CENTRAL ADMINISTRATIVE TRIBUNAL

(10)

PRINCIPAL BENCH

O.A.No.2160/96

New Delhi this the 2nd day of December, 1998.

HON'BLE SHRI A.V.HARIDASAN, VICE CHAIRMAN

HON'BLE SHRI R.K.AHOOJA,MEMBER(A)

Shri O.P.Singh,
S/o Shri Inderpal Singh,
Ex.Travelling Ticket Examiner,
under D.R.M. Central Railway,
Jhansi. ..Applicant

(By Shri B.S.Mainee)

vs.

1. Union of India:Through
The General Manager,
Central Railway,
Bombay V.T.

2. The Divisional Railway Manager,
Central Railway,
Jhansi. ..Respondents

(By Shri P.S.Mahendru)

HON'BLE SHRI A.V.HARIDASAN, VICE CHAIRMAN:

O R D E R

While the applicant was working as Travelling Ticket Examiner(TTE- for short) at Jhansi he was served with a memorandum of charge dated 4.7.94 alleging that he allowed decoy passenger and his colleagues to travel in Coach S-9 from Agra Cantt. to Nizamuddin without ticket collecting an amount of Rs. 130/- without passing any railway receipt, that a sum of Rs.570/- which was not declared as his private funds was found in his possession and that on vigilance check, 5 passengers were found travelling in the coach manned by him without proper ticket and on his collecting Rs .503/-. As the applicant denied the charge,

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an enquiry was held and the enquiry officer submitted a report finding the applicant guity. Accepting the enquiry report, the disciplinary authority imposed on the applicant a penalty of dismissal from service vide impugned order Annexure A1 dated 24.5.96. Though the applicant submitted an appeal, the same was rejected by the order dated 23.9.96(Annexure A2). Aggrieved by this, the applicant has filed this application seeking to have the impugned orders set aside and to direct the respondents to reinstate the applicant with consequential benefits.

2. The impugned orders are assailed mainly on the following grounds:

(a) That the applicant was not given reasonable opportunity to defend inasmuch as after completion of the evidence in support of the charge, the enquiry officer did not question the applicant on the evidence appearing against him in order to give him an opportunity to explain away the inculpatory evidence as required under sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules.

(b) That no independent witness was examined.

(c) That the disciplinary authority in determining the penalty has taken into account the alleged past record of the applicant's service without notifying him that the record of service would be taken into account and that this has resulted in denial of principles of natural justice and that for that reason the order of penalty is vitiated.

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(d) The appellate authority has not applied his mind to the various grounds raised by the applicant in appeal.

3. We have perused the pleadings in this case and have heard the learned counsel appearing on either side at considerable length.

4. Shri Mainee, the learned counsel of the applicant argued that the non-examination of independent witnesses has vitiated the proceedings and to buttress this point he referred to the provisions of paragraph 704 of Chapter 7 of the Railway Vigilance Manual which provide that whenever a trap is laid, there should be 2 or more independent witnesses. The argument of Shri Mainee that the provisions of paragraph 704 of Chapter 7 of the Railway Servants Vigilance Manual are statutory in character has no force at all because the said provisions are only guidelines to assist the vigilance officials in carrying out their operations properly and are only directory in nature. The non-compliance with the requirements of these instructions do not make the enquiry vitiated. However, we find force in the argument of Sri Mainee that the enquiry is vitiated for non-compliance with the mandatory provision of sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules. Sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules reads as follows:

> "(21) The inquiring authority may, after the Railway servant closes his case, and shall, if the Railway servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Railway servant to explain any circumstances appearing in the

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evidence against him "

It is evident from the enquiry report and from the pleadings in this case that the applicant has not examined himself as a witness in defence. While the enquiry authority may at his discretion question the Railway servant on the evidence appearing against him in a case where the Railway servant has examined himself as a witness on his side, in a case where the Railway servant has not examined himself as a witness , it is mandatory on the part of the enquiry officer to question the railway servant broadly on the evidence adduced in support of the charge and appearing against him with a view to give him an opportunity to explain the inculpatory evidence. It is clearly provided in the rules that in a case where the railway servant has not chosen to examine himself as a witness on his side, the enquiry officer shall question him broadly on the evidence appearing against him because if he chooses to examine himself as a witness, he gets an opportunity to explain the inculpatory evidence in his testimony while such an opportunity would not be there if he has not examined himself as a witness . The question whether the non-compliance of any procedural requirement would vitiate the proceedings would depend on whether any prejudice is caused to the railway servant on account of such non-compliance. In this case as the applicant has lost an opportunity to give his explanation to the inculpatory evidence appearing against him, we are of the considered view that the applicant has been gravely prejudiced in his defence and that for that reason the proceedings of the enquiry after the closure of the

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evidence in support of the charge, is vitiated.

5. A question whether the omission by an enquiry officer to question the charged officer broadly on the evidence appearing against him in the evidence recorded in support of the charge in a case where the charged officer has not got himself examined as a witness on his side would amount to a grave irregularity or not was considered by a Division Bench of the Central Administrative Tribunal, Hyderabad Bench, to which one of us (Hon'ble Shri A.V.Haridasan) was a party. In O.A.No.27/94 (S.B.Ramesh vs. Ministry of Finance & Another). The Bench in that case was considering the non-compliance with the provisions of sub-rule 18 of Rule 14 of the Civil Services (Classification, Control and Appeal) Rules. which is anologous to sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules. It was observed as follows:

> "This shows that the Enquiry Officer has not attempted to question the applicant on the evidence appearing against him in the proceedings dated 18.6.1991. Under Sub-Rule 18 of Rule 14 of the CCS(CCA)Rules, it is incumbent on the Enquiry Authority to question the officer facing the charge, broadly on the evidence appearing against him in a case where the officer does not offer himself for examination as a witness. This mandatory provision of the CCS(CCA) Rules has been lost sight of by the Enquiry Authority. The learned counsel for the respondents argued that as the inquiry itself was held ex-parte as the applicant did not appear in response to notice. It was not possible for the Enquiry Authority to question the applicant. This argument has no force because , on 18.6.1991 when the enquiry was held for recording the evidence in

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support of the charge even if the Enquiry Officer has set the applicant ex -parte and recorded the evidence he should have adjourned the hearing to another date to enable the applicant to participate in the enquiry hereafter/or even if the inquiry authority did not choose to give the applicant an opportunity to cross-examine the witness examined in support of the charge, he should have given an opportunity to the applicant to appear and then proceeded to question him under sub-rule 18 of Rule 14 of CCS(CCA)Rules. The omission to do this is a serious error committed by the inquiring authority."

On the above ground and for other reaasons, the penalty order which was subject matter of the application was set aside by the Tribunal. Though the Union of India took up the matter before the Hon'ble Supreme Court, the Apex Court by its judgment dated 2.2.98 titled Ministry of Finance and another vs. S.B.Ramesh reported in All India Services Law Journal,1998(2) SC 67, approved the finding and decision of the Tribunal, quoting the above observation with approval.

6. The omission on the part of the enquiry officer to question the applicant on the evidence appearing against him recorded in support of the charge, has resulted in deprival of a reasonable opportunity to the applicant to make a proper defence. The impugned order of the disciplinary authority, as upheld by the appellate authority, has therefore to be set aside.

7. There is yet another infirmity in the order of penalty. The disciplinary authority after finding the applicant guilty of the charge for the purpose of deciding

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the quantum of penalty to be imposed on the applicant took into consideration the past conduct of the applicant . In the impugned order(Annexure A1), it is seen that the disciplinary authority considered four orders of penalty imposed on the applicant previously and felt that in view of the bad service record, the applicant was beyond correction and therefore awarded the punishment of dismissal from service. In the Memorandum of Charge, the applicant was not informed of his prior service record. Neither in the Memorandum of Charges nor along with the report of enquiry, when the applicant was called upon to make his representation, the applicant was notified about the prior record of service and that, it would be taken into account in awarding the penalty. If the applicant had been notified, the applicant could have disputed the correctness thereof or explained why it cannot be a ground for giving him a more severe penalty than what would have been awarded if the antecedents were not considered. The reliance placed by the disciplinary authority on the prior record of service in coming to the conclusion that the applicant was beyond correction and therefore, the proper penalty would be one of dismissal from service, without notifying the applicant of an intention to place reliance on them, in our view, has prejudiced the defence of the applicant. In re Awwanna Timmappa Pujari reported in AIR 1960 Mysore 163, the Mysore High Court has relying on the decision of the Madhya Pradesh High Court reported in AIR 1957 M.P.126 held that the reliance placed on the previous service record of the Government servant for deciding the quantum of penalty

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without notifying the employee was unjustified. Though these two decision were prior to the 42nd Amendment of the Constitution dispensing with the requirement of giving a notice informing the proposed penalty, the principle enunciated in the rulings would still be applicable. If the disciplinary authority intended to take into account the previous service record of the applicant also for deciding the quantum of penalty in case the charge against the applicant would be established in the enquiry, the applicant should have been told of his prior conduct either in the Memorandum of Charge or at least when he was called upon to submit his explanation in regard to the acceptability of the enquiry report. This having been not done, we are of the considered view that a matter in which the applicant was not informed and was kept in the dark having been taken into account in deciding the quantum of penalty, the order of penalty is vitiated.

8. In the conspectus of facts and circumstances, we are of the considered view that the impugned order of penalty and the order of the appellate authority, are liable to be struck down.

9. In the result, the application is allowed. The impugned orders are set aside. As the impugned orders have been set aside on the technical ground of non-compliance with sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules and failure of the disciplinary authority to notify the applicant of its intention to take into account the applicant's prior service record, we are of the considered view that it is

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necessary to grant leave to the respondents to pass a fresh order on the disciplinary proceedings in accordance with law after questioning the applicant as required under sub-rule 21 of Rule 9 of the Railway Servants Discipline and Appeal Rules and notifying him of the intention to take into account his prior record of service in determining the quantum of penalty in case he is found guilty. If the respondents decide to do so, they should resume the disciplinary proceedings by calling upon the applicant to appear for being questioned by the enquiry authority within three months from the date of receipt of a copy of this order. To enable the respondents to resume the disciplinary proceedings and to pass a fresh order, we direct that the applicant shall be deemed to have been placed under suspension with effect from the date of dismissal from service and be paid the arrears of subsistence allowance forthwith. If the enquiry is not recommenced as above, then the applicant shall be paid arrears of pay and allowances for the period he was kept out of service, as also the attendant benefits. There is no order as to costs.

R.K.AHOOJA
MEMBER(A)

A.V.HARIDASAN
VICE CHAIRMAN

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