CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH
O.A.No.531/11

Wednesday this the 22nd day of May, 2013

C O R A M :

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE MR.K.GEORGE JOSEPH, ADMINISTRATIVE MEMBER

V.S Radhakrishnan
S/o K.Vasudevan (Retd. Senior Commercial Clerk/Kochuveli/
Southern Railway/Trivandrum Division)
Residing at "Sai Vas", VP 1/156, Sankaran Nair Road
Kundamon Bhagom
Perukavu P.O
Pin – 695 573
Thiruvananthapuram District ...Applicant

(By Advocate Mr.T.C.G Swamy)

V e r s u s

1. Union of India represented by the
General Manager, Southern Railway
Headquarters Office
Park Town P.O
Chennai – 600 003

2. The Chief Commercial Manager
Southern Railway, Headquarters Office
Chennai – 600 003

3. The Additional Divisional Railway Manager
Southern Railway, Trivandrum Division
Thiruvananthapuram – 695 014

4. The Senior Divisional Commercial Manager
Southern Railway
Trivandrum Division
Thiruvananthapuram – 695 014 ...Respondents

(By Advocate Mrs.K Girija)

This application having been heard on 20/05/13 this Tribunal on 22/05/13 delivered the following :-

ORDER

HON'BLE DR.K.B.S RAJAN, JUDICIAL MEMBER

1. The applicant, while working as Parcel Clerk at Trivandrum, had allegedly committed a mis-conduct on 26.10.2005, whereby he was charge sheeted vide memorandum dated 16.01.2007 (on which date he was serving as Senior Commercial Clerk, Kochuveli) and the charge is as under:-

> "(1) He demanded Rs.30/- for his personal gains while effecting delivery of parcels under Parcel Way Bill Nos.244024, 244025 and 244026 all dated 25.10.2005 ex ERS to TVC and collected the amount through a contract labourer.
>
> (2) In addition to the subject amount of Rs.30/-, he had collected Rs.740/- for effecting delivery of the parcels through the said contract labourer for his personal gains. "

2. The charges having been stoutly denied by the applicant, the regular Inquiry was conducted and in the Inquiry, after the closure of the prosecution witnesses, the Inquiry Officer (I.O for short) posed certain questions to the applicant as the applicant did not enter into the witness box. The mandatory questions asked are as under :-

> " Q.127. So far, you have heard the evidence of administrative witnesses. Please do you have any defence witnesses/documents to be examined on your behalf?
>
> Ans. I have no witnesses to be examined as defence witnesses. I may be allowed to present the defence document viz. the details of transactions (both local and foreign) at inward section at PO/TVC on the day of the check i.e. On 26.10.2005.
>
> Q.128. At this stage do you admit/deny the charges? Would you like to be examined yourself as a witness in your own case or indicate the way of your defence?

Ans. Still I deny the charges. I do not offer myself to be examined as a witness in my case. I may be permitted to submit my written defence brief by way of defence. "

3. The I.O held that the charge relating to demanding and accepting of Rs.30/- stood proved while the other part of the charge (collection of Rs.740/ for affecting the delivery of a parcel) stood as not proved (Annexure A-1 refers). The Disciplinary Authority, however, disagreed with the I.O in so far as the second charge is concerned and his reason for disagreement as contained in Annexure A-11 is as under:-

" Para 5.7.2

According to Ext.S5, Shri Usman had stated that he had collected approximately Rs.400/- from different parties. In this context, it is pertinent to point out that Shri Usman and stated that he had written Vanchinad and Intercity on the reverse and handed over the same to the party after collecting Rs.30/- from the party as per the instructions of the delivery Clerk Shri Radhakrishnan sir. Like this, he had collected approximately Rs.400/- from diferent parties. The words "Like this" means that the amount of Rs.400/- (approximately) was collected in the same manner as per the instructions of Shri Radhakrishnan. Ext.S5 has been witnessed by SW 3, who in fact read over the same in Malayalam to enable SW 6 to understand the same.

It is also pointed out that SW 5 who is the circumstantial witness has also identified Ex.S5 and stated that it was prepared in his presence. SW 6 also identified S 5 and his signature in it and stated that it was read over by SW 3 in order to enable him to understand the same. SW 5 and SW 6 were only circumstantial witnesses, who were not aware of the check before the conduct of the same and they have identified S5 and given life to the document.

It is also noted that in Ext. S5, the amount written was only approximate. After this, when the cash was taken out and in the presence of SW 6 and SW 6 had actually counted and written the denomination of Rs.770/-. Out of which Rs.30/- was the amount from the currencies handed over to SW 1 in the presence of SW 2. vide Ext. S1.

Para 5.7.3

It has infact come in evidence that the CO was Inward (local) and SW.3 was in Inward (foreign). Also that there were other porters apart from Shri Usman. But, in the statement given by Shri Usman, i.e. S5 he has not mentioned anywhere the name of SW 3. Hence, the CO claiming the contract labourer had collected the amount for his own purpose as his wages were meager, is only as after thought.

Para 5.7.4

There was no necessity for the Investigator to collect the details of the Rrs and the number of foreign and local items handled by Shri Usman.

The Vigilance team had not come to a conclusion suddenly as the evidence to this charge was given by the agent Shri Usman himself in Ex.S5 in the presence of SW5 and SW 6 and they appeared on the floor of the enquiry and gave oral evidence to this effect confirming their earlier statements. Thus, the collection of money by the CO using Shri Usman as an agent has been established beyond doubt. "

4. The applicant gave his explanation. However, the Disciplinary Authority holding that the applicant was guilty of the misconduct, imposed the penalty of compulsory retirement vide Annexure A-1 dated 09.01.2009. Appeal preferred by the applicant was unsuccessfull and the same was dismissed vide order dated 23.06.2010 at Annexure A-2. The revision petition filed by the applicant also stood dismissed vide Annexure A-3 order dated 11.01.2011. Hence, this O.A has been filed seeking the following reliefs:-

"8.(i) Call for records leading to the issue of Annexures A1 to A3 and quash the same;

(ii) Declare that the applicant is entitled to all the benefits as if there is no disciplinary action against him;

(iii)Award costs of and incidental to this Application. "

5. The respondents have contested the O.A. According to them the

applicant cannot agitate against the penalty order imposed. It has been contended that the applicant mainly relied upon the non-examination of prime witness Shri Usman (authour of Exhibit S-5). Having agreed in the Inquiry, he is not expected to speak otherwise in the O.A. Again it has been contended that during the preliminary Inquiry also the said Usman had confessed before the Vigilance Inspector in the presence of the applicant and stated that he was collecting the money only on behalf of the applicant and as per instructions. This statement, according to the respondents, was not denied by the applicant. The respondents also relied upon Annexure A-8 Vigilance Report, wherein the fact of demand and acceptance of Rs.30/- had been admitted by the applicant himself by putting his signature without any demur. The respondents also contended that non-examination of the said Mr.Usman is not fatal to the Inquiry. The respondents further stated that as the applicant refused to be self examined and rather preferred to submit a written statement, he cannot contend that Rule 9(21) of Railway Servants(Discipline and Appeal) Rules, 1968 has been violated.

6. Counsel for the applicant, after narrating the sequence of events in this case, submitted that the challenge is on the following four grounds.

" (a) This being a trap case, the drill to be performed in accordance with the procedure laid down (including having two gazetted officers as independent witnesses) has not been followed and thus the proceedings are vitiated as held by the Apex Copurt in the case of **Moni Shankar vs Union of India (2008 (3) SCC 484)**.

(b) The Disciplinary Authority while disagreeing with the findings of the I.O has not given any correct or cogent reason for disagreement.

(c) The entire decision, both of the I.O (findings) and the Disciplinary Authority, is based on the statement made by Shri.Usman, who however, was not examined or cross examined eventhough he was one of the witnesses as shown in Annexure A-4 to the charge sheet. It is only SW-5 and 6 who have stated that the statement was prepared by Mr.Usman and signed. This confirms only the fact of the statement having been given by Mr.Usman but by no-stretch can it be stated that the evidence of SW-5 and SW-6 could prove the contents of S-5.

(d) The mandatory question which is expected to be asked by the I.O was not asked as required by the Rules. The counsel for the applicant has also relied upon the following decisions:-

(1) A1 SLJ 2013 Pre IV – P 36

(2) Al SLJ 2013 P.I – 27

(3) 1999 SCC (L&S) 429

(4) 2000(3) CAT Ernakulam D – 29

(5) 2006 SCC (LPS) – 919

(6) AIR 1969 SCC 938 "

7. Counsel for the respondents argued on the basis of the reply furnished and the important points argued by the counsel are as narrated in para 5 above.

8. Arguments were heard and documents perused.

9. As to the non-compliance of the procedure in respect of a trap case, the contention of the respondents as given in the inquiry report is that as per the decision of the Apex Court in the case of **CCM/SE Railway Vs G.Retnam and others**, instructions contained in para 704 and 705 of the Vigilance Manuals were in the nature of departmental instructions with no statutory force.

10. At the time of argument, the counsel for the applicant referred to Apex Court decision in **Moni Shankar** , wherein the judgment of the Apex Court in G.Retnam's case supra was also considered in detail. The Apex Court in Monishankar's case held as under:-

"9. In the case of Moni Shankar, (2008) 3 SCC 484, the Apex Court has first discussed the trap cases in general and the case of G. Ratnam as under:-

10. We may at the outset notice that with a view to protect innocent employees from such traps, appropriate safeguards have been provided in the Railway Manual. Paras 704 and 705 thereof read thus:

"704. Traps.—(i)-(iv) * * *

(v) When laying a trap, the following important points have to be kept in view:

(a) Two or more independent witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification to meet the defence that the money was actually received as a loan or something else, if put up by the accused.

(b) The transaction should be within the sight and hearing of two independent witnesses.

(c) There should be an opportunity to catch the culprit red-handed immediately after passing of the illegal gratification so that the accused may not be able to

dispose it of.

(d) The witnesses selected should be responsible witnesses who have not appeared as witnesses in earlier cases of the Department or the police and are men of status, considering the status of the accused. It is safer to take witnesses who are government employees and of other departments.

(e) After satisfying the above conditions, the investigating officer should take the decoy to the SP/SPE and pass on the information to him for necessary action. If the office of the SP, SPE, is not nearby and immediate action is required for laying the trap, the help of the local police may be obtained. It may be noted that the trap can be laid only by an officer not below the rank of Deputy Superintendent of Local Police. After the SPE or local police official have been entrusted with the work, all arrangements for laying the trap and execution of the same should be done by them. All necessary help required by them should be rendered.

(vi)-(vii) * * *

705. Departmental traps.—For departmental traps, the following instructions in addition to those contained under Para 704 are to be followed:

(a) The investigating officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where two gazetted officers are not available immediately, the services of non-gazetted staff can be utilised.
All employees, particularly, gazetted officers, should assist and witness a trap whenever they are approached by any officer or branch. The Head of Branch should detail a suitable person or persons to be present at the scene of trap. Refusal to assist or witness a trap without a just cause/without sufficient reason may be regarded as a breach of duty, making him liable to disciplinary action.

(b) The decoy will present the money which he will give to the defaulting officers/employees 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 GC notes for legal and illegal transactions. The memo, thus

prepared should bear the signature of decoy, independent witnesses and the investigating officer/Inspector. Another memo, for returning the GD notes to the decoy will be prepared for making over the GC notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and investigating officer/Inspector. The independent witnesses will take up position at such a place wherefrom they can see the transaction and also hear the conversation between the decoy and delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe a fact to which they will be deposing in the departmental proceeding at a later date. After the money has been passed on, the investigating officer/Inspector should disclose the identity and demand, in the presence of the witnesses, to produce all money including private, and bribe money. Then the total money produced will be verified from relevant records and memo for seizure of the money and verification particulars will be prepared. The recovered notes will be kept in an envelope sealed in the presence of the witnesses, decoy and the accused as also his immediate superior who should be called as a witness in case the accused refuses to sign the recovery memo, and sealing of the notes in the envelope.
*(c)-(d) * * * "*

***11.** The trap was laid by the members of the Railway Protection Force (RPF). It was a pre-arranged trap. It was, therefore, not a case which can be said to be an exceptional one where two gazetted officers as independent witnesses were not available.*

12. Indisputably the decoy passenger was a constable of RPF. Only one Head Constable from the said organisation was deputed to witness the operation. The number of witnesses was, thus, not only one, in place of two but also was a non-gazetted officer. It was a pre-planned trap and thus even independent witnesses could have also been made available.

***13.** When the decoy passenger purchased the ticket, the Head Constable was at a distance of 30 metres. The booking counter was a busy one. It normally remains crowded. Before the enquiry officer, the said decoy passenger accepted that he had not counted the balance amount received from the appellant after buying the ticket. It was only half an hour later that the vigilance team arrived and searched the appellant.*

***14.** While we say so we must place on record that this Court in Chief Commercial Manager, South Central Railway v. G. Ratnam*[1] *opined that non-adherence to the instructions laid down in Paras*

704 and 705 of the Vigilance Manual would not invalidate a departmental proceeding, stating:

> *"17. We shall now examine whether on the facts and the material available on record, non-adherence of the instructions as laid down in Paras 704 and 705 of the Manual would invalidate the departmental proceedings initiated against the respondents and rendering the consequential orders of penalty imposed upon the respondents by the authorities, as held by the High Court in the impugned order. It is not in dispute that the departmental traps were conducted by the investigating officers when the respondents were on official duty undertaking journey on trains going from one destination to another destination. The Tribunal in its order noticed that the decoy passengers deployed by the investigating officers were RPF constables in whose presence the respondents allegedly collected excess amount for arranging sleeper class reservation accommodation, etc. to the passengers. The transaction between the decoy passengers and the respondents was reported to have been witnessed by the RPF constables. In the facts and circumstances of the matters, the Tribunal held that the investigations were conducted by the investigating officers in violation of the mandatory instructions contained in Paras 704 and 705 of the Vigilance Manual, 1996, on the basis of which inquiries were held by the enquiry officer which finally resulted in the imposition of penalty upon the respondents by the Railway Authority. The High Court in its impugned judgment has come to the conclusion that the inquiry reports in the absence of joining any independent witnesses in the departmental traps, are found inadequate and where the instructions relating to such departmental trap cases are not fully adhered to, the punishment imposed upon the basis of such defective traps are not sustainable under law. The High Court has observed that in the present cases the service of some RPF constables and railway staff attached to the Vigilance Wing were utilised as decoy passengers and they were also associated as witnesses in the traps. The RPF constables, in no terms, can be said to be independent witnesses and non-association of independent witnesses by the investigating officers in the investigation of the departmental trap cases has caused prejudice to the rights of the respondents in their defence before the enquiry officers.*

18. We are not inclined to agree that the non-adherence

> of the mandatory instructions and guidelines contained in Paras 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained."

> *15. It has been noticed in that judgment that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued. "*

11. In the case of K.J Gandhi in O.A 155/03 decided on 23 Jul 2009, on an identical issue, this Tribunal after extracting the above part of the judgment in Moni Shankar's case, has held as under:-

> "10. The above decision when applied upon the facts of the case, the same fits in all the four squares. Just as in the other case there was only one independent witness instead of two and that too a non gazetted official, in the instant case also, there has been only one and that too non gazetted official. In fact, the sequence of events would even go to show that this witness is also a party of decoy and not exactly a witness. Similarly, the mandatory question asked also is not in the manner as required by the rules. Thus, the inquiry has been vitiated for non following of the stipulated procedure. "

12. It has been submitted by the counsel for the respondents on instructions that the said decision in K.J Gandhi's case is under judicial review by the Hon'ble High Court and the writ petition filed by the respondents is pending.

13. Notwithstanding the fact that the case of Gandhi (supra) is under challenge, the decision of the Apex Court squarely applies to the facts of the case. Failure to adhere to the rules relating to the trap cases has weakened the case of the respondents to a great extent.

14. As regards the next contention of the applicant's counsel that the decision of the respondents is entirely based on the statement of Shri Usman who had not been examined the same vitiates the proceedings, there is force in the argument. When the author of a statement was not examined, and the statement relied upon, then a prejudice is caused to the delinquent official. In the case of **Canara Bank Versus Devasis Das 2003 4 SCC 557**, the observations of the Hon'ble High Court hereunder was not over reviewed by the Apex Court:-

> "Prejudice is patent as the author of the disputed document was not produced to prove or disprove a signature and contents of the letters in question".

15. In the instant case, admittedly, Shri Usman, whose statement had been fully relied upon by the respondents was not examined. By circumstantial evidence, SW 5 and 6 who were by the side of the said Mr.Usman at the time of giving statement and who were witnesses to this statement, had been examined and they have stated as to the statement given by Shri Usman.

16. The following are the relevant questions during examination and cross examination:-

> "Q.85. Please peruse Ext.S-5 duly identifying your signature, *if any in it and say what do you know about it ?*
>
> Ans. I dentify my signature in Ext.S-5. This is the statement of Shri Usman and it was read over/Smt.Bright, CCC/III/TVC.
>
> Q.94. Please peruse Ext.S-14 duly identifying your signature, *if any in it and stay what do you know about it?*
>
> Ans. This is the final proceedings and I identify my signatures in all the pages.
>
> Q.116. In Ext.S-5 it was stated that he had allegedly collected money at the instance of Delivery Clerk buty at the time of proceedings were drawn (Ext.S-14) Shri Usman denied that. What have you got to say?
>
> Ans. Shri Usman has already given a statement that he

had collect the money as per the instructions of Delivery Clerk and what Shri Usman said in Ext. S-14 is unfair (Page No.6)

Q.117. Can you recollect or after perusing the statement who were all present at the time of giving Ext.S-5?

Ans. Vigilance Inspectors, Shri Kiran, RPF/SI and myself were present.

17. In para 5.6.7 the I.O has inter-alia stated as under:-

" The CO further argued that in the presence of CPS (SW-6) and SIPF(SW-5) while giving statement Shri Usman had corroborated the allegation but in CO's presence he emphatically denied and it was also recorded in the final proceedings (Ext.S.14). "

18. It is to be stated here that S-5 and S14 are the documents written by the said Usman former behind the back of the applicant, while latter in his presence. There has been sharp variation in the two. When there is variation between exhibit S-5 and S-14 in cross examination, SW 6 has stated that what Shri Usman said in Exhibit S-14 is unfair. As stated earlier, S-5 was a statement given by Mr.Usman in the absence of the applicant and behind his back. While Exhibit S-14 is one which was given by the said Usman in the presence of the applicant as held by the I.O in para 5.6.7. It is trite that what ever has been stated behind back of the delinquent should be proved beyond reasonable doubt. Thus the absence of said Mr.Usman has disabled the applicant to cross examine him. By mere statement of SW-5 and 6 though the fact of Mr.Usman having signed the statement could be held as proved, notwithstanding the fact that the contents of the said order was read over, the contents cannot be said to have been proved. The statements of SW-5 & 6 could at best be treated as heresay evidence and thus to prove the charge, there must be corroborating evidences which is not available in the records. There is no other concrete evidence to corroborate the statements of SW 5 and SW 6.

19. As regards the next contention that the Disciplinary Authority has not given any cogent reason to disagree, a look at the note of disagreement vide Annexure A-11 would go to show that the statement of Shri Usman S-5 has been taken on its face value with the interpretation of the term "like this" of the Disciplinary Authority. The term of 'like this' according to the Disciplinary Authority meant that the money was collected in the said manner as per the instructions of the applicant. The interpretation of the aforesaid words can only be a presumption especially when the author of the statement was not available for cross examination. Again, the Disciplinary Authority has relied entirely by the circumstantial witnesses SW 5& 6. This would not be sufficient to prove that the applicant was guilty of the mis-conduct. The disagreement thus lacks in merit.

20. As regards mandatory questions, according to the counsel for the respondents since the applicant had chosen not to stand in the witness box and preferred to written brief, the mandatory question become directory and hence, non following of the said rule is not fatal to the case.. In this regard, reliance was placed on the decision in the case of State Bank of Patiala vs S.K. Sharma, ((1996) 3 SCC 364 wherein the law relating to disciplinary proceedings with reference audi alteram partem and attendant aspects has been crystallized as hereunder:-

> **33.** We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):
>
> (1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (*a*) the provision violated is of a substantive nature or (*b*)

whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can *also* be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at

the same aspect as is dealt with herein and not a different or distinct principle.

(4)(*a*) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(*b*) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it *or* that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar*. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no *adequate* opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing". (*a*) In the case of former, the order passed would undoubtedly be invalid (one may call it 'void' or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the

> Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (*b*) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]
>
> (6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.
>
> (7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.

In so far as Rule 9(21) of the Railway Servants (Discipline and Appeal) Rules is concerned, the same is pari materia with the provisions of Rule 14(18) of the CCS(CC&A) Rules, 1965. This provision had been held as mandatory in character by the Tribunal in the case of S.B. Ramesh vs Ministry of Finance and others (1996) 32 ATC 731) When challenge was made to the above order by the Government, the Apex Court had considered the same, extracted a substantial portion of the order of the Tribunal and upheld the same. The following is inter-alia the extracted portion in the judgment of the Apex Court in **Ministry of Finance vs S.B. Ramesh (1998) 3 SC 227:-**

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:

> "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....."

That the provisions of Rule 14(18) CCS(CC&A) Rules, 1965 have been held to be mandatory by the CAT has been impliedly upheld by the Apex

Court. .

21. Rule 9(21) of the Railway Servants (Discipline and Appeals) 1966 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. "

22. The above Rule clearly states that if the charged Officer does not stand as witnesses in his own case, the I.O **shall** ask a mandatory question. As extracted above, the mandatory questions were certainly asked by the I.O but the question is whether they meet the requirement for the purpose for which such mandatory questions are to be asked. In Monishankar (supra) the Apex court had considered this question and held in para 20 & 21 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. "

23. According to the counsel, once an opportunity to stand in tie witness box is given but not availed of, and the delinuent has chosen to file written brief, the latter option being in lieu of the former, the provisions of Rule 9(21) becomes directory. That is not so. For, provision for filing of written brief is one provided for in Rule 9(22) and thus, the charged officer has two opportunities namely he can stand in the witness box and also he can furnish a written brief. Furnishing of written brief cannot thus be a substitute for standing in the witness box. As

such, the respondents are not right in contending that since the applicant has refused to enter into the witness box, the mandatory question was only directory

24. Thus considering from any angle, the decision of the Disciplinary Authority cannot stand judicious scrutiny. **The impugned order at Annexure A-1 necessarily has to be struck down as illegal and is liable to be quashed and set aside Ordered accordingly.**

25. In view of the fact that the punishment order itself is quashed and set aside, the edifice constructed thereon, namely, the order of the Appellate Authority and Revisionary Authority inevitably has to meet the same Waterloo!. Thus, the **Original Application is allowed.** The order of compulsory retirement is set aside and so are the orders of the Appellate and Revisionary authorities It is declared that the applicant is entitled to all such benefits as if there is no disciplinary case against him. The consequential benefits would include reinstatement of the applicant, if the applicant has not crossed the age of superannuation and payment of pay and allowances for the period for which he was kept out of service. In case the applicant crossed the age of 60, the respondents shall deem that the applicant had served till the age of superannuation and accordingly, he shall be paid his pay and allowances and also his pension and terminal benefits shall be based on his last pay drawn.

26. The above order shall be complied with within a period of 6 months from the date of communication of this order. Needless to mention that at the time of disbursement of pay and allowances the extent of pension drawn during the period in question shall be adjusted. No order as to costs.

(Dated this the 22nd day of May, 2013)

K.GEORGE JOSEPH
ADMINISTRATIVE MEMBER

Dr.K.B.S.RAJAN
JUDICIAL MEMBER

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