CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 517/91

Transfer Application No.

Date of Decision 10/4/95

A.N.Bhanot — Petitioner/s

Shri L.M.Nerlekar — Advocate for the Petitioners

Versus

Divisional Railway Manager, Central Railway, Bombay VT. — Respondent/s

Shri V.G.Rege — Advocate for the Respondents

CORAM :

Hon'ble Shri. B.S.Hegde, Member (J).

Hon'ble Shri. M.R.Kolhatkar, Member (A)

(1) To be referred to the Reporter or not ? ✗

(2) Whether it needs to be circulated to other Benches of the Tribunal ? ✗

(M.R.KOLHATKAR)
MEMBER(A)

abp.

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

BOMBAY BENCH

O.A.517/91

A.N.Bhanot ... Applicant

V/s.

Divisional Railway Manager
Central Railway- Bombay VT ... Respondent.

CORAM: Hon'ble Shri B.S.Hegde, Member (J)
Hon'ble Shri M.R.Kolhatkar, Member (A)

APPEARANCE:

Shri L.M.Nerlekar, Counsel
for Applicant.

Shri V.G.Rege, Counsel
for Respondent.

JUDGEMENT: DATED : 10th Oct

X Per Shri M.R.Kolhatkar, Member (A) X

In this OA, the applicant has sought the relief of setting aside the order dated 9/3/90 at p.58 passed by Senior Divisional Electrical Engineer, Bombay VT which was an appellate order confirming the penalty imposed by the Disciplinary Authority on 19.7.89 at p.52/53 namely that of reduction from stage of Rs.1275/- to the stage of Rs.1225/- in the scale of Rs.950-1500 for a period of 2 years without the effect of the postponing of future increments. Further relief is sought that the suspension period should be treated as on duty or in the alternative should be counted for the purpose of pensionary benefits. This is with reference to order dated 25/2/91 at p.59 from the Divisional Railway Manager's office which states that as per directions of the Railway Board, the suspension period cannot be considered for qualifying service. This is the third round of litigation. In OA 323/88 decided on 10/6/88, the Tribunal had given to the applicant the

relief of having one Shri Badve as his Assisting Railway Employee (A.R.E). In OA 804/88, decided on 2/1/89, the applicant had sought the relief of enhancing the subsistence allowance to full pay and allowances and for revocation of suspension. The OA was rejected and the respondents were directed to complete the enquiry within 3 months.

2. At the outset, Shri Rege Counsel for respondents states that any prayers relating to suspension should be rejected on the ground of res-judi-cata in the light of this Tribunal's judgement in OA 804/88 dated 2/1/89 referred to above. This contention does not appeal to us. The prayer is not for enhancing subsistence allowance or revocation of suspension but for treatment of the suspension period as duty or as qualifying service for pensionary benefits. We can therefore very well consider his prayer as to suspension.

3. The counsel for applicant contends that the background of the Disciplinary Enquiry was that he had represented that Shri J.V.S.Shisodia who was a Senior Loco Inspector used to compel the employees to take insurance policy through his wife and those who did not comply with his request were harassed. Moreover, he had also given a notice of Hunger Strike, in connection with a legitimate demand and the respondents had threathened the applicant either to withdraw the hunger strike notice or face the consecuences. This is the reason for starting the Disciplinary Enquiry.

4. The main article of charge against the applicant is that he disregarded the orders, in that he failed to depose and produce documentary and oral evidence before the Enquiry Authority appointed to investigate

into the report dated 13/2/87 and 13/3/87 submitted by him. It is not disputed that the fact finding enquiry was conducted by Shri Dhamangaonkar, Assistant Electrical Engineer (AEE) and that one Shri Lillywhite, Senior Loco Inspector was the Enquiry Officer who had conducted the enquiry. The enquiry report is at pages-42 to 51. The report of the enquiry officer was considered by Disciplinary Authority Shri K.K.Lachwani, Assistant Electrical Engineer (AEE) who by the order dated 19/7/89 (page.52) imposed the penalty on the applicant. The Appellate Order against this penalty was passed by Shri Ved Pal, Senior Divisional Electrical Engineer vide his order dated 9/3/90 (page-58). The findings of the enquiry officer are as follows:-

> "Assistant Driver, A.N.Bhanot has refused to cooperate in the enquiry proceedings conducted by EO AEE/TRS Shri Dhamangaonkar on 28/3/87. The CSE has also failed to produce any witnesses or documentary evidence during enquiry. Therefore Assistant Driver Shri A.N.Bhanot is guilty of charges levelled against him vide SF-5 memorandum No.BB-LR-302,RSO.DAP.13 dt. 9/4/87 issued by AEE/TRS-O/I/BB of violating the provision of Rule 3(i) of the Railway Service Conduct Rules 1966."

Several contentions have been raised by the Counsel for Applicant in support of the OA and we deal with the same serially.

5. Firstly, it is urged that the charge sheet was issued by the incompetent authority. According to the Counsel for the Applicant, the Assistant Electrical Engineer who issued the charge sheet was not the appointing authority. He was not, however, able to produce the copy of appointment order; on the other hand, the Counsel for the respondents argued that

the applicant is a group 'C' employee and the officer who issued the charge sheet was a Senior Scale Gazetted Officer who was competent to issue charge sheet in terms of Annexures 3 and 4 of the Railways Servants(Discipline and Appeal) Rules. In our view, in this regard the contention of the applicant is, therefore, not sustainable.

6. The next contention of the Counsel for Applicant is that the Charge Sheet is vague. The Counsel for respondents states that the charge sheet read with the statement of imputations is quite specific. The applicant had made certain representations and the applicant was asked to produce documentary evidence in support of those representations and it is his failure which is the subject matter of the charge which is quite specific. We are inclined to accept the contention of the respondents.

7. The third contention of the Counsel for the Applicant is that he had by order dated 28/3/87 (page-20) asked for certain documents. These documents were not supplied to him and by the he was informed letter dt. 14/5/87 (page-22) that the enquiry report Sr.DEE's is available in office. The Counsel for respondents showed the original file from which it was clear that the applicant had acknowledged receipt of the copy of the enquiry report. The Counsel for the applicant stated that, however, the enclosures with that report were not supplied. to be This contention, however, appears only technical because these were the representations of the applicant himself. It is true, ofcourse, that the applicant had asked for certain other documents and in regard to these he was advised to contact the Sr. DEE office and apparently he was not supplied

the documents as required by him. In our view, at this stage, the applicant was expected either to accept or deny the charges. The charges were very specific namely in regard to failure to supply documents and give evidence in support of his allegations against Shri Shisodia. In these circumstances, failure to supply the documents did not in our view vitiate the enquiry.

8. Fourthly the Counsel for Applicant contends that the findings of tne Enquiry Officer are perverse because his main finding is that he refused to cooperate with the enquiry whereas that was not the charge. The Counsel for the respondents states that the reference in the enquiry report in the conclusion to the refusal of the Officer to cooperate is tobe treated as an observation and not the basic finding. According to us, considering the nature of the charge, the findings of the enquiry officer cannot be said tobe perverse.

9. The Counsel for Applicant next submits that the payment of subsistence allowance was not as per rules. In our view the OA on this specific point was dismissed and therefore this contention is hit by principles or analogue to res-judicata and cannot be accepted.

10. The next contention of the Counsel for Applicant is that the power of suspension in the case of the applicant has been misused. On this point, the Counsel for Applicant has quoted the well known English authority WADE and has urged that where any power is used oppressively or unnecessarily, the exercise of the same is liable to be interfered with. On this point not much material is available on record but Counsel for the respondents states that

the applicant was under suspension from 2.4.87 to 31.3.89. Normally the suspension of a Government Employee is resorted to when the charge is of a serious nature and there is apprehension that the Government employee was likely to tamper with the documents. There are also provisions that prolonged suspension is to be avoided and if necessary the Government employee may be transferred instead of continuing him under suspension which is otherwise unwarranted. It is clear that the applicant had made allegations against a Senior Government Employee. His allegations were in the nature of misuse of official position. In any government department, which has a vigilance branch, this allegation would normally be investigated discreetly because the issue involved is of purity of administration. This is an important feature to be kept in view. It is no doubt true that this factor has to be weighed against the harm done by unfounded allegation made by subordinate employees against the superior officers which would adversely affect the discipline in Government Offices. However, a balance between purity of administration & discipline in public administration has to be maintained. The counsel for the respondents stated at the bar that some enquiries in regard to the allegations against Shri Sisodia had been conducted but he was not in a position to state as to what the outcome was. It appears to us, however, that the charges against applicant taken in the totality were not such as to warrant prolonged suspension of a government employee for over two years as appears to be the case in O.A. We will refer to this matter later on.

11. The next contention of the counsel for applicant is that inquiry officer was lower in rank than fact finding officer and therefore the

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enquiry officer was influenced while writing his report by the indirect compulsion not to go against facts found by Fact finding Authority. In this connection, the learned counsel for applicant invites our attention to Railway Board letter dt. 10.4.1962 on this point which is reproduced below:-

> "Authority competent to conduct departmental enquiry under discipline and appeal rules. It has been represented to the Board that in certain cases Departmental enquiry was held by an Officer of a status lower than the one who had conducted the Fact finding enquiry and that in such cases there was a possibility of the Enquiry Officer being influenced by the findings of the superior authority. The Board have considered the matte matter and have decided that, except in cases arising out of fact finding enquiries like accident enquiries, enquiries consequent to audit reports, reports from the S.P.E. departmental enquiries for disciplinary action should not be entrusted to an officer lower in status than that of the Officer who conducted the fact-finding enquiry."

12. According to the Counsel for applicant, these instructions are issued in terms of section 125 of the Railway Board Establishment Code and have the force of law. The counsel for Respondents states that the facts of the present case do not attract the instructions in the Railway Board circular. According to us, there is definitely an irregularity committed by Competent Authority in entrusting a disciplinary enquiry to an officer lower in status than the officer who conducted the fact finding enquiry.

13. We note that this point was, in fact, raised before the Enquiry Officer who has referred to it in his report below:

> "CSEhas asked for a copy of Board's letter according to which a Junior Officer cannot be an Enquiry Officer when his superior is involved. This clearly indicates that CSE had reservations about EO AEE M.G.Dhamangaonkar's function as EO on 23.3.87 and hence had no cooperated during the enquiry proceedings of 23.3.1987."

It is clear that EO did not comprehend the nature of reservations entertained by the applicant.

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14. The next contention of the Counsel for the applicant is that the enquiry officer was biased and therefore the enquiry officer ought to have stopped the enquiry and sought further instructions of the Disciplinary Authority. In this connection, the learned counsel relied on 1993 SCC L&S 1106 Ratanlal Sharma V/s. Managing Committee. In our view, no material was placed showing malice in facts. The main factor in support of malice in law is that the E.O. was junior to the fact finding authority. This has relation to what has been stated earlier in regard to Railway Board instructions.

15. The counsel for applicant has argued that there is clearly a non-application of mind by Disciplinary Authority. Initially, the enquiry was conducted ex parte, a penalty of removal from service was imposed by the Disciplinary Authority on 10.5.1988 vide internal page 6 of the Enquiry Officer's report but later on, after the Tribunal's Order relating to assisting railway employee (ARE), the matter was required to be re-heard and thereafter the lower penalty of reduction in rank came to be imposed. In our view, the Disciplinary Authority appears to have adopted the reasoning of the Enquiry Officer which is quite detailed but the fact of imposition of penalty of removal in an ex parte inquiry and imposition of a lesser penalty on more or less the same material on record does show arbitrariness.

16. The next contention of the counsel for applicant is that the Appellate Order was passed without giving him a personal hearing. Secondly, the appellate order is not in accordance with the rules. It is a mechanical order and therefore in spirit, it violates the ratio of the Supreme Court in Ramchandran's case.

17. On a perusal of the order of the Appellate Authority, we do find that the order appears to have been written in a mechanical manner. In this connection, the material part of the order referred to is as below:-

> "I have gone through your appeal carefully, based on the facts and documents available on record. I am convinced that you have been given adequate opportunity to present your case in the enquiry. The enquiry has been conducted abiding all rules, in unbiased manner. The articles of charges have proved in the enquiry and inspite of all the opportunities given to you, you have failed to produce the documentary evidence before the enquiry authority, appointed to investigate into the charges. Hence you have violated the provisions of Railways Service Conduct Rules, which is unbecoming of Government servant. The penalty imposed by the Disciplinary Authority is justified."

18. The counsel for applicant has also relied on judgment of the Bangalore Bench of this Tribunal in a similar case vide D.V.Pathan V/s. Union of India in OA 921/88 decided on 3.12.1990 and reported apparently in SLJ 1991 356. In that case, the Tribunal held the enquiry be irregular on various grounds including the ground that the Appellate Authority did not apply its mind to the case and did not peruse the file. The Tribunal found that the Railway Employee was dismissed from service for a charge of dashing his cycle against a Rakshak & that he uttered some, ~~in~~ abusive words, holding an enquiry which was only a farce. Under the circumstances, the Tribunal set aside the impugned order and directed the respondents to reinstate the applicant into service without liberty to respondents to conduct a denovo enquiry.

19. In ~~my~~ my view, although not on all fours, the case decided by Bangalore Bench shares

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certain essential features with the instant OA. On perusal of the pleadings,documents, and arguments, we consider that the charge-sheet framed against the employee is of a very formal nature. The main charge against the applicant is that he disregarded the orders in that he failed to depose and produce documentary and oral evidence before the enquiry authority. The charge is not that he made false allegations against the Superior officer or that he breached the office discipline but the charge is as stated above. Considering the very brief report of the fact finding authority, such a charge was not difficult to be proved but to suspend an employee on account of this charge and then to hold an ex parte enquiry and to remove him and thereafter in terms of Tribunal's order to conduct a fresh enquiry from the stage of appointment of a new defence assistant and then to impose the penalty of reduction in the pay scale from the stage of Rs.1275/- to the stage of Rs.1,225/- for two years appears to be nothing but the abuse of instrumentality of the departmental enquiry. Enquiry Officer being factually biased has not been substantiated but the malice in law is evident. The record, no doubt leaves me in that the departmental enquiry was initiated against the applicant for extreneous consideration in the context of his having made allegations of abuse of office against a senior officer and in the context of notice of Hunger Strike. We have already observed that it was highly irregular for the Railway Administration to have appointed an Enquiry Officer who was junior to the fact finding officer in violation of Railway Board instructions.

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I have also observed that the Disciplinary Authority has betrayed arbitrariness and Appellate Authority has shown non-application of mind. I am, therefore, of the view that the departmental enquiry is vitiated and liable to be set aside.

20. So far as the treatment of period of suspension is concerned, I have already observed that the suspension prima facie was unwarranted but at this stage I am not in a position to give any relief relating to subsistence allowance. I also note that it is the prerogative of the departmental authority to consider the treatment of period of suspension. In regard to this question, therefore, the ends of justice would be served in case suitable directions are given to the Railway Authority.

I therefore dispose of the OA by passing following order :

O R D E R

The order of the appellate authority confirming the penalty and the Disciplinary Authority imposing the penalty are hereby quashed and set aside. The respondents are directed to give all consequential benefits to the applicant consequent on quashing of the penalty. Respondents are directed to re-consider the question of treatment of period of suspension as a period in the nature of qualifying service in the light of observations in this judgment. There will be no orders as to costs.

M.R.Kolhatkar

(M.R.KOLHATKAR)
Member(A).

B.

Per: Hon'ble Shri B.S. Hegde, Member (J)

1. I have had the advantage of perusing the order of my learned brother Shri M.R. Kolhatkar, Member (A). Though he has held certain issues raised in the O.A. against the Applicant, in conclusion, he granted the relief which is not borne out of records. Therefore, it is with great respect that I find myself unable to agree with the conclusion for the reasons stated hereinbelow.

2. So far as the facts are concerned, there is no dispute that the Appellate Authority confirmed the penalty imposed by the Disciplinary Authority and passed order vide dated 9-3-1990 namely that of reduction from stage of Rs. 1275/- to the stage of Rs. 1225/- in the scale of Rs. 950-1500 for a period of two years without the effect of the postponing of future increments. The Applicant has also asked that suspension period should be treated as duty or in the alternative the suspension may be counted for the purpose of pensionary benefits. This is with reference to Respondent's letter dated 25-2-1991 stating that as per directions of the Railway Board, his suspension period cannot be considered for qualifying service, against which he has not preferred any appeal though an appeal is provided under the statute. To reiterate some of the salient features, it is true, that the Applicant has filed O.A. 323/88 in which he sought for quashing of the inquiry as he was denied the Defence Assistant in the inquiry which was decided on 10-6-1988 directing the Respondents to provide defence assistance of one Shri Badve. Again, he filed another O.A. 804/88 which was decided on 2-1-1989 in which he sought for enhancing subsistence allowance and revocation of suspension.

The second OA was rejected and the Respondents were directed to complete the enquiry within 3 months. This is the third O.A. filed by the Applicant. The main charge against the Applicant is that he disregarded the orders and failed to depose and produce documentary and oral evidence before the Enquiry Officer. My learned brother in his order, upheld most of the contentions of the Respondents rejecting the plea of the Applicant. However, I am inclined to agree with my learned brother's observation in paras 5 to 9 of the note. However, in response to para 10 of the note, I beg to differ and in my view, the principles laid down by the English authority 'WADE on administrative law' has no relevance to the facts of this case. The Applicant's counsel has not furnished any material in support of his contention which has been considered relied upon by my learned brother in his observation in para 10. Nevertheless, he has stated that the charge against the Applicant in totality were not such as to warrant prolonged suspension for over two years which is not based on records and unwarranted in the facts and circumstances of the case.

3. In so far as 'suspension' matter is concerned, I beg to differ with the observations made by my learned brother. In law, suspension pending departmental enquiry is temporary and does not involve punishment. It only means temporary deprivation of the officer's functions or the right to discharge his duties but does not amount to any lowering down or reduction of his rank or status nor does he cease to be a Government servant. He continues to be subject to the same discipline and subject to the same authority. The only restriction, therefore, is that during the suspension the Government servant cannot seek employment elsewhere nor the Government can employ

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any person in his place. There is no termination of his services or reduction mainly on account of suspension and requirement of article 311(2) need not be complied with before making order of suspension. It is a settled principle that suspension pending enquiry is an administrative and not quasi-judicial order. It was a subjective assessment of the Competent Authority, unless such assessment is perverse or arbitrary or malafide in nature, it is not open to the Tribunal to substitute the findings of the Competent Authority. In this case, there is no such allegation. In the instant case, he has only questioned that the Enquiry Officer is lower in rank than the fact finding authority. In law, the right of the delinquent employee to be heard arises only from the stage where the charges are brought against him in the disciplinary proceedings and not at any stage of the enquiry to the framing of the charge. A fact finding inquiry is held for the very object of determining whether there is prima facie case for making a final departmental inquiry against the delinquent. Article 311(2) is attracted to the later enquiry but not the preceding inquiry, (i.e. fact finding enquiry) the object of which is not to punish the delinquent but only to decide whether a final proceeding to punish him should be initiated or not. The report of the preliminary inquiry/fact finding inquiry cannot be used at the departmental inquiry without furnishing a copy of the report to the delinquent employee. In para 14 of the order, my learned brother has stated that the Enquiry Officer was biased. He has also stated that no material was placed showing malice in facts. The main factor in support of malice is that the E.O. was junior to the fact finding authority. In this connection, the Railway Board's instruction contained in their letter

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dated 10-4-1962 is cited. With due respect to my learned brother, I state that since no concrete evidence was produced except the bare allegation and the said contention is denied by the Respondents in their reply.

4. The question is what is malice in law ? No explanation except stating that the Enquiry Officer is junior to the fact finding authority. There is no pleading on the part of the applicant that the action of the Respondents is malice in law or misrepresents as to material facts. It is clear that where a rule or order is administrative having no force of law, there is no cause of action for such breach thereof, unless such breach constitutes a violation of the statutory or constitutional provision. The Railway Board's circular 1962 at the most could be treated as guidelines only; for breach thereof it cannot be enforced in a Court of Law. In the absence of any clear allegation against any particular official and in the absence of impleading such person co-nominee so as to enable him to enforce the charge against him the charge of malafide cannot be entertained. It is true that, an opportunity of showing cause at the post-enquiry stage has been taken away by the 42nd amendment to the Constitution. However, the power of the Disciplinary Authority to delegate the functions of making the enquiry into the charges has not been affected by the amendment. Under Art. 311(2), two conditions are required to be fulfilled.

i) such an employee shall not be dismissed/removed by the authority subject to condition by which he was appointed;

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ii) such an employee shall not be dismissed/ removed or reduced in rank without enquiring into the charges against him and without offering him an opportunity of showing cause against the action proposed to be taken against him.

Dismissal by an officer subordinate to the Appointing Authority is null and void. It is for the Government servant to plead and prove who was his appointing authority and also that the disciplinary authority is lower than the appointing authority. On the same principle, the appointing authority cannot delegate his power of dismissal or removal to a subordinate authority so as to destroy the protection aforded by the Constitution. In the light of the above legal principle, under the circumstances, the onus of producing all relevant papers to show that the disciplinary authority is lower in rank than the appointing authority is upon the petitioner. The applicant failed to produce the same. Further, it is amply made clear in Thulsiram Patel's case that not only the power to make enquiry, but also the power to dismiss may be delegated by the appointing authority, subject to the only condition that the person to whom the power is delegated must not be subordinate to the appointing authority. Therefore, it does not require, that the order initiating the enquiry or the enquiry itself must be made by the appointing authority himself or by a person not subordinate to him. Art. 311(2) is not attracted when any other punishment is sought to be awarded against a civil servant, as a result of allegations or imputations after holding inquiry to ascertain the truth as in the instant case i.e. reduction in pay scale from Rs. 1275/- to the stage of Rs. 1225/- in the scale of Rs. 950-1500.

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5. In the instant case, the main contention of the counsel for the Applicant is that the fact finding authority is higher than the Enquiry Officer. The Enquiry Officer submitted his report (A-6) to the Disciplinary Authority stating that it has been established that CSE had no documentary evidence to substantiate his allegations and the allegations were only aspersions and assumptions without any proof and he failed to produce any documentary evidence to prove the allegations vide his letter dated 13-2-1987. As a matter of fact, the inquiry initiated by the fact finding authority has not given any finding as the applicant failed to give any evidence and produce documentary evidence, thereby, recommended for regular inquiry as per rules and did not submit any report to the Disciplinary Authority. Thereafter, the Disciplinary Authority appointed an Enquiry Officer to enquire into the charges. The Enquiry Authority has given a reasonable opportunity to the Applicant to adduce evidence or furnish documentary evidence since he had not produced any documents or witnesses during the enquiry, he came to the conclusion that charges levelled against him vide dated 9-4-1987 issued by AEE violating rule 3(1) of the Railway Services Conduct Rules is established. It is not the contention of the Applicant that the Inquiry Officer is lower in rank than the Applicant. Hence, the said contention is not sustainable.

6. On receipt of the Enquiry Authority's report, the Disciplinary Authority after consideration of the same agreed with the findings of the Enquiry Officer and held that article of charge against him is proved and imposed a penalty of reduction to lower stage in the time scale of pay vide dated 19-7-1989 against which

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he preferred an appeal which was duly considered by the Appellate Authority vide order dated 19-10-1989 stating that article of charge is proved and despite all opportunities given to him, the applicant failed to produce before the Enquiry Officer any documentary evidence. Accordingly, he agreed with the findings of the Disciplinary Authority and thus dismissed the appeal.

7. The contentions of the Applicant are controverted by the Respondents in their reply. So far as the suspension is concerned, the Applicant has not preferred any appeal which is provided under the rules. They concide that the Applicant's suspension from 1987 to 1989, though the suspension order is not attached. Since the applicant did not give any oral or documentary evidence in support of his contention, no separate finding was given by the fact finding authority. They contend that the Railway Board's letter dated 10-4-1962 is not applicable to the facts of this case, though he has asked for other documents, however, in the facts and circumstances of the case are not relevant to the issue to be decided; therefore, they rejected the contention of the Applicant. The Applicant has not preferred any appeal and filed O.A. which was dismissed subsequently on the basis of arguments advanced by the Respondents that payment was made in accordance with the rules which was not controverted and no rejoinder has been filed. It is incorrect to state that the Disciplinary Authority as well as Appellate Authority have not applied their mind in not considering the plea of the Applicant. In my view, both orders cannot be faulted with. In para 12 of the note, my learned brother has quoted the section 125 of the Railway Board Establishment Code, which will have the force of law. It is interesting to note, that the

Applicant has produced one incomplete cyclostyled paper which is alleged to have been issued by the Railway Board on 10-4-1962 stating that competent authority to conduct enquiry under Discipline & Appeal Rules. The learned counsel for the Applicant has not furnished full text of the circular. On perusal of the Indian Railway Establishment Code, Vol. I 1985, I find, that no such rule like section 125 exists. As a matter of fact, rule 123 which states that power to frame rules, the Railway have all powers to make all usual rules applicable in respect of Group 'C' and 'D' employees under their control. Hence, the said rules are not applicable and deals only with the status of the Enquiry Officer vis-a-vis the charged officer. It is not clear whether the portion of the 1962 circular supplied by the learned counsel for the Applicant, was issued pursuant to the rule making power of the Railway Board and also nowhere it is established that the Applicant during the course of enquiry, sought for the change of the Enquiry Officer; therefore, it is not open to raise such plea by filing this O.A. and seek for cancellation of the Inquiry proceedings. In so far as paras 15 to 18 of the note, it is incorrect to state that both the Disciplinary Authority and the Appellate Authority disposed of the matter on account of non-application of mind. I see no illegality in the procedure adopted by the Respondents. It has been authoritatively stated by a string of authorities of the Apex Court that Administrative Tribunals cannot sit as an Appeal Court in disciplinary proceedings and it is not the function of the Administrative Tribunal to review the same and reach a different finding than that of the Disciplinary Authority. Govt. of Tamil Nadu v/s A. Rajapandian 1994 (5) SLR 745. The learned

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counsel for the Applicant has cited a Bangalore Bench decision which according to me is not relevant to the facts of this case as that decision was treated as irregular inquiry. The contention of the Applicant that the charge framed against him is of formal nature and found to be incorrect cannot be accepted. The charge sheet issued against the Applicant is on the basis of the complaint which is required to be proved with oral or documentary proof which he did not do so despite sufficient opportunity given to him. In fact, the applicant was avoiding the responsibility of proving the allegations which are nothing but fabricated. Therefore, what punishment to be given is for the competent authority to decide and it is not for the Tribunal to come to a different conclusion in view of the repeated observations of the Apex Court.

8. In the result, the O.A. is liable to be dismissed and accordingly the same is dismissed with no order as to costs. The only direction in the circumstances that can be given to the Respondents is to consider the question of treatment of the period of suspension as the period in the nature of qualifying service though the Applicant has not preferred any appeal against the order dated 25-2-1991.

9. In the facts and circumstances of the case, I hereby direct the Applicant to prefer a detailed appeal and submit to the competent authority within a period of one month and on receipt of the same, the same be disposed of, keeping in view the directions of the Court and prayer made in the O.A.

(B.S. Hegde)
Member (J)

O R D E R

As there is divergence of views, Member (Judicial) Shri B.S. Hegde holding that the O.A. is liable to be dismissed and the Member (A) Shri M.R. Kolhatkar holding that the O.A. is entitled to succeed, we hereby direct the Registry to place the record of the file before the Hon'ble Chairman, CAT with a request to nominate a third Member so that the matter can be decided by a majority.

(M.R. Kolhatkar)
Member (A)

(B.S. Hegde)
Member (J)

ssp.

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO: 517/91.

Dated this Friday, the 27th day of June, 1997

CORAM : HON'BLE SHRI JUSTICE K. M. AGARWAL J., CHAIRMAN.

Shri A. N. Bhanot,
Asstt. Driver,
Central Railway,
Bombay V. T.
Residing at -
C/o. Shri L.M. Nerlekar,
140, Usha Niwas,
Shivaji Park,
Mumbai - 400 0016. ... Applicant

(By Advocate Shri L.M. Nerlekar)

VERSUS

Divisional Railway Manager,
Central Railway,
Bombay V.T. ... Respondent.

(By Advocate Shri V. G. Rege)

: O R D E R :

PER.: Justice Shri K.M. Agarwal, J. Chairman

The learned Administrative and the Judicial Members differed in their opinions and conclusions and, therefore, the matter was argued again before me for resolving the difference, which has not been crystallised by the Division Bench. According to me, the questions which arise for consideration are as follows :-

i) Whether the power of suspension was misused in the case of the applicant ?

ii) Whether the inquiry by an Inquiry Officer lower in rank than the fact finding officer

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has resulted in miscarriage of justice and, therefore, vitiated ?

iii) Whether imposition of minor penalty on the basis of the same materials on which the major penalty of removal from service was earlier imposed was justified ?

2. Briefly stated, the applicant is an Assistant Driver in Central Railway, Bombay. He was first put under suspension on 02.04.1987, charge-sheet and then ultimately subjected to a minor penalty of reduction of pay scale from the stage of Rs. 1,275/- to Rs. 1,225/- in the pay scale of Rs. 950-1500 for a period of two years without any effect of postponing the future increments. This penalty was upheld in appeal by order dated 09.03.1990. By another order dated 25.02.1991, the suspension period was directed to be excluded from consideration for purposes of qualifying service. Being aggrieved, the said O.A. was filed for quashing the said orders with consequential relief for treating the period of suspension as period spent on duty, or for treating it as qualifying service for post retirement benefits.

3. It may be mentioned that this is the third round of litigation. The first round started with O.A. No. 323/88 decided on 10.06.1988 for providing defence assistance of one Shri Badve. The second O.A. No. 804/88 for enhancing the subsistence allowance and for revocation of suspension was dismissed on 02.01.1989.

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4. As mentioned in Explanation IV of Section 11 of the Code of Civil Procedure, 1908, "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit", and, therefore, shall operate as res-judicata. Applying this principle, if we look to the 1st two questions arising out of the order of reference, they would appear to be hit by the said principle of res-judicata and, therefore, they would further appear to need no answer in this case. If the suspension order was bad for the reasons stated in the present O.A., they were bad for the same reasons on the dates of earlier O.A. Nos. 323/88 and 804/88 and could be challenged by the applicant in his earlier applications. It is not his case, nor does it appear from the facts that the grounds on which suspension is now sought to be challenged, subsequently became available to him. Similarly, the inquiry had started and the same Inquiry Officer was conducting the same at the time of the aforesaid two earlier petitions and, therefore, the point could be raised that the Inquiry Officer lower in rank than the fact finding officer was incompetent or was likely to result in prejudice to the applicant. I am, therefore, of the view that both the 1st two questions are hit by the principle of res-judicata and need no answer.

5. As to the second question, it may be additionally mentioned that no fact finding officer was appointed in respect of the alleged misconduct by the

present applicant. It was for the purpose of investigating some allegations against some other employee of the Railways. During the course of that investigation, the applicant was alleged to have been directed to do something for the progress of the investigation, which was defied, dis-obeyed or omitted to be carried out by the applicant. On a complaint being made in this regard, the present Departmental enquiry was started against him. Under the circumstances, the allegations were mis-placed and mis-conceived.

6. In paragraph 15 of his separate order, the learned Administrative Member has mentioned :-

> ".....Initially, the enquiry was conducted ex parte, a penalty of removal from service was imposed by the Disciplinary Authority on 10.05.1988 vide internal page 6 of the Enquiry Officer's report but later on, after the Tribunal's Order relating to assisting railway employee (ARE), the matter was required to be re-heard and thereafter, the lower penalty of reduction in rank came to be imposed."

It does not appear from the separate orders of the Learned Members, whether the entire ex-parte proceedings, including the exparte order of removal from service, were required to be treated or actually treated as non-est, or it was required to be reconsidered on the basis of available materials. In this back-ground, I am of the view that if the enquiry was conducted ex-parte and the effect of the Tribunal's Order was to set aside the entire ex-parte proceedings, the imposition of any

penalty on the basis of the same materials would, per se, be bad, because the effect of quashing ex-parte proceedings has also the effect of quashing the ex-parte evidence taken on record. Accordingly, it would amount to imposition of penalty on the basis of no material on record. If on the other hand, the effect of the Tribunal's order was re-hearing or re-consideration of the penalty imposed on the basis of the available materials, there appears no legal bar in imposition of the minor penalty on the basis of the same materials, which were earlier considered sufficient for imposition of major penalty of removal from service. Accordingly, my answer to the 3rd question arising out of the order of reference is either "No" or "Yes" according to the situation of the case in the light of aforesaid facts and discussion.

7. For the aforesaid reasons, my answer to the aforesaid questions arising out of the order of reference are as follows :-

(i) Does not arise, because of res-judicata.

(ii) Does not arise, because of res-judicata, and, for the further reasons as stated in paragraph 4 of this order.

(iii) If the entire ex-parte proceedings were set aside, the imposition of minor penalty on the basis of same materials (collected ex-parte) on which the major penalty was earlier passed, cannot be justiced; otherwise, if rehearing on available materials was permissible under the order, which necessitated re-hearing, the imposition of minor penalty on the basis of the same material which had earlier formed basis for imposition of major penalty cannot be said to be bad or unjustified.

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8. Let the papers be now placed before the Division Bench for further hearing and orders in accordance with Law.

(K. M. AGARWAL)
CHAIRMAN.

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