Central Administrative Tribunal
Ernakulam Bench

OA No.490/2012

Wednesday, this the 21st day of August, 2013.

CORAM

Hon'ble Dr.K.B.S.Rajan, Member (J)
Hon'ble Mr.K.George Joseph, Member (A)

Sobha Mary Alexander
W/o Joseph George
Ex Head Commercial Clerk
Payyannur Railway Station
Residing at Chathukulam
Perumpaikadu Post
Kottayam District
PIN 686 028. Applicant

(By Advocate: Mr.M.P.Varkey)

Versus

1. Union of India represented by
General Manager
Southern Railway
Chennai-600 003.

2. Addl. Divisional Railway Manager
Southern Railway, Palghat Division
Palakkad-678 002.

3. Sr. Divisional Commercial Manager
Southern Railway, Palghat Division
Palakkad -678 002. Respondents

(By Advocate : Mr.Thomas Mathew Nellimoottil)

This application having been heard on 7th August, 2013, the Tribunal on 21.08.2013 delivered the following order:-

ORDER

By Hon'ble Dr.K.B.S.Rajan, Member (J)

1. The applicant was served with a charge sheet vide Annexure A-1 Memo dated 26-03-2010 and the articles of charges read as under:-

" Smt.Sobha Mary Alexander, HD-CC/PAY while working as CCC/III/KTYM and manning window No.3 on 21.11.2007 at BO/KTYM had failed to maintain absolute integrity, show devotion to duty and acted in a manner unbecoming of a Railway Servant n that:

1. She had neither defaced manually nor cancelled in the system one II M/E ticket No.232217169 Ex-KTYM-CLT which was tendered for cancellation and resold the same with intention to retain the clerkage charge for her personal gain.

2. She was in possession of one II M/E ticket No.232217167, Ex-KTYM-CLT which had been tendered for cancellation and which she had neither defaced manually nor canceled in the system with an intention to resell the same.

By the aforesaid acts Smt.Sobha Mary Alexander, Hd-CC/PAY had contravened the provisions of Article 3.1(i), (ii) & (iii) of the Railway Services (Conduct) Rules 1966. "

2. The applicant having denied the charges, regular inquiry commenced and the inquiry officer has rendered the findings as under:-

"8.0.0 Discussion of Misconduct

8.1.1 It is the primary duty of the Booking Clerk to cancel the ticket by defacing it as soon as it was tendered for cancellation and simultaneously or at least immediately it should be cancelled in the system. The object of this procedural requirement is to bring the clerkage charges in to the books of accounts of the Railways. It is not out of context to point out that defacing the ticket will disqualify the ticket from further sale and canceling it in the system will account for the cancellation charges retained by the clerk while effecting the refund for such cancelled tickets. In the present case, two of the tickets tendered by SW.I for cancellation were neither defaced nor canceled in the system by the Charged Official. Further, it had been established that Charged Official had resold the one of the tickets and the clerkage charge of Rs.10/- for the cancellation this tickets was not accounted in the system. Thus, it is established that the Charged Official had retained the clerkage charges for her personal gain and thereby failed to maintain absolute integrity. The charged official's behavior can not be brought under the purview of loyal and honest servant of the Master i.e Railways. As defined by the D&AR the integrity to be maintained by a Railway official must be "ABSOLUTE". In the D&AR the word "Absolute" is used very specifically to indicate that any Railway employee is expected to exhibit highest order of integrity. In the context of Charged

official's refunding the amount to the passenger without effecting such cancellation in the system, I am unable to give "clean chit" to the Charged Official with regard to the integrity. As a Railway employee the Charged Official is expected to maintain absolute integrity and there cannot be even an iota of deviation.

8.1.2 Further assuming, though not concluding, that the Charged Official had not resold Ext.S.4 then she should have been able to produce that tickets in the defaced condition at the time of the check itself that too in the presence of CBSR/KTYM (SW.3) and CCC/KTYM (SW.4). The possession of defaced tickets by the counter clerk, in the present case by the Charged Official, is mandatory even if it was agreed that the Charged Official was unable to cancel those tickets in the system due to pressure of work or crowd waiting in the queue. In other words the action of defacing the ticket should precede the action of cancellation in the system. The Charged Official is also expected to hand over such canceled tickets to the supervisor at the end of the shift so as to bring the cancellation charges in to the books of accounts and also to make such tickets available for inspection/scrutiny by any of the inspecting official including officials of Accounts Department. The Charged Official was unable to produce any such defaced tickets during the check. In the absence of defaced tickets the possibility of those tickets being resold could not be ruled out. Thus the claim of the Charged Official in her written brief under para 1(c) that no violation of rule was quoted in the charges or in the imputation is not tenable.

8.1.3 By not canceling the ticket in the system and accounting the clerkage charges in to the books of Railways, the Charged Official failed to show devotion to duty there by acted in a manner unbecoming of a Railway servant. Thus, the Charged Official had contravened Rule 3.1(i), (ii) & (iii) of Railway Services (Conduct) Rules, 1966.

9.0.0 <u>Findings</u>

9.1.1 Thus, on the basis of oral and documentary evidences, valued and discussed by me in the above paragraphs, my findings is that the charges framed against Smt.Sobha Mary Alexander, Hd.CC/Pay (then CCC/III/KTYM) (Vide SF.5 No.CON/J/V/533/SMA dated 26.03.2010) STAND PROVED.

Thus, Smt.Sobha Mary Alexander, Hd.CC/Pay (then CCC/III/KTYM) had contravened the provision of only Rule 3.1. (i), (ii) & (iii) of the Railway Services (Conduct) Rules, 1966. "

3. The applicant filed her representation against the I.O's report, vide

Annexure A6. However, the Disciplinary authority has imposed the major penalty of compulsory retirement vide impugned Annexure A 7 order dated 17-08-2001. The applicant filed her appeal and the same was dismissed vide Annexure A-9. Against the said penalty advice and the appellate order the applicant has moved this O.A seeking the following reliefs:-

> ***a)*** *Declare that A-7 and A-9 orders are unjust, illegal, non-est and set aside the same.*
>
> ***b)*** *Declare that the applicant is entitled to be restored to her original post as on 22.11.2007, treating the period of suspension from 22.11.2007 to 18.2.2008 as duty, with all consequential benefits and direct the respondents accordingly.*
> ***c)*** *Pass such other orders or directions as deemed just fit and necessary in the facts and circumstances of the case.*

4. Respondents have contested the O.A. They have contended that the disciplinary proceedings have been conducted as per the procedure laid down in the Rules and that there is no legal lacuna in the decision making process. The standard of proof adopted for arriving at the finding is also in accordance with the rules. The resale of tickets to one Mrs. Maya Muralidharan is proved by the statement of SW 3, to whom the applicant has admitted the fact of the ticket having been re-sold.

5. In her rejoinder, the applicant reiterated her contentions as raised in the OA and in addition, she has referred to the statement made by the said Maya Muralidharan stating that the wordings are such that such a statement could be made only by Railway officials, as the said statement contains such terms which are exclusively used only within the Railways. All other legal issues have been reiterated in the Rejoinder.

6. Additional reply statement and Additional rejoinder have also

been filed presenting the case of the respective side.

7. Counsel for the applicant succinctly presented the case and has highlighted the following legal issues:-

(a) The case is one of trap case and thus, the provisions and guidelines for conducting trap case (Para 704 and 705 of Vigilance Manual/revised Rule 307)but the guidelines thereof have not been fully complied with. This is against the law laid down by the Apex Court in the case of Moni Shankar vs Union of India (2008) 3 SCC 484.

(b) The alleged incidence occurred on 21st November, 2007, which was a period called "Sabarimala season", when thousands of pilgrims visit the Sacred Sabarimala. There would always be huge rush in every counter and so was on that day. In order to ensure that the public are not made to suffer, when cancellation of tickets was made, the full rigmarole of canceling the tickets through the system was not immediately followed, as otherwise, for cancellation of each ticket, sufficient time would be wasted and till then, the passengers at the counter may have to wait.

(c) On that day, it was not the three tickets which were sought to be cancelled by the decoy customer, but earlier, a number of tickets had been canceled and cancellation, at the lean period (when passengers were not there at the counter) was systematically

conducted as could be verified from Annexure A-10. Had the intention of the applicant been to retain the cancellation charge and resell the tickets, the same would have been conducted in respect of majority of the tickets.

(d) The entire drill was conducted as a trap case. The respondents would have arranged for purchase of such cancelled tickets as well; this was not done. They have alleged that one Maya Muralidharan bought one of the canceled tickets and her statement obtained. The said individual has not been examined. This is against the law laid down by the Apex Court in the case of **Central Bank of India vs Prakash Chand Jain (AIR 1969, SC 983)**

(e) Out of the three tickets, two were got cancelled in front of the vigilance team itself, as could be seen from Annexure A-10. It is the case of the applicant vide Ground (d) that there has been no cancellation of the third ticket. The only evidence relied upon is the statement of SW 3, whereas, the said SW3 had clearly stated that all the signatures appended by her in various documents were at the dictation of the vigilance and she was in a perplexed situation at that time. Inquiry Report at para 5.3.1 refers.

(f) This is a case of no evidence.

8. Counsel for the respondents submitted that the evidences are

sufficient to prove the misconduct as per the Inquiry Report. The guidelines have been followed as required in respect of trap. The EFT given to the passenger Maya Muralidharan in lieu of ticket bought by the said passenger is available on record. When the decoy had tendered three tickets for cancellation and got the money due to him after discounting the cancellation charges, all the three tickets ought to have been cancelled, whereas only two of them had been canceled, that too at the time when the vigilance team entered the counter and on their instance, while there was no cancellation of the third ticket, which was in fact in possession of the passenger Maya Muralidharan.

9. Arguments were heard and documents perused. Three tickets bearing Nos. 232217167, 232217168 and 232217169 were stated to have been bought by one decoy Mr. K.V. John HC-55/CO. The journey was from Kottayam to Calicut (232217167), Kottayam to Trichur 232217168 and again Kottayam to Calicut (232217169). All the three tickets reflect the time of issue as 21.47. It is the case of the respondents that the decoy customer (Shri K.V. John) had asked for three separate tickets two for ex Kottayam to Calicut and one for ex-Kottayam to Trichur. **When such a request is made, i.e. two tickets to the same destination and one to a different destination, normally, any counter clerk would get two tickets printed to the same destination consecutively and the third one to the different destination.** Thus, the natural course would have been that the ticket No. 232217167 and 232217168 would have been for CLT while 232217169 would have been for Trichur or the first one would have been to Trichur while the next two to the same destination. **In this case, the first**

ticket was for CLT, the second was for Trichur and the last one for CLT. The same leads to some doubt.

10. The alleged incident is of 2007, while the charge sheet issued was of 2010. Of course, the three years delay cannot be treated as inordinate. It is also seen from the records that the applicant was shifted out of that place and posted to another Division on administrative grounds.

11. The scope of judicial interference is permissible to the extent of

(a) ascertaining the legality and sustainability of the decision making process (***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312***, wherein it has been held by the Apex Court as under:-

> *Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact.* ***The purpose of judicial review is to ensure that the individual receives fair treatment*** *and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorized by law to decide, a conclusion which is correct in the eyes of the Court.*

(b) to examine as to whether it is a case of no evidence as held in para 17 of the judgment of the Apex Court in the case of Moni Shankar (supra) where the Apex Court has stated as under:-

> *"17. The departmental proceeding is a quasi-judicial one. 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 as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. ***Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, 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, meet the requirements of burden of proof, namely, preponderance of probability.*** *If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality." (Emphasis supplied)*

12. This is admittedly a trap case. The same ought to have been carried out in a fool proof method, duly observing the guidelines. Moni Shankar (supra) highlights the need to comply with a substantial part of the trap procedure as contained in the Vigilance Manual. In the instant case, it would not have been possible for the vigilance to project another decoy customer to buy a ticket to Calicut. That was not done. Instead, the vigilance has performed the following:-

(a) was observing as to whether some one was purchasing any ticket which was given without operating the computer system (i.e. From out of the tickets given for cancellation)

(b) On ascertaining that one lady passenger (Maya Muralidharan) had so bought the ticket, SW 5 and another (Shri Charles) interacted with her and she was taken to PO (Parcel Office) where SW 4 Ulahannan was also summoned.

(c) According to the prosecution, in front of Ulahannan, the

lady passenger gave a statement vide S-6 of the Enquiry Proceedings. This contained the signature of the said Ulahannan.

(d) An EFT was prepared, in which the details of the ticket No. 232217169 had been incorporated and the same was handed over to the Lady Passenger in lieu of the original ticket.

(e) Thereafter, the vigilance team had entered the counter and further action of checking the cash etc., took place.

13. In trap cases, it has been held in Moni Shankar (supra) that there must be substantial compliance of the Guidelines as given in para 307 of the Indian Railways Vigilance Manual. The same reads as under:-

307. Departmental Trap cases - Procedure & Guidelines:

307.1 The Railway Vigilance department also carries out decoy checks. These checks require careful planning, selection, execution and documentation for success. The need for a very good information network and regular flow of information from the field cannot be over emphasized, for it is only this that leads Vigilance to the right person at the right time.

307.2 The spot for the trap should be selected very carefully after thorough ground work. If one has studied the field conditions well, then one would know which are the vulnerable locations and who are the regular extorters. For example, checks on booking windows are most rewarding when there is a huge rush at the windows and the booking clerks help themselves to extra cash by way of keeping the change, dropping of cash etc. Similar would be the case in an overflowing train during the vacation period.

307.3 The selection of the decoy has also to be done very carefully. If he is a Government Servant, he should have a clear past and should not have any enmity against the person who is to be trapped. If the decoy is a non-Government person, then he should be adequately informed of the purpose of this trap. The decoy should be one who would always stand with the Vigilance agency under all circumstances and not be bought over or pressurized by the trapped person. He would have to be told before-hand that his commitment in the case would last a long while, he would face cross examination in the subsequent inquiry process and, hence, should be willing to cooperate with the Vigilance till the very end.

307.4 In addition, the Investigating Officer/Inspector should immediately arrange one or more officials (gazetted or non-gazetted or a combination of gazetted & non-gazetted) to act as independent witness/witnesses. It is imperative that all Railway employees should assist and witness a trap, whenever they are approached by the Vigilance branch. Refusal to assist or witness a trap without sufficient reason can be construed as breach of duty, making the person liable to disciplinary action.

307.5 Proper execution of the trap is very important. The following important points should be kept in view:

(i) One or more responsible and impartial witness/witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification. This would squarely meet the likely defense of the accused that the money was actually received as a loan or something else.

(ii) The transaction should be within the sight and hearing of the independent witness/witnesses.

(iii) There should be an opportunity to catch the culprit red-handed immediately after the bribe money has changed hands so that the accused may not be able to get rid of it.

(iv) The witnesses selected should not have appeared as witnesses in earlier cases of the department. It is safer to take as witness a Government employee who belongs to some other department.

(v) It is preferable to take a written complaint from the decoy. The complainant must specifically give the name of the person receiving the money, motive for receipt, the

actual amount, date, time and place of the transaction.

307.6 Prior to the trap, the decoy should present the money, which he will give to the target officer/employee as bribe money on demand. A memo should be prepared by the investigating officer/inspector in the presence of the independent witnesses and the decoy indicating the numbers of the Government Currency (GC) Notes for legal and illegal transactions. This memo should be signed by the decoy, independent witness/witnesses and the investigating officer/inspector. Another memo, for returning the GC notes to the decoy, should be prepared for paying the bribe to the delinquent employee on demand. This memo should also be signed by the decoy, witnesses and the investigating officer/inspector.

307.7 At the time of the check, the independent witness/witnesses should take up position in such a place where they can see the transaction and also hear the conversation between the decoy and the delinquent employee, so as to satisfy themselves that money was demanded, given and accepted as bribe.

307.8 After money has been passed by the decoy to the delinquent employee as bribe, the investigating officer/inspector should disclose his identity and demand, in the presence of witnesses, to produce all money including private, Railway and bribe money. Then, the total money produced should be verified from relevant records and a memo be prepared for seizure of money. The recovered notes should be kept in an envelope, sealed in the presence of the witness, decoy, the accused and his immediate superior, who should be called as witness, in case the accused refuses to sign the recovery memo and sealing of notes in the envelope. It is crucial to seize supporting relevant documents immediately after the trap.

307.9 A site plan should also be prepared indicating the important features of the trap, namely, where the trap was laid, the position of witnesses, the delinquent official, the position of decoy and the relative distance from each other.

307.10 It is essential to follow the due procedure in cases of decoy checks. Procedural lapses enable the accused to get the benefit of doubt in the inquiry proceedings. Several cases of decoy checks have finally not resulted in the desired punishment on the employee because of these lapses.

307.11 It is essential that a successful decoy check should be followed to its logical conclusion, namely - the issue of a major penalty charge sheet which should eventually entail imposition of penalties of compulsory retirement, removal or dismissal from service. Rule 6 of the RS (D&A) Rules specifies dismissal/removal for proven cases of bribery & corruption. The disciplinary authority should not take up a position of misplaced sympathy for people who don't deserve it. If not, then the message that is conveyed to delinquent employees - present and potential - is that 'anything goes' (sab chalta hai) and they can get away with just about anything. The Executive and Vigilance wings need to cooperate in making the tool of decoy checks a very effective deterrent to the wrongdoer, and not take up a confrontationist approach which would ultimately benefit him.

14. In the instant case, the engagement of decoy, supporting witness, etc., has definitely been in accordance with the above manual. However, to prove that all the three tickets were cancelled not much of evidence could be there, except the refund of Rs 150 by the applicant, which has not been in dispute. Nevertheless, the respondents could have set up a decoy customer to buy one of the tickets, who would have been available for examination by the applicant. Instead, they observed that some lady passenger bought a ticket and the applicant without operating the computer, got her a ticket (meaning thereby that it was one of the cancelled tickets that had been re-sold) and one Pramod Kumar and another Charles had interacted with the lady passenger, got a statement from her (Annexure A-1/12 i.e. Ext. S-6) and issued to her an EFT in lieu of the ticket from Kottayam to Calicut (Ticket No. 232217169). The said passenger has not been examined. The contention of the counsel for the applicant that the statement at Annexure A-1(12)i.e. Ext. S-6 cannot have been written by the lady passenger, as the same contains such abbreviations, which are used

exclusively in the Railways and thus, the same must have been authored by the Railway vigilance authorities, cannot be just brushed aside. Had the said passenger been made available for examination, the applicant would have certainly had the opportunity to get the actual truth in this regard. Further, SW 4, Mr. Ulahannan, the individual, who had issued the EFT to the applicant has stated as under:-

Q. 56. Have yhou seen said lady passenger giving this statement (S.6)?
Ans. No.

Q. 57: Did you obtain the signature of the said ldy passenger in the EFT Foil?
Ans: No.

Q.58: If so, who had obtained it?
Ans: Vigilance Inspectors

Q.59: Had you seen the said lady passenger with your eyes?
Ans: I have seen one lady, I do not know it was a passenger or not.

Q.61: Please peruse Ext. S.7 and say whether anyone's hand writing other than yours available in it?

Ans: The name and signature of the passenger is not mine and the rest are my writing only.

15. While analyzing the evidences, the Inquiry officer laid stress to answer to the Examination in Chief Q. No. 51 and stated, ***"The passenger had also given a statement (Ext. S 6) in the presence of SW.4 who confirmed his endorsement in Ext. S6 vide his answer to Q.No. 51. Thus it is established that the Charged Official had resold the ticket to Mr. Maya Muralidharan of Kottayam."*** Had the I.O. considered the answers

to the questions during cross examination, i.e. Q. 56 and further questions and their answers, to contrast the same with answer to Q.No. 51, the result would have been the other way round.

16. Reply elicited in the cross examination of SW 4 vide answer to Q.No. 56 belies the statement of SW 5, wherein he has stated *"The passenger gave a statement in the presence of Shri K.P. Ulahannan at PO/KTYM in which she had stated that she had purchased the above ticket at Counter No. 3 of BO/KTYM by paying Rs 69/-."*

17. The question that arises now is, whether the probability of the applicant having re-sold the ticket is substantial to hold that she is guilty of having re-sold the ticket and thus violates provisions of Rule 3(1)(i) of the Railway Servants Conduct Rules. The following significant points are to be considered before coming to a conclusion, even under the standard of proof of pre-ponderance of probability:-

(a) Both the personal cash and the Railway cash were subjected to the verification and the same does not reflect extra cash in hand or in the chest. Rather, there was a deficiency of Rs 7/-. Had the cancellation money been pocketed by the applicant, then there ought to have been an extra cash either as a personal cash or in the railway cash.

(b) The person to whom the applicant is alleged to have re-sold the ticket has not been produced for cross examination.

(c) The statement purported to have been given by the said passenger has been couched with such abbreviations, which are exclusively the abbreviations of the Railways and common public may not have the knowledge of such abbreviations especially, CVI.

(d) The EFT was issued at the instance of the Vigilance party and SW4 Ulahannan clearly stated that he had not written the name of the passenger and he had handed over the book to the Vigilance Inspectors.

(e) The said Ulahannan also has stated in cross examination that he had not seen the statement having been given by the said passenger.

(f) Rather, he had stated that he had seen one lady and he did not know whether she is the passenger or not.

(g) The applicant had been in the counter from noon time and in all she had cancelled a number of tickets as is evidenced from Annexure A-10. Cancellation, prior to the two tickets cancelled in the presence of the Vigilance party at 23.08 hours was of 22.13, 22.16 and 22.17. A person who had malafide intention the applicant would have retained without canceling at least such tickets to those destination for which trains would be available at that point of time. For example, one of the tickets was to Ernakulam Town Station and the said ticket was cancelled at 21.03 hrs. Probability of such ticket being retained

is more in case a person had the ill intention to re-sell the ticket.

18. Thus, when the inquiry held is examined under judicial review, within the permissible limit as provided for in Moni Shankar, the conclusion that could be arrived at is that there is no evidence to show that the applicant had re-sold the ticket. Thus, the first article of charge cannot be held to be proved.

19. Again, Moni Shankar dealt with the mandatory question to be posed and the significance thereof has also been reflected therein. The said provision reads as under:-

> (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 evidence against him.

20. The questions asked by the Inquiry Authority in compliance with the above are as under:-

> Q. 68: The presenting side and your side have completed the production of documents/witnesses. In terms of Rule 9 (21) of Railway Servants D & A Rules, 1968, do you wish to explain the circumstances appears to be scaling against you and in the support of charges, adduced by the state witnesses?

Ans: I still deny the charges. Though opportunity is given to me to explain the circumstances/evidence appearing against me, I may be permitted to explain the circumstances by way of my written defence brief. So I may kindly be permitted to file my written defence brief on receipt of PO's written brief.

21. The applicant had accordingly filed the written brief, which was stated to have been 'carefully' gone through by the Inquiry Officer. There was no reference in his discussion in par 4 about the defence under para 2 (c), which has been pointed out in her representation against the Inquiry Report, vide Annexure A-6, in which para V reads as under:-

There is no evidence to show that Ext. S-4 was tendered for cancellation or that it was resold. There was no excess in my cash, but only Rs 7 shortage. Proceedings of Vigilance or Ex. S-6 are not legal evidence, simply because they contain the signatures of some Sws. I strongly reiterate par 2(c) of my written brief. I suspect that Ext. S-4 ticket was retained by the Vigilance and they only made out the fictitious Ext. S-6 statement after the departure of SW 1 and SW 2 to save the face of the Vigilance team. For this reason only, Exts. S-6 and S-8 do not contain the signature of SW-1 and SW-1.

22. When permission was granted to file written brief and no answer to the mandatory question was given save that written brief is being submitted, the I.O. ought to have addressed himself to the contentions made in para 2(c) of the defence brief. The report is totally silent about it. While asking the mandatory question, specific circumstances going against the applicant ought to have been pointed out. The purpose of asking the question is the same. Otherwise, prejudice is caused. The applicant has exhibited in her representation about the prejudice caused.

23. In Moni Shankar as well as in an earlier case of Ministry of Finance vs S.B. Ramesh (1998) 3 SCC 227, the significance and importance of asking the mandatory question was discussed. Failure to fully comply with the above in the considered view of the Apex Court would result in violation of principles of natural justice. In S.B. Ramesh (supra) the Apex Court extracted the order of the Tribunal in this regard and held as under:-

> ***13.*** *It is necessary to set out the portions from the order of the Tribunal which gave the reasons to come to the conclusion that the order of the Disciplinary Authority was based on no evidence and the findings were perverse. The Tribunal, after extracting in full the evidence of SW 1, the only witness examined on the side of the prosecution, and after extracting also the proceedings of the Enquiry Officer dated 18-6-1991, observed as follows:*
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> > *"After these proceedings on 18-6-1991 the Enquiry Officer has only received the brief from the PO and then finalised the report. 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 inquiry was held for recording the evidence in 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 Enquiry 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 the CCS (CCA) Rules. The omission to do this is a serious error committed by the Enquiry Authority. Secondly, we notice that the Enquiry Authority has marked as many as 7 documents in support of the charge, while SW 1 has proved only one document,*

namely, the statement of Smt K.R. Aruna alleged to have been recorded in his presence. How the other documents were received in evidence are not explained either in the report of the Enquiry Authority or in the proceedings. Even if the documents which were produced along with the charge-sheet were all taken on record, unless and until the applicant had requested the Enquiry Officer to mark certain documents in evidence on his side, the Enquiry Authority had no jurisdiction in marking all those documents which he had called for the purpose of defending himself on the side of the applicant while he has not requested for marking of these documents on his side. It is seen that some of these documents which are marked on the side of the defence not at the instance of the applicant, have been made use of by the Enquiry Authority to reach a finding against the applicant. This has been accepted by the Disciplinary Authority also. We are of the considered view that this is absolutely irregular and has prejudiced the case of the applicant. These documents, which were not proved in accordance with law should not have been received in evidence and that, any inference drawn from these documents is misplaced and opposed to law. We further find that the Enquiry Authority as well as the Disciplinary Authority have freely made use of the statement alleged to have been made by Smt K.R. Aruna in the presence of SW 1 and it was on that basis that they reached the conclusion that the applicant was living with Smt K.R. Aruna and that, he was the father of the two children of Smt K.R. Aruna. SW 1 in his deposition which is extracted above, has not spoken to the details contained in the statement of Smt K.R. Aruna which was marked as Ex. 1. ***Further it is settled law that any statement recorded behind the back of a person can be made use of against him in a proceeding unless the person who is said to have made that statement is made available for cross-examination, to prove his or her veracity. The Disciplinary Authority has not even chosen to include Smt K.R. Aruna in the list of witnesses for offering her for being cross-examined for testing the veracity of the documents exhibited as Ex. 1 which is said to be her statement. Therefore, we have no hesitation in coming to the conclusion that the Enquiry Authority as well as the Disciplinary Authority have gone wrong in placing reliance on Ex. 1 which is the alleged statement of Smt K.R. Aruna without offering Smt K.R. Aruna as a witness for cross-examination.*** *The applicant's case is that the statement was recorded under coercion and duress and the finding based on this statement is absolutely unsustainable as the same is not based on legal evidence. The other documents relied on by the Enquiry Authority, as well as by the Disciplinary Authority for reaching the conclusion that the applicant and Smt K.R. Aruna were living together and that they have begotten two children have also not been proved in the manner in which they are required to be*

proved." (emphasis supplied)

14. *Then, again after extracting the relevant portions from the Disciplinary Authority's order, the Tribunal observed as follows:*

> *"We have extracted the foregoing portions from the order of the Disciplinary Authority for the purpose of demonstrating that the Disciplinary Authority has placed reliance on a statement of Smt K.R. Aruna, without examining Smt Aruna as a witness in the inquiry and also on several documents collected from somewhere without establishing the authenticity thereof to come to a finding that the applicant has conducted himself in a manner unbecoming of a government servant. The nomination form alleged to have been filed by Shri Ramesh for the purpose of Central Government Employees' Insurance Scheme, was not a document which was attached to the memorandum of charges as one on which the Disciplinary Authority wanted to rely on for establishing the charge. This probably was one of the documents which the applicant called for, for the purpose of cross-examining the witness or for making proper defence. However, unless the government servant wanted this document to be exhibited in evidence, it was not proper for the Enquiry Authority to exhibit it and to rely on it for reaching the conclusion against the applicant. Further, an inference is drawn that S.B.R. Babu mentioned in the school records (admission registers) and Shri Ramesh mentioned in the municipal records was the applicant, on the basis of a comparison of the handwriting or signature or telephone numbers are only guesswork, which do not amount to proof even in a disciplinary proceedings. It is true that the degree of proof required in a departmental disciplinary proceeding, need not be of the same standard as the degree of proof required for establishing the guilt of an accused in a criminal case. However, the law is settled now that suspicion, however strong, cannot be substituted for proof even in a departmental disciplinary proceeding. Viewed in this perspective we find there is a total dearth of evidence to bring home the charge that the applicant has been living in a manner unbecoming of a government servant or that, he has exhibited adulterous conduct by living with Smt K.R. Aruna and begetting children."*

15. *On a careful perusal of the above findings of the Tribunal in the light of the materials placed before it, we do not think that there is any case for interference, particularly in the absence of full materials made available before us in spite of opportunity given to the appellants. On the facts of this case, we are of the view that the departmental enquiry conducted in this case is totally unsatisfactory and without observing the minimum required procedure for proving the charge. The Tribunal was, therefore, justified in rendering the findings as above and*

setting aside the order impugned before it.

***16.** In the result, the appeal fails and is dismissed accordingly with no order as to costs.*

(Rule 14(18) of the CCS (CC&A) Rule is in pari materia with Rule 9(21) of the Railway Servants (Disciplinary & Appeal) Rules, 1968.)

24. In Moni Shankar (supra) the Apex Court has held as under:-

***"20.** The enquiry officer had put the following questions to the appellant:*

"Having heard all the PWs, please state if you plead guilty? Please state if you require any additional documents/ witness in your defence at this stage? Do you wish to submit your oral defence or written defence brief? Are you satisfied with the enquiry proceedings and can I conclude the enquiry?"

***21.** Such a question does not comply with Rule 9(21) of the Rules. What were the circumstances appearing against the appellant had not been disclosed.*

25. Thus, there has been complete violation of principles of natural justice in so far as the failure on the part of the Inquiry Officer in fulfilling his obligation mandated in Rule 9(21) of the Railway Servants(D & A) Rules.

26. Perhaps, had the I.O. rendered his finding without taking into account S-6 and also had he kept in mind the answer given by SW 4 in cross examination (extracted above) no prejudice would have been caused to the applicant even in the circumstances that 9(21) of the Rules has not been strictly adhered to. In that case, no prejudice would have been cause to the

applicant.

27. The disciplinary authority endorsed the findings of the Inquiry Officer and imposed the penalty of Compulsory Retirement.

28. Pointing out the deficiencies in conducting the inquiry, the applicant filed the representation vide para 4 of Annexure A-6, but the Disciplinary authority has thoroughly eclipsed the said contention. This makes the order of the D.A. unsustainable.

29. The lacunae both at the hands of the I.O. and the D.A. have been pointed out by the applicant in her appeal. The appellate authority's view in this regard is as under :-

> "There is no need for the IO to pinpoint any oral or documentary evidence appearing against the CO and question her on that. Further, as per 9(21) of RS (D&A) Rules 1968 it is necessary for the IO to question generally, only in case the CO has not examined herself. In this case the PO has examined all the 5 witnesses and the CO has cross examined them. Thus, the requirement under Rule 9(21) of RS(D&AS) Rules, 1968 have been met."

30. The above decision goes diagonally opposite to the law laid down by the Apex Court in the case of S.B. Ramesh (supra) and Moni Shankar (supra).

31. In so far as the second charge is concerned, cancellation not through system but by defacing of one ticket cannot be considered as such a

misconduct to award the severe punishment of compulsory retirement. In fact, by not effecting the cancellation through the system, the applicant would have only run into the risk of making good the money which was returned to the passenger. Non cancellation either by system or by defacing is no doubt against the rules, and the punishment for the same too could be by way of transfer to another division, which the applicant already suffered and on departmental proceedings being conducted, the penalty should be commensurate with the extent of gravity of charge. Thus, the penalty of compulsory retirement is shockingly disproportionate, if this charge is held to be proved.

32. In view of the above, the impugned penalty order and the appellate orders are quashed and set aside. Respondents are directed to reinstate the applicant forthwith subject to the refund of the terminal benefits drawn by the applicant being refunded in one lump sum to the Railways. The Disciplinary authority is directed to proceed further with the stage of considering the inquiry report with the representation of the applicant against the inquiry report and take arrive at a suitable decision. In other words the proceedings are deemed to continue. Thus, the period of absence from duty from the date of compulsory retirement till the date of reinstatement shall be treated one under deemed suspension. Pension if any drawn by the applicant shall be treated as subsistence allowance.

33. Respondents are directed to pass suitable orders. If the reinstatement is taken place beyond a period of two months from the date of communication of this order, the applicant shall be entitled to full pay

and allowance for the period beyond two months of communication of this order, as if reinstatement takes place within two months.

34. ***The OA is allowed to the above extent. No cost.***

(K.GEORGE JOSEPH)
Member (A)

(Dr.K.B.S.RAJAN)
(Member (J)

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