CENTRAL ADMINISTRATIVE TRIBUNAL
GUWAHATI BENCH : GUWAHATI-5

O.A. No. 53 of 1994

Date of decision 11-8-95

Shri B.C.Tewari ..... PETITIONER(S)

Applicant in person ..... ADVOCATE FOR THE PETITIONER(S)

VERSUS

Union of India & Ors. ..... RESPONDENT(S)

Shri B.K.Sharma ..... ADVOCATE FOR THE RESPONDENT(S)

THE HON'BLE JUSTICE SHRI M.G.CHAUDHARI, VICE-CHAIRMAN.

THE HON'BLE SHRI G.L.SANGLYINE, MEMBER (A)

1. Whether Reporters of local papers may be allowed to see the Judgement? Yes

2. To be referred to the Reporter or not? YES

3. Whether their Lordships wish to see the fair copy of the Judgement? } NO

4. Whether the Judgement is to be circulated to the other Benches? }

Judgement delivered by Hon'ble VICE-CHAIRMAN.

CENTRAL ADMINISTRATIVE TRIBUNAL

GUWAHATI BENCH

Original Application No. 53 of 1994

Date of decision : This the 11th day of August 1995.

The Hon'ble Justice Shri M.G.Chaudhari, Vice-Chairman.

The Hon'ble Shri G.L.Sanglyine, Member (Administrative).

Shri B.C.Tewari
Son of Late G.D.Tewari
Assistant Personnel Officer
N.F.Railways
Lumding Division
Lumding in the District of Nagaon
Assam ..... Applicant

Applicant appears in person

-versus-

1. Union of India
Represented by the Chairman,
Railway Board,
New Delhi

2. The Chairman
Railway Board,
New Delhi

3. Chief Vigilence Commissioner,
Central Vigilence Commission
New Delhi

4. Shri Amit Cowshish
Commissioner of Departmental Enquiry
Central Vigilence Commission,
New Delhi

5. The General Manager,
N.F.Railway,
Maligaon, Guwahati.

6. The Chief Personnel Officer,
N.F.Railway,
Maligaon,
Guwahati.

7. The Chief Vigilence Officer,
N.F.Railway,
Maligaon,
Guwahati.

Contd..P/2

8. P.G.Keshavan
Sr. Personnel Officer,
N.F.Railway
Maligaon,
Guwahati

9. A.Kispotta
Asstt. Personnel Officer,
New Jalpaiguri,
N.F.Railway
District - Jalpaiguri
West Bengal ..... Respondents

By Advocate Shri B.K.Sharma.

Judgement

CHAUDHARI J.(V.C.).

The applicant is aggrieved by the Office Order No. E/74/Gaz/254/Con. dated 17.1.94 issued by the General Manager, N.F. Railway imposing upon him major penalty of reduction of pay by one stage viz. from Rs. 3125 to 3050 in the time scale of Rs. 2000-3500 for a period of 3 months with effect from 8.1.94 in a disciplinary proceeding. The applicant prays for quashing and setting aside the said order and a direction to the respondents to give him benefit of promotion to senior scale together with all consequential benefits from the date his immediate junior was promoted to that scale. In aid of the aforesaid reliefs he also prays that the orders of promotion of respondent Nos. 8 and 9 dated 19/22.11.93 and 2.3.94 respectively be set aside.

2. The relevant facts are as follows :

3. The applicant was initially appointed as Wireless Operator with N.F. Railway and in due course reached the post

of Assistant Personnel Officer and at the material time was posted at Lumding. In that capacity he was nominated during the period from 29.6.88 to 2.7.88 to act as a Member of Selection Committee for recruitment to Group 'D' posts (in the N.F.Railway).

4. The applicant was served with a Memorandum of Charges for major penalty under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968 dated 27.3.90. The said charges on which a disciplinary enquiry was proposed to be held interalia related to the allegation of violation of standing instructions for observance of age limit of the recruitees while acting as a Member of the Selection Committee and making changes as to age of some candidates in the tabulation form thereby exhibiting lack of integrity, devotion to duty and conduct unbecoming of a Railway servant constituting breach of Rule 3(1) (i),(ii) and (iii) of the Railway Service Conduct Rules, 1965. There were three heads of charge framed which encompassed this allegation.

5. The Commissioner of Departmental Inquiry, New Delhi was appointed as the Inquiry Officer and the enquiry was proceeded with. The defence assistant represented the applicant. The enquiry report was served upon the applicant on 18.11.92. The Inquiry Officer recorded the finding that charge No. 1 was partly established but the other charges were not proved. The findings were submitted to the General Manager for passing necessary orders.

6. The General Manager (N.F.Railway) as the Disciplinary authority imposed the penalty as mentioned at the outset by the

impugned Memorandum Order dated 17.1.94. The applicant did not prefer an appeal to the Railway Board against that order but has challenged the same by filing the instant O.A. on 1.3.1994.

7. The second grievance made by the applicant relates to denial of promotion to senior scale. He avers that during the month of August, 1993 the Departmental Promotion Committee had found him suitable for promotion to the post of senior scale but the result was kept in sealed cover due to pendency of the disciplinary proceeding and that as the said proceeding was not disposed of for a long time his promotion has got delayed and in the meantime persons junior to him have been promoted and that has caused him prejudice. Thus he seeks that after setting aside the penalty he be directed to be promoted with effect from his selectio by the Departmental Promotion Committee in August, 1993.

8. The respondents resist the application. They interalia contend that the charge levelled against the applicant has been proved and penalty has been imposed in accordance with the law after a careful consideration of the evidence. They further contend that the applicant could not be promoted owing to pendency of the Enquiry proceeding and that as soon as the period of penalty was over, he has been duly promoted by order dt. 11.4.94. They contend that the delay in finalisation of the proceedings was due to unnecessary representations that were filed by the applicant time and again.

9. They thus submit that the applicant is not entitled to get any relief and the O.A. is liable to be dismissed.

10. The points that arise for consideration in the background of above noted pleadings may be formulated thus :

1. Is the impugned order ~~is~~ vitiated and illegal and is liable to be set aside ?

2. Alternatively, is the penalty awarded commensurate with the proven misconduct ?

3. Is the application not maintainable as alternative remedies are not exhausted as required under Sectio 20 of the Administrative Tribunals Act 1985 ?.

4. Is the applicant entitled for benefit of promotion to senior scale retrospectively ?

5. What Order ?

Reasons :

11. Point No. 1.

The disciplinary Enquiry (DE) was held under Rule 9 of the Railway Servants (Discipline and Appeal) Rules 1968 and the procedure for imposing major penalty as prescribed thereunder has been followed. We find no procedural error therein so as to vitiate it on that ground.

12. The Memorandum of charges related to violation of Rule 3(1)(i), (ii), and (iii) of Railway Service Conduct Rules 1966. The said Rule (to the extent material) reads as under :

"3. General (1) 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 or Government servant.

2. (i) .....

(ii) No railway servant shall, in the performance of his official duty or in the exercise of power conferred on him, act otherwise than in his best judgement except ....."

The various counts of charge were as follows :

"Statement of Article of Charges framed against Shri Bhuwan Chandra Tewari, APO/1/Lumding, N.F. Railway

Article - 1

That Shri Bhuwan Chandra Tewari, APO/1/Lumding, while functioning as a Member from Personnel Branch in the Recruitment Committee for the reqruitment of 84 Group 'D' staff for Traffic Department/Lumding, from Employment Exchange sponsored candidates during 29/6/88 to 2/7/88 at Lumding, had accepted 2 bogus and false School certificates, showing lesser age, from 2 overage candidates and changed date of birth particulars in the Tabulation Sheet for accepting their candidature for ultimate selection to the post violating the standing instructions for observance of age limitations of the recruitees.

Article - 2I

That said Shri B.C.Tewari, APO/1/LMG, while functioning in the aforesaid Recruitment Committee in aforesaid position had connived with Shri R.Hazarika, ACS/LMG, another member of the said Recruitment Committee, for manipulating/tampering with date of birth particulars of 2 candidates in the individual tabulation sheet of Shri N.Dekaraja, a non-railway official member of the said Recruitment Committee, beyond Shri Dekaraja's knowledge when he had left the venue of selection.

Article - 3

That said Shri B.C.Tewari, APO/1/LMG, while functioning as a member of the aforesaid Recruitment Committee, had in consideration of his own, exerted influence and induced Shri R. Hazarika, ACS/LMG, and Dr (Miss) Doma Yanzom, ADMO/Lumding, both members of the said Recruitme Committee, to accept certain school certificates which indicate lesser age of overaged candidates viz. S/Shri Manik Ch. Dey and Swapan Dasgupta and to alter their date of birth particulars recorded in the respective tabulation sheet on the basis of particulars furnished by Employment Exchange, to favour the aforesaid two overaged candidates for their ultimate selection to the post. Shri Tewari also influenced Shri Hazarika to enhan the marks of two candidates named Sarva-Shri Pradip Chandra Sharma and Layataque Ali from the originally awarded marks of 37 and 30 to 39 and 34 respectively.

Thus by aforesaid acts said Shri B.C.Tewari, APO/1/ LMG, exhibited lack of integrity, devotion to duty and conduct unbecoming of a Railway servant and thereby violated rule 3(1) (i), (ii) & (iii) of Railway Service Conduct Rules, 1966."

13. The Inquiry Officer has recorded his finding in the following manner :

"The first article of charge is established to the exten as brought out in para 18 above. The other two articles of charge are not established".

14. After analysis of evidence, other material on record and the defence of the applicant the Inquiry Officer has held in para 18 as follows :

In view of the foregoing analysis, the first article of charge is established only to the extent that the CO was instrumental in accepting false certificate produced by S/Shri Manik Ch. Dey and Swapan Dasgupta

at the time of the interview and changing the date of birth particulars of these candidates as shown in the Tabunation sheets based on these false certificates without highlighting this fact in the Selection proceedings. However, it is not established that these two candidates were indeed overaged. It is also not established whether this was a case of an injudicious decision taken by the Committee on the advice of the CO or whether this was done by design with the objective of ensuring ultimate selection of the aforesaid candidates in violation of the standing instructions for Second Article of Charge".

15. The General Manager (as the DA) has not considered in the impugned penalty order about the impact of the exoneration of the applicant under Second and Third heads of charge. This assumes significance inasmuchas the allegation contained under the First head of charge has to be understood in the context of allegations contained in the Second & Third heads of charge which have not been proved. That has resulted in arriving at contradicting findings as we shall show little later. Thus a vital aspect has been overlooked by the DA. That leads to the inevitable inference that the order suffers from non-application of mind and has been mechanically passed.

16. It is submitted by Shri B.K.Sharma, the learned counsel for the respondents that the Tribunal would have no jurisdiction to interfere with the penalty order as it is based on the finding recorded by the Inquiry Officer and it was entirely within the province of the General Manager as the DA to accept the finding and determine the measure of penalty. Submits the learned counsel that as there has been no procedural error or any legal flaw in the conduct of the Enquiry or

imposition of penalty there is no violation of Article 311(2) of the Constitution of India and the same cannot be reopened by the Tribunal. In support of his above submissions the learned counsel relied on following rulings :

1. AIR 1989 SC 1185
UNION OF INDIA V/S PARMANANDA

and

2. AIR 1995 SC 561
Govt. of Tamil Nadu & Another V/S
A.Rajapandian

In Parma Nandas' case (supra)it was held that the Administrative Tribunal cannot interfere with the penalty imposed on a delinquent employee by the competent authority on ground that the penalty is not commensurate with the delinquency of the employee.

In Rajapandians' case (supra) it has been held that the Administrative Tribunal cannot sit as a Court of Appeal over a decision based on the findings of the Inquiring authority in disciplinary proceeding. Where there is some relevant material which the disciplinary authority has accepted and which material reasonably support the conclusion reached by the disciplinary authority, it is not the function of the Administrative Tribunal to review the same and reach different finding than that of the disciplinary authority.

17. The learned counsel therefore submits that the Tribunal cannot go behind the finding of the Inquiry Officer or the order passed by the Disciplinary Authority particularly as these are base on the evidence and the record adduced at the enquiry and a

certain view which could be taken on its appreciation has been taken by the authorities. In that strain the learned counsel also submits that the applicant not having availed of the remedy of appeal provided under the rules it is not open to him to challenge the finding of fact and orders based thereon. Learned counsel also submits that as Section 20 of the Administrative Tribunals Act has not been complied with the O.A. itself is not maintainable.

18. We are convinced that the impugned order is vitiated and is illegal and must be quashed on following grounds :

i. The General Manager has not applied his mind to the effect of charge Nos 2 & 3 having been held as not established.

ii. He has failed to notice the absence of a clear finding to have been recorded by the Inquiry Officer as to which clause of Rule 3(1) of the Conduct Rules has been breached nor has himself recorded such a finding.

iii. His decision is not the result of his own view on appreciation of the record but is the produc of opinions of CVC and is thus vitiated.

iv. He has not passed a reasoned order after discussing the evidence and appreciating the same.

19. In our view these features make it permissible to go behind the order and to find out whether the action can be sustained in law and on the touch stone of natural justice by lifting the veil. Therefore ww proceed to examine the aforesaid grounds in detail :

20. <u>Ground No. 1</u>

Article 1 of the charge was based on the allegation of accepting 2 bogus and false school certificates showing lesser

age from 2 overaged cnadidates and changing the date of birth particulars in the tabulation sheet for accepting their candidatures for ultimate selection to the post. The finding in the affirmative on this allegation cannot be sustained as Article 2 of charge has not been established and the Inquiry Officer has recorded the finding that it is not established that the two candidates (i.e. Manik Ch. Dey and Swapan Das Gupta) were indeed overaged.(Para 18). That knocks out the very genesis of charge under Article 1. With these contradictory findings the question of the applicant having altered the dates in the tabulation sheet can be described as an honest act committed under a mistake and misconception about the function of verification of the certificates and not done with a view to achieve any ulterior purpose. Likewise the finding recorded on Article 3 of charge that whether this was a case of injudicious decision taken by the committee on the advise of the applicant or whether this was done by design with the objective of ensuring ultimate selection of the aforesaid candidates in violation of the standing instructions for observance of age limit of the candidates is not established renders the finding on Article 1 of no material consequence nor it results in establishing any deliberate act amounting to a misconduct. The General Manager has not at all applied his mind to this vital aspect as that is not reflected in the order passed by him.

21. Ground No. ii.

This is another vital aspect. Sub Rule (1) of Rule 3 of the Railway services (Conduct) Rules, 1966 casts three different obligations upon a railway servant which are independent of each other though ~~communicatively~~ cumulatively all the three ingredients could be established on evidence. These three ingredients are :

Null

(i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do ~~something~~ nothing which is unbecoming of a railway or Government servant.

The serialisation of these ingredients and placing of semi-colon after each clause makes them distinct. The articles of charge framed against the applicant contained an omnibus allegation that the conduct mentioned in articles (1) (2) and (3) had resulted in violation of all the three aforesaid clauses of the Sub rule. It was therefore essential for the General Manager to sift the findings of the Inquiry Officer and determine whether the findings on article 1 of the charge which alone was only established, had resulted in misconduct under clause 1 or clause ii or ~~ii~~ iii of Subrule (1) of Rule 3. That had direct relevance to the determination of quantum of punishment if at all he were to come to the conclusion that punishment was indeed called for. This is one more instance of non-application of mind.

22. Grounds (iii) & (iv).

It is stated in the written statement that initially the vigilance officials of the N.F. Railway had seized the documents on the basis of some information about the irregularity committed by the Selection Committee in selecting some candidates. Thereafter the Vigilance Department recorded the statement of the applicant as regards the irregularities detected during the investigation. The applicant was advised that he could inspect all the documents that were being relied which were in custody of the Chief Vigilance Officer. In due course the Commissioner of Departmental Enquiry was appointed as the Enquiry Officer.

23. In so far as the steps taken till the Inquiry Officer was appointed and the part played by the Vigilance Cell is concerned no exception can be taken to it. What transpired after the enquiry was commenced is material.

24. Although in para 14 of the written statement it is stated that the Inquiry Officer conducted the inquiry independently it is however seen from para 16 of the written statement that there was internal correspondence with the Central Vigilance Commission and the Railway Board. It is contended that these communications is the internal affair of the Railway Administrative Machinery and that the question of supplying copies of thos communications to the applicant does not arise. It is apparent that the applicant had requested for the same but on above ground it was not considered. It is stated in para 18 of written statement that the Central Vigilance Comission and/or the Railway Board did never indicate or advise for imposition of any particular penalty on the applicant.

25. Two facts are clearly revealed from what has thus been stated namely that there was some consultation with the Vigilance Commission and secondly that was not revealed to the applicant but had been taken into account. The opinion expressed by the Commission was not made part of evidence at the enquiry nor the applicant had any opportunity to offer his explanation in that behalf.

26. That second stage advice was also tendered by the Commission is revealed from letter No. 89/V 4/NF/PNL/12/CA-III dated 5.11.92 from Deputy Director of Vigilance ( A & P) Railway Board to the General Manager (Vig.) N.F.Railway which is produced by the applicant. The material portion therefrom is extracted below :

"Please find enclosed Central Vigilance Commission's second stage advice ..... It is seen that as per this advice ..... major penalty is to be imposed on ..... B.C. Tiwari, APO ..... In compliance with the above advice, necessary action may please be taken under advice to this office..... All the documents referred to in the Enquiry Reports ..... are also sent herewith ....."

The impugned order was thereafter passed on 17.1.94. Although the letter does not show that the penalty was specified yet in the absence of the advice that was tendered being disclosed the possibility that the General Manager had decided to impose the penalty as awarded in tune with that advice does not stand ruled out. In other words it is difficult to say that the quantum of punishment was decided by the General Manager on the basis of his own independent assessment of the evidence recorded at the Enquiry and the findings recorded by the Inquiry Officer uninfluenced by the advice as may have been tendered by the Vigilance Commission.

26-A It is apparent that the Disciplinary Authority has sought the advice of the CVC in view of Circular issued by the Railway Board dated 5.4.88, the letter of the Railway Board, Vigilance Section dated 17.3.89, letter dated 30.6.92 and dated 28.8.89, whereunder procedure for dealing with DAR cases arising out of vigilance/CBI investigations has been laid down. Copies of the Circular and letters aforesaid are at Annexures 12 to 12C.

27. It is settled position in law that where the Disciplina Authority has arrived at its own conclusion on material available to it, its finding and decision cannot be said to be tainted with any illegality merely because it consulted Vigilance Commissioner and obtained his views on the very same material (See Sunil Kumar Banerjee Vs. State of West Bengal : AIR 1980 SC 1170). In the

instant case while obtaining the advise of the Vigilance Commission may not be faulted yet the impugned order of the Disciplinary Authority stands vitiated as he has not arrived at its own conclusion on material available to it as we shall demonstrate a little later, which is not in consonance with the opening words of the ratio laid in the aforesaid decision of the Supreme Court.

28. In State Bank of India & Ors. Vs. D.C.Aggarwal and anoth SLJ VI-1993(2) (SC) 89 Their Lordships of the Supreme Court considered the effect of non-supply of CVC recommendations. It was observed in that connection as follows :

> "The order is vitiated not because of mechanical exercise of power or for non-supply of the inquiry report but for relying and acting on material which was not only irrelevant but could not have been looked into. Purpose of supplying document is to contest its veracity or give explanation. Effect of non-supply of the report of Inquiry Officer before imposition of punishment need not be gone into nor it is necessary to consider validity of rule 5. But non-supply of CVC recommendation which was prepared behind the back of respondent without his participation, and one does not know on what material which was to only sent to the Disciplinary Authority but was examined and relied, was certainly violative of procedural safeguard and contrary to fair and just enquiry .....
>
> "Taking action against an employee on confidential document which is the foundation of order exhibits complete misapprehension about the procedure that is required to be followed by the Disciplinary Authority. May be that the disciplinary authority has recorded its own findings and it may be ~~confidential~~ coincidental that reasoning and basis of returning the findings of guilt are same as in the CVC report but it being a material obtained behind back of the respondent without his knowledge or

supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order."....."

"The submission of the learned Addl. Solicitor General that CVC recommendations are confidential, copy of which, could not be supplied cannot be accepted. Recommendations of Vigilance prior to initiation of proceedings are different than CVC recommendation which was the basis of the order passed by the Disciplinary Authority."

(SLJ -1993) Vol. 48 June Part II P. 88, (S.C.)

29. Similarly, in Nagaraj ShivraoKarjagi Vs. Syndicate Bank Head Office and Another (1991) 3 SLJ 219 while dealing with the subject of consultation with and acceptance of advice of Central Vigilance Commission in relation to Departmental enquiry it was held after examining the Syndicate Bank Officers' Employees (Discipline & Appeal) Regulations 1976, the Direction of the Ministry of Finance, Department of Economic Affairs (Banking Division), circulars of the Bank dated 27.6.1984, and 8.9.1986, and after noticing the contentions of the petitioner and the Bank respectively it was observed as follows :

"17. We are indeed surprised to see the impugned directive issued by the Ministry of Finance, Department of Economic Affairs (Banking Division). Firstly, under the Regulations, the Bank's consultation with Central Vigilance Commission in every case is not mandatory. Regulation 20 provides that the Bank shall consult the Central Vigilance Commission wherever necessary, in respect of all disciplinary cases having a vigilance angle. Even if the Bank has made a self-imposed rule to consult the Central Vigilance Commission in every disciplinary matter, it does not make the Commission's advice binding on the punishing authority. In this

context, reference may be made to Article 320(3) of the Constitution. Article 320 (3) like Regulation 20 with which we are concerned provides that the Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted on all disciplinary matters affecting a civil servant including memorials or petitions relating to such matters. This Court in A.N. D'Silva v. Union of India has expressed the view that the Commission's function is purely advisory. It is not an appellate authority over the inquiry officer or the disciplinary authority. The advice tendered by the Commission is not binding on the government. Similarly, in the present case, the advice tendered by the Central Vigilance Commission is not binding on the Bank or the punishing authority. It is not obligatory upon the punishing authority to accept the advice of the Central Vigilance Commission".

And,

" Secondly, the Ministry of Finance, Government of India has no jurisdication to issue the impugned directive to banking institutions ....."

And further,

"The punishment to be imposed whether minor or major depends upon the nature of every case and the gravity of the misconduct proved. The authorities have to exercise their judicial discretion having regard to the facts and circumstances of each case. They cannot act under the dictation of the Central Vigilance Commission or of the Central Government. No third party like the Central Vigilance Commission or the Central Government could dictate the disciplinary authority or the appellate authority as to how they should exercise their power and what punishment they should impose on the delinquent officer.(See : De Smith's Judicial Review of Administrative Action, 4th edn., p.309). The impugned directive of the Ministry of Finance, is therefore, wholly without jurisdiction,

and plainly contrary to the statutory Regulations governing disciplinary matters".

30. As stated earlier in the instant case admittedly advice of Central Vigilance Commission had been obtained. Likewise it is the stand of the respondents that the communication from the Vigilance Commission is the internal affair of the Railway Administrative Machinery and therefore the question of supplying (copies of the communications to the applicant as requested by him does not arise. We have already referred to the guidelines issued by the Railway Board for seeking advice of the Vigilance Commission (Annexures 12 to 12 C). The position therefore squarely falls within the ratio in the aforesaid decisions of the Supreme Court.

31. The Enquiry was held under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968. Rule 9 provides the procedure for imposing major penalties. It is pertinent to note that Sub rule (1) lays down that no order imposing penalties specified in clauses (v) to (ix) of Rule 6 shall be made except after an inquiry held, as far as may be, in the manner provided in this Rule and Rule 10.

Sub rule 10 of Rule 9 referes to the material that can be relied upon at the enquiry namely :

a) The articles of charge and the statement of the imputations of misconduct or misbehaviour,

b) The Written Statement of defence submitted by the Railway servant (if any).

c) Copy of the statement of witnesses (if any) referred to in Sub rule 6.

d) evidence proving the delivery of the documents referred to in sub-rule (6) to the Railway servant (which means these documents can be relied upon).

e) Order appointing the presenting officer (if any) and

f) list of witnesses (if any) furnished to by the Railway servant (which means the evidence of the witnesses when recorded).

Sub-rule 6 refers to the statement of all relevant facts and list of documents by which and a list of witnesses by whom, the articles of charge are proposed to be sustained.

32. The sub-rules following thereafter provide for discovery and production of relevant documents at the instance of the Railway servant, recording of oral and documentary evidence, production of evidence and stating the defence orally or in writing after the case for the disciplinary authority is closed, examination of the Railway servant generally by the Inquiry Officer where he has not got examined himself, submission of written briefs by both the sides and oral arguments. After the conclusion of the enquiry a report has to be prepared by the Inquiring authority in which he has to deal with assessment of evidence in respect of each article of charge and record findings on each of them with reasons ~~thereafter~~ therefor. The report is then forwarded to the disciplinary authority together with the records of the enquiry. The procedure so prescribed is complete within itself and leaves no room for any extraneous material or advise to be taken into account. By note under Sub rule 18 new evidence is not permitted save and except

for the circumstances mentioned therein. The procedure of the Inquiry does not refer to any advise of the CVC to be treated as part of the record or evidence at the enquiry. It therefore follows that where it is shown that the opinion of the Inquiry Officer or Disciplinary Authority is influenced by such advice and is not found based entirely on merits it would be vitiated.

33. After having discussed the position in law about the advice of CVC we now turn to the impugned order.

34. Rule 10 (of the D & A Rules) provides for action on the Inquiry Report. It interalia provides that having regard to its decision on all or any of the findings of the inquiring authority if the Disciplinary Authority is of the opinion that the penalty warranted is such as it is within its competence, that authority may act on evidence on record and may impose the appropriat penalty. Sub-rules 4 and 5 provide as follows :

> " (4) If the disciplinary authority having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clause (i) to (iv) of Rule 6 should be imposed on the Railway servant, it shall, notwithstanding anything contained in Rule 11, make an order imposing such penalty.
>
> Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the Railway servant.
>
> (5) If the disciplinary authority, having regard to its findings on all or any of the articles of charge and on the basis of evidence adduced during the inquiry, is of the opinion that any of the penalties specified in clause (v) to (ix) of Rule 6 should be imposed on the Railway servant, it shall make an order imposing such penalty and

it shall not be necessary to give the Railway servant any opportunity of making representation on the penalty proposed to be imposed;

Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making an order imposing any such penalty on the Railway servant".

The provisos to sub rules 4 and 5 do contemplate advice of the Commission which is Union Public Service Commission by virtue of definition contained in Rule 2 (b) (of the Railway servants (D & A) Rules 1968). There is thus no provision to obtain advice of the Vigilance Commissioner. The D & A Rules having been made by the President of India in exercise of the powers conferred by the proviso to Article 309 of the Constitution the executive guidelines issued by the Railway Board providing for consultation with Vigilance Commissioner cannot override the procedure prescribed under Rules 10 & 11 from the stage the disciplinary Enquiry is initiated and till the order is passed by the Disciplinary Authority under Rule 11 and even where such advice is obtained the Disciplinary Authority cannot mecahnically act on that basis but has to independently arrive at his conclusion strictly upon consideration of the evidence and record forming part of the Inquiry.

The impugned order has been passed in following manner :

"MEMORANDUM

After careful consideration of the inquiry report into the charges framed vide Memorandum of even Number dated 27.3.90, the representation dated 17.3.93 of the Charged Officer and all other relevant factors,

the undersigned has decided to impose on Shri B.C. Tewari, APO/LMG penalty of reduction of pay by one stage viz. from Rs. 3125/- to Rs. 3050/- in the time scale of Rs. 2000-3500/- for a period of 3 months with cumulative effect to meet the end of justice. The penalty will take effect from 8.1.94.

Shri Tewari should acknowledge receipt of this Memorandum in the enclosed format".

35. It does not discuss the evidence nor the findings of the Inquiry Officer. It does not set out any reasons even briefly to indicate as to which of the findings are accepted and why. We have already shown above as to how the findings are inconsistent and it is not clear as to what misconduct has exactly been found established. Those aspects needed critical examination by the Disciplinary Authority. We have also shown above that there has been non-application of mind on the part of the Disciplinary Authority. Therefore the words "After careful consideration of the inquiry report ....." and "all other relevant factors" sound mechanically used. Likewise the assertion in the written statement that the General Manager has passed a reasoned order on careful consideration of the imputation of charges carries no conviction. The order therefore cannot be sustained even if it does not refer to any advice of the Vigilance Commission.

36. The distinct possibility of the advice of the Vigilance Commission being the basis of the order of the General Manager arises from the following circumstances :

(1) findings are neither discussed nor evidence is assessed.

(2) Nature and degree of misconduct held proved by the Enquiry Officer has not been critically examined.

(3) It is revealed from the written statement that advice of the Vigilance Commissioner had been obtained.

(4) By reason of the general instructions issued by the Railway Board to the General Manager the advise given by the CVC will be ordinarily accepted and that advice having been obtained behind the back of the applicant and not being shown to have been disagreed with it appears to have been followed No reasons are stated in the order. It is therefore difficult to say that General Manager has recorded his own findings independently of the advise as may have been tendered.

We, therefore hold that the impugned order cannot be sustained in law and uphold ground Nos. III and IV.

Point No.3.

37. Having thus found that the impugned order cannot be sustained the next question to be examined is as to whether in the absence of an appeal having been filed against that order to the Railway Board, it is open to the Tribunal to interfere with the same having regard to the provisions of Section 20 of the Administrative Tribunals Act 1985.

38. There is no dispute that under Rule 17 (D & A) Rules read with Schedule III an appeal against the impugned order lay to the Railway Board. Admittedly no such appeal has been filed by the applicant. He has stated in that connection that as he was on the verge of retirement on superannuation he has filed the O.A. before the Tribunal(straight away) for a speedy and quick relief. He however submitted orally that as the Disciplinary Authoriry had acted on the instructions and advise of the Board he did not expect any fair and impartial consideration of ~~this~~ his case and therefore he did not

appeal to the Board and did not think it proper to state that reason in the O.A. and that he was giving out that reason in reply to the persistent query from the Bench as to why he had not preferred the appeal. In order to buttress the above submission he has drawn our attention to the statements contained in the written statement.

39. In para 16 of written statement the respondents have stated that (Central Vigilance Commission) and Railway Board's communication in this respect is the internal affair of the Railway Administrative machinery. In para 18 it is stated that no restriction was imposed by the Railway Board in taking General Managers' independent decision in imposition of penalty. These statements leave no manner of doubt that some advice was tendered by the Railway Board. What was that advice has not been shown. Copy thereof was not supplied to the applicant though he had asked for the same. It is contended that that is internal communication. This position does not rule out the possibility of the General Manager having been influenced by the opinion particularly as he has not discussed in his order any reasons to indicate that his decision was entirely based on appreciation of evidence and record and analysis of the findings returned by the Inquiry Officer. In this situation whether applicant's failure to file the appeal is fatal to the maintainability of the O.A. is the question that stares in the face.

40. In order to resolve the above question it is necessary to refer to Section 20 of the Administrative Tribunals' Act 1985. That section provides that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances. The word <u>ordinarily</u> is significant. Reasonably construed the use of that word means that in appropriate cases the Tribunal is not precluded from

entertaining an application notwithstanding that the remedies available under the service rules may not have been availed of. The Tribunal derives its jurisdiction under Section 14 read with Section 2 (q) of the Act in relation to all service matters relating to the conditions of service in connection with the affairs of the Union (etc.). We are therefore inclined to entertain the O.A. on merits since the powers exercisable are analogous to the exercise of powers by the High Court under Article 226 of the Constitution.

41. We are fortified in the above view by following decisions :

In Ram and Shyam Company V/S State of Haryana & Ors (1965) 3 SCC 267 the Supreme Court was pleased to hold as follows :

> "Ordinarily it is true that the court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court. In fact in in the very decision relied upon by the High Court in State of U.P. v. Mohammad Nooh it is observed "that "there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy". It should be made specificall clear that where the order complained against is allege to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it, would lie to the High Court under Article 226 and such a petition cannot be rejected on the ground that an appeal lies to the higher officer or the State Government. An appeal in all cases cannot be said to provide in all situations an alternative effective

remedy keeping aside the nice distinction between jurisdiction and merits."

In Shri Shankar Baruah and Ors. V/S U.O.I. & Others this Bench (Guwahati) of the Central Administrative Tribunal negatived the respondents objection under Section 20 holding that the plea was belatedly taken and was not taken when the application was admitted and that cannot be a ground to dismiss the application. We rely on this decision only for the limited purpose that even though Section 20 may not have been complied with the O.A. can be decided on merits and do not express any view on the point as to when the objection should be raised.

42. We therefore reject the submission of Mr. B.K. Sharma that the O.A. should be dismissed as the applicant had not exhausted the remedy of appeal. We hasten to add that we are inclined to do so in the peculiar facts and circumstances of this case and for interest of justice to be secured in this case and do not lay down as an absolute proposition that in every case where Section 20 is not complied with yet the application should be entertained as a rule. Doing so will be rendering Section 20 nugatory. In other words we have looked upon this case as an exception to the general rule.

Point No.4:

43. The next point to be considered is the grievance of the applicant about denial of promotion to him to senior scale though selected by the D.P.C. held in August 1993. The respondents have stated that as the disciplinary proceeding was pending (out of which the O.A. has arisen) the question of promotion did not arise. That question would depend upon our order in respect of the impugned order and we shall indicate our answer accordingly.

44. Lastly, it has to be considered as to what relief ought to be granted since we hold that the impugned order is not sustainable. One course to be adopted is to direct the applicant to file an appeal to the Railway Board with a direction to the Board to entertain and decide it. Second course would be to direct the General Manager to reconsider the matter and pass a fresh order. Third course open is to grant final relief to the applicant.

45. We are not inclined to adopt the first two options as that would leave room for further litigation and involve delay. Moreover the applicant has already retired from service and therefore it is desirable that he gets the relief earlier. In the facts and circumstances of the case we are inclined to adopt the 3rd course. For that purpose we hold that the applicant had acted in an irresponsible manner but that was not coupled with any ulterior purpose. No harm or prejudice was thereby occasioned to anyone. At the highest that would have led the applicant to be considered unfit to be nominated on a selection committee and the fact could be recorded in his ACR. What the applicant did although cannot be ignored or justified yet we are not satisfied that it amounts to any punishable misconduct under the conduct rules particularly when as discussed earlier neither the Inquiry Officer nor the Disciplinary Authority has specified as to which category of conduct defined as misconduct under Rule 3 of the Conduct Rules has been committed. Even the tenor of the findings of the Inquiry Officer indicates that he had merely found the conduct of applicant unwarranted. May be it was technical breach of the rules and ethically wrong. The circumstance that there could have been error of judgement on the part of the applicant and the lapse committed was an honest mistake does not stand absolutely ruled out and this aspect has not been examined by the General Manager.

Point No.2:

46. In the ~~In~~ view as we are inclined to take as above the question of ~~us~~ our going behind the quantum of punishment does not survive. The principle that it is not open to the Tribunal to interfere with the quantum of penalty awarded could be applicable if we had upheld the impugned order but as we are inclined to quash it the question does not arise.

46 A. In sum, we hold that the impugned order cannot be sustained in law. The order is also vitiated for violation of principles of natural justice. We have not reappreciated the evidence nor we purport to ignore the finding recorded by the Inquiry Officer. Our conclusions are reached in the light of the finding as it stands. We are interfering with the order on purely legal grounds.

47. Thus on point No. 1 we hold that the impugned order is vitiated and cannot be sustained in law and answer the point in the affirmative. Consequently we hold in answer to point No. 2 that it does not survive. We hold that the application is maintainable though no appeal was preferred departmentally and answer point No. 3 in the negative. On point No. 4 we hold that although applicant is entitled to be considered for promotion it will be subject to directions in the operative order.

48. In the result following order is passed :

Order

1. The impugned order dated 17.1.94 passed by the General Manager imposing the penalty as stated therein upon the applicant is hereby quashed and set aside.

Hrll

2. It is declared that the applicant is not liable to be awarded penalty on the first article of charge.

3. The respondents are directed to restore the pay of the applicant without effecting any reduction as ordered in the impugned order.

4. The respondents are directed to pay to the applicant the arrears of difference of pay from the day the penalty was enforced and till the date of superannuation on the basis that no reduction by way of penalty was permissible.

5. The respondents are directed to examine the question of giving benefit of proforma promotion to the senior scale to the applicant consistently with the decision of D.P.C. held in August 1993 kept in sealed cover. It is made clear that it will be open to the respondents to take into account the conclusions drawn by the Inquiry Officer in respect of first article of charge in para 18 while considering the question of promotion although it is held that despite that finding there does not arise misconduct attracting a penalty.

6. In the event of the respondents being inclined to give benefit of promotion to senior scale from due date retrospectively to the applicant, the respondents will fix the pay accordingly on proforma basis as on the date of superannuation of the applicant. The applicant however will not be entitled to be paid

arrears in the senior scale and the proforma fixation will enure only to the pensionary benefits unless he has actually drawn the senior scale.

7. In view of the above directions no order on prayer for quashing the promotion order of PG Keshavan and A. Kispotta.

The O.A. is partly allowed in terms of the above order and is disposed of. No order as to costs.

Interim directions vacated. Record if any produced by the respondents be returned to them against acknowledgement.

(G.L.SANGLYINE)
Member (A)

11.8.95

(M.G.CHAUDHARI)
Vice-Chairman

trd