

Central Administrative Tribunal, Lucknow Bench,

Lucknow

Original Application No. 206/2006

This the 30th day of November, 2009

Hon'ble Ms. Sadhna Srivastava, Member (J)

Hon'ble Dr. A.K. Mishra, Member (A)

Sushil Kumar, Aged about 66 years, S/o late Sri Jang Bahadur, R/o B-5/152, Indira Nagar, Lucknow (lastly working as Senior Section Engineer Construction Works), N.E.R., Anwarganj, Kanpur.

...Applicant

By Advocate: Sri R.C. Singh.

Versus

1. Union of India through the Secretary, Ministry of Railway, (Railway Board), New Delhi.
2. Deputy Chief Engineer (Construction), N.E.R, Lucknow.
3. Union Public Service Commission, New Delhi through its Secretary.

.....Respondents

By Advocate: Sri N.K. Agarwal for R-1 & R-2 and Sri Pankaj Awasthi for R-3

ORDER

By Dr. A.K. Mishra, Member(A)

The applicant seeks a direction to set-aside the order dated 22.3.2006 passed by the respondent no.1 and communicated under letter dated 29.3.2006 of respondent no.2 imposing the penalty of 50% cut in pension of the applicant for 10 years.

2. While working as Senior Section Engineer (Construction Works) N.E.R., Anwarganj, Kanpur, the applicant was placed under suspension on 30.5.2000, a month prior to his retirement. A regular chargesheet was issued by respondent no.2 on 23.5.2001, almost a year after the applicant's retirement from railway service. The applicant submitted a representation on 4.6.2001 that the chargesheet issued under Railway Servants (Discipline & Appeal) Rules, 1968 to a retired railway servant was not maintainable in the absence of its approval by the President of India. A corrigendum of the chargesheet was issued on 16.01.2002 by the respondent no.2 clarifying that the disciplinary proceedings initiated against

him was treated as in continuation of the suspension order issued to him while he was in service. The applicant denied the charges whereupon a regular inquiry was held. The copy of inquiry report was furnished to him on 26.5.2003 and the applicant submitted his representation on 9.6.2003. Thereafter, the respondent no.1 held that the articles of charge nos. 1,2 and 3 were proved against the applicant, and sought for advice of UPSC following the prescription mandated under Rules. The impugned punishment order was issued in the name of President of India and communicated to the applicant vide letter dated 29.3.2006 alongwith a copy of the advice letter of UPSC dated 6.3.2006. Since no appeal is possible, his application challenging the punishment order has been filed.

3. The following grounds have been taken in the application:

that both the chargesheet dated 23.5.2001 and corrigendum issued on 16.1.2002 are void ab initio as no proceedings could have been initiated against the applicant under Railway Servant (Discipline & Appeal) Rules, 1968 after his retirement; the departmental proceedings initiated in such circumstances are nullity in the eyes of law; that the findings of the Inquiry Officer are not based on evidence; they are perverse in nature and reached through conjectures and surmises; that the Enquiry Officer had not considered the defence pleas raised during the course of hearing and while submitting the written brief; that the advice of UPSC is an extraneous material on which no reliance could have been placed by the respondents while deciding on the findings as well as the quantum of punishment; that the disciplinary authority has passed the order in a mechanical way and has not applied his mind to the facts of the case; that the impugned order was illegal, arbitrary and discriminatory in nature and violative of provisions of Articles 14 and 16 of the Constitution of India; that the Senior Supervisor Officer like the Deputy Chief Engineer has been completely let off, whereas for similar allegations, a major penalty was imposed on him; that the inquiry was conducted by a retired railway servant, which is against the provisions of Rules, thus, vitiating the entire disciplinary proceedings.

4. The respondents have countered the pleas. Let us examine the ground of the applicant in the context of the submissions made by the respondents.

The corrigendum was issued on 16.1.2002 to clarify that the proceedings against the applicant were continuing one, which were deemed to have commenced from the date of issue of suspension order on 30.5.2000. This clarification has been made in terms of Rule 9 (5)(a) of Railway (Pension) Rules, 1993. For better appreciation, Rule 9 (5) (a) is extracted below:

“ department proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and”

The Rule clearly provides that if a railway servant is placed under suspension prior to his retirement and disciplinary proceedings are initiated against him after the retirement the proceedings will be deemed to have commenced from the date of suspension. Since, on the date of suspension, the respondent no.2 was the disciplinary authority (DA) it was within his competence to issue the chargesheet treating the case as continuing proceedings. Therefore, there was no jurisdictional error in issuance of the chargesheet by an authority who was the disciplinary authority at the time of suspension of the applicant and the proceedings so initiated could not be held as suffering from material infirmity to be declared as non-est.

5. It is alleged that the findings of the Inquiry Officer/DA are perverse in nature being based on conjectures and surmises only. Both Inquiry Officer as well as disciplinary authority have held all the articles of charges as proved on the basis of evidence on record. The fourth article of charge though proved was not pressed as the applicant had been punished for the same allegation in another proceeding. The results of joint check where the applicant participated established that the applicant had failed to take initial ground level correctly and he allowed incorrect initial level which resulted in computation of excess of earth work done by the contractor. The charged officer himself has affixed his signature on the joint check reports and his plea regarding incorrect reference point was discarded as an after thought. Both the Inquiry Officer and the disciplinary authority held that Article II of the charge that cut spoils were not efficiently used leading to unnecessary expenditure was established. From the evidence on record, it was noticed that not a single CUM of earth was used from cut spoils; hence Article II of the charge was found proved. Article 3 of the charge relating to large scale variations at the time of execution of the contract was held as established on account of improper recording of initial levels and non-utilization of spoils. The explanation of the applicant that variation was due to shifting of broad-gauge alignment was not accepted as the only factor responsible for such large scale variation. It was held that even after making allowances for change of alignment of tracks, excessive variation was unduly processed by the applicant. It is seen that the Inquiry Officer has meticulously examined the evidence on record and analyzed it charge-wise in a detailed discussion before coming to the conclusion that all the charges were proved against the applicant. All the pleas taken by the applicant have been discussed in the background of replies made by the prosecution. Cogent reasons have been given why they were not accepted and why the charges were held as proved. Therefore, the plea that the findings are based on surmises and conjectures and no evidence is not borne out



6. As regards non-supply of advice reply of UPSC is concerned, the respondents have relied on the judgment of Karnataka High Court in Secretary, Ministry of Railways and others Vs. A.B. Dagalwadi in which the judgment of constitutional Bench of the Apex Court in ECIL case has been referred to. The Karnataka High Court has held that there was no requirement of law for supplying a copy of advice report of the UPSC before the penalty is imposed.

6.2. The learned counsel for the applicant placed reliance on the decision of the Supreme Court in the Civil Appeal No. 642 of 2004 S.N. Narula Vs. Union of India & Others in which a passing reference about non-supply of UPSC report was made and the order of this Tribunal (PB) in O.A. no. 1154 of 2002 directing the respondent authorities to pass a speaking order was upheld. It may be noted that neither in the judgment of Principal Bench, nor in the judgment of Apex Court any specific direction was given for supply of a copy of UPSC report. However, relying on this decision, it was held in the judgment dated 4.10.2004 of Lucknow Bench of the Tribunal in O.A. no. 39 of 2003 that the disciplinary proceedings would be vitiated if a copy of the UPSC report which was relied on for deciding on the quantum of punishment is not supplied to the applicant before such punishment is imposed. But, this decision is per incuriam as it did not discuss the earlier judgment of the Full Bench of this Tribunal in the case of Shri Chiranji Lal Vs. U.O.I. & Others 2000 (5) ATJ 3 in which it was held that supply of UPSC advice was not required. Later, the Supreme Court examined the issue in some detail in the case of Union of India & Others Vs. T.V. Patel 2007 (2) SCC 98 and held that supply of a copy of UPSC advice report before imposition of penalty was not necessary. Rule 28 of Railway Servants (Discipline & Appeal) Rules, 1968 specifically states that a copy of UPSC advice report should be provided to the railway servant only at the time of supply of the punishment order. In other words, there is no requirement to supply the UPSC report at pre decisional stage. Rule 9 (2)(a) of the Railway (Pension) Rules provides that the disciplinary proceedings deemed to have been initiated under this Rule shall be continued by the authority by which they were commenced in the same manner as if railway servant had continued in service. In other words, the procedural requirements as provided under Railway Servants (Discipline & Appeal) Rules, 1968 would have to be followed in deemed disciplinary proceedings continued after retirement of a railway servant.

From the aforesaid discussion, one can safely conclude that there was no requirement for supply of UPSC report.



6.3. The plea of the applicant that the advice of the Commission was extraneous in nature and should not have been taken into consideration does not appear to have any merit. The advice is sought for in accordance with the provisions of Constitution of India in Article 320 (3)(c) read with Regulation 5(1) of the UPSC (Exemption from Constitution) Regulations 1950 and Rule 9 of the Railway Servants (Pension) Rules 1993. The consultation with UPSC is a statutory requirement and it is a specific safeguard granted to a government servant against arbitrary action of the executive. In compliance with the statutory requirement any reference of the case to the UPSC and consideration of its advice report while deciding on the quantum of punishment cannot be treated to be extraneous in nature.

7. As regards the inquiry and findings of the Inquiry Officer, it was alleged that the inquiry report has not been prepared strictly in accordance with the provisions of Rules, which prescribed that the findings should be given to each of the charges. The Inquiry Officer, as stated earlier has discussed each charge in detail and summed up by holding that all the charges have been proved against the applicant. The Disciplinary authority has given finding on each of the articles of charge. He has given reasons for his conclusions. Hence, the charge of non-application of mind does not hold water.

At the time of hearing, it was argued that the Inquiry Officer had traveled beyond the charges in order to prove the allegations. The learned counsel for the applicant took the cue from the observations of the Inquiry officer at paragraph 3.1 (a) of page 3 of the Report. It shows that the applicant did not record the levels in the level book no. CNB-KSJ/9, but in the rest of level books. The statement of imputations mention not only CNB-KSJ/9, but also books no 66 to 74. In other words, the Inquiry Officer has correctly given his finding that the levels recorded by the applicant were in books no. 66 to 74, but not in book no.9. This does not establish that he traveled beyond the charges. On the other hand, he gave correct findings on the basis of correct facts. We find that this plea has not been taken in the pleadings of the applicant and is not a justified one.

It is not the case of the applicant that there was any denial of opportunity. He participated in the inquiry and submitted his defence pleas, which were taken into consideration by the Inquiry Officer. Both Inquiry Officer as well as the disciplinary authority have found that the charges have been proved against the applicant on the basis of joint check report, to which the applicant was one of the signatories. This joint check report conclusively proved that the applicant had failed to record the correct initials ground level, which resulted in calculation of excess earth work. Similarly it was held from the measurement of quantity of earth from private/Railway land used for forming bank/filling up troughs that the cut spoils were not used at all for the purpose. The disciplinary authority has

held that even after making allowances towards variation in quantity on account of shifting of broad-gauge alignment, excess variation has been recommended by the applicant.

8. It is alleged that though the major penalty proceedings were initiated against the Deputy Chief Engineer, yet he has been completely exonerated from the charge on the basis of same facts. The respondents have clarified that the Deputy Chief Engineer was not responsible for taking wrong initial levels. Besides taking into considerations his large jurisdiction, a view was taken that he was not directly responsible for lapse. The exoneration of the Deputy Chief Engineer will not provide any excuse to the applicant, whose conduct has to be assessed based on the evidence brought against him in respect of the charges framed.

9. The settled law is that this Tribunal will not function as appellate forum. It can only interfere if it is established that there was no evidence on the basis of which the charges have been proved. This is not the case here. It has been held by the Apex Court in the case of **Bank of India & another Vs. Degala Suryanarayana reported at JT 1999 (4) SC 489** that the full rigors of the Evidence Act would not apply in a departmental proceeding. If on the basis of evidence placed before the Inquiry Officer/disciplinary authority, there are preponderance of probabilities that the charges have been proved, the Tribunal should not re-assess the evidence. "So long as there is some evidence to support the conclusion arrived at by the departmental authority, the same has to be sustained."

10. It was held in the case of **High Court of Judicature at Bombay through its Registrar Vs. Shashikant S. Patil and Another reported at (2000) 1 SCC 416** that the judicial interference was permissible if there was violation of natural justice or statutory regulations. The decision of the disciplinary authority can be held to be vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority on the very face of it is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion. The Supreme Court went on to say that the disciplinary authority was the sole judge of facts. If the inquiry had been properly conducted and if there was some legal evidence on which findings could be based then adequacy or even reliability of that evidence was not a matter to be canvassed before the higher judicial forum.

11. The applicant has also taken a ground that the inquiry being conducted by a retired railway officer was vitiated and the penalty based on such report should be treated as nullity. This subject was considered by Full Bench of this Tribunal in its judgment and order dated 1.4.2009 in **O.A. no.1699/2008**. Although, the

judgment was made in the context of Rule 14(2) of CCS (CCA) Rules 1965 (Rules, 1965) holding that a retired officer could be appointed as an inquiring authority under the Rules and no opinion was expressed whether a retired railway servant could be appointed as Inquiry Officer under the Railway Servants (Discipline & Appeal) Rules, 1968 (Rules, 1968), we find that the rule 9(2) of the Rules, 1968 meant for railway servants is analogous to Rule 14(2) of Rules of 1965. The provisions of Rule 14(2) of the Rules, 1965 in juxtaposition to provisions of Rule 9(2) of Rules of 1968 are extracted below for better appreciation:

“14(2) Whenever the Disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Government servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof”.

“Rule 9(2) – Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a railway servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be [a Board of Inquiry or other authority] to inquire into the truth thereof.”

It may be seen that except for addition of the phrase ‘a Board of Inquiry’, the provisions of both Rules are almost the same. Therefore, the reasoning of the Full Bench in respect of Rule 14(2) of the Rules of 1965 would also apply to Rule 9(2) of the Rules, 1968. The apex Court in **H.V. Nirmala Vs. Karnataka Financial Corporation and Others (2008) 7 SCC 638** has held that if no prejudice is established the inquiry conducted by a retired officer could not be treated as vitiated. It was further held that the employee should have taken objection at the earliest opportunity while the inquiry was being conducted so that the authorities could have taken remedial measure. If he had not made any objection at that stage, he would be estopped from taking this plea at a later stage before the Court. The Apex Court in paragraph 20 of the judgment in the Nirmala case (supra) has made following observations:

“We however, notice that in a case of this nature where appointment of the inquiry officer may have something to do only for carrying out the procedural aspect of the matter, strict adherence to the rules may not be insisted upon. Superior courts in a case of this nature may not permit such a question to be raised for the first time. xxxxxxxxxxxx Appointment of an incompetent inquiry officer may not vitiate the entire proceeding.

Such a right can be waived. In relation thereto even the principle of estoppel and acquiescence would apply."

In the case of **Central Bank of India Vs. C. Bernard** reported at **1991 SCC (L&S) 291** the Apex court has made the following observations:

"If the objection was raised at the earliest possible opportunity before the inquiry officer the appellant could have taken steps to remedy the situation by appointing a competent officer to enquire into the charge before the respondent's retirement from service."

12. For the aforesaid reasons, we do not find any justification to interfere with the order of disciplinary authority.

13. In the result, the application is dismissed. No costs.

A.K. Mishra 30/11/09
(Dr. A.K. Mishra)
Member-A

Sadhna Srivastava
(Ms. Sadhna Srivastava)
Member-J

Girish/-