

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 361 of 2010

.....Monday...., this the 08th day of August, 2011.

CORAM:

**HON'BLE Mr. JUSTICE P.R. RAMAN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

K.G. Valsalan,
S/o. K. Gopalan,
Junior Engineer/II/Permanent Way/
(Under orders of promotion as Section
Engineer/P.Way), Southern Railway,
Tenmalai R.S. & P.O., Quilon District,
Residing at Tenmalai Railway Quarters,
Tenmalai, Quilon District. 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 P.O.,
Chennai – 3
2. The Senior Divisional Engineer,
Southern Railway, Madurai Division,
Madurai.
3. The Divisional Railway Manager,
Southern Railway, Madurai Division,
Madurai.
4. The Principal Chief Engineer,
Southern Railway, Headquarters Office,
Chennai – 3
5. Chief Personnel Officer,
Southern Railway, Headquarters Office,
Park Town P.O., Chennai – 3



6. Shri B.N.S. Chalam,
Sr. Divisional Engineer (S),
Southern Railway, Madurai Division,
Madurai.

7. The Senior Divisional Personnel Officer,
Southern Railway, Madurai Division,
Madurai. Respondents.

(By Advocate Mr. Thomas Mathew Nellimootttil for R1-5 & 7)

This application having been heard on 22.07.2011, the Tribunal on ~~08-08-11~~ delivered the following:

ORDER

HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER

The applicant while working as Junior Engineer/II/Permanent Way at Tenmalai Railway Station (Quilon), was served with a charge memo dated 14.01.04 alleging that "he had failed to maintain the track geometry of curve No. 104 in that there was a widening of gauge to the extent of +26mm, shoulder ballast was only 260mm against the required amount 400mm and there was displacement of chairs to the extent of 35mm, due to the decayed sleeper; all of which led to the derailment of YDM 6309, GS 5593, GS4137 and GS 5551 of T.No. 748 P at KM.715/9-11 between PUU-EDN on 01.09.2003. Thus he has violated the provisions of para 15.02 of GRS". The applicant denied the allegation. An enquiry followed. In the enquiry report, the enquiry officer held that the charges were not proved. The disciplinary authority while enclosing a copy of the enquiry report on 07.07.2004 also furnished his tentative views to the applicant as follows:

"Gone through carefully enquiry report and the report of the E.O and I come to the conclusion that the track



was not maintained to standard. From the enquiry and as per the track reading, at '0' station the PSC sleeper, the insert and the pandrol clip were found missing at the point of mount and the wooden sleepers were in poor state of affair which required maintenance. Being sub section maintenance JE, he could have paid more attention to maintain the track in which he failed."

Notwithstanding his submission, the penalty of removal from service was imposed on him vide order dated 26.07.2004. The appeal against this order was disposed of by modifying the penalty of removal from service to one of reduction in scale from Rs. 6200/- to Rs. 5000/- in the scale of Rs. 5000-8000 for a period of 5 years with the effect of postponing his future increments vide order dated 10.09.2004. Upon dismissal of his review petition, he approached his Tribunal by filing O.A. No. 535/2005. It was allowed by quashing the impugned orders on the ground of lack of jurisdiction. The order of this Tribunal was challenged before Hon'ble High Court of Kerala in Writ Petition No. 14966/2008. Hon'ble High Court disposed of the same vide its judgement dated 30.06.2009 upholding the order of this Tribunal. However, Hon'ble High Court further held that "in view of the above position, we modify the impugned order Exhibit P5 giving liberty to the disciplinary authority to start from the stage of over-ruling the findings of the the inquiry authority, if so advised. xxxx xxxx xxxx The disciplinary authority, if so advised, shall pass fresh proceedings over-ruling the findings of A6 within three months from the date of receipt of a copy of this judgement...." Hon'ble High Court also held that the disagreement note of the disciplinary authority cannot be treated as an over-ruling of the report of the enquiry officer. It was also observed that if the disciplinary authority does not agree with the finding of the Enquiry

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Authority, based on the materials on record, he should give his reasons with reference to those materials on record and also specifically say on what point there is disagreement and grounds therefor should also be stated and that therefore, the disagreement note is unsupportable in law and based on it, no action can be taken against the applicant.

2. While so, the Chief Personnel Officer had called for the service record and ACR of the applicant for placing before the DPC on or before 05.10.2009.

The service record was sent with the following entries:

"No. U/T-5/D3/1960/MG dt. 6.10.2009:

In compliance of the judgement dated 30.06.09 delivered by Hon'ble High Court of Kerala @ ERS in WP (C) No. 14966/08 the penalty of removal from service with effect from 31.07.04 imposed by Sr. DEN/S/MDU/DA against Shri K.G. Valsalan vide order dated 26.07.2004 and subsequently modified as reduction to the lower stage for five years (recurring) by DR/MDU (AA) vide order dated 10.09.2004 and further on revision petition submitted to the PCE/MAS (RA) the modified penalty was confirmed vide order dated 07.04.05 is set aside and it is decided to start fresh proceedings from the stage of over-ruling the findings of the Inquiry Authority.

Sd/- APO/MDU
For Sr.DEN/S/MDU."

"No. U/W/CH/11/DAR dt. 7.10.2009:

Pay reduction to the lowest stage of time scale of pay from Rs. 11,860 + 4200 (GP) in PB-2 (Rs. 9300-34800) for a period of 60 (sixty) months (recurring) with effect from 01.11.2009.

Charges:

He has failed to maintain the track geometry of curve No. 104 in that there was a widening of gauge to the



extent of +26mm, shoulder ballast was only 260mm against the required amount 400mm and there was displacement of chairs to the extent of 35mm, due to decayed sleeper; all of which led to the derailment of YDM 6309, GS 5593, GS4137 and GS 5551 of T.No. 748 P at KM.715/9-11 between PUU-EDN on 01.09.2003. Thus he has violated the provisions of para 118 of IRPWM and para 15.02 of GRS.

Sd/- APO/(M&E)
For Sr.DEN/S/MDU."

Thereafter, the applicant was informed that being a sub-sectional PWI, the applicant should have ensured safe running of trains duly maintaining the required safety standard.. He could have imposed any speed restriction/ highlighted the unsafe condition of the track. By this, he failed to maintain track geometry which led to the derailment of T.No. 748 on 01.09.03. Shri K.G. Valsalan, JE/I/KKZ is responsible. The applicant submitted a detailed reply dated 16.10.2009 to the 2nd/6th respondent and he sought a copy of the service register which was denied. But he was informed that the entries dated 6.10.2009 and 7.10.2009 made in the service register had been cancelled. As the directions of Hon'ble High Court were not complied with, the applicant filed a Contempt Petition on 12.04.2010. On 17.04.2010, he was served with a memo dated 06.04.2010 setting aside the orders set aside by this Tribunal and confirmed by the Hon'ble High Court, which was followed by Annexure A-1 order dated 27.04.2010 imposing on him the penalty of reduction to the lowest stage in the time scale of pay, i.e., his pay Rs. 14,630/- + Rs. 4200 (GP) in PB-2 of Rs. 9300-34800 is reduced to the lowest stage and fixed as Rs. 9300/- + 4200/- (GP) in PB-2 of RS. 9300-34800 with immediate effect for a period of 24 months (recurring) with the effect of postponing his future increments. This O.A. has been filed praying for



quashing Annexure A-1 order of penalty and to direct the respondents to grant the applicant all consequential benefits as if Annexure A-1 had not been issued at all.

3. The applicant submitted that Annexure A-1 order is without application of mind and arbitrary. It is opposed to the direction of Hon'ble High Court and the finding of this Tribunal. There is absolutely no disagreement with the finding of the Enquiry Officer as is evident from Annexure A-15, which is even not termed as a disagreement note. Instead of showing disagreement with the finding of the Enquiry Officer, it shows that the Disciplinary Authority agrees with the finding of the Enquiry Officer. Even before differing from the finding of the Enquiry Officer, the 2nd/6th respondent had already pre-decided the issue. Annexure A-1 is not based on the relevant consideration nor is it based on the evidence on record. The time granted by the Hon'ble High Court to over-rule the finding of the Enquiry Officer was over as early as 07.10.2009. The train accident was caused by the laxity on the part of the respondents in providing men and materials. The penalty imposed on the applicant is not for the allegation for which he has been charge sheeted.

4. In the reply statement, it was submitted by the respondents that the Disciplinary Authority had passed a reasoned speaking order over-ruling the finding of the Enquiry Officer as directed by Hon'ble High Court on 07.10.2010 within the time limit specified by the Hon'ble High Court. It was further submitted that the O.A is not maintainable as the applicant has not exhausted the appeal provision available to him in the Railway Service (Disciplinary & Appeal) Rules, 1968. The Disciplinary Authority had passed penalty order

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after considering the representation of the applicant.

5. We have heard Mr. T.C. Govindaswamy, learned counsel for the applicant and Mr. Thomas Mathew Nellimoottil, learned counsel for the respondents and perused the records.

6. The two issues to be adjudicated in this O.A are whether the O.A is maintainable or not and whether Annexure A-1 penalty order is sustainable or not.

7. As regards the maintainability of this O.A, the respondents relied on the decision of Hon'ble Supreme Court in **S.S. Rathore vs. State of Madhya Pradesh**, CDJ 1989 SC 203 wherein it was held as under :

"It is proper that the position in such cases should be uniform. Therefore, in every such case only when the appeal or representation provided by law is disposed of, cause of action shall first accrued and where such order is not made, on the expiry of six months from the date when the appeal was filed or representation was made, the right to sue shall first accrue. Submission of just a memorial or representative to the head of the establishment shall not be taken into consideration in the matter of fixing limitation."

The respondents took the stand that the O.A is not maintainable as the applicant has not exhausted the statutory remedy of appeal available to him before approaching this Tribunal. The applicant contended that Annexure A-1 penalty order was passed in violation of principles of natural justice. The 2nd/6th respondent had already pre-decided the case even before Annexure A-15 show cause notice dated 07.10.2009 was served on the applicant. The



disagreement note was sent vide Annexure A-15 dated 07.10.2009; but on the same day, a penalty of reduction to a lower stage for a period of 5 years reckoned from 01.11.2009 was also issued, but the same was not communicated to him. The Disciplinary Authority had not disclosed the materials based on which he had any disagreement with the finding of the Enquiry Officer. The applicant relied upon the decision of Mumabi Bench of the C.A.T in ***Dr. B.V. Prasad Reddy vs. Union of India & Others***, 2005 SLJ Vol.I CAT (Mumbai Bench) 61, wherein it was held as under :

"So far as the objection of non-exhausting of departmental remedies is concerned, we agree with the submission of the learned Counsel for the applicant that since the OA is already admitted, the Tribunal is deemed to have exercised its discretion in admitting the application without exhausting the departmental remedy under Section 20 (1) of the Administrative Tribunals Act, 1985."

He further relied on the decision in ***Sheikh Mushtaque Ahmad vs. Union of India & Others***, 1997 SLJ Vol.3 CAT (Allahabad Bench), wherein it was held that *"the language of the Section 20 of the Administrative Tribunals Act, 1985 leaves no room for doubt that bar against filing application without exhausting alternative remedies is not absolute. The Tribunal in appropriate cases, may waive the necessity of filing departmental appeal"*. The word 'ordinarily' implies a discretion to the Tribunal in proper cases to waive the condition of exhausting the departmental remedies to save the applicant from the resultant hard-ships. It was further pointed out that this litigation was going on from 2005 onwards. This Tribunal allowed his O.A on earlier occasion. Hon'ble High Court also upheld the order of this Tribunal. Thereafter, the applicant filed a Contempt Petition. It was during the pendency of the C.P. that the impugned order was passed. He further submitted that the entries



made in his service register dated 06.10.2009 and 07.10.2009 were not communicated to him.

8. The Hon'ble Supreme Court in its judgement in **S.S. Rathore vs. State of Madhya Pradesh** (supra) dealt with the admission of O.A. in ordinary situations. It did not deal with the discretion available to the Tribunal to waive the condition of exhausting departmental remedies in extra ordinary situations, like, when principles of natural justice are violated. There was considerable delay in complying with the orders passed by this Tribunal and confirmed by the Hon'ble High Court. Although the order of the High Court was delivered on 30.06.2009, the impugned orders set aside by this Tribunal were given effect by the order dated 06.04.2010 only. The applicant was forced to file a Contempt Petition on 12.04.2010. The entries made in the service register on 06.04.2009 and 07.04.2009 though cancelled subsequently cannot be ignored. This litigation is going on from 2005 onwards without achieving any finality. In the above circumstances, we are of the considered view that the discretion available to this Tribunal under sub-clause (1) of Section 20 of the Administrative Tribunals Act, 1985, is to be exercised in the interest of justice to admit the instant O.A without exhausting the departmental remedy to save the applicant from extreme hardship. Accordingly, we declare that the O.A. is maintainable.

9. Now we take up Annexure A-1 penalty order for consideration. The findings of the Enquiry Officer and the tentative view of the Disciplinary Authority are extracted below:



Findings of the Enquiry Officer	Tentative views of the Disciplinary Authority
<p>Shri K.G.Valsalan, JE/P.Way has stated in his Defence statement that the Para 118 of IRPWM 1986 is not a Para relevant to the defendant as he is not a section incharge P.Way Engineer. While referring IRPWM, it reveals that the <u>Para 118 is not relevant to Sub Section PWI.</u></p> <p>In the light of above evidence and;</p> <p>1. Since the gauge at the point of drop was recorded as +20mm and +26mm was recorded only at point of drop under loaded condition also under free condition the gauge was +20mm which is permitted as per Para 224E(V) of IRPWM and theoretical gap between chair hole and screw spike permitted is +8mm as per Drawing No. T 10674 of Track Manual as such total of $20+8 = 28$mm can be there and under loaded condition +26mm gauge was recorded. That means that is the total of chair shifting plus the gauge available at that point. And 10 points per KM exceeding the 'C' Category that is +6mm above the theoretical gauge is permitted as per Para 607 of IRPWM, and</p> <p>2. Since the joint track reading in case file does not mention anything about the ballast availability on track and since the administrative witness No. 1 has answered to Q.No. 67 that the ballast available at outside of curve was 105 cm width and on inside of curve was 62 cm width from the non gauge face of the rail and as such there <u>was no ballast deficiency exist</u> and</p> <p>3. Since the administrative witness No.2 has answered to Q.No.9 that 5mm to 10 mm chair shifting mark was recorded an administrative witness No.1 has answered to Q.No. 65 that there was chair shifting mark of 5mm and even in joint track reading available in case file no where <u>chair shifting to the extent of 35mm</u> were recorded.</p> <p>I conclude that the charges are <u>NOT PROVED.</u></p>	<p>1. It is agreed that Para 118 of IRPWM is not relevant to Sub-Section PWI.</p> <p>2. The gauge was found to be slack upto 20mm at the point of drop in free condition and upto 26mm slack under load condition. The considerable variation in gauge was found in the gauge readings from sleeper to sleeper. Basic requirement is uniform gauge over a continuous stretch of track and such gauge can be permitted/allowed to continue so long as it is within the permissible limits of tightness or slackness as per IRPWM 224 (e).</p> <p>Approaching from the 13th sleeper to the point of drop, the gauge is slack upto station No. 6 and station No.5. At station No.4, the gauge is tight. At stn No. 3, the gauge is neat under free condition and +4mm under load condition. Thereafter, the gauge widens and is +26mm under load condition at point of drop. The continuous change in the gauge from stn. No. 7 to POD, the abrupt change to tight gauge at stn. No. 4 and sudden wider/slack gauge exceeding the permissible values at POD is sufficient to cause heavy oscillation leading to further widening of gauge under dynamic condition of fastenings, decayed/ineffective sleepers and absence of any fastening on the outer side of the outer rail at the POD.</p> <p>3. It is agreed that the available ballast cushion is sufficient for the speed of 30kmph.</p> <p>4. As concluded by ADEN/TEN, there is no track record to prove the chair shifting to the extent of 35mm.</p> <p>5. GM/Southern Railway note No. GM/M/2003/09/397 dt. 15.09.2003 highlights the urgency and plight of sectional maintenance of track.</p> <p>Being a sub-sectional PWI, he should have ensured safe running of trains duly maintaining to required safety standard. He could have imposed any speed restriction/ highlighted the unsafe condition of track. By this, he failed to maintain/to ensure safety of track and to maintain track geometry which led to the derailment of T.No. 748 on 1.9.03. Sri K.G. Valsalan, JE/II/KKZ is responsible".</p> <p>(emphasis supplied)</p>



10. From the above, it is clear that on 3 counts, the Disciplinary Authority has agreed with the Enquiry Officer. As far as disagreement is concerned, there is none. The charge against the applicant is that he has failed to maintain the track geometry of curve No. 104. There is no mention of poor maintenance of wooden sleepers or that the applicant alone was responsible for the same. The applicant had no opportunity to controvert what was not stated in the charge sheet. Moreover, the Appellate Authority in Annexure A-9 had held that the applicant "alone may not be held responsible for the gradual deterioration of the track" and had modified the penalty order. At serial No. 2 in the tentative views, there is no disagreement with the finding of the Enquiry Officer. There are certain observations which apparently do not find a place in the charge sheet. They remain just as observation, not as disagreement with the finding of the Enquiry Officer based on the materials on record. Again at Serial No.5, there is an observation by the Disciplinary Authority that the applicant "should have ensured safe running of trains duly maintaining to required safety standard" and that he "could have imposed any speed restriction / highlighted the unsafe condition of track", but there is no such allegation in the charge sheet. Consequently, there is no finding by the Enquiry Officer on that point for the Disciplinary Authority to disagree with. Although the Disciplinary Authority further states that the applicant failed to maintain track geometry, it is the very same charge that was held 'not proved' by the Enquiry Officer. The Disciplinary Authority does not state on what materials on record he arrived at the conclusion that the applicant failed to maintain track geometry. He does not specifically state on what point there is disagreement and grounds thereof. The liberty granted by the Hon'ble High

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Court to the Disciplinary Authority has not been exercised as per the directions of Hon'ble High Court so as to be supportable in law. In the tentative views of the Disciplinary Authority in Annexure A-15, there is more of agreement with the findings of the Enquiry Officer and no disagreement. Annexure A-15 just like Annexure A-5 does not overrule the findings of the Enquiry Officer, based on the materials on record. Annexure A-15 is not a disagreement note. It being not supportable in law, the penalty order at Annexure A-1 based on it is not sustainable.

11. In the result, the O.A. is allowed. Annexure A-1 order dated 27.04.2010 is quashed and set aside. The respondents are directed to grant all consequential benefits as if Annexure A-1 had not been issued at all, within a period of three months from the date of receipt of a copy of this order.

12. No order as to costs.

(Dated, the 08th August, 2011)



(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER



(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER

cvr.