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

+ **Date of Decision: 05.07.2017**

% **W.P.(C) 3743/2014**

UNION OF INDIA & ORS

..... Petitioner

Through: Mr. Rajan Sabharwal, Adv.

versus

NASEEM NAWAB

..... Respondent

Through: Ms. Padma Priya, Adv. for DHCLSC

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The Union of India has preferred the present writ petition to assail the order dated 24.03.2014 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal) in O.A. No.1249/2013, whereby the said O.A. preferred by the respondent has been allowed and the tribunal has directed the petitioner to reinstate the respondent in service forthwith. The period of her absence from duty has been directed to be treated as leave of the kinds due, including extraordinary leave. The back wages have been denied to the respondent during the period from the date of her removal from service, to the date of her reinstatement in service.

2. The respondent was working as a Clerk, Stores Branch, Headquarter Office, Baroda House, New Delhi in the railways. She was working in the Receipt Section during the period 2003-04 and 2004-05. She absented from duty unauthorisedly i.e. without obtaining leave for long periods of time and, consequently, on 10.03.2005 inquiry proceedings were initiated against her under Rule 9 of the Railway Service (Discipline & Appeal) Rules, 1968.

3. The Statement of Articles of Charge were as follows:

“Smt. Naseem Nawab, Clerk, Stores Branch, Head Quarter Office, Baroda House, New Delhi while working in Receipt Section during period 2003-04 and 2004-05 was found to have committed serious irregularities in as much as:-

(i) She is a habitual absentee and do not take prior sanction of leave.

(ii) She remained unauthorisedly absent from office since May, 2003 and failed to attend office in spite of repeated reminders.

(iii) She has neglected her duties and shown total disinterest to work for the administration.

By this act of omission and commission Smt. Naseem Nawab, Clerk, Stores Branch acted in a manner unbecoming of a Railway Servant and thus violated Rule 3.1(i), (ii) and (iii) of Railway Service Conduct Rules, 1966”.

4. The statement of imputation of misconduct and misbehaviour, on the basis of which the Articles of Charge were framed, reads as follows:

*“1. Based on poor record of presence of Smt. Naseem Nawab, in office **during January, 2000 to 14th February, 2005**, it was ordered to issue SF-5 to her for neglecting her*

duties as well as for unauthorized absence from duty.

2. *The following record of her attendance shows that she is a habitual absentee with total disregard to the administrative norms. The following statement also shows that she has not bothered to take prior sanction before proceeding on leave.*

<i>Year</i>	<i>Total Days</i>	<i>Sat. Sun/ G.Holidays (Days)</i>	<i>Working Days</i>	<i>Present (Days)</i>	<i>Absent (Days)</i>
<i>2000</i>	<i>366</i>	<i>120</i>	<i>246</i>	<i>159</i>	<i>83</i>
<i>2001</i>	<i>365</i>	<i>121</i>	<i>244</i>	<i>133</i>	<i>121</i>
<i>2002</i>	<i>365</i>	<i>116</i>	<i>249</i>	<i>88</i>	<i>200</i>
<i>Upto April 2003</i>	<i>120</i>	<i>41</i>	<i>79</i>	<i>11</i>	<i>85</i>

Note: from May, 2003 she is absent till today.

3. *Repeated counseling of this employee has not resulted in any improvement in her attitude and availability in office. It is also seen that whenever she applies for leave, her leave application does not bear her address.*

Thus by the above acts of omission and commission, Smt. Naseem Nawab, while working as Clerk in Receipt Section, failed to maintain absolute integrity, exhibited lack of devotion towards her duties and acted in a manner unbecoming of a Railway Servant, thereby contravening Rule 3.1(i), (ii) and (iii) of Railway Service Conduct Rule, 1966". (emphasis supplied)

5. The list of documents relied upon by the Department included the leave applications submitted by the respondent on 21.08.2003 and 20.08.2003, as well as the communication addressed to the respondent on 28.08.2003, 06.11.2003 and 20/24.08.2003. Pertinently, it also included the

attendance record of the respondent for the period January 2000 to 14.02.2005. The charge sheet did not list any witness by whom the Articles of Charge were proposed to be sustained.

6. Repeated attempts were made to serve the respondent with the charge sheet, firstly, by registered post, then by deputing a senior clerk to deliver the same to her at her residential address – which was found locked, and eventually by issuing public notice in leading newspapers.

7. The inquiry officer proceeded with the inquiry ex-parte since the respondent did not participate. After holding several hearings – during which the respondent did not participate, the inquiry officer made his report on 14.05.2007. In the inquiry report, the inquiry officer noted the endeavours made to serve the respondent and to grant her sufficient opportunity to participate in the inquiry. He also discussed the documentary evidence placed before him and concluded, on the basis of the relied upon documents listed in Annexure-3 to the charge sheet, that all the charges levelled against the respondent stood proved.

8. The disciplinary authority upon receipt of the inquiry report sent a communication on 21.05.2007 to the respondent requiring her to make a representation within ten days. It appears that the respondent sent a representation and, in pursuance thereof, a fresh inquiry was held on the same charges.

9. The respondent participated in the inquiry proceedings held on 03.11.2009. However, she stopped participating in the inquiry thereafter. Consequently, a fresh inquiry report was made on 16.12.2011. Pertinently,

all this while the respondent continued to remain absent from service.

10. Finally, the disciplinary authority passed the order of removal from service against the respondent on 05.07.2012 on the ground of her habitual absentism, firstly, from 12.06.1986, secondly from May 2003, and thirdly from 30.07.2010.

11. The respondent then preferred her departmental appeal on the ground that she had sent her leave application on 21.08.2003 for grant of leave from 01.08.2003 to 31.08.2003. She also sent a representation on 28.04.2003, stating that her son was under medical treatment and, therefore, she was unable to present herself in the office. She claimed that her absence was on account of compelling reasons. However, she did not deny the factum of her absence from duty during the period in question, and did not claim that during that period, or any part thereof, her leave had been sanctioned. She claimed that the inquiry had not been conducted in accordance with the principles of natural justice, and that no evidence has been adduced against her.

12. The appellate authority rejected her appeal on 28.12.2002. A perusal of the order passed by the disciplinary authority as well as the appellate authority shows that they are detailed and considered orders. The order of the appellant authority shows that the respondent appeared for personal hearing. During the said personal hearing, she explained her personal circumstances, namely, that one of her two sons were suffering from prolonged anxiety neurosis while the other was working. Her husband had deserted her and that it was not possible for her to attend the office, leaving

her younger son alone. She maintained that her absence was not wilful and requested for sympathetic consideration. Thus, it would appear that the respondent did not dispute the factum of her unauthorised absence. She claimed that her absence was a result of her personal circumstances, while not denying the same unauthorised. The appellate order takes note of the fact that earlier as well, she had been removed for unauthorised absence by an order passed on 27.05.1989 but was subsequently reinstated after reducing the penalty vide order dated 12.10.1992. However, her conduct had not improved and she continued to remain absent on leave without pay on several occasions. The respondent then preferred a revision before the revisionary authority, which too rejected the said revision petition on 07.03.2013 giving reasons for the same. Consequently, the respondent preferred the aforesaid O.A. which, as aforesaid, has been allowed by the tribunal.

13. The tribunal while allowing the O.A. has observed that even if the delinquent employee did not participate in the proceedings, *“the Enquiry Officer cannot blindly say that the charge of unauthorised absence has been proved against such delinquent employee.”* The tribunal placed reliance on the letter dated 18.04.1990 of the railways, bearing No. E(D&A) 90 RG 6-34, which contained the instructions as to how ex-parte inquiry should be held. The extract from this letter relied upon by the tribunal read as follows:

“4. It is now clarified that the provisions of Rule 14(ii) of the RS(D&A) Rules may not be resorted to where it becomes necessary to proceed in an ex-parte manner against charged Railway Servants who are absconding or are on unauthorized absence and the charge sheets are returned undelivered. In

such cases, while conducting the ex-parte proceedings, the entire gamut of the enquiry has to be gone through. The notice to witnesses should be sent, the documentary evidences should be produced and marked, the Presenting Officer if one is appointed should examine the prosecution witnesses and the enquiring authority may put such questions to the witness as it thinks to be fit. The enquiring authority should record the reasons why he is proceeding ex-parte and what steps he had taken to ask the accused official to take part in the enquiry and avail of all the opportunities available under the provisions of Rule 9 of the RS(D&A) Rules. In such a case, the details of what has transpired in his absence, including depositions, should be furnished to the accused officer. During the course of enquiry, the accused is free to put in appearance and participate in the inquiry. If the accused appears in the enquiry when some business has already been transacted, it is not necessary to transact the same business again unless the accused official is able to give justification to the satisfaction of the Inquiry Officer for not participating in the enquiry earlier. The competent disciplinary authority may thereafter proceed to pass final orders after following the prescribed procedures”.

14. The tribunal also placed reliance on ***State of U.P. & Others v. Saroj Kumar Sinha***, 2010 (2) AISLJ 59, wherein the Supreme Court held that even in ex-parte proceedings, the evidence available has to be examined. Reliance was placed on ***Roop Singh Negi v. Punjab National Bank & Ors.***, (2009) 2 SCC 570, wherein the Supreme Court, inter alia, held:

“14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to

be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof....”

15. The submission of Mr. Sabharwal, learned counsel for the petitioner is that the present is a gross case, where the respondent admittedly remained unauthorisedly absent for years together. She did not participate in the first round of inquiry and surfaced only after the inquiry officer made a report against her. At her instance, a fresh inquiry was held and, once again, she allowed the same to be proceeded ex-parte after participating on one day only. She also continued to remain absent from duty, despite the petitioner having initiated disciplinary action against her, and did not join her duties at all.

16. Learned counsel for the petitioner submits that, in these circumstances, when the employee has remained unauthorisedly absent and has neither contested the charges against her, nor participated in the enquiry proceedings, and the service record of the delinquent employee is available inhouse i.e. in the department itself, to require adoption of a formal procedure of the service record of the employee being led in evidence through a witness is an empty formality. Learned counsel submits that the strict rule of evidence-which are applicable to civil and criminal proceedings in courts, do not apply to departmental proceedings. A charge of unauthorised absence from service does not require the leading of any documentary or other evidence from any outside source. The evidence in relation to the same is available in-house, and the same is a matter of record. In these circumstances, the letter dated 18.04.1990 cannot be applied in te

facts of the present case and it would be applicable, depending on the factual context of each case. If the service record of the employee-who was unauthorisedly absent is required to be produced from some other department, it may be necessary to produce a witness, who may tender the documentary evidence. However, where the disciplinary authority has the record available with it, and the same has also been made a part of the charge sheet, there is no necessity of leading any formal evidence through a witness. Learned counsel further submits that since the respondent did not contest the factual position with regard to her unauthorised absence, and, rather, sought to offer an excuse to justify the same, there was no need to lead any formal evidence through a witness. The same would have been an empty formality. Learned counsel further submits that an employee who does not participate in the inquiry proceedings and allows the same to proceed ex parte, cannot be heard to complain of about non-compliance of the principles of natural justice.

17. Learned counsel for the petitioner has placed reliance on a three Judges Bench decision of the Supreme Court in ***State Bank of India & Ors. v. Narendra Kumar Pandey***, (2013) 1 SCC (LS) 459. The Supreme Court in this decision has, inter alia, observed:

“20. We are of the view that the High Court also committed an error in holding that since no witness was examined in support of charges, it was a case of no evidence. In an ex parte inquiry, in our view, if the charges are borne out from documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the Inquiring Authority should not have relied upon the documents which were not made available or

disclosed to him. Of course, even in an ex parte inquiry, some evidence is necessary to establish the charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges". (emphasis supplied)

18. On the other hand, Ms. Padma Priya, learned counsel for the respondent submits that the letter dated 18.04.1990 has been issued by the railways to specifically deal with cases where the delinquent is unauthorisedly absent and does not participate even in the inquiry proceedings. It is the decision of the railways, that documentary evidence should be produced and marked through a prosecution witness. This being the position, the non production of a witness to tender the evidence is fatal to the inquiry proceedings. She further submits that the inquiry officer did not consider her requests for leave which explained her personal condition, namely, that her son was seriously ill due to which she could not join her duties.

19. Having heard learned counsel for the parties, perused the impugned order and the documents placed on record and considered the legal position, we are of the view that the impugned order is patently laconic and cannot be sustained.

20. Firstly, the respondent did not dispute the factum of her absence from duty during the periods in question. She also did not claim that her leave for the said periods had been sanctioned by the respondent. The aforesaid being the position, in our view, there was absolutely no necessity for the petitioner to produce any formal witness to produce the in-house record available with the petitioner in relation to the unauthorised leave availed of by the

respondent. The said record was kept in the normal course of business by the petitioner. It would have been a different matter if the respondent had disputed the allegation of her absence during the periods in question, or claimed that the said absence was authorised or sanctioned. These were not her defences. Only if her defence would have been on those lines, it would have been necessary for the petitioner to lead in evidence the relevant record through a witness, so that the respondent would have had the opportunity, if she so desired, to cross-examine the witness for the purpose of rebutting the charge. However, firstly, the respondent did not deny the factual position with regard to her unauthorised leave, and, secondly, she did not even participate in the inquiry proceedings even after the same were re-initiated at her behest. The respondent allowed the inquiry proceedings on both occasions to proceed ex parte.

21. The purpose of holding a departmental inquiry is to inquire into the alleged misconduct in a fair and reasonable manner which is in compliance with the principles of natural justice. The emphasis cannot, and should not be on mere formal adherence to the rules. The procedural rules for conduct of departmental inquiries are framed and structured to ensure compliance with the principles of natural justice, so that the delinquent employee has adequate opportunity to meet and rebut the charges levelled against him/her and put forward his/ her defence. However, in a case where the delinquent, firstly, does not deny the charge and, secondly, does not participate in the inquiry proceedings, it would be an empty formality to require the inquiry officer/disciplinary authority to strictly go through the complete rigmarole of the prescribed procedure. The delinquent employee would have to establish

what is the prejudice suffered by him/ her due to some procedural aspect not being formally and strictly adhered to. Pertinently, in the present case, it is not the case of the respondent that under the relevant conduct rules, it was essential for the petitioner to lead evidence through a witness. Reliance has been placed on the letter dated 18.04.1990. The said letter, on its plain reading, does not cover within its scope all kinds of situations, such as the present. The decision in **Narender Kumar Pandey** (supra), in our view, applies in the facts of the present case.

22. We may also refer to the decision of the Supreme Court in **Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. and others**(2005) 5 SCC 337. In this case, the appellant - who was working as a cashier-cum-clerk in the respondent bank, did not join duties despite expiry of his leave in June, 1983 at his transferred posting. He was issued a show cause notice wherein he was informed that in the event of his failure to resume duties by the date fixed, he would be deemed to have been discharged from the service of the respondent bank. In response, he claimed that he was not well and, therefore, could not join his duties. He was thereafter issued a memorandum of charges and he again requested for sanction of leave. His services were dispensed with by invoking clause (2) of Bipartite Settlement entered into between the Management of 58 Banks and their workmen. The Supreme Court held that in this background while it was true that principles of natural justice were required to be complied with, but at the same time, a full-fledged departmental inquiry was not required to be initiated. The Supreme Court held:

“22. The principle of natural justice, it is trite, is no unruly

horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. [See Gurjeewan Garewal (Dr.) v. Dr. Sumitra Dash [(2004) 5 SCC 263 : 2004 SCC (L&S) 747] .] The principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case. (See State of Punjab v. Jagir Singh [(2004) 8 SCC 129 : 2004 SCC (L&S) 1109] and Karnataka SRTC v. S.G. Kotturappa [(2005) 3 SCC 409 : (2005) 2 Scale 493] .)”

23. In **Bank of India Vs. Aurba Kumar Saha** (1994) 2 SCC 615, the Supreme Court held that where the delinquent employee had avoided filing of the written explanation of the charges of misconduct levelled against him and had also for no valid reason refused to participate in the disciplinary proceedings and to avail of the opportunities provided to him in the said proceedings of defending himself against the charges, he cannot be permitted to complain later that he had been denied reasonable opportunity of defending himself of the charges levelled against him, and that the disciplinary proceedings conducted against him by the employer had resulted in violation of principles of natural justice of fair hearing. Thus, in our view, the Tribunal gravely erred in concluding that the departmental inquiry against the respondent was vitiated on account of a formal witness not having been produced to tender the evidence during the inquiry proceedings. The reliance placed by the Tribunal on the letter dated 18.04.1990 of the Railways in the facts of this case is completely misplaced.

24. A perusal of the orders passed by the competent authority also shows that the justifications offered by the respondent with regard to her personal

circumstances were also considered and were rejected on account of extremely poor attendance of the respondent, which, did not improve despite the earlier opportunity granted to her by substituting the removal from service vide order dated 27.05.1989 with a lesser punishment vide order dated 14.10.1992. A government servant is paid his/ her salary and given the perks out of the public exchequer. It cannot be doled out like a private estate. The respondent has been more than adequately indulged in the facts of the present case in view of her personal circumstances.

25. In the aforesaid circumstances, the impugned order passed by the Tribunal cannot be sustained. The same is, accordingly, set aside leaving the parties to bear their respective costs.

VIPIN SANGHI, J

REKHA PALLI, J

JULY 05, 2017

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