

**CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA**

OA No.471/2012

Reserved on: 31/03/2016
Pronounced on: 06.05.2016

PRESENT:

THE HON'BLE MR. JUSTICE V.C.GUPTA, JUDICIAL MEMBER
THE HON'BLE MS. JAYA DAS GUPTA, ADMINISTRATIVE MEMBER

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Himangshu Chakraborty son of late Sarojendra Mohan Chakraborty resident of 36/38, Ghoshpara Road, Police Station Jagatdal, District North 24 - Parganas and Box Porter under Station Manager, Naihati, Eastern Railway.

.....Applicant

For the Applicant: Mr. A.K.Banerjee, Counsel

-Versus-

1. Union of India service through the General Manger, Eastern Railway.
2. The General Manager, Eastern Railway Nos. 1 & 2 having their offices at 17, Netaji Subhas Road, Police Station Hare Street, Kolkata-700 001.
3. The Additional Divisional Railway Manager (O), Eastern Railway, Sealdah and Revisioning Authority.
4. The Divisional Operations Manager, Eastern Railway, Sealdah and Appellate Authority.
5. The Assistant Operations Manager (Coaching), Eastern Railway, Sealdah and Disciplinary Authority.



6. Shri G.C.Poddar, Inquiry Officer, having his office at Inquiry Cell, 3rd Floor, Eastern Railway Headquarters, Fairlie Place, Kolkata.

.....Respondents

For the Respondents: Mr.S.Mukherjee, Counsel
Mr. T.K.Ghosh, Counsel

ORDER

JUSTICE V.C.GUPTA, JM:

The Applicant, Shri Himangshu Chakraborty, has filed this Original Application under section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

"a) Direct the Respondents to forthwith cancel the orders dated November 8, 2011, June 8, 2011 and November 23, 2010 holding the applicant guilty of the charges levelled against him and punishing him with reduction of pay;

(b) Any other or further order or orders as this Hon'ble Tribunal may deem fit and proper."

2. The brief facts of this case are that the applicant while working as Parcel Porter/NH was checked by a Vigilance Team at about 17/00 hrs on 20.12.2006 and the applicant was found to be on duty at Parcel Office at about 17/10 hrs although his duty was for 7 hrs to 15 hrs. He was also found in possession of excess cash of Rs. 435/- as against his declared personal cash of Rs. 330/-. Accordingly, a Memorandum of charge dated 10.12.2008 under Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968 was issued to him. The applicant submitted his



defence to the said Memorandum of charge. Upon considering the reply, Respondent No.6 was appointed as the Inquiry Officer, hereinafter in short as "IO" to enquire into the allegation levelled against the applicant in Memorandum of charge dated 10.12.2008. However, no Presenting Officer was appointed by the Disciplinary Authority to present the case on behalf of the Department. After conducting the enquiry, the IO submitted his report on 01.10.2010 substantiating both the charges. On the basis of the report of the IO, the Disciplinary Authority, vide order dated 23rd November, 2010 awarded the punishment to the applicant as under:

"After considering the enquiry report with its findings in the matter of Major Penalty Memorandum No. SDA/VIG/MJ/895 dated 10.12.2008 issued to you and on carefully examining the entire case, the undersigned has decided that you are guilty of the charges as enumerated in the aforesaid Memorandum and on the gravity of the case as per findings draw (copy enclosed) and the undersigned impose the following punishment:

" Your pay is reduced to Rs. 7000/- (Pay Rs. 5200/- plus GP Rs. 1800/-) upto 30.6.2015 with cumulative effect. Your seniority position will not be affected."

If you wish to submit any representation against the above punishment, you can do so within a period of 45 days from the date of receipt of this letter to ADRM/O/Sealdah through proper channel, doing so you should keep in view the provision Sub Rule (1) & (2) of Rule 21 of RS (D&A) Rules, 1968.

You are to acknowledge receipt of this notice."

As against the order of punishment, the applicant preferred appeal dated 19.01.2011 to the Appellate Authority. The appellate

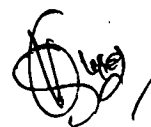
authority after considering the case in *extenso*, vide order dated 08.06.2011 modified the order of punishment to the extent as under:

"Basic pay reduced to Rs. 7000/- upto 30.06.2013 with cumulative effect."

Thereafter, the applicant preferred revision petition which was rejected by the Revisionary Authority vide order dated 8th November, 2011. Hence by filing the instant OA, the applicant sought to quash the order of the Disciplinary authority dated 23rd November, 2010, the order of the Appellate Authority dated 08.06.2011 and the order of the Revisionary Authority dated 8th November, 2011.

3. The Applicant assailed the aforesaid orders on a technical ground that in this case the IO, in absence of any Presenting Officer "hereinafter called as 'PO'" acted as a prosecutor. Hence, the entire enquiry is vitiated due to non observance of the principles of natural justice.

4. So far as the factual position is concerned, it has been stated that the applicant was not a parcel porter and he was a Box Porter working under the control of Operating Department of the Railway and not under the Commercial Department. It has also been stated that he was working beyond duty restore hrs is not established as no such evidence has been brought on record by



the prosecution. The duty roster has not been placed before the IO. The Disciplinary Authority recorded the finding in this regard contrary to the finding of the IO which amounts to non application of mind on the part of the Disciplinary Authority which was upheld by two other authorities viz; Appellate as well as Revisionary Authorities. Hence on this score the charge could not have been established against him.

5. In this regard, it has been submitted that the IO found reached on the conclusion on the basis of the statement of the applicant that his duty hours was from 07 AM to 03 PM i.e. from 07.00 hrs to 15.00 hrs whereas, the Disciplinary Authority contrary to it held that the applicant's duty hours as per the roster was between 7.00 am to 5.30 p.m. and he worked upto 7.30 p.m. on 20.12.2006 in the Parcel Unit and if the finding of the Disciplinary Authority is accepted, the applicant was deemed to have been working within his duty hours as IO found that he was found working at 17.10 hrs. There is nothing on record that the applicant was working in the Parcel Unit till 7.30 p.m. His finding is contrary to the report submitted by the IO. Similar finding has been endorsed by the Appellate Authority also.

6. It was submitted by the learned Counsel for the Applicant so far as the second charge is concerned, the amount of Rs. 435/- was virtually recovered from the table of Shri Sukumar Sarkar, HBC/NH who deposited this amount in cash as Govt.



Receipt. Therefore, it cannot be said that the amount of Rs. 435/- was an amount which alleged to be illegally acquired and possessed by the Applicant. In this regard, the Applicant drew our attention to the findings record by the IO, relevant portion of which reads as under:

"From the above analysis it is understood that the excess amount of Rs. 435/- which was in possession of Sri Chakraborty was not at all the Govt. Cash. If that be the case the amount must not have been excess in Govt. Cash rather the amount could have been disbursed to the labourers. It is not also acceptable that the payment of labourers have to be carried out by a Porter when the HBC is present in the office. It is also not acceptable that the C.O. should remain in his office for about 2 1/2 hrs beyond his rostered duty hours. The statement of the C.O. in P/Exbt.II and the statement made by Sri Sukumar Sarkar, HBC/NH in D/Exbt I while depositing Rs. 435/- in sundry cash are not tallying with each other. Sri Sukumar Sarkar, HBC/NH made a concocted story to save the C.O. It also indicates that they are used to earn extra money during their duty hours conniving with each other. Therefore, Sri Sukumar Sarkar deposited the personal cash of Rs. 435/- of Sri Himanshu Chakraborty as Govt. Cash to the Sundry account violating vigilance instruction.

Stayal of Sri Himanshu Chakraborty beyond rostered hours and possession of Rs. 435/- excess in personal cash gives an impression that these two issues are related with each other and **Sri Sukumar Sarkar being the HBC nourishes corrupt activities.**

Sri Sukumar Sarkar may suitably be taken up by the appropriate authority for violating the instructions of the vigilance given in P/Exbt.I.

Therefore, the contention of the C.O. made against para 3 of his defence brief is not accepted."

7. It was further contended that no action was taken against Shri Sukumar Sarkar though a finding has been recorded

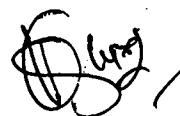


by the IO that Shri Sukumar Sarkar was in connivance with the Applicant earned the extra money during their duty hours. The IO gave categorical finding that the amount of Rs. 435/- was deposited in cash as a govt. Receipt. The amount was deposited as a Govt. Cash was said to have been in violation of the vigilance instruction. But the same has not been proved. As such, the second charge has also not been proved.

8. Reply has been filed by the Respondents stating therein that non appointment of the PO cannot vitiate the proceeding as the IO is competent to put questions to the prosecution as well as with defence witnesses, if any. He also relied upon Sub rule 17 and 20 of Rule 9 of the Railway Servants (Discipline and Appeal) Rules, 1968. It was further submitted that the charge stand proved based on the admission of the applicant. Hence no further proof is required to establish the guilty of the applicant. Accordingly, they have prayed for the dismissal of this OA.

9. We have heard the learned Counsel for both sides and perused the records.

10. In so far as non appointment of the PO is concerned, the Respondents have taken the shelter of Sub Rule 17 and 20 of Rule 9 of the RS (Discipline and Appeal) Rules, 1968 which are reproduced herein below:



"(17) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved, shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer, if any, and may be cross-examined by or on behalf of the Railway servant. The Presenting Officer, if any, shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit.

(20) The evidence on behalf of the Railway servant shall then be produced. The Railway servant may examine himself in his own behalf, if he so prefers. The witnesses produced by the Railway servant shall then be examined by or on behalf of him and shall be cross-examined by or on behalf of the Presenting Officer, if any. The Railway servant shall be entitled to re-examine the witnesses on any point on which they have been cross-examined, but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses as it thinks fit."

11. A bare perusal of the above Rules, reveals that the witnesses shall be examined by or on behalf of the Presenting Officer, if any, and may be cross examined by or on behalf of the railway servant. The Presenting Officer, if any, shall be entitled to re examine the witnesses on any points on which they have been cross examined, but not on any new matter without the leave of the Inquiring Authority. The Inquiring authority may also put such questions to the witnesses as it thinks fit. For the use of the word, 'if any' in Rule 17 it has been contended that it was the discretion of the Disciplinary Authority to appointment the Presenting Officer or not and therefore, the proceeding cannot be vitiated merely on

the ground that no Presenting Officer was appointed. Similarly, Rule 20 of the Rules, 1968 provides that the witnesses produced by the railway servant shall then be examined by or on behalf him and shall be cross examined by or on behalf of the Presenting Officer, if any. The railway servant shall be entitled to examine the witnesses on any point on which they have been cross examined but not on any new matter, without the leave of the inquiring authority. The inquiring authority may put such questions to the witnesses as it thinks fit. Here also the word 'if any' used in the rule has been emphasised by the learned counsel for the respondents and on that score it has been contended that it is discretionary on the part of the Disciplinary Authority to appointment the PO or not and merely because the PO was not appointed the inquiry cannot be vitiated.

12. Contrary to it, the learned counsel for the applicant relied upon the decision of the Hon'ble Madhya Pradesh High Court rendered in the case of **Union of India vs Mohd. Naseem Siddiqui**, reported in (2005) ILLJ 931 (MP). A perusal of the said decision reveals that the Hon'ble Madhya Pradesh High Court, after considering several judgments of the Hon'ble Apex Court and Hon'ble High Courts, summarized the principle in paragraph 16 in regard to appointment/non/appointment of PO in an enquiry which reads as under:

"16. We may summarise the principles thus:



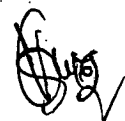
- (i) The Inquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer who is in the position of a prosecutor;
- (ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry, non appointment of a Presenting Officer by itself will not vitiate the inquiry;
- (iii) The Inquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts an questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross examine such witnesses on those clarifications;
- (iv) If the Inquiry Officer conducts a regular examination in chief by leading the prosecution witnesses through the prosecution case, or puts leading questions to the departmental witnesses pregnant with answers or cross examines the defence witnesses or puts suggestive questions to establish the prosecution case employee the Inquiry Officer acts as prosecutor thereby vitiating the inquiry;
- (v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognised that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in and recorded in the Inquiry;
- (vi) Whether an Inquiry Officer has merely acted only as an Inquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of



inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Officers, except in simple cases. Be that as it may."

This case was also of the Railway administration. From portion quoted above, it reveals that that if the Inquiry Officer conducts a regular examination in chief by leading the prosecution case or puts leading questions to the departmental witnesses pregnant with answers or cross examines the defence witnesses or puts suggestive questions to establish the prosecution case or of employee the Inquiry Officer acts as prosecutor thereby vitiating the inquiry. It was also observed that the matters should be decided on case to case basis where proceeding shall be vitiated or not.


13. In so far as the case in hand is concerned, from the report of the IO it appears that two witnesses were examined on behalf of the Department. Several questions were put to these witnesses as in examination in chief and thereafter the CO was permitted to cross examine. Similarly, the applicant was also examined and cross examined by the IO, as is evident from the report of the IO. Therefore, it is clear that in this case the IO not only acted as a judge but also acted as a prosecutor. Therefore, we are of the firm view that in view of the judgment rendered in the case of **Mohd. Naseem Siddiqui** (supra) to which no contrary decision has been placed by the Respondents, the matter falls



within the fourth category and the enquiry stands vitiated on this score.

14. In so far as the factual position is concerned, we would like to deal with the different charges framed against the applicant. As regards charge No.1, the charge relates to performing the duty beyond roster hrs. So far as the findings of the IO is concerned, it is established that the department has not placed roster of the working hrs of the applicant and the IO based his conclusion on the basis of the statement made by the applicant. Therefore, in absence of any evidence of duty hrs on behalf of the department, the finding based on mere statement of the applicant which cannot be termed as admission in the light of the statement made during the course of enquiry, the applicant ought not to have been held guilty. Moreover, the IO held that the applicant has to perform his duty from 7.00 am to 3.00 pm and he was found working at 5.10 p.m. but the Disciplinary Authority made a contrary statement to the effect that the duty hrs of the applicant was from 7 am to 5.30 pm and he was found working at 7.10 pm which is contrary to the findings reached by the IO. Therefore, we are of the view that the Disciplinary Authority has not acted fairly with due application of mind.

15. The surmises and conjectures have also been used in arriving at a conclusion that the presence beyond duty hours was with oblique motive and presumed to earn monetary benefit for



which nothing is available on record to establish such finding except the wishful thinking of the disciplinary authority. Therefore, we are of the view that the charge No.1 has not been substantiated against the applicant.

16. In so far as the recovery of Rs. 435/- which was alleged to be made from the possession of the applicant, is concerned, the applicant categorically stated before the IO that the amount does not belong to him but it belongs to Shri Sukumar Sarkar who was working as HBC/NH and was responsible for booking etc. The applicant was a porter. The alleged amount of Rs. 435/- was deposited as a Govt. Cash by Shri Sukumar Sarkar. The IO considered the same to be in violation of the vigilance instruction. It was also observed by the IO that Shri Sukumar Sarkar made a concocted story to save the applicant which also indicates that both Shri Sarkar and the applicant used to earn extra money during their duty hours. It was also proposed by the IO in his report that suitable action shall be taken against Shri Sarkar for violating the vigilance instruction but what action was taken against him has not been brought on record.

17. Therefore in view of the fact that the amount which was said to have been recovered from the applicant was actually deposited by Shri Sukumar Sarkar as a Government cash, in absence of any action against Shri Sarkar, a porter working under him cannot be punished for any illegality especially when no one



18. Accordingly, the order of the Disciplinary Authority dated 23rd November, 2010, order of the Appellate Authority dated 08.06.2011 and the Revisional Authority dated 8th November, 2011 are hereby quashed and it is held that the applicant shall be entitled to all consequential service and financial benefits which he would have ordinarily been entitled to, had there been no such disciplinary proceedings against him.

19. Resultantly, this OA stands allowed. There shall be no order as to costs.

(Ms. Jaya Das Gupta)
Admn. Member

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(Justice V.C.Gupta)
Judicial Member