

(2011) 05 DEL CK 0418

In the Delhi High Court

Case No : Writ Petition (C) No's. 23792-93 of 2005

Union of India (UOI) and Another

APPELLANT

Vs

Sh. Kalyan

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Railway Servants (Discipline and Appeal) Rules, 1968 — Rule 9

Citation : (2011) 05 DEL CK 0418

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : Rajesh Kumar Singh and Poonam Singh, for the Appellant; H.P. Chakravarthi, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The Petitioners, Union of India, through the General Manager, Northern Central Railway and Anr., have challenged the order dated 1st August, 2005 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 2496 of 2004, titled as "Sh. Kalyan v. Union of India, through General Manager and Anr." allowing the OA of the Respondent and setting aside the order dated 10th October, 2003 imposing the major penalty of withholding of increments with cumulative effect for three years and order dated 19th February, 2004 passed in appeal dismissing the appeal of the Respondent.

2. Brief facts to comprehend the disputes between the parties are that the Respondent was appointed as Gangman and on 30th January, 1981, he was posted as a Gateman at Gate No. 144/C at Railway Station Ajayab Pur.

3. On 24th February, 2001, the Respondent was on duty from 1600 hours to 2400 hours, i.e. from 4.00 pm to 12.00 am. After 12.00 am, another Gateman, namely Sh. Tehsil, was to be on duty from 0000 hours to 0800 hours on 25th February, 2001. The other Gateman, Sh. Tehsil, did not come for duty, consequently, the Respondent could not leave the gate No. 144/C and hence, he

did not get relieved.

4. Therefore, the Respondent had also performed the duty of the other Gateman, Sh. Tehsil, who remained absent without any cogent reason and performed continuous duty from 1600 hours to 2400 hours i.e. from 4.00 pm to 12.00 am on 24th February, 2001, which was his duty, and from 0000 hours to 0800 hours i.e. 12.00 am to 8.00 am on 25th February, 2001, which was the duty of the other Gateman, Sh. Tehsil.

5. Though the Respondent had done his duty and also the duty of another gateman who remained absent without seeking leave, the Respondent received charge sheet dated 9th/17th April, 2001 stipulating that the Respondent kept on performing the duty at Gate No. 144/C from 0000 hours to 0800 hours on 25th February, 2001 in place of Sh. Tehsil without informing anyone and while performing the duty in place of Sh. Tehsil, he slept, due to which Train No. 5707 was detained from 2.51 to 2.53 minutes AJR; Train No. 3111 was detained from 3.17 to 3.20 minutes AJR; Train No. 5205 was detained from 3.30 to 3.45 minutes TOS and Train No. DH/3 was detained for 2 minutes for caution at Dadri and in the circumstances, the Respondent acted negligently and caused losses. Reliance was placed on the written report sent by Sh. Pravesh Vishwakarma, Junior Engineer, Railway, dated 25th February, 2001 and thus, it was concluded that the Respondent had acted in a manner not becoming of a Railway Employee/ Servant.

6. The Respondent contended that it was Sh. Tehsil who was at fault, as he did not attend his duty without seeking any leave or giving any intimation. However, regardless the Respondent did not leave the gate and rather performed the duty of Sh. Tehsil. The Respondent also categorically denied that while performing the duty of Sh. Tehsil from 0000 hours to 0800 hours on 25th February, 2001 he had slept and that the detentions of the four trains for 3 to 2 minutes was not for the want of the hand signals of the Respondent, but was on account of the fact that no talk with the cabin switch man was possible as the telephone was not in working order.

7. The Respondent contended that he had sought a copy of the fact finding enquiry report, but it was not supplied to him. The Respondent also demanded a copy of the caution order of 24th February, 2001 of Ajayabpur Railway Station and the other report pertaining to the detention of the trains by a written request on 5th October, 2001. According to the Respondent, though a copy of the report dated 25th February, 2001 was given to him, however, neither the alleged caution order dated 24th February, 2001, nor the logbook or any other relevant record detailing or reflecting that the trains were detained at Gate No. 144/C at Railway Station Ajayabpur were given to him. The Respondent also made a grievance that the enquiry was not conducted fairly and in accordance with law and as per procedure laid down under Rule 9 of the Railway Servants (Discipline & Appeal) Rules, 1968. Relying on the level crossing rule S.R. 18.06/2, it was asserted that if the Station Master is unable to contact the Gateman on duty then

a caution order is to be issued by the Station Master to the driver of the first Train who has to awaken the Gateman/Gangman to get his signature and then the same is to be intimated to the Station Master on walkie talkie.

8. The Respondent categorically asserted that all the Trains which were alleged to have been detained, in fact, passed through the said gate after seeing the signal given by the Respondent, which is reflective of the fact that he was not sleeping. The allegation regarding the four trains which allegedly got detained from 3.21 hours till 3.45 hours, the Respondent contended that it is highly unlikely that for such short intervals the Respondent would have gone to sleep again and again. During the enquiry, the Respondent also alleged that it was not possible to communicate with the next cabin switchman as the telephone was not working and neither the switchman was called for the verification of this fact, nor any other record was produced which reflected that the train was detained on account of not getting the proper signal from the Respondent since the Respondent was sleeping on the duty.

9. The enquiry officer, however, by his report dated 17th September, 2003 held that the JE/Section Dankaur did not have the information about the Gateman, Sh. Tehsil, not coming for duty on 25th February, 2001 since neither had he obtained leave, nor was his salary deducted and therefore, the Respondent could not be relieved of his duty. It was also noted that no action has been taken against Sh. Tehsil, the other Gateman, for not attending his duty. Since the Trains had got detained when the Respondent was performing the duties of Sh. Tehsil, therefore, he alone could be held responsible for the same, even if it was on account of Respondent's not getting rest, as he had to do duty of Gateman, Sh. Tehsil. The conclusion/findings of the enquiry officer are as under:

1. The charges leveled against Shri Kalyan Gateman in which he did not give information about not coming up Shri Tehsil gateman and kept on doing the duty generally it is not done instead it appears that JE/Section/Dankaur had the information about not coming up Gate Man Shri Tehsil since earlier time because the neither salary of dated 25.02.2001 was deducted and nor leave was marked for that date. Therefore, the arrangement of relieve should have been made on his own therefore, Shri Tehsil Gateman has been held responsible but no action has been taken against him because the detention of the train has been done in the charges ANNEXURE II during the time of duty of Kalyan Gateman therefore, he can be held responsible for the detention even if it is the result of under rest at the time of doing duty of the Gate Man Shri Tehsil.

10. The disciplinary authority concurred with the findings of the enquiry officer and awarded punishment of withholding of increments with cumulative effect for a period of three years by his order dated 10th October, 2003. An appeal filed by the Respondent was also dismissed by order dated 19th February, 2004 holding that the disciplinary authority has followed proper procedure and has imposed punishment with proper application of mind. The Respondent was charged with not informing the concerned supervisor/control about not turning up of his relief

which resulted in the charged officer in neglecting his duties. It was also alleged that the charged officer has been penalized several times in the past for the negligence of his duties, and, thus, the appeal was dismissed.

11. Aggrieved by the order of the disciplinary authority and the appellate authority imposing the punishment of stoppage of increments for three years with cumulative effect, the Respondent filed an original application, being OA No. 2496 of 2004, u/s 19 of the Central Administrative Tribunal Act, 1985. The Respondent categorically relied on S.R.18.06/2 about the procedure of the manned level crossing provided with the telephone line. The relevant extract of S.R.18.06/2 is as under:

S.R. 18.06/2: Manned level crossing Gates provided with telephone, if the S.M on duty is unable to contact the Gateman on duty due to the telephone becoming defective, the Gateman being absent or for any other reason, he shall issue a caution order to the Driver of a train leaving his station or get it issued by the SM of the Block Station at other end before granting line clear. The Caution order would mention about being obstructed. The gate number and kilometer age shall be clearly indicated in the caution order. The station master shall not allow any train to proceed towards the level crossing unless the caution order is issued to the Driver. Driver would only pass such level crossing gate after ensuring that it is closed against road traffic.

12. The Respondent categorically elaborated the procedure in case the Gateman sleeps on duty, in which case if the station master is unable to contact the gangman, a caution order is to be issued to the first train's driver who stops the train at the station and the level crossing and he in turn ensures that the gangman is awakened, after which he is relieved on obtaining his signatures on the caution order. The Respondent referred to the statement of Sh. Pravesh Vishwakarma, the witness who appeared on behalf of the Petitioners, who categorically deposed that the record of the caution order was kept at the Station. He also admitted that he did not find the Respondent sleeping during the working period at Dankaur. He rather deposed that he found the Respondent working efficiently during his tenure.

13. The Respondent in his statement also categorically denied that he had slept while performing the duties of Sh. Tehsil from 0000 hours to 0800 hours on 25th February, 2001. He denied that the trains were detained and deposed that there was no telephone communication and since the bell of the candle of the telephone of one side was not working, therefore, he could not talk to the Cabin man. He also deposed that he had informed about the telephone problem to Sh. Kumar Pal, Key man, and Sh. Pravesh Vishwakarma.

14. The OA was contested by the Petitioners contending, inter-alia, that the competent disciplinary authority has imposed the major punishment of withholding increments with cumulative effect for three years after following the Railway Servant (Discipline & Appeal) Rules, 1968. The Petitioners reiterated that

Sh. Tehsil was to be on duty from 0000 hours to 0800 hours on 25th February, 2001, however, he did not report for duty after the completion of the duty by the Respondent from 4.00 pm to 12.00 am at night on 24th February, 2001. In spite of this, the Respondent did not inform the same to the Station Master/AJR and the Switchman, West Cabin/AJR and continued to perform the duty of Sh. Tehsil. It was further asserted that instead of performing the duty, the Respondent rather slept which led to the detention of three trains from 2.51 up till 3.45 hours at different times. The Petitioners also alleged that the Respondent could have examined the Switchman in order to substantiate his allegation that the telephone was not functional because of which he could not contact the appropriate authorities.

15. The pleas of the Respondent that he was not provided with the copies of the caution notice, the logbook and the relevant record regarding the detention of the trains was neither refuted nor categorically dealt with by the Petitioners in their counter reply filed before the Tribunal.

16. The Tribunal, after considering the pleas and contentions of the parties, held that the copy of the caution notice, which was demanded by the Respondent, was not produced and proved during the enquiry, nor was a copy of the same supplied to the Respondent thereby causing great prejudice to him. The Tribunal also noted that the charges against the Respondent are not proved as there was no evidence inculcating the Respondent. The Tribunal further observed that from the enquiry report, it was apparent that neither the charge of not informing the non-arrival of Sh. Tehsil to the competent authority had been established nor the charge of sleeping while on duty by the Respondent had been substantiated. In the circumstances, the Tribunal had set aside the order of the disciplinary authority dated 10th October, 2003 and the appellate authority dated 19th February, 2004. While setting aside the orders, the Tribunal had held as under:

16. Apart from it, the present is a case of no misconduct and no evidence as well. What has been alleged against applicant is that despite performing his duties when he returned one Shri Tehsil, Gateman had not reported, applicant had performed his duties and had slept, which resulted in detention of trains. From the enquiry report though the charge of not informing the non-arrival of Shri Tehsil to the competent authority has not been established, we do not find that the charge of sleeping on duty performed by applicant of Shri Tehsil has not been established. What has been held is that the detention has caused as a result of unrest, as such the findings are inconclusive, yet the DA punished applicant on the charge either without disagreeing with the findings, which cannot be countenanced, as we do not find any evidence or material on record to establish that applicant had slept on duty. Moreover, if one is not held guilty of the charge he cannot be punished.

18. Misconduct is a general term, which has to be defined as per fact situation. However, there may be negligence in performance of duty or lapse or error of judgment, but would not, per se, constitute misconduct, unless the

consequences directly attributable to negligence would be having resultant damage very high in degree of culpability. Mere error is not indicative of negligence, as held by the Apex Court in Union of India (UOI) and Others Vs. J. Ahmed, . In the above backdrop, the alleged negligence of applicant is not reflected, as, if the caution notice was there, the same would have been supplied to applicant. Moreover, in the departmental record we find that applicant had also apprised that the telephone was not hooked to line and there was no negligence on his part.

17. The Petitioners have challenged the order of the Tribunal reiterating the pleas and contentions raised before the Tribunal and contending that on 25th February, 2001 caution notice was issued by the station master and that there was detention of four trains on account of Respondent's sleeping on duty, which he was performing for Sh. Tehsil as he was absent from duty without any prior intimation. The Petitioners have also contended that the enquiry had been conducted in accordance with law and the enquiry officer had found the Respondent responsible for detention of the trains.

18. This Court has heard the learned Counsel for the parties in detail and has also perused the record produced along with the writ petition. S.R.18.06/2 categorically stipulates that if the S.M on duty is unable to contact the Gateman on duty, due to the telephone becoming defective, the Gateman being absent or for any other reason, he shall issue a caution order to the Driver of a train leaving his station or get it issued by the SM of the Block Station at other end before granting line clear. The caution order under the said rule should also stipulate the cause of obstruction and the station master should not allow any train to proceed towards the level crossing unless the caution order is issued to the driver.

19. This is not disputed that the Respondent had been performing the duty of another Gateman, Sh. Tehsil, as he had absented himself unlawfully and without any reason, and therefore he could not be charged, on account of defect in the telephone as has been alleged by him. The station master ought to have issued the caution order to the first train and the subsequent trains which were alleged to have been detained at the level crossing where the Respondent was posted. The caution order is a very relevant document as it would establish whether the train driver, on approaching the said gate, found the Respondent sleeping and whether or not he was awakened to take his signature. Neither the caution order was produced by the Petitioners, nor the copies of the same were given to the Respondent. No cogent reason has been disclosed for non production of the caution order and the logbook of the train which would have reflected that the trains were detained at the level crossing gate No. 144/C at Railway Station Ajayabpur. In the absence of these relevant documents, there is no cogent reason which could inculcate the Respondent. A perusal of the copy of the enquiry report also reveals that the findings of the enquiry officer are inconclusive and it has been held that the Respondent is responsible without any

evidence against him. Even the Disciplinary Authority has not passed a speaking order substantiating the guilt of the Respondent, and has blindly accepted the findings of the enquiry officer, which are also not based on any cogent evidence. In the circumstances, the findings of the Tribunal that the enquiry report is based on no evidence against the Respondent cannot be faulted by the Petitioners.

20. This is admitted that Sh. Tehsil though had duty hours from 0000 to 0800 hours on 25th February, 2001, did not attend his duties so as to relieve the Respondent. Still, the learned Counsel for the Petitioners is unable to disclose as to what action was taken against him. There is neither any evidence that the Respondent was found sleeping on duty, nor were the copies of the caution orders, or the logbook of the train or any of the train drivers who had allegedly stopped the train to wake up the Respondent been produced in terms of the S.R.18.06/2. This is also not believable in the facts and circumstances that the Respondent would have gone to sleep repeatedly in a short span of just one hour leading to detention of four trains and that all the drivers had to wake him up.

21. In totality of the facts and circumstances, the findings of the enquiry officer are based on no evidence and the charges against the Respondent have not been proved. In the circumstances, the Tribunal was justified in setting aside the major punishment order of stoppage of three increments of the Respondent.

22. Therefore, there are no grounds to interfere with the order of the Tribunal setting aside the order of the punishment passed by the Disciplinary Authority and the order dated 19th February, 2004 dismissing the appeal passed by the appellate authority. In the present circumstances of the case, this Court does not find any illegality or perversity in the order of the Tribunal. The writ petition in facts and circumstances is without any merit and it is therefore, dismissed. The parties are, however, left to bear their own costs.