

**CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH, KOLKATA**



No. O.A. 350/00979/2017

Reserved on: 12.12.2019

Date of order: 10.01.2020

Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Smt. Munmun Acharya,
Wife of Sukanta Acharya,
Working as Office Superintendent
At South Eastern Railway,
11, Garden Reach Road,
Kolkata - 700 043,
Permanently residing at
Ruchira Residency,
Tower 4, Floor 7,
Flat No. 1,
Kolkata - 700 078.



.... Applicant

- V E R S U S -

1. Union of India,
Through the General Manager,
South Eastern Railway,
Having office at 11, Garden Reach Road,
Kolkata - 700 043;
2. FA & CAO/T/GRC,
South Eastern Railway,
Having office at 11, Garden Reach Road,
Kolkata - 700 043;
3. Deputy Chief Statistical & Analysis Officer,
South Eastern Railway,
Having office at 11, Garden Reach Road,
Kolkata - 700 043.
4. Assistant Statistical Officer,
South Eastern Railway,
Having office at
11, Garden Reach Road,
Kolkata - 700 043.

.. Respondents

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For the Applicant : Mr. S. Banerjee, Counsel
Mr. S. Nayak, Counsel

For the Respondents : Mr. S. Banerjee, Counsel

O R D E R

Per Dr. Nandita Chatterjee, Administrative Member:

The applicant has approached this Tribunal under Section 19 of the Administrative Tribunals Act, 1985 praying for the following relief:-

"(a) The notice to show cause dated 19th October, 2016 along with Memorandum of charges and statement of imputation dated 8th November, 2016 and order directing inquiry against the applicant dated 24th November, 2016 be set aside or quashed.

(b) The inquiry report prepared on 5th January, 2017 be set aside or quashed;

(c) The notice imposing punishment dated 8th February, 2017 by the disciplinary authority along with the order of punishment dated 5th May, 2017 by the appellate authority be set aside or quashed;

(d) The notice giving effect to the punishment imposed upon the applicant dated 1st June, 2017 be quashed or set aside.

(e) The recoding of the order of punishment dated 5th May, 2017 as well as the order by the disciplinary authority dated 8th February, 2017 may be erased from the service sheet of the applicant;

(f) Such other relief as this Hon'ble Tribunal may deem fit and proper;"

2. Heard both Ld. Counsel, examined pleadings, documents on record as well as judicial pronouncements cited by the Ld. Counsel in support.

3. The facts, in a narrow compass, is that the applicant had joined the respondent authorities as a Senior Clerk on September, 1988 and was subsequently promoted to the post of Office Superintendent, Department of Statistics and Analysis. The applicant had requested the authorities for two days LAP on 13th & 14th October, 2016 but the authorities verbally informed her that such LAP would not be sanctioned due to administrative reasons. Nevertheless, the applicant proceeded on leave for those two days, but thereafter when she resumed her duties, the respondent authorities issued her show cause notice dated 19.10.2016.

The applicant denied the allegations therein vide her reply dated

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25.10.2016 and also responded to the subsequent memorandum of charges dated 8.11.2016 (Annexure A-5 to the O.A.) vide her response dated 18.11.2016. The respondent authorities, thereafter, decided to hold an enquiry under Rule 9 of Railway Servants (Discipline and Appeal) Rules, 1968, and an enquiry officer was appointed vide order dated 24.11.2016. The applicant participated in the enquiry and the enquiry officer submitted his enquiry report dated 23.1.2017 in which it was held that the reply of the applicant to the charges not being satisfactory, the applicant was liable for appropriate punishment. The applicant reacted to the enquiry report on 3.2.2017.



The disciplinary authority, vide his orders dated 8.2.2017 concluded that, upon being established that the applicant had blatantly disobeyed her superiors, the punishment of withholding increments of pay for a period of two years, i.e. 2017 & 2018, with the effect of postponing the future increments of pay be imposed on the applicant. The applicant, thereafter, appealed to the concerned respondent authority on 21.3.2017 (Annexure A-13 to the O.A.) but the appellate authority, vide orders dated 5.5.2017, while agreeing that there was an definite act of insubordination on the part of the applicant, reduced the punishment to "withholding of one increment with non-cumulative effect for one year".

Being aggrieved the applicant has approached the Tribunal in the present O.A. praying for quashing of the entire proceedings.

The applicant would advance the following grounds in support of her claim which are as follows:-

(a) That, an officer, who was responsible for issue of the show cause notice to the applicant vide his memorandum 19.10.2016 (Annexure A-3 to the O.A.) was appointed as an enquiry officer by

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the respondent authority's orders dated 24.11.2016 (Annexure A-7 to the O.A.). The said action being clearly violative of the principles of '*nemo judex in causa sua*' namely, no one is a judge in his own cause was violative of the principles of natural justice giving way to possible bias thereby vitiating the entire proceedings. The applicant would rely on the ratio enunciated in the **State of Uttarakhand & ors. v. Kharak Singh (2008) 8 SCC 236** in support.

(b) That, the applicant was not allowed any access to the deposition made by witnesses nor provided with an opportunity of cross-examination which again fall in the ratio of **Kharak Singh (supra)** and **Meenglas Tea Estate v. Workmen AIR 1963 SC 1719** is prima facie illegal and contrary to well established principles of law.

(c) That, no opportunity of hearing was accorded to the applicant prior to imposition of the punishment which again is illegal in accordance with the ratio held in:

- (i) **Syed Mansoor Hasan Rizvi v. Director, Local Bodies & ors. WP No. 5729 of 2005 (Allahabad HC)**
- (ii) **S. Kapur Singh v. Union of India AIR 1960 SC 493**
- (iii) **State of Gujarat v. Pagi Bhurabhai Rumalbhai AIR 1969 Guj 260**

(d) That, incorrectness of certain factual information, particularly, in stating that the applicant had applied for leave only on 7.10.2016 when in reality she had applied on 26.9.2016 was prejudicial to the applicant. That, relevant documents were not taken into account.

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(e) That, purported oral instructions of the authorities cannot be held to be valid instructions, particularly, in the context of Rule 3(2)(iii) of Railway Service (Conduct) Rules, 1966.

(f) And, that, following the ratio in ***Suman Tuteja v. Hindalco Industries Ltd. 2012 LLR 902***, as the applicant's leave was never refused or rejected by the respondent authorities overtly in writing, the general presumption was that her prayer was accepted by the respondent authorities.

4. The respondents, per contra, would challenge the claim of the applicant with their following arguments:

- (i) That, the Railway authorities has followed all the procedures as required under service jurisprudence.
- (ii) A show-cause notice was issued to the applicant with the scope of replying to the same.
- (iii) The applicant was given an opportunity to respond to her memo of charges.
- (iv) The enquiry officer's report was also handed over to the applicant and she reacted to the same.
- (v) The disciplinary authority considered her defence while issuing his orders.
- (vi) The appellate authority accorded an opportunity of hearing to the applicant and also reduced the punishment imposed by the disciplinary authority.

According to the respondents,

- (i) The applicant was given enough opportunities to defend herself and it could not be held that natural justice was denied to the applicant.

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(ii) Leave cannot be claimed as a matter of right and as no leave was sanctioned prior to the two dates on which the applicant decided to proceed on LAP, it cannot be presumed that prayer for leave was automatically accepted by the respondent authorities; rather the applicant was advised verbally in the presence of other staff of the office not to proceed on leave.

The office leave application form dated 17.10.2016 states that regretted leave applications are by themselves a written instruction. The written instructions noted thereupon were as follows:-

"Regretted. She was instructed to be present in office on 13.10.2016 and 14.10.2016."

And, that such instructions were as per Para 2 (iv) of Railway Board letter No. E (D&CA) 2014 GS-1-3 dated 12.1.2015.

(iii) The applicant's prayer for LAP was not substantiated by any documents and contained an incorrect address of the patient whom she was purportedly visiting on an emergency basis on 13.10.2016 and 14.10.2016.

5.1. We have carefully considered the rival contentions. It is a fact that the applicant had been given opportunities to defend herself while replying to the show-cause notice (Annexure A-4 to the O.A.), to the charge memorandum (Annexure A-6 to the O.A.), to participate in the enquiry (Annexure A-8 to the O.A.), to reply to the supplementary questions (Annexure A-10 to the O.A.), to the findings of the enquiry report (Annexure A-11 to the O.A.) and to appeal (Annexure A-13 to the O.A.). In none of her replies, the applicant had ever raised the issue of likely bias on the part of the enquiry officer. There are no observations in the enquiry report that the applicant had challenged the authority of the

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enquiry officer on the grounds that he was acting as a judge in his own cause.

For the first time, the applicant alleged irregularities in the enquiry proceedings in her appeal. She had alleged that the enquiry proceedings were violative of procedural rules as contained in Railway Servants (Discipline & Appeal) Rules, 1968 in as much as that her signature was not noted on the proceedings, and she was not given a copy of the proceedings for record. In her appeal, the applicant had also alleged bias and unilateral enquiry by the enquiry officer, an issue which she rightfully should have brought to the notice of the disciplinary authority, who was responsible for appointment of the enquiry officer. The applicant also raised the issue in her appeal that a "prosecuting officer" should have been appointed during the enquiry proceedings, but the same was not done in violation of the provisions of Railway Servants (Discipline & Appeal) Rules, 1968. The applicant has also alleged that she was not given an opportunity to take assistance of her defence counsel, she was not given an opportunity to cross-examine the witness, and, that, relevant documents were not examined to conduct a fair enquiry in her case.

5.2. The orders of the appellate authority dated 5.5.2017 (at Annexure A-13 to the O.A.) is next examined and we find that the appellate authority has analysed the factual incongruities in the response of the applicant to conclude that the applicant's insubordination having been confirmed, she deserves to suffer a minor penalty which was reduced to "withholding of one increment with non-cumulative effect for one year" as against the disciplinary authority's penalty of "withholding of increments of pay for a period of two years, i.e. 2017 & 2018, with the effect of postponing the future increments of pay". The appellate authority has

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not however, deliberated upon the issue of procedural violation of Railway Servants (Discipline & Appeal) Rules, 1968, particularly, the biasness of the enquiry officer, non-availability of the scope of cross-examination, reference to relevant documents and availability of a Presenting Officer (referred to as Prosecuting Officer by the applicant) in inquiry proceedings.

5.3. The applicant has challenged the proceedings primarily on the following grounds:-

(a) That the enquiry officer was a judge of his own cause, and, hence the enquiry was biased.

We find, however, that the applicant had, till the stage of her appeal, never raised this issue with the disciplinary authority, in her response to the appointment orders of the enquiry officer, while participating in the enquiry proceedings or while reacting to the enquiry report.

In this we are guided by ***H.V. Nirmala v. Karnataka State Financial Corporation and others (2008) 7 SCC 639*** in which the Hon'ble Apex Court held that where the employee did not raise any objection with regard to the appointment of a legal advisor as the Enquiry Officer at the time of enquiry, and even participated in the proceedings, such employee was debarred from raising objections at a belated stage. She would be debarred, on the principles of waiver, estoppel and acquiescence. In particular, we would refer to the following observations of the Hon'ble Court as follows:-

“The appellant did not raise any objection in regard to the appointment of the enquiry officer. She participated in the enquiry proceedings without any demur whatsoever. A large number of witnesses were examined before the enquiry officer. xxxxx. The High Court has already held that the appellant has failed to establish that any prejudice has been caused to her by reason of appointment of a legal advisor as an enquiry officer and as the appellant has participated in the enquiry proceedings, she could not be permitted to raised the said contentions.”

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The Hon'ble Apex Court in the above mentioned matter while discussing the ratio in *Union of India v. Tulsiram Patel (1985) 3 SCC 398*, in *Moti Ram Deka v. North East Frontier Railway AIR 1964 SC 600* referred to the findings in *Rattan Lal Sharma v. Dr. Hari Ram (Co-Education) Higher Secondary School (1993) 4 SCC 10* and held as follows:-

"12..... But if the plea though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved."

The said decisions, to our mind, are not applicable to the facts of the present case."

In this case also, the applicant, not having agitated on the purported biasness of the enquiry officer till the stage of appeal, cannot raise this plea at this belated stage.

(b) The applicant's grievances on the fact that her rights to natural justice were violated, particularly, in the fact that she was not allowed to cross-examine witnesses, that relevant documents were not consulted and that she was not allowed to note her signature in the proceedings or any copy of the proceedings were not handed over to her should have, however, been discussed and enquired into by the appellate authority as per the provisions of Rule 22 of the Railway Servants (Discipline & Appeal) Rules, 1968 and, particularly, in the context of Board's letter dated 3.3.78, which states as follows:-

"(ii) The Appellate Authority has to consider three main aspects viz.:-

- (i) Whether the procedure was followed correctly and there has been no failure of justice.
- (ii) Whether the Disciplinary Authority's findings are based on the evidence taken on record during the enquiry, and
- (iii) Whether the quantum of penalty imposed is commensurate to the gravity of offence.

After considering the above points the case should, if necessary, be remitted back to the Disciplinary Authority with directions; otherwise the Appellate

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Authority should pass reasoned, speaking orders, confirming enhancing, reducing or setting aside the penalty. The orders of the Appellate Authority should be signed by the authority himself and not on his behalf."

Accordingly, we quash the orders of the appellate authority dated 1.6.2017, and, we remand the matter back to the appellate authority in terms of the ratio in **Chairman, LIC Of India & Ors vs A. Masilamani, JT (2012) 11 SC 533** for reexamination of the appeal afresh.

The concerned appellate authority shall examine each of the issues alleged by the applicant on violation of procedural and natural justice, issue a revised order within a period of 12 weeks from the date of receipt of a copy of this order and convey the same to the applicant in the form of reasoned and speaking order thereafter.

In the event, that the appellate authority decides not to impose any penalty on the applicant, the amount involved in stoppage of her increments should be refunded to the applicant within a further period of 8 weeks thereafter.

6. The O.A. is partly allowed to the extent of the above directions. No costs.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

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