CENTRAL ADMINISTRATIVE TRIBUNAL
LUCKNOW BENCH, LUCKNOW

ORIGINAL APPLICATION NO. 398/2010

ORDER RESERVED ON: 04/02/2014

ORDER PRONOUNCED ON: 10th/April/2014

CORAM :

HON'BLE MS. JAYATI CHANDRA, ADMINISTRATIVE MEMBER
HON'BLE MR. M. NAGARAJAN, JUDICIAL MEMBER

Mahendra Prakash (S.C.) aged about 59 years, Son of Late Ganga Ram Ex-Head Clerk under the respondent No. 2, removed from service on 22/04/2010 and resident of House No. 569 Ch/391, Prem Nagar Alambagh, Lucknow.

....Applicant.

By Advocate: Shri Indu Lal.

VERSUS

1. Union of India, through General Manager, N. Railway, H.Q. Office, Barauda House, New Delhi.

2. The Chief Works Manager, Northern Railway Loco Workshop, Charbagh, Lucknow.

3. Deputy Chief (Mechanical Engineer) DSL, N. Railway Loco Shop Charbagh, Lucknow.

....Respondents.

By Advocate: Shri S. Verma.

O R D E R

Per: Shri M. Nagarajan, Member (J)

1. The applicant is challenging the action of the respondents in imposing the penalty of removal from service vide disciplinary authority order dated 22.4.2010 (Annexure-1) and the order of the appellate authority dated 30.6.2010 (Annexure-2).

2. The brief facts of the case is that the applicant while in service was allotted a railway quarter No. II/48-A at Alambagh, Lucknow. According to the applicant, he made a representation on 1.2.1994 to the authority for providing new doors for his allotted quarters. Subsequently he wrote a letter dated 7.6.1996 addressed to DEN, Headquarter, Lucknow to arrange for repairs of the said quarter allotted to him and since the same was not repaired by respondents authority, he shifted to a rented house and thereafter on 1.3.1994 he found that one Shri Angad Ram Meena, Assistant Guard had occupied the said quarter. Consequently, he wrote to DEN, Headquarter, Lucknow on 2.3.1994 to take action against said Shri Angad Ram Meena. His request for getting the said quarter repaired, to vacate Shri Angad Ram Meena and to hand over the same to the applicant was not acceded to, although regular rent was recovered from him. Consequently, he vacated the said quarters on 24.6.2004. The said room was allotted to one Shri Jagdish Singh by the respondents by an allotment letter dated 11.6.2004.

3. The applicant has received charge memo dated 23.10.2003. In pursuance the charge memo dated 23.10.2003, the inquiry was commenced on 23.3.2006 and the same was concluded on 4.8.2006. On receipt of enquiry report the Disciplinary Authority has taken action for imposing penalty and vide order dated 22.4.2010 (Annexure No. 1) he was removed from service.

4. As against the said order dated 22.04.2010 he preferred an appeal to the Chief Works Manager, Loco Shop, Charbagh, Lucknow on 1.5.2010, which was also rejected by Appellate Authority vide order dated 30.6.2010 (Annexure No. 2). The applicant has prayed for quashing said two orders dated 22.4.2010 and 30.6.2010 respectively passed by the Disciplinary Authority and Appellate Authority respectively at Annexure-A-1 and A-2, whereby the penalty from removal of service was imposed upon him.

5. The several grounds urged by the applicant in support of his prayer for quashing the impugned orders are:

   i. That the penalty of removal can be imposed only by the Appointing Authority but in his case the same was not done by the Appointing Authority and hence the order dated 22.4.2010 (Annexure No. 1) suffers for want of competency.

   ii. The disciplinary proceedings are initiated against him after 8 years of the act of subletting of the quarter allotted to him.

   iii. Even the charge of subletting of railway quarter allotted to him was to be proved, then he can be charged for payment for rent excess than that of 10% of the monthly emoluments by a special order and not removal from service.

   iv. The report submitted by the vigilance team does not meet the requirements of paras 704 and 705 of the Indian Railway Vigilance Manual.

   v. The inquiry was not conducted in a fair manner and there is no proper appreciation of evidence.

   vi. The order of punishment of removal from service is against of doctrine of proportionality.

6. The respondents in the counter affidavit has contended that the Disciplinary Authority was competent to impose punishment of

removal from service, that the delay in initiation of inquiry cannot be a ground for interference since no prejudice is caused to the applicant due to the delay in initiation of disciplinary proceeding against him.

7. The respondents further contended that the Doctrine of proportionality cannot be applied in the facts and circumstances and the penalty of removal from service is just and proper. The respondents further denied the allegation made by the applicant that the inquiry was not conducted in a fair manner and the further allegation that evidence was not properly appreciated. It is submitted therein that there was no violation of principle of natural justice and that charge against him was proved and as such neither the order passed by the Disciplinary Authority nor the order passed by the Appellate Authority is liable to be interfered with. They also contended that para 704 and 705 of Indian Railway Vigilance Manual has no application at all.

8. We have carefully gone through the pleadings of both the parties and heard Shri Indu Lai, learned counsel of the applicant and Shri S. Verma, learned counsel for the respondents.

9. It is argued by Shri Indu Lal, learned counsel for the applicant that the respondents ought not to have proceeded to hold a departmental inquiry for the act of subletting of the quarter allotted to the applicant. By referring to the memorandum dated 23.10.2003 (Annexure-13) and the statement of article of

charge therein he contended that the act of subletting does not attract the provisions of the Railway Services (Conduct) Rules, 1966. He further contended that the act of subletting of quarter allotted to him does not fall within any act of misconduct enumerated in Rule 3 on the Railway Services (Conduct) Rules, 1966 and as such the very initiation of proceeding is vitiated. In support of this contention, he placed reliance upon of the order of this Tribunal, Ernakulam Bench [(1990) 12 Administrative Tribunal Cases] in the case of P. Moosa Vs. U.O.I. and others. The Tribunal has held as follows:

> *"6. In our opinion, subletting of railway quarters cannot be construed as a clear case of misconduct. In such a case, it is open to the respondents to initiate proceedings against the erring railway servant by initiating action under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. After taking proceedings under the aforesaid act, he could be evicted from the railway quarter. The action of the respondents to remove the petitioner from service by means of a disciplinary proceeding without taking the course of the normal eviction proceedings is arbitrary and unjustified. In this context, a reference may be made to the decision of the Patna Bench of this Tribunal in Dukhan Ram v. S.K. Vij. In that case, the penalty of compulsory retirement from service was imposed on a railway servant for the alleged misconduct of non-vacation of railway quarter. It was held that the disciplinary proceedings against him was inappropriate and misconceived and that the penalty imposed on him was not sustainable. The impugned order of compulsory retirement was quashed and the applicant was directed to be reinstated in service with all consequential benefits".*

10. With regard to the reliance placed by the counsel for the applicant upon the orders of the Ernakulam Bench of this Tribunal we may observe that the fact and circumstances of the case decided by the Enrnakulam Bench is different and distinct from the fact and circumstances of the case on hand. The

Enrnakulam Bench of this Tribunal placed reliance upon the decision of Patna Bench of this Tribunal in case of Dukhan Ram Vs. S.K. Vij. A reading of the orders of the Ernakulam Bench of the Tribunal reveals that departmental proceedings in the said Dukhan Ram case was initiated for not vacating of Railway Quarter, but in the case on hand the fact is otherwise. The Railway Authority has initiated departmental proceedings against the applicant for subletting quarters allotted to him.

The Hon'ble Supreme Court by referring to the following words of Lord Denning in the matter of applying precedents

> *"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.*
>
> * * *
>
> *Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches, else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it."*

in the case of **Union of India and another vs. Major Bahadur Singh** [2006 SCC (L&S) 959] at paragraph 11 held as -

> *"11. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."*

This view is reiterated by the Hon'ble Supreme Court recently in the case of **Union of India and another vs. Arulmozhi Iniarasu and others** (2011) 2 SCC (L&S) 267 at para 14 reads as –

> *"14. ..... the well-settled principle of law in the matter of applying precedents that the Court should not place reliance on decisions without discussing as to how the fact situation of the case before it fits in with the fact situation of the decision on which reliance is placed. The observations of the courts are neither to be read as Euclid's theorems nor as provisions of statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Disposal of cases by blindly placing reliance on a decision is not proper because one additional or different fact may make a world of difference between conclusions in two cases. ....."*

In view of the above principles, we are required to examine whether the facts and circumstances of the said **Dukhan Ram's** case and the facts and circumstances of the case on hand are similar to each other or differ. In the instant case, the allegation against the applicant is that he has committed a forbidden act of sub-letting under sub-rule (i) of Rule 15A of the Railway Services (Conduct) Rules, 1966 and not the failure to vacate as provided under sub-rule (ii) of the said Rule-15A.

That failure to vacate the quarters allotted to a Railway Servant may not attract the Rule 3 of Railway Services (Conduct) Rules, 1966. But on the other hand subletting of the quarter allotted to a Railway Servant attracts Rule 3 of Conduct Rules. Rule 3 of the Railway Services (Conduct) Rules, 1966, provides, inter alia that every Railway Servant shall at all times (i) maintain absolute integrity (ii) maintain devotion to duty, and (iii) do

nothing which is unbecoming of a railway servant. At this juncture, it is also relevant to refer to the meaning of the term "misconduct" as explained by the Hon'ble Supreme Court in number of cases.

> *"The word 'misconduct' is not capable of precise definition. But at the same time though incapabie of precise definition, the word 'misconduct' on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality of character and its ambit has to be construed with reference to the subject matter and the context wherein the terms occurs, having regard to the scope of the statute and the public purpose it seeks to serve. The definition of the word as given in Ballentine's law Dictionary (148th Edition) is a transgression of some established and definite rule of action, where no discretion is left except what necessary may demand, it is violation of definite law, a forbidden act."*

11. In view of above, meaning of the term "misconduct" as explained by the Hon'ble Supreme court time and again, it is necessary for us to examine whether the act of subletting of quarter allotted to the applicant attracts Rule 3 of Railway Services (Conduct) Rules, 1966 or not. To deal with this question it is necessary for us to refer to Rule 15-A of the Railway Services (Conduct) Rules, 1966, which reads as:

"Rule 15-A of the Railway Services (Conduct) Rules, 1966.

Subletting and vacation of Government Accommodation-

(i) Save as otherwise provided in any other law for the time being in force, no railway servant shall sublet, lease or otherwise allow occupation by any other person of Government accommodation which has been allotted to him.

(ii) A railway servant shall, after the cancellation of his allotment of Government accommodation, vacate the same within the time limit prescribed by the allotting authority.

12. A plain reading of the aforesaid Rule 15A of the said Conduct Rules reveals that Sub clause (i) of Rule 15A prohibits a railway servant from doing an act whereas sub clause (ii) of the said Rule 15A requires a railway servant to do an act. In other words an act of subletting is prohibited under sub clause (i) of 15A of said Rules. An act of subletting is a forbidden act under sub Rule (i) of Rule 15A and thus constitute an act of misconduct. As already observed sub clause (ii) of Rule 15A requires an act to be done. As such failure to perform an act as required under Sub-Rule (ii) of Rule 15A may not fall within the meaning of the term "misconduct". To explain it further, the command of Sub Rule (i) of Rule 15A is don't do an act whereas the command of sub clause (ii) of Rule 15A of the said Rule is do an act. "Don't do" is a prohibition whereas "do" is a direction. Hence, in view of this position and in view of the fact that the misconduct alleged against the applicant is an act of prohibition of subletting as provided under Rule 15A of the Railway Services (Conduct) Rules, 1966, we are of the opinion that the decision of this Tribunal in the said **P. Moosa's** case has no application to the facts and circumstances of the case since the Ernakulam Bench of this Tribunal passed the order by following the order passed by the Patna Bench of this Tribunal and hence, we are not inclined to accept the argument of the learned counsel for the applicant that the act alleged under the charge memo does not attract the provisions of Railway Services (Conduct) Rules, 1966.

13. The Learned counsel for the applicant contends that the authority who passed the impugned order of removal from service has no competency. In order to appreciate this contention he has not placed any material much less an authenticated material to establish the fact the authority who passed the impugned order of removal from service is neither an appointing authority nor a disciplinary authority in respect of the post he was holding as on the date of the impugned order.

Rule 7 of the Railway Servants (Discipline and Appeal) Rules, 1968 prescribes the Disciplinary Authority, the same reads as –

> *"(7) **Disciplinary authorities**: - [1] The President may impose any of the penalties specified in Rule 6 on any railway servant.*
>
> *[2] Without prejudice to the provisions of Sub-rule (1), any of the penalties specified in rule 6 may be imposed on a railway servant by the authority specified in Schedule I, II and III.*
>
> *[3] The disciplinary authority in the case of a railway servant officiating in a higher post, shall be determined with reference to the officiating post held by him at the time of taking action.*

The applicant is a non-gazetted officer and he was in the cadre of Head Clerk. Schedule II to the said Railway Servants (Discipline & Appeal) Rules, 1968 prescribes the authorities i.e. Disciplinary Authority in respect of non-gazetted staff of Zonal Railways. As per item 10 of Schedule II of said Rules for imposing major penalties of compulsory retirement, removal from service and dismissal from service, the Disciplinary Authority is "Appointing Authority" or an authority of an equivalent rank or any higher authority. While the applicant

contending that the impugned order of removal from service is not passed by an incompetent authority miserably failed to establish this fact. At para 4.1 of the OA, it is stated by the applicant that in the ministerial category, he was appointed as a Junior Clerk in CPO Office, Central Railway, Head Quarters, Bombay on 11.01.1972 by the Chief Personnel Officer. At paragraph 5 of the reply (wrongly typed as 4), the respondents have specifically denied this fact. While denying this fact, it is submitted by the respondents that as per the office record, vide letter No. HPB/706/R/BD dated 24.12.1971 issued by the Assistant Personnel Officer (Headquarters), Central Railway, Bombay, the offer of appointment to the temporary post of Office Clerk in the pay scale Rs. 110-3-131-4-155-EB-4-175-5-180 (AS) @ pay Rs. 110/- per month was made to the applicant, who had accepted and signed the terms and conditions of the appointment on 11.01.1972 and accordingly, vide Staff Office Order No. 8 [No. HPB/706/R/BD dated 11.01.1972] signed by Sri E.S. Sundaram, the then Assistant Personnel Officer (S&M), Office of the Chief Personnel Officer, Head Quarters Office, Personnel Branch, Central Railway, Bombay, the applicant was appointed as a temporary Clerk [Rs. 110-180 (AS)] in the Personnel Branch and was posted to work with Office Superintendent (P). Anything contrary thereto, is unequivocally denied.

The rejoinder of the applicant to the aforesaid submission of the respondents is as follows -

"Para-5

That in reply to contents of Para 2 of counter reply which relates with Para 1 of O.A., it is most respectfully submitted that deponent has specifically mentioned in brief facts of the case in Para 3 Supra, that Dy. Chief Mechanical Engineer (Diesel), N. Rly., C.B.-Lucknow had no jurisdiction to impose the punishment of removal from service in the instant case against the deponent, as he was neither Disciplinary Authority nor appointing authority of the deponent.

That the deponent was appointed by Chief Personnel Officer, Central Railway on 11.1.1972 in the CPO's Office, Bombay (Now Mumbai) and not by an authority equal to the status of Dy. Chief Mechanical Engineer of Junior Administrative grade. Therefore, order dated 22.4.2010 through which the applicant was removed from service was illegal.

That the service record, personal file of the deponent is maintained by the respondents and therefore burden lies on the respondents to submit strict evidence in support of the contention that deponent was removed from service by Dy. Chief Mechanical Engineer (Diesel) respondent no. 3 being appointing authority, after ascertaining with reference to initial appointing authority. In case respondents do not produce evidence in support that deponent was appointed initially by an authority equal in rank to that of Dy. Chief Mechanical Engineer i.e. of JA Grade officer by virtue of not being available then the appointing authority of the deponent will be deemed to be General Manager and in that situation also, the order passed by the respondent no. 3, removing him from service would be illegal and liable to be set aside....."

The assertion of the applicant is not supported by any materials. It is not his case that no such records, as stated by respondents, are not available with the respondents. The rule of evidence is that he who asserts a particular fact has to prove the same. While he contends that CPO is his appointing authority, the burden is on him to establish that fact. If for any

reason, he is not in a position to produce the records, he ought to have made a prayer to summon the records which is also not done by him. The applicant has to succeed on his own strength and not on the weakness of the defence. It is an admitted fact that initially the applicant was appointed as a Junior Clerk for which post the appointing authority is Assistant Personnel Officer. As on the date of imposition of penalty, he was in the cadre of Head Clerk for which post the appointing authority is Junior Administrative Grade Officer. The applicant admits the fact that a Deputy Chief Mechanical Engineer is a Junior Administrative Grade Officer. As per item 10 of Schedule-II read with Rule 7 of the Railway Servants (Discipline and Appeal) Rules, 1968, an authority equivalent in rank to that of the Appointing Authority is the Disciplinary Authority for major penalties. As such the Deputy Chief Mechanical Engineer (DSL) is the Disciplinary Authority who is competent to pass the order of punishment. Neither in the O.A. nor in the rejoinder statements, the defence set-up by the respondents has not been specifically controverted by the applicant. Hence, we don't want to interfere in the impugned order on the ground of competency.

14. The learned counsel for the applicant further argued that the disciplinary proceedings against the applicant was initiated after 8 years of the act of subletting of the quarter allotted to him. It may be a fact there is a delay in initiation of the proceedings when the act of subletting has taken place is taken into account. But at the

same time what is required to be noted by us is whether the delay in initiation of the proceedings has caused any prejudice to the applicant on account of the delay in initiation of the proceedings. In the process, we find that apart from asserting the fact that there is delay in initiation of the proceedings, either in the O.A. or in the rejoinder statement, the applicant has not explained the prejudice that has caused to him on account of the delay in initiation of the proceedings. Hence we are unable to accept this contents of the applicant also.

15. Learned counsel for the applicant placed reliance upon the following judgments in support of his contention that the impugned orders are liable to be set aside on the ground of delay in initiation of the proceedings -

(i) K. Kumaran vs. State of Tamil Nadu and another [2007 (114) FLR 798]
(ii) Som Nath Manocha vs. Punjab and Sind Bank and others [2007 (114) FLR 1014]
(iii) M.V. Bijlani vs. Union of India and others (2006) (5) SCC 88.

The Hon'ble Madras High Court in the case of K. Kumaran (supra) was pleased to refer to the judgment of Hon'ble Supreme Court in the case of **State of Punjab and others v. Chaman Lal Goyal** 1995 (2) SCC 570 and in the case of **State of A.P. vs. N. Radhakrlshna** 1998 (4) SCC 154. The Hon'ble Supreme Court in the case of **N. Radhakrishna** (supra) has held –

> "*.....The essence of the matter is that the Court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the*

interest of clean and honest terminate after delay particularly when the delay is abnormal and there is no explanation for the delay....."

Similarly, in the case of **Chaman Lal Goyal** (supra), the Hon'ble Supreme Court has observed –

".....Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the Court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances....."

Keeping this in mind, while considering 'whether the delay has vitiated the disciplinary proceedings', we have to take into consideration the nature of charge, its complexity and 'whether the delay has caused any prejudice to the delinquent employee'. In the process, we find that, as already observed, though the applicant asserts that there is a delay, he has not explained the prejudice that has caused to him on account of the delay in initiation of the disciplinary proceedings. Besides, we also observe the fact in the case of **K. Kumaran** (supra) the delay in initiation of the disciplinary proceedings is of 18 years.

Similarly, in the case of **Som Nath Manocha** (supra), the delay in initiation of the disciplinary proceedings is of 25 years. The Hon'ble Delhi High Court in the said case of Som Nath Manocha was pleased to refer the judgment of the Hon'ble Supreme Court in the case of **P.V. Mahadevan vs. M.D. Tamil Nadu Housing Board** 2005 (106) FLR 1003 (SC). In the said case, the charge memo was issued in the year 2000 for charges of corruption pertaining to the year 1990. The Hon'ble Supreme Court quashed the charge sheet on the ground that keeping a higher Government Official on the charges of corruption and disputed

integrity would cause unbearable mental agony and distress to the officer concerned. In the case on hand, the integrity of the applicant is not involved. On the other hand, the question involved in the case on hand is whether the applicant has committed a forbidden act of sub-letting, which results in misconduct.

The Hon'ble Supreme Court in the case of **M.V. Bijlani** (supra) quashed the proceedings on the ground of delay by taking into account of the peculiar facts and circumstances of the said case. The charges leveled against the said M.V. Bijlani are as follows –

> *"(i) that he had failed to maintain ACE-8 Register showing acquisition and utilisation of 4000 kg of telegraph copper wire received from SDOT, Raipur, through Sub-Inspectors Kashiram and Badul Quadir on 22-10-1969, 30-10-1969 and 2-12-1969 for utilisation on Geedam-Bairagarh truck line against Estimate No. 2162 duly approved;*
>
> *(ii) that he had failed to supervise the working of the line and utilisation of copper wire while the rules require the personal supervision and accountability of the said wire; and*
>
> *(iii). t*hat he also showed misleading entries on the bills of transportation for transportation of the material."

A reading of the aforesaid charges reveals that there is a failure on the part of the delinquent official in respect of the work which is allotted to him. As such, there is every chance of causing prejudice to the delinquent official in defending the charges leveled against him, whereas in the instant case, the charge is in respect of a forbidden under sub-clause (i) of Rule 15-A of the Railway Services (Conduct) Rules, 1966. Thus, by appreciating the fact that the facts and circumstances of the said three cases relied upon by the learned counsel for the applicant and the facts and circumstances

of the case on hand and by bearing in mind the principle laid down by the Hon'ble Supreme Court in **Major Bahadur Singh** (supra) and in **Arulmozhi Iniarasu and Others** (supra), we find that the judgment of Hon'ble Madras High Court in the case of K. Kumaran (supra), the judgment of the Hon'ble Delhi High Court in the case of Som Nath Manocha (supra) and the judgment of the Hon'ble Supreme Court in the case of M.V. Bijlani (supra) in which the disciplinary proceedings were quashed on the ground of delay is in the facts and circumstances of the respective cases, which is not similar to the facts and circumstances of the case on hand, and, as such, the judgments of the Hon'ble Supreme Court, Hon'ble Madras High Court and the Hon'ble Delhi High Court are of no help to the applicant.

16. The learned counsel for the applicant further argued that even in circumstances where the act of subletting of the quarter allotted to the applicant is proved then the same does not warrant an initiation of disciplinary enquiry, but only warrants payment of more than 10% of the monthly emoluments or double of the assessed rent as provided in RBE No. 100/2001 or penal rent as per rule. In view of the fact that Rule 15A (i) of the Railway Services (Conduct) Rules, 1966, prohibits the act of subletting, we are not in agreement to accept the argument of the counsel for the applicant that instead of initiating departmental enquiry should have proceeded for making order for payment more than 10% of the monthly emoluments or the double of the assessed rent as provided in RBE No.100/2001.

17. The other limb of argument of the learned counsel for the applicant Shri Indu Lal is that the departmental enquiry came to be initiated against the applicant is on the basis of the reports submitted by the vigilance team and since the report of the vigilance team does not meet the requirements of Paras 704 and 705 of the Railway Vigilance Manual, the whole proceedings is vitiated. Paras 704 and 705 of the Railway Vigilance Manual reads as:

"Para 704 : 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 culprits red handed immediately after passing of the illegal gratification so that the accused may not be able to disposed it off.

(d) The witnesses selected should be responsible witnesses who have not appeared as witness 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 witness who are in government employment and of other departments.

(e) xxxxxxxxxxxxxxxxxxxxxxxx

Para-705: For departmental traps the following instructions in addition to those contained under Paragraphs 704 and 705 are to be followed:

(a) The investigating officer/inspector should arrange two gazetted officers from Railway to act as independent witness 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 utilized.

(b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand which he will give to the defaulting officers/employees as bribe money on demand memo should be prepared by the investigating Officer/Inspector in the presence of the independent witnesses and the decoy indicating the numbers of the G.C. notes for legal and illegal transactions, the memo thus prepared should bear the signature of the decoy, independent witnesses and the Investigating officer/Inspector. The independent witness will take up position at such a place where from they can see the transactions and also hear the conversation between the decoy and the 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 proceedings at a later date. After the money has been passed on, the investigating officer/inspector should disclose the identify and demand in the presence of the witnesses to produce all money including private. Railway and bribe money 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 witness in case the accused refuses to sign the recover memo and sealing of the notes on the envelope.

(c) to (e)xxxxxxxxxxxxxxxxxxxxxxxxxxxxx."

18. A plain reading of the said para 704 and 705 reveals that what are provided therein are the procedure, which are required to be followed while laying a trap. Admittedly, in the case on hand, no trap was laid. In view of this position, the argument of the learned

counsel for the applicant that the proceedings are liable to be interfered with for non-adherence to the provisions of para 704 and 705 of the Indian Railway Vigilance Manual is wholly untenable.

19. Learned counsel for the applicant further contended that the enquiry was not conducted in a fair manner and there is no proper appreciation of evidence. In support of this contention, the learned counsel for the applicant invited our attention to the question and answer in the cross examination of certain witnesses. He referred to the Question No. 1 asked to Sri S.K. Jain on 16.06.2006, which is extracted at Para 4.16 (1) of the OA and reads as under –

"Who put your duty to do the said joint check?

Ans: by S.K. Jain – I do not remember that the instant date as to who was the officer who deputed me to conduct the joint check."

He also referred to the question and answer of the witness Sri S.K. Ahuja which is also extracted in the very same paragraph and reads as under –

"Who deputed you for the joint check and given any letter or register to this effect?

The answer given by Sri S.K. Ahuja – "Administration."

The settled position of law is that while re-appreciation of evidence is not within the domain of the Tribunal, an absurd situation emanating from the statement of a witness can certainly be taken note of. It is also a settled position of law that strict rule of evidence is not applicable to departmental enquires. The rule of

evidence in departmental enquiries is the preponderance of probabilities. Bearing this in mind, while appreciating that portion of the evidence of the witnesses relied upon by the learned counsel for the applicant, we find that the applicant could not elicit any favourable answer in order to disprove the allegation of subletting. No absurd situation emanates from the said statement of the witness. On a perusal of the averments made in the O.A. and the rejoinder to the reply filed by the applicant, we find that nowhere it is stated by the applicant that he has handed over possession of the quarter allotted to him, to the respondents. On the other hand, what is stated by him is that one Sri Angad Ram Meena was in unauthorized occupation of the quarters allotted to him and the same was informed by him to the A.D.E.N., Headquarters, Lucknow. He has not mentioned as to how the said Sri Angad Ram Meena has occupied the premises unauthorizedly when the same was under his possession / occupation. Any man of ordinary prudence necessarily will take appropriate steps about the trespass of the illegal occupation. There is no whisper either in the O.A. or in the rejoinder statement as to how the quarter allotted to him came to be occupied unauthorizedly by Sri Angad Ram Meena. In this regard, it is necessary to refer the following portion of the averment in the O.A. i.e. paragraph 4.5, 4.6 and 4.7 of the O.A. –

> *"4.5. That also the condition of his quarter due to badly leakage the roof of the quarter became bad to worse and applicant sent a letter dated 7.6.1996 to the A.D.E.N. Head Quarter Lucknow to arrange its repairs otherwise its roof may fell down as it was badly leaking, but in vain. True copy of his said letter dated 7.6.1996 is attached as Annexure no. 4 to this O.A.*

4.6 That when his quarter not repaired by the DEN. HQ. Lucknow, the applicant shifted to rented house No. 566/38, Jai Prakash Nagar Alambagh Lucknow to save his family from a insuing danger snd incident of falling of the roof as the quarter was badly leaking. True copy of the said letter dated 1.2.94 is attached as Annexure no. 3 to this O.A.

4.7 That after a few days when applicant went to the said quarter on 1.3.1994, he found that one Sri Angad Ram Meena Assistant Guard has unauthorizedly, by breaking its lock, occupied the quarter. So the applicant informed the DEN, Hq. Lucknow on 2.3.1994 to take action against Sri Angad Ram Meena. The DEN Head Quarter also inspected the said quarter and found that Sri Meena was living in it without any allotment."

At para 4.5, he states that he addressed a letter dated 07.06.1996 to A.D.E.N., Headquarters, Lucknow to arrange for repairs. At para 4.7, he states that when he went on 01.03.1994, he found that one Sri Angad Ram Meena occupied quarter unauthorizedly. Had he found Angad Ram Meena was in unauthorizedly in possession of the quarter on 01.03.1994, as stated by him at para 4.7 of the O.A., there is no necessity for him to write a letter to A.D.E.N., Headquarters, Lucknow to arrange for its repairs on 07.06.1996 as stated by him at paragraph 4.5 of the O.A. This statement of the applicant in the O.A. leads to an inference that the applicant himself allowed the said Angad Ram Meena to occupy the quarter. In the O.A., it also not stated that on vacating the quarter on account of the fact that the quarters allotted him became uninhabitable due to the failure of the respondents to get it repaired, he handed over the lock and key to the concerned. Thus, averments made in the O.A. and the statement made in the rejoinder statement itself leads to an irresistible inference that the applicant has committed an act of

subletting which is forbidden under Rule 15A(i) of the Railway Services (Conduct) Rules, 1966 and thus the conclusion and the finding of the enquiry officer that the charges of subletting are proved is just and proper. In view of this fact, we are not inclined to accept the argument of the learned counsel for the applicant that neither the enquiry officer nor the disciplinary authority properly appreciated the evidence. We also find that the inquiry has been conducted in accordance with the rules.

20. Coming to the other argument of the learned counsel for the applicant that the order of punishment of removal from service is against the doctrine of proportionality and to appreciate this submission, it is necessary for us to refer to the principles accorded by the Hon'ble Supreme Court in the case of **Ranjit Thakur vs. Union of India & Ors,** 1989 (1) SLJ 109 (SC) = (1987) 4 SCC 611. Speaking for the Court, Hon'ble Mr. Justice M.N. Venkatachaliah (as he then was) emphasizing that "all powers have legal limits" invokes the doctrine of the proportionality in the following words –

> *"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review."*

21. Here in the given case, we already found that the applicant has committed an act of misconduct. The question is whether in the facts and circumstances of the present case, the doctrine of proportionality can be applied. There is no doubt that in case of proved misconduct, normally the imposition of the penalty may be within the discretion of the authorities. But the punishment of removal from service has to suit the act of subletting committed by the applicant. In the process of examination of the case on hand as to whether the doctrine of proportionality can be applied or not, on a perusal of the Indian Railway Manual, we find that there is a provisions for charging rent excess than the specified rent by a special order from a Railway Servant, who sublets the residence allotted to him, without permission. Considering this position and considering the fact that the applicant has committed an act of misconduct by subletting the quarters allotted to him, we feel that the punishment of removal from service is unduly harsh. It is disproportionate to the act of misconduct committed by the applicant and shocking the conscience. The punishment of removal from service does not suit to the misconduct of subletting committed by the applicant. As such the punishment of removal from service imposed upon the applicant is not immuned from correction and, hence, is liable to be interfered with. In view of this finding that the punishment of removal from service is shocking the conscience, we set aside the impugned orders dated 22.04.2010 and 30.06.2010 at Annexure-1 and Annexure-2, respectively.

22. In view of the discussions made hereinabove, the Original Application is partly allowed. The respondents-authorities are directed to take into account the totality of the circumstances and pass an order, which would be in commensurate with the misconduct committed by the applicant i.e. the act of subletting, within a period of three months from the date of receipt of a copy of this order. Under the circumstances, there shall be no order as to costs.

(M. NAGARAJAN)
JUDICIAL MEMBER

(MS. JAYATI CHANDRA)
ADMINISTRATIVE MEMBER

Kumawat/Vv