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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 30.08.2022***Pronounced on: 23.09.2022*****+ W.P.(C) 17173/2004 and C.M. Nos. 18643/2015 & 18644/2015**

UNION OF INDIA

..... Petitioner

Through: Ms. Pratima N. Lakra and
Ms.Vrinda Baheti, Advocates

versus

SH. BHUPINDRA KUMAR

..... Respondent

Through: Mr. Atul T.N., Advocate

CORAM:**HON'BLE MR. JUSTICE GAURANG KANTH****J U D G M E N T****GAURANG KANTH, J.**

1. The present petition has been filed under Article 226 of the Constitution of India for setting aside the award dated 06.05.2004 passed by the Central Government Industrial Tribunal-cum-Labour Court, New Delhi in I.D. No. 35/95 titled as "*Shri Bhupindra Kumar Versus The General Manager*" ("***Impugned Award***"). Vide the Impugned Award, the learned Labour Court quashed the order passed by the Petitioner/Management whereby the Petitioner imposed the punishment of '*removal from service*' on the Respondent/Workman and gave a direction for reinstatement with full back wages and continuity in service.



2. The Respondent herein, joined the services of the Petitioner as a Clerk on 28.04.1987. Later, while working as a Senior Clerk under the Petitioner, he was posted at the Stores Office at Tilak Bridge, New Delhi. While being posted there, the Respondent was sanctioned casual leave for two days i.e., 11.01.1990 & 12.01.1990 (suffixing 13.01.1990 & 14.01.1990 as Saturday and Sunday). The Respondent had to resume duties on 15.01.1990 after the expiry of the sanctioned casual leave.
3. However, the Respondent did not resume duties. Later, on 24.01.1990, a registered letter was sent by the Respondent to the Petitioner requesting for extension of leave on medical grounds. No decision was taken by the Petitioner *qua* the said letter dated 24.01.1990. It is the case of the Petitioner that the Respondent remained unauthorisedly absent from duty for a period of more than one year i.e., from 15.01.1990 to 15.02.1991. He resumed his duties on 18.02.1991.
4. Thereafter, departmental proceedings were initiated against the Respondent for unauthorized absence and chargesheet dated 02.08.1991 was issued to him. An inquiry was conducted after due opportunity having been given to the Respondent to submit his defence and the Disciplinary Authority, after considering the inquiry report, imposed a penalty of 'removal from service' on the Respondent vide Order dated 08.01.1992.
5. Hence, the services of the Respondent were terminated with effect from 09.01.1992. Thereafter, the Respondent filed an appeal dated



24.02.1992 against the said penalty order. The said appeal was dismissed by the Appellate Authority vide order dated 24.06.1992.

6. The Respondent initiated the industrial dispute by filing complaint before the Assistant Labour Commissioner. Upon failure of the conciliation proceedings, the Ministry of Labour, vide their order dated 21.02.1995 made the following reference to the learned Labour Court:

“Whether the action of the management of Northern Railway in removing the Services of Sh. Bhupender Kumar, Sr. Clerk (Store) w.e.f. 2.1.92 is justified? If not, to what relief the concerned workman is entitled?”

7. The Respondent filed the Statement of Claim before the learned Labour Court stating that due to his illness he could not join back on duties, and he informed the Petitioner about his illness. Further, he produced the medical certificate. He was forced to defend his case without the assistance of any defence assistant. It is the case of the Respondent that the Petitioner had not conducted the enquiry in accordance with the rules in this regard and prays for setting aside of the order of the Disciplinary Authority and Appellate Authority.
8. The Petitioner filed their Written Statement stating that the Respondent took two days’ leave and joined back on duty after a year. The Respondent was on unauthorised leave and hence the Petitioner conducted domestic enquiry and the charges levelled against him were proved. Hence, the competent authority inflicted a penalty of ‘removal from service’ in accordance with rules applicable in this regard. It was further the submission of the Petitioner that the



domestic enquiry conducted by the Petitioner was in accordance with law and in compliance with the principles of natural justice.

9. Both the parties adduced their respective evidences to substantiate their cases. The Respondent/Workman examined himself as WW-1. On behalf of the Petitioner/Management, Mr. P. Mirani, Senior Stores Officer, Rail Coach Factory, Kapurthala was examined as MW-1.
10. Based on the evidence adduced by the parties, learned Labour Court held that the Petitioner conducted the domestic enquiry arbitrarily. Further, learned Labour Court held that the action of the Petitioner in removing the Respondent from his services with effect from 09.01.1992 is completely illegal, improper and against the principles of natural justice. In view of the said findings, learned Labour Court quashed the order of the removal of the Respondent from the service of the Petitioner and directed for the reinstatement of the Respondent in service with complete back wages and continuity in service. Learned Labour Court further directed the Petitioner to dispose of the application of the Respondent for extension of leave on the ground of his sickness in accordance with the rules not affecting his reinstatement in the service and other benefits.
11. The Petitioner/Management is challenging the said Impugned Award in the present proceedings.

SUBMISSIONS ON BEHALF OF THE PETITIONER

12. Ms. Pratima N. Lakra, learned counsel on behalf of the Petitioner/Management submitted that the learned Labour Court



erred in law by holding that the Respondent/Workman '*may have presumed*' that his application for leave would have been granted as the Petitioner did not inform him as to whether it was allowed or not. The learned Labour Court failed to appreciate that there can be no presumption that the leave was extended just on the asking of the Respondent. The Respondent was absent from duty for a period of one year. He never intimated the Petitioner about the seriousness of his illness. Learned Counsel further submitted that leave cannot be claimed as a matter of right.

13. Learned counsel for the Petitioner further submitted that it is crucial to note that the Respondent proceeded on casual leave for two days and thereafter, sent a registered letter requesting for indefinite extension of leave on medical grounds and annexed a medical certificate issued by a private medical practitioner. The said letter did not mention the duration of the leave being sought to be extended; and did not even mention a tentative date from which the Respondent proposed to resume duty. The Respondent remained unauthorizedly absent from duty and was practically absconding for a period of more than one year i.e., 15.01.1990 to 15.02.1991. The learned Labour Court failed to appreciate that there was nothing which prevented the Respondent from submitting the medical certificates received by him by different doctors on different dates.
14. Learned counsel for the Petitioner further submitted that it is no more *res integra* that when an employee remains absent from duty after submitting leave application without getting it sanctioned it amounts to misconduct, even if the said period of absence is treated as leave



without pay. She referred to *DTC v. Presiding Officer & Anr.* reported as (2004) 7 SCC 574, wherein the Hon'ble Supreme Court observed that the very purpose of submitting an application for leave is to seek prior permission from an employer so as to enable the employer to make alternative arrangements and to ensure that its work does not suffer on account of the absence of the employee. In *DTC v. Narayan Singh* reported as 2013 SCC OnLine Del 4351, this court was pleased to hold that unauthorized leave amounts to misconduct.

15. Further, in *Mithilesh Singh v. Union of India & Ors.* reported as (2003) 3 SCC 309, the Hon'ble Supreme Court was pleased to hold that a mere application for grant of leave cannot be construed to be a proper intimation for absence. Thus, mere request for leave which has not been accepted will not amount to proper intimation.
16. Through the case of *Union of India v. Parma Nanda* reported as (1989) 2 SCC 177, it was further submitted by learned counsel that the jurisdiction of the learned Labour Court to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The learned Labour Court cannot interfere with the findings of the Inquiry Officer where they are not arbitrary or utterly perverse. The learned Labour Court also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence if some of it is found to be irrelevant or extraneous to the matter.
17. Lastly, learned counsel submitted that the Hon'ble Supreme Court has held that it is not mandatory for the department to appoint a



Presenting Officer. She substantiated her submission through *Union of India & Ors. v. Ram Lakhan Sharma* reported as (2018) 7 SCC 670. As such the Impugned Award is liable to be set aside and the writ petition deserves to be allowed.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

18. Mr. Atul T.N., learned counsel for the Respondent apprised the court about the developments in the present case during the pendency of the petition. He submitted that the Respondent filed an application bearing C.M. No.10377/2005 seeking grant of interim wages under Section 17B of the Industrial Disputes Act, 1947 (hereinafter referred to as “**I.D. Act**”). This court vide order dated 18.05.2006 was pleased to direct the Petitioner to make payment of wages to the Respondent at a rate whichever was higher between the last drawn wages and the minimum wages.
19. Thereafter, the Respondent filed a C.M. No. 18202/2012, seeking entire wages along with the arrears under Section 17B of the I.D. Act as he was not being paid the entitled amount in accordance with the order dated 18.05.2006. This court, while deciding the application, directed the Respondent to re-join the services of the Petitioner at the post of Senior Clerk from 03.02.2014. He emphasized that the Respondent has been working with the Petitioner from 8 years now.
20. Learned counsel submitted that there was no apparent error and perversity in the Impugned Award. The learned Tribunal had passed the order after thorough examination of the material placed on record



and relevant evidence submitted by both the parties without any violation of principles of natural justice.

21. It was further submitted that it was impermissible in Industrial Jurisprudence that the Presenting Officer and the Inquiry Officer could be same. In the present case, the Inquiry Officer had gone to the extent of exhaustively cross-examining the Respondent. It is a well settled law that the Inquiry Officer is empowered to put only clarificatory questions to the Respondent but not cross-examine him.
22. The same principle has also been expressed in Rule 15(g) of the 'Master Circular on Important points to be kept in view while imposing penalty, considering the Appeal, Revision and Revision Petitions in Disciplinary Cases' (hereinafter referred to as "**Master Circular**") which read as:

"15. Points to be kept in view of Inquiry Officer:

(g) Where no Presenting Officer has been appointed, there should be no objections to the Inquiry Officer examining and cross examining the witness as he is appointed to find out the truth in the charges and such examination/cross-examination is aimed at the end only. However, the Inquiry Officer should refrain from searching cross-examination as this might affect as impartial authority."

23. Learned counsel submitted that the inquiry was conducted by the Inquiry Officer in a biased manner and without adhering to the principles of natural justice. The Inquiry Officer concluded the Disciplinary Inquiry in just two sittings i.e. on 03.10.1991 and 21.10.1991 without appreciating the relevant documents and



evidence adduced by the Respondent/Workman. The Petitioner wrongfully and illegally dismissed the Respondent without any cogent reason.

24. Furthermore, the Inquiry Officer while conducting the inquiry did not consider the rules and regulations of the Petitioner wherein it was clearly stated that the medical certificate from the registered private practitioner can be rejected only when the Railway Medical Officer has verified that the same is not reliable. It is also pertinent to note that the jurisdiction of the Railway dispensary is up to 8 kms. Thus, any workman residing beyond such jurisdiction can resort to treatment from a private practitioner.
25. The said principle is provided in Rule 538(4) under Section D of the Indian Railway Rules. It was stated that the Inquiry Officer has violated the said Rule and has acted arbitrarily without considering the relevancy of the certificate submitted by the Respondent along with the leave application. The relevant portion read as:

“538. Sick Certificate

(4)... The medical certificates from the Registered private practitioners produced by the employee in support of their applications for leave may be rejected by the competent authority only after a Railway medical officer has conducted the necessary verifications and on the basis of the advice tendered by him after such verifications. However, where the Railway medical officer could not be deputed for such verifications, the certificate from the registered private medical practitioner may be accepted straightaway.

Note:- (i) Ordinarily, the jurisdiction of a Railway doctor will be taken to cover Railway employees residing



within a radius of 2.5 K.M of railway hospital or health unit to which the doctor is attached, and within a radius of one kilometre of a Railway station of the doctor's line jurisdiction. ..."

26. It was further submitted that in any inquiry the examination of the witness and filing of the documents were first done by the Management. However, in the present case the Respondent was cross-examined at the first instance. In addition to that, he was not given the opportunity to cross-examine the witness of the Petitioner. Learned counsel corroborated his submissions through Rule 15(e) of the Master Circular which reads as:

"15. Points to be kept in view by Inquiry Officer:

(e) During the inquiry, the evidence on behalf of the Disciplinary Authority has to be produced first. It would be incorrect to examine the charged official first, as this would be against the principles of natural justice...."

27. Mr. Atul T.N, learned counsel for the Respondent submitted that it is apparent that the chargesheet and the dismissal order reflects non-application of mind. The learned Labour Court after scrutinizing all the facts and examining the evidence had passed the order directing the Petitioner to reinstate the Respondent. Hence, the Impugned Award should not be interfered with.

LEGAL ANALYSIS

28. Heard arguments on behalf of both the parties and perused the documents placed on record including the Lower Court Record. In the present case, the issue to be decided is the terms of reference, i.e.,
"Whether the action of the management of Northern Railway in



removing the Services of Sh. Bhupender Kumar, Sr. Clerk (Store) w.e.f. 2.1.92 is justified? If not, to what relief the concerned workman is entitled?”

29. Perusal of the record of the case shows that the following facts are admitted by the parties:

- (i) While being posted at the Stores Office at Tilak Bridge, the Respondent took casual leave for two days i.e., 11.01.1990 & 12.01.1990 (sufficing 13.01.1990 & 14.01.1990 as Saturday and Sunday).
- (ii) The Respondent did not join back on duties immediately thereafter. He resumed duties on 18.02.1991, approximately after 13 months.
- (iii) Vide registered letter dated 15.01.1990 (received by the Petitioner's office on 24.01.1990), the Respondent requested the Petitioner for extension of leave on medical grounds.
- (iv) No decision was taken by the Petitioner *qua* the said letter dated 24.01.1990.
- (v) The Respondent joined back on duties on 18.02.1991 and produced medical and fitness certificate covering his entire period of absence from duty from private doctors.
- (vi) The Petitioner served him with a charge sheet dated 02.08.1991 under Railway Servants (Discipline and Appeal) Rules, 1968 alleging that *'he has shown lack of devotion to duty and committed an act of indiscipline and misconduct by remaining absent for the period from 15.01.1991 to*



15.02.1992 unauthorisedly and without permission or sanction of leave’.

(vii) After conducting the inquiry, the inquiry officer held that the charges were proved against the Respondent. The Disciplinary Authority concurred with the view of the Inquiry Officer and a penalty of ‘removal from the service’ was imposed upon him.

(viii) The Appeal filed by the Respondent was also dismissed.

30. There is no dispute to the fact that the Respondent was absent from duty for the period from 15.01.1990 to 15.02.1991 without the permission of the Petitioner. Even though the Respondent requested for extension of leave vide letter dated 15.01.1990 (received by the Petitioner on 24.01.1990), no leave WAS sanctioned to him. Hence, it is evident that he was on unauthorised absence from duty for the period from 15.01.1990 to 15.02.1991.

31. The Hon’ble Supreme Court had an occasion to examine the question whether the unauthorised absence from duty amounts to failure of devotion to duty or behaviour unbecoming of a government servant in ***Krushnakant B. Parmar v. Union of India & Ors.*** reported as ***(2012) 3 SCC 178***, and held as follows:

16. 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 can not be held to be wilful.

18. 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.

32. Now, the question to be examined is whether the Respondent was prevented from joining duty due to valid reasons. It is the case of the Respondent that he was ill during the said period. It is an admitted position that at the time of joining duty, the Respondent produced medical and fitness certificates covering his entire period of absence from duty from private doctors. This position is not disputed by the Petitioner. During his cross examination, the Respondent categorically stated that he was staying in his native place Kosli where he got himself treated from Dr. J.P. Gautam and Dr. J.S. Chabra. He stated that he never came out of his house during his treatment period and he was taken to the hospital in camel cart. He also denied that he was absent from duty intentionally. The Petitioner never disputed the fact that the Respondent was ill during the said period. The Petitioner has also not disputed the veracity of the medical certificates produced by the Respondent. Their only objection was that the Respondent ought to have informed them and taken the treatment from the Railway hospitals. This is not a case of medical reimbursement where the expenses incurred from private



hospital is sought to be recovered from the Petitioner. There is no bar for the Respondent to get himself treated from the private doctors/private hospitals. Since, there is no dispute regarding the illness of the Respondent, this Court is of the considered view that there were valid reasons for the Respondent for his unauthorised absence.

33. The doctrine of proportionality is a well-recognized concept of judicial review in our jurisprudence. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review. A reasonable employer is expected to take into consideration the measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.
34. In the present case, the learned Labour Court has found that the Inquiry Officer did not properly weigh the evidence of the parties before him and based his conclusions on surmises and conjectures. Further, the Disciplinary Authority and Appellate Authority have also not considered the relevant facts while awarding the punishment in question. In view of the same, the learned Labour Court held that the removing of the Respondent from the service of the Petitioner is completely illegal, improper and against the principles of natural justice and hence directed for the reinstatement in service with complete back wages and continuity in service. The learned Labour Court further directed the Petitioner to dispose of the leave



application of the Respondent in accordance with the Rules not effecting his reinstatement and other benefits.

35. There is no dispute to the fact that the Respondent was on unauthorized absence from his duties for approximately 13 months. It is a well-settled principle of law that a mere application for grant of leave cannot be construed to be a proper intimation for absence and the unauthorized leave amounts to misconduct. In the present case, since there is an admitted unauthorised absence, the same amounts to misconduct and hence the Petitioner was entitled to conduct domestic enquiry. However, the Petitioner being the employer is expected to consider the measure, magnitude and gravity of the misconduct. In the present case, the learned Labour Court has rightly held that removing of the Respondent from the service of the Petitioner is completely illegal and improper. However, the learned Labour Court's reasoning bordered on perversity as no liberty is granted to the Petitioner to reconsider the case of the Respondent on proportionality, such unreasoned, undue liberalism and misplaced sympathy would subvert all discipline in administration.
36. In view of the discussion herein above, this Court is of the considered view that the Impugned Award can be modified to the limited extent by giving liberty to the Disciplinary Authority to reconsider the penalty imposed on the Respondent on the principle of proportionality. In the peculiar facts and circumstances of the case, this Court deems it appropriate to direct the Petitioner to consider the mitigating circumstances existing in the present case and consider imposing a 'minor penalty' on the Respondent. As directed by the



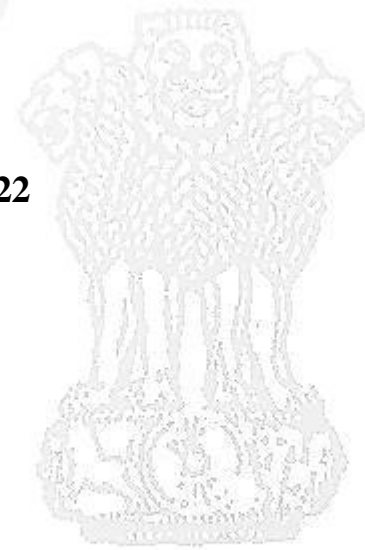
learned Labour Court, the Petitioner is also directed to consider the pending leave application of the Respondent in accordance with law. The Petitioner is also free to treat the period of unauthorized absence, i.e., the period from 15.01.1990 to 15.02.1991 in accordance with law including restricting the pay for the said period.

37. The present Writ Petition is disposed of with the above modification in the impugned Award. All the pending applications are accordingly disposed off. No order as to cost.

GAURANG KANTH, J.

SEPTEMBER 23, 2022

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