

Central Administrative Tribunal, Lucknow Bench, Lucknow
Original Application No. 38/2012

This the 8th day of November, 2012

Hon'ble Mr. Justice Alok Kumar Singh, Member (J)
Hon'ble Sri D.C. Lakha, Member (A)

G.S. Pathak, aged about 52 years son of late Ramji Pathak r/o 1B, Bhartipuram, Tewariganj Behind Durga Atta Mill, Faizabad Road, Lucknow.

Applicant

By Advocate: Sri Praveen Kumar

Versus

1. Union of India through the General Manager, NE Railway, Gorakhpur.
2. The Chief Engineer (Co-ordination), NE Railway, Gorakhpur.
3. The A.D.R.M., NE Railway, Ashok Marg, Lucknow.
4. The Senior D.E.N. (Co-ordination), NE Railway, Lucknow.
5. Sri D.P.Singh, E.O., (A.D.E.N./ Special), DRM Office, NER Ashok Marg, Lucknow.

Respondents

By Advocate: Sri D. Awasthi for Sri Ravi Kant Ranjan

(Reserved on 5.11.2012)

ORDER

By Hon'ble Mr. Justice Alok Kumar Singh, Member (J)

This O.A. has been filed for the following reliefs:-

- a) After quashing Annexure A-1, A-2, A-3 and A-4 , the Hon'ble Tribunal be pleased to issue order/ directions and clarification in regard to additional documents and Court witnesses; and issue order/ direction to complete the inquiry within the purview of charge sheet.
- b) To pass appropriate order against present E.O. for his illegal action of going beyond jurisdiction.
- c) Any order as considered by the Hon'ble Tribunal proper may be awarded in favour of the applicant.
- d) Cost of the application be awarded in favour of the applicant.

2. Briefly stated the facts are that while working as Section Engineer (Works), the applicant was served with major penalty

N.E.Railway, Lucknow (Disciplinary Authority) (Respondent No.4)

along with, Article of Charges (Enclosure-1), Statement of

imputation for misconduct and neglect of duty (enclosure-II), List of

relied upon documents and list of witnesses by whom articles of

charges were to be proved (Enclosure-III and IV). The photo copy of

the said charge sheet has been placed at Annexure No. A-5. In all,

there were six charges and in the list of witnesses, there were only

two names i.e. Sri Manoj Kumar and Sri Pradeep Kumar Mishra. In

the enquiry, both the prosecution witnesses confined their

depositions in respect of charge Nos. 1,2 and 3 only. There was no

inherent lacuna or defect in the evidence which was produced

originally. In spite of this, the enquiry officer, in order to fill up the

gap, referred the matter to disciplinary authority seeking inclusion of

additional documents and additional witnesses vide order sheet

dated 8.8.2011 (Annexure A-1) though he ought to have closed the

prosecution evidence and proceeded further under Rule 9(19) and

Rule 9(22) as per DA Rule,1968. After getting permission/approval,

the enquiry officer on 6.9.2011 provided copies of five additional

documents and also intimated three names to the applicant to be

examined as Court witnesses namely Nazir Ahmad Khallan,

Dhirendra Singh SE (Works) Asst and Ramesh Singh Asst.Town

Engineer, Lucknow. The applicant opposed it on the ground that

there was no provision for Court witnesses under the D.A. Rules

1968 (Annexure A-2). On 13.9.2011, the applicant again moved an

application against additional documents and alleged Court

witnesses but the enquiry officer rejected the same on 13.9.2011

(Annexure No. A-7). The applicant however, endorsed his written

objections on the order sheet dated 13.9.2011 (Annexure A-3) and

also requested that the matter be referred to the revisionary

authority. On 16.1.2012, he was provided with a letter dated

11.1.2012 issued by disciplinary authority intimating that the

revisionary authority (Respondent No.2) has rejected the application for change of enquiry officer (Annexure No. A-4). Hence this O.A.

3. The official respondents have contested the O.A. by filing a detailed Counter Affidavit refuting the allegations, saying that the disciplinary authority was not aware that Sri Pradeep Kumar Mishra, Office Superintendent and Sri Manoj Kumar were witnesses in relation to charge Nos. 1, 2 and 3 only and not with regard to remaining charge nos. 4, 5 and 6 and therefore, the enquiry officer sought permission from disciplinary authority on 8.8.2011 to introduce additional witnesses as Court Witnesses and it was done also after taking consent of the charged officer as well as Defence Assistant on 8.8.2011. It has also been contended that under Rule 9(18) of the aforesaid Rules, this power has been vested with the Enquiry Officer.

4. As against this, a rejoinder Reply has been filed reiterating the earlier pleadings and saying that the authorities have violated the note appended below to Rule 9(18) of the relevant rules and the enquiry officer has tried to fill up the gap in the enquiry proceedings. In respect of producing additional witnesses with the alleged consent of the applicant, it has been said that consent has to be specific, plain, unconditional and unambiguous and no inference can be drawn in such matters. As far as the signature of the applicant on the order sheet is concerned, it is contended that the same were made in token of presence only. Thereafter, the applicant had continuously opposed this action.

5. We have heard the learned counsel for the parties and thoroughly perused the entire material on record.

6. There is no quarrel on certain points such as that the charge sheet consists of six charges, that originally in the enquiry, only four documents and names of only two witnesses i.e. Manoj Kumar and Pradeep Kumar Mishra were mentioned in the enclosures 3 and 4 of

the charge sheet (Annexure A-5). It is also not disputed that after examining both the original witnesses mentioned in the charge sheet, the enquiry officer came to know that these witnesses have no concern with the remaining charges Nos 4 to 6. Similarly, he also found that the original documents mentioned with the enclosure of charge sheet have also no relation with the remaining charge Nos.4 to 6. As mentioned in the order sheet dated 8.8.2011 (Annexure A-1), after coming to know about the above, the enquiry officer decided to seek direction/approval from the disciplinary authority and then to proceed further. Then the enquiry was taken up on 6.9.2011 and the perusal of this order sheet (Annexure A-2) shows that enquiry officer received direction from the disciplinary authority in respect of inclusion of those new witnesses and documents. Consequently, four new documents were taken on record and its copies were handed over to the delinquent. Similarly, the names of three new (additional) witnesses were intimated to the applicant and the enquiry was fixed for 13.9.2011. The perusal of order sheet of 13.9.2011 (Annexure No. A-3) shows that on that date, at the beginning, the delinquent moved a representation which was rejected. The delinquent then moved another representation, upon which the enquiry was adjourned with the following directions:-

1. दिनांक 06.09.2011 की जाँच कार्यवाही में यह निर्णय लिया गया था कि कोर्ट गवाह के रूप में श्री नजीर अहमद, खलासी, श्री धीरेन्द्र सिंह, सीसेइ/कार्य/ऐशबाग एवं श्री रमेश सिंह, सनई/लजं0 को जाँच कार्यवाही हेतु बुलाया जायेगा। उस दिन दैनिक आदेश प्रपत्र पर आरोपी कर्मचारी एवं उनके बचाव सहायक ने सहमति स्वरूप अपने हस्ताक्षर किये थे। आज जाँच कार्यवाही में प्रारम्भिक प्रतिवेदन को प्रस्तुत करने का कोई औचित्य नहीं है।
2. यह जाँच कार्यवाही दिनांक 29.01.2011 से चल रही है तब से लगभग 12 बार जाँच की तिथि निर्धारित कर कार्यवाही की गई है। आपके द्वारा इतनी जाँच कार्यवाही के दौरान जाँच अधिकारी के ठपें होने का पूर्व में आरोप नहीं लगाया गया है।
3. आरोपी कर्मचारी द्वारा आज दिये गये प्रतिवेदन के साथ कोई भी Supporting Document नहीं लगाये गये हैं। दिये गये प्रतिवेदन को आर0ओ0पी0 12 एवं 13 पर पंजीकृत किया गया। अगली जाँच की तिथि पर आरोपी कर्मचारी Supporting Document

जॉच कार्यवाही के दौरान प्रतिवेदन देना, केस के त्वरित निस्तारण को प्रभावित करता है। जॉच की कार्यवाही अगली तिथि दिनांक 20.09.2011 को निर्धारित की गयी।
अतः नोटिस जारी की जाती है।

ह0 (जी0 एस0 पाठक) आरोपित कर्मचारी	ह0 (अयूब खाँ) बचाव सहायक	ह0 (डी0 फी0 सिंह) जॉच अधिकारी
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Just below the above order sheet, the following five objections have been mentioned by the delinquent:-

With the following dissent (आपत्ति)
Notes

1. **Court witness** शब्द आपत्तिजनक है क्योंकि इसका कोड उल्लेख RS (D&A) Rules 1968 के नियम 9(i) ka 9(25) तक में नहीं है।
2. दिनांक 06.09.11 की DOS में मात्र हस्ताक्षर करना सहमति का अर्थ प्रदान नहीं करता अतः यह कहना कि आरो० ने सहमति स्वरूप हस्ताक्षर किया था, पूर्णतया असत्य है।
3. आज दिए गये प्रथम एवं द्वितीय प्रतिवेदनों में RS(D&A) Rules 1968 के नियम 9(18) टिप्पणी का ही संदर्भ दिया गया है। अतः इसके औचित्य पर प्रश्नचिन्ह लगाना किसी भी प्रकार से उचित नहीं है।
4. अतिरिक्त अभियोजन साक्षों के रूप में प्रस्तुत अभिलेखीय एवं मौखिक साक्षों को प्रस्तुत करने का निर्णय, नियम 9(18) टिप्पणी के विरुद्ध लिया गया निर्णय है जोकि RS(D&A) Rules 1968 का नियम है सिके लिए किसी Supporting Document देने की आवश्यकता नहीं है। वैसे ही ह0 को RS(D&A) Rules 1968 के सम्यक मान होना चाहिए जिसके तहत ही उन्हे जॉच कार्यवाही करनी है।
5. आज दिये गए प्रतिवेदन दिनांक 06.09.11 को आप द्वारा लिए गए निर्णय जोकि नियम विरुद्ध थे, की विरुद्ध आपत्ति देने का अवसर आज ही था। आज के पूर्व देने का काई औचित्य नहीं था।
7. We do not find any indication as to whether or not the enquiry proceeded on the next date i.e. on 20.9.2011. But it comes out from record that the disciplinary authority informed in writing vide letter dated 11.1.2012 that the application of the delinquent regarding alleged bias of the enquiry officer against him had not been accepted by the revisionary authority. The perusal of Annexure A-8 shows that the delinquent official had made the allegation of

producing additional evidence, he has proceeded against Rule 9(18) of the relevant rules.

8. The relevant Rule 9(18) and the note appended below are extracted herein below for convenience:-

"(18) If it shall appear necessary before the close of the case on behalf of the disciplinary authority, the inquiring authority may, in its discretion, allow the Presenting Officer, if any, to produce evidence not included in the list given to the Railway Servant or may itself call for new evidence or recall and re-examine any witness and in such cases the Railway servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The inquiring authority shall give the Railway servant an opportunity of inspecting such documents before they are taken on the record. The inquiring authority may also allow the Railway servant to produce new evidence if it is of the opinion that the production of such evidence is necessary in the interest of justice.

Note:-

New evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally."

9. The pith and substance of the above Rule appears to be that before closing of the enquiry, the enquiry officer has discretion to allow for production of evidence not included in the list given to the Railway servant and in such cases the Railway servant shall be

entitled to have a copy of the list of such further evidence proposed to be produced. But as has been clarified in the above note appended just below the above rule that no new evidence can be permitted or called for, to fill up any gap in the evidence. Such evidence may be called for only when there is an inherent lacuna or defect in the evidence which has been produced originally.

10. Now, therefore, we have to see as to whether the inclusion of new documentary and oral evidence in respect of charge Nos. 4 to 6 by the enquiry officer after seeking direction from the disciplinary authority was on account of some inherent lacuna or defect in the evidence which had been produced originally or it was to fill up any gap in the evidence and whether the Enquiry Officer was justified in seeking direction from disciplinary authority instead of exercising his own discretion.

11. A charge sheet is issued after due and proper application of mind on the entire subject upon which the enquiry has to be conducted against the delinquent. Admittedly, along with the charge sheet in question, only four documents and two oral witnesses were mentioned which were proposed to be relied upon in respect of all the six charges. The perusal of both the headings under which the four documents and two witnesses have been mentioned also reveals that the proposed evidence was in respect of all the charges framed against the delinquent (Annexure 3 and 4).

12. We have already seen as mentioned before, that it is only after examining both the witnesses that the enquiry officer found that they have deposed in respect of charge Nos. 1,2 and 3 only, thenin his wisdom he decided to seek directions from the disciplinary authority. At this stage itself, he committed mistake. An enquiry officer acting in a quasi judicial authority, is in position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority. His function is to examine

the evidence presented by the department to find out as to whether it is sufficient to hold the charges as proved. This is so as to avoid the charge that the enquiry officer has acted as a prosecutor as well as a judge. The enquiry officer has to be wholly unbiased and he has to ensure that justice is not only done but is manifestly seen to be done. Similar observations have been made by the Hon'ble Apex Court in the case of **State of U.P. and others Vs. Saroj Kumar Sinha reported in (2010) 2 Supreme Court Cases 772.**

13. As clearly provided in the note appended below Rule 9(18), the condition precedent for permitting additional evidence by the enquiry officer is when there is any inherent lacuna or defect in the evidence which has been produced originally. In the present case, there was no inherent lacuna or defect in the evidence originally produced. The enquiry officer also did not make any such mention in any of the order sheet or elsewhere. There is also no such specific pleadings from the side of respondents. It is a simple case where after examining original witnesses, it was found that both the witnesses mentioned to prove all the charges have confined their submissions only to three charges and not all the six. Thereafter, the enquiry officer, as if acting as a caretaker or representative of the prosecution with a view to fill this gap, himself informed and suggested about it to the disciplinary authority seeking his direction/ approval for additional evidence. Now the second significant point is that even if there was any lacuna or defect in the original evidence, then also it was the enquiry officer himself who had a discretion to allow the presenting officer, if any, to produce evidence not included in the list given to the Railway servant. But there was no occasion to seek direction or approval from the disciplinary authority and then to include the additional evidence as clearly mentioned in the order sheet dated 6.9.2011(Annexure A-2). This act was certainly against

the spirit of the provisions envisaged in the aforesaid note appended below the relevant rules.

14. There is a specific negation in the note in its first line itself that no new evidence shall be permitted to fill up any gap in the evidence. In the present case, it was indeed a gap in evidence because as already said in the original documentary and oral evidence no lacuna whatsoever has been mentioned either in any of the relevant order sheets or in the pleadings. Thus, in violation of the aforesaid rule/ note, the enquiry officer permitted to include the additional documentary and oral evidence after wrongfully seeking direction/ approval from the disciplinary authority.

15. Learned counsel for applicant placed his reliance on the case of ***Ram Prasad Meena Vs. Union of India and others (O.A.No. 312 of 2002 decided by coordinate bench of CAT, Jodhpur Bench on 31.5.2004)***. This case squarely applies in the present case. In the above case also, Rule 9(18) was involved. A charge sheet complete in all respect, was issued. Thereafter, some new documents and witnesses were introduced without showing any lacuna or defect in the charge sheet. The CAT, Jodhpur Bench therefore, opined that it caused prejudice to the defence and such extraneous evidence cannot be allowed. It was also observed that if such documents formed part of official record and were to be used to substantiate the charges, the same would have been available and produced by the disciplinary authority itself. It was also found that the objections of the applicant regarding invoking of Rule 9(18) of the Rules wrongfully were dealt with in a slip shod manner and came to be thrown overboard without any cogent reasons as appears to has been done in the case in hand. In that case, a defence was taken, as has been taken in the case before us also, that the copies of such additional documents were made available and opportunity was also given to cross examine the additional

evidence. The CAT of Jodhpur Bench did not accept it and held that under Rule 9(18) of the Rules, specific provision has been made to deal a case only when there is any inherent lacuna or defect in the evidence. The enquiry officer has to confine himself to the documents and witnesses listed in the Annexures enclosed with the charge sheet. His job is not to travel beyond that parameters fixed by the disciplinary authority. It was also observed that the enquiry officer is not required to fetch the evidence from here and there or at the sweet will of the presenting officer and prove the charges at any pretext. His function is like that of judge who has to discharge his duty without any favour or fear.

16. An example would make the difference more clear between gap and lacuna mentioned in the aforesaid note appended below the relevant rules. This example is mentioned in the electrostat copies of a commentary (book) which has been placed at Annexure R-1 along with Rejoinder Reply on page 9. Suppose, there is a charge against Mr. 'A' that despite a memo have been served upon him, he did not attend office. To prove service of memo, a peon 'X' is cited as a witness. During his examination, he deposes that he had left the memo with 'Y' a servant of Mr. 'A' to give him when he comes home. Now the statement of 'Y' is no proof of service of memo of Mr. 'A'. For this, 'Y' has to be called. In this situation, if it has come to the knowledge during the proceedings that 'Y' is a necessary witness, it may be allowed as a lacuna in the evidence. But if, it was already known to the prosecution that memo was left with 'Y' and that 'Y' was a necessary witness, then they have left a gap in their prosecution by not citing 'Y' as a witness. Now 'Y' will be filling in the gap and may not be allowed. In the present case, it appears that the respondents/ prosecution side knew it well that the two witnesses mentioned in support of the charge sheet will depose only in respect of first three charges. Similarly, they knew about the

documentary evidence mentioned in support of the charge sheet that the same pertain to first three charges only and that in respect of remaining charges, more documents and witnesses are required to be mentioned. But either on account of non-application of mind or on account of carelessness or inadvertence or any other reason whatever it was, those documents and witness were not mentioned. Thus, this gap was left by official respondent themselves which could not have been filled as per specific negation in the above note appended below the relevant rules.

17. We are also not able to persuade ourselves to accept the contention on behalf of the official respondents that the additional evidence was included with the consent of delinquent. On the contrary, the order sheet dated 13.9.2011 clearly shows that delinquent had made a detailed written note of dissent consisting of five points in this regard as mentioned before.

18. Finally, therefore, in view of the above, the O.A. is partly allowed. The impugned order sheets dated 8.8.2011, 6.9.2011 and 13.9.2011 (Annexures 1 to 3) shall be construed and read in accordance with the observations made in the body of this judgment/order and the direction given by the enquiry officer in furtherance of the order/approval sought by him from the disciplinary authority in respect of including additional documentary and oral evidence would be treated as non-est. With these observations, the enquiry is relegated to the enquiry officer to conclude it in accordance with the Rules so as to bring it to its logical conclusion. As the matter is of the year 2010, this exercise shall be completed expeditiously not later than four months from the date of this order. No order as to costs.


(D.C. Lakha)
Member (A)


(Justice Alok Kumar Singh) 8.11.12
Member (J)