalty imposed on the deceased employee is definitely disproportionate to the charge. Thirdly, the material fact that the alleged absence of the deceased employee from duty which was the basis of his removal from service was not wilful and this was overlooked by disciplinary authority as well as appellate authority. After the order passed by the appellate authority, the delinquent employee expired and revision

petition filed by the present applicant i.e widow of the deceased employee has not yet been decided, though liberty to prefer revision by the legal heirs was accorded by this Tribunal in previous litigation. This Tribunal is also of the view that there is miscarriage of justice in the present case of the deceased employee. In such view of the matter and in the peculiar facts and circumstances of the case, we find it appropriate to remand the matter to the revisionary authority where the statutory revision petition of the applicant (widow of the deceased employee) is still pending, as the case of the deceased employee needs a re-look. Accordingly, the OA is disposed of with directions that the revisionary authority shall consider the revision petition filed by the widow of the deceased employee, late Akhilesh Prasad, keeping in view the observations made by this Tribunal hereinabove and pass appropriate speaking order, within a period of two months from the date of receipt of copy of this order.

(Jayesh V. Bhairavia) M [J]

(A.K. Upadhyay) M (A)

/cbs/

