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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A.No.345 of 2008
Cuttack, this the 19th day of April, 2011

Shri Suryanarayan Mishra Applicant
Versus
Union of India & Ors. Respondents

[For instruction]

1. Whether it be referred to reporters or not? Yes.
2. Whether it be circulated to Principal Bench, Central Administrative Tribunal or not? Yes.


(A.K. PATNAIK)
Member(Judl)


(C. R. MOHAPATRA)
Member (Admn.)

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CUTTACK BENCH: CUTTACK

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Cuttack, this the 19th day of April, 2011

CORAM:

THE HON'BLE MR. C.R.MOHAPATRA, MEMBER (A)
AND
THE HON'BLE MR.A.K.PATNAIK, MEMBER (J)

Shri Suryanarayan Mishra, Aged about 50 years, Son of Late Narendranath Mishra of Village Eradanga, PO:Nalibar, Dist. Jagatsinghpur, working as Traveling Ticket Examiner under the Senior Divisional Commercial Manager, East Cost Railway, Khurda Road.

...Applicant

By Legal practitioner: M/s. A.Das,D.K.Mohanty,Counsel
-VERSUS-

1. Union of India represented through its General Manager, East Coast Railway, Chandrasekharpur, Rail Vihar, Bhubaneswar, PIN-751 023.
2. The Chief Commercial Manager, East Coast Railway, Chandrasekharpur, Rail Vihar, Bhubaneswar, PIN 751 023.
3. The Chief Personnel Officer, East Coast Railway, Rail Vihar, Bhubaneswar, PIN 751 023.
4. The Divisional Railway Manager, East Coast Railway, Khurda Road, Po. Jatni, Dist. Khurda, PIN-752 050.
5. The Additional Divisional Railway Manager, East Coast Railway, Khurda Road, PO-Jatni, Dist. Khurda, PIN-752 050.
6. The Senior Divisional Personnel Officer, East Coast Railway, Khurda Road, PO-Jatni, Dist.Khurda, PIN-752 050.
7. The Senior Divisional Commercial Manager East Coast Railway, Khurda, PO-Jatni, Dist. Khurda, PIN 752 050.

.... Respondents

By legal practitioner: Mr.D.K.Behera, Counsel.

O R D E R

Per-MR.C.R.MOHAPATRA, MEMBER (ADMN.):

The Applicant, in this Original Application, filed

U/s.19 of the Administrative Tribunals Act, 1985, seeks to quash



the charge sheet dated 30.6.2006[Annexure-A/1], inquiry report dated 26.7.2006[Annexure-A/3], the order of punishment dated 25.8.2006[Annexure-A/5], the order of Appellate Authority dated 15.11.2006 [Annexure-A/7] and the order of Revisionary Authority dated 02/03.04.2004 [Annexure-A/9] and to direct the Respondents to reinstate him in service forthwith with grant of all consequential service and financial benefits retrospectively.

2. According to the Applicant, the charge sheet under Annexure-A/1, report of the IO in Annexure-A/3, order of punishment in Annexure-A/5, the order of Appellate Authority in Annexure-A/7 so also the order of Revisionary Authority in Annexure-A/9 are not sustainable being illegal, arbitrary, based on no evidence, against all canons of justice and fair play and without complying with the principles of natural justice as contemplated in Article 14 of the Constitution of India.

2-b. In support of the prayer to quash the charge sheet, it is the contention of the Applicant that sufficient time was not allowed to him to submit his reply to the Charge sheet. On 14.07.2006, he received Memorandum of charge dated 10.07.2006 wherein it was stated that preliminary as well as regular hearing will be taken up on 12.07.2006. Without considering points raised by him in his representations dated 03.07.2006, 05.07.2006, the D.A

conducted the enquiry by putting leading question without appointing PO as provided in the Rules and conducted the enquiry in a novel manner even before receipt of the reply of the Applicant. The Applicant was denied a proper and reasonable opportunity of defending himself by reason of the charge being altogether vague and indefinite and the statement of allegations was without containing the material facts and particulars based on which charges were framed. In this context by relying on the decision of the Hon'ble Apex Court in the cases of **Surat Chandra v State of West Bengal** AIR 1971 SC 752; **State of UP v Mohammed Sheriff**, AIR 1982 SC 937 and **Sawai Singh v State of Rajasthan**, AIR 1986 SC 995 the applicant seeks to quash the charge sheet.

2-c. The DA proceeded in the enquiry in an arbitrary manner and closed the enquiry, without adhering to the norms provided in the Rules, and without paying any attention to the requests of the Applicant to testify the genuineness or otherwise of the CD received by the DA. Hence there was violation of the principles of natural justice. The DA acted as the judge of his own action. This is because the DA received the CD, conducted the enquiry by putting leading question to the Applicant in absence of any IO and PO, prepared the report, considered the defence

statement against the report of the IO and passed the order of punishment of removal from service. Though Railway servants (Discipline and Appeal) Rules, 1968- Rule 9(9)(c) envisages for appointment of PO, the Applicant has been imposed with the major penalty of removal from service, like death sentence, without following the procedures laid down in the Railway Servant (Discipline and Appeal) Rules, 1968. Therefore, the relevant provisions of the Rules 9. (7), 9.(9)(a)(i), 9.(9)(b) and note (2)(i) to Rule 9(13)(b) of the RS (D&A) Rules, 1968 were violated.

2-d. Further contention of the Applicant is that in paragraph 1.2 of the report of the IO, it was held by the DA cum IO cum PO that "the documents enlisted in the charge memorandum dated 30.6.2006 were taken on record from exhibit P/1 to P/6." The DA proved the charge based on "RUD 1 (Exhibit P/1)" in the charge sheet. The applicant had specifically doubted such documents and requested in his reply dated 14.7.06 not to rely on the same without testing. The Applicant had also specifically doubted the authenticity and genuineness of the RUD No. 1 (Exhibit P /1) during the inquiry while answering to Q. No. 2 to the DA cum IO cum PO. But the Disciplinary Authority cum IO cum PO, moved hastily without taking any decision on his request. The "RUD 1 (Exhibit P/1)" was not proved by the person

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who prepared it or by any other person from the Railway. The Applicant had no means to show that the picture/episode recorded was not correct. The list of witnesses which formed part of the charge sheet did not contain the name of videographer who prepared/recorded the incident. The persons whose faces find place in the tainted video clippings, the video grapher or the RPF personnel were the Key witnesses but none of them was cited as witness; the Department cited two persons who had nothing to do for proving/disproving the incident. It is, therefore, the contention of the applicants that by no stretch of imagination it can be said that the video clippings are based on true and real facts. But the DA cum IO cum PO, without considering these aspects of the matter submitted its report holding the charge proved and accordingly, imposed the punishment of removal from Service which suffers from the vice of principles of natural justice and arbitrariness. Therefore, by relying on the decisions in the cases of **Ministry of Finance v. S.B. Ramesh** [J.T. 1998 (I) SC 319, M.D. **Sukumaran v. Union of India and others**, (1988) 8 ATC 424] "para-7", **V.D.Joseph v. Union of India and another** (1990)14 ATC 99, **P.S.Gopal Pillai vrs. UOI and others**, AISLJ 1993 (I) CAT 171 and **Ranvir Singh Yadav v. Union of India and others**, 9/2002 Swamysnews 37 (Allahabad) date of judgment 1.2.2002 (OA No.

830 of 1995)] it was stated that no document can be admitted in evidence unless the author is examined nor recording made behind the back of a person can be made use of against any person in a proceeding unless the person who is said to have made that statement is made available for cross examination. The charge was proved/the applicant held guilty by the DA cum IO cum PO biased and on the external dictation. The DA while assuming the role of IO prepared the report in a perfunctory and defective manner without proving the veracity and genuineness of the CD, RUD 1. Hence, the notice of punishment of removal from service is liable to be struck down.

2-f. Next contention of the Applicant is that no step was taken to testify the CD, prepared on imagined and dramatized manner, despite emphasis to send the CD for laboratory testing. The appearance of RPF personnel was crystal clear in the CD but for the reasons best known to the DA, none of them was cited or put to the witness box thereby giving an opportunity to the applicant to cross examine. The DA had shown over enthusiasm to hold the applicant guilty in the charge which can be inferred from the manner of conducting the enquiry without any IO and PO. This action of the DA de hors the Railway Board's letter No. E (D&A)/2000/RG 6-60 dated 09.05.2001. The Disciplinary

Authority cum IO cum PO closed his eyes to the Railway Board's instruction/circular No. E(D&A) 2001 RG 6-3 dated 20.10.2002, No. E (D&A) 75 RG 6-32 dated 23.08.1975 and No. E (D&A) 78 RG 6-3 dated 20.22.01.1979 with ulterior motive. The DA cum IO cum PO reached the conclusion of guilty on conjecture and surmises without granting the applicant adequate opportunity to prove his innocence. The statement of P/3 and P/5 that the applicant did not perform duty on 12.09.2005 in 7045 Exp. has been overlooked by the DA cum IO cum PO, intentionally and deliberately. It was not the case of the prosecution that the occurrence was on 12.05.2006 and 15.05.2006; whereas the DA cum IO cum PO observed in page 9 of the report that "since the charged official has not issued any EFT to the passengers of 7045 on 12.5.2006 and 15.5.2006 (East Coast Express) against railway dues.". Therefore, this was a case foisted against the applicant and ultimately charge was held proved and punishment imposed on the applicant. The DA cum IO cum PO took into consideration the report of the investigation conducted by Shri H.K.Panda, PW 2 behind the back of the applicant and reached certain conclusion on the basis of such report, without verifying availability of the said report to the Applicant along with charge sheet nor at any time during enquiry to enable him to know the report and to cross examine Shri Panda

on the points finding place in his report. Therefore, according to the applicant, he was seriously prejudiced in not knowing what are the materials taken and utilized as against him. His contention is that along with him, some RPF personnel were roped into the alleged incident. But against such highhanded action of the Railways, the RPF personnel immediately moved before the Hon'ble High Court of Orissa and by virtue of the interim order of stay dated 19.07.2006 they are continuing in service. Therefore, the Respondents ought not to have proceeded hastily so as to impose the punishment on the Applicant. During the departmental inquiry against some of the RPF personnel, one Shri Braja Bhusan Chhotray, Video grapher has stated that some GRP Inspectors of Cuttack had requisitioned his services for Video shooting in connection with collection of illegal money by GRP, RPF, TTE, Guard etc. from prawn traders. Shri Chhotray is a very vital witness. In substance it was stated that although the Applicant insisted in his statement of defence to produce the CD for testing its authenticity in appropriate laboratories, nothing was communicated to him. The Railway Board issued Letter No. E (D & A)75 RG 6-32 dated 23.08.1975, letter No. E (D & A) 78 RG 6-3 dated 20/22.1.1979 and Rule 9(9)(C) of the RS (D&A) Rules, 1968 dealing with the manner of appointment of IO and PO which

were violated. The inquiry was closed without citing or examining the Key witnesses in spite of request of the Applicant. The documents were taken into consideration without supplying copies thereof or without testifying the author who prepared the document or produced it. The Disciplinary Authority was an instrumentality/ Director of the entire episode and thereby conducted the enquiry in hottest haste and thrown out the Applicant from service by adopting a novel procedure. For the reasons best known, the Disciplinary Authority cum IO cum PO did not examine the Applicant before conclusion of the disciplinary proceedings as required under law- **Ministry of Finance and others v. S.B.Ramesh**, 1998 SCC (L&S) 865]. It is mandatory that the charges must be accompanied by statement of allegations. If the inquiry officer conducts regular examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with the answers, or cross examine the defence witnesses or puts suggestive questions to establish the prosecution case, the inquiry officer acts as prosecutor thereby vitiating the inquiry which has exactly happened in this case. In the instant case, the Disciplinary Authority acted as IO and PO and put the leading questions to the prosecution witnesses. A person cannot act as a

prosecutor and judge simultaneously. Therefore, the entire proceedings are vitiated [Ref: **Union of India and ors. vs. Mohd. Naseem Siddique, 2005(1) ATJ, Page 147**. Though the CD was produced by the Disciplinary Authority, he has not been examined during enquiry. Since erasures and insertions could easily be done in the recordings, such evidence (CD) should have been received with caution after satisfying beyond reasonable doubt that the record had not been tampered with. But no such finding was given by any of the authorities that they are satisfied beyond reasonable doubt about the video recording based on which the Applicant was punished.

2-g. He has preferred appeal. It was obligatory on the part of the Appellate Authority to pass a reasoned order after taking into consideration all the points raised by him in his appeal and after granting the applicant personal hearing. But the Appellate Authority rejected the appeal without discussing the points raised by the applicant in his appeal and without affording opportunity of personal hearing. Hence the order of the Appellate Authority is not sustainable Learned Counsel appearing for the Applicant has relied on the decisions of the Hon'ble Apex Court in the case of **Ram Chander vrs. Union of India and others- AIR 1986 SC 1173** and has prayed to quash the order of the Appellate Authority.

2-h. The Revisional Authority did not take into consideration all the above in proper perspective and to save the skin of the DA and Appellate Authority modified the order of punishment by imposing the punishment of compulsory retirement which according to the Applicant, is also not sustainable in the touch stone of judicial scrutiny.

3. Respondents filed their counter in which it has been averred that the applicant, Head TTE (TTE 'A'), Cuttack was issued with a major penalty charge sheet vide Memorandum No. SDCM/Con/Vig-11/06 dated 30.06.2006 by the Senior Divisional Commercial Manager, Khurda Road. After considering the reply submitted by the Applicant denying the charge, vide Memorandum No. SDCM/Con/Vig.11/06 dated 10.7.2007 (Annexure-RII), the Senior Divisional Commercial Manager, Khurda Road Division, the Disciplinary Authority decided to conduct inquiry into the allegations mentioned in the Memorandum of charge sheet. Accordingly, the Disciplinary Authority conducted the proceedings of inquiry in accordance with the extant rules and procedures and submitted its report on 25.7.2006. Copy of the report of the inquiry was given to the Applicant; in reply thereto the applicant submitted his written statement of defence dated 07.08.2006. Having considered the

reply of the applicant, the Disciplinary Authority imposed the penalty of removal from service vide notice No. SDCM/Con/Vig-II/06 dated 25.8.2006 (Annexure-R/III). The Appellate Authority considered the appeal preferred by the Applicant but rejected the same for the reasons recorded in the letter dated 15.11.2006 and communicated to the Applicant. The Revisional Authority in exercise of the powers under Rule 25 of the Railway Servants Discipline and Appeal Rules, 1968, considered the Revision Petition but did not find any reason to interfere in the order of the Disciplinary Authority upheld by the Appellate Authority. But considering the financial distress of the family of the applicant reduced the punishment of removal from service to that of compulsory retirement and payment of compensation pension and gratuity admissible to him as per extant rules.

4. Applicant has filed rejoinder in which it has been stated that there is no record or the record based on which the charge was proved is thoroughly unreliable or a reasonable man with little commonsense cannot come to such finding. The finding is based on conjecture and surmises. The Disciplinary Authority prior to receipt of the reply of Applicant 'decided' to conduct the enquiry by himself. This is not in accordance with rules or law on the subject. Merely stating that the proceeding of enquiry was

conducted by the Respondents in accordance with extant rules and procedures is not enough to conclude sufficient compliance of the Rules. Hence by way of reiterating some of the stand taken in the OA, Applicant prays grant of the relief claimed in this OA.

5. After closure of the arguments, by way of opportunity, on the request of Mr. Behera, Learned Counsel appearing for the Respondents, he was granted time to file written note of submission. Accordingly Mr. Behera filed note of submission more or less reiterating his stand taken in the counter but there is no record produced to show that copy of the written note has been served on the other side.

6. Learned Counsel appearing for the Applicant, by referring to the Rules and judge made laws relied on by him, has reiterated the points raised in the pleadings. On the other hand besides the points raised in the counter, the Respondents' counsel has submitted that there was no necessity to examine the author of the CD because the applicant has admitted the clippings of the CD as genuine and real and during inquiry he has not made any demand for sending the material to laboratory for testing its genuineness. He has admitted the photograph which appeared in the CD. So the CD was genuine and therefore, there was no need to examine the passengers whose photograph is shown in the CD

Screen. The genuineness of the CD having not been challenged it was presumed that the characters in the clippings are genuine.

Based on the same, the DA imposed the punishment which was upheld by the Appellate Authority. But the Revisional Authority though agreed with the report, order of the DA and AA, on humanitarian ground in exercise of the powers, reduced the punishment which warrants no interference by this Tribunal.

7. We have considered the rival submission of the parties and perused the materials placed on record.

8. At the out set, we may record that it is settled law that the Departmental proceeding is quasi-judicial in nature. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider whether relevant piece of evidence has been taken into consideration and irrelevant facts excluded there from, while proving misconduct against an employee. Inference of facts must be based on evidence which meet the requirements of legal principles. The Tribunal is thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meets the requirements of burden of proof, namely

preponderance of probability. If on such evidence, the test of doctrine of proportionality has not been satisfied, the Tribunal is within its domain to interfere. Doctrine of unreasonableness is giving path to the doctrine of proportionality. Also it is well settled law that the Tribunal is empowered to consider the question as to whether the evidence led by the Department was sufficient to arrive at a conclusion of guilt or otherwise of the delinquent officer. Keeping in mind the aforesaid dicta, now we are to examine whether on the face of the pleadings and material, the conclusion reached by the Respondents is justified; if not what relief the applicant would be entitled to. In this connection, it is relevant to quote the charge framed against the applicant. It reads as under:

"Article-1: That the said Shri S.N.Mishra, Hd. TTE/CTC working under CTI/KUR has been found collecting illegal gratification from passengers in a coach of 7045, East Coast Express on 12.09.2005 and 15.09.2005.

He has thus failed to maintain devotion to duty and indulged a serious misconduct in violation of Rule 3 (ii) & (iii) of RS (Conduct) Rules, 1966 which lays down that every Railway Servant shall at all times maintain devotion to duty and do nothing which is unbecoming of a Railway Servant, and thus, he has rendered himself liable for disciplinary action being taken against him.

9. The Applicant submitted his reply on 14th July, 2006
stating as under:

"Re: Written statement of defence under Rule 9(9) off RS (D&A) Rules 1968.

Ref: (1) Sr. DCM/KUR's letter No. SDCM/CON/Vig-II/06 dated 30.6.2006 enclosing Major Penalty Charge Sheet No. SDCM/CON/Vig-II/06 dt.30.6.06.

(2) Sr. DCM/KUR's letter No. Even/1853 dated 10.7.06.
(3) Sr. DCM/KUR's letter No. Even dated 12.7.06.
(4) Sr. DCM/KUR's Memorandum No. Even dated 12.7.06.

Most respectfully I beg to bring the following for your kind consideration and necessary action as deemed fit please.

1. That the charge, as recorded in the above mentioned Memorandum relates to date 12.9. & 15.9.2005.
2. That I have been kept under suspension on and from 22.6.2006.
3. That the CTI/KUR conveyed me the Commercial Control Order No. 99 of 28.6.06 requiring me to attend the office of SR.DCM/KUR on 29.6.06. Accordingly I attended the office on 29.6.06 and I was detained till 9 p.m. of 30.6.06 when I was handed over the above Memorandum.
4. That the above forwarding letter of Sr.DCM/KUR contains inter-alia the following:

"You are advised to submit your written statement of defence to the charges within minimum possible time, not later than (02) two days from the date of receipt of this letter, failing which action as deemed fit would be taken without further reference."

5. That the statutory permissible minimum period for submission of written statement of defence is 10 days. But in this case, having been asked to submit the same within 02 (two) days, I became upset and as I was bed-ridden being physically ill, I preferred a representation dated 03.7.06 to permit me 10 days' time and again vide my representation dated 05.7.06 I requested to make the 10 days to 15 days to submit my written statement of defence followed by another representation dated 12.7.06.
6. That on 14.7.06 at 10/30 hrs. I received a Memorandum dated 10.7.06 mentioned under reference (2) above wherein it has been stated that the preliminary hearing as well as regular hearing had been fixed to be held on 12.7.06 without waiting for my written statement of defence. Also my representations dated 3.7 & 5.7.06 were not disposed.
- 6-1. That on 14.7.06 at 10/30 hrs., I received a Memorandum dated 12.7.06 issued by Sr. DCM/KUR mentioned under reference (3) above, which indicates that since I failed to attend the regular hearing scheduled on 12.7.06, second sitting of regular hearing has been fixed to be held on 15.7.06 at 11.00 hrs.

6-2. That on 14.6.06 at 10/30 hrs., I received a letter dated 12.7.06 of Sr. DCM/KUR mentioned under reference (3) above, which contains the following inter-alia:

“...However, as a last chance and in consideration of your explanation dtd. 12.07.06, you are further allowed 03 (three) days more i.e. up to 15.7.2006 to submit your final defence statement and advised to participate in the departmental enquiry scheduled to be held on 15.7.06 at 11.00 hrs in the chamber of the undersigned at Khurda Road.”

7. That the relevant Rules of the RS(D&A) Rules, 1968 is reproduced below:

“9. (7) and shall require the railway servant to submit a written statement of his defence within ten days or such further time as the disciplinary authority may allow.

“9. (9) (a) (i) On receipt of the written statement of defence, the disciplinary authority shall consider the same and decide whether the inquiry should be proceeded with under this rule.

“9. (9) (a) (iv) If the disciplinary authority, after consideration of the written statement of defence, is of the opinion that the imposition of a major penalty is not necessary, it may

“9. (9) (b) If no written statement of defence is submitted by the railway servant, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary to do so, appoint, under sub-rule (2) an inquiring authority for the purpose and also inform the railway servant of such appointment.

“**Note (2) (i) to Rule 9 (13) (b)** Nomination of an assisting railway servant or an official of a recognized Railway Trade Union, who is a full time union worker, shall be made within twenty days from the date of appointment of the Inquiring authority.

8. That the above would indicate the following:

(i) I was asked vide the letter under reference (1) above, that “You are advised to submit your written statement of defence to the charges within minimum possible time, not later than (02) two days from the date of receipt of this letter failing which action as deemed fit would be taken without further reference. This is in violation of **Rule 9(7)** of RS(D&A) Rules, 1968, as mentioned above.

(ii) On 10.7.06 a Memorandum is said to have been issued and received by the SMR-CTC on 13.07.2006 and not communicated to me, which I received on 14.7.06, stating that inquiry has been fixed to be held on 12.7.06. By 10.7.06 neither the statutory period of 10 days was over, nor I submitted any written statement of defence nor I was informed of any appointment of inquiring authority i.e. whether the D.A. himself

would inquire or appoint any other authority and I was not given the statutory period of 20 days to nominate my defence counsel which are in violation of **Rules 9 (9) (b) & "Note (2) (i) to Rule 9 (13) (b)**.

(iii) On 14.7.06 I have received one letter of Sr. DCM/KUR dated 12.7.06 mentioned under reference (3) above stating that considering my representations I have been given time upto 15.7.06 to submit my written statement of defence.

(iv) On 14.7.06 I have received a Memorandum dated 12.7.06 issued by the Sr.DCM/KUR stating that since I failed to attend the regular hearing scheduled on 12.7.06, second sitting of regular hearing has been fixed to be held on 15.7.06. This indicates that the time allowed by the Sr.DCM/KUR to me to submit my written statement of defence upto 15.7.06 has not been honoured by himself.

(v) I have not been given the statutory time of 20 days to nominate my defence counsel which violates the **Note (2) (i) to Rule 9 (13) (b)** of RS(D&A) Rules 1968.

9. That the Article-I, as has been alleged in the said Charge Memorandum, is reproduced herein under for ready reference:

"That the said Sri S. N. Mishra, Hd. TTE/CTC working under CTI/KUR has been found collecting illegal gratification from passengers in a coach of 7045, East Coast Express on 12.09.05 and 15.09.05."

9-1. That an analysis of the above Article would indicate the following:

- (i) I have been found collecting illegal gratification - which means that some body has/have found me collecting the same. So they are vital witnesses. Hence, it is necessary that such person(s) who have found me collecting illegal gratification has to depose and I should be given a chance to cross-examine him/them. But no such person(s) have been cited as Prosecution Witness(s).
- (ii) it has been alleged that I have been collecting illegal gratification from passengers - but the passengers from whom I have been alleged to be collecting illegal gratification have to confirm the allegation in my presence so that I can cross-examine them. But none of the passengers has been cited as Prosecution Witness.
- (iii) The vigilance investigating Team ought to have verify my cash on those days to see whether on those days I had any excess cash with me. But no such exercise was done, which is a standard normal practice in similar cases.
- (iv) The CD (RUD No. 1) is capable of showing some visuals, which have been photographed by some interested persons including Producer, Anchors, Cameraman, video-photographers, Editors etc, who are most vital witnesses. They are only authorized to produce this CD before Inquiry Officer, if any inquiry

is conducted, and I should be allowed to cross-examine them. It is a settled principle of law that no piece of document can be taken on record unless it is placed by its author who may be subjected to cross-examination by the Charged Officer. In this case also the CD (RUD No. 1) need be produced by those who have direct roll in producing this visual. But none of them has been cited as Prosecution Witness.

(v) Since the CVI(T)/ECoR has been cited as Prosecution Witness No. 2 in the Annexure-IV to the charge sheet, it was but natural for him, if he was with the Video-Crew to obtain statements from those (i) who witnessed my accepting alleged "illegal gratification" and (ii) those passengers who alleged to have had paid me the said "illegal gratification".

9. That before taking the CD (RUD No. 1) on record as an evidence, I request your honour to kindly get it tested in the appropriate laboratories to ensure its genuineness, as was done in recent past in some similar scam case.
10. That I am unable to realize the relevancy of Sri H.K.Panda, CVI(T)/ECoR in this case. Is this episode is the outcome of vigilance investigation? If so, I may please be supplied with the Vigilance Investigation Report, which has been the basis and foundation of this charge sheet and the authors of the said report may please be cited as Prosecution Witnesses for placing the said Report.
11. That having been selected by Railway Service Commission (Railway Recruitment Board), Calcutta, I have been appointed as Ticket Collector on 19.6.85. Since then I am in ticket-checking job. So far I have not been issued with any charge sheet excepting once when along with many others in a mass scale a charge sheet was issued for detaining railway cash for two days though I had deposited in time. But I have been awarded punishment of stoppage of increment for 3 months (NCE) along with others. Hence, I am having a good record of service for which I have been retained in Ticket Checking Squad. It is improbable that suddenly I can commit such offence as has been displayed in the said CD.

Under the facts and circumstances stated herein above, I deny the charge under Article-I unequivocally. I pray your honour by considering the case in its entirety to be kind enough to cancel the charge sheet and relieve me from my mental strain which has not only upset my mind but also has become a stigma in the eye of society for no fault of mine."

10. Thereafter the matter was enquired into by the DA cum IO cum PO who after enquiry supplied copy of the report to the applicant inviting his objection if any. In turn, the Applicant



submitted his written statement of defence to the report of the IO in which the stand of the Applicant is as under:

"Sir,

Reg: Written representation on the report of the inquiry held by the D. A.

Ref: The Inquiry Officer-cum-Disciplinary Authority's letter No. SDCM/Con/Vig/-11/06 dated 26.7.2006.

Most respectfully I beg to submit the following in response to the report of the inquiry held by you for your kind perusal and necessary action as deem fit to meet the ends of justice.

That while the time granted to me for filing defence statement has been elaborately discussed in Para 1.1 of the above report, it has not been discussed as to under what circumstances, I was asked to submit my defence statement within "not later than (02) two days" against the statutory permissible limit of ten days for submission of written statement. This directive for submission of written statement within two days made me upset and bed ridden under the treatment of Rly. Doctor.

That without waiting for the written statement of defence and without application of mind, the Disciplinary Authority had decided to conduct an inquiry by himself, which indicates that he had pre-judged the issue and made up his mind to punish me and this inquiry is only an empty formality.

That on 14.7.06 at 10/30 hrs. I received a Memorandum vide Sr. DCM/KUR's letter No. Even/1853 dated 10.7.06 wherein it was stated that the preliminary hearing as well as regular hearing had been fixed to be held on 12.7.06. without waiting for my written statement of defence. Also my representations dated 3.7 & 5.7.06 were not disposed.

That on 14.7.06 at 10/30 hrs., I received another Memorandum vide Sr. DCM/KUR's letter No. Even dated 12.7.06, which indicates that since I failed to attend the regular hearing scheduled on 12.7.06, second sitting of regular hearing has been fixed to be held on 15.7.06 at 11.00 hrs. The said letter also contains inter-alia:

"...However, as a last chance and in consideration of your explanation dtd. 12.07.06, you are further allowed 03 (three) days more i.e. up to 15.7.2006 to submit your final defence statement and advised to participate in the departmental enquiry scheduled to be held on 15.7.06 at 11.00 hrs in the chamber of the undersigned at Khurda Road."



The relevant statutory provisions contained in the Railway Servants (Discipline & Appeal) Rules, 1968 are mentioned below:

"9. (7) and shall require the railway servant to submit a written statement of his defence within ten days or such further time as the disciplinary authority may allow.

"9. (9) (a) (i) On receipt of the written statement of defence, the disciplinary authority shall consider the same and decide whether the inquiry should be proceeded with under this rule.

"9. (9) (a) (iv) If the disciplinary authority, after consideration of the written statement of defence, is of the opinion that the imposition of a major penalty is not necessary, it may

"9. (9) (b) If no written statement of defence is submitted by the railway servant, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary to do so, appoint, under sub-rule (2) an inquiring authority for the purpose and also inform the railway servant of such appointment.

"Note (2) (i) to Rule 9 (13) (b) Nomination of an assisting railway servant or an official of a recognized Railway Trade Union, who is a full time union worker, shall be made within twenty days from the date of appointment of the Inquiring authority.

That on receipt of my written statement of defence dt. 14.7.06, the Disciplinary Authority vide his No. SDCM/Con/Vig-11/06 dt. 15.7.06 assured the following which has not been complied with in the course of inquiry:

"2. Relevant points would be clarified in due course of the present D&A proceedings. All attempts shall be made to redress any doubts or apprehensions that you may be having. In consideration of your petition, the regular hearing will commence with the participation of your Defence Counsel and enquiry shall be conducted on 18.7.2006 and details shall be communicated to you."

That it has been mentioned in Para 1.2 of the inquiry report that "the documents enlisted in the charge memorandum dtd. 30.06.2006 were taken on record from exhibit P/1 to P/6." That as I mentioned earlier in Para 10 of my defence statement dated 14.7.06 which has been admitted to have been received by the D.A. on the same day, "before taking the CD (RUD No. 1) on record as an evidence, I request your honour to kindly get it tested in the appropriate laboratories to ensure its genuineness, as was done in recent past in some similar scam case." But the

said CDs have not been tested before taking it on record. Though I also mentioned the following in the said defence statement, without being placed by either the author, anchor, cameraman, video-photographers, producer, editor of the said CDs, the said RUD No. 1 ought not to have been taken on record. I also questioned the authenticity and genuineness of the RUD No. 1 (Exhibit P/1) during the inquiry in answer to Q. No. 2 to the D.A. cum I.O.

"It is a settled principle of law that no piece of document can be taken on record unless it is placed by its author who may be subjected to cross-examination by the Charged Officer. In this case also the CD (RUD No. 1) need be produced by those who have direct roll in producing this visual. But none of them has been cited as Prosecution Witness."

That at the cost of repetition, I may please be permitted to quote some of the questions put by the Disciplinary Authority-cum-Inquiry Officer, and the answers given by the P.W. I, which will prove that by putting such questions the D.A.-Cum-I.O. has proved himself to be biased against me and it appears that he is only interested to substantiate the charges which have been framed by him and to punish me. In this case, the DA-Cum-IO has acted more as a Presenting Officer than as an I.O. which has prejudiced my case.

"Q. No. 4. Please go through the exhibit No. P/3& P/5. Please state whether Sri S.N.Mishra was on duty on 12.09.2005 & 15.09.2005.

"Ans. He was on duty on 12.09.2005 & 15.9.2005.

(The examination of P/3 & P/5 will indicate that I was on duty on both the days but these two documents do never prove that I was on duty by the 7045 East Coast Express on 12.09.2005. This means the D.A. - cum - I.O. intentionally did not clearly ask the P.W. 1 whether I was on duty by 7045 East Coast Express on both the days knowing fully well that the videograph was on 7045 only.)

"Q. No. 6. Do you know that Sri Mishra has been kept under suspension and if so please state why.

"Ans. I know he was suspended but I do not know the reasons of his suspension.

"Q. No. 12. Do you think Sri S.N.Mishra as shown in the Video recording (CD picture) has accepted illegal gratification from the passengers?

"Ans. I do not know whether it was legal or illegal.

"Q. No. 15. Do you feel that the case portrayed in CD is one of acceptance of illegal gratification?

"Ans. He might have collected money for other reasons.

"Q. No. 16. Do you think collection of money by the Railway Servant from the passengers in a coach in random manner as seen in the Video CD is legal?

"Ans. No.

"Q. No. 17. Why do you think 'No'?

"Ans. If he collects money he should make out the receipt.

That similarly some of the questions put to the P.W. 2 are reproduced below to indicate the attitude of the D.A.-cum-I.O.

"Q. No. 5. Do you think that he is accepting some kind of illegal gratification from the passengers?

"Q. No. 6. Has it been checked whether EFTs have been issued for the same on those days, e.g. 12.9.2005 & 15.9.2005 to this effect?

"Q. No. 7. What else have you seen in these CDs that will support your previous averment?

"Q. No. 8. Do you have any other evidence or points in addition to what you have stated?

"Q. No. 9. Do you feel the case portrayed in the CDs is one of acceptance of illegal gratification by the charged official?

"Q. No. 12. Do you think the charged official has violated the provisions of R.S.Conduct Rules, 1966?

That the above questionnaire discloses that admittedly the role of P.W. 1 was limited to identify the person from the visuals as desired by the Dy.CVO (T)/E.Co.Rly/BBS. Similarly, the role of the P.W. 2 was limited only to seize certain documents as desired by the competent authority i.e. the Dy.CVO (T)/E.Co.Rly/BBS. Neither these two P.W.s were present on spot and heard and witnessed the demand and acceptance of the alleged gratification. Neither these two P.W.s were not utilized to recover the amount of gratification nor any other person was asked to do the same by the Vigilance Team.

That in the instant case, the D.A. has preferred to inquire into the charges himself without appointing any Inquiry Officer. He has also preferred to act as Presenting Officer and hence no P.O. has been appointed. This indicates that Sri J.P.Mishra, Sr.DCM/KUR has played single-handedly three roles e.g. D.A., I.O. & P.O., which has adversely prejudiced my case and not in conformity with the principles of natural justice.

That the role of I.O. has been laid down by the Railway Board in their letter No. E(D&A)/2000/RG 6-60 dated 9.5.2001 which contain inter-alia:

"It is also emphasized here that the Inquiry Officer is not a prosecutor and therefore, it is not his duty to somehow prove the charge(s). He has been appointed to assist the disciplinary authority in taking a correct and impartial decision on the basis of the evidence on record. However, he should avoid searching cross-examination. The most crucial facet of the

personality of the official conducting the departmental inquiry is his impartial approach, as he is performing a *quasi-judicial* function. His conduct must be above board so much so that he should not merely be impartial but also seen to be so, to ensure that the inquiry commands the confidence it deserves."

That the Railway Board's letter No. E(D&A)70RG6-41 dated 20.10.71 contains inter-alia:

"3. It will be seen therefrom that in both the above sub-rules [9(17) & 9(20)], provision has been made about examination and cross-examination of witnesses by the Presenting Officer, if any. In this connection, a point has been raised as to who should do this function of examining and cross-examining the witnesses where there is no Presenting Officer, there is no objection for the inquiring authority to examine and cross-examine the witnesses in cases where no Presenting Officer is appointed to enable him to find out the truth in the charges against the delinquent railway servant."

That the above would indicate that where there is no P.O., the I.O. can do the job of examining and cross-examining the witnesses. But it has not stated that the D.A. will do the job of P.O., as has been resorted to in this case.

The relevant instructions issued by the Railway Board vide their No. E(D&A)2001 RG6-3 dated 20.10.2002 reiterating their earlier instructions issued vide No. E(D&A) 75 RG 6-32 dt. 23.8.75 and No. E(D&A)78 RG 6-3 dt. 20/22.1.79 is quoted below:

"12. After an inquiry is ordered and an Inquiry Officer appointed, a Presenting Officer to present the case in support of the charges may be appointed by the Disciplinary Authority. Appointment of a Presenting Officer is not mandatory in all cases and is generally done in complex cases especially those arising out of CBI/Vigilance investigations."

That the Disciplinary Authority, Inquiry Officer and Presenting Officer are having separate quasi-judicial roles in a departmental enquiry. In this case, in compliance to Rule10 (2)(a) of D & A Rules, a copy of the Inquiry Report has been sent to me and I have been asked to submit my written representation. But who is going to consider my representation against the Inquiry Report. Definitely the D.A., who has conducted the inquiry, cannot examine the same as it is a sound principle of law that nobody should be the judge of his own action, as there are a number of judicial pronouncements on this, which is binding on everybody. Hence, I pray that an appropriate authority examine this representation.

That the D.A.-cum-I.O. in his report (page 9) has stated that "Since the charged official has not issued any EFT to the passengers of 7045 of 12.05.2006 & 15.05.2006 (East Coast

Express) against Railway dues,..." The above indicates the following:

The alleged charge relates to 12.09.2005 and 15.09.2005, whereas, the D.A.-cum-I.O. has mentioned the dates as 12.05.2006 & 15.05.2006. This indicates that the D.A.-cum-I.O. has not applied his mind while discharging his quasi-judicial function and has signed the Report mechanically.

That P/3 & P/5 clearly indicate that I did not perform any duty by 7045 Exp. on 12.09.2005. This aspect has been overlooked by the D.A.-cum-I.O. either inadvertently or deliberately.

That similarly the D.A.-cum-I.O. has stated in his report (page 10) "The CO's contention that citation of Sri H.K.Panda as PW-2 is irrelevant is not acceptable, since Sri H.K.Panda as Chief Vigilance Inspector has **done some preliminary enquiry** in this case. The video recording **appears genuine** and I feel no need for it to be tested in a laboratory..... and **failure of charged official to prove his innocence....**" The above indicates the following: (emphasis is mine)

The D.A.-cum-I.O. has considered "some investigation report" of the Sri H.K.Panda, P.W. 2 at my back without producing either as RUD or during inquiry. Thus I have been deprived of opportunity to cross-examine Sri Panda on his report.

The **D.A.-cum-I.O.** has been pleased to express that the video recording "**appears**" to be genuine and hence it need not be tested. This opinion of the D.A.-cum-I.O. is based on his **surmise and conjecture** as being a Traffic Officer of the Railways, he may not possess the necessary knowledge of technical aspect of any CD, which can be tested in only two laboratories in India, as I have gathered from newspapers. Hence, the decision of the D.A.-cum-I.O. to dispense with the checking of the CDs has prejudiced my case.

It is not the duty of mine to prove my innocence and it is the duty of the prosecution to prove the misconduct.

That a plain reading of the statement of Article - 1 would reveal that the **Disciplinary Authority had prejudged** the issue and reached at a conclusion even before the commencement of the enquiry. To make this point clear, at the cost of repetition, the Article - 1 is reproduced herein under:

"That the said Sri S.N.Mishra, Hd. TTE/CTC working under CTI/KUR has been found collecting illegal gratification from passengers in a coach of 7046, East Coast Express on 12.9.05 and 15.09.05."

That there has been no allegation of charge in the above Article of Charge, instead the guilt has been firmly concluded by stating that "...has been found collecting illegal gratification from passengers..." The D.A.-Cum-I.O.-Cum-P.O.

trying this case should not have pre-judged the issue or form an opinion before the guilt is proved.

That as per Rule 9(9)(a)(i) of the D & A Rules, "On receipt of the written statement of defence, the disciplinary authority shall consider the same and decide whether the inquiry should be proceeded with under this rule." Whereas, in the instant case, while the charge sheet was handed over to me I was directed by the D.A. under his own signature to submit my explanation within two days though it was against the statutory Rule No. 9(7) of the D & A Rules.

That Sri H.K.Panda, P.W. No. 2 in answer to Q. No. 15 has stated that in the month of June 2006 he along with the Dy. CVO (T)/ECoR/BBS and the P.W. No. 1 viewed the C.D.s. In answer to Q. No. 20 he has stated that the Dy.CVO (T)/ECoR/BBS ordered him to seize the documents. Similarly Sri D.P.Badhei, P.W. No. 1 in answer to Q. No. 8 on 18.7.06 has stated that on 20.6.06 he was called by the Dy. CVO (T)/ECoR/BBS to identify the person and he had seen the two CDs in the office of Dy. CVO (T)'s office on 20.6.06. In answer to Q. No. 9 he stated that he had given his statement in Dy. CVO (T)/BBS's office at Chandrasekharpur. In answer to Q. No. 5 on 20.7.06, the P.W. No. 1 has stated that he was shown two CDs in the monitor at Dy. CVO (T)/BBS's office and the Dy.CVO (T) asked him to identify the persons on 20.6.06 at 17.00 hrs and after that he had given his written statement. Hence, it apparently suggests that the instant case has originated from the Railway vigilance investigation. Neither the report submitted by the Vigilance Department and the statements obtained during the investigation have been submitted during the inquiry nor the Dy. CVO (T)/BBS has been produced as Prosecution Witness to present his investigation report basing on which the case has been originated.

That the above makes it abundantly clear that there is a vigilance investigation on the subject and a report must have been forwarded by the Vigilance Department based on which the present charge sheet has been issued. Hence, a copy of the said investigation report and advice tendered by the Chief Vigilance Officer, E. Co. Railway should have been relied upon in view of maintaining transparency in all matters, as has been suggested by the Chief Vigilance Commission, New Delhi to all Chief Vigilance Officers vide his No. 99/VGL/66 dated 28.9.2000.

That the present case, where the D.A. has concluded "has been found collecting illegal gratification from passengers in a coach of 7046, East Coast Express on 12.9.05 and 15.09.05", as a general rule, the Vigilance Department should have found fit to send this case to Court after investigation, as the offence is of 'accepting gratification' involving loss of substantial public funds. In such cases, departmental action should not precede prosecution. The decision of the Vigilance Department not to

send the case to any Court of Law itself indicates that the evidence in support of the charges are either insufficient or absent and not fit to be placed before a Court where the Law of Evidence would be applicable.

That basing on the same video shooting, a few RPF personnel have been alleged to be involved. The RPF personnel being aggrieved by the decision of their superiors have moved before the Hon'ble High Court of Orissa where the Hon'ble Court has been pleased to pass an interim order on 19.7.2006 in which the petitioner was allowed to continue in the present post till the next date.

That during the departmental inquiry in some of the RPF personnel, Sri Braja Bhusan Chhotray, who had video graphed, has stated some GRP Inspector of Cuttack had requisitioned his services for video shooting in connection with collection of illegal money by GRP, RPF, TTE, Guard etc from spawn fish traders. Sri Chhotray is a very relevant witness. I had insisted in my statement of defence to produce the CD for testing the authenticity of the CDs in appropriate laboratories, but which has not been complied with.

That it is evident that GRP of Cuttack and one Sri B.B.Chhotray were the prime members of the videography team and not any member of Railway Vigilance Department If that be so, then they are not the concerned authority to do so under any rule/statute.

That the above proves conclusively that not only Railway Vigilance Department but also GRP is at the backdrop of this incidence. But none of the officials of the concerned departments who are very material in this case has been produced as Prosecution Witness.

That in the instant case, the only evidence is RUD No. 1 i.e. two CDs. As I have already mentioned in my defence statement that the CD is capable of showing some visuals, which have been photographed by some interested persons including Producer, Anchors, Cameraman, video-photographers, Editors etc, who are most vital witnesses. They are only authorized to produce this CD before Inquiry Officer, if any inquiry is conducted, and I should be allowed to cross-examine them. It is a settled principle of law that no piece of document can be taken on record unless it is placed by its author who may be subjected to cross-examination by the Charged Officer. In this case also the CD (RUD No. 1) need be produced by those who have direct roll in producing this visual. But none of them has been cited as Prosecution Witness.

That I had also requested in my defence statement that before taking the CD (RUD No. 1) on record as an evidence, it should be tested in the appropriate laboratories to ensure its genuineness, as was done in recent past in some similar scam case.

That in spite of my above request, neither any of the persons involved in video graphing has been produced during the inquiry nor the CD has been tested in some appropriate laboratories. Whereas, the said CD has been considered to substantiate the charge. In fact, excepting the CD, there is no other evidence with the D.A. This CD is of no consequence without the same being placed by the person who has recorded it and without verifying/examining by the appropriate laboratories.

That having been selected by Railway Service Commission (Railway Recruitment Board), Calcutta, I have been appointed as Ticket Collector on 19.6.85. Since then I am in ticket-checking job. So far I have not been issued with any charge sheet excepting once when along with many others in a mass scale a charge sheet was issued for detaining railway cash for two days though I had deposited in time. But I have been awarded punishment of stoppage of increment for 3 months (NCE) along with others. Hence, I am having a good record of service for which I have been retained in Ticket Checking Squad since the year 1994. The performance of mine during the period of my working in squad would substantiate that I was honestly and sincerely discharging my duties. The RUD No. 3 & 6 would prove that in the month of September 2005, I had deposited Rs. 11,352/- collected from irregularities detected during checking of trains. Also due to my laudable performances, my group was awarded CCM's award twice and I was nominated in the group of Railway Board Ticket Checking squad during April-May 2002 and performed duties in foreign Railways. It is improbable that suddenly I can commit such offence as has been displayed in the said CD.

That since this is a case of 'illegal gratification', **the material/vital witnesses are the persons (passengers) who having been demanded by me paid the amount to me.** Besides the above, as discussed, the Dy.CVO (T)/E.Co.Rly, who has been referred to by the P.W.s, Video photographer, Anchor, Editor of the CDs are also vital/material witnesses in this case. Hence, without examining/cross-examining them, my defence will be severely prejudiced. Inspite of my request, the above vital/material witnesses have not been examined/cross-examined.

That I firmly claim that the 'charge' as has been brought out in the Charge Sheet has not been substantiated, excepting the CD, the validity of which has been questioned, no other direct material/witness has been produced in support of the of the alleged 'charge'.

That the Article of Charge is bound to be unsubstantiated for the following reasons:

I have been found collecting illegal gratification - which means that some body has/have found me collecting the same. So they are vital witnesses. Hence, it

is necessary that such person(s) who have found me collecting illegal gratification has to depose and I should be given a chance to cross-examine him/them. But no such person(s) have been cited as Prosecution Witness(s).

It has been alleged that I have been collecting illegal gratification from passengers - but the passengers from whom I have been alleged to be collecting illegal gratification have to confirm the allegation in my presence so that I can cross-examine them. But none of the passengers has been cited as Prosecution Witness.

The vigilance investigating Team ought to have verified my cash on those days to see whether on those days I had any excess cash with me, which is a standard normal practice in similar cases. But no such exercise was done.

The CD (RUD No. 1) is capable of showing some visuals, which have been photographed by some interested persons including Producer, Anchors, Cameraman, video-photographers, Editors etc, who are most vital witnesses. They are only authorized to produce this CD before Inquiry Officer, if any inquiry is conducted, and I should be allowed to cross-examine them. It is a settled principle of law that no piece of document can be taken on record unless it is placed by its author who may be subjected to cross-examination by the Charged Officer. In this case also the CD (RUD No. 1) need be produced by those who have direct roll in producing this visual. But none of them has been cited as Prosecution Witness.

Since the CVI(T)/ECoR has been cited as Prosecution Witness No. 2 in the Annexure-IV to the charge sheet, it was but natural for him, if he was with the Video-Crew to obtain statements from those (i) who witnessed my accepting alleged "illegal gratification" and (ii) those passengers who alleged to have had paid me the said "illegal gratification".

That the findings of the D.A.-cum-I.O. that I was "found collecting illegal gratification" have been based on no evidence. Moreover, it appears that according to the D.A.-cum-I.O. there are some 'gratification' which are 'legal' and the CD has indicated that I was collecting 'illegal gratification' and not 'legal gratification'. This only further affirms that the D.A.-cum-I.O. has not applied his mind and has conducted the inquiry in a mechanical way.

Under the facts and circumstances stated above, may I pray to your honour to be gracious enough to drop the charges as without production of material/vital witnesses and only relying on the visuals of a CD, which has been video graphed by a private interested party, the genuineness of which has not been established, the charge cannot be substantiated."

11. From the above, it is seen that the applicant from the beginning has been objecting to the manner of proceeding against the Applicant and praying not to take the video clipping as the primary evidence without testing the same in the laboratory. On perusal of the records, we also see that video recording is the main basis of proving the charge whereas despite request, neither the said CD was tested in the laboratory nor the CD was certified to be the original through the videographer or any of the independent witnesses. The fish merchants from whom the applicant was allegedly taking the bribe had also not been examined in course of enquiry or prior to that. The RPF personnel deployed in the coach and entangled with the incident had not been cited as witness nor had they been examined in course of the enquiry by the DA-cum-IO-cum-PO. Nothing is forthcoming as to why the DA had chosen himself to act as the IO and conduct the enquiry without appointing PO.

12. The cardinal principle of law is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application

of principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person. The purpose of law is to prevent brooding sense of injustice. It is not the words of the law but the spirit and eternal sense of it that makes the law meaningful. Fact remains that in the present case the DA acted as IO and conducted regular examination in chief in absence of any PO by putting leading question to the applicant. The request of the applicant for testing the CD in the laboratory did not yield any result. On the basis of the visuals of the CD, the DA cum IO cum PO held the charged officer guilty of the charge. Thereafter, the DA considered the defence statement submitted by applicant on the report of the IO and issued the order of punishment. The matter regarding departmental enquiry against a Railway servant getting vitiated due to factors like conducting regular examination in chief by the IO in absence of PO and putting questions suggestive of answers supporting the charge, and non-production of documents in the enquiry sought by the delinquent had come up for consideration before the Jabalpur Bench of the Tribunal in OA No. 408 of 2002. The Tribunal by order dated 25.3.2004 allowed the said OA. The Union of India challenged the said order before the Hon'ble Madhya Pradesh High Court [reported in 2005(1) ATJ

147 -Union of India and others v Mohd Naseem Siddique]. The Hon'ble High Court of MP while affirming the view of the Jabalpur Bench of the Tribunal held as under:

"(a) Railway servants (Discipline and Appeal) Rules, 1968- Rule 9(9)(c)- disciplinary proceedings- natural justice - contention that as the rule uses the word 'may appoint' a Presenting Officer, disciplinary authority has the discretion to appoint or not to appoint a Presenting Officer- held it is an enabling provision which gives discretion to the disciplinary authority to appoint any railway or other Govt. servant as a Presenting Officer to present the case on behalf of the Disciplinary Authority- but the aid provision does not permit an inquiry officer to act as the Presenting Officer and conduct examination-in chief- of the department witnesses and cross examine the defence witnesses.

(b) Disciplinary Proceedings- the inquiry officer, who is in the position of a Judge shall not act as Presenting Officer, who is in the position of a prosecutor.

(c) Disciplinary Proceedings- it is not necessary for the disciplinary authority to appoint a Presenting Officer in each and every inquiry- non appointment of a Presenting Officer, by itself will not vitiate the inquiry.

(d) Disciplinary Proceedings- the inquiry officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses- in the absence of a presenting officer, if the inquiry officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employees to cross examine such witnesses on those clarifications.

(e) Disciplinary Proceedings - whether an inquiry officer can be said to have acted as a prosecutor will have to be decided with reference to the manner in which the evidence is let in and recorded in the enquiry- if the inquiry officer conducts regular

examination-in-chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with the answers, or cross examine the defence witnesses or puts suggestive questions to establish the prosecution case, the inquiry officer acts as prosecutor thereby by vitiating the inquiry.

(f) Disciplinary Proceedings- Natural Justice- Disciplinary authority did not appoint any Presenting Officer- The evidence on behalf of the disciplinary authority has been presented by the inquiry officer, by conducting regular examination-in-chief of prosecution witnesses by taking them through the prosecution case- inquiry officer has also conducted regular cross examination of the defence witnesses- put questions suggesting of answer supporting the charge- enquiry held vitiated being violative of principles of natural justice- a person cannot act as a prosecutor and judge simultaneously."

13. It is also noticed that various points raised by the Applicant were not considered or repelled by the Disciplinary authority and the DA reached the conclusion of guilt based on the CD without testifying genuineness or otherwise of the CD. The CD was not also supported by the author or any independent witness. Hence the order is vitiated by non-adherence of the rules in regard to appointment of PO, principles of natural justice for the reason of accepting the CD without ratification and non-application of mind.

14. Though a statutory duty is cast upon the Appellate Authority, while considering the Appeal of a delinquent, to look into specifically whether the enquiry was conducted in accordance with Rules/law whether principles of natural justice were

complied with, he failed to look into the same and upheld the order of punishment. He also failed to meet/answer all the points raised by the Applicant in his appeal. The Appellate Authority by simply adopting the language employed by disciplinary authority, refused to interfere with the dismissal order. Hence, the order is held to be vitiated by total non application of mind.

15. The doctrine of fairness in the concept of justice stands as the most accepted methodology of government action. The administrative action is to be just on the test of fair play and reasonableness. It is within the domain of the Tribunal to examine and interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. Keeping in mind the above, now we proceed to examine whether the conclusion of guilt based on CD without testifying in laboratory or justifying through any

independent witness is justiciable. In this connection, we may profitably take note of some of the decisions of the Hon'ble Apex Court. In the case of **Yusufalli Esmail Nagree v State of Maharashtra**, AIR 1968 SC 147 the Hon'ble Apex Court observed that since the tape records are prone to tampering, the time, place and accuracy of the recording must be proved by a competent witness. It is necessary that such evidence must be received with caution. The Court must be satisfied, beyond reasonable doubt that the record has not been tampered with. In the case of **Maqsud Ali**, (1965)2 All ER 464 it was held that it would be wrong to deny to the law of evidence advantages to be gained by new techniques and new device, provided the accuracy of the recording can be proved and the voices recorded are properly identified. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. In **Ziyauddin Burhanuddin Bukhari**, AIR 1975 SC 1788 relying on another decision of three judges Bench the Apex Court held that tape records of speeches were admissible in evidence on satisfying the following conditions; (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it; (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory

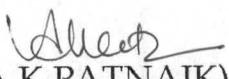
evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record; (c) the subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act. In a recent decision in the case of **Tukaram S.Dighole v Manikrao Shivaji Kokate, AIR 2010 SC 965**, the Hon'ble Apex Court held that the Petitioner producing VHS cassette to prove charge, no cogent evidence regarding source and manner of its acquisition was produced. Cassette cannot be read in evidence dispute being public document. Petitioner did not also lead evidence to prove that cassette was true reproduction of original speeches made by respondent or his agent. Respondent cannot be held to have committed corrupt practice. Evidence Act (1 of 1872), S.3-Document-admisiblity-tapes are more susceptible to tampering-Standard of proof about its authenticity and accuracy has to be more stringent as compared to other documentary evidence. On the touchstone of the tests and safeguards enumerated above, we are of the opinion that in the instant case the Respondents have miserably failed to prove the authenticity of the cassette as well as the accuracy of the speeches purportedly made by the Applicant. Admittedly the Respondents did not lead any evidence to prove that the cassette produced on record was a true reproduction of the original speeches by the

Applicant. On a careful consideration of the evidence and circumstances of the case we are convinced that the Respondents have failed to prove their case that the Applicant was guilty of indulging in corrupt practices. It is well settled law that allegation of fact, if not denied/controverted normally shall be taken to be admitted [State of **Assam v Union of India and others** (2010) 2 SCC (L&S) 812]. On perusal of the counter, we find that the counter of the Respondents has been prepared and filed in a cavalier fashion without meeting/answering all the points raised supported by law. For example, in support of the relief at **paragraph 5 'ground'** in the OA, no light was thrown by the Respondents' counsel with supporting decision, in course of hearing to take any other view than the views expressed above. Therefore, when the factual scenario is examined in the background of the legal principles set out above, the inevitable conclusion is that the impugned report/orders viz; enquiry report dated 26-07-2006 (Annexure-A/3), the order of punishment dated 25-08-2006 (Annexure-A/5), the order of the Appellate Authority dated 15-11-2006 (Annexure-A/7) and the order of the Revisional Authority dated 02/03.04.2008 (Annexure-A/9) are bound to be set aside and are accordingly set aside. Accordingly, (Annexure-A/3), (Annexure-A/5), (Annexure-A/7) and (Annexure-A/9) are

hereby quashed with direction to the Respondents to reinstate the Applicant but without any back wages on the principle of 'no work no pay'. But as the Revisional Authority converted the order of removal to that of compulsory retirement on sympathetic and humanitarian ground, if any payment ^{was} ~~is~~ made towards pension, the same shall not be recovered from the Applicant. The above direction shall be complied with by the Respondents within a period of 30(thirty) days from the date of receipt of copy of this order.

16. However, liberty is given to the Respondents, if they so wish, they may proceed against the applicant in accordance with Rules and law.

17. In the result, this OA stands allowed to the extent stated above. There shall be no order as to costs.


(A.K.PATNAIK)
Member (Judicial)


(C.R.MOHAPATRA)
Member (Admn.)