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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 10825/2015

% ***Judgment dated 24th August, 2016***

UNION OF INDIA AND ORS. Petitioners

Through : Ms.Shipra Shukla, Adv.

versus

RUPWATI Respondent

Through : Mr.S.P. Sethi, Adv.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE I.S. MEHTA

G.S.SISTANI, J (ORAL)

1. Challenge in this writ petition is to the order dated 20.08.2015 passed by Central Administrative Tribunal (in short '*the Tribunal*') in OA No. 3620/2014 filed by the respondent whereby the Tribunal has allowed the OA.
2. The necessary facts as culled out from the impugned order of the Tribunal are that late Sh. Jai Parkash, husband of the respondent, was initially appointed as a 'Carriage Cleaner (Helper)' in the Railways. During the course of his employment, it is alleged that he absented himself from duty without seeking permission and in fact did not bother to inform the Department during the period of his absence. It is further alleged that the husband of the respondent remained absent from duty without permission w.e.f. 2001 till 2005. Further in the year 2005, the husband of the respondent remained absent w.e.f. 14.9.2005

till 21.12.2005. For this alleged misconduct of the husband of the respondent, he was charge sheeted vide Memorandum dated Nil/11/2005. Since the husband of the respondent denied the charges leveled against him, the Disciplinary Authority held an inquiry against him. It is also alleged that during the course of inquiry, the husband of the petitioners also remained absent on most of the hearings. On 02.08.2006, the Inquiry Officer submitted his report thereby holding the charge of remaining unauthorisedly absent stood proved against the husband of the respondent. Pursuant to the inquiry report, the Disciplinary Authority passed the order dated 15.1.2007, thereby inflicting the punishment of removal from service upon the husband of the respondent.

3. Thereafter, the Divisional Personnel Officer, vide his letter dated 15.2.2007, informed all concerned except the husband of the respondent, with regard to the removal of the husband of the respondent from service. In the meanwhile, the husband of the respondent died on 07.05.2009, till which date, his family members were not aware about the order of his removal from service. On 20.01.2014, the son of the respondent filed an RTI application to obtain a copy of inquiry report, order of removal, copy of the appeal filed by his late father, complete inquiry proceedings, copy of charge sheet along with all annexures enclosed with the charge memo, copy of reply submitted by his father to the charge sheet and the defence documents. The Divisional Personnel Officer, vide his letter dated 31.01.2014, informed the son of the respondent that after necessary deductions an amount of Rs.21,18,979/- was due and payable by his late father and directed the son of the respondent to deposit the said amount. In response to the RTI application, it was informed to the son of the

respondent that his father was removed from service on 15.01.2007 and copies of charge memo and inquiry report were supplied to him. It was also informed to the son of the respondent that his father did not make any appeal against the order of Disciplinary Authority. Aggrieved by the fact that the husband of the respondent was removed from service without following the due procedure, the respondent filed OA No.3620/2014 before the Tribunal seeking to quash and set aside the impugned order dated 15.01.2007 and grant of all consequential benefits. A direction was also sought by the respondent that wages of her late husband till his death be also granted to her.

4. The Tribunal vide impugned order dated 20.08.2015 has allowed the OA, set aside the Enquiry Report dated 02.08.2006 and the order of termination dated 15.01.2007. The Tribunal has also directed the petitioners herein to treat Sh. Jai Parkash, husband of the respondent, as having died while in service and give all consequential benefits including the family pension to the respondent. Further, the Tribunal also directed payment of arrears of pay, any other admissible dues payable to the husband of the respondent and family pension to the respondent with interest at the rate of 9% on arrears.
5. Aggrieved by the order of the Tribunal, the petitioners have preferred the present writ petition. Learned counsel for the petitioners submits that while passing the impugned order the Tribunal has erred in observing that no witness was produced to show the period of absence of the husband of the respondent whereas the husband of the respondent had himself admitted his period of absence. Counsel further submits that the Tribunal has failed to consider that the husband of the respondent, during the course of his employment, remained absent

without seeking prior permission and even during the course of inquiry he remained absent. It is also submitted that the Tribunal has failed to take into consideration that the husband of the respondent remained absent in the starting of each year i.e. from the year 2003 till 2006. Counsel also submits that the conduct of the husband of the respondent would show that he was not interested in his job as he remained repeatedly absent without permission.

6. It is also contended by the counsel for the petitioners that the Tribunal has failed to consider that the husband of the respondent had himself admitted that he remained absent and, thus, the onus was on him to prove whether his absence was wilful or not. Counsel further contends that the Tribunal has erred in holding that the husband of the respondent was not given an opportunity to defend himself on account of the fact that the husband of the respondent had himself refused any defence assistance and for that the petitioners cannot be faulted. It is next contended that the husband of the respondent did not raise any objection with regard to appointment of an Enquiry Officer nor had he raised any objection with regard to the manner in which the Inquiry was conducted. It is also contended that the Tribunal has failed to consider that the husband of the respondent also did not challenge either the inquiry report or the order of termination.
7. It is further contended by the counsel for the petitioners that the medical certificate produced by the husband of the respondent was not supported by any document like test reports, medical bills, etc., and, thus, the same was not reliable. It is also contended that the medical certificate did not disclose that the respondent herein was hospitalized and, thus, it cannot be assumed that there was valid and justifiable

reasons for his unauthorized absence. Counsel also submits that the conduct of the husband of the respondent would show that he had lacked complete interest in his job.

8. Learned Counsel for the petitioner has also drawn our attention a letter addressed to Sh. Jai Prakash whereby the Enquiry Report was intimated to him. He has shown a letter whereby the Termination Order was sent and further informed us that the order was also published in Dainik Jagran as well as served on the husband by affixation. He submits that the findings of the Tribunal in this regard are not sustainable as the orders were communicated to the husband of the respondent by all possible means.
9. Learned counsel for the respondent has opposed the present petition and submits that the inquiry was conducted against the husband of the respondent in violation of Rule 9(6) of Railway Servants (Discipline And Appeal) Rules, 1968. Counsel further submits that neither any list of documents was supplied to the husband of the respondent nor any witness was produced to prove the charge against him. Thus, no opportunity to cross-examine the witnesses was given to the respondent. It is further contended that there is no finding by the Inquiry Officer that the absence of the husband of the respondent was wilful.
10. We have heard learned counsel for the parties and considered their rival submissions. The basic facts of the case are not in dispute.
11. We may notice that Sh. Jai Parkash, husband of the respondent, died in the year 2009 leaving behind his wife, who is the respondent herein, and two children. What persuaded the Tribunal to allow the OA was that the inquiry was not conducted as per the relevant Rules.

12. Before the rival submissions of the counsel for the parties can be considered, it would be useful to examine the Memorandum whereby the charge sheet issued to the charged officer. The Memorandum contained 4 annexures; being statement of article of charge, imputation of misconduct and misbehaviour, list of documents and list of witnesses respectively. The same reads as under:

“ARTICLE OF CHARGE

Annexure I Sh. Jai Parkash s/o Sh. Gulab Singh Desgn C/C T.No.1121 remained unauthorisedly absent from duty w.e.f. 14.9.05 till today. By this you have violated Rule 3(A) 1, 11 and 111 of Railway Service Conduct Rules 1966

Sd/-
Vijay Arora
ADME/Cng/NDLS
Office Coaching Depot Office &
Desgn Coaching Depot, New Delhi

Annexure II Sh.Jai Parkash s/o Sh. Gulab Singh Desgn C/C T.No.1121. You without any prior information remained un-aunthorised absent from duty w.e.f. 14.9.05 till today

Thus you failed to maintain absolute integrity and devotion to duty and acted in a manner unbecoming of a Railway Servant by contravening provisions of Rule No.3(A) 1, 11 and 111 of Railway Service Conduct Rules 1966.

Sd/- Vijay Arora
ADME/Cng/NDLS
Office Coaching Depot Office &
Desgn & Office Coaching Depot, New Delhi

Annexure III The record of Sh. Jai Parkash s/o Sh. Gulab Singh is available in the office of Senior Section Engineer New Delhi

Sd/- Vijay Arora

*ADME/Cng/NDLS
Office Coaching Depot Office &
Desgn & Office Coaching Depot, New Delhi*

Annexure IV The record of Sh. Jai Parkash s/o Gulab Singh is available with pay clerk in the office of Sr. Section Engineer, Coaching depot, New Delhi

*Sd/- Vijay Arora
ADME/Cng/NDLS
Office Coaching Depot Office &
Desgn & Office Coaching Depot, New Delhi”
(Emphasis Supplied)*

13. From the foregoing, it is clear that the charge against the respondent was that he unauthorisedly absented himself from duty from 14.09.2005. The objective of reproducing the Annexures I to IV to the Memorandum is to show that in Annexure III it is stated that record of Sh.Jai Parkash is available in the office of Senior Section Engineer, New Delhi, and in Annexure IV it is stated that the record of Sh. Jai Parkash is available with Pay Clerk in the office of Senior Section Engineer, Coaching Depot, New Delhi. This, in our view, is only the tip of the iceberg and gives a bird's eye view of the manner in which the relevant Rule as also the Rules of natural justice were flouted and the casual manner in which the inquiry was conducted.
14. It may be noticed that while passing the impugned order, the Tribunal has considered the question whether the absence of the respondent was a wilful act of neglecting his duties. The Tribunal has considered the report of the Enquiry Officer and held that although the Enquiry Officer noted the illness of the respondent herein but he did not deal with it in his report and simply held that the charge is proved against the husband

of the respondent. The Inquiry Officer has failed to take into consideration whether the absence of the husband of the respondent was wilful or not. The Inquiry Officer in his report had also observed that the husband of the respondent had produced medical certificate showing that his wife was ill, but failed to take it into consideration.

15. We have also gone through the report of the Enquiry Officer, there is not even a slight whisper upon whether the absence was wilful or not. On the contrary, the Enquiry Officer has mentioned that the medical certificate had been produced by the husband of the respondent herein. The Supreme Court in ***Krushnakant B. Parmar v. Union of India***, (2012) 3 SCC 178 has held that it is incumbent upon the disciplinary authority to prove that the absence was wilful, otherwise the same does not amount to misconduct. The relevant paras read as under:

“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.

19. In the present case the inquiry officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold that the absence was wilful; the disciplinary authority as also the appellate authority, failed to appreciate the same and wrongly held the appellant guilty.”

(Emphasis Supplied)

16. This Court in ***R.K. Sharma v. Union of India and Anr, (2013) 196 DLT (CN) 14*** after relying upon the foregoing judgment, this Court had vitiated the disciplinary proceedings in the absence of a finding pertaining to whether the absence was wilful or not. The relevant paras read as under:

*“8. It is apparent that before it could be held that the petitioner is guilty of misconduct and is liable for the punishment of dismissal from service, it was incumbent upon the disciplinary authority to return a clear finding that the absence was willful. If there is no such finding, the absence of the petitioner from work, although it may be unauthorized, would not amount to misconduct. In the present case we find that there is no clear finding that the petitioner was willfully absent from work. It is true that some part of his absence was unauthorized but that by itself would not be sufficient, in view of the Supreme Court's decision in *Krushnakant B. Parmar (supra)*, for returning the finding of misconduct and for foisting the punishment of dismissal from service on the petitioner.*

9. In these circumstances, the impugned order of the Tribunal and all the authorities below cannot be sustained. As a result the writ petition is allowed and the impugned order is set aside. The consequence of this would be that the dismissal order dated 14.07.2000 would also be set aside.

The petitioner would consequently be reinstated, but he would not be entitled to any backwages. The learned counsel for the petitioner has also stated that he is not claiming any backwages.”

(Emphasis Supplied)

17. Further, this Court in ***Union of India & Ors. v. Darshan Lal, W.P. (C) 6782/2014*** dated 25.08.2015 has held that merely because the charged officer was absent from duty cannot inescapably and inevitably lead to the conclusion that he was guilty of misconduct. We may also take note of the following observations of this Court in ***Govt of N.C.T.D., New Delhi Through Commissioner of Police & Others v. Sunil Tanwar, W.P. (C) 6831/2011*** dated 23.07.2012:

*“18. In the present case there is no finding or even a hint of an allegation that the absence of the respondent was wilful. It was further seen that there were compelling circumstances beyond the control of the respondent i.e. illness, hospitalization etc. which prevented the respondent from returning to duty. In such a case, as held by the Supreme Court in *Krushnakant B. Parmar (supra)*, the respondent could not be held guilty of wilful absence or failure of devotion to duty or behaviour unbecoming of a Government servant. Therefore, the Disciplinary Authority had not proved that the absence of the respondent was wilful and in the absence of such finding the absence cannot amount to misconduct.”*

(Emphasis Supplied)

18. At the same time, the judgment of ***Krushnakant B. Parmar (Supra)*** has been distinguished by the Supreme Court in ***Chennai Metropolitan Water Supply & Sewerage Board v. T.T. Murali Babu, (2014) 4 SCC 108*** and held that it is not an absolute proposition that it is obligatory on the part of the disciplinary authority to record a finding on wilfulness especially when the employee fails to give compelling

reasons. The relevant paras read as under:

“23. We have quoted in extenso as we are disposed to think that the Court in Krushnakant B. Parmar case has, while dealing with the charge of failure of devotion to duty or behaviour unbecoming of a government servant, expressed the aforestated view and further the learned Judges have also opined that there may be compelling circumstances which are beyond the control of an employee. That apart, the facts in the said case were different as the appellant on certain occasions was prevented to sign the attendance register and the absence was intermittent. Quite apart from that, it has been stated therein that it is obligatory on the part of the disciplinary authority to come to a conclusion that the absence is willful. On an apposite understanding of the judgment Krushnakant B. Parmar case we are of the opinion that the view expressed in the said case has to be restricted to the facts of the said case regard being had to the rule position, the nature of the charge levelled against the employee and the material that had come on record during the enquiry. It cannot be stated as an absolute proposition in law that whenever there is a long unauthorised absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is wilful even if the employee fails to show the compelling circumstances to remain absent.”

(Emphasis Supplied)

19. In view of the foregoing, it is clear that though it is not incumbent upon the disciplinary authority to record a finding as to whether the absence was wilful or not, but at the same time, if compelling circumstances are shown then the disciplinary authority must examine the same and record a finding. Failure to do so would inevitably vitiate the proceedings.
20. Similarly in the present case, the Enquiry Officer failed to record whether the absence was wilful or not, even after acknowledging that

the husband of the respondent had claimed that the absence was owing to the illness of his wife/ respondent herein. He had further produce medical certificates in support of his claim. The submissions of the learned counsel for the petitioner in respect to the authenticity of the medical certificate cannot be looked into at this belated stage. If any such objections were there, it was on the Enquiry Officer to find the same and record accordingly. Further we notice that the submission is being made for the first time before us and the same was not even raised before the Tribunal. On the contrary, the petitioners had denied that any medical certificate was ever produced before the Tribunal. The relevant portion of an additional affidavit dated 18.05.2015 filed before the Tribunal reads as under:

“2. ...More importantly, during the inquiry proceedings, the husband of the applicant failed to produce any medical certificate/document which indicated that the wife of the employee was suffering from specific disease or illness.”

21. In view of the same, it was obligatory on the part of the disciplinary authority to return a finding as to whether the absence was wilful or not and it has clearly failed to do so. Though the petition warrants to be dismissed on this ground alone, we proceed further to examine one more aspect of the proceedings.
22. It may be noticed that the manner in which the inquiry has been conducted by the Inquiry Officer gives an impression that it was a mere empty formality, which is evident from the fact that neither any list of document was supplied to the husband of the respondent nor was there any witness to prove against him.

23. The Apex Court in the case of *State of U.P. v. Saroj Kumar Sinha*, (2010) 2 SCC 772 has held as under:

*“28. When a department enquiry is conducted against the Government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. In the case of *Shaughnessy v. United States*, 345 US 206 (1953) (Jackson J), a judge of the United States Supreme Court has said "procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.”*

24. The Tribunal has also noticed that the husband of the respondent being a low paid employee was not aware of the prescribed procedure of which the Disciplinary Authority could not have taken the advantage. The Disciplinary Authority has passed the order in a very mechanical manner. In view of the foregoing, the documents on record showing the intimation of the Enquiry Report and Termination Order are of no benefit to the petitioners.
25. Despite a detailed order having been passed by the Tribunal, the petitioners have chosen to file the present writ petition and press the matter further, having scant regard to the fact that the husband of the respondent has since died and all benefits, which were granted by the Tribunal vide impugned order dated 20.8.2015, have been held up.
26. Having regard to the facts of this case, we find no merit in the present

writ petition and the same is dismissed with costs of Rs.15,000/- to be paid by the petitioners to the respondent.

G.S.SISTANI, J

I.S. MEHTA, J

AUGUST 24, 2016

//msr

