CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 604 of 2008

Thursday, this the 10th day of December, 2009

CORAM:

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

V.G. Bhaskaran,
SPA/Grade II/Diesel ERS,
Southern Railway,
Diesel Loco Shed, Ernakulam,
Residing at Thittethara House,
Gandhi Nagar, Kadavanthra P.O.,
COCHN - 682 020 ... Applicant.

(By Advocate Mr. Siby J. Monippally)

versus

1. Union of India represented by
Chief Motive Engineer (Diesel) &
Revising Authority, Headquarters Office,
Personnel Branch, Southern Railway,
Chennai : 600 003

2. The Additional Divisional Railway Manager,
Southern Railway, Trivandrum Division,
Trivandrum.

3. Senior Divisional Mechanical Engineer,
Diesel Loco Shed, Southern Railway,
Ernakulam.

4. Divisional Personnel Officer,
Southern Railway, Trivandrum Division,
Trivandrum. ... Respondents

(By Advocate Mr. P. Haridas)

The Original Application having been heard on 01.12.09, this Tribunal on 10.12.09. delivered the following :

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The spinal legal issue involved in this case is whether the action of the respondents in cancelling the charge sheets issued on the same sets of facts

and in issuing a de-novo charge sheet and conducting further proceedings (which resulted in imposing of penalty on the basis of the inquiry conducted) is valid. The applicant relies upon the Railway Board Circular No. 171/93 dated 01.12.1993. which states, "once the proceedings initiated under Rule 9 or Rule 11 of RS (D&A) Rules,1968 are dropped, the disciplinary authorities would be debarred from initiating fresh proceedings against the delinquent officers, unless the reasons for cancellation of the original charge memorandum or for dropping the proceedings are appropriately mentioned and it is duly stated in the order that the proceedings were being dropped without prejudice to further action which may be considered in the circumstances of the case. It is therefore, necessary that when the intention is to issue fresh charge sheet subsequently, the order cancelling the original one or dropping the proceedings should be carefully worded indicating the intention of issuing the charge sheet afresh appropriate to the nature of the charges."

2. The satellite issues involved include that the report of the enquiry officer of the third disciplinary proceedings is stated to have not been furnished to the applicant for making an effective representation. Hence, the further proceedings beyond the stage of inquiry report are vitiated.

3. Brief facts of the case : According to the applicant he had made certain complaints about some Railway Officials over the theft of diesel which were later on withdrawn as the guilt was admitted by them. The applicant was then transferred to some other section to the prejudice of the applicant. Thereafter the applicant fell ill and he reported to the Railway medical officer When he reported before Senior Medical Officer, Railway, Ernakulam on 01.07.2000, he was advised to report to Railway Hospital Perambur, Madras on 06.07.2000 for further check up. The applicant having felt that the medical

advice was accentuated with vindictive attitude, did not report to the Perambur Hospital and instead underwent medical examination at General Hospital Ernakulam, which had given the Annexure A-4 report dated 04-08-2000. On the strength of the said certificate, the applicant requested the respondents to permit him to resume duties but he was prohibited from so joining. The applicant, therefore, moved the Tribunal in OA No. 1061/2000 and on its disposal by the Tribunal, he filed OP No. 38071/2000 before Hon'ble High Court which was disposed of by a judgment dated 11-01-2001 as per which the applicant was to report to Medical College Hospital, Trivandrum on 21-11-2001. Accordingly, the applicant having reported, as per the directions of the Board, the Medical Board had furnished medical card vide Annexure A-5 dated 21-11-2001. but the Medical Board sent the applicant back as he need not be admitted in the Medical College Hospital for further investigation. However, the Medical superintendent, vide Annexure A-6 letter dated 18-10-2001 intimated that the Medical Board at Trivandrum Hospital has sent a report to the effect "that the applicant needs to be observed for a minimum period of ten days in an inpatient facility and some information needs to be collected from the relatives to help the patient". And the Medical Superintendent, Trivandrum Railway Hospital had advised that the Psychiatrist Member of the Hospital required the applicant to get admitted at the Trivandrum Medical College Hospital under Dr. K.S. Pillai to enable him to arrive at a proper diagnosis after observing the applicant for a minimum of ten days. The applicant thereafter, filed Writ Petition No 22278/2000(B) which was disposed of by judgment dated 12-08-2004, directing the respondents to consider the representation preferred by the applicant and to take appropriate action on the representation in accordance with law. In pursuance of the same, the respondents, vide Annexure A-7 issued order dated 24-09-2004, had advised the applicant to take the course of action as indicated in the Annexure A-6 order, i.e. to report before Dr. K.S. Pillai, at the Trivandrum Medical College

Hospital. The applicant made a representation dated 05-10-2004 and by letter dated 13.12.2004, the respondents stated that as per the hospital authorities, the applicant did not report therein and had thus, advised him to appear before the medical authorities, at the Trivandrum Medical College Hospital. Having been aggrieved by the above, the applicant challenged the action of the respondents through OA No. 397/2005, which was disposed of by Annexure A-8 order dated 16th August, 2005, by only extending the time limit for reporting before the Medical College Hospital. Vide Annexure A-9 communication dated 06-12-2005 from the Railway Medical Superintendent, Trivandrum it was stated that the applicant was examined by the MS/TVC and the applicant was issued with a fit certificate. Period of absence was not covered and the same be dealt with departmentally.

4. While the above was as regards the facts as contained in the OA with regard to medical check up of the applicant, as regards issue of charge sheet, the applicant was issued with two charges sheets, one under SF 11 and another under SF 5 on the same set of charge i.e. absence of same period as under:-

(i) Charge memo dated 25-09-2000

(ii) Charge Memo dated 05-02-2003.

5. The above two charge memos were cancelled by Annexure A-2 order dated 05-12-2003 which reads as under:-

"Sub: DAR case against Shri V.G. Shcharansky, SPA-1/DSL/ERS.

Ref: This office charge memo (SF 11 & SF 1) even No. dated 25-09-2000 and 05-02-2003

Since the SF 11 & SF 5 under reference were issued for absence of same period which are cancelled without prejudice to further action being taken."

6. It was thereafter that, vide Annexure A-3 memorandum dated 01.07.2004, the applicant was issued a fresh charge memo spelling out the following article of charge:-

"That the said Shri V.G. Bhaskaran, while functioning as SPA Gr. 1 Diesel Loco Shed, Ernakulam committed serious misconduct in that he has unautorisedly absented himself after discharged him from sick list by Sr. DM/RH/ERS w.e.f. 02-07-2000 to 30-06-3004 without getting proper sanction of leave from the competent authority."

7. The above charge memo was further progressed by way of conducting an inquiry and the inquiry officer had furnished his report, a copy of which was sent to the applicant on 14-02-2005 with an advice to make representation, but the applicant had not furnished any representation. It was thereafter that the penalty order of Removal from service was issued, vide Annexure A-10 order dated 09-12-2005. The applicant was however, by a separate order of the same date, granted compassionate allowance of amount for 2/3rd of pension and gratuity subject to having required qualifying service,

8. In his Annexure A-11 appeal dated 23rd December, 2005, the applicant contended that he was not permitted to join duties on those periods, which were treated as unauthorized and thus reasons for absence are attributable only to the administration and further that the alleged inquiry report was not received by him consequent to which he could not make effective reply to the same. Various grounds of appeal were also raised in the said appeal.

9. The appellate authority gave a personal hearing to the applicant on 28-09-2006 and having upheld the decision of the disciplinary authority as to the fact that the alleged misconduct of unauthorized absence from duty has been proved, however, reduced the penalty of removal from service to one of reduction to the post of SPA Grade II in the scale of Rs 4000 – 6000 for a period of two years with recurring effect and the period of absence from 02-07-2000 to 30-06-2004 and from the date of removal to the date of joining would be treated as non duty. Annexure A-12 order dated 27-10-2006 refers.

10. The applicant had filed revision petition vide Annexure A-13 dated 23rd November 2006 and it is after considering the said revision petition that the revisionary authority had, vide Annexure A-14 impugned order dated 20-01-2008 upheld the penalty and dismissed the revision petition. The applicant had challenged the same and has prayed for quashing the said order and for a direction to the respondents to pay salary for the period of absence, both from 2000-2004 and also for the period of absence from the date of removal and reinstatement.

11. Respondents have contested the O.A. According to them, Annexure A-4 cannot be taken as a fitness certificate. His appearance before the Medical College Hospital on 21-11-2001 is posterior to the report of the said Medical authorities who had earlier examined and furnished the report, as communicated vide Annexure A-6. In fact, it was being dissatisfied with the issue of Annexure A-6 that the applicant moved the High Court in WP No. 22278/2004, which was disposed of by a direction to the respondents to duly consider the representation of the applicant. Accordingly, Annexure A7 came to be passed. The denial by the applicant of the receipt of inquiry report was specifically rebutted in para 10 of the reply read with para 15. The legal issue that fresh charge sheet cannot be

issued was rebutted stating that there has been no authority that has been annexed or cited by the applicant.

12. Counsel for the applicant argued at length that the entire action is vitiated by a legal lacuna that there is no authority for issue of a fresh charge sheet when the earlier charge sheets were cancelled without giving any reason for such cancellation or dropping of the charges. In this regard, he had heavily relied upon the Railway Board Circular No. 171/93 referred to in para 1 above. He has also contended that the inquiry report was not furnished. His further argument was that the penalty imposed was totally unjustified and in any event, disproportionate to the misconduct in question.

13. Counsel for the respondents justified their action and invited our attention to the fact that there is no challenge to the orders of penalty, appellate order and only the revision order has been challenged.

14. Arguments were heard and documents perused. The provisions of RBE circular No. 171/93 are specific in two aspects to enable the authorities to issue a fresh charge sheet:-

> (a) Reasons for cancellation of the earlier charge sheet should be spelt out.
>
> (b) Intention to proceed further should also be reflected as "without prejudice to further action which may be considered in the circumstances of the case."

15. Vide Annexure A-2 order dated 05-12-2003, the above two conditions are certainly fulfilled. **Reason for cancellation of the earlier two charge sheets is "the charge sheets were issued for absence of same period" and a caution as to the proposal for fresh inquiry was rightly administered,**

when the letter states, "without prejudice to further action being taken." Thus, this aspect has been fully satisfied by the respondents and hence, the contention of the applicant on this point cannot be accepted.

16. However, notwithstanding the fact that the above two conditions are fulfilled, one aspect has to be always kept in view. Cancellation of charge sheet and issue of fresh charge sheet on the same issue is discouraged presumably on the ground that there could be improvement in the fresh charge sheet, after the delinquent individual discloses his defence in the course of the previous enquiry. It is for this reason, even when the disciplinary authority has discretion to remit the matter to the inquiry authority on receipt of inquiry report, that is restricted only to 'further inquiry' not fresh inquiry. In the further inquiry, such improvement of the charge is not permissible. As such, issue of fresh charge sheet has to be only after giving out the reason for cancellation of the earlier ones and with an indication that cancellation is without any prejudice to take further action. Hence, to ascertain asto whether any undue advantage had been taken by the respondents by cancelling the earlier charge sheets, so that an improved version of the charges could be made, the original records leading to the issue of the three charge sheets were called for which have been produced.

17. The first charge sheet was issued on 25-09-2000. Internal correspondence shows that on 12-10-2000 there was a communication to the extent that the charge memo was sent by Registered post and acknowledged by the applicant but there has been no reply from the applicant and further his whereabouts were also not known. There were some internal correspondence as to the alerting of the applicant for certain suitability test to which the applicant replied that the test be deferred till the finalization of the case pending before the High Court. Thus, no defence was disclosed in response to the first charge

sheet and it was vide charge memo dated 05-02-2003 that the second charge sheet was issued, wherein the charge was alleged unauthorized absence from "02-07-2000 onwards." Thus, this charge sheet has taken into account absence upto the date of issue of the charge sheet. The Divisional Office, Mechanical Branch (DSL) in its communication to the Sr. DPO/TVC informed the latter that on review of DAR cases, he came across the pending proceedings and had accordingly requested the Sr. DPO, to peruse the case file and advise whether the disciplinary authority be asked to proceed with the DAR case in view of the court case etc. At this juncture, it was decided to issue a formal cancellation letter, cancelling the earlier two charge sheets, giving the reasons and indicating that the cancellation is without prejudice to take further action, vide Annexure A-2. Thus, till such time annexure A-2 was issued and the charge sheets cancelled, there was no representation from the applicant with reference to the two charge sheets. It was thereafter that the third charge sheet has been furnished on 01-07-2004.. To this, the applicant responded, vide his representation dated 14-07-2004. It was after consideration of the same that the disciplinary authority had chosen to conduct inquiry and proceeded ahead. **The inquiry officer had put questions upon the applicant and his replies included that he had not reported for duty during the period from 02.07.2000 to 30-06-2004 and that he is satisfied with the opportunities given to him to prove his innocence. These have taken place in the presence of the Defence Assistant.** The inquiry report was sent to the disciplinary authority by communication dated 03-12-2004. The disciplinary authority had addressed a communication dated 14-02-2005 to the applicant enclosing the proceedings of the inquiry conducted by the inquiry officer and time to represent was granted to the extent of 15 days. This communication was acknowledged on 15-02-2005 by the applicant, vide postal acknowledgment. Thus, **the contention that the inquiry report was not received is disproved.**

The applicant had been given an opportunity of being heard by the appellate authority on 28-09-2006 as stated in the appellate order dated 27-10-2006. The penalty has been reduced from removal to one of reduction to the post of SPA for two years with cumulative effect and with the further condition that the period of absence from 2000 to 2004 and from the date of removal from service to the date of reinstatement would be treated as non duty. Revision has also been preferred which had been duly considered. All the authorities have applied their mind without being influenced by any others. The noting portion also has been perused in this regard. Thus, no legal lacuna could be traced in the entire proceedings.

18. It is appropriate to refer to the decision in the case of *State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364*, wherein the Apex Court has held as under:-

> *" ..... Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counter-productive exercise.*
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> ***33.*** *We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):*
>
> > *(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.*
> >
> > *(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.*

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

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

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public

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

(5) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it 'void' or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or ***Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query.*** *[It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.] (emphasis supplied)*

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

19. Keeping in view the above dictum of the Apex Court if the case is viewed, it is evident that no procedural irregularity in the decision making process could be discerned. No prejudice had been caused to the applicant by issuing fresh charge sheet after cancelling the earlier ones, giving reasons for cancellation (though in brief) and with a caution that the cancellation is without prejudice to take further action. Nor is the quantum of penalty disproportionate to the misconduct in question. From removal from service, it has been substantially reduced to one of reduction in rank with cumulative effect and with the periods of absence treated as non duty.

20. In view of the above, we do not find any illegality or irregularity in the decision of the respondents. The OA being devoid of merits is therefore, **dismissed**.

21. No costs.

(Dated, the 10th December, 2009)

(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER

(Dr. K B S RAJAN)
JUDICIAL MEMBER

cvr.