CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A.NO. 205 OF 2005

.....TUESDAY....THIS THE 27th DAY OF SEPTEMBER, 2005

CORAM

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEROGE PARACKEN, JUDICIAL MEMBER

Bijumon J, aged 31 years
Son of Shri D.John,
Diesel Assistant/Assistant Loco Pilot,
Southern Railway, Quilon,
residing at Maryvilasom Puthenveedu,
Kura Post, Chengamnadu Via.
Quilon District. .... Applicant

(By Advocate Mr.T.C.Govindaswamy)

V.

Union of India, represented by the
General Manager, Southern Railway,
Headquarters Office, Park Town PO
Chennai.3.

Chief Mechanical Enginer,
Southern Railway,
Headquarters Office, Park Town Post,
Chennai.3.

The Senior Divisional Mechanical Engineer,
Southern Railway, Trivandrum Division,
Trivandrum.14. .... Respondents

(By Advocate Ms. P.K. Nandini)

The application having been heard on 8.9.2005, the Tribunal on 27.9.2005 delivered the following:

ORDER

HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

The Applicant has challenged Annexure A.3. letter dated 9.2.05 by which the earlier Memorandum No. SF.5 No,.V/T(M)/1/258/2004-5/DAR/2 dated 7.12.04 was cancelled "without prejudice to the right of the department for further action under R.S D&A Rules, 1968." He is also aggrieved by Annexure A.4 Memorandum dated 17.2.2005 by which he was informed that the respondents were proposing to hold an enquiry against him under Rule 9 of the Railway Servants (Disciplinary and Appeal) Rules, 1968. The statement of Articles of Charges and the statement of Imputation of Misconduct or Misbehavior in support of the Article of Charges framed against the Applicant were also supplied to him along with the said A4 Memorandum.

2. The brief facts of the case are that the Applicant is presently working as Assistant Loco Pilot (earlier designated as Diesel Assistant) at Quilon Junction of Southern Railway, Trivandrum Division. He was issued the following Charge Memo dated 7.12.04 by the third Respondent:-

> "**Annexure.I: Statement of the articles of charges framed against Shri J.Bijumon, Asst. Loco Pilot/QLN.**
>
> That the said Shri J.Bijumon, Asst. Loco Pilot/QLN has committed dereliction to duty in that. While working as the DAT of TEN MU LE (WDG 2 14667+14671) on 14.11.2004 at about 17.05 Hrs while MU LE was receiving on the NCJ Bye Pass line from ERL he has passed starter cum LSS 22 B of NCJ bye pass line at Danger by belated application of brake. He has thus violated GR 3.81 G.R. 2.11 (2) and Rule 3(1)(ii) & (iii) of Railway Services Conduct Rules, 1966.
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> **Annexure.II: Statement of imputations of misconduct on misbehavior in support of the Article of Charges framed against Shri J..Bijumon, Asst.Loco Pilot/QLN.**
>
> That the said Sri J.Bijumon, Asst. Loco Pilot/QLN, has committed dereliction to duty in that. While working as the DAT of TEN MU LE

> (WDG 2 14667+14671) on 14.11.2004 at about 17.05 Hrs while MU LE was receiving on the NCJ Bye Pass line from ERL he has passed starter cum LSS 22 B of NCJ bye pass line from ERL he has passed starter cum LSS 22 B of NCJ bye pass line at Danger by belated application of brake. He has thus violated GR 3.81 GR 2.11(2) & Rule 3(1)(ii) & (iii) of Railway Service Conduct Rules, 1966.

The applicant has denied the charges and submitted a detailed reply dated 10.1.05, a copy of which has been annexed with the O,.A. as Annexure.A.2.

3. The applicant in the O.A. has alleged that when the new incumbent of the office of the Senior Divisional Mechanical Engineer took charge, he issued the impugned letter dated 9.2.05 without assigning any reason canceling Annexure Al Charge Memo but with a rider stating that the same was issued "without prejudice to the right of the department for further action under the R.S.&D.A. Rules, 1968". Thereafter, the third respondent issued the Charge Memo dated 17.2.05 annexed as Annexure.A.4 with this O.A.

4. The contention of the applicant is that Annexure.A.4 contains the very same charges as mentioned in Annexure A.1 except to the extent that "G.R.380" has been substituted as "G.R.381". His further contention is that there is no provision in the rules for issuance of a fresh Charge Memo once the proceedings initiated has already been dropped or cancelled under the Rules. He relies on the Railway Board's Order No.RBE.171/93 dated 1. 12.93, a copy of which has been annexed as Annexure.A5 to the O.A. The contents of the said O.M. can conveniently be reproduced here as under:

> "It has come to the notice of the Railway Board that on one of the Zonal Railways, the Memorandum of Charges issued to an employee was withdrawn by the disciplinary authority with the intention of issuing fresh detailed Charge Memorandum. However, while withdrawing the charge sheet no reason therefor were given and it was only stated that the charge sheet was being withdrawn. The issue of a fresh charge Memorandum subsequently was challenged by the employee before CAT/Bombay. The Central Administrative Tribunal on hearing the case have quashed the said charge Memorandum holding that unless there is a power in the disciplinary authority by virtue of the rules or administrative instructions to

give another charge sheet on the same facts after withdrawing the first one, the second charge sheet will be entirely without authority.

2.The matter has been examined and it is clarified that once the proceedings initiated under Rule 9 or Rule 11 of RS(D&A) Rules, 1968 are dropped, the disciplinary authority 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 so as to mention the reasons for such an action indicating the intention of issuing charge sheet afresh appropriate to the nature of the charges."

5. The applicant submits that in case the respondents proceed further with A.4. Memorandum, he has to unnecessarily suffer an ordeal or face an enquiry which is otherwise illegal and ultra vires of the statutory rules. If the respondents proceed against with the enquiry, substantial prejudice and irreparable damages would be caused to the applicant.

6. The learned counsel for the applicant also would submit that the impugned order/orders of the respondents are in violation of Sub Rules 6 and 7 and of Rule 9 of the Railway Servants (Discipline and Appeal Rules) 1968 which is reproduced below:

(6). Where it is proposed to hold an inquiry against a Railway Servant under this rule and Rule,10, the disciplinary authority shall draw up or cause to be drawn up--
(i) the substance of the imputations of misconduct or misbehavior into definite and distinct articles of charges;
(ii) a statement of the imputations of misconduct or misbehavior in support of each article of charge which shall contain;

(a) a statement of all relevant facts including any admission or confession made by the Railway servant;

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained.

(7) The disciplinary authority shall deliver or cause to be delivered to the Railway Servant a copy of the articles of charge, the statement

> of the imputations of misconduct or misbehavior and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the Railway servant to submit a written statement of his defence within ten days or such further time as the disciplinary authority may allow.

7. He has relied upon the following case laws in support of the reliefs sought in the O.A:-.

1. OA 427/02 (K.Samy Vs. Union of India and others

2. 1998 ATC (37) 36 G.Suddir Vs. Union of India and others

3. 2004(1) ATJ 458. H.S.Shekhawat Vs. Union of India and others

4. 1997 (36) ATC 647 Uttam Sonajji Vs. Union of India and others.

8. In the case of K.Samy (supra) this Tribunal has considered the question whether under the provisions of Rules 9 and 10 of the Railway Servants (Discipline and Appeal) Rules, 1968 the Disciplinary Authority is empowered to cancel the enquiry report and proceedings and order a fresh enquiry, if it is found that there are some procedural lapses in the enquiry. The finding of the Tribunal in this case was as under:

> "A mere reading of the above quoted provisions would make it clear that the disciplinary authority has no right or discretion to order a fresh enquiry cancelling the enquiry proceedings and report, even if a procedural lapse is noted. If the disciplinary authority finds that there is any lapse or irregularity in the enquiry what the authority can do under Sub Rule (2) of Rule 10 is to remit the enquiry report to the inquiring authority for further inquiry for the reasons to be recorded in writing. It has no power to cancel the entire proceedings and report and direct a de-novo enquiry under the Railway Servants (Disciplinary & Appeal) Rules, 1968. If such a course is permitted, whenev4r an enquiry officer in his report holds the charged Railway Servant not guilty, the disciplinary authority would be at liberty to have a fresh inquiry held by an officer of his choice which may lead to an unhealthy practice."

9. In the case of G.Sudhir (supra) the applicant who was a Goods Driver was charged with misconduct while working as Diesel Assistant for giving a false deposition before a committee and he was awarded a minor penalty. After lapse of six months, the earlier charge memo was cancelled and a fresh charge memo

was issued based on the same facts for enhancement of the minor penalty to a major penalty. It was held by this Tribunal that cancellation of the charge memo and issue of fresh charge memo based on the same facts under Rule 25 of the Railway Servants (Discipline and Appeal) Rules, 1968 was illegal.

10. In the case of H.S.Sekhawant (supra) the applicant was inflicted with the penalty of removal from service which was later on modified to reduction to the next lower grade for five years. The penalty was again enhanced by the higher authorities for removal which was finally quashed by this Tribunal. Thereafter, the respondents dropped the charge sheet and another charge sheet for major penalty has been issued in violation of the Tribunal's order. Hence, the Tribunal held that the issuance of fresh charge sheet does not stand to the scrutiny of law and declared as invalid.

11. In the case of Uttam Sonalji (supra) the coordinate Bench of this Tribunal at Bombay followed the orders in an earlier OA 695/92 decided on 16.7.93 (K.Ramankutty Vs. Union of India). That was a case of a Railway Employee against whom a charge sheet was issued in February, 1990 and withdrawn on 30.5.91. The applicant was due to retire on 1.6.91 but a second charge-sheet was given to him on 30.5.91. The Tribunal observed that "the charge-sheet was withdrawn unconditionally and no reasons were given in the order for withdrawal of the charge-sheet and the effect of the withdrawal of the charge-sheet would be to put an end to the enquiry which was in progress and would result in discharging the applicant of the charges mentioned in the charge-sheet. Since the above action of the department was without sanction of any rules or administrative instructions which empowers the disciplinary authority to give another charge-sheet after the first charge sheet was withdrawn on identical facts, the OA was allowed.

12.The respondents in the reply statement has submitted that the applicant was involved in a serious case of violation of safety rules in which the train engine which was operated by him as Assistant Loco Pilot on 14.11.2004 passed the Danger Signal. Passing of Danger Signal and entering a line which is not meant for his train is a fatal mistake and is likely to cause a major disaster. In view of the seriousness of the case a major penalty charge sheet dated 7.12.04 was issued to the applicant. However, the respondents have noticed that there was an error in the rule number quoted in the charge sheet. Rule G.R.380 was quoted whereas Rule G.R.381 was the relevant rule which should have been quoted. When this mistake was detected, the charge sheet had already been served on the applicant. Hence a fresh charge sheet indicating the correct number has been issued vide Memorandum dated 17.2.05. Before issuing 17.2.05 Memorandum the Annexure.A1 charge dated 7.12.04 was cancelled by A3 letter dated 9.2.05 in which it was clearly mentioned that the cancellation is without prejudice to the right of the department for further action under the Railway Servants (Discipline and Appeal) Rules, 1968. The respondents' contention is that the reason for cancellation is quite apparent by the simple reading of the earlier charge sheet and the new charge sheet together ie., both of them are one and the same except for the Rule No.G.R.381 is quoted in the second one instead of G.R.380 quoted in the first one by mistake. The respondents' counsel has further argued that the respondents have the inherent power to alter the charge and the revised memorandum has been issued only to carry out the correction of a mistake. There is no irregularity involved in such correction. She has also argued that no prejudice has been caused to the applicant in any manner by the revised memorandum correcting a mistake.

13. The Apex Court in **Union of India V. A.N.Saxena, 1992(3)SCC 124** has deprecated the intervention of the Tribunals and Courts in disciplinary proceedings at an interlocutory stage. The imputations made against the applicant are of extremely serious nature of the facts alleged, if proved would establish misconduct and misbehavior.

15. In the case of **State Bank of Patiala and others Vs.S.K.Sharma, AIR 1996 SC 1669** the Hon'ble Apex Court considered the question whether the impugned action/orders of the respondents would prejudice the delinquent employee in defending himself properly and effectively in the Disciplinary Proceedings. The scope of the principles to be followed in the context of disciplinary enquiries and the order of punishment imposed by the employer upon the employee have been explained in the following terms.

> "We may summarize 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 inquiries 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 inquiry in violation of the rules/regulations/statutory provisions governing such enquries should not be set aside automatically. The Court or the Tribunal should inquire 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 herein before 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 postilion 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 inquiry 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 prejudice 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 inquiry 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 o 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 enqjury officer does not give the 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 ie., 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 is different or distinct principle.
(4).(a) in the case of a procedural provision which is not of a mandatory character, th complaint of violation has to be examined from the stand point of substantial compliance. Be that as it may,the order passed in violation of such a provision can be set aside only Where such violation has occasioned prejudice to the delinquent employee.
(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot beset aside on the ground of 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,(1994 AIR SCW 1050). 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 inquiry 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, ie., 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 a fresh according to law ie., 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 stand point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this Principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.

(6).While applying the rule fo 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 or the rule of audi alteram partem. In such situation,the Court may have to balance public/states interest with the requirement of natural justice and arrive at an appropriate decision."

15. In the case of Board of Management of **SVT Educational Institutions and others Vs.A.Raghupathy Bhat and others,** AIR 1997 SC 1898 the Apex Court reiterated the settled law that the employer has power to conduct inquiry afresh from the stage at which the illegality in the proceedings is found vitiating the action.

16. We have heard the counsel for both the parties. We are of the considered view that the rules do not prohibit the Disciplinary Authority in any manner to drop the charge to correct a mistake and issue a fresh memo on the same charge. In the instant case, the Memorandum dated 7.12.04 was cancelled without prejudice to the right of the department for further action under Railway Servants (Disciplinary & Appeal) Rules, 1968. The cancellation of the Memorandum dated 7.12.04 was necessitated due to a

mistake crept into it and the subsequent Memorandum dated 17.2.05 was issued after correcting the mistake. The respondents have clearly mentioned the prohibitory clause that the first charge was dropped without prejudice to take further action. The entire proceedings are at its initial stage. No prejudice has been caused to the applicant by the action of the respondents in dropping the first charge and issuing a fresh charge correcting the mistake.

17. In view of the above facts and circumstances we do not find any merit in the plea taken by the applicant. Accordingly the O.A is dismissed without any order as to costs.

Dated this the 27th day of September, 2005

GEORGE PARACKEN
JUIDICIAL MEMBER

SATHI NAIR
VICE CHAIRMAN

S.