

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9470 of 2010

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Sri Umesh Jha, S/O Late Gulab Jha, R/O Vill.- Narayanpur Deadhpura, P.O.- Jandaha, P.S.- Mahnar, District- Vaishali (Bihar), Ex. Head Clerk under the C.P.R.C. N.F. Railway, Katihar, at present residing in Rly Qr. No. 715 (G), O.T. Para, Katihar (Bihar). Petitioner.

Versus

1. The Union of India represented through the General Manager, N.F. Railway, Maligaon, Guwahati, Assam.
 2. The Divisional Mechanical Engineer (Power), N.F. Railway in the office of the Divisional Railway Manager, Katihar.
 3. The Senior Divisional Mechanical Engineer, N.F. Railway in the office of the Divisional Railway Manager, Katihar
 4. The Additional Divisional Railway Manager, N.F. Railway, Katihar.
 5. The Chief Mechanical Engineer, N.F. Railway, Maligaon, Guwahati, Assam.
- Respondents.

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Appearance :

For the Petitioner : Mr. Tej Bahadur Singh, Sr. Adv.
Mr. Ram Kumar Jha, Adv.
Mrs. Shashi Priya Pathak, Adv.

For the Respondents : Mr. Anil Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH
And
HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)
Date: 06-05-2015

Petitioner, who was the Head Clerk in the North Frontier Railway at Katihar in the State of Bihar, has filed this writ petition being aggrieved by the order of removal from service as passed by the Divisional Mechanical Engineer (Power), Katihar dated 23.03.2006 which was not interfered with in appeal or mercy appeal or by the Central Administrative Tribunal, Patna Bench, Patna (hereinafter referred to as the 'Tribunal').

2. The petitioner was charged with being unauthorizedly absent from 14.08.2004 to 09.09.2004 i.e. 27 days

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and that is the solitary charge against him. He was asked to show cause in the disciplinary proceedings so initiated and the disciplinary enquiry was conducted. Before the disciplinary authority, the petitioner submitted that as he was suffering from acute sinus infection, he had informed his colleague and consulted a private specialized doctor for specialized treatment after which he returned and he was allowed to join where-after these proceedings were initiated. The Inquiry Officer submitted his report dated 08.01.2006 merely holding that being Head Clerk, he should have informed his controlling authority directly or in written and should have sought leave. Not having done so, he was guilty of unauthorized leave. Petitioner was then given a copy of the enquiry report for the purposes of imposition of penalty and upon cause being shown, the disciplinary authority i.e. Divisional Mechanical Engineer (Power), Katihar holding that the petitioner had not intimated the authorities about his absence, he was guilty of unauthorized absence for the period aforesaid but while doing so, the disciplinary authority noted that even subsequently he went on unauthorized leave which proved that he was a habitual absentee and, as such, he was punished with removal from service with immediate effect. Petitioner then filed appeal, as statutorily provided, before the Senior Divisional Mechanical Engineer

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(Incharge). The appellate authority, while agreeing with the disciplinary authority, referred to not only past conduct of being absent on various occasions but also his subsequent conduct being absent during pendency of the disciplinary proceedings and, thus, affirmed the order of removal from service. The petitioner then preferred a mercy appeal before the Additional Divisional Railway Manager, Katihar who also affirmed the order taking into account past conduct and his leave account. The petitioner then moved the Tribunal and the Tribunal also did not interfere in the matter.

3. Mr. Tej Bahadur Singh, learned Senior Advocate appearing in support of the writ petition, raised a short issue. His submission would be that if the authorities in disciplinary proceedings intend to take into account past or future conduct of a delinquent, it must either form a part of the charge itself or before imposition of penalty, the same must be disclosed else it would be in violation of procedural fairness and thus violation of principles of natural justice. He would show with reference to the records that the charge was singular of 27 days unauthorized absence so was the report of the Inquiry Officer but without notice, the disciplinary authority took into account his absence during other periods and ordered for his removal from service. The appellate

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authority also based his order mostly on past conduct which was all beyond the charge and the allegations and, therefore, there being violation of procedural fairness the order of punishment is not sustainable. He would further submit that for being absent for about 27 days, removal from service was grossly disproportionate and too harsh punishment and would leave the petitioner with no employment opportunity being over age.

4. On the other hand, learned counsel for the Railways, Mr. Anil Singh, submitted that past conduct was known to the delinquent and was not denied. As such, there was no necessity of noticing the petitioner in this regard. He relied on the case of **Union of India and others Vs. Bishamber Das Dogra** since reported in **(2009) 13 Supreme Court Cases 102**. He would further submit that delinquency having been established, there was nothing wrong in imposing the major punishment which was the discretion of the disciplinary authority and should not be interfered with by this Court.

5. Therefore, the two issues for our consideration would be, whether the disciplinary authority can take into account past conduct or conduct not mentioned in the charge nor brought to the notice of a delinquent officer for the purposes of imposing punishment and whether in view of the charge of unauthorized

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absence for 27 days, the punishment of removal from service is valid and legal.

6. As noted above, the charge against the petitioner was the singular charge of unauthorized absence of about 27 days. He was Head Clerk in the Railways at Katihar. He gave an explanation. The Inquiry Officer simply found the explanation unacceptable and thus found him guilty for unauthorized absence for 27 days. He mentioned nothing else. When the stage for punishment came, the disciplinary authority, without notice to the petitioner, took into account his unauthorized absence even in course of the departmental proceeding and imposed punishment of removal from service. When the matter came before the appellate authority, the appellate authority went further and scrutinized his past service in detail without notice to the petitioner and based thereon justified and upheld the order of removal from service. The similar was the action of the authorities in the mercy appeal. The Tribunal also holding that the authorities held him to be habitual absentee did not interfere.

7. Thus, on facts, it is clear that apart from the specific singular charge of being unauthorisedly absent for 27 days, there was nothing that petitioner was required to meet and he was never noticed that his past or other conduct would be taken

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into account when the question of punishment was to be considered. In our view, this is a clear example of violation of principles of natural justice in a disciplinary proceeding. It is specific requirement that a person who is to be visited with punishment and that too the extreme punishment of removal from service must be informed of all the grounds that are likely to be considered against him either in course of the enquiry or before the disciplinary authority for the purposes of punishment. Non-disclosure of material facts and circumstances and reliance thereon would vitiate the proceedings. This legal proposition is long well established since, inter alia, the judgment of the Constitution Bench of the Apex Court in the case of the **State of Mysore Vs. K. Mancha Gowda** since reported in **AIR 1964 Supreme Court 506**. We may then refer to the judgment of the Apex Court in the case of **Mohd. Yunus Khan Vs. State of Uttar Pradesh and others** since reported in **(2010) 10 Supreme Court Cases 539** wherein on this very specific issue, inter alia, considering the judgment of the Apex Court in the case of **Bishamber Das Dogra (supra)**, the case being relied upon by the respondent Railways, the Court upon detailed considerations held thus in paragraphs-34 & 35 of the judgment, which is quoted hereunder:-

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“34. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show-cause notice, before imposing the punishment.

35. This Court in *Union of India v. Bishamber Das Dogra* considered the earlier judgments of this Court in *State of Assam v. Bimal Kumar Pandit*, *India Marine Service (P) Ltd. v. Workmen*, *State of Mysore v. K. Manche Gawda*, *Colour-Chem Ltd. v. A.L. Alaspurkar*, *DG, RPF v. Sai Babu*, *Bharat Forge Co. Ltd. v. Uttam Manohar Nakate* and *Govt. of A.P. v. Mohd. Taher Ali* and came to the conclusion that it is desirable that the delinquent employee be informed by the disciplinary authority that his past conduct could be taken into consideration while imposing the punishment. However, in case of misconduct of a grave nature, even in

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the absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record of the delinquent for “adding the weight to the decision of imposing the punishment if the fact of the case so required.”

8. The Apex Court then summarized the conclusion in paragraph 37 and, in particular reference can be made to paragraph no. 37-X, XII and XIII, which is quoted hereunder:-

“37. In view of the above, we reach the following inescapable conclusions:

I. to IX -----

X. The appellate authority could not consider the past conduct of the appellant to justify the order of punishment passed by the disciplinary authority without bringing it to the notice of the appellant.

XI. -----

XII. Past conduct of an employee should not generally be taken into account to substantiate the quantum of punishment without bringing it to the notice of the delinquent employee.

XIII. The error of violating the principles of natural justice by the disciplinary authority has been of such a grave nature that under no

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circumstance can the past conduct of the appellant, even if not satisfactory, be taken into consideration.”

9. Now, we may consider the judgment of the Apex Court in the case of **Bishamber Das Dogra (supra)**. The first thing we would like to observe is that that was a case of security guard in the uniformed service of Central Industrial Security Force (CISF). In paragraph-30 of the reports this is what their Lordships have held:-

“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 report of the employee for adding the weight to the decision of imposing the punishment if the facts of the case so require.”

10. As subsequently noted in the case of **Mohd. Yunus Khan (supra)** it is only in case of grave misconduct and as we have noticed especially in cases of uniformed services that as

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an exception past services can be taken into account without specific notice to the delinquent. This is an exception to the general rule that in absence of notice the authorities may not take into account past services for the purposes of disciplinary action. Such past services or other matters if not noticed to the delinquent would be extraneous consideration. This was neither the case of grave misconduct nor the case of uniformed service. Thus, on this finding, we are unable to sustain the order of punishment as passed by the disciplinary authority and upheld by all other authorities.

11. Now, we may consider the fact that the petitioner was the Head Clerk in the Railways and was absent unauthorisedly as charged for a period of 27 days would that in any event justified removal from service. In our view, the punishment of removal from service is grossly disproportionate and too harsh. Considering the fact that petitioner was employed in the year 1990 and removed from service in 2006 after 16 years of service and we are almost 10 years from then and having already held that the punishment cannot be upheld, it would not be proper for us to direct reinstatement with full back wages in the facts and circumstances and considering the judgment of the Apex Court in the case of **Chairman-cum-Managing Director Coal**

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India Limited and another Vs. Mukul Kumar Choudhary and others since reported in **(2009) 15 Supreme Court Cases 620** and what is said therein with regard to proportionality of punishment and considering the fact that this Court had already permitted the petitioner to retain the railway accommodation by order dated 28.06.2010, we direct in the facts and circumstances above, while setting aside the order of punishment and instead of remanding the matter after such a long time for reconsideration of penalty, the reinstatement of petitioner without benefit of any remuneration for the period from the time of order of removal from service by the disciplinary authority up to the time of his reinstatement pursuant to our order but granting him continuity only for the purposes of retiral benefits when the occasion so arises.

12. With the aforesaid directions and observations, this writ petition stands allowed.

(Navaniti Prasad Singh, J.)

I agree.

Jitendra Mohan Sharma, J.

(Jitendra Mohan Sharma, J.)

Trivedi/AFR

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