Central Administrative Tribunal
Principal Bench
New Delhi

O.A.No.666/2013
M.A.No.1090/2014

Order Reserved on: 02.08.2016
Order pronounced on 05.09.2016

Hon'ble Shri V. Ajay Kumar, Member (J)
Hon'ble Dr. Birendra Kumar Sinha, Member (A)

Sri Madan Lal Arora
S/o Late (Sh.) Sita Ram
Ex. Sr. Section Engineer (Diesel)
Northern Railway Headquarters
Baroda House, New Delhi
R/o House No.548, Sector-37
Faridabad – 121003
(Haryana) ... Applicant

(By Advocate: Ms. Meenu Mainee)

Versus

1. Union of India through
   Secretary
   Railway Board, Ministry of Railways
   Rail Bhawan
   New Delhi.

2. General Manager
   Northern Railway Headquarters
   Baroda House
   New Delhi.

3. Chief – Motive Power (Diesel)
   Northern Railway Headquarters

Baroda House
New Delhi. ... Respondents

(By Advocate: Shri Shailendra Tiwary)

O R D E R

By V. Ajay Kumar, Member (J):

The applicant, a retired Senior Section Engineer (Diesel) of the respondent-Northern Railway, originally filed the OA questioning the Order dated 30.04.2012 (Annexure A1) whereunder a punishment of compulsory retirement was imposed on him in pursuance of a departmental inquiry conducted against him in respect of certain alleged omissions and commissions of the applicant. However, after the OA is filed, as the appellate authority passed orders on 10.04.2013 imposing a penalty of 10% cut in pension otherwise admissible to him for a period of three years, the OA was accordingly amended vide Order dated 03.12.2013 in MA No.3163/2013.

2. The factual background of the case is that the applicant while working as SSE/Spares, has been chargesheeted on 08.11.2005, containing 10 charges, in causing misappropriation of Railway material by entering into conspiracy with one Shri Brij Mohan. After the departmental inquiry and basing on the Inquiry Officer's report, wherein charges 6 to 9 were held proved, a penalty of compulsory retirement was imposed on the applicant by Order dated 29.10.2007 of the disciplinary authority, though the applicant was due to retire on

superannuation just after two days, i.e., on 31.10.2007. The OA No.1432/2008 filed by the applicant was disposed of on 14.07.2008 directing the appellate authority to dispose of the appeal filed by the applicant against the disciplinary authority's Order dated 29.10.2007. The appeal of the applicant was rejected on 08.12.2008.

3. Questioning the said disciplinary authority's Order dated 29.10.2007 and the appellate authority's Order dated 08.12.2008, the applicant filed OA No.223/2009. This Tribunal allowed the said OA by Order dated 25.08.2009, as under:

> "6. On careful consideration of the rival contentions of the parties, in our considered view that in a disciplinary proceeding especially when out of number of charges, the inquiry officer exonerates the delinquent of 4 of them and then partially proves the charges, it is incumbent upon the disciplinary authority acting as a quasi judicial authority to pass a reasoned order as ruled by the Apex Court in Roop Singh Negi Vs. PNB, 2009 (1) SCC (L&S) 398. As per the instructions issued by the Railway Board in 1978 and 1982, in a disciplinary proceeding it is mandated upon the disciplinary authority to record reasons though reasons may be brief but should be relevant to the record. From the perusal of the order passed by the disciplinary authority, mere on a finding of the inquiry officer when the charge against the applicant has been toned down to this extend that he has been held guilty of only administrative lapse allegedly but not for misappropriation, a non-speaking order is sine qua non of non-application of mind by the disciplinary authority which cannot be countenanced in law. If a thing is to be done in a particular manner by a quasi judicial authority, no other manner can be adopted. One of the procedural safeguards in disciplinary proceeding against the Govt. servant is Rule 9.21 of Railway Rules which is akin to Rule 14 (18) of the CCS (CCA)M Rules, 1965. It is incumbent upon the inquiring authority to put circumstantial evidence brought against the delinquent in the inquiry to be confronted with him and thereafter an opportunity to rebut the same be given. From the perusal of the cross-examination, in the instant case, under Rule 9.21 except asking the applicant to explain the charge 6 to 9 which formed basis of the punishment against him, no evidence or circumstances appeared against him have been put to him. This has deprived the applicant a reasonable opportunity to defend and also prejudiced him in light of decisions of the Apex Court in Moni Shankers case (supra) and coordinate Bench in OP Singh.
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> 7. As regards the decision of appellate authority, though appellate authority when decides an appeal, the order of the disciplinary authority merges into it but there will be no merger if an order passed by the appellate authority is itself

> illegal or has been passed on extraneous grounds or exceeding jurisdiction. Whereas the applicant has not been held guilty of misappropriation or initiating the demands, yet a specific observation made by the appellate authority when disagreement arrived at by the disciplinary authority earlier that the charge of initiating demand and misappropriation has been indirectly proved against the applicant on circumstantial evidence and his responsibility failure on his part which has attributed to it is a finding recorded where the charge pertaining to it has not been established and proved by the inquiry officer. It appears that imputing his own knowledge and in the backdrop that such an indirect evidence has not been put to the applicant under 9.21 by the inquiring authority upholding the punishment on this count, is deciding the appeal on extraneous matter beyond the scope of the inquiry which cannot be countenanced.
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> 8. Resultantly, we do not find the orders passed by the respondents legal and valid. OA is allowed to the extent that the impugned orders are set aside. As a result thereof, the applicant shall be reinstated forthwith in service. However, we give liberty to the respondents, if so advised, to resume the proceedings from the stage of passing the order by the disciplinary authority. In such an event, observations made by us shall be kept in mind. Interregnum to be operated as per law. No costs."

4. The disciplinary authority, in pursuance of the liberty granted by this Tribunal in OA No.223/2009, passed fresh disciplinary order on 03.08.2010 which was forwarded to the applicant on 30.04.2012 again imposing the penalty of compulsory retirement on the applicant. When the appeal preferred by the applicant against the said order, was not disposed of for a long time, the present OA has been filed. Since after the filing of the OA, an Order dated 10.04.2013 was passed, in the name of the President, imposing the penalty of 10% cut in pension, the OA was got amended by questioning the said order also.

5. The OA No.1539/2012 filed by the applicant for issuance of directions to the respondents to release the amount of Gratuity, etc. was disposed of vide Order dated 09.05.2012 by directing the

respondents to decide the representation of the applicant dated 02.05.2012.

6. This Tribunal by its Order dated 16.04.2014 in MA NO.1090/2014 stayed the orders of the respondents for reduction of the pension of the applicant and recovery of the excess amount in pursuance of the impugned order dated 10.04.2013.

7. Heard Mrs. Meenu Mainee, the learned counsel for the applicant and Shri Shailender Tiwary, the learned counsel for the respondents-Railways and perused the pleadings on record.

8. The learned counsel for the applicant, inter-alia, contended as under:

a) The applicant retired from service w.e.f. 31.10.2007, on attaining the age of superannuation. Hence, imposing the punishment of compulsory retirement, by the disciplinary authority on 30.04.2012, is unsustainable and accordingly liable to be set aside.

b) Once the applicant retired from service on 31.10.2007, the 3rd Respondent cannot pass any order against the applicant, and accordingly the Order dated 30.04.2012, passed by the incompetent authority, is liable to be set aside.

c) The Order passed in the name of the President on 10.04.2013 is also liable to be set aside on the ground of non-furnishing of the UPSC advice.

d) The order dated 10.04.2013 was passed after obtaining and following the advice of the UPSC and hence, the said advice is required to be supplied to the applicant and after calling for representation against the same from the applicant and after considering the said representation only, the orders can be passed. Since in the present case, the respondents furnished the UPSC advice along with the impugned order dated 10.04.2013, i.e., without giving any opportunity to the applicant to make any representation and without considering the same, the Order dated 10.04.2013 is liable to be set aside.

9. The learned counsel for the respondents, per contra, would contend that as per Order in OA No.223/2009, the applicant was under deemed suspension from 29.10.2007 to 31.10.2007 as per Para 4 of Rule 5 of the Railway Servants (D&AR) Rules, 1968, and hence, there is no illegality in the disciplinary authority's Order dated 30.04.2012. However, the respondents in their reply to the amended OA at Para 10 categorically admitted that the order dated 30.04.2012 wherein the applicant was imposed with the punishment of compulsory retirement, though he was admittedly retired from service on 31.10.2007 was due to clerical mistake and that is why the President passed a fresh penalty order against the applicant on 10.04.2013 imposing the 10% cut in the pension of the applicant for a period of three years.

10. The learned counsel for the respondents would further submits that the copy of the UPSC advice dated 19.12.2012 was furnished to the applicant along with the impugned order dated 10.04.2013. Though the same was not furnished in advance, and that no representation was called for against the same, before passing the order dated 10.04.2013, since no prejudice is caused to the applicant, the non-furnishing of the same does not vitiate the order dated 10.04.2013.

11. In view of the submissions of the learned counsel for the respondents and of the averments made in the reply of the respondents, the Order dated 30.04.2012 imposing the penalty of compulsory retirement on the applicant, after the date of his retirement, was a mistake and the said order superseded by the Order dated 10.04.2013, whereunder a penalty of 10% cut for three years was imposed on the applicant, the only Order of which the validity is to be examined is order dated 10.04.2013. Hence, the grounds/averments raised in respect of the order dated 30.04.2012 need not be considered.

12. The issue of furnishing of UPSC advice before passing the penalty order by the Disciplinary Authority is not a res integra. In **S.N.Narula** v. **Union of India & Others** (decided on 30.1.2004) reported in 2011 (3) SCC 591, after considering the Report of the Enquiry Officer, the disciplinary authority proposed a punishment suggesting a suitable cut in the pension on the Appellant therein. But

after receipt of the opinion from UPSC to the effect that the Appellant's pension shall be reduced to the minimum and he shall not be granted any gratuity, the disciplinary authority therein, accepted the proposal of UPSC and imposed the said punishment. The advisory opinion of UPSC was communicated to the Appellant only along with the punishment order. As such, no opportunity of making a representation against UPSC advice was given to the Appellant therein. On questioning, this Tribunal allowed the OA, by holding that the order impugned therein is a non-speaking order and after quashing the penalty order, remanded the case back to the disciplinary authority to pass a detailed order in accordance with law. When challenged by Union of India, the High Court of Delhi interfered with the order of the Tribunal by partly allowing the Writ Petition by directing the Tribunal to consider the matter again. The Hon'ble Supreme Court of India in a Civil Appeal filed against the order of the High Court, after observing that the Report of UPSC was not communicated to the Appellant therein before the final order was passed and thereby the Appellant could not make an effective representation before the disciplinary authority as regards the punishment imposed, set aside the judgment of the High Court and upheld the decision of the Tribunal and disposed of the Appeal permitting the Appellant to submit a representation and directed the disciplinary authority to dispose of the same.

13. The Hon'ble Supreme Court of India in **Union of India & Another** v. **T.V.Patel,** (decided on 19.4.2007) = (2007) 4 SCC 785, dealing with a similar question, categorically held-

> "25. In view of the law settled by the Constitution Bench of this Court in Srivastava, we hold that the provisions of Article 320(3)(c) of the Constitution of India are not mandatory and they do not confer any rights on the public servant so that the absence of consultation or any irregularity in consultation process or furnishing a copy of the advice tendered by UPSC, if any, does not afford the delinquent government servant a cause of action in a court of law."

14. However, the Hon'ble Apex Court in **Union of India & Others** v. **S. K. Kapoor,** (2011) 4 SCC 589, considered both the aforesaid judgements i.e. **Narula's** case and **Patel's** case finally held that –

> "Although Article 320(3)(c) is not mandatory, if authorities do consult UPSC and rely on its report for taking disciplinary action, then copy of the Report must be supplied in advance to the employee concerned, otherwise it would amount to violation of principles of natural justice."

It was further held that –

> "On the other hand, if disciplinary authority does not rely on UPSC Report, then it need not be supplied to the employee concerned."

It was also observed by the Hon'ble Apex Court that Narula's case was prior to the decision in T.V.Patel's case and that since the decision in Narula's case was not noticed in T.V.Patel's case, the latter decision is a judgement per incuriam.

15. This issue is again clarified by the Hon'ble Apex Court itself in **Union of India & Others** v. **R.P.Singh,** (2014 7 SCC 340. The question raised before the Apex court in the said judgment was that "whether the High Court is justified in issuing the directions solely on

the ground that non-supply of the advice obtained by the disciplinary authority from the UPSC and acting on the same amounts to violation of principles of natural justice?". Since, the Union of India issued certain Office Memorandums, in terms of the decision in **S.K.Kapoor** (supra) and that the said Memorandums were also referred and explained in **R.P.Singh** (supra), we deem it necessary to quote the decision in **R.P.Singh** (supra) extensively as under:

> "22. Testing on the aforesaid principles it can safely be concluded that the judgment in T.V. Patel's case is per incuriam.
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> 23. At this juncture, we would like to give our reasons for our respectful concurrence with **S.K. Kapoor** (supra). There is no cavil over the proposition that the language engrafted in Article 320(3)(c) does not make the said Article mandatory. As we find, in the **T.V.Patel's** case, the Court has based its finding on the language employed in Rule 32 of the Rules. It is not in dispute that the said Rule from the very inception is a part of the 1965 Rules. With the efflux of time, there has been a change of perception as regards the applicability of the principles of natural justice. An Inquiry Report in a disciplinary proceeding is required to be furnished to the delinquent employee so that he can make an adequate representation explaining his own stand/stance. That is what precisely has been laid down in the **B.Karnukara's** case. We may reproduce the relevant passage with profit: -
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> > "Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with **regard** to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges leveled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

24. We will be failing in our duty if we do not refer to another passage which deals with the effect of non-supply of the enquiry report on the punishment. It reads as follows:-

> "[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the [pic]concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

25. After so stating, the larger Bench proceeded to state that the court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished. The courts/tribunals would apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment. It is only if the court/tribunal finds that the furnishing of report could have made a difference to the result in the case then it should set

aside the order of punishment. Where after following the said procedure the court/tribunal sets aside the order of punishment, the proper relief that should be granted to direct reinstatement of the employee with liberty to the authority/ management to proceed with the enquiry, by placing the employee under suspension and continuing the enquiry from that stage of furnishing with the report. The question whether the employee would be entitled to the back wages and other benefits from the date of dismissal to the date of reinstatement, if ultimately ordered, should invariably left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome.

26. We have referred to the aforesaid decision in extenso as we find that in the said case it has been opined by the Constitution Bench that non-supply of the enquiry report is a breach of the principle of natural justice. Advice from the UPSC, needless to say, when utilized as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence. We have been apprised by Mr.Raghavan, learned counsel for the respondent, that after the decision in S.K.Kapoor's case, the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel & Training vide Office Memorandum dated 06.01.2014 has issued the following directions:

> "4. Accordingly, it has been decided that in all disciplinary cases where the Commission is to be consulted, the following procedure may be adopted :-
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> (i) On receipt of the Inquiry Report, the DA may examine the same and forward it to the Commission with his observations;
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> (ii) On receipt of the Commission's report, the DA will examine the same and forward the same to the Charged Officer along with the Inquiry Report and his tentative reasons for disagreement with the Inquiry Report and/or the advice of the UPSC;

(iii) The Charged Officer shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the Inquiry report/advice of UPSC is in his favour or not.

(iv) The Disciplinary Authority shall consider the representation of the Charged Officer and take further action as prescribed in sub-rules 2(A) to (4) of Rule 15 of CCS (CCA) Rules, 1965.

27. After the said Office Memorandum, a further Office Memorandum has been issued on 05.03.2014, which pertains to supply of copy of UPSC advice to the Charged Officer. We think it appropriate to reproduce the same:

"The undersigned is directed to refer to this Department's O.M. of even number dated 06.01.2014 and to say that it has been decided, in partial modification of the above O.M. that a copy of the inquiry report may be given to the Government servant as provided in Rule 15(2) of Central Secretariat Services (Classification, Control and Appeal) Rules, 1965. The inquiry report together with the representation, if any, of the Government servant may be forwarded to the Commission for advice. On receipt of the Commission's advice, a copy of the advice may be provided to the Government servant who may be allowed to submit his representation, if any, on the Commission's advice within fifteen days. The Disciplinary Authority will consider the inquiry report, advice of the Commission and the representation(s) of the Government servant before arriving at a final decision."

28. In our considered opinion, both the Office Memoranda are not only in consonance with the S.K.Kapoor's case but also in accordance with the principles of natural justice which has been stated in B.Karunakar's case.

29. In view of the aforesaid, we respectfully agree with the decision rendered in S.K.Kapoor's case and resultantly decline to interfere with the judgment and order of the High Court. As a result, the appeal, being devoid of merit, is dismissed without any order as to costs."

16. In view of the categorical declaration of law by the Hon'ble Apex Court in its aforesaid Judgement in **Shri R.P.Singh's** case, wherein not only the decisions in **Narula's case** (supra), **T.V.Patel's case** (supra), and **S.K.Kapoor's case** (supra) and also the latest DoPT OMs dated 06.01.2014 and 05.03.2014 were considered and finally agreed with the decision rendered in **S.K.Kapoor's case** (supra), the action of the respondents herein in passing the impugned penalty order without furnishing the copy of the advice obtained from the UPSC to the applicant for submitting a representation thereon, amounts to violation of principles of natural justice and accordingly is unsustainable and is liable to be set aside on the said ground. For the same reasons, and in view of their own Memorandums, the contention of the respondents that no prejudice is caused to the applicant, is also unsustainable.

17. We are conscious that there can be only zero tolerance for corruption, but before a person is thrown away by such a stigma which may not only ruin his career but also his reputation in society, the orders should be passed only after following the due procedure.

18. In view of the well settled law of the Hon'ble Apex Court, and for the reasons mentioned above, the OA is allowed and the impugned orders are quashed and set aside. The applicant is permitted to submit his representation/objections if any against the UPSC advice,

which was furnished to him along with the penalty order dated 10.04.2013, within four weeks from the date of receipt of a copy of this order, and the disciplinary authority shall pass a speaking and reasoned order in accordance with law, within a reasonable period, preferably within four months therefrom. No costs.

19. In view of the above orders passed in the OA, MA No.1090/2014, for passing interim directions in the matter, is disposed of as having become infructuous.

(Dr. Birendra Kumar Sinha)
Member (A)

(V. Ajay Kumar)
Member (J)

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