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## **ALLAHABAD HIGH COURT ON BURDEN OF PROVING WILLFUL ABSENCE**

### **A. Introduction**

Allahabad High Court (“**HC**”), in the *S.C. Asthana* case<sup>1</sup>, held that in departmental proceedings, the burden to prove that the unauthorized absence was ‘wilful’ is on the disciplinary authority. In absence of such finding, unauthorized absence does not amount to misconduct.

### **B. Brief Facts**

1. In 1974, petitioner Dr. S.C. Asthana (“**Asthana**”), was appointed medical officer in Provincial Medical and Health Services (“**PMHS**”) on *ad-hoc* basis. His appointment was confirmed in 1975 by the Uttar Pradesh Public Service Commission. He was also registered as an expert under the foreign assignment scheme and was posted in Nigeria.
2. In 1981, No-Objection Certificate (“**NOC**”) was issued to him for passport purpose for his travel to Nigeria. Also, he was sanctioned earned leave for 15 days.
3. In October 1984, while he continued his tenure in Nigeria, the Government of Uttar Pradesh (“**State**”) issued a letter to the Superintendent of Hospital, Unnao, that Asthana should join duty at PMHS within a month.
4. Upon his return, Asthana was served with a charge sheet and show cause notice (“**SCN**”) for allegedly skipping work while on overseas assignment. Also, an adverse entry was made in his service record. Subsequently, all representations and written responses filed by Asthana were rejected.
5. In 1997, Asthana was not promoted unlike his juniors. Also, in 1998, he was found guilty of unauthorized absence by the State.
6. Aggrieved, Asthana filed a writ against the State for not sanctioning his leave and not promoting him.

### **C. Asthana’s Contentions**

1. The State, in an arbitrary and illegal manner, instituted disciplinary proceedings against him on the charge of unlawful absence from duties during his foreign assignment. Also, adverse entry was made.
2. He was entitled to promotion on completing 10 years of service. The State is under legal obligation to consider his promotion and other benefits.
3. The 1998 order refusing leave was arbitrary as he applied for the leave prior to departing for Nigeria.

### **D. State’s Contentions**

1. Asthana was granted NOC for arranging passport for travel to Nigeria with the condition that before moving, he will get necessary relieving instructions. However, without resigning from his original position and without permission, he departed for the assignment and hence, no leave was granted. Therefore, he was directed to re-join his duties under PMHS cadre within a month.
2. SCN was issued to Asthana for unauthorized absence from his duty. Also, it was claimed that he proceeded to Nigeria of his own will, ignoring directions issued to him. Hence, was found guilty of unauthorized absence orders and awarded an adverse entry.

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<sup>1</sup> *Dr. S.C. Asthana vs. State of U.P. Through Principal Secy. Medi. and Hel. And Another*, 2023 LiveLaw (AB) 217 and available [here](#).

3. He failed at fulfilling 10 years of service and hence he was not promoted.

#### **E. HC's Judgment & Reasoning**

The HC:

1. Observed that the State erred in law while making an adverse entry when it had regularized his foreign assignment period.
2. Placed reliance on the 2012 *Krushnakant Parmar* case<sup>2</sup> where the SC observed: *"The question whether 'unauthorized 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...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 unauthorized 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, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government servant."*<sup>3</sup>
3. Observed: *"[T]he disciplinary proceedings held by the State authorities by and large do not adhere to the well settled principles of law in the matter of holding inquiry. This amounts to a dereliction of duty embodied under U.P. Government Servant Rules.<sup>4</sup> The irregularities in the enquiry leave enough scope for indiscipline and the guilty go unpunished in all those cases, where the procedural violations shield their misconduct. The discrepancies also prolong the disciplinary action contrary to the objects of service jurisprudence. The dormant role on the part of the State not to have a trained staff for disciplinary enquiry cannot be viewed lightly in every case. The disciplinary action must culminate into reformation and discipline."*<sup>5</sup>
4. Set aside the order of punishment and award of adverse entry.

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<sup>2</sup> *Krushnakant B. Parmar v. Union of India*, (2012) 3 SCC 178.

<sup>3</sup> Paragraph 22 of the Judgement.

<sup>4</sup> U.P. Government Servant (Discipline and Appeal) Rules, 1999.

<sup>5</sup> Paragraph 31 of the Judgment.