

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 535/2005

TUESDAY THIS THE 6th DAY OF NOVEMBER, 2007

C O R A M

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER**

K.G. Valsalan S/o K.Gopalan
Junior Engineer-II
Permanent Way, Southern Railway
Tenmalai R.S. & P.O
Quilon District
residing at "AP Nilayam", HSRA-B-5
Kaladi, Karamana PO
Trivandrum-695 002

.. Applicant

By Advocate M/s T.C. Govindaswamy & D. Heera

Vs.

- 1 Union of India represented by the
General Manager, Southern Railway
Headquarters Office, Park Town PO
Chennai-3
- 2 The Senior Divisional Engineer
Southern Railway, Madurai Division
Madurai.
- 3 The Divisional Railway Manager,
Southern Railway, Madurai Division
Madurai.
- 4 The Principal Chief Engineer,
Southern Railway, Headquarters Office
Chennai-3
- 5 The Chief Personnel Officer
Southern Railway, Headquarters Offices
Park Town Post,
Chennai-3.

.. Respondents.

By Advocates Ms. P.K. Nandini & Smt. Sumathi Dandapani Sr. Advocate.

ORDER

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN

The applicant who is presently working as Junior Engineer Gd.II, Permanent Way, Southern Railway, Madurai Division at Tenmalai Railway Station in the scale of Rs. 5000-8000/- is aggrieved by Annexure A-I penalty advice removing him from service and Annexure A-II appellate order modifying the penalty to reduction to the lowest stage in the time- scale from Rs. 6200/- to Rs. 5000/- for a period of five years with recurring effect.

2 The applicant has prayed for quashing the above orders on the following grounds:

(i) The applicant's appointing authority is the 4th respondent, the Principal Chief Engineer and the Annexure A-1 order of removal from service has been issued by the second respondent Senior Divisional Engineer who is only a Junior administrative grade officer at the divisional level. Hence Annexure A-1 is without jurisdiction and opposed to Article 311(1) of the Constitution of India.

(ii) The Disciplinary Authority has disagreed with the specific findings of the Enquiry Officer but in Annexure A-7 letter communicated to the applicant no such disagreement is seen either in express terms or by necessary implication. The findings of the Disciplinary Authority is therefore perverse and without application of mind and issued under the dictation of higher authorities.

(iii) The applicant is not guilty of any misconduct or negligence as he had no control over matters such as arranging of men required for urgent works, arranging of materials i.e. Sleepers, fastenings, ballast, etc. also drafting of proposals for executing track renewal works and several derailments had taken place in the Section for which employees of lower levels were made scapegoats.

(iv) The applicant also enclosing some newspaper cuttings which indicated the state of affairs regarding the poor maintenance of the track in the various sections, contends that he cannot be personally held responsible for the same.

3 The respondents have filed a reply statement denying the averments of the applicant. They have submitted that since the applicant had failed in discharging his duties, action has been initiated against him and after detailed enquiry he was found responsible for the alleged accident of derailment that had taken place on 1.9.2003 of three coaches of Passenger Train No. 748 between Punalur and Edamon on 1.9.2003. The applicant belongs to the Punalur Section having Sub section headquarter at Kottarakkara. The applicant is a Junior Engineer Gradell Permanent Way of the Kottarakkara Sub Section and as per **Para 118 of the Indian Railway Permanent Way Manual**, the applicant is duty bound to inspect and maintain the track in a safe and satisfactory condition for traffic. It is correct that the Enquiry Officer had stated that the charges are not proved but on detailed analysis it was revealed that the Enquiry Officer had not correctly analysed the evidence and had come to an erroneous conclusion. The

Disciplinary Authority therefore disagreed with the findings of the Enquiry Officer and recorded his own reasons for the said disagreement. The Disciplinary Authority had power to disagree with the Enquiry Officer, had given opportunity to the applicant by Annexure A-4 Memorandum and the applicant had submitted a representation as per Annexure A-8 which was considered by the Disciplinary authority. The applicant had preferred Annexure A-9 appeal before the Divisional Railway Manager and taking note of the contentions raised by the applicant, the Appellate Authority had reduced the punishment. There are also no procedural lapses in the enquiry as copies of various documents and depositions of the witnesses were furnished to the applicant. As regards the contention of the applicant about the jurisdiction of the Disciplinary authority it has been submitted that the applicant was appointed as a Junior Engineer, Permanent Way in the scale of Rs. 5000-8000 and as per Railway Servants (Discipline and Appeal) Rules, 1968, the second respondent is the Appointing authority. He is working under the administrative control of the second respondent. The respondents have denied that the 5th respondent is the Appointing authority as averred by the applicant. The applicant had also not raised any such objection when he was issued with Annexure A-5 show cause notice. Hence he is estopped from raising such contention now. It is also averred that Annexure A-1 order has since been modified and therefore the stigma of removal from service has been removed and the punishment imposed now cannot in any way be considered as disproportionate as contended by the applicant.

4 Rejoinder has been filed by the applicant stating that the averments of the respondents on the power of judicial review vested with the Tribunal is without any substance. The Disciplinary Authority has imposed the penalty on extraneous consideration as the alleged charge in Annexure A-4 was not proved in the enquiry and **Para 118 of the INDIAN RAILWAY PERMANENT WAY MANUAL** relied on by the respondents is not applicable to the applicant. Annexure A-4 charge memorandum was issued on the basis of the report of the Accident Committee and the Accident Committee put forth suggestions in respect of action to be taken in the track maintenance and the General Manager has as per Annexure A-14 issued direction in this regard. The deficiencies pointed out in the charge memorandum are not only applicable to a particular point where the accident took place but throughout the Shencottai Quilon section and this was because of the policy adopted at higher level due to conversion of MG line to BG line. There is no proof to show that these deficiencies caused the derailment and that the applicant is responsible for the same.

5 During the hearing, certain doubts arose in respect of the powers of appointing and disciplinary authorities as determined by the Railways on which the respondents have filed a detailed affidavit vide M.A. 707/07 which was also taken on record.

6 We have heard Learned counsel Shri TCG Swamy for the applicant and the counsel for the respondents and have gone through the pleadings.

7 The Learned counsel for the applicant mainly adverted to the question of competency of the order of removal from service issued by the Sr. Divisional Engineer (SDE) on 26.7.2004. It was argued that mere issue of the order by a lower authority does not make him the appointing authority and the order dated 17.4.1997 (R-2(5) was issued by the CPO, Annexure R-2 order was issued by the HQrs office namely the Chief Track Engineer (CTE) and the subsequent orders issued by the Divisional level officer by the DPO or the Divisional Engineer, cannot be termed as appointment orders. On merits of the case also, it was argued that the Enquiry officer had held charges as not proved and the Disciplinary authority has by-passed the enquiry officers' report and imposed the penalty by way of conclusions arrived at independently by Annexure A-7.

8 The learned counsel for the respondents submitted that the SDE is a Junior Administrative Officer and the actual appointment order dated 19.5.97 has been issued after his approval by the DPO and only approval of the panel was given by the Controlling Officer namely the CTE. Merely because approval was given by an authority, he does not become the appointing authority. For this, they relied on the judgment of the Hon'ble Supreme Court in Kanta Devi Vs. Union of India & Another (2003 (2) ASLJ 213) to the effect that mere approval of appointment by a higher authority does not make him the appointing authority.

9 We shall deal with the point of jurisdiction first as it was the main plank of the applicant's case on which an affidavit is filed by the

respondents on a specific direction from the Court for clarifying the instructions relating to Appointing authority as far as the Railways are concerned. It is not disputed that the applicant was promoted to the post of Junior Engineer in the scale of Rs. 1400-2300 (5000-8000 during 1997. It is also admitted that the Chief Track Engineer (CTE), Southern Railway Madras is the authority controlling the cadre of the applicant. The CTE has constituted a Selection Committee as per rules and the recommendations of the Selection Committee as approved by him the panel was prepared and approved by the CTE. The employees in the panel were allocated to different divisions by the order dated 17.4.2007 in which the applicant was at Sl. No. 31 and he was promoted and posted to Bangalore Division by Annexure R-2(5) order. On a request made by the applicant his allocation was changed from Bangalore Division to Madurai Division on 17.4.1997 (R-2(6). On receipt of Annexure R-2(6) the order at Annexure R-2(4) dated 13.8.97 was issued posting the applicant as JE under SE Permanent Way, SLT. The orders at Annexures R-2(5) and R-2(6) were issued by the CPO whereas Annexure R-2(4) was issued by the DPO. The stand of the respondents is that the power to appoint the applicant in the scale of Rs. 5000-8000 is vested with the Senior Scale Officer in accordance with the Schedule of powers in Establishment matters copy produced as Annexure R-2(3). Hence SDE was competent to appoint the applicant and it was within the competence of the SDE. The CTE will come in to picture only for administrative convenience for direct recruitment and promotion and the action taken by the said authority was only performance of a managerial function. At the same time, the respondents have also submitted that

the operation and maintenance of the posts in the Railway are monitored at different level such as Assistant/Junior Engineer at Unit level, Divisional level and Headquarters level for administrative convenience.

10 In the light of these averments on both sides the question arising for consideration is who is the appointing authority for the posts of JE in the scale of Rs. 5000-8000 which is a promotion post. The respondents have produced Annexure R-2(3) which is an extract of relevant portion of schedule of power of establishment matters of non-gazetted part-II It is a tabular statement. Sl.NO. 3 in col. 1 relates to promotion. Col. 3, 4 & 5 which are relevant are extracted under:

Sl. No.	Nature of powers	PHOD/HO D	DRM/ADRMSAG Officers in Field Units	Divisional Officers Extra Divisional Officers & Officers in Headquarters	Remarks
1	2	3	4	5	6
3	Promo-tions a)regular	Full Powers	Full Powers within the Division/Work shops except those posts which are controlled by Hqrs.	JAO Full Powers to posts in scales to Rs. 1650-2660/ 5500-9000 in respect of Div./Hqrs posts controlled by them Sr. Scale Full Powers to posts on unit basis carrying scales upto Rs. 1400-2300/5000-8000 under their control Jr. Scale Asst. Officer Full Powers for Group-D posts only	1 Accounts concurrence is not necessary.....

11 Annexure R-2(2) is the PB Circular No.161/04 which relates to imposition of penalties of dismissals, removal or compulsory retirements of non-gazetted staff – notification of appointing authority as given in the table under para 3 is reproduced below:

Sl.No.	Grade/Scale of pay	Lowest Appointing Authority empowered to make appointment
1	For all posts carrying scales/grades above Rs 5500-9000 up to Rs. 7450-11500	Head of Department
2	For all posts carrying scale/Grade Rs. 5500-9000	Junior Administrative Grade Officer
3	For all Group-C posts carrying scales upto Rs. 5000-8000	Senior Scale Officer
4	For all posts in group-D service	Jr. Scale/Assistant Officer

12 It is also to be noticed that the respondents in their reply have admitted that the post of JE Permanent Way is a Hqrs controlled post though they maintain that the second respondent namely the SDE who is a Divisional Officer is the appointing authority. Though R-2(2) specifies that for all Group-C posts carrying the scale upto Rs. 5000-8000 the Sr. Scale Officer will be the appointing authority, Col. 5 of R- 2(3) would show that the Sr. Scale Officers have the powers only for posts under **their control** and Jr. Administrative Grade Officers have powers for the Hqrs posts **controlled by them**. At the same time the respondents have admitted that the posts are controlled by the Hqrs. It is evident from Annexurer-R-2(5) schedule, that for such posts which are controlled by the Hqrs, the powers are vested with the Head of the department only. This can be further confirmed by the fact that under col. 4 even Sr. Administrative Grade Officers in the unit do not have powers on posts which are controlled by Hqrs. The stand of the respondents therefore that the SDE who is a Junior Administrative Cadre Officer, is the appointing authority in view of the delegation ordered in Annexure R-2 (3) is not borne out by the wordings of the schedule when it is considered

that the post in question is controlled by the Hqrs, which appears to be the important criterion based on which the delegation of powers has been given. It has to be concluded that the appointing authority in respect of the Hqrs controlled posts was only the Head of the department namely the CTE. The same conclusion is re-inforced by the fact that the initial order of promotion referred to above at Annexure R-2(5) and R-2 (6) were also issued by the Hqrs and communicated by the CPO. It appears that the practice prevailing in the Railways is that once approval of the competent authority is taken the actual orders of promotion, etc. are issued by the Sr. DPOs or Divisional Personnel Officers of the division and they are only issuing authorities and not functional authorities acting under statutory authority. From the averments of the respondents and the wordings of the above order also, it is obvious that the CTE was not only an approving authority as was the case of the applicant in the judgment referred to by the respondents **Smt. Kanta Devi Vs. Union of India and another.** In the instant case CTE is the cadre controlling authority and not merely the approving authority and the panel has been approved by him and promotions/allotments have been made to the various divisions by the CTE. It is clear from sub para (iii) of the order in Annexure R-2(5) to this effect that "The following PWs in the scale of Rs. 1400-2300 who have been selected and placed in the panel for the post of JE (PW) in the scale of Rs. 1400-2300 by office order dated 31.3.1997 are promoted and posted to the Divisions as indicated against each." In the wake of this finding Annexure R-2(4) can only be termed as a consequential posting order against the existing vacancies in the division issued at the Divisional level. Hence the Divisional Officer

cannot be taken as the competent authority to appoint a JE(PW) on promotion. The clarificatory orders issued in Annexure R-2(8) by the Railway Board in this regard dated 25.11.2002 is also relevant:

"...The intention of the rule is that the penalties of dismissal, removal or compulsory retirement from service on a railway servant should be imposed only by the highest of these authorities i.e. Either by the authority which actually appointed the railway servant to the relevant grade or post or the authority which is empowered to make appointment to that grade or post at the time of imposition of penalty, whichever is the higher authority. The penalty of dismissal, removal or compulsory retirement from service should obviously not be imposed by an authority which have merely issued the offer of appointment or order of promotion with regard to the appointment or promotion ordered by a competent authority higher to that authority."

It is thus made clear by this order that an authority which merely issued the order of appointment cannot impose the penalty of dismissal or removal of a JE because the promotion has been ordered by a competent authority higher to that authority.

13 The respondents have also argued that the appointing authority should also be determined with reference to the entries in the Service Record of the employee and in this case they have produced the extracts of Service Records of the applicant. The entries at page 5 of Annexure R-2(7) under col. "Capacity of appointment" shows the order of the CPO dated 17.4.97 which is Annexure R-2(6) issued from the Hqrs. It also shows that the applicant reported for duty according to the DPO's order dated 13.8.97. This entry also therefore supports the contention of the applicant that the authority actually competent to promote him is the Hqrs under order of the CTE whose order was communicated by the CPO.

14 Having determined that the competent appointing authority of the applicant – was the CTE (Hqrs), the question is whether Annexure A-1 order removing the applicant from service by the Sr. Divisional Engineer was without jurisdiction or not. According to the Schedule 2 to the Railway Servants Discipline and Appeal Rules punishments of removal, dismissal and compulsory retirement can be only ordered by the Appointing authority or equivalent or higher grade authority. In this connection, we have to revert back to Annexure R-2(2) order namely the PB circular No. 161/04. Para 4 provides as follows:-

"4 The "Appointing authority" is defined under Rule (2)(1)(a) of the RS(D&A) Rules, 1968. The Authority empowered to make appointment, referred to in Rule 2(1)(a) means the authority empowered to make appointment to the grade or post which the railway servant is holding, at the time of imposition of penalty. Such authority may be higher or lower in rank than the authority which was empowered to make appointments at the time of induction of the Railway servant to the relevant grade or post or the authority which actually appointed him to that grade or post.

The intention of the rule is that the penalties of dismissal, removal or compulsory retirement from service on a Railway servant should be imposed only by the highest of the authorities i.e. either by.

The authority which actually appointed the Railwahy servant to the relevant grade or post

OR

The Authority which is empowered to make appointment to that grade or post held at the time of imposition of penalty.

Whichever is the higher authority.

The penalty of dismissal, removal or compulsory retirement from service should obviously not be imposed by an authority which have merely issued the offer of appointment or order of promotion, with regard to the appointment or promotion ordered by a competent authority higher to that authority.

Adherence of the authorities specified above while making initial appointments, would avoid the authorities lower than the appointing authority imposing the penalties of dismissal, removal or compulsory retirement in violation of the RS(D&A) Rules."

15 In terms of the interpretation of Rule 2(1)(a) of the Railway Discipline & Appeal Rules, 1968 as given above, it is evident that such punishment can only be imposed by the highest of the authorities who have issued orders of appointment or who are empowered to make such appointment. In this case the authority who was empowered to make appointment and who had actually appointed the employee was the Head of the Department namely the CTE. Hence, he is the authority who could have imposed the penalty of dismissal, removal or compulsory retirement. The Senior Divisional Engineer who has actually imposed the penalty is of the rank of a Junior Administrative Officer and lower in rank to that of the appointing authority. Hence Annexure A-1 order is to be held as having been issued by an incompetent authority.

16 In this context, we would like to invite attention of the Railway Administration to their own instructions in PB Circular No.161/2004 circulating the guidelines in Board's letter No.E(D&A) 2002RG-6 dated 25th November, 2002 and 2nd September, 2003, regarding imposition of penalties of dismissal, removal or compulsory retirement and particularly emphasising adherence to the authorities specified for making appointments in sub paras (1), (2) and (3) of para 4 thereof. Had these guidelines been followed, such cases of challenge on the ground of competency would not have arisen. As many such cases have come before us, we are constrained to make the observation that these

instructions are being followed more in the breach than in observance. If the designation of the competent authority is mentioned in the orders/service record instead of general statements like "This has the approval of the competent authority", such situations can be avoided.

17 On the merits of the order also it has been submitted by the applicant's side that the Disciplinary authority's order is without application of mind and not based on the evidence or record as the Enquiry Officer had acquitted the applicant of all the charges. Though the applicant argued that there has been procedural lapse in the disagreement conveyed by the Disciplinary authority with the finding of the Enquiry Officer on the ground that it cannot be termed as dissenting because there is no finding of guilt nor have the reasons been furnished for arriving at a different conclusion from the Enquiry Officer. In Annexure A-7 in which the tentative views of the disciplinary authority was conveyed to the applicant, the Disciplinary Authority notes as under:

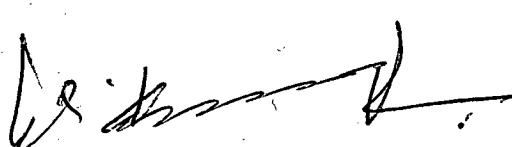
"Gone through carefully enquiry report and the report of the EO and come to the conclusion that the track was not maintained to standard, from the enquiry and as per the track readings, at 'O' station the PSC sleeper, the insert and the pandrol clip were found missing at the point of mount and the wooden sleepers were in poor state of affair which required maintenance. Being subsection maintenance JE, he could have paid more attention to maintain the track in which he failed."

18 It would appear therefrom that he has come to the above conclusion from the enquiry report that the wooden sleepers were in poor condition and required maintenance. On record, there is no such mention in the Report. The Enquiry Officer has come to the conclusion on the

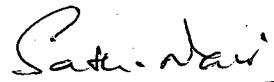
basis of deposition given by the administrative witnesses that there were no deficiency as noted in the charge memo and whatever minor deviation was shown was within the permissible limits and the chargesheet against the applicant also did not mention anything about the poor maintenance of the wooden sleepers and that the applicant alone was responsible for the same. Hence it appears that the Disciplinary Authority's conclusion was not based on the evidence tendered in the enquiry but on the basis of extraneous matters which were perhaps within his knowledge but on which the applicant had no opportunity to controvert during the course of the enquiry. The deficiency in the maintenance of the track which had fallen into arrears was highlighted in the report of the Accident Committee which the applicant has shown had been the subject of news paper report, etc. The situation was created by various administrative and technical constraints. By no means the applicant alone could have been found responsible for the same. The applicant had submitted these points in his appeal petition and also in the reply given to Annexure A-7 notice but there was no application of mind on these points raised by the applicant either by the Disciplinary authority or by the Appellate authority. Hence even on merits we are of the view that the Disciplinary Authority and Appellate authority merely acted on the premise that there was derailment and some one has to be made responsible for the same. In fact, the Appellate authority had recognised this fact to some extent by modifying the Disciplinary authority's order of removal to reduction in pay though we are of the view that even this modified punishment was not warranted in the circumstances of the case. In any case we are not going into detail as regards the merits of the case as we have already

held that the impugned order Annexure A-1 is without jurisdiction having been issued by incompetent authority and is not legally sustainable and is thereby quashed. Since the impugned orders at Annexure A-2, and A3 are also based on the said order these orders are also be quashed and we do so. The respondents are directed to grant all consequential benefits to the applicant as if these orders are not issued at all. The OA is allowed. No costs.

Dated 6th November, 2007



DR. K.B.S. RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

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