

CENTRAL ADMINISTRATIVE TRIBUNAL,
ERNAKULAM BENCH

Original Application No. 291 of 2012

Friday, ____, this the 14th day of June, 2013

CORAM:

Hon'ble Dr. K.B.S. Rajan, Judicial Member

Hon'ble Mr. K. George Joseph, Administrative Member

M. Muthiah, aged 47 years,
S/o. Muthuvel, Senior Commercial Clerk,
Southern Railway/Booking Office,
Tirunelveli R.S. & P.O., Permanent Address:
No. 29/7-A2, M.M. Compound, Beach Road,
Nagarcoil, Tamil Nadu, 629 002.

..... Applicant

(By Advocate – Mr. T.C. Govindaswamy)

V e r s u s

1. Union of India, represented by the
General Manager, Southern Railway,
Headquarters Office, Park Town PO.,
Chennai-600 003.
2. The Additional Divisional Railway Manager,
Southern Railway, Madurai Division,
Madurai-625 016.
3. The Senior Divisional Commercial Manager,
Southern Railway, Madurai Division,
Madurai-625 016.
4. The Divisional Commercial Manager,
Southern Railway, Madurai Division,
Madurai – 625 016.
5. The Assistant Commercial Manager,
Southern Railway, Trivandrum Division,
Trivandrum – 695 014.
6. The Senior Divisional Commercial Manager,
Southern Railway, Trivandrum Division,
Trivandrum – 695 014.



7. The Chief Commercial Manager,
Southern Railway, Headquarters Office,
Park Town PO., Chennai- 600 003.

..... Respondents

(By Advocate – Mrs. K. Girija)

This application having been heard on 10.06.2013, the Tribunal on 14/06/13 delivered the following:

ORDER

By Hon'ble Dr. K.B.S. Rajan, Judicial Member -

The applicant at present functioning as senior commercial clerk was subjected to a trap case by projecting a decoy customer for transportation of a motorbike through railway parcel. After the receipt of the tariff/fare for such transportation by the applicant, vigilance team entered and demanded the cash retained by the applicant including the personal cash declared by him. There was a shortage of Rs.24 in the personal cash and excessive Rs.29 in the railway cash. The explanation given by the applicant was that as no floating cash was made available to him, in order to ensure that the customers are not made to wait for balance, in three or four cases, he had utilised the personal cash held with him and in so far as the case of the decoy customer, the fare being Rs.255/-, on receipt of Rs.300, the applicant returned Rs.40 and asked the decoy passenger to pay Rs 5 and get back the balance of Rs 10/-. However, the version of the department is that the applicant had demanded and accepted Rs 15 in excess of the fare for transportation of the bike and thus, he was kept under suspension followed by issue of charge sheet, the charges being the following:-

"Sri M.Muthiah, Sr.CC/CVP, while working as Sr.CC/NCJ on 06.11.07, has committed serious irregularities and failed to maintain absolute integrity, show devotion to duty and acted in a manner unbecoming of a Railway servant in that,

(1) He had demanded and collected Rs.270/- from Sri R.Ramasamy of NCJ and booked a Hero Honda deluxe with registration No.TN 74E 9497 and issued receipt No.952148 for Rs.255/- only and thereby he retained Rs.15/- for his personal gains.

(2) *He had excess cash of Rs.29/- in his railway cash.*

Thus, Sri Muthiah, Sr.CC/CVP, while working as Sr.CC/NCJ had contravened the provision of Rule 3.1 (i), (ii) and (iii) of the Railway Services (Conduct) Rules, 1966."

2. The applicant having denied the charges, inquiry followed and the Inquiry Officer held the first charge as not having been proved and held the second one as having been proved. The applicant was supplied with a copy of the same, against which he has represented vide Annexure A-12. The Disciplinary Authority thereafter differed from the findings of the I.O. and held vide Annexure A-1 order dated 19-11-2010 that both the charges remained proved and imposed the penalty as under:-

Considering the nature of offence committed by the charged employee, I, in exercise of powers conferred under Rule 9 and 10 (5) of Railway Servants (Discipline & Appeal) Rules, 1968, impose a penalty of "Reduction to lower post for a period of Three years" on the charged employee. He will be fixed on the pay which he is drawing now.

Accordingly, Shri M.Muthiah is reduced from the post of Sr.CC in pay band Rs.5200-20200+GP Rs.2800/- to the post of Commercial Clerk in pay band Rs.5200-20200+GP Rs.2000/- for a period of three years w.e.f. 01.12.2010. On expiry of the penalty-

(1) *he will be restored back to his original post i.e. Sr.CC on the Grade pay from which he was reduced; and*

(2) *he will retain his original seniority in the category of Sr.CC."*

3. The applicant preferred an appeal vide Annexure A-15, wherein he had raised various grounds, including the irregularities in the procedure adopted in conducting the trap case, and also brought out that the introduction of the decoy customer to his own brother (SW2) is illogical and stage managed and further it has been conducted that there is violation of principles of natural justice inasmuch as the dissenting view of the Disciplinary Authority having not been communicated, the same is illegal.

4. The appellate authority, vide order dated 18-07-2011 modified the penalty to one of Reduction of pay by 2 stages for a period of 24 months (NR) w.e.f. 01-12-2010, i.e. the date of penalty imposed by the Disciplinary Authority. Annexure A-2 refers.

5. Revision petition filed, vide Annexure A-18 had also been dismissed vide Annexure A-3. Thus the penalty order, the order of the appellate authority and that of the Revisional Authority are under challenge in this OA seeking the following reliefs:-

i) *"Call for the records leading to issuance of Annexures A1, A2 and A3, quash the same and direct the respondents to grant all the consequential benefit emanating there from;*

ii) *Direct the respondents to refund the arrears of pay and allowances due, as a consequence of the relief prayed for in para 1 above with 12% interest to be calculated month after month as arrears fell due upto the date of full and final settlement of the same;*

iii) *Award costs of and incidental to this Application;*

iv) *Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case."*

6. Respondents have contested the OA. They have stated that there is no prejudice caused in not communicating the point of disagreement by the disciplinary authority in respect of the first charge. They have cited a number of judgments of the Apex Court as well as other courts.

6. In his rejoinder the applicant has referred to the Railway Board Circular No. RBE 33/96 which provides for opportunity before imposing penalty to be given with reference to the point of disagreements by the disciplinary authority.

7. Counsel for the applicant submitted that the inquiry officer himself has clearly rendered the finding that the evidence of SW-1 and SW-2 cannot be relied upon. Further, non communication of the tentative finding

arrived at by the Disciplinary Authority is fatal to the entire proceedings. The counsel refers to the following decisions of the Apex Court's and various Benches of this Tribunal as hereunder to hammer home his point that the procedure adopted in respect of trap cases should be as per the provisions of Paras 704 and 705 of the Indian Railway Vigilance Manual and that the applicant ought to have been afforded opportunity before the Disciplinary Authority came to the conclusion based on his views on the findings of the I.O.:-

1. 2008 (1) SCC (L&S) 819 – Moni Shankar
2. 2010 (1) CAT 319
3. SLJ 2011 (1) CAT 206
4. SLJ2009 (2) CAT 216
5. SLJ 2013 (1) CAT 361
6. SLJ 2012 (1) CAT 258
7. SLJ 2012 (3) CAT 306
8. OA 531/2011 decided on 22.05.2013.
9. 1999 SCC (L&S) 629
10. SLJ 2013 (1) CAT 317
11. 1998 SCC (L&S) 783 – PNB Vs. Kunj Behari

8. The counsel heavily relied upon the decision of the Apex Court in the case of Moni Shankar (Supra) with regard to the necessity to adopt the procedure contained in paras 704 and 705 of the Manual, and for hammering home the mandatory requirement that the point of disagreement should be made known to the delinquent official in advance to enable him to make representation, he has relied upon the decision of the Apex Court in the case of Punjab National Bank vs Kunj Behari (supra).

9. Counsel the respondents followed the contentions as raised in the counter and submitted that there is no legal infirmity in conducting the inquiry and if at all there had been any minor deficiencies, the same has not resulted in any prejudice to the applicant.

10. Arguments were heard and documents perused. Two vital legal issues are involved in this case from the stage of imposition of penalty by the disciplinary authority. They are as under:

- (a) Whether the inquiry involving trap was conducted as per

the procedure and if not whether the same is fatal to the very conducting of the inquiry.

(b) Whether non availability of opportunity to rebut the point of disagreement prior to imposition of penalty is fatal to the case and if so, the effect thereof.

11. As regards (a) above, the law has been crystallized in the case of *Moni Shankar* (supra). Many Benches of the Tribunal has fully followed the decision in that case and held that in respect of trap cases, the procedure has to be substantially followed. In the instant case, the alleged incidence took place in Nagarcoil Junction where one has many staff members to be independent witnesses. Selection of Chidambaranathan, who was well known to the Vigilance Inspector (with whom he had worked for four years) who was working at a place 125 kms from Nagarcoil, having his own brother to act as a decoy customer, recording in the statement (S-21) that the said Ramaswamy was introduced to him (Chidambaranathan) whereas both of them are brothers are all intriguing. Other formalities also have not been carried out as per paras 704 and 705 of the Vigilance Manual. In the case of *V.S. Radhakrishnan* OA No. 531 of 2011, this Tribunal has held as under:-

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

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

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

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

"704. Traps.—(i)-(iv) * * *

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

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

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

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

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

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

(vi)-(vii) * * *

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

(a) The investigating officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where two gazetted officers are not available immediately, the services of non-gazetted staff can be utilised.

All employees, particularly, gazetted officers, should assist and witness a trap whenever they are approached by any officer or branch. The Head of Branch should detail a suitable person or persons to be present at the scene of trap. Refusal to assist or witness a trap without a just cause/without sufficient reason may be regarded as a breach of duty, making him liable to disciplinary action.

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

(c)-(d) * * * *

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

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

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

14. While we say so we must place on record that this Court in Chief Commercial Manager, South Central Railway v. G. Ratnam¹ opined that non-adherence to the instructions laid down in Paras 704 and 705 of the Vigilance Manual would not invalidate a departmental proceeding, stating:

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

18. We are not inclined to agree that the non-adherence of the mandatory instructions and guidelines contained in Paras 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained."

15. It has been noticed in that judgment that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally

enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued. "

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

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

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

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

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

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

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

16. The following are the relevant questions during examination and

cross examination:-

"Q.85. Please peruse Ext.S-5 duly identifying your signature, if any in it and say what do you know about it ?

Ans. I identify my signature in Ext.S-5. This is the statement of Shri Usman and it was read over/Smt.Bright, CCC/III/TVC.

Q.94. Please peruse Ext.S-14 duly identifying your signature, if any in it and say what do you know about it?

Ans. This is the final proceedings and I identify my signatures in all the pages.

Q.116. In Ext.S-5 it was stated that he had allegedly collected money at the instance of Delivery Clerk buty at the time of proceedings were drawn (Ext.S-14) Shri Usman denied that. What have you got to say?

Ans. Shri Usman has already given a statement that he had collect the money as per the instructions of Delivery Clerk and what Shri Usman said in Ext. S-14 is unfair (Page No.6)

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

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

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

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

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

19. As regards the next contention that the Disciplinary Authority has not given any cogent reason to disagree, a look at the note of disagreement vide Annexure A-11 would go to show that the statement of Shri Usman S-5 has been taken on its face value with the interpretation of

the term "like this" of the Disciplinary Authority. The term of 'like this' according to the Disciplinary Authority meant that the money was collected in the said manner as per the instructions of the applicant. The interpretation of the aforesaid words can only be a presumption especially when the author of the statement was not available for cross examination. Again, the Disciplinary Authority has relied entirely by the circumstantial witnesses SW 5 & 6. This would not be sufficient to prove that the applicant was guilty of the mis-conduct. The disagreement thus lacks in merit.

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

33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

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

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is

established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

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

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

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a

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

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

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

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

13. It is necessary to set out the portions from the order of the Tribunal which gave the reasons to come to the conclusion that the order of the Disciplinary Authority was based on no evidence and the findings were perverse. The Tribunal, after extracting in full the evidence of SW 1, the

only witness examined on the side of the prosecution, and after extracting also the proceedings of the Enquiry Officer dated 18-6-1991, observed as follows:

"After these proceedings on 18-6-1991 the Enquiry Officer has only received the brief from the PO and then finalised the report. This shows that the Enquiry Officer has not attempted to question the applicant on the evidence appearing against him in the proceedings dated 18-6-1991. Under sub-rule (18) of Rule 14 of the CCS (CCA) Rules, it is incumbent on the Enquiry Authority to question the officer facing the charge, broadly on the evidence appearing against him in a case where the officer does not offer himself for examination as a witness. This mandatory provision of the CCS (CCA) Rules has been lost sight of by the Enquiry Authority. The learned counsel for the respondents argued that as the inquiry itself was held ex parte as the applicant did not appear in response to notice, it was not possible for the Enquiry Authority to question the applicant. This argument has no force because, on 18-6-1991 when the inquiry was held for recording the evidence in support of the charge, even if the Enquiry Officer has set the applicant ex parte and recorded the evidence, he should have adjourned the hearing to another date to enable the applicant to participate in the enquiry hereafter/or even if the Enquiry Authority did not choose to give the applicant an opportunity to cross-examine the witness examined in support of the charge, he should have given an opportunity to the applicant to appear and then proceeded to question him under sub-rule (18) of Rule 14 of the CCS (CCA) Rules. The omission to do this is a serious error committed by the Enquiry Authority....."

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

21. Rule 9(21) of the Railway Servants (Discipline and Appeals) 1966 reads as under:-

"(21) The inquiring authority may, after the Railway servant closes his case, and shall, if the Railway servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Railway servant to explain any circumstances appearing in the evidence against him."

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

" 20. The enquiry officer had put the following questions to the

appellant:

"Having heard all the PWs, please state if you plead guilty? Please state if you require any additional documents/witness in your defence at this stage? Do you wish to submit your oral defence or written defence ~~or~~ brief? Are you satisfied with the enquiry proceedings and can I conclude the enquiry?"

21. Such a question does not comply with Rule 9(21) of the Rules. What were the circumstances appearing against the appellant had not been disclosed. "

23. According to the counsel, once an opportunity to stand in the witness box is given but not availed of, and the delinquent has chosen to file written brief, the latter option being in lieu of the former, the provisions of Rule 9(21) becomes directory. That is not so. For, provision for filing of written brief is one provided for in Rule 9(22) and thus, the charged officer has two opportunities namely he can stand in the witness box and also he can furnish a written brief. Furnishing of written brief cannot thus be a substitute for standing in the witness box. As such, the respondents are not right in contending that since the applicant has refused to enter into the witness box, the mandatory question was only directory.

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

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

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

12. In the instant case also, the procedure prescribed has not been followed. The same has made the case of the respondents sufficiently weak.

13. As regards the disciplinary authority dissenting from the findings of the Inquiry Officer, the applicant has cited the decision in the case of Kunj Behari Mishra (supra). The Apex Court in that case has held as under:-

"whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

14. In their Order vide Annexure A-19, the Railway Board has also emphasized the need to forward the tentative opinion of the Disciplinary Authority, and the said order reads as under:-

"5. It has also been decided that where the Inquiring Authority holds a charge as not provided and the disciplinary authority takes a contrary view, the reasons for such disagreement must be communicated, in brief, to the charged officer along with the report of Inquiry so that he charged officer can make an effective representation. This procedure would require the Disciplinary Authority to first examine the report as per the laid down procedure and formulate its tentative views before forwarding the Report of Inquiry to the Charged Officer."

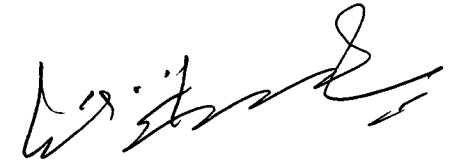
15. In view of the decisions in Apex Court in the aforesaid cases, we have no hesitation to hold that the enquiry has not been conducted in a manner as provided for in the relevant rules.

16. Though the enquiry officer has held that the second charge stands proved, a mere shortage or excess of cash would not be construed that the applicant has committed the misconduct. Provision exists for depositing the

excess money or making up the deficiency. This means that there could be certain inadvertent errors resulting in availability of excess money or shortage of money. Again in the instant case the applicant had stated that there had been no floating money made available to him on the day which would be utilised for the purpose of paying the balance amount especially when they are in smaller denomination. The utilisation of personal cash which resulted in shortage of Rs.29 in the personal cash, for the purpose of discharging the customers without making them wait for a long time for small changes, cannot be ruled out as the excess money found in the railway cash is comparable to the deficiency in personal cash. Preponderance of probability is well in favour of the applicant rather than in favour of the prosecution. Thus the holding of charge number two as proved also is questionable insofar as it relates to misconduct. At best it could be an act which is not based on any specific rule. The mischief aimed at in the charge sheet does not exist. It cannot be said to be an act of lack of devotion to duty.

17. Thus, the order of the disciplinary authority is necessarily to be held as illegal and unjust. Consequently the same stands quashed. As a logical corollary subsequent appellate and Revision orders also are quashed and set aside. The OA is allowed. Respondents are directed to release the amount due to the applicant as if no penalty has been imposed. Though interest is claimed in the OA and insisted by the counsel, who also prayed for cost, the sober way of presentation of the case by the counsel for the respondents coupled with the fact that the entire act of the respondents cannot be branded as one accentuated by malafide no interest is awarded nor are the respondents saddled with costs.


(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER


(DR. K.B.S. RAJAN)
JUDICIAL MEMBER

"SA"

.1.

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Contempt Petition No.180/43/14

in

Original Application No.291/2012

Tuesday, this the 3rd day of November, 2015

C O R A M :

**HON'BLE Mr.JUSTICE N.K BALAKRISHNAN, JUDICIAL MEMBER
HON'BLE MRS.P.GOPINATH, ADMINISTRATIVE MEMBER**

M.Muthiah

S/o.Muthuvel

Senior Commercial Clerk

Southern Railway/Booking Office

Tirunelveli R.S & P.O, Permanent address:

No.29/7 – A2, M.M Compound, Beach Road

Nagarcoil, Tamil Nadu- 629 002

...Petitioner

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

V e r s u s

1. **Shri.Rakesh Mishra
General Manager, Southern Railway
Headquarters Office, Park Town P.O
Chennai – 600 003**
2. **Shri. M.Babu
The Additional Divisional Railway Manager
Southern Railway, Madurai Division
Madurai – 625 016**
3. **Shri.N.Mahesh
The Senior Divisional Commercial Manager
Southern Railway
Madurai Division
Madurai – 625 016**
4. **Shri.S.T.Ramalingam
The Divisional Commercial Manager
Southern Railway, Madurai Division
Madurai – 625 016**

...Respondents

.2.

(By Advocate Mrs.Sumathi Dandapani, Sr with Mrs.K.Girija)

This Contempt Petition having been heard on 3rd November, 2015 this Tribunal on the same day delivered the following :

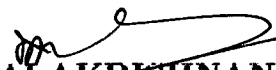
ORDER

By Justice N.K.Balakrishnan, Judicial Member

Mr.T.C.G Swamy, learned counsel for the petitioner submitted that the Contempt Petition may be closed with liberty to the petitioner to get it revived if occasion arises. Accordingly, the Contempt Petition is closed with liberty as prayed for.



(P.GOPINATH)
ADMINISTRATIVE MEMBER



(N.K.BALAKRISHNAN)
JUDICIAL MEMBER

SV

**Central Administrative Tribunal
Ernakulam Bench**

RA//180/00022/14 in OA 291/12

Thursday, this the 9th day of July, 2015

CORAM

HON'BLE MR.JUSTICE N.K.BALAKRISHNAN, JUDICIAL MEMBER
HON'BLE MR.R.RAMANUJAM, ADMINISTRATIVE MEMBER

1. Union of India, represented by the
General Manager, Southern Railway, Headquarters Office
Park Town P.O., Chennai-600 003.
2. The Additional Divisional Railway Manager
Southern Railway, Madurai Division, Madurai-625 016
3. The Senior Divisional Commercial Manager
Southern Railway, Madurai Division, Madurai-625 016.
4. The Divisional Commercial Manager
Southern Railway, Madurai Division, Madurai 625 016.
5. The Assistant Commercial Manager
Southern Railway, Trivandrum Division, Trivandrum-695 014.
6. The Senior Divisional Commercial Manager
Southern Railway, Trivandrum Division, Trivandrum-695 014
7. The Chief Commercial Manager
Southern Railway, Headquarters Office
Park Town PO, Chennai-600 003.

Review Applicants

(By Advocate: Mrs. Sumathi Dandapani, Sr.)

Versus

M.Muthiah, 47 years
S/o Muthuvel
Senior Commercial Clerk, Southern Railway
Booking Office
Tirunelveli R.S. & P.O.,
Permanent Address No.29/7-A2, M.M.Compound,
Beach Road, Nagercoil, Tamil Nadu 629 002.

Respondent


(By Advocate: Mr. T.C.Govindaswamy)


This Review Application having been heard on 9th July, 2015, the Tribunal delivered the following order on the same day:

ORDER (oral)

By Mr.N.K.Balakrishnan, Judicial Member

The main ground stated in the Review Application is that Annexure R1 order passed by this Tribunal suffers from certain infirmities in as much as irrelevant factual and legal findings have crept in the order. After going through the order, it is seen that in pages 6 to 16 of the impugned order, excerpts from order in OA 513/2011 (Para 9 to 26) were quoted by this Tribunal. It created the whole confusion. Going through the quoted portion, it was felt that there was incorrect statement of facts. If that portion is understood in the line mentioned above, there can be no difficulty to hold that there is no error apparaent on the face of the record. Hence this RA is dismissed.


R.Ramanujam)
Administrative Member


(N.K.Balakrishnan)
Judicial Member