IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. No. 532 of 89

DATE OF DECISION 5-6-91

K. Kunhiraman — Applicant (s)

Shri V.P. Raghu Raj — Advocate for the Applicant (s)

Versus

The Senior Divisional Engineer, Southern Railway, Trivandrum and 3 others — Respondent (s)

Smt. Sumathi Dandapani — Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. S.P. Mukerji, Vice Chairman

The Hon'ble Mr. N. Dharmadan, Member (Judicial)

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not? Yes
3. Whether their Lordships wish to see the fair copy of the Judgement? Yes
4. To be circulated to all Benches of the Tribunal? No

JUDGEMENT

N. Dharmadan, M(J)

The applicant in this case has challenged the orders at Annexure 22 and 24 passed by the Disciplinary Authority (DA for short) and Appellate Authority (AA for short) respectively, holding the applicant guilty of having possessed assets disproportionate to his known sources of income as on 31-12-1984.

2. The applicant is working as Inspector of Works, Southern Railway at Trichur. While working

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so, the Central Bureau of Investigation searched his house on 20-4-85 and prepared two inventories of valuable and other things kept in the house and started preliminary enquiry. Annexure 1 and 2 are the lists of inventories. The department required the applicant to submit a property return from 2-10-58. Accordingly he submitted the return on 29-5-1985 giving details of his income and assets. The CBI after investigation found that there is no material to sustain criminal charges and referred the case recommending departmental action. Thereafter the first respondent on 8-12-86 served the applicant Annexure A-6 memo of charge with a statement of imputation of misconduct. It reads as follows:

> "....That Shri K. Kunhiraman while [illegible] functioning in various capacities in Southern Railway during the period between 1-7-78 and 30-12-84, was found on 30-12-84, to possess assets disproportionate to his known source of income to the extent of about Rs.80,544/-, suggesting that the aforesaid Shri.K. Kunhiraman acquired the said disproportionate assets by questionable means and/or from dubious sources and that thereby he failed to maintain absolute integrity.
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> By his above acts, Shri K. Kunhiraman violated Rule 3(1)(1) of the Railway Services (Conduct) Rules 1966..."

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3. As per the charge, the applicant is in possession of assets disproportionate to his known sources of income to the extent of Rs.80,544/-. It is suggested that the applicant has acquired the said disproportionate assets by questionable means from dubious sources. According to the statement of allegations, the applicant had a total income (inclusive of income from his father, wife and two sons) of Rs.2,03,936/- and assets of Rs.1,93,269/-. The applicant submitted his reply Annexure-8 dated 7-12-1987. After receipt of the reply the first respondent decided to conduct an enquiry and passed Annexure-9 order dated 22-12-1987. He appointed an enquiry officer who is attached to Vigilance Deptt. of Southern Railway. He was a Non-Malayali who does not know Malayalam language.

4. The applicant raised the following contentions in the enquiry proceedings:

(i) The cost of construction of the house 'Sivapuri' is Rs.30,163/- only as against the cost Rs.69,033/- fixed by the CPWD Engineer.

(ii) The income of Rs.19,060/- from his 2nd son Sivadasan has not been taken into

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account.

(iii) The receipt of Rs.8000/- from the tenant Muralikrishnan has not been accounted.

(iv) The income from the sale of two Sindhi cows at Rs.8,050/- and the income therefrom 1956 to 1988 at Rs.22,000/- has not been taken into account.

(v) The assets and savings of the applicant from 1973 has not been taken into account.

(vi) The actual income from his first son Shri Narayanan was also not taken into account.

(vii) The details of the house 'Ganesh' constructed by the applicant's wife and children and the agricultural income of Rs.8000/- were not properly considered.

The applicant produced Annexure 10 to 20 documents in support of his contentions. The Enquiry Officer after conducting a detailed enquiry and taking evidence submitted Annexure21 Enquiry report finding the applicant guilty of acquiring disproportionate assets to the tune of Rs.63,735/-. According to the applicant the enquiry is vitiated and it cannot be accepted. But the Disciplinary Authority passed Annexure-22 order on 17-1-89 accepting the enquiry report and imposed a penalty of reduction to the post of Works Mate for a period of 2 years (N.R.) with effect from 1-2-1989 duly fixing the pay at

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Rs.1500/- in the scale of Rs.1320-2040. The applicant filed Annexure-23 appeal before the 2nd respondent who passed Annexure-24 order dated 19-7-1989 dismissing the appeal, but modifying the penalty to reduction to the stage of Rs.1520/- in the grade of Rs.1400- 2300 as Inspector of Works Grade-III.

5. The respondents have filed counter affidavit and additional counter affidavit. Similarly the applicant also filed his rejoinder and additional rejoinder.

6. The learned counsel for the applicant formulated the following points for consideration:

I. There was no material to issue a charge memo against the applicant

II. The enquiry officer being a non-malayali and majority of the documents produced in the evidence are in Malayalam, there was no proper appreciation of the evidence

III. While a C.B.I. officer well-versed in prosecution was appointed as the presenting officer, the applicant was not afforded same facility by making an appointment of defence assistant having legal background.

IV. The copies of the statement of witnesses recorded xx during the CBI investigation were not given to the applicant inspite of

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the request.

v. The enquiry officer omitted to consider material evidence available in the files.

vi. The appellate authority disposed of the appeal without hearing the applicant.

vii. The denial of promotion due to the pendency of enquiry and investigation in this case amounts to double punishment attracting the principles of double jeopardy.

7. Having heard the arguments on both sides and after examining the documents carefully, I am of the opinion that the applicant is not well founded in his submission that this is a case of no materials to issue the charge, as contended by the applicant. It is pertinant to note in this connection that the applicant has no case any where in the pleading before any of the statutory authorities or before this Tribunal that the charge is vague and indifinite and he was not able to understand the same. On the otherhand he has admitted that he has understood the charges. It is stated in the enquiry report "the charged employee admitted that he had understood the charge throughly, but he denied the charges.." Even though he had denied the charges and produced 35 documents and examined three witnesses on his side he was unable to establish that the charge levelled against him is false and unacceptable. The following extracts from the enquiry report are relevant for examining the contentions raised by the parties.

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"...5.6 The Presenting Officer pointed out that out of 35 defence documents submitted by the charged employee during the course of the enquiry, certain documents such as Ex-D.4 and D.6 suggest that the charged employee was having slightly more income and expressed no objection to admit such income which are found genuine as per original and authentic documents..."

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8.4.....We cannot take into account the sound financial condition of his father as claimed by the charged employee in the absence of any valid documentary evidence to the effect that the charged employee was obtaining considerable financial assistance from his father..."

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8.5 With the above back ground of the charged employee, I have to consider whether the probable savings R_s.4286/-as on 30th June 78 is reasonable. Taking his salaries from 1959 to 30-6-78 and also his family composition and the consequential expenditure towards the maintenance of the family including upkeeping of children and their education, I have reason to believe that the delinquent could have saved only to that extent because the expenditure can be worked out at the minimum rate of Rs.200/- p.m. for the family maintenance for that 20 years during which period none of his children were working nor was there any additional income other than his salary. I find therefore the probable savings assessed by the Investigating Official as Rs.4286/- at the end of June 1978 is fully justified and reasonable.."

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8.6.6. .....Since the agreement was executed as 1st day of January 1985, it cannot be taken that the agreement made during the dead midnight on 31-12-84 but it should definitely be in the morning of 1-1-85. The occupation can be after the payment of advance i.e. may be in the evening. So, I have no evidence to add this amount (Rs.8000/-) under the heading Income...."

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8.6.7.....It is evident that this Ex.D.11 was written subsequent to Ex.P.15 just to cover up the issue. Hence, I find it unreasonable to account this amount as Rs.1200/- and the existing amount shown against Sl.No.3(b) under House rent is perfectly in order.

8.6.8. As far as agricultural income out of cocoanut yield from 9 cocoanut trees, the claim of the charged employee for about Rs.10,000/- for the check period is highly exaggerated. From 1978 to 1984, the yield from cocoanut could be reasonably calculated as 1755 numbers for 6 1/2 years at the rate of 30 cocoanuts per tree per year. If the average rate is calculated at rate

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of Rs.150 paise per cocoanut during the check period the income could have been Rs.2630/-. So, the income out of agricultural yield (only cocoanut) can be taken as Rs.2630/- against item 3(a) agricultural income instead of Rs.2,000/-..."

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8.6.10.....As per the statement of imputations the earnings of Sri. Sivadasan, (SW.23) is taken as Rs.5000/- for the period 1983-84 whereas the charged employee claimed in his written brief that SW.23 had earned Rs.24,500/- which includes the profit over investment and sale value of furniture disposed on winding the Bhardwaj Associates..."

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"...I would like to state that Sri. K.K. Sivadasan born in 1964 and he had completed his ITC course in July 1983 (vide Ex.P.22 and P.23 and P.37). However, the Ext. P.38, the deed of partnership shows that he was a partner at his very early age while he was still a student in 1982. I have my own doubt that the signatures affixed in Ext. P.37 and in enquiry proceedings (Page 34), do not tally with any of the five signatures in page 3 of Ext. P.38. I cannot agree that there will be such a wast difference in the signatures of a person affixed in 1982 with that of one affixed in 1988, say within 6 years. Moreover (Ext. P.38) the deed of partnership is not a registered document to be relied up on fully. Even Sri KK Sivadasan (SW.23) has not stated any thing about the winding of BHARADWAJ Associates during 1984, while giving his statement to the investigating officer....."

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"... I am unable to accept that SW.23 who had just completed his Diploma course inJuly 1983 could have earned such a large amount i.e. Rs.5,500/- Rs.3800/-, Rs.6000/- and terminal benefits due to winding up of Bhardwaj Associates to the tune of Rs.39,300/-. Further, the charged employee has not provided any authentic evidence to show that he had received Rs.24,500/- from Sr. KK Sivadasan (SW:23) which amount is said to have been deposited in charged employees bank account on 10-4-84, as in Ext. P.66. So, there is no justification and also no documentary evidence to show that the SW.23 had earned such a large amount and given to the charged employee.."

8.6.11.As far as the income from Sri KK Narayanan (the eldest son of the charged employee), it is mentioned that he had joined in service some where in April 1983 at Calcutta and was drawing Rs.2400/- per month. However, there is no documentary evidence to show as to how much money he was giving to the charged employee, as well as his actual income. On perusal of Ex.P.66 the Bank account of the charged employee from 1982 to 1984, there is no crediting of amount regularly every month or once in two months to show that the charged employee was regularly receiving money from Calcutta and Neyveli where the eldest son was working. At least, the

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charged employee should have produced his eldest son Sri KK Narayanan as a Defence witness to set in evidence as to theamount he was paying or he has paid to the charged employee. Hence, I find it not unreasonable to compute the income of the charged employee to this effect at the rate of Rs.300/- p.m. I have no evidence to reject the income indicated against item No.14(b) in page 3 of the statement of imputations, as unreasonable in the absence of any documentary evidence...."

10. Let me now consider the kitchen expenses shown as Rs.46,898/- against 14(a) of page 5 of statement of imputations based on Exts. P.29, P.30 and P.31. The contentions of the charged employee is that the Ext.P.30 shows the purchase and payment from 1978-79 to 1985-86, which is beyond the check period 1.7.78 to 31-12-84. I do agree his contention. However, I have to point out that Ext.P.30 does not show the Calender year but cooperative year which commences from 1st of July to 30th of June every year. So, the account, which is shown against 1978-79, 79-80 80-81, 1981-82, 1982-83 and 1983-84 and the average amount for another six months from 1-7-84 to 31-12-84 is now correctly calculated.

a)	July 1978 to June 1979	Rs. 2,975.00	Ext.P.30 and P.31
	July 1979 to June 1980	Rs. 4, 260.00	
	July 1980 to June 1981	Rs. 5,050.00	
	July 1981 to June 1982	Rs. 6,050.00	
	July 1982 to June 1983	Rs. 5.550.00	
	July 1983 to June 1984	Rs. 4,900.00	
	July 1984 to Dec. 1984	Rs. 1,500.00	
	(Average amount taken)	30,285.00	

b) Rice, wheat, sugar, oil etc. in Fair Price Shop (Society)

Average for the check period 78 months Rs.6,247.00 Ext.P.30

c) Expenditure for purchase of milk, fruits, vegitables, meat, eggs, fish etc for the check period - 78 months Rs.10,460.00

Total (a) + (b) + (c) Rs.46,992.00

I would like to say that the amount of Rs.10,460/- must have been based at the rate of Rs.135/- per month towards the items mentioned and calculated for the check period. So, I do not find any reason to alter the existing amount under Kitchen expenses. As per the statement P. 27 only, thecost of milk works out toRs.3780/- for the check period for four years (i.e. for 48 months). The amount of Rs.1000/- shown under the medical expenditure is not unreasonable. Even-though the family members are covered under the Railway Medical facilities, it cannot be said that railway employees are always taking medicines from Railway hospitals only. There could have been occassion for buying medicines from outside medical shops and Rs.1000/- for the check period is reasonable."

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11...I have substantial evidence and reasonable factors to conclude that the evaluation done by the SW:28 Executive Engineer, CPWD/CLT as in Ext.P.2 perfectly in order. As far as earnings of the charged employee's spouse is concerned, I have to state that she was not having any independent income and independent account for her own. She was fully dependent on the delinquent. All the properties (mobile and immobile) in the name of his wife(purchased and sold) and value of sale proceeds of the land, house and ornaments,cows etc. were taken into account. The properties purchased in the name of his wife must be taken as his assets unless contrary is proved. In as much as the value of all items such as ornaments, cowsyieldings, sale proceeds,of land was taken as income of the charged employee he cannot have ground for grievance. The charged employee had not produced any concrete Proof to establish that his wife was having indpendent source of regular income to be reckoned with. Inspite of taking the entire income of his wife, into account the Charged employee could not satisfactorily account for the assets disproportionate to the total known source of income...."

From the return submitted by the applicant before the department on 28-5-85, the applicant's income and the assets were known to the department and the matter was considered by the department in the back ground of the applicant's service under the Railway from 2-10-58 which is stated in the Enquiry report as follows:

"...8.3..As far as the above contention of the charged employee is concerned I am to point out that the charged employee was appointed as Gangman with basic pay of Rs.30 plus allowance Rs.45/- (Total Rs.75/-) on 2-10-58 and from August 1959 to July 1971 he was working as a brick lyer labour with a basic salary of Rs.70/- plus Rs.10/-(Rs.80/-) with yearly income Re.1/- every year. I has been substantially proved that the charged employee has been working as a Class IV from October 1958 to July 1971 (i.e for

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about 13 years) with a total salary, ranging between Rs.75/- and Rs.210/- p.m. However, from October 1971 to February 1978 he was drawing gross salary ranging from Rs.610/- p.m. from March 1978 to April 1980, drawing gross salary ranging from Rs.610/- to Rs.680/- p.m. and from 1980 April to December 1984 drawing gross salary ranging from Rs.881/- to Rs.1581/- p.m. These gross salary is computed without taking into account the monthly deduction towards, house rent, provident fund subscription, Loan (temporary P.F.) recovery, co-operative society recovery which was in the range of Rs.6/- to 448/- p.m. from 1958 to December 1984. As per the records, the net salary of the employee upto June 1959 is Rs.75/- p.m. from August 1959 to June 1962 ranging from Rs.75/- to Rs.82/- p.m. from july 1962 to October 1974 Rs.223/- from October 1974 to June 1978 ranging from Rs.400/- to Rs.555/- p.m. and from July 1978 to December 1984 the net salary was drawn ranging from Rs.555/- to Rs.806/-, excluding TA and arrears if any. As such the charged employee according to his salary income, will definitely come under the classification of lower middle class family after his marriage in 1955 and his appointment in 1958 which otherwise considered that his family had started functioning with his independant income from 1955 onwards...."

8. It is seen that the check period has been fixed by the D.A. based on the materials available in this case. The period from 1-7-78 to 31-12-84 was taken as the check period. The D.A. has taken into account the applicant's prior savings upto 1978 with reference to available evidence including his bank account of Rs.4286/-. Hence it is to be presumed that

the applicant's prior earnings before the check period were also taken into account by the D.A. Under these circumstances it cannot be said that the enquiry is vitiated on account of the lack of materials or due to the failure of considering the previous assets and acquisitions of the applicant.

9. The Supreme Court held in STATE OF MAHARASHTRA V. POLLONIJI DABABASHAW DARUWALLA, 1987 (Supp.) SCC 379, that " it is for the prosecution to choose, what according to it, is the period which having regard to the acquisition activities of the public servant in amassing wealth, characterise and isolate that period of special scrutiny. It is always open to the public servant to satisfactorily account for the apparently disproportionate nature of his possession. Once the prosecution establishes the essential ingredients of the offence of criminal misconduct by proving, by the standard of criminal evidence, that the public servant is, or was at any time during the period of his offence, in possession of pecuniary resources or property disproportionate to his source of income known to the presecution, the presecution discharges its burden of proof and

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the burden of proof is lifted from the shoulders of the prosecution and descends upon the shoulders of the defence. It then becomes necessary for the public servant to satisfactorily account for the possession of such properties and pecuniary resources.."

The Supreme Court in VISWABHUSAN NAIK V. STATE OF ORISSA, AIR 1954 SC 359 held as follows:

> "....All that the prosecution has to do is to show that the accused or some person on himself is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by Sec.5, viz. Criminal misconduct in discharge of his official duty..."

The Supreme Court in later cases also laid down the same proposition (see Swamy V. The State, AIR 1960 SC 7 and Krishnand V. The State of M.P., AIR 1977 SC 796).

10. The principles in the above cases will apply in disciplinary proceedings initiated against persons who possess disproportionate assets from dubious sources and hence the burden is very heavy on the applicant to prove his innocence. In this case the D.A. conducted elaborate enquiry and produced sufficient materials and evidence in support of the charge and hence the

the burden of proof has shifted to the applicant to prove that the charge is unsustainable, and he is innocent. As indicated above he has not produced any reliable documentary or oral evidence to satisfy the enquiry authority that the charge is absolutely false and unsustainable. Without discharging his burden he is now raising a number of technical contentions which were not even placed before the statutory authorities for consideration. If these contentions were urged before the disciplinary authority and appellate authority we would have had the benefit of their views about the matter and decided the issues. Our jurisdiction in disciplinary proceedings is verylimited particularly when three statutory bodies viz. Enquiry Authority, Disciplinary Authority and Appellate Authority have gone through the matter carefully and decided the issue involved in this case in one voice. The Supreme Court in State of Orissa V. Bidyabhushan, AIR 1963 SC 779, held as follows:

> "...Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The court has no jurisdiction, if the findings of the Enquiry Officer or the Tribunal prima facie make out a case of misdemeanour, to direct the authority to reconsider the order because in respect of some of the findings but not all it appears that there had been violation of rules of natural justice..." (emphasis supplied).

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The Supreme Court followed this dictum in a large number of cases. It would be useful to read the following paragraph from the celebrated judgment of the Supreme Court in Parma Nanda 's case (AIR 1989 SC 1185). It reads as follows:

> "....25. The view taken in Bidyabhushan case, AIR 1963 SC 779 has been repeatedly affirmed and reiterated in Railway Board V, Niranjan Singh, (1969) 3 SCC 548 at p.552; O.P. Gupta case, AIR 1970 SC 679 and Union of India V. Sardar Bahadur, (1972) 2 SCR 218. Any doubts as to the incapacity of the court to review the merits of the penalty must vanish when we read the remarks of Mathew.J in Sardar Bahadur's case (at P.225 of SCR):
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> > "A disciplinary proceeding is not a criminal trial. The standard of proof required is that of preponderance of probability and not proof beyond reasonable doubt. If the inference that Nand Kumar was a person likely to have official dealings, with the respondent was one which reasonable person would draw from the proved factors of the case, the High Court cannot sit as a Court of Appeal over a decision based on it. Where there are some relevant materials which the authority has accepted and which materials may reasonably support the conclusion that the officer is guilty, it is not the function of the High Court exercising its jurisdiction under Article 226 to review the materials and to arrive at an independent finding on the materials. If the enquiry has been properly held the question of adequacy or reliability of the evidence cannot be canvassed before the High Court."
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> > The learned judge also said (p.227) (of SCR):
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> > "Now it is settled by the decision of this Court in State of Orissa V. Bidyabhusan Mohapatra (AIR 1963 SC 779) that if the order of a punishing authority can be supported on any finding as to substantial misdemeanour for which the punishment can be imposed, it is not for the Court to consider whether the charge proved alone would have weighed with the authority imposing the punishment. The Court is not concerned to decide whether the punishment imposed provided it is justified by the rules, is appropriate having regard to the misdemeanour established.."
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> 26. So much is, we think, established law on the scope of jurisdiction and the amplitude of powers of the Tribunal. However, of late we have been receiving a large number of appeals from the orders from Tribunals - Central and State - complaining about the interference with the penalty awarded in the disciplinary proceedings. The Tribunals seem to take it within their discretion to interfere with the penalty on the ground that it is not commensurate with the delinquency of the official. The law already declared by this Court, which we reiterate makes it clear that the Tribunals have no such discretion or power.

> 27. We must unequivocally state that the jurisdiction of the Tribunal to interfere with the disciplinary matters or punishment cannot be equated with an appellate jurisdiction. The Tribunal cannot interfere with the findings of the Inquiry Officer or competent authority where they are not arbitrary or utterly perverse. It is appropriate to remember that the power to impose penalty on a delinquent officer conferred on the competent authority either by an Act of legislature or rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority. If the penalty can lawfully be imposed and is imposed on the proved misconduct, the Tribunal has no power to substitute its own discretion of that of the authority. The adequacy of penalty unless it is malafide is certainly not a matter for the Tribunal to concern with. The Tribunal also cannot interfere with the penalty if the conclusion of the Inquiry Officer or the competent authority is based on evidence even if some of it is found to be irrelevant or extraneous to the matter.."

In the case on hand there is sufficient evidence and materials to support the charge levelled against the applicant. The findings of enquiry officer are neither perverse nor based on insufficient and inadequate materials as contended by the applicant. Under these circumstances, as already found it cannot be said that there is no materials in this case. I am of the view that there is no merit in the contention of the applicant that this is a case of no materials to issue the charge.

11. The next submission made by the learned counsel for the applicant is that the enquiry officer being a non-malayali not conversant with the Malayalam language has prejudicially effected the enquiry proceedings. the enquiry is bad and his action

This contention was not raised specifically before the enquiry officer as a preliminary issue. On a perusal of

the enquiry proceedings it is seen that no difficulty has been experienced by the applicant in the enquiry on account of the language problem. The depositions of all the witnesses were recorded in English and read over to them in vernacular. After having participated in the enquiry, the applicant cannot now raise this plea particularly when the applicant did not feel any difficulty as regards the language during the whole of the enquiry proceedings. Even in this application it was raised only at a later stage in the M.P. filed by the applicant seeking permission to amend the original application. I am fully aware of the view that in proceedings before the Administrative Tribunals strict compliance of the forms and pleadings would not be insisted because this is a specialised institution not barred by the procedural provisions. Neverthless it would be unfair to allow to argue a point not raised before any of the statutory authorities. The Supreme Court in Smt. Jamilabi Abdul Khadar V. Shankarlal Gulachand and others, (1975) 11 SCWR 307, held that 'a second point faintly raised was prudently abandoned for the reason that it had not been set up in the pleadings or urged at earlier stages. Last minute ingenuity is not fairplay in court and we cannot and did not permit him to argue that the court had no material in the recitals.... We do not examine the merits of the contention at all.." The privy council also expressed the same view in a

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similar context in Income Tax Commissioner V. Krishna Kishore, AIR 1941 PC 120.

> "..No such contention is raised in the case as stated nor has the commissioner referred to it the opinion which the statute requires him to give nor was it dealt with in the High Court. Hitherto the assessments on the family would appear to have been made under Sec.9 as to the house property. It is neither convenient nor conducive to accuracy that new and important point of law should be raised for the first time at their Lordship Board, or that decisions should be given upon matter not duly submitted to the High Court. Their Lordship will therefore express no opinion as to this new line of attack..."

Under these circumstances if this Tribunal considers this issue which was not placed before any of the lower authorities it would be unfair and would be laying down a bad precedent which makes difficulty, for the administration particularly when it is found on the facts and circumstances of this case by all the authorities that the applicant is guilty of charge. There is no bonafide grievance for the applicant in so far as his plea pertaining to the language problem.

12. There is no force in the third contention urged by the learned counsel for the applicant. The applicant was assisted by Sri A.S.K. Menon, a Railway employee who was not stated to be a inexperienced person to conduct the enquiry proceedings. The applicant never sought for permission of the enquiry officer to allow him to defend his case by a defence assistant who is qualified in law. If he had made such a request

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and the enquiry officer rejected the same the applicant can have a case. In fact, in Annexure-8 reply to the charge memo he only stated that the applicant may be given an opportunity for hearing him along with his defence assistant and such an opportunity was given to him. On a careful perusal of the enquiry proceedings and the files thereof and in the light of the fact that Sri ASK Menon was an experienced defence assistant who xxxx had conducted the enquiry to the satisfaction of the applicant I am not in a position to find that the applicant was prejudicially affected on account of the failure, if any, one the part of the enquiry officer in providing the facility of a legally trained and competent defence assistant for defending the applicant in the enquiry. There is no denial of principles of natural justice in this case because of the failure to provide a legally trained person to assist the applicant in the enquiry. The Supreme Court in A.K. Roy V. Union of India, AIR 1982 SC 710, held that " It may not be that, denial of legal representatives is not denial of natural justice per se, and therefore, if a statute exclude that facility expressly, it would not be open to the Tribunal to allow its fairness as said by Lord Denning M.R. in Maynard V. Osnand, (1977)1 QB 240, 253 can be obtained without legal representation.." The Kerala High Court in Subramania Sarma V. State Bank of Travancore, 1987 (2) KLT 632, considered this issue and held as follows:

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"12. In Tripathi V. State Bank of India, (1984) 1 LLJ 2, a Bench of three judges of the Supreme Court had occassion to consider the scope of the rules of natural justice in the context of disciplinary proceedings against an employee of the State Bank and their Lordship had observed

> 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. Every thing depend on the subject matter, the application of natural justice, resting as it does upon the statutory implication, must always be in confirmity with the scheme of the Act and with the subject matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complaint; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of enquiry, the rules under which the Tribunal is acting, the subject - matter to be dealt with, and soforth.'

Two things seem to the important:one, the statutory prescription governing the procedure, and two suffering of some prejudice by the delinquent. The rules in this case have already been seen; they do not permit a lawyer's presence at the enquiry. And as for prejudice, no attempt at all was made at the hearing to suggest that despite the engagement of a brother officer experienced in participating such enquiries any kind of prejudice was caused to the petitioner because of the appearance of a trained prosecuter on the other side..." (emphasis added)

13. The learned counsel submitted that the copies of the documents including the statements of witnesses recorded in the CBI investigations were not given to the applicant before the enquiry. Hence the enquiry proceedings are vitiated and there is violation of the principles of natural justice. I have gone through the enquiry files. Along with the charge, Annexure-2 statement of imputation of misconduct, Annexure-III list of 31 witnesses and Annexure-IV list of 65 documents with which the articles of charge were framed against the applicant, were served on him. The articles of charge do not disclose that the statement of witnesses recorded were relied on for framing articles of charge against the applicant. In the nature of

allegations against the applicant the matter can be proved merely placing reliance on the documents referred to in Annexure-4. The applicant before submitting his reply to the charge, requested for the perusal of documents relied on, for framing the charge in this case. When he requested for perusal of documents for preparing his defence he was asked to appear before the Chief Vigilance Officer in the third floor of the Head Quarters Office, Southern Railway, Madras at 10.00 hrs. on 12-1-87 for the purpose of perusal of documents and taking copies thereof as per office memo dated 2-1-87. This was replied by the applicant by his letter dated 8-1-87 intimating his prepardness to attend the office on that day. Accordingly, the applicant appeared in the office and perused the documents. This is clear from a confidential letter, seen in the files, written by the Chief Vigilance Officer, V.A. Raja Rao, to the D.R.M. dated 1-4-87. The relevant portion of the letter reads as follows:

> "...Shri K. Kunhiraman, IOW Cannanore, has attended this office on 12-1-87 and perused

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the documents. He has asked for additional documents and necessary action is being taken by this office."

Again as per memo dated 7-8-87, the applicant was directed to attend the office at 10.00 AM on 17.8.87 for taking extracts of documents and statements of witness required by him. He was also given journey pass to go to Madras and return to Cannanore. From the letter of the applicant dated 19-8-87 addressed to Senior Divisional Engineer, Palghat, he has admitted that as directed in the memo dated 7-8-87 he proceeded to Madras and perused all the available documents with the Head Office. But he made a further request to arrange the perusal of the documents with the CBI officials which were taken from his custody. In reply to his letter, it is seen that, the applicant was advised by the officer (letter of even number dated 20-8-87) to approach the Superintendent of Police, CBI, SPE, Cochin. It is further seen from the letter written by the Chief Vigilance Officer dated 4-9-87 to D.R.M., Palghat that the applicant attended the Vigilance office on 17-8-87 and "perused the remaining documents and also the statement of witnesses and taken the extracts of the documents".

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In this connection, it is relevant to note a confidential letter in the files written by Shri Rajagopalan, Dy. CVO/E dated 29-10-87 to Shri P.N. Doraiswamy, Sr. DEN/West, Palghat. It is stated in that letter that the applicant has perused all the relevant documents. The relevant portion of it reads as follows:

> ".From a perusal of your letter No.CON/J/V/264 dated 31-8-1987 and this office letter of even number dated 4-9-87, it could be seen that the charged official has perused all relevant documents. In his letter dated 19-8-87 he has not specified any other document he desires to peruse. He has also been advised to contact CBI's office for return of his personal documents in your letter dated 20-8-87."

From these correspondence and the letters it can be seen that all relevant documents for shaping up the defence in this case and cross examining the witness were made available to the applicant and he has perused them and taken extracts of the relevant documents.

14. Further, in Annexure-A8 reply the applicant has admitted that he had taken extracts of a few letters required for him. It is also clear from the enquiry report that the applicant had admitted the perusal of documents mentioned in Annexure-III to VI

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The relevant portion of the enquiry report reads as follows:

> "...The charged employee admitted that he had understood the charge thoroughly but he denied the charge. The charged employee submitted that he had perused all the documents mentioned in Annexure-3 to the charge memorandum."

In the enquiry proceedings the applicant has admitted in answer to a question that " I have perused all the documents mentioned in Annexure-III to charge memorandum. However, certain documents which have been confiscated by the C.B.I. and shown in the seizure memo have also got to be produced in the enquiry for me to be fully prepared to submit myself to the enquiry". He has not mentioned which are those documents confiscated from him and how they are relevant for the enquiry. Further he did not make any complaint before any of the authorities in the enquiry that he was not given the copies of the statements of the witnesses or recorded by the CBI and that he cannot cross examine the witnesses without these statement. Moreover, the applicant has not made any specific request for the copies of the statement of the witnesses recorded by the CBI or other documents before the

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enquiry officer nor did he make any such complaint before the appellate authority. He never stated before any of the authorities that the denial of copies of statements recorded in the CBI enquiry prejudicially affected the applicant in shapping up his defence or cross examining the witnesses. In this connection it is to be noted that after having participated in the enquiry without raising any objection in this behalf the applicant cannot assail the disciplinary proceedings stating that the enquiry and penalty order have been vitiated on the ground of denial of documents requested by him. The Supreme Court has held in STATE OF ASSAM V. MAHENDRA, AIR 1970 SC 1255, that withholding of documents from the delinquent employee would not vitiate the disciplinary proceedings if the finding against him does not solely rest upon them. In the instant case three authorities independently considered the whole evidence and came to a unanimous view regarding the findings and conclusions. They cannot be disturbed by this Tribunal as if it is sitting in appeal after adverting to minor irregularities. In the above cited case, the Supreme Court held as follows:

> "...Over and above these circumstances, it is also to be seen that the enquiry officer was not the disciplinary authority competent to impose the punishment against the respondent. Thecompetent authority is the Superintendent of Police. The show cause notice, issued on October 18, 1958 as well as the order of dismissal passed by the Superintendent of Police, dated December 3, 1958 clearly show that the said officer has independently gone into the evidences on record in respect of the charges for which the respondent was tried and has, after taking into account the explanations furnished by him, independently come to the conclusion that the respondent is guilty. Similarly, the Deputy Inspector-General-of-Police, Range Assam, before whom the respondent filed an appeal has also very elaborately and in considerable

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> detail discussed the entire evidence on record and has agreed with the conclusions regarding the guilt, of the respondent. We have already held that there is no violation of the rules of natural justice in the enquiry proceedings. Even assuming that there was any defect in the said enquiry proceedings, in as much as the punishing authority and the appellate authority xxxxxxxxxxxxxxxxx xxxxxxxxx, the Superintendent of Police, respectively, have independeltly considered the matter and found the respondent guilty on the evidence on record, it must be held that in the circumstances of this case there has been no violation of principles of natural justice when the order of the dismissal was passed.."

In the instant case, the charge against the applicant was framed after perusing the return submitted by the applicant himself on 28-5-85, disclosing his income and assets and Annexure 1 and 2 inventories prepared by CBI on the search of the house of the applicant. The documents relied on by the respondents in this connection are mentioned in Annexure-IV attached to the charge memo. The disciplinary authority had not referred to or relied on the statement of witnesses recorded in the preliminary enquiry for preparing the charges nor are they relied on by the Enquiry Authority for arriving at his findings entered xxxxxxx in the enquiry report as could be seen from the report. It is an admitted fact that the charge against the applicant can be proved by documentary evidences referred to in Annexure-IV I to VI. The applicant did not produce any reliable documentary evidence to disprove the allegation made against him. He has no case that the finding against him has been arrived at solely on the statements of witnesses recorded by the CBI. Under these circumstances, it is difficult to understand how he was prejudiced due to the denial, if any, of opportunity for the perusal of the statement

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of witnesses in the preliminary enquiry. In fact there is no such denial to the applicant to peruse and take extracts of the copies of the relevant documents including the statement of witnesses in the preliminary enquiry. He has admitted that he had perused all the documents and taken extracts of relevant portions. Hence it is to be presumed that he has made use of them for cross examining the witness. But I am of the view that the statement of witnesses would notbe helpful to advance the case of the applicant particularly because this is a case of suppression of assets, which has to be either established or disproved by documentary evidence alone and not by oral or other evidence. However, having regard to the facts and circumstances of the case and the admission of the applicant extracted above, I am of the view that there is no substance in the contention that the applicant was denied the facility to peruse the documents including the copies of the statements of witnesses recorded in the CBI investigation, and that the applicant had been prejudically affected in the enquiry on account of the same.

15. The next contention raised by the learned counsel for the applicant is that the enquiry officer omitted to consider the materials evidence and relied on irrelevant matters. He has brought to our notice four specific instances in support of his contention. They are (1) while examining witness (SW.4) Shri.

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Chandrasekharan in the enquiry, a document Ext. P.6 dealing with the salary particularly was marked. But this was not an authenticated document. The enquiry officer did not call for the authenticated copy for verification accepted in the enquiry. (2) Two documents produced in the course of evidence and the examination of SW 23 (Shri KK Sivadasan) were not permitted to be marked by the enquiry officer. (3) When SW 28(Shri Narayanan Kutty, Executive Engineer) was examined, he admitted that the calculation regarding cost of construction of two building was made on the basis of the valuation prevailing at the time of inspection and not at thetime of construction of the building. Hence, the correct valuation of the building has not been made by the enquiry officer. (4) When SW 18 (Shri V.R. Kutty) Goods Guard was examined, he stated about the statement of accounts of the applicant from 1978-86 maintained in the Southern Railway Employees Consumer Copperative Stores Limited., Calicut bearing A/c No.432. The applicant made a submission that the original ledgers maintained by the society based on which Ext.P.30 was prepared should be called for and examined. But the enquiry officer did not take steps to bring the original and examine the same.

16. These are not very important document relevant for the main issue involved in this case. The applicant has not established by giving satisfactory explanation as to how the above documents are to be treated as material evidence crucial for proving the defence version. However, I will examine the same. Ext. P.6 pertains to salary particulars of the

applicant. Even though it is unauthenticated it the applicant has no case that/is a false document and it should be rejected out-right. He wanted only a verification with authenticated document which the enquiry officer did not do. There is nothing wrong in accepting these documents on the facts of this case without further verification. Regarding the two documents sought to be produced when SW23 was examined, it can be seen from para 8.6.10 of the enquiry report that the enquiry officer mentions about these documents and gave cogent and convincing reason for not accepting the documents. They are not very material documents. They are only two letters dated 20-7-83 and 27-4-88, one addressed to the witness by one Shri Babu and another written by I.T.O. Regarding the next item even though SW28 Narayanan Kutty stated that the calculation regarding the cost of construction of two buildings of the applicant was made on the basis of valuation prevailing at the time of inspection, in the course of his examination in answer to question number 237 he has admitted that the valuation was made on the basis of the market rate prevailing at the time

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of construction. The statement regarding the valuation of the building has been marked as ExtP-45 and the enquiry officer has correctly fixed the value of the construction on the basis of the available evidence. Similarly, the enquiry officer did not find it necessary to call for the original ledger maintained in the Southern Railway Employees Consumers Cooperative Stores Limited as requested by the applicant for verification of Ext. P-30 because it was found that Ext.P.30 statement of accounts of the applicant was correct and complete. It cnnnot be said on the basis of specific instances pointed out by the applicant that the enquiry officer omitted to consider any material evidence which caused prejudice to the applicant. It is to be remembered in this connection that this Tribunal is not sitting in appeal over the decisions of the Disciplinary Authority and the Appellate Authority for evaluating the evidence. Hence I am cannot appraise the evidence and come to different conclusion. I am of the opinion that there is no merit in the contention of the applicant.

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17. The applicant's further contention that the appeal was disposed of without giving him an opportunity of being heard cannot be accepted. From the files it is seen that the appeal was presented by the applicant before the D.R.M. Southern Railway Trivandrum on 29-1-89 personally before him with a covering letter containing only the following request.

> "....The affidavit-cum-petition may please be heard and orders may please be passed urgently, as the impugned order will take effect from 1-2-89..."

He did not make any request for a further posting and a personal hearing before the appeal is heard and disposed of. Accordingly it appears that the applicant was heard in respect of the matter on the very same day on which the applicant presented the appeal. It can be seen from the notes written on the covering letter that the applicant has made his submissions about the appeal personally to D.R.M. while presenting the appeal and he had made notes on the same. Hence I am of the view that there is no merit in the submission of the applicant.

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18. The last contention urged by the learned counsel for the applicant is that the denial of his promotion during the pendency of the disciplinary proceedings amounts to double punishment and hence the punishment imposed against him is illegal. There is no such pleading in this application giving details about the effective date of the operation of punishment and his promotion so as to consider whether there is any such denial of promotion to the applicant during the operation of the revised punishment imposed by the Appellate Authority. Hence, I am not considering the applicant's contention raised in this behalf in this application. He has also filed another application O.A. 594/89 seeking for an earlier promotion. That case was heard along with this case. The judgment was pronounced on 29.4.91 allowing the application with the following observation indicating that the respondents can proceed with the penal action by implementing the directions in the judgment. The relevant portion reads as follows:

> "Accordingly, we allow the application and direct the respondents to pay the salary and all other emoluments applicable to the post of IOW Grade-II to the applicant w.e.f. 24.1.1986 in accordance with law as if he had worked in that post subject to the penalty orders Annexure A-9 and A-10."

19. The learned counsel for the applicant has not raised any other point for our consideration. No argument was advanced relying on the latest Supreme Court decision in Union of India Vs. Mohammad Ramza Khan and others, AIR 1991 SC 471. I am not considering the relevancy of this judgment in this application due to the fact that it has not been raise

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by the learned counsel for the applicant.

20. Under these circumstances of this case, I am of the view that the applicant misserably failed in the discharge of his burden and establish his innocence. On the other hand the Department had proved the case against the applicant by producing sufficient materials and evidence which remain unrebutted. The relevant findings entered by the Enquiry Officer in the Enquiry Report extracted in para 7 (supra) are unassailable. The applicant participated in the enquiry in which he was given sufficient opportunity to adduce evidence and disprove the case of the deptt. and prove his innocence. Hence, there is no violation of principles of natural justice in this case. After having participated in the enquiry with the opportunity of examining all relevant documents relied on by the Department to prove his guilt, the applicant is now raising some technical objections before us. This is like sitting on the fence and seeking a chance of exoneration and when he failed to prove his innocence and courted punishment he has turned round and assailed the Department on technical grounds. This cannot be allowed. If this is allowed on the facts and circumstances of this case, it would cause gross injustice to the Department particularly when the Department had spent a lot of public money and time for conducting a detailed enquiry in a careful manner without any legal flaw. Under these circumstances, I am of the view that the

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application is devoid of any substance and it is only to be rejected. Accordingly, I dismiss the application, but without any costs.

5.6.'91

(N. DHARMADAN)
JUDICIAL MEMBER

Hon'ble Shri S.P.Mukerji,Vice Chairman

I have gone through the judgment rendered by my learned Brother and also carefully and anxiously perused the document and the enquiry file. I am unable to overcome the feeling that the whole disciplinary proceedings in this case have from the very beginning some fatal fundamental flaws which would render the findings of the disciplinary authority and the appellate authority illegal and unconstitutional inspite of what my learned Brother has stated in his judgment.

2. Firstly, the charge memo itself is basically absurd and illogical and cannot sustain any enquiry or punishment based thereon. The charge reads as follows:-

> " That Shri K.Kunhiraman while functioning in various capacities in Southern Railway during the period between 1.7.1978 and 30.12.84 was found on 30.12.1984, to possess assets disproportionate to his known source of income to the extent of about Rs.80,544/- suggesting that the aforesaid Shri K.Kunhiraman acquired the said disproportionate assets by questionable means and/or from dubious sources and that thereby he failed to maintain absolute integrity.
>
> By his above acts, Shri K.Kunhiraman violated Rule 3(1)(i) of the Railway Servants (Conduct) Rules, 1966". (emphasis added)

The disproportionate excess assets of Rs.80,544/- mentioned in the charge-sheet has been derived by the details of "income during the period between 1.7.78 and 31.12.84", "the expenditure during the above period and "assets as on 31.12.84" as given with the charge-memo(Annexure-II) as follows:-

Income between 1.7.78 to 31.12.84	Rs.2,03,926.00
Savings till 1.7.78 as per the bank balance on 1.7.78	Rs. 4,286.00
Total of income and savings between 1.7.78 and 31.12.84	Rs.2,08,212.00
Expenditure during the above period	Rs. 95,487.15
Net available income till 31.12.84	Rs.1,12,724.80
"Assets as on 31.12.84"	Rs.1,93,269.00
Excess of assets over available income and saving	Rs. 80,544.15

The gross unpardonable fallacy in the aforesaid mode of computing excess of assets over income and savings is that while the income and other liquid resources reduced by the expenditure relate to the check period of six and a half years between 1.7.78 and 31.12.84, the assets on which excess has been calculated relate not only to those acquired during that period but to the total accumulated assets over 26 years as on 31.12.84. Logically, against the income and savings reduced by the expenditure relatable to the check period , only those assets which are acquired during the check period and nothing more should have been taken into consideration because the assets inherited or acquired before the check period stand accounted for and covered by the overall income and savings till 1.7.78. Thus

by considering the total assets of 26 years as on 31.12.84 and comparing the same with resources available only during the check period of 6 1/2 years, the applicant has been subjected to an outrageous inquisition from which not even the most honest can escape an unmerited indictment. This will be evident from an illustration as given below.

3. Suppose an absolutely and impeccably **HONEST** officer started his official career in 1958 without any assets whatsoever. During twenty years between 1958 and 1977 he earned an income of Rs.10,000/- of which he spent Rs.6,000/- to live. Suppose that from his net income of Rs.4,000/- he acquired assets of Rs.3,000/- during these twenty years in the form of landed estate, furniture, ornaments, utensils etc. Then he would still have a cash saving of Rs.1,000/- at the end of 1977. During the check period from 1.1.1978 to 31.12.84 supposing he had earned an income of Rs.7,000/- and incurred a living expenditure of Rs.3,000/- he would have saved a further Rs.4,000/- from his income which with the cash savings of Rs.1,000/- as on 31.12.77 would enable him to acquire additional assets of Rs.5,000/- during 1978-84. At the end of 1984, i.e. as on 31.12.84 he would thus have total assets worth Rs.8,000/- but no savings. Suppose a vigilance enquiry is mounted against him for the check period 1978-1984 the position as would emerge would be as follows.

		Income	Expenditure	Assets acquired during the period	Savings in cash at the end of the period
(Pre-check period)	1958-77:	Rs.10,000	Rs.6,000	Rs.3,000	Rs.1,000
(Check period)	1978-84:	Rs.7,000	Rs.3,000	Rs.5,000 (Rs.4000 net income during check period plus Rs.1000 savings from pre-check period)	Nil

If we follow the same method as has been followed in the case before us then even in case of this absolutely honest officer, the vigilance authorities will still find him possessing disproportionate assets as follows

Assets on 31.12.84	Rs.8,000.00
Income during the check period	Rs. 7,000.00
Savings from 1958-77	Rs.1,000.00
Total available income	Rs.8,000.00
Expenditure during check period	Rs.3,000.00
Net income during the check period	Rs.5,000.00
Assets as on 31.12.84	Rs.8,000.00
Disproportion of assets over income	Rs.3,000.00 !

4. The above will make it clear that even though every paisa of the aforesaid honest officer's income has been fully accounted for, as a result of wrongly taking the total assets as on 31.12.84(instead of increase in assets during check period) into account the absolutely honest officer in our example will still be found to be in possession of disproportionate assets . This fallacy can be cleared only if the assets acquired during the check period worth Rs.5,000/-only is taken into account. This will tally with the net available income of Rs.5,000/- during the check period including the savings at the end of the pre-check period. The charge in the case before us is therefore thoroughly invalid in so far as it has taken into account the total accumulated assets of the applicant as on 31.12.84 without identifying and excluding the assets which he had acquired before the check period i.e. before 1.7.78. The charge memo thus should have included the computation of assets as on 1.7.78 in addition to the valuation of assets as on 31.12.84 and

the available income/savings during the check period compared with the increase in assets between 1.7.78 and 31.12.84 and not compared with the assets as on 31.12.84 only. There is nothing on record to show for example whether the gold ornaments worth Rs.4,200/-, the various items of steel and other furniture and other movable assets, share in Railway Employees Co-operative Society etc. were all acquired after 1.7.78. By presuming in one stroke and extraneous to the charge memo that all the movable and immovable assets as on 31.12.84 were acquired by him only during the check period from 1.7.78 to 31.12.84, the respondents would make us presume that on 1.7.78 the applicant was a pauper, what with 20years of service behind him and coming of a middle class family with agricultural and other income and being member of a joint family with the father being a money-lender and sons undergoing expensive education!. In any case at its worst the charge memo should have at least indicated that his assets as on 1.7.78 were valued at zero!. This cannot be rationally accepted and we have to come to the irrefragable conclusion that by taking into account the total accumulated assets instead of increase in assets during the check period, the assets for the purpose of calculating the disproportion have been overblown. Can anyone be punished for not being able to prove that two and two make five? Can anyone be punished for not being able to prove that total assets at the end of twenty years must not exceed income during the check period of six and a half years? And this is exactly what has happened in this case. Where

the very foundation of the charge suffers from egregious error in computation and accounting, any conclusion of guilt drawn therefrom would be fundamentally erroneous. In this respect I respectfully disagree with my learned Brother in para 8 of his judgment in which it has been stated that since the applicant's prior earnings before the check period were also taken into account the enquiry is not vitiated. The fact, however, is that since the savings prior to the check period accrued to the applicant only after acquiring some movable and immovable assets prior to the check period, those assets should have been excluded from the total assets as on 31.12.84 to compare the same with the net income during the check period. This has been made clear by me in para 3 above in the illustrative calculation of an honest officer's income and assets prior to and during the check period. The applicant had clearly stated in the written brief that he had considerable assets before 1978 and the assets belonged to four members of the joint family, but in spite of this no effort has been made to sift the total assets as on 31.12.84 and to identify and exclude the assets acquired before 1978. The following defence given in the reply to the charge memo by the applicant will be very relevant:-

> " 7. It is incorrect to say that I have no assets till 1978. I was the owner of 30 3/4 cents of land at Iringal and 10 cents of land consisting a house at Meladi prior to 1978. An extent of 30 3/4 cents of land was acquired by me in the year of 1956 prior to my appointment in the regular service. The other land was gifted to us and

a house was constructed by us in the year 1972. This has been shown in the property statement furnished by me. I was getting considerable amount as agricultural income from my Iringal property until it was disposed of in 1973. Further 10 cents of land at Melady which consisted yielding coconut trees and we were getting agricultural income. The house of Melady was let out for monthly rent till its disposal, in 1979. We were also having two cows, the same being given to my wife by her mother. We are getting considerable income from that source. The alleged assets shown in your charge memo was earned due to the income derived out of the above assets earned prior to 1978. The allegation that I could not have saved more than 4286/- prior to 1978 is incorrect and hereby denied. I deny the charge that I had acquired properties worth more than my known income during the period from 1.7.78 to 31.12.1984 as alleged by the CBI based on some wrong calculations made in respect of my income and expenses during the said period. It is merely owing to this wrong calculations they had made they could not tally both sides leading to a difference of Rs.80544.00. In this connection I have to draw your kind attention to the following ...."

"The cost of furniture and other movable items found in my house was estimated to be Rs.9430/- and the CBI appears to be thinking that all the above items were purchased by me only during the review period and prior to 1.7.1978. I had no furniture or movable assets. A careful study of the list of items given will convince anybody that most of the items could have been there in any house, and I could not have lived from 1955 to 1978 without any of the said assets in my possession. To include the cost of all such items in the column for the review period I can only state that it was unwarranted and inappropriate."

5. I can perhaps do no better to bring home the illogicality of the mode of computation in the charge memo , than cite from the Enquiry Officer's report as quoted in para 34 of the counter affidavit of the respondents dated 1st August 1990(page 240 of the paper book).

"Misconduct relating to disproportionate assets is said to be proved during the check period,surplus of income over expenditure is substantially less than the cost value of the increase in the assets during the check period"
(emphasis added)

Having accepted the position that surplus of income over expenditure during the check period has to be compared with the cost value of the "increase" in the assets during the check period, the Enquiry

Officer and all the respondents thereafter without a thought proceeded to consider the total assets as on 31.12.84 and not the increase in the asset during the check period!

6. Having enunciated the principle of computation correctly(as quoted above) the Enquiry Officer went about computing the excess of assets by taking into account the total assets and not increase in the assets during the check period. By taking into account certain items of check period income which had been excluded in the charge memo, the Enquiry Officer in his report reduced the quantum of excess disproportionate assets from Rs.80,544/- to Rs.63,735/-(page 115 of the paper book), but again he forgot to take into account the saving of Rs.4286/- as on 1.7.78 and the respondents in para 37 of the aforesaid counter affidavit corrected and reduced the quantum of disproportionate assets from Rs.63,735/- to Rs.59,449.65 !. The disciplinary authority still further in the penalty order dated 17.1.89 at Annexure-22 quoted the charge of the disproportionate assets of Rs.80,544/- and indicated agreeing with the Enquiry Officer that the charge is established, failing to notice that the Enquiry Officer had reduced the quantum of disproportionate assets from Rs.80554/- to Rs.63735/- which was still further reduced and corrected by the respondents to Rs.59449.65. The whole scenario smacks of not only an absurd basis of computation but also non-application of care and mind even in computing the quantum of disproportionate assets on that illogical basis.

7. What should have been done correctly in this case was to compare the surplus of income over expenditure during the check

period(1978-84) with the "increase in assets" during the same period. This would have been possible if the respondents had in the charge memo annexures estimated the assets as on 1.7.78 and the assets as on 31.12.84 and computed the increase in assets during the check period by reducing the valuation of assets of 1984 by the valuation of assets of 1.7.78. As against this there is no mention whatsoever in the charge memo of the valuation of assets as on 1.7.78 i.e. the beginning of the check period. The other gross flaw in the charge memo was that the statment of witnesses taken behind the back of the applicant and relied upon by the Enquiry Officer was not listed in the list of documents at Annexure-III to the charge memo though the list of witnesses was appended as Annexure-IV. Could it be justifiably presumed by the respondents that the applicant would accept that all assets as on 31.12.84 indicated in the charge memo were acquired by him during six years of the check period ?. Can it be presumed that the applicant would imagine on his own that the witnesses listed in Annexure-IV had been examined by the CBI and their statements would be relied upon by the Enquiry Officer without those statements being listed in the list of documents at Annexure-III to the charge memo wherein all the documents on which the charge is based are supposed to have been listed ? The answer to both these questions must be in the negative. In Surath Chandra Chakravorty vs. State of West Bengal, AIR 1971 SC 752 the Supreme Court held that the charges must be definite

and contain full particularity in regard to the date, time, place and person. It also held that the various essential details relating to a charge cannot be left to be guessed by the charged employee. It observed that "if a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded, he cannot possibly by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the charges to be established against him". It further held that the full particulars and details without which the charged employee cannot defend himself must be supplied to him. It cannot be treated as a matter of evidence. Accordingly the respondents cannot introduce the statements recorded by the CBI without mentioning their particulars in the list of documents at Annexure-III to the charge memo. Likewise without mentioning in the charge memo that the quantum of assets possessed by the applicant in the beginning of the check period i.e. on 1.7.78, the Enquiry Officer cannot unilaterally proceed to surmise and record in his report that the applicant's assets in the beginning of the check period was zero. in A.R.Mukerjee vs. Deputy Chief Mechanical Engineer, AIR 1961 Calcutta 40, the Calcutta High Court held that the charges must be specific with full particularity. It cannot be presumed that the accused employee knows all the ramifications of the charge.

8. This brings us to the second fatal flaw in the disciplinary proceedings, of the gross violation of the rules of natural justice.

The Enquiry Officer [illegible] in his report on the basis of his ex parte information, estimated the applicant's earnings from 1958 to 1978 and excluded all other income by writing off the applicant as one coming from a lower middle class family and presumed that he was a outright pauper as on 1.7.78 with no movable or immovable assets except a saving of Rs.4386/- . Such an ex parte conclusion based on reasonings and information introduced in the Report but extraneous to thecharge memo and enquiry proceedings is against the principle of natural justice. The applicant had no opportunity or was not called upon to rebut the aforesaid finding of the Enquiry Officer before the disciplinary authority accepted the enquiry report and passed the order of penalty. It was held by the Supreme Court in its recent celebrated judgment in Union of India and others vs. Mohd. Ramzan Khan, (1991)1 SCC 588 that non-supply of copy of the enquiry report before the disciplinary authority makes up its mind on the guilt or the innocence of the charged officer is violative of the rules of natural justice. In the present case it was all the more necessary that the disciplinary authority should have made the copy of the enquiry report available to the applicant not only because of the intricate nature of the case and the plethora of data of income and expenditure and valuation of assets which were accepted or rejected by the Enquiry Officer but also because the disciplinary authority found that the charge of

disproportionate assets to the tune of Rs.80,544/- was established while the Enquiry Officer had found that the charge of disproportionate assets was established to the tune of Rs.63,735/-.Since the disciplinary authority took a more adverse decision against the applicant than the Enquiry Officer in his report, the rules of natural justice demanded even otherwise that a copy of the enquiry report should have been given to the applicant and his explanation obtained before the disciplinary authority took a more adverse decision against the applicant on the enquiry report. We have been taking such a view in a number of cases relying upon the Supreme Court's ruling in Narain Misra vs. State of Orissa,(1969)3 SLR 657. I respectfully disagree with my learned Brother when he says that since this point is not raised by the applicant, it cannot be considered by us. It is established law that a point of law can be taken up at any stage and Courts can take it up even though not raised earlier by the applicant (AIR 1925 Lucknow 97; AIR 1965 SC 1325; AIR 1967 SC 465, et al.)This is more so in case of the Tribunal where substantial justice has to be given irrespective of the financial capacity of the applicant to engage a lawyer and irrespective of the professional capacity of the lawyers to raise a vital point of law.In one of the earliest judgments of the Tribunal when it was charting out its own approach and formulating case law, a very pertinent ruling was given in P.Banerjee vs.Union of India and others (ATR 1986(1)CAT PB 16. That judgment, to which I was also a party, was rendered by Mr.Justice K.Madhava Reddy, the Hon'ble Chairman of the Tribunal as he then was. That was a case of supersession of the applicant therein for the post of

Director,Archeological Survey of India. While going through the papers relating to the Departmental Promotion Committee called by the Tribunal it came to light that as against four members of the DPC, the selection papers were circulated only to three members leaving out the 4th member, i.e., the Additional Director General, Archeological Survey of India. The Hon'ble Chairman,Mr.Justice K.Madhava Reddy on behalf of the Division Bench observed as follows:-

> "The point on which we are allowing this Petition, no doubt, was not taken in the Writ Petition but we permitted it to be raised for it arises from the record placed before us by the respondent during the course of the hearing. The petitioner had no opportunity to know the contents of that record earlier. In fact it is a record in respect of which privilege is claimed by the respondent. When a point arising from the record goes to the root of the matter, for doing substantial justice between the parties, the Tribunal, instead of standing on technicalities, should allow it to be raised." (emphasis added)

Dwelling on the procedure to be followed by the Tribunal the Division Bench gave the following landmark ruling:-

> "The procedure to be followed by the Tribunal need not be exclusively adverserial. The Tribunal itself could investigate how far the appointment made was in accordance with the Rules. The Tribunal could adopt inquisitorial procedure also to meet the ends of justice so however that it does not offend the principles of natural justice."

From the above it is clear that in the interest of justice the Tribunal is at liberty to take suo motu cognizance of an irregularity and in the interest of justice but without violating the principle of natural justice decide the cases accordingly. The technicality of an applicant not raising a vital point of law should not therefore deter us from taking cognizance of the same even on our own and do justice to the parties. In the peculiar circumsta nces and character of this case I am fully convinced that non-supply of the enquiry report in which a number of ex parte incriminating presumptions and deductions

were made by the Enquiry Officer about the private affairs and income/expenditure of the applicant, the latter has been denied the benefit of the principle of natural justice.

9. There are a number of other controversial and cryptic findings in the enquiry report which in the interest of natural justice should have been brought to the notice of the applicant before the findings could be accepted by the disciplinary authority. Some of the findings of this nature are given below:-

(a) The credit of Rs.24,500/- in the bank account of the applicant made on 10.10.84 as contribution by the second son of the applicant was rejected by the Enquiry Officer on the ground that the son who was only 20 years old in 1984 could not have earned such a huge amount in a partnership firm of building contractors through commission for constructing houses and the terminal benefits due to winding up of that firm. He has also rejected the partnership document by coming to his own non-professional (he is not a handwriting expert)conclusion that the signatures of the second son affixed in; 1982 differ from his signatures of 1988. He also refused to bring on record the defence document of deed of partnership and also a letter from the Income Tax Officer, without any valid reason. If the amount of Rs.24,500/- duly credited in the bank account of the applicant were taken into account the excess of assets to the tune of Rs.59,000/- would have come down to Rs.34,500/-. The

applicant would have had lot to say on this matter only if he had been given an opportunity to do so by the disciplinary authority.

(b) In the kitchen expenses while expenses on other items have been based on actual purchases from the Fair Price Shops and Co-operative Store, the Enquiry Officer has estimated the expenditure on purchase of milk, fruit, vegetables, meat, egg etc. during the check period of 78 months as Rs.10,460/- at the rate of Rs.135/- per month. No reason has been given as to how the amount of Rs.135/ per month was fixed and accepted by the Enquiry Officer.

(c) The applicant has estimated the cost of construction of the ground floor of the Shivpuri house at Rs.30163/- , the Enquiry Officer accepted its valuation as Rs.69033/-. My learned Brother has stated in para 16 of his judgment that the Executive Engineer had stated at one stage that the cost of construction was made on the basis of valuation prevailing at the time of inspection i.e.,in 1985 while in the course of his examination he (Exe.Engineer) stated that the valuation was made on the basis of the market rate prevailing at the time of construction i.e, 1979-81. Nothing has been indicated by the Enquiry Officer to show why he accepted the second version of the Executive Engineer and not his first. The various arguments given by the applicant in his defence on this point have not been properly dealt with.

10. Apart from the aforesaid major items there are a number of minor items of income and expenditure on which the applicant would

have had much to say as indicated in his original application before us. Had the enquiry report been supplied to him, the disciplinary authority and the appellate authority would have been in a better position to do justice to the applicant. The non-supply of the enquiry report by the disciplinary authority before passing the punishment order has therefore deprived the applicant of the reasonable opportunity to defend himself effectively before the disciplinary authority.

11. In Krishnand Agnihotri vs. State of Madhya Pradesh, AIR 1977 SC 796 the Hon'ble Supreme Court held that since the excess of asets over the surplus income was less than 10 per cent of the total gross income during the check period, it would not be proper to hold that the assets found in the possession of the accused were disproportionate to the known sources of income. It is possible that if the enquiry report had been made available to the applicant he would have been able to reduce the items of expenditure like kitchen expenses and likewise added to his income and got the assets revalued at a lesser amount. This could have brought down the excess assets now valued by the respondents as Rs.59,000/- to less than 10% of the income of Rs.2,23,969.50 assessed by the Enquiry Officer. That is, to less than Rs.22,400/-. In that case the applicant could have been exonerated of the charge. It cannot therefore be said that non-supply of enquiry report before the disciplinary authority gave his finding is a technical infirmity and can be ignored. It is violation of the principle of natural justice regarding the total

conspectus of the singular charge of disproportionate assets and cannot be overlooked at the risk of miscarriage of justice.

12. The third fatal flaw in the enquiry and disciplinary proceedings repeatedly brought out by the applicant is that the statement of witnesses examined during preliminary investigation by the CBI behind the back of the applicant and liberally relied upon by the Enquiry Officer had not been made available to the applicant before those witnesses were examined before the Enquiry Officer. This deprived the applicant to cross-examine the witnesses effectively.

13. We may at once note the fact that with the charge memo the respondents attached Annexure-III(Ext.R.1-page 308 of the paper book) which listed out 63 documents and 5 additional documents. The heading of Annexure-III reads as follows:-

> "List of documents by which the articles of charge framed against Shri K.Kunhiraman,IOW/Gr.III/CAN are proposed to be sustained."

There was another Annexure-IV attached with the charge memo(Ext.R.2 page 313 of the paper book) the title of which reads as follows:-

> "List of witnesses by whom the articles of charge framed against Shri K.Kunhiraman,IOW/Gr.III/CAN are proposed to be sustained".

In the list of documents at Annexure-III there is no reference whatsoever to be statement of witnesses examined during the preliminary investigation. Annexure-IV is not a list of documents but only a list of witnesses and there is nothing to indicate in the heading of Annexure-IV that these witnesses had been examined by the CBI and that their statements are

going to be relied upon in support of the charge. Thus the applicant had no reason to call for the statement of witnesses as the same was neither included in the list of documents nor was there any indication that the witnesses listed in Annexure-IV had been examined by the CBI. It however transpires that these witnesses had actually been examined by the CBI and their statements had been recorded behind the back of the applicant and many of them had been called by the Enquiry Officer The applicant was virtually taken by surprise when these witnesses were shown the unsigned record of their earlier statements made before the CBI. These statements were not even read out in presence of the applicant before the Enquiry Officer but simply admitted by the witnesses by reference and brought on record. The applicant had no occasion to go through these statements elaborately and prepare himself for cross-examining these witnesses. The respondents have in their counter affidavit dated 22nd January 1991 indicated that the applicant had been informed that "he can inspect and take extracts from the documents mentioned in the enclosed list of documents(Annexure-III) at any time during office hours ....". They have further stated that "the applicant requested to inspect the documents mentioned in the charge memo and he was permitted to peruse the documents". The respondents would have us to believe that since the applicant asked for inspection of the documents mentioned in the charge memo and he was permitted to peruse the documents and took extracts thereof, it can be presumed that he had perused

and taken extracts of the statement of witnesses recorded by the CBI. This is absolutely wrong because the respondents have averred that they showed the applicant only the documents mentioned in the charge memo i.e., Annexure-III which did not include the statement of witnesses. The respondents have also referred to Question No.303 in which the charged employee had said that "I have the evidence of the witnesses examined in the enquiry so far ..". This statement would simply mean that the applicant had the evidence of the witnesses who were examined before the Enquiry Officer and not their earlier statements recorded by the CBI.This is evident from the question put by the enquiry authority after the prosecution had closed the case on 28.7.88. The question reads as follows:-

> "You have the evidence of the witnesses examined in the enquiry so far. What have you got to say by way of defence? Do you offer yourself for my examination? Have you got any documents to be produced or witnesses to be examined in the enquiry on your behalf?"

By no stretch of imagination can the question asked by the Enquiry Officer or the reply given by the applicant be construed to refer to the evidence of the witnesses recorded by the CBI behind the back of the applicant. Reference has been made to the confidential letter dated 4.9.87 written by the Chief Vigilance Officer to the D.R.M in which it was stated that the applicant had "perused the remaining documents and also statement of witnesses and taken extracts of the documents". Since a copy of this letter had not been sent to the applicant, the applicant cannot be bound by the ex parte statement made in the confidential

letter. On the other hand in the letter which the Divisional Engineer sent to the applicant on 2.11.87 based on the aforesaid letter of the Chief Vigilance Officer,the following was mentioned:-

> "It is learnt from the Chief Vigilance Officer, Madras that you have perused all the relevant records relating to the charges framed against you vide charge memorandum of even number dated 28.11.86".(emphasis added)

It may be noted that it was not mentioned in this letter that according to the Chief Vigilance Officer the applicant had perused the documents and also statement of witnesses. It was only mentioned that the applicant had perused all relevant records relating to the charges which the applicant justifiably interpreted as the documents mentioned in Annexure-III attached to the charge memo. Since Annexure-III did not include the statement of witnesses recorded by the CBI at Annexure-IV as mentioned above did not mention that the statement of the witnesses listed in that annexure had been recorded by the CBI, the applicant had no reason to protest against the aforesaid statement of the Divisional Engineer nor to demand statement of witnesses recorded by the CBI. Again, in his letter dated 22.9.87(page 126 of the enquiry file) the Divisional Railway Manager asked the Chief Vigilance Officer to confirm "that the charged employee has perused and taken extracts of all the documents listed in the charge-sheet issued to him" to which the CVO replied that the "charged official had perused all the relevant documents(page 127 of the enquiry file)". He did not mention that the applicant had perused

the statement of witnesses. The applicant was separately moving the Railway authorities for the return of the documents which the CBI had seized from him during the raid. The question of these documents being the statement of witnesses examined by the CBI does not arise. In the above context the contention of the respondents in the counter affidavit that the applicant had perused "the remaining documents and also statement of witnesses" cannot be accepted. The respondents have however conceded that "the charged employee submitted that he had perused all the documents mentioned in Anneuxre-III to the charge memorandum". This would show that the applicant had perused only the Annexure-III documents which do not include the statement of witnesses. The respondents have feebly tried to ward off the effect of non-supply of statement of witnesses recorded by the CBI by stating that "the attack against the enquiry proceedings, and in ground B that statements recorded under Section 164 has been made use of and on the basis of the same cross-examination was conducted, is of no consequence".

14. In the above background I am fully convinced that the statement of witnesses recorded by the CBI had never been shown to the applicant much less the copies thereof delivered to him, before the enquiry started or witnesses examined. In this regard I respectfully disagree with the conclusion arrived at by my learned Brother in para 13 of his judgment that all relevant documents for cross-examining the witnesses

had been made available to the applicant. The statement of witnesses examined by the CBI were neither listed in the list of documents attached to the charge memo nor were they made available to the applicant. The portion of the enquiry report quoted by my learned Brother in para 14 of his judgment refers to the charged employee's submission that "he had perused all the documents mentioned in Anneuxre-III of the charge memorandum"which obviously does not include the statement of witnesses recorded by the CBI. In Kashinath Dikshita v. Union of India and others, (1986)3 SCC 229 the Supreme Court held that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross-examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible. By the non-supply of copies of statements made by the witnesses at a pre-enquiry stage, the delinquent officer was held to have been prejudiced in regard to his defence by his handicap in cross-examining the witnesses properly. In Union of India vs. T.R.Varma,(1958)S.C.R 499 a Constitution Bench of the Supreme Court held as follows:-

> "Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given

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> the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed."

In State of Mysore and others vs.Shivappa Makapur, AIR 1963 SC 375 a Five Judge Bench of the Supreme Court categorically stated that before any statement made behind the back of the delinquent officer is taken into account, the delinquent officer must be given a full opportunity to cross-examine the party which made that statement and observed as follows:

> "The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him, and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him".

A Three Judge Bench of the Supreme Court in Phulbari Tea Estate vs. Workmen, AIR 1959 SC 1111 held that where copies of statements made by the witnesses were not supplied before the delinquent officer was asked to question them and the statements were not read over to the employee at the enquiry before he was asked to question the witnesses and where the earlier statements were produced before the Tribunal, but the witnesses were not produced so that they might be cross-examined the dismissal of the employee was not justified on the ground of proper procedure not having been followed. In State of Madhya Pradesh vs. Chitaman Sudashiva Waishampayan, AIR 1961 SC 1623 a Constitution Bench of the Supreme Court quoting from the judgment in T.R.Varma's case cited above observed as follows:

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> " 'Stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.' The right to cross-examine the witnesses who give evidence against him is a very valuable right, and if it appears that effective exercise of this right has been prevented by the enquiry officer by not giving to the officer relevant documents to which he is entitled, that inevitably would mean that the enquiry had not been held in accordance with rules of natural justice."

In Central Bank of India vs. P.C.Jain, AIR 1969 SC 983 the Supreme Court held that "statements made behind the back of the person charged are not to be treated as substantive evidence, is one of the basic principles which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act. In State of Punjab vs. Bhagat Ram, AIR 1974 SC 2335 the Supreme Court held that for an effective and useful cross-examination it is necessary that copies of previous statements of witnesses are supplied to the charged officer. Even supplying the synopsis of the statement will not satisfy the requirements of reasonable opportunity for defence. In Kesoram Cotton Mills Ltd. v.Gangadhar, AIR 1964 SC 708 the Supreme Court held that the minimum that can be expected where witnesses are not examined in the presence of the charged worker is that the person charged should be given a copy of the statement made by the witnesses well in advance at least two days before the date of enquiry.

1.5 The trend of the aforesaid rulings gives the inevitable impression that it is obligatory duty of the Enquiry Officer to let the charged officer have copies of the full text of the previous statements made

by the witnesses during investigation at least two days in advance before the witnesses are examined and cross-examined before the Enquiry Officer and this obligation of the Enquiry Officer cannot be evaded on the plea that the charged officer did not ask for the previous statements or was merely allowed to have a look at them and take extracts. This is more so in the case before us where the list of documents attached with the charge memo did not mention the record of the statements of witnesses before the CBI. The fact that the applicant did not complain that he was not given the copies of the statement of witnesses recorded by the CBI should not to my mind be held out against him because until the last moment before those witnesses were produced by the Enquiry Officer for examination and cross-examination the applicant had never been told that such witnesses had been examined by the CBI and their statements would be made use of. Had the list of documents at Annexure-III to the charge memo included such statements of the witnesses, only then perhaps could the applicant be faulted (but not seriously) for not raising a complaint about non-supply of these statements.

16. I have some difficulty in agreeing with my learned Brother that since the applicant did not mention before the Enquiry Officer that non-supply of the statement of witnesses or certain items will prejudice his evidence he cannot find fault with the legality of the enquiry proceedings. I feel that it is the obligation of the Enquiry Officer to conduct

the enquiry in accordance with law and rules of natural justice and silence or ignorance on the part of the charged officer about his rights cannot per se give a licence or liberty to the Enquiry Officer or the disciplinary authority or the appellate authority to transgress or breach the recognised procedure of enquiry as laid down by law and by judicial pronouncements. A point of law can be taken up at any stage even though not raised earlier and even by a Court or this Tribunal suo motu in the interest of substantial justice. It has been held by the Privy Council (AIR 1946-50 Privy Council 171) that the point that the proceedings before the lower court should be regarded as 'coram non judice' can be taken up as a ground of appeal even though it was not taken up earlier before any lower court. The High Court of Madras in V.B.Kalingarayar vs.Rajam, AIR 1978 Mad.192, held that an issue which is one of law and is self evident from records can be taken up at the appellate stage even though it did not figure in the original claim. In a catena of cases the Courts held that a new plea involving question of fact cannot be taken up by a party or even by a Court suo-motu. Similarly a plea not taken up in the plaint nor embodied in the issue cannot be taken up in the appellate stage. However an objection regarding irregularity of procedure or jurisdiction of the Court or objection of res judicata or limitation or fundamental flaw in the case or any other question of law may be raised in the appeal provided that the objection appears on the record as it stands and no fresh evidence is necessary to substantiate

it. I have dealt with this issue comprehensively in para 8 supra and cited a ruling of this Tribunal (ATR 1986(1)CAT 16) to the effect in the interest of substantial justice, the Tribunal can adopt inquisitorial procedure and take cognizance of an illegality evident from the records placed before it.

17 Even otherwise if the burden of ensuring legality of enquiry proceedings is shifted from the Enquiry Officer representing the monolith of the State, to the charged officer by saying that if the charged officer did not object to the procedure, he cannot question its legality later, no enquiry proceedings howsoever irregular it may be, can be subject to challenge. Because, if the charged officer raises an objection about the illegality, the Enquiry Officer can correct it and if the charged officer does not raise any objection the illegal procedure by the aforesaid count will be beyond the pale of judicial scrutiny. Such a dispensation will be travesty of law. It will also result in irreparable damage and disadvantage to such charged official as is either illiterate or semi-literate or is not familiar with the intricacies of law. The Court or Tribunal also cannot come to their help if the principle of estoppel or waiver even on points of law is applied to them or if the Court or Tribunal cannot take cognizance of the illegality suo motu. I therefore feel that the silence on the part of the charged officer about his legal rights of having natural justice in the procedure followed during the enquiry, cannot be held out against him as an impregnable barrier to intervention by the Tribunal which if nothing else has to remain the unrelenting custodian of the rule of natural justice for its own sake,

irrespective of all other factors. In one of the latest judgments in Management of M/s M.S Nally Bharat Engineering Co.Ltd vs. State of Bihar and others,(1990)2 SCC 48, the Hon'ble Supreme Court has endorsed that the principle of natural justice knows of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. Non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

18. The above discussion will show that the charge memo itself had been wrongly and absurdly framed by referring to the total accumulated assets at the end of the check period i.e. 31.12.84 instead of following the concept of increase in assets during the check period. Reasonable opportunity to explain the surplus assets during the check period has not been afforded to the applicant by not giving him a copy of the enquiry report before the disciplinary authority gave his careless finding verbally agreeing with E.O. but differing in the extent of disproportion in assets more adversely from the finding of the Enquiry Officer. The enquiry proceedings are further vitiated by the fact that the copies of the statements of witnesses recorded by the CBI behind the back of the applicant had not been mentioned in the list of documents annexed with the charge memo and were not given to the applicant before the witnesses were examined by the Enquiry Officer. This also deprived the applicant of his rights of effective cross-examination of the witnesses before the Enquiry Officer. I therefore feel that the entire disciplinary proceedings

and their foundation in the charge memo suffers from grave perversity, illegalities,illogicalities and denial of natural justice to the applicant and cannot be upheld even by the most relaxed standards of reasonableness and fairness of law and procedure. The disciplinary proceedings deserve to be struck down at the most with liberty to hold fresh enquiry right from the stage of framing of charge.

19. I feel that in a case like this where disproportionate assets are taken to be an indirect evidence of the lack of integrity of the official one should be extremely circumspect in quantifying the questionable assets. As I have stated earlier by the wrong method adopted in the charge memo even the whitest angel of the fairy tale with impeccable purity of character and honesty would not be able to prove that the known sources of income during the check period of six and a half years would be sufficient to cover the assets accumulated over a period of twenty five years. It is the "increase in the assets" during the check period and not the "assets at the end of the check period" that was to be taken into account in the charge memo. With this fundamental absurdity in the charge memo and mode of computation of excess assets, one has to be doubly careful before coming to the conclusion of lack of integrity of the official. The other circumstances of the case are also heavily in favour of the applicant. His dishonesty had never been in doubt during the last twenty five years. There was no departmental proceedings earlier. On the other hand the applicant

was actually promoted as Inspector of Works Grade II as late as on 5.11.85 (Annexure-III page 337 of the paper book) while the charge memo was served on 28.11.86. The CBI opted out and refused to file criminal proceedings under the Prevention of Corruption Act for disproportionate assets. Under these circumstances I cannot reconcile myself to considering the applicant guilty of corruption on the basis of the erroneous charge memo and the manner in which the enquiry proceedings were conducted. In the peculiar circumstances of the case I feel that it will be abnegation of my judicial responsibility if I close my eyes to the gross failures and perversity in the disciplinary proceedings and overlook them on the ground that a hierarchy of administrative authorities have ratified the same. As has been shown by me in para 6 supra, while the charge memo estimated the excess assets to Rs.80,544/-, the Enquiry Officer found it to be Rs.63,735/-. The disciplinary authority agreeing with the Enquiry Officer, still indicated that the charge is established overlooking the fact that the Enquiry Officer had reduced the excess assets indicated in the charge. The appellate authority also did not notice this discrepancy in the order of the disciplinary authority.All the three authorities omitted to take the savings of Rs.4286/- into account. The respondents in the counter affidavit corrected the omission and further reduced the excess to Rs.59,449.65, belying the punishment and appellate orders based on the disproportion of Rs.80,544/-. This shows that the different layers of administrative authorities did not properly exercise even their optical powers to read the

documents much less their cerebral powers in careful consideration of the evidence in discharging their quasi judicial functions. In such a situation legitimising void proceedings on the ground of ratification by multiplicity of such 'careless' authorities will be travesty of justice. In the same light legtimising such void proceedings on the ground that lot of money and time have been spent by the respondents on the enquiry will be denying justice 'in terrorem'. This will also create a dangerous precedent barring judicial intervention at the threshold even in cases of perverse and gross miscarriage of justice by placing unmerited premium on the numerical strength, status and spending capacity of the employers who may have thus the licence to get away by violating the mandatory principles of natural justice and the established canons of fair procedure which is obligated irrespective of whether the employee is prima facie or ultimately found to be guilty. The demarcation of optimum number of levels of administrative authorities and the level of money and time spent on the disciplinary proceedings, beyond which the Tribunal should desist from going into the legality thereof irrespective of the enormity of illegality, will be outside the realm of judicial norms. It may also sow the seeds of unaccountability and irresponsibility amongst administrative authorities discharging quasi-judicial functions. It may also introduce undue uncertainty and subjectivism in judicial decisions and review of administrative action.

20. Accordingly with deep and profound respect I disagree with my learned Brother on the following counts and find that the disciplinary proceedings in this case are ab initio void and have to be struck down and the application allowed:-

a) The charge memo which is the foundation of the disciplinary proceedings, as framed is absurd, perverse and irrational inasmuch as it calls upon the applicant to establish what is impossible to be established, that his total assets at the end of more than twenty six years of earning is NOT in excess of his known sources of income during the six and a half year period between 1.7.78 and 31.12.84. The charge memo does not identify and exclude the assets accumulated between 1958 and 1.7.78 nor does it proclaim that the applicant had zero assets on 1.7.78 and that he had acquired all the assets as on 31.12.84 during the check period of six and a half years.(paras 2 to 7)

b) Annexure-III to the charge memo giving the list of documents on which the charge is based significantly excludes the statement of witnesses taken behind the back of the applicant. Annexure-IV to the charge memo while giving the list of names of witnesses in support of the charge fails to indicate that the statement of these witnesses had been taken by the CBI. By excluding the statement of witnesses from Annexure-III and suppressing that the witnesses listed at Annexure-IV had been examined, the applicant was deflected from demanding copies of statement of these witnesses for effectively cross-examining them. (paras 12,13)

c) There is nothing to show that copies of the statement of witnesses recorded by the CBI had been made available to the applicant before the witnesses were examined during the enquiry proceedings. Reference to making all documents

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listed in the charge memo available to the applicant cannot cover this defect as the list of documents with the charge memo does not include statement of witnesses. The reference to Question No.303 (vide para 13 supra) and the answer of the applicant thereto are in regard to the "evidences of the witnesses examined in the enquiry" and not to the copies of their statements made before the CBI behind applicant's back. All this has led to denial of reasonable opportunity of defence and of natural justice to the applicant. (paras 12 to 15)

d) By not supplying the copy of the enquiry report to the applicant before the disciplinary authority made up its mind, when in the report the Enquiry Officer had drawn a number of unilateral conclusions and made unilateral presumptions extraneous to the enquiry, the rules of natural justice have been drastically violated not so much in form as in substance leading to miscarriage of justice. (paras 8 to 12)

e) The Tribunal can suo motu take cognizance of the violation of rules of natural justice from the records made available to it in the matter of non-supply of the statement of witnesses and copy of the enquiry report before the finding of guilt, even though these points may not have been raised by the applicant before the Enquiry Officer or the disciplinary authority or in the pleadings. In the interest of substantial justice the Tribunal can adopt inquisitorial procedure and need not be shackled by an exclusively adverserial procedure or by technicalities. (paras 8,9,16, 17)

f) The charge was that disproportion of assets was to the extent of Rs.80544/-. The Enquiry Officer found that the disproportion is of the reduced amount of Rs.63735/-. The disciplinary

authority while agreeing with the finding of the Enquiry Officer still insisted that the charge is established. The appellate authority also found that the charge is established overlooking the fact that the charge of disproportion of Rs.80544/- has been established only to the extent of Rs.63735/-. All the three authorities, i.e,the Enquiry Officer, the disciplinary authority and the appellate authority overlooked to take into account the saving of Rs.4286/- as on 1.7.78. It is in the counter affidavit before us that this omission was corrected and the disproportion was reduced to Rs.59449.65. Thus the Enquiry Officer, the disciplinary authority and the appellate authority were factually incorrect and self contradictory in their findings on degree of disproportion in assets and cannot be said to have exercised elementary care much less applying their mind in passing the punishment orders which are thus prima facie defective. (paras 6 and 19)

g) In the face of gross irregularity and perversity and lack of care even to go through the records by the three levels of the enquiry authority, disciplinary authority and appellate authority, justice cannot be denied to the applicant on the ground that three levels of administrative authorities have gone into the matter and the disciplinary proceedings were conducted at heavy cost to the exchequer. This will be denying justice 'in terrorem' and will set up an embarrassing precedent in all disciplinary matters where three levels of authorities are in any case involved. At what level of quantum of cost incurred in disciplinary proceedings should the Tribunal lay its hands off irrespective of th quantum of injustice required to be repaired, is a subjectiv matter and shall leave the judicial fora in a state of unmitigated fix.

(para 19)

5.6.91

(S.P.Mukerji)
Vice Chairman

In view of the fact that differences of opinion have arisen between us on the various points as emerging in the preceding paragraphs, we direct the Registry to refer this case to Hon'ble Chairman under Section 26 of the Administrative Tribunals Act.

5.6.91.

(N.Dharmadan)
Judicial Member

5.6.91

(S.P.Mukerji)
Vice Chairman

n.j.j

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O. A. No. 532 of 1989

DATE OF DECISION 3-9-1991

K Kunhiraman — Applicant (s)

Applicant in person. — Advocate for the Applicant (s)

Versus

Sr.Divisional Engineer, Southern Railway, Trivandrum & 3 others — Respondent (s)

Mrs Sumathi Dandapani — Advocate for the Respondent (s)

CORAM:

The Hon'ble Mr. Justice David Annousamy, Vice Chairman

1. Whether Reporters of local papers may be allowed to see the Judgement? yes
2. To be referred to the Reporter or not? yes
3. Whether their Lordships wish to see the fair copy of the Judgement? —
4. To be circulated to all Benches of the Tribunal? yes

JUDGEMENT

This matter has been referred to me under Section 26 of the Act by the Hon'ble Chairman on account of difference of opinion between the Hon'ble Vice Chairman and Hon'ble Member Mr N Dharmadan of this Tribunal. Since the facts on the points are clearly narrated and elaborately dealt with in the two discording judgements, I need not repeat the same.

2. The Hon'ble V.C. while disagreeing with the conclusions arrived at by the Hon'ble Member has listed 7 points of disagreement. In respect of the first point, the stand taken by the Hon'ble V.C. is that the charge is not a valid one, whereas Hon'ble Member has found that the charge was proper. The

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point made by the Hon'ble V.C. is based on the statement appended to the charge memo which brings out the amount of assets found to be in excess of the known sources of income. That account is as follows:

Income between 1.7.78 to 31.12.84	Rs.2,03,926.00
Savings till 1.7.78 as per the bank balance on 1.7.78	Rs.4,286.00
Total of income and savings between 1.7.78 and 31.12.84	Rs.2,08,212.00
Expenditure during the above period	Rs.95,487.15
Net available income till 31.12.84	Rs.1,12,724.80
"Assets as on 31.12.84"	Rs.1,93,269.00
Excess of assets over available income and saving	Rs.80,544.15

It has been specifically pointed out by the Hon'ble V.C. that the amount of Rs.4,286.00 taken as assets possessed by the applicant on 1.7.78 has no acceptable basis and that on that score the charge is vitiated.

3. When one proceeds to calculate the excess of assets over available income over a period, in this case, the period from 1.7.78 to 31.12.84, 4 elements are to be taken into account:

i) the assets existing at the beginning of the period,
ii) the income during the period,
iii) the expenditure during the period, and
iv) the assets at the end of the period.

The comparison between the expenditure and the income would give the balance, if any. That balance should be added to the assets at the beginning of the period and that total

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should tally with the assets actually found at the end of the period. If there is any ~~error~~ excess, the same should be accounted for. But, if there is any error in any one of the four elements, one cannot reach any valid conclusion. As regards the first element, if it is not admitted by the officer it should also be proved by the Department. Now turning to the facts of the case, regarding the amount of assets existing at the beginning of the period that is to say on 1.7.78, the way in which it was arrived at is found in Statement No.10 annexed to the report of the Superintendent of Police dated 3.7.86, Special Police Establishment, Kerala Branch. That Annexure-10 was not given to the accused, however, it is said that he has perused it. In his written explanation to the charge memo, he has categorically challenged the figure of Rs.4,286.00 as being his assets on 1.7.78. He has stated that the allegation that he could not have saved more than Rs.4,286.00 prior to 1.7.78 is incorrect and is denied. Once the applicant has given such a reply, 2 courses were open to the respondents. Either to direct the applicant to give his statement of assets as on 1.7.78 and if found acceptable and if there is still an excess of assets at the end of the period, viz, 31.12.84 to proceed to frame the charge. Or, if on the contrary, the statement given by the applicant in respect of his assets as on 1.7.78 is not acceptable to the Department, the Annexure-10 to the police report dated 3.7.86 should have been given to the charge sheeted officer, and the Department should have reasonably proved the same, leaving the charge sheeted employee to adduce evidence in

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respect of his stand.

4. At any rate, in order to frame a charge on the basis of possession of assets in excess of the known sources of income, in respect of a period, there should be agreement between the parties in respect of the assets at the beginning of the period. It appears that there was no statement of return of properties obtained from the applicant at the end of the year 1978 on which the respondents can rely. It is stated that the Annexure-10 was arrived at on the basis of a statement obtained from the applicant, prior to framing of the charge. But there is no reference in the body of the report of the Police to which statement No.10 is annexed as to how each of the figures appearing in the statement has been arrived at. So it has not been shown that all the entries in Annexure-10 are based on the statements unequivocally accepted by the applicant. Therefore the initial amount of Rs.4,286.00 cannot form the basis for the calculation of excess of assets at the end of the check period. The charge proceeds on the assumption that the figure of Rs.4,286.00 as the original assets at the beginning of the check period is unchallenged. Once it is challenged, it is not possible to proceed further without first determining the exact amount of assets at the beginning. The charge as it stands based on the assumption which is not admitted by the other party is obviously invalid.

5. In conclusion, the charge as it was framed is based on a balance sheet in which one of the disputed element is taken as granted. I therefore agree with the Hon'ble V.C. that the charge is not a valid one. However, it will be open to the

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respondents to frame a new charge, in accordance with law, if they are so advised.

6. I would like to add that while drawing this balance sheet, two factors have to be taken into consideration, the inflation or the depreciation of the rupee in one side and the appreciation of certain things like gold or immovable property and the depreciation of other things like furniture. Therefore, care should be taken to value everything at the time of acquisition or sale and in the state it was at the time of such an operation.

7. In view of my finding on this point, it is not necessary to go on the other points of disagreement listed by the Hon'ble V.C. In the result, the application is allowed and the penalty is set aside.

(DAVID ANNOUSSAMY, J.)
3-9-1991

trs