

**MoinuddIn Vs. Divisional Mechanical Engineer, N.R. Rly. and anr.**

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**Court :** Allahabad

**Decided On :** Feb-26-1959

**Reported in :** AIR1959All795

**Judge :** S.S. Dhawan, J.

**Acts :** [Constitution of India](#) - Articles 226 and 311(2)

**Appeal No. :** Civil Misc. Writ No. 1705 of 1957

**Appellant :** Moinuddin

**Respondent :** Divisional Mechanical Engineer, N.R. Rly. and anr.

**Advocate for Def. :** J. Swarup and ;H. Swarup, Advs.

**Advocate for Pet/Ap. :** S.N. Dwivedi and ;K.K. Bajpai, Advs.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**S.S. Dhawan, J.**

1. This is a petition under Article 226 of the Constitution impugning the legality of an order of removal passed against the petitioner by the authorities of the Northern Railway. The case of the petitioner, as alleged in his affidavit, is this. He was

employed as a Cleaner in the East Indian Railway at Allahabad on 2-2-1948, He claims to have done good work which earned him promotion. In 1955 he was working as II grade Fireman at Allahabad on the Northern Railway, which is the successor' of the old East Indian Railway.

The petitioner states that his wife visited Bombay to see some relations and the petitioner applied for a return third class privilege pass for her, which was issued. According to the petitioner, his wife did actually make the journey to Bombay. On the return trip, it is further alleged, she travelled in the company of a gentleman called Moharamad Nurul Huda and his family, who were also travelling in the same train but were travelling in the Second Class.

In order to remain in the company of these persons the petitioner's wife got her third class pass converted into Second Class on payment of the excess fare. Somewhere between Kara and Igatpur the Assistant Inspector of Tickets checked the compartment in which the petitioner's wife and the Hilda's family were travelling. His suspicions were aroused that the- lady travelling on the pass was Mr. Huda's wife. He, therefore, questioned Huda and took him to the Guard In-charge of the train. He was cross-examined at great length and gave a statement in writing, in which he admitted that the lady travelling with the pass was his wife.

He thereupon paid the railway fare amounting to Rs. 74/4/- for third class journey from Allahabad to Bombay and back. (In other words, he was deprived of the benefit of the tree pass). It is alleged by the petitioner that Mr. Huda made the aforesaid written statement under, to quote his own words, 'great confusion and nervousness' (It was subsequently proved in the enquiry against the petitioner that Mr. Huda holds two M. A. degrees and is the Principal of a local College). When the party reached Allahabad, some applications were sent to the higher authorities, allegedly, on behalf of the petitioner's wife, in which she protested that, while returning from Bombay, she was checked and made to pay Rs. 74/-.

It was further stated in the telegram that, as she apprehended danger from the Ticket Examiner, she paid the aforesaid amount. Evidently, the petitioner's wife took up a position that she was the person who was travelling with Mr. Huda and that the written statement of Mr. Huda admitting that the lady travelled with him

was his wife was wrong and had been given under pressure. It is not surprising that this turn of events landed the petitioner in trouble and he was served with a charge-sheet accusing him of serious misconduct on the ground, that a privilege pass meant for his wife was fraudulently used for the benefit of another man's wife. The petitioner was asked to submit his written explanation within 7 days, which he did. Thereupon an enquiry committee was appointed which investigated into the correctness of the charge against the petitioner. Its report has been filed as Annexure 'A' of the petitioner's affidavit. Its conclusion is in these words,

'In the circumstances mentioned above it is evident that Shri Moinuddin had transferred the pass in question issued in favour of his wife to Shri Noorul Huda and thus allowed Shri Nurul Huda to misuse the same.'

The aforesaid finding was in due course placed before the authority concerned (Divisional Mechanical Engineer I Allahabad), who issued the show cause notice against the petitioner on 10-1-1957. It is in these words:

'I have considered your written defence in reply to the charge-sheet No. 44P/3/55 HC dated 19-4-1955 and the report of the Departmental enquiry set up by me to enquire into the matter and your explanation at the personal interview given to you by me .....

'I have therefore come to the provisional decision that you should be removed from service

'You are hereby directed to show cause in writing not later than the end of seven days from.

the date of the receipt of this notice by you why the proposed penalty should not be imposed upon you.'

'Your reply should be given in a separate sheet, of paper quoting the number and date of this, notice.'

'A copy of the enquiry report in full is sent for your information also.'

Sd. Divisional Mechanical Engineer No. 1'

2. This notice was obviously served in compliance with the provisions of Article 311(2) of the Constitution which enjoins that no Government servant

'shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. ...'

3. The language of the 'show cause' notice quoted above is based on the standard form used by the Railway in such cases. It is noteworthy that the petitioner, was warned that if he did not submit his reply within the specified period, the case would be dealt with on the basis of the information available. The obvious implication of this' warning was that if he did send an explanation it would be duly considered by the Railway before his case was decided.

4. The petitioner admittedly sent a reply to the show cause notice on 13-3-1957. On 6-4-1957 he was informed that he had been removed from service with effect from 9-4-1957. The order which communicated this information to him is annexure 'C' of the petitioner's affidavit and its operative portion is as follows:

'Ref. Show cause notice No. 44 Pass 12/55/HC dated 10-1-57 and your reply dated 13-3-1957.

1. You are hereby informed that in accordance with the order passed by the undersigned the following penalty has been awarded to you.

Removed from service with effect from 9-4-1957.

2. You are required to acknowledge (not readable) the form Sub-joined.

Sd/. Divl. Mechanical

Engineer 1,

Allahabad.'

5. The petitioner's appeal was dismissed by the Divisional Superintendent after which this petition was filed in this Court on 16-7-1957.

6. Learned counsel for the petitioner, Mr. S. N. Dwivedi, who argued this case with his usual brevity, submitted a number of arguments impugning the legality of the proceedings leading upto the removal of the petitioner. It is not necessary for me to decide all of them as I am of the opinion that this petition should be allowed on one ground which was raised by Mr. Dwivedi. He contended that the petitioner was entitled that his explanation to the show cause notice should have been considered by the Railway in accordance with the provisions of Article 311(1) (sic) of the Constitution before inflicting the proposed penalty on him.

Mr. Dwivedi contended that the Railway appears to have given no consideration to the petitioner's explanation. He referred to the various orders of the Railway authorities which have been annexed to the petitioner's affidavit. The show cause notice was issued on 10-1-1957 and is Annexure 'B.' The petitioner's reply, which has not been filed as an annexure, was sent on 13-3-1957 is Annexure 'C.' It refers to the show cause notice and to the petitioner's reply. But there is nothing in this order to show that the authority which made the decision to remove the petitioner considered the petitioner's reply on merits before making up its mind.

7. The petition is opposed by the Railway and a counter-affidavit has been filed. It is, sworn by Dwarka Nath Bhatia, who is described as 'Sub-Head, Divisional Superintendent's Office, Northern Railway.' The first two paragraphs of this affidavit are sworn as true to the personal knowledge of the deponent, and the rest as "based on papers on the official file which I believe to be true.' The verification clause specifies neither the papers nor the file on which the contents of the rest of the affidavit are alleged to be based. The deponent does not even formally swear that he read this file.

All that he states is that he believes the papers and the file to be true, whatever that might mean. Even assuming that the deponent read some papers contained in some file (not identified), the allegations in the counter-affidavit are obviously hearsay. For example in paragraph 12, the deponent Dwarka Nath Bhatia states that the petitioner's explanation to the show cause notice was carefully examined by the competent authority who finally passed orders for removal. I do not see how Shri Dwarka Nath Bhatia was able to get a glimpse into mental processes of the

competent authority which enabled him to swear confidently on oath that that authority must have examined the petitioner's explanation before making his decision.

8. Mr. Hari Swarup, on behalf of Mr. Jag-dish Swarup, learned counsel for the Railway placed before me a file which he claimed to be the record of the petitioner's case and I have perused it from beginning to end. But I do not find any order or paper showing that the petitioner's explanation to the show cause notice was considered on merits by any authority. The petitioner's explanation dated 13-3-1957, is recorded at pages 81 to 84 of the record. The next page No. 85 is the letter of the Loco Foreman dated 14-3-1957, forwarding the petitioner's reply to the A.P.O. (Assistant Personal Officer) Allahabad, Mr. S. Diesh,

The next page No. 86 is the original of Annexure 'C' of the petitioner's affidavit. It is the letter of the Divisional Superintendent's office dated 6-4-1957 informing the petitioner that the penalty of removal from service had been awarded to him. The next document is page No. 87. which is a carbon copy of this communication. The next page No. 88 is a letter from the petitioner to the Divisional Superintendent acknowledging the receipt of the notice which communicated to him the decision to remove him from service.

The next page No. 89 is a letter of the Loco Foreman, Allahabad, forwarding the petitioner's aforesaid receipt to the District Mechanical Engineer I, Allahabad. The next page No. 90 is a letter from the Divisional Superintendent, Allahabad, to the Chief Commercial Superintendent, Central Railway, Bombay informing him that the petitioner had been removed from service. Presumably this was in reply to a complaint made by the Chief Commercial Superintendent of that Railway against the conduct of the petitioner. The next page No. 91 is a letter from the petitioner to the Divisional Superintendent protesting against certain aspects of the removal notice. The next document is the appeal of the petitioner to the Divisional Superintendent and consists of 6 pages Nos. 92 to 97.

9. It is thus clear that the statement made by Dwarka Nath Bhatia that his allegation in paragraph 12 that the competent authority had examined the petitioner's explanation to the show! cause notice was based on a perusal of the

record of the case is not correct, I asked Mr, Hari Swarup to point out to me a single document which would show on the face of it that the petitioner's explanation to the show cause notice had been considered by the competent authority as alleged by Dwarka Nath Bhatia. After, a thorough examination of the record in open Court, he stated that there was nothing in it to show that the petitioner's explanation was considered.

10. Another specimen of the manner in which Dwarka Nath Bhatia has sworn allegations as 'based on a perusal of the record' is contained in paragraph 6 of his counter-affidavit. This paragraph purports to be a reply to the petitioner's allegations in paras. 4 to 7 of his affidavit describing the circumstances in which his wife is alleged to have travelled to Bombay and returned to Allahabad and giving his version of the circumstances under which Shri Huda made his statement confessing that the lady travelled with him on the pass was a member of his own family. In controverting the petitioner's version Shri Dwarka Nath Bhatia has related the incident in detail and in a manner which would do credit to any witness. He alleges that 'Shri Huda was cross-examined by the T. T. I. who suspected the travelling lady being not the bona fide holder of the railway free pass mentioned above, and so on. 'All this is based upon 'papers on the official file' which Dwarka Nath Bhatia believed to be true.

11. I am compelled once again to comment upon the unsatisfactory character of the counter-affidavit filed by a department of the Government. In the case of Avadh Narain Singh v. State of U. P., Writ Petn. No. 1263 of 1957 (All) I rejected the affidavit of the State of Uttar Pradesh and made the following observation:

'It has been pointed out again and again by this Court that the allegations in an affidavit in proceedings under Article 226 must confine to statements based on the personal knowledge of the person swearing it and must not contain expression of opinion or submission of law.

'This warning had been repeated a large number of times but the habit of including irrelevant and even improper allegations continues. J. regret to say that affidavits filed on behalf of the State very often include all the undesirable features frequently condemned by this Court. The counter-affidavit .... in these proceedings

is a fair specimen of what ought not to be.'

12. These comments are equally applicable to the counter-affidavit filed on behalf of the Railway in the present petition. In the circumstances I reject this affidavit as it is not properly sworn and is inadmissible under the law. The allegations of the petitioner in his affidavit shall be deemed to have remained uncontroverted.

13. I have come to the conclusion that Mr. Dwivcdi's contention that the competent authority did not consider the petitioner's explanation to the show cause notice before deciding his case must be upheld. His contention is corroborated by Dwarka Nath Bhatia's admission in paragraph 14 of his 'affidavit' in which he states:

'The competent authority after considering the defence of the applicant and the findings or the joint enquiry committee found good and sufficient reasons to remove the applicant from service for serious misconduct and passed final orders for removal of the applicant. 'A copy of which is attached as Annexure 'C' with the affidavit of the applicant.' '

The words underlined by me (here in ' ') amount to an admission on the part of the Railway on which the petitioner is entitled to rely, that the only order of removal is the one which has been filed as Annexure 'C' of the petitioner's affidavit. I have already stated that this order, on the face of it, contains no indication that the competent authority considered the petitioner's explanation for there is a reference to it at the head of the letter. But there is nothing to show that the competent authority ever applied its mind to that document. We have only Dwarka Nath Bhatia's hearsay statement that the competent authority must have applied its mind and considered the petitioner's explanation on merits. There is no affidavit by the official who was the competent authority nor is there any explanation why he did not swear any affidavit. This Court has, in a number of cases, deprecated the tendency among Government officials to send their clerks or paikars to swear affidavits in regard to facts which are within their own knowledge. This practice is contrary to law and improper, and smells of discourtesy to this Court.

14. In the result, the petitioner has proved that the order of removal was passed without considering his explanation to the show cause notice served on him. That being so, I hold that the petitioner was removed without complying with the mandatory provision of Article 311(1) (sic) of the Constitution. I, therefore, allow the petition and quash the order of removal as well as the subsequent order dismissing his appeal. In the circumstances there shall be no order as to costs.

15. It is not the normal function of this Court, in proceedings under Article 226 to comment upon the findings of the Tribunal on merits, but it appears that one possibility has been overlooked throughout the proceedings which lead to the removal of the petitioner. The petitioner's wife is reported to be on very intimate terms of friendship with the wife of Shri Huda. It is possible that the pass may have been passed on by the petitioner's wife to Shri Huda's wife without the knowledge of the petitioner. By his subsequent (and somewhat silly) defence, the petitioner made it impossible for the enquiry tribunal to investigate this possibility. He may have suffered for the foolish conduct of his wife and made his own position worse by the line of defence adopted by him. In fact, his hands were somewhat tied by the telegram sent from the Allahabad railway station on behalf of his wife.

16. (Order dated 26-2-59): Yesterday, several hours after the judgment had been delivered in the morning in open Court in presence of the learned counsel holding the brief for the Railway but before it had been signed, Mr. Hari Swarup rose in the afternoon to make a mention about the same case. He stated that he had been instructed to state that the Railway authorities had discovered some document purporting to show that the competent authority had applied its mind to the explanation submitted by the petitioner in response to the show cause notice. I pointed out to Mr. Hari Swarup that there was nothing to show when the document now claimed to have been discovered had been inserted in the record, and who had signed it and at what time.

I reminded him that he had examined the record, in Court and. after a long inspection, stated that there was no document to show that the competent authority had considered the petitioner's explanation to the 'show cause' notice, and that after the file had been handed over to the Court, I too did not find any

such document in the place where it is now claimed to be. I also pointed out that in paragraph 14 of the counter-affidavit of the Railway it was stated that the competent authority . . . had passed final 'orders for removal of the applicant a copy of which' is attached as Annexure 'C' with the affidavit of the 'applicant.' The words, underlined (here in ' ') show that, at the time of the swearing of this counter-affidavit, the case of the Railway was that Annexure 'C' (and no other document) was the final order of removal.

Though the Railway were contending that the petitioner's explanation had been considered by the competent authority, there was no reference to this document (which is now claimed to have been signed) nor was it filed as Annexure. On the contrary, according to the Railway, Annexure 'C' of the petitioner's affidavit was the order of removal. However, I permitted Mr, Hari Swarup, in the interests of justice, to make an application supported by an affidavit for the rehearing of the case if so instructed by the Railway. I, however, made it very clear to him that the Railway would have to file an affidavit explaining this document and the petitioner must have a chance of filing a counter affidavit and impugning the genuineness of this document if he so desired.

I told the learned counsel that there would have to be a thorough inquiry, and that the Railway would have to explain a number of things to the satisfaction of the Court as for example, (1) why there was no reference to this document in paragraph 14 of Bhatia's affidavit; (2) why Annexure 'C\*' of the petitioner's affidavit had been stated by the Railway to be the order of removal; (3) why the document now produced was not placed in its proper place in the file immediately prior to page No. 86 which is the original of Annexures 'C' of the petitioner's affidavit; (4) when this new document had been signed and (5) by whom; and so on.

I made it clear to learned counsel that the Railway would have to pay substantial costs for the re-hearing which may require a full probe into the circumstances in which this document was brought into being. Mr. Hari Swarup took time to finalise his instructions. This morning Mr. Hari Swarup states that he has been instructed by the Divisional Superintendent of the Northern Railway Allahabad that that Officer has decided now to make no application nor file any affidavit or document

and that the judgment might be signed by the Court. He stated that the Railway authorities did not want a rehearing of the case.

I reminded counsel that he had asked for a rehearing yesterday, but learned counsel gave no explanation why the Railway had changed its mind after having instructed its counsel to ask for a rehearing. I must conclude that the Railway are not anxious for a probe into the genuineness of the documents which are now alleged to be found in the record and there may be other undisclosed reasons. In the circumstances, the judgment shall stand. Both this order and the judgment are being signed simultaneously and the order shall form part of the judgment.

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