

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 492 of 2012

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

Kshirod Chandra Biswal, aged about 65 years, S/o Late Jadumani Biswal, retd. OS Gr.I, O/o Sr. DEN/Co-ord./E.Co.Rly/Khurda Road Division, At/PO-Jatni, Dist-Khurda, resident of Plot No. LIG-165, Baramunda Housing Board Colony, PO-Baramunda, Bhubaneswar-3, Dist-Khurda, Odisha.

.....Applicant

VERSUS

1. Union of India, represented through the General Manager, E.Co.Rly., Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist-Khurda.
2. Chief Personnel Officer, E.Co.Rly., Rail Vihar, Chandrasekharpur, Bhubaneswar, Dist-Khurda.
3. Secretary, Railway Board, Rail Bhawan, New Delhi – 110001.
4. Sr. Divisional Engineer (Co-ord), East Coast Railway, Khurda Road Division, At/PO-Jatni, Dist-Khurda.
5. Executive Director (IR), Railway Board, Rail Bhawan, New Delhi – 110001.

.....Respondents.

For the applicant : Mr.N.R.Routray, counsel

For the respondents: Mr.T.Rath, counsel

Heard & reserved on : 13.11.2019 Order on : 28.11.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The applicant in this OA has prayed for the following reliefs :

- (a) To declare Rule 28 of Railway Servants (D&A) Rules, 1968 as non est in view of Judicial pronouncement delivered by the Hon'ble Apex Court in case of S.N.Narula -vs- Union of India and Union of India & Others -vs- R.P.Singh.
- (b) And to quash the order of punishment dtd. 15.10.2013 and 4.11.2013 under Annexure A/9 series.
- (c) And to direct the respondents to release all the retirement financial benefits with 12% interest for the delayed period.
And pass any other order as this Hon'ble Tribunal deems fit and proper in the interest of justice.
And for which act of your kindness the applicant as in duty bound shall every pray."

2. The applicant, while working under the respondents as O.S. Grade-I was served a charge memo under the rule 9 of the Railway Servant (Discipline and

Appeal) Rules, 1968 (in short RDA Rules) on 18.5.2009 (Ann.-A/1) with the following charge as under:-

“That the said K.C.Biswal while functioning as O.S.Gr.-I of Estab. Section under Sr. D.E.N./Co/KUR office has committed serious misconduct in as much as

That he has initiated a note dt. 18.10.2006 for approval of Sr.D.E.N./Co/KUR to change category of 83 Track Man in the scale of Rs.2750-4400/- to Khalasi in the scale of Rs.2550-3200/- in violation of para 179(XV) of IREM Vol-I (1989 edition) as amended vide advance correction slip No. 132. He has also failed to bring to the notice of Sr.D.E.N./Co-ord/KUR the provision of Item No.33 of Estt. Srl.No.109/81 of SOP on Estt. Matter.”

3. The applicant submitted his written statement of defence in reply to the charge (Ann.-A/2) dated 27.5.2009 explaining his conduct. A retired official was appointed as Inquiry Officer (in short IO) vide order dated 15.10.2008 (Ann.-A/3). After inquiry, the IO directed the PO to submit prosecution brief by 15.1.2010 with a copy to the applicant who was directed to submit his brief by 20.1.2010. But the brief of the prosecution was received on 29.1.2010 and the applicant submitted his brief on 2.2.2010. But it is stated in the OA that the IO had submitted his report on 13.1.2010 before receipt of the applicant's brief.

4. The report of the IO dated 13.1.2010 was communicated to the applicant vide letter dated 4.4.2012 (Ann.-A/6) and the representation was submitted by the applicant on 21.4.2012 (Ann.-A/7). It was sent to UPSC for advice, which communicated the advice vide letter dated 19.8.2013 (Ann.-A/8). After receiving the advice of the UPSC, the disciplinary authority i.e. respondent no. 5 passed the punishment order dated 15.10.2013, forwarded to the applicant vide letter dated 4.11.2013 (Ann.-A/9 series). Being aggrieved by the punishment order, the applicant has filed this OA.

5. The grounds advanced in the OA are mainly as under:-

(i) The IO was appointed on 15.10.2008 before issue of the charge memo dated 18.5.2009.

(ii) The inquiry proceeding is vitiated as a retired officer was appointed as IO in contravention to the rules.

(iii) The IO's report was submitted prior to submission of the written brief of the applicant, which was not considered by the IO before finalizing report.

(iv) Respondent no. 4 took more than two years and 3 months to send the IO's report to the applicant to ask for his representation and the applicant suffered due to such delay.

(v) As per the judgment of Hon'ble Apex Court in the case of SN Narula vs. UOI and UOI & others vs. RP Singh, wherein it was held that the copy of the UPSC advice is to be sent to the applicant for his representation if any. But this was not followed. Rule 28 of the RDA Rules is non est like the rule 32 of the CCS (CCA) Rules, 1965.

(vi) Specific views of the PHOD and CPO on the proposal were not sent with the record to the Railway Board as per the RBE No. 100/1996 (Ann.-A/10).

6. The respondents have filed Counter opposing the OA and stating that the applicant while working as O.S. should have referred to the rules while initiating his note in question. It is stated that the applicant's contention that he initiated the note as per the verbal instructions of the respondent No. 4 was not proved. It is also stated that the order appointing the IO was 15.10.2009, which was wrongly typed as 15.10.2008. The appointment of the PO was done on 15.10.2009. Regarding the contention of the applicant that his brief was not considered, it is stated that the IO's report has discussed all the points mentioned in the brief and the IO's report was submitted on 15.2.2010 and the date 13.1.2010 was a mistake, which has caused no prejudice to the applicant. It is further averred that the procedure as per the RDA Rules has been followed by the respondents while disposing of the disciplinary proceeding against the applicant. Regarding UPSC advice and views of PHOD and CPO, it is stated in the Counter as under:-

“That the submissions made in para 4.10 of the original application are misconceived and misleading. Even assuming for sake of argument not admitting that the UPSC advice is a confidential document and that ought not to have been supplied to the applicant, merely because the same has been supplied, it is not understood as to how such action of the respondents have put the applicant in any prejudice. The fact that the copy of UPSC advice was supplied to the applicant, even wrongly, the same only goes to show the fairness of the procedure adopted in this case, hence the question of quashing the punishment order doesn't arise. With regard to compliance of the procedure laid down under Annexure A/10 vide RBE No. 100/96, it is humbly submitted that the views of the concern PHOD and the CPO are confidential in nature, which are not required to be disclosed to the applicant. The UPSC being an independent statutory advisory body renders its own opinion on the basis of the materials collected during the course of departmental proceeding and therefore it was not necessary for the UPSC to referred any opinion of others.”

7. Regarding appointment of a retired officer as IO, it is stated that there is no bar in the rules to appoint retired officer as IO. It is stated in the written note of the respondents' counsel, as per the judgment of Hon'ble Apex Court in the case of Union of India vs. P.C. Ramakrishnayya in CA No. 6743/2010, a retired official can be appointed as IO. It was held that since the rule 9(2) has provided for appointment of other authority apart from public servant as IO, there is no bar to appoint retired official as IO.

8. It is also stated that as per the rules, it is not necessary “to serve a copy of the UPSC opinion and to seek comments of the applicant before imposition of the final punishment.” In para 4.12 and para 5(I) of the OA, it is stated that the rule 28 of the RDA Rules regarding supply of the copy of the UPSC advice alongwith the punishment order, was not challenged in the cases of SN Narula (supra) and RP Singh (supra), but the similar rule 32 of the CCS (CCA) Rules,

1965 that was challenged, became non est after judgment in the case of S.K.Kapur, for which the rule 28 has also become non est. This contention has been disputed by the respondents. In this regard, learned counsel for the respondents filed a Memo with the instructions of the Railway Board enclosing the order of Hon'ble Apex Court in SLP (C) No. 3068/2017 [UOI and Ors vs. Bal Indu and Anr.], SLP (C) No. 17430/2017 [UOI & Ors vs. Arup Kumar Sinha] and SLP (C) dairy No. 12672/2018 [UOI & Ors. vs. Girdhar Singh] in which the issue of the supply of the UPSC advice has been referred by Hon'ble Apex Court to Three-Judge Bench in view of conflict in the judgments in the case of UOI & Another vs. T.V. Patel, (2007) 4 SCC 785 and UOI & others vs. R.P. Singh (2014) 7 SCC 340. Copy of the orders of Hon'ble Apex Court referring the above issue to larger Bench have been enclosed by the learned counsel for the respondents.

9. The Rejoinder has been filed by the applicant reiterating the contentions in the OA without any fresh point.

10. Learned counsel for the applicant was heard. He referred to the judgments of Hon'ble Apex Court in the case of S.K.Kapoor, R.P. Singh and S.N. Narula to argue that that the UPSC advice should have been supplied prior to passing of the punishment order. It was also submitted that no opportunity was given to the applicant to file his written brief as the IO had submitted the report before submission of the brief by the applicant. The issue of retired official as IO and delay in communicating the IO's report to the applicant were also reiterated by learned counsel for the applicant.

11. Learned counsel for the respondents submitted that the issue of supply of the UPSC advice has been referred to Full Bench of Hon'ble Apex Court as submitted in his Memo filed by him with copy to the applicant's counsel. He further submitted that at present, the issue is pending before the Full Bench for which the decisions refereed by the applicant's counsel cannot be applied to the present OA. Regarding the issue of delay of about 26 months, it was submitted by learned counsel for the respondents that the applicant has to state what prejudice was caused to him due to delay.

12. We have perused the pleadings on record as well as the judgments referred and submissions made by learned counsels for both the sides. Regarding the issue of supply of the UPSC advice and challenge to the rule 28 of the RDA Rules, it is seen from the Memo dated 11.11.2019 filed by the respondents' counsel that the judgment in the case of R.P. Singh (supra) regarding communication of a copy of the UPSC advice to the charged officer prior to punishment order, which has been relied upon by the applicant's

counsel, has been referred to Three-Judge Bench by Hon'ble Apex Court. The challenge to the rule 28 is based on the judgments of Hon'ble Apex Court, which are under consideration of Three-Judge Bench. Since the matter is sub judice at present, no point of law can be decided on the basis of the judgments cited by the applicant and hence, no decision can be taken on the issue in this OA.

13. Regarding the issue of delay, it is stated in para 5G of the OA as under:-

“For that the vindictive attitude of the respondents is tale telling from the very fact that though the applicant after being retired is deprived of his retirement/superannuation benefit for last 3 years, the Respondent No.4 took more than two years and 3 months to ask the applicant to give representation on the inquiry report and therefore the applicant humbly submits that the entire inquiry proceeding is liable to be set aside.”

In reply, the para 17 of the Counter states as under:-

“That in reply to the submissions made in para 5.G of the OA it is submitted that, the illegal order was issued due to the careless attitude of the charged official, who did not follow the proper Rules and regulations by not getting clarification from Ruling cell.

Prior to initiating any proposal, the Applicant was required to ensure that there is a separate norm for staff holding post comes under the purview of safety category.

Since the aforesaid illegality was detected during preventing check by the Vigilance Organization and besides the applicant involvement of another officer also came to light, therefore proper thorough enquiry in the matter become a time lagging process.”

14. It is seen that in the paragraph 5G of the OA, the issue of delay has been averred, stating therein that the applicant, having retired from service, was deprived of the retirement benefits due to pending disciplinary proceedings against him. No satisfactory reply to that point is available in the Counter. The reason for about 26 months delay at the level of the respondent no. 4 for taking a decision on communicating the IO's report, has not been explained satisfactorily by the respondents in the Counter, which has vaguely referred to a vigilance inquiry without explaining why the said vigilance inquiry took such a long time, particularly when the applicant had retired from service by the time the IO submitted his report. Since the applicant had retired by the time the IO's report was received by the disciplinary authority in January/February, 2010, the delay of about 26 months has clearly prejudiced the applicant by delaying disbursement of his retirement benefits as averred in para 5G of the OA. In the circumstances, we are not able to agree with the contentions of the respondents' counsel in his written note that such delay has not prejudiced the applicant.

15. Learned counsel for the applicant has cited the judgment of Hon'ble Apex Court in the case of Prem Nath Bali vs. Registrar Delhi High Court, (2007) 1 SCC (L & S) 263, in which, on the issue of delay in finalizing the disciplinary proceeding, it has been held as under:-

“25. We are constrained to observe as to why the departmental proceeding, which involved only one charge and that too uncomplicated, have taken more than 9 years to conclude the departmental inquiry. No justification was forthcoming from the respondents' side to explain the undue delay in completion of the departmental inquiry except to throw blame on the appellant's conduct which we feel, was not fully justified

.....
 28. Keeping these factors in mind, we are of the considered opinion that every employer (whether State or private) must make sincere endeavor to conclude the departmental inquiry proceedings once initiated against the delinquent employee within a reasonable time by giving priority to such proceedings and as far as possible it should be concluded within six months as an outer limit. Where it is not possible for the employer to conclude due to certain unavoidable causes arising in the proceedings within the time frame then efforts should be made to conclude within reasonably extended period depending upon the cause and the nature of inquiry but not more than a year.”

16. Applying the ratio of the judgment in the case of Prem Nath Bali to the present case, the applicant's contention that he was prejudiced due to delay in taking action on the IO's report by the disciplinary authority as his retirement benefits were released after a delay, has some force. Thus, the prejudice caused to the applicant has been established. It is also noticed that in the cited judgment in the case of Prem Nath Bali (supra), the punishment order was not set aside on the ground of delay, but the applicant was allowed the pensionary benefit since the suspension period was directed to be counted as qualifying service for the purpose of pension.

17. Another ground advanced by the applicant is not adhering to the RBE No. 100/1996 (Ann.-A/10), which stipulated that the views of the PHOD and the Chief Personnel Officer are to be sent alongwith the views of the disciplinary authority while sending the proposal for disciplinary proceedings against retired employees to the Railway Board. The said circular does not stipulate the consequences of not enclosing the views of the PHOD and CPO with the proposal. Learned counsel for the respondents in his written note of submission has pointed out that such advices are confidential in nature, which is not to be communicated to the applicant. The applicant has also not mentioned how he was prejudiced due to non-adherence of the stipulations in RBE No. 100/1996.

18. Regarding the ground of non-consideration of the applicant's brief by the IO, the applicant has not mentioned which submission in his written brief was not considered in the report of the IO and how such non-consideration has caused prejudice to him. Further, from the IO's report at Annexure A/6, it is

seen that the written brief of the applicant has been at paragraph 13 of the IO's report. Hence, we are unable to accept such plea. Other grounds taken in the OA are not considered to be adequate to justify any interference in the impugned punishment order, as the applicant has not been able to show how such deviation from the procedure has prejudiced him. On this issue, we take note of the judgment of Hon'ble Apex Court in the case of State Bank of Patiala & Ors. vs. S.K. Sharma, 1996(1) SCSLJ 440, in which it was held:-

"We may summarise the principles emerging from the above discussion. [These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee]:

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be

the former, then it must be seen whether the delinquent officer has waived the said requirements either expressly or by his conduct. If he is found to have waived its then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could no be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in B.Karunkar. The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called.”

19. It is the settled position of law that the Tribunal cannot interfere in a disciplinary proceeding except for limited number of reasons. In the case of B.C. Chaturvedi vs. Union of India & others, reported in 1996 AIR 484, Hon'ble Apex Court has held as under:-

“Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re- appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.”

20. On perusal of the report of the IO at Annexure A/6, the IO has arrived at the following conclusions after due consideration of the stand of the applicant in written brief as discussed in paragraph 13 of the report. The conclusions of the report are as under :

“Conclusion: the CO put up a definitive note for approval to Sr.DEN/Co-ord/KUR for change of category orf 83 trackmen in scale Rs.2750-4400/- to khalasi in scale Rs.2550-3200/- in violation of provisions of IREM Vol-I (1989 edition) as contained in para 179 (XV) as amended vide advance correction slip No. 132. He did not bring out the provision of SOP under item No. 33 of establishment srl. No. 109/81. Though it was a part of his duty as OS Gr.I of Estb. Section under engineering department to point out the limitations of power of SR./DEN/Co/KUR, he has failed in his duty. To sum up, the CO has put up a note without the date of birth of the applicants to indicate the age of the candidate at the time of approval of the name of optees. He has simply taken it for granted that category change from higher scale to lower scale in trackmen can be done by Sr. DEN/Co-ord/KUR irrespective of any reference/consultation with the P.Branch of the division and irrespective of the age of optees as well as provisions of SOP where DRM is only empowered on the instant subject of category change. The charges are proved.”

21. It is further seen from the IO's report that there is evidence available on record showing the lapses on the part of the applicant. As noted in the report of the IO, the applicant failed to inform the proposal to personnel Department since it involved change of category of 83 employees. The applicant has also failed to mention the applicable rules and instructions of the Railway Board in the note.

22. For the reasons as discussed above, we are not able to allow the relief sought for in paragraph 8 of the OA relating to the impugned punishment order dated 15.10.2013 (Ann.-A/9 series). But taking into consideration the prejudice caused to the applicant due to delay of about 26 months at the level of the disciplinary authority (respondent No. 4) as stated at para 5G of the OA and discussed in paragraphs 14 and 16 of this order, we hold that the applicant is entitled for interest⁴ on withheld pensionary benefits. The respondents are accordingly directed to pay interest on retirement benefits of the applicant, which were withheld as on the date of communication of the IO's report to the applicant i.e. on 4.4.2012 (Ann.-A/6) due to pending disciplinary proceedings, at the rate of 12% per annum for a period of unexplained delay of 26 months to communicate the IO's report to the applicant. The respondents will have liberty to recover the interest so paid to the applicant from the person who was responsible for such delay of 26 months. It is clarified that if no amount of the applicant's retirement benefit was withheld as on 4.4.2012 due to the disciplinary proceeding in question, then no interest is payable as per this order.

23. The OA is partly allowed as mentioned above There will be no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)