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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH:CUTTACK.

Original Application No.118 of 1989.

Date of decision : January 29 ,1990.

Nilakantha Mishra, son of late
Purna Chandra Mishra, At-5127,
Goutam Nagar, Bhubaneswar-14.

... Applicant.

Versus

1. Union of India, represented through the General Manager, S.E.Railway, Garden Reach, Calcutta.

2. Divisional Railway Manager, S.E.Railway, Khurda Road. Khurda.

3. Divisional Operating Superintendent, S.E.Railway, Khurda Road, Khurda.

... Respondents.

For the applicant ... M/s.Jayant Das, B.S.Tripathy, S.K.Purohit, S.Mallik & B.K.Sahoo, Advocates.

For the respondents ... Mr.Ashok Mohanty, Standing Counsel (Railways)

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C O R A M:

THE HON'BLE MR.N.SENGUPTA, MEMBER (JUDICIAL)

A N D

THE HON'BLE MISS USHA SAVARA, MEMBER (ADMN.)

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1. Whether reporters of local papers may be allowed to see the judgment ? Yes.

2. To be referred to the Reporters or not ? Yes

3. Whether Their Lordships wish to see the fair copy of the judgment ? Yes.

JUDGMENT

N.SENGUPTA,MEMBER(J) In this application under section 19 of the Administrative Tribunals Act,1985, the applicant, who was working as a Guard under the South Eastern Railway, has prayed for quashing the order of punishment of reduction from the cadre of Guard 'A' Special to Goods Guard with effect from 16.2.1989 and for a direction to grant the applicant all the consequential service and monetary benefits on quashing of the order of punishment.

2. Some of the facts which are undisputed and are necessary for decision of this case may be stated at the outset. The applicant was appointed as a Brakesman in 1949 and then was promoted to the cadre of Guard'C' under the South Eastern Railway, Khurda Road Division with effect from April,1951. In due course he was promoted to the cadre of Guard'B' in June,1972 and last promotion of his was to Guard'A' with effect from 1.1.1971 till the date on which the impugned order of punishment of reduction in rank was passed. It is also undisputed that the applicant retired on superannuation on 1.3.1989. A departmental proceeding was initiated against the applicant alleging that on 24.12.1985 he was found in possession of assets which were disproportionate to his known sources of income and the excess was to the tune of about Rs.1,28,200/-.

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So he failed to maintain absolute integrity and his conduct was unbecoming of a Railway employee. The further allegation against the applicant was that between January,1960 and December,1985 he acquired various properties in the names of his wife, son, daughter and himself without obtaining prior permission or intimating the Railway Administration regarding such acquisition. He also dis not inform the Railway Administration of the business that his (applicant's) son was carrying on under the name and style of "M/s.Dhobi Cashew". Thus he contravened sub-rules(2) and (3) of Rule 18 of the Railway Services(Conduct)Rules,1966. The applicant filed his defence statement in the enquiry and also adduced some evidence in support of pleas taken by him i.e. his wife had Streedhan properties and his brother who was in West Germany used to send some money to his(applicant's) wife with which the acquisitions were made and that his son was a major separated one, who had his own independent source of income. The case of the applicant is that during the course of enquiry he asked for the copies of statements of witnesses recorded prior to the commencement of the enquiry and also copies of certain letters referred to in Annexure-III to the statement of imputations but those were not given to the applicant. ~~xxxxx~~ The disciplinary authority followed a queer procedure in appointing an enquiring officer prior to the filing of his written statement in the disciplinary proceeding thereby showing a bias. In the course of enquiry in the departmental proceeding he made an application requesting the enquiring

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officer for a spot inspection and for examining some defence witnesses but his prayer was refused thereby he was prejudiced. The enquiring officer without affording him reasonable opportunity to make out his defence, recorded the findings of guilt. The disciplinary authority did not supply him a copy of the report of the Enquiring Officer prior to imposition of the penalty. Thus, the principles of natural justice were violated. He has also challenge the findings of the enquiring officer being lopsided and being vitiated by wrong placing of onus. That in substance would represent the case of the applicant though the application runs into 25 typed pages.

3. The respondents in their counter have averred that the applicant during the period of his service had been punished several times and they have given almost a list of different punishments which were inflicted on the applicant. But it is unnecessary to refer tothem as in the present case we are concerned with the question of legality or otherwise of the punishment imposed in the departmental proceeding which was initiated last. With regard to the case of the applicant that he was not given the copies of documents, the reply of the respondents is that all the documents which were referred to in the memorandum of charges and the statement of imputations were given to the applicant and he was not entitled to copy of any other document and the question of supply of additional documents was to be decided by the Enquiring

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Officer. The applicant was allowed to inspect and take extracts of all the documents and records which he wanted. Therefore, the allegation that he was not given copies of the relevant documents is without foundation. With regard to the appointment or nomination of the Enquiring Officer along with the memorandum of charges it is the case of the respondents that that course was followed to avoid delay in the disposal of the disciplinary proceeding and from that no inference of any bias or illegality could be drawn.

4. We have heard Mr.Jayant Das, learned counsel for the applicant and Mr.Ashok Mohanty, learned Standing Counsel for the RailwayAdministration. At this stage it may be made clear that it is not open to this Tribunal to reassess the evidence adduced in the departmental proceeding as if it were an appellate forum of the departmental authorities, all that is permissible is to scan the records and materials to see if there was complete absence of materials to support the charges levelled against the applicant or the conclusions that the enquiring officer and the disciplinary authority drew were so perverse that no prudent man could be satisfied with them. For this limited purpose, we may now refer to some portions of the report of the enquiring officer. Copy of the report of the Enquiring Officer hasbeen made Annexure-18 to the application. The report is to be found at pages 97 to 105 of the file. From page 99 of the file it would be found that evidence was adduced before

the enquiring officer in support of the plea of the applicant that his son was carrying on a business in cashewnut and that there were profits totalling to about Rs.43,601/- . From page 103 of the ~~report~~ brief it would be found that one Naresh Kumar Mishra, son of the applicant, examined as Defence witness, stated in the departmental enquiry that he was running an independent business and he was financed by Banks as well as by his uncle, Shri B.N.Mishra who was in West Germany but however he could not furnish all the details. In this regard, the observation of the Enquiring officer wasthat the said Naresh Kumar Mishra being theson of the defendant was obviously an interested person and therefore, he did not find any force in his evidence to controvert the allegations against the defendant(the present applicant) in this case. It is true, as has been stated above, this Tribunal cannot enter into any reassessment of the evidence adduced in the departmental proceeding but however when an apparent mistake is committed in the evaluation of evidence, this Tribunal has of necessity to comment on it. It needs no thought to say that a departmental proceeding is quasi-criminal in nature. Therefore, the principles of the criminal jurisprudence ~~could obviously be awarded~~ should apply in thematter of procedure in such a departmental proceeding. A charged officer is in the position of an accused in a criminal case and it is never permissible to put the onus of proof on an apcused and for that reason it would not be permissible to say that the charged officer did not prove his case.

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We are quite alive to the changes made in the criminal jurisprudence by the enactment of the Prevention of Corruption Act which to some extent has weakened the presumption of innocence of an accused but that would arise only when the prosecution, in a departmental proceeding the prosecuting Department, places materials which prima facie would raise a presumption against the charged officer. To say that the charged officer did not prove his case before saying that the materials placed were prima facie acceptable and could prove the charges levelled against the charged officer, would not be permissible. A similar opinion was expressed a little below on that page. Learned Enquiring officer dismissed the plea of the applicant that his wife had streedhan summarily by saying that possession of streedhan by his (applicant's) wife was never before disclossed to the Railway Administration. This again shows a wrong approach going to the very root of the matter. Without going to reassess the evidence we have simply pointed out the glaring mistakes or wrong approach of the enquiring Officer. We do not feel any necessity to diallate further on this part of the argument of Mr.Das.

5. It has next been contended by Mr.Das, learned counsel for the applicant, that Article II of the charges levelled against the applicant was under misconception and the finding arrived at by the Enquiring Officer and the disciplinary authority were results of misc-onception

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of the provisions of Rule 18 of the Railway Services (Conduct)Rules. Article II of the charges was to the effect that the applicant while working under South Eastern Railway in various capacities during the period from January,1960 till December,1985 acquired properties in the name of his wife, son,daughter and himself without obtaining prior permission or intimating the Railway authorities regarding such acquisitions. It was further mentioned in that Article of charge that the applicant did not intimate to the Railway authorities regarding the business carried on by his son under the name and style of 'M/s. Dhobi Cashew'. So far as the first part of this article of charge is concerned, not much fault could be found with the framing of the charge. But definitely the Railway authorities misconceived the implications of sub-rules(2) and (3) of Rule 18 of the Railway Services (Conduct)Rules,1966. What that Rule provides is that every Railway servant shall submit a return of his assets and liabilities(underlining is made to supply emphasis) in such form as may be prescribed by the Government giving the full particulars regarding the property inherited by him, or owned or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of any other person; shares, debentures etc; and debts and other liabilities incurred by him directly or indirectly. On reading Sub-rule(1), it would be apparent tha

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that a Railway servant would be under an obligation to give a return only if he owns or acquires properties or incurs liabilities, may be in his own name or in the name of anybody else. Sub-rule(2) is a prohibition against acquisition or disposal of property without previous knowledge of the Government and in certain cases the sanction of the Government would be necessary. Relevant part of sub-rule(3) may be quoted because on going through the report of the enquiring officer and the disciplinary authority the ultimate finding , it would be found that the two authorities or officers made much use of this sub-rule.

> " (3) Every railway servant shall report to the prescribed authority every transaction concerning movable property <u>owned or held by him</u> either in his own name or in the name of a member of his family, if the value of such property exceeds Rs.2000.00 in the case of a railway servant holding any Group A or Group B post or a Temporary Gazetted Officer, Rs.1000.00 in the case of a railway servant holding any Group C and Group D post. "

From the portion underlined it would be manifest that such transactions must be in respect of the properties of the Railway servant himself, merely because the word ' family' occurs in that sub-rule it cannot cast a duty on the railway servant to obtain the permission of the prescribed authority for any acquisition or disposition made by a member of his family. It has been urged by learned Standing Counsel for the Railway Administration that if no obligation would be there for a railway servant to give information about the acquisitions in the names of the members of the family, that would

encourage defeating the provisions of the Rules and entry into Benami transactions. A rule is to be enforced and read as it stands, it is not permissible to traverse beyond the Rules. If really a railway servant acquires property in the name of any of his family members it would be open to the Department to prove so and then apply the provisions of sub-rule(3) but not before that. Infact, in the instant case, the enquiring officer and the disciplinary authority with respect to certain items attempted to get it proved that some acquisitions in the name of the wife of the applicant were really not by his wife but by the applicant himself. We have already shown that the enquiring officer and the disciplinary authority put the onus of proof wrongly on the applicant.

6. Some other contentions have ofcourse been raised but we do not feel it necessary to notice them here, for what we are going to state below.

Mr.Das, learned counsel for the applicant, has contended that the order of the disciplinary authority was vitiated and is unsustainable for the reason that no copy of the report of the enquiring officer was furnished to the applicant before the disciplinary authority imposed the penalty. In this regard he has sought reliance on a decision of the Hon'ble Supreme Court reported in AIR 1967 SC 1269(State of Orissa v. Dr(Miss) Binapani Dei and others) and a Full Bench decision of this Tribunal, in the case of Premnath K.Sharma v. Union of India and others.

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Learned Standing Counsel for the Railway Administration has contended that the case of Binapani Dei was prior to the amendment of Article 311 of the Constitution of India and at that time a second show cause notice was necessary. In that context, the observations of the Hon'ble Supreme Court were made and the applicant can derive no assistance from that. It is unnecessary to set out all the facts of that reported case. But it may be stated that Their Lordships of the Supreme Court made reference to Article 311 as it then stood, and the requirement to give a reasonable opportunity of showing cause against an action proposed to be taken in regard to the applicant. But the observations in paragraph 12 were not based on the provisions of Article 311 of the Constitution of India, Their Lordships of the Supreme Court made an enunciation of the principles of natural justice. The observations ~~x~~ were that the report of the enquiring officer was never disclosed to the respondent (the writ applicant in the High Court) and she was asked to show cause why a particular date should not be accepted as her date of birth. That is not the portion on which learned counsel for the applicant really relies, Mr. Das referred to that portion of paragraph 12 where it has been stated that even if the order is administrative in character, but if such order involves civil consequences, principles of natural justice should be followed. Only to this extent this ~~rule~~ ruling has relevance. The Full Bench

in Premnath K.Sharma's case referred to a number of decisions of the Supreme Court and also to some other decisions of this Tribunal. In that case, the Full Bench held that it shall not be necessary to give an opportunity tomake a representation against the penalty proposed but it does not and cannot, nor is it intended to take away the right of reasonable opportunity of being heard in respect of the charges itself whichis guaranteed by clause(2) of Article 311. In paragraph 29, the Full Bench elaborated what is meant by hearing and in so doing it held that a copy of the enquiry report must be given before imposition of penalty so that the charged officer may represent on it. Apart from the fact that the decision of the Full Bench is binding on us, we would add a little bit to the reasonings given by the Full Bench. When the enquiry is conducted by an officer other than the disciplinary authority himself, the disciplinary authority does not have the opportunity to personally hear the charged officer or the witnesses examined. The disciplinary authority has the liberty either to accept the findings of the enquiring officer or reject them and it would require really no thought to say that such rejection or acceptance cannot be made without a hearing. From Annexure-11 it would be found that along with the order of punishment a copy of the report of the enquiring officer was supplied to the applicant. Therefore, the norms of natural justice were violated.

7. Whether or not the applicant could succeed to show that the report of the enquiring officer was not correct need not be considered to judge whether there was violation

of the principles of natural justice. In this regard a decision of the Orissa High Court reported in 1988(1)OLR 602 (Sewa Papers Ltd. v. Assistant Collector, Central Excise & Customs,Sambalpur Division and another) may be referred to. In that case, a Division Bench of the High Court of Orissa noticing the case of S.L.Kapoor reported in AIR 1981 SC 136 and quoting therefrom, observed that the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed and the non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. In this view of the matter the applicant is bound to succeed.

8. Without lengthening the judgment any further, we would simply observe that from Annexure-2 series it would be found that before any written statement of defence was filed an enquiring officer was appointed. The Rules prescribe that after the written statement of defence is filed, the disciplinary authority shall decide whether an euqniry would be necessary or not . Therefore, prior to the filing of the written statement of defence, it is not permissible to appoint an enquiring officer as that would amount to putting the cart before the horse. There are also other infirmities in the procedure adopted by the enquiring officer in that some records which were seized by the Central Bureau of Investigation were not made available

to the applicant during the enquiry though he requested for production of those documents. For all these reasons we would hold that the order of punishment is vitiated and accordingly the punishment order is quashed. Since the applicant had not had the opportunity to make representation before the Disciplinary authority, for want of a copy of the enquiry report, the proper course would be to direct the Disciplinary authority to give an opportunity to the applicant to make his representation before him(Disciplinary authority) whereafter the said authority should dispose of the matter within a period of three months.

9. This application is accordingly disposed of leaving the parties to bear their own costs.

Member(Administrative)

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Member(Judicial)