

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.18886-88/2005**

% **Date of Decision: 26.04.2011**

Union of India Petitioner

Through Ms.Geetanjali Mohan and Mr.Ketan
Madan, Advocates.

Versus

Sh.H.D.Sharma Respondent

Through Ms.Meenu Mainee, Advocate.

CORAM:

HON'BLE MR.JUSTICE ANIL KUMAR

HON'BLE MR.JUSTICE SUDERSHAN KUMAR MISRA

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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1. The petitioner, Union of India through General Manager Northern Railway has challenged the order dated 18th May, 2005 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in O.A No.2997/2003 titled as 'Sh.H.D.Sharma v. Union of India through General Manager, Northern Railway and Ors' allowing the original application of the respondent and setting aside the order of removal of the respondent from the service dated 19th December, 2002 and the

appellate order dated 11th March, 2003 and the revisional order dated 13th October, 2003 whereby the punishment of removal from service was reduced by the revisional authorities to reduction in the grade of Rs.6500-10500/- to the grade of Rs.5500-9000/- with a basic pay of Rs.5500/- and at the bottom of seniority of JE-I/P-WAY in the grade of Rs.5500-9000/- for a minimum period of 3 years, until the respondent was found fit for promotion in the normal channel of promotion.

2. Relevant facts to comprehend the disputes are that the respondent was appointed as Pathway Inspector (PWI) in the grade of Rs.6500-10500/- vide office order No. 220-E/BONR/PWI/94 dated 15th January, 1999 issued by the Senior Divisional Personnel Officer, Northern Railways, Moradabad though the promotion order had been passed by the Divisional Railway Manager, Northern Railway, Moradabad. The Divisional Railway Manager, Northern Railways, Moradabad is the superior authority to the Senior Personnel Officer, as he is a subordinate officer of the Divisional Railway Manager.

3. When the respondent was working as PWI Grade I, a chargesheet dated 29th December, 1998 was served on the respondent alleging that he failed to provide adequate supervision in not allowing the small size ballast to be loaded into DMT as 20% ballast was being retained on the

40 mm square mesh for one out of three samples taken from Zone No.1 while the permissible limit was 55% to 70%.

4. The respondent contended that after the chargesheet dated 29th December, 1998 another chargesheet on the same very charges dated 4th January, 1999 was issued against the respondent. In the chargesheet dated 4th January, 1999 it was alleged that a technical audit was carried out by Shri. V.K. Duggal, Dy.CE/TS at Bhitaura on 18th November, 1998 in the presence of Sh.Bhanu Prakash, DEN/III/MB, Sh.Rajeev Saxena, AEN/Bareilly and Sh.H.D.Sharma, PII/Rampur. It was further disclosed that in Zone No.1, M/s. Pragatisheel Nirman Sansthan had supplied 4434.654 cubic meter of ballast out of which 600-700 cubic meter of ballast was lying in six complete stacks and four partial stacks. Size analysis of Zone No.1 indicated that out of total 10 stacks of Zone No.1 the under sized ballast was visible and in the circumstances an enquiry revealed that although sizeable quantity of ballast had been taken in Zone I and II, but the impact test and abrasion test had not been carried out on the ballast during the execution of the contract and the respondent failed to exercise proper checks on the quality of ballast and inadequate supervision in loading of ballast into DMT.

5. The respondent there after was reverted from the post of PWI Grade I to PWI Grade II which was challenged by the respondent by filing an O.A No.1237/2000 challenging his reversion and for quashing of charge-sheets issued against him. His original application was partly allowed and the reversion of the respondent was set aside and respondent was directed to file an application with the petitioner to withdraw one of the charge-sheets. Consequent thereto the charge sheet dated 4th January, 1999 was withdrawn by the petitioners.

6. Another charge sheet dated 15th February, 2001 was served thereafter, having similar charges. The respondent had contended that no reasons were disclosed as to why the charge sheet dated 29th December, 1998 was cancelled and a new charge sheet dated 15th February, 2001 was issued. The case of the petitioner against the respondent was that while being posted and working as PWI/RMU on MB Division he was in charge of ballast depot at BTO and being in charge he was aware of rejection of the ballast stack No.5, 9 and 17 in Zone No.1 which fact was also communicated to him by AEN/BE by two letters dated 28th November, 1998 and 21st December, 1998. Despite knowing about the rejection of ballast the respondent failed to prevent loading of the rejected ballast in DMT on 7th January, 1999. On loading of rejected ballast the evidence of sub standard quality of ballast got destroyed and sub standard ballast was used in making the track and

therefore, the respondent failed to maintain absolute integrity and exhibited lack of devotion of duty.

7. These allegations were refuted by the respondent contending inter-alia that the charges leveled against him were misconceived and baseless and charge sheet issued on 15th February, 2001 did not give any reasons for cancelling/withdrawing the earlier charge sheet dated 29th December, 1998. The respondent categorically asserted that there is no evidence in support of the charge, which is based on the version of the sole witness, Sh. Rajiv Saxena, Assistant Engineer (Budget) of the department who was listed in the list of witnesses given along with the charge sheet. Rather the said witness during the enquiry had stated that the respondent was not responsible for supervising the loading of ballast into DMT as this was the duty of material checking person. The respondent also asserted that the order of removal from service was not passed by a competent officer because the Divisional Superintending Engineer/II (DSE) who passed the order was an officer subordinate to the Divisional Railway Manager who was the appointing authority of the respondent.

8. During the enquiry proceedings the petitioner only examined Sh. Rajiv Saxena, AEN/C/Budget as SW1 and the enquiry officer by his report dated 7th July, 2002 held that all the charges against the

respondent were made out and that the respondent was responsible for destroying/not preserving the material evidence. The enquiry officer also held that there are strong indications that the respondent in connivance with Sh.Rajiv Saxena must have passed the sub standard ballast to cover up an elaborate game plan which was evolved by them by creating a façade of charge sheeting Sh.Sushil Kumar for destroying the evidence. Para 13.1.0 of the enquiry officer's report is as under:-

“13.1.0:- It is established beyond all reasonable doubts that CO was responsible for destroying/not preserving material evidence. Not only that, there are strong indications that CO in connivance with Sh.Rajiv Saxena must have passed the sub-standard ballast to cover up which an elaborate game plan was evolved by them by creating a façade of charge-sheeting Sh.Sushil Kumar for destroying evidence.”

9. The disciplinary authority by order dated 19th December, 2002, therefore, passed the order of removal from service as against the respondent. The enquiry officer while holding the respondent guilty of charges had also relied on cases of Munna Lal and inability of V.K.Duggal in securing details from Bhanu Prakash or Rajiv Saxena.

10. The respondent thereafter filed an appeal against the order of the Disciplinary authority. The appeal was however, dismissed by the Appellate Authority by order dated 11th March, 2003. The respondent, thereafter, filed a revision against the order of the disciplinary authority

and appellate authority. The Revisional Authority by order dated 13th October, 2003 modified the punishment order of the Disciplinary Authority and imposed the punishment of placing the respondent at the bottom of seniority of JE-1/P-Way in the grade of Rs.5500-9000/- and also held that the period from the date of removal from service to the date of joining back in service be treated as 'dies non'.

11. Aggrieved by the orders passed by the Disciplinary authority, Appellate authority and the Revisional authority, the petitioner filed an original application before the Central Administrative Tribunal seeking quashing of orders of punishment passed against him and to restore the respondent to the original post of PWI Grade I with all consequential benefits and also to quash the order treating the intervening period as dies non with the direction that the intervening period be treated as spent on duty and consequently to allow the back wages for the said period.

12. The original application filed by the respondent was contested by the petitioner who filed a detailed counter affidavit dated 5th May, 2004 of Sh.P.P. Pandey, Sr. Divisional Personnel officer, Moradabad division contending inter-alia that the order of the disciplinary authority dated 19th December, 2002 and Appellate order dated 11th March, 2003 and Revisional authority dated 13th October, 2003 were passed by

competent authorities in accordance with Railway Servants (Discipline & Appeal) Rules, 1968. Reliance was also placed by the petitioner on para 13.1.0 of the enquiry officer's report dated 7th July, 2002 which was quoted in the counter affidavit. Regarding the punishment order issued by the competent persons, it was disclosed that by order dated 15th January, 1999 the respondent was promoted as JE-I in the grade of Rs.6500-10500/- by the Senior Divisional Personnel Officer, Moradabad and the order indicated that the said order was passed with the approval of competent authority. It was contended that approving authority does not become the appointing authority of the respondent and therefore, the plea of the respondent that the punishment orders have not been passed by the appointing authority are not sustainable. Regarding the misconduct on the part of the respondent, relying on the enquiry officer's report, it was contended that the respondent was one of the members of the technical audit team who inspected Zone No. 1 on 18th November, 1998 at Bhitara (BTO) depot and had found some of the stacks having sub standard quality of ballast. Even on 19th December, 1998 few other stacks were found to have sub standard ballast on visual examination. Despite this the respondent failed to preserve the rejected ballast stacks at BTO depot as all the ballast stacks including the rejected stacks were trained out by DMT during the short span of time, i.e. 6th January, 1999 to 10th January, 1999 and thus the respondent destroyed the evidence of sub standard ballast.

The petitioner also pleaded that Sh.Rajiv Saxena's statement dated 12th February, 2002 was not found to be convincing by the enquiry officer and even the evidence of Sh.Vijay Narain had not been considered to be cogent in face of the other evidence on the record and thus not much weightage was given to it.

13. The plea of the petitioner before the Tribunal was also that enquiry report was sent to the respondent by letter dated 11th September, 2002 which was acknowledged on 25th September, 2002, however, as no representation from the respondent was received till 19th December, 2002, the disciplinary authority after careful consideration of all facts and circumstances passed the order dated 19th December, 2002.

14. The Tribunal after considering the pleas and contentions of the parties has held that the counsel for the petitioner did not provide any specific explanation regarding the relevance of the case of Munna Lal and the inability of V.K.Duggal in securing details from Bhanu Prakash or Rajiv Saxena. Regarding the consideration of MB No.51872 in case of Munna Lal, XEN/C and also the inability of Sh.V.K.Duggal in securing details from Bhanu Prakash and Rajiv Saxena, the Tribunal held that the remark of the enquiry officer that the present case of Sh.H.D.Sharma was a linked up case in the D&A proceedings launched

against Sh.Munna Lal, SEN/C, Rajiv Saxena, AEN/C/Budget and Sh.Sushil Kumar, MCC/PWI/RMU is not sustainable and the enquiry report could not be based on enquiries conducted against Munna Lal and Sushil Kumar. The Tribunal also held that the reports of the enquiry proceedings against Munna Lal and Sushil Kumar to be extraneous material and further held that any inferences against the respondent could not be drawn on the basis of the said reports of the other persons as the respondent was not a delinquent officer in the other enquiry proceedings.

15. Regarding the order of punishment passed by an incompetent authority, the Tribunal held that the Senior Personnel Officer merely communicated the decision of the issuing authority and therefore, could not have passed the punishment order and thus the punishment order could be passed only by the DRM and not by any other authority lower than DRM and as such held that the order of punishment has been passed by an incompetent authority since the competent authority was either the Additional DRM or DRM.

16. The Tribunal, however, rejected the plea of the respondent that the punishment orders were passed without application of mind and is a non-speaking and non-reasoned order. The Tribunal, however, held that in absence of any direction in the revisional order regarding

restoration to the original scale, placement at the bottom of seniority was in violation of Rule 6(vi) of the Railway Servants (Discipline & Appeal) Rules, 1968.

17. The Tribunal, however, on perusing the statement of Sh.Rajiv Saxena, the sole witness of the petitioner held that there is no evidence against the respondent as according to him Sh.Sushil Kumar, MCC had supervised the loading of the ballast into DMT at BTO and the respondent was not in direct supervision of loading of ballast and not instrumental in allegedly destroying the evidence of alleged sub standard ballast. Reliance was also placed on the defense witness Sh.Vijay Narain who had categorically deposed that the respondent had not given any specific instruction to load the ballast which had been identified in red color and therefore, the charge of loading the objectionable ballast could not be inferred against the respondent in absence of any other evidence produced on behalf of the petitioner.

18. The petitioner has challenged the order of the Tribunal dated 18th May, 2005 primarily on the grounds that apart from the oral evidence led by the petitioner the findings are also supported by strong circumstantial evidence, as detailed in ground (a) of the petition. It is contended that even if the oral evidence does not support the findings arrived at by the enquiry officer, no prejudice could have been caused

by consideration of extraneous material since there is no other evidence to support the findings of the enquiry officer. The petitioner has also asserted that the Tribunal could not substitute its own conclusion with the conclusion arrived at by the enquiry officer so long as there was some evidence to support such conclusions. The petitioner also contended that there is no violation of Rule 6(vi) of the Railway Servants (Discipline & Appeal) Rules, 1968. Reliance has also been placed on Rule 1343 (F.R.54) of IREC Vol. II to contend that the said rule contemplates that if the disciplinary authority has to pass two separate orders; one with respect to pay and allowances to be paid to the delinquent for the intervening period i.e the period between the date of removal from service and the date of joining back on duty and second with respect to whether the said period should be treated as spent on duty or not, then it will be competent for the disciplinary authority to order reduction to a lower time scale of pay, grade, post or service and that the said intervening period may be considered as 'dies non'. The petitioner also contended that the direction of the Tribunal to pay the full back wages was not in consonance with the precedents of the Supreme Court in R. Rajinder Singh v. Dy. Manager, PSRTC and Deputy Commissioner of Police v. Akhlakh Singh.

19. The respondent has contested the writ petition and has filed a detailed counter affidavit dated 2nd November, 2006 reiterating the

pleas and contentions raised before the Tribunal and before the authorities.

20. This Court has heard the learned counsel for the parties in detail and has also perused the record which was produced before the Tribunal including the charge sheets and the order of the enquiry officer and the order imposing the punishment.

21. Though this Court in exercise of its jurisdiction under Article 226 of the Constitution of India does not have to re-appreciate the evidence and arrive at its own findings and to substitute its findings with the findings of the enquiry officer, however, the statement of the sole witness Sh. Rajiv Saxena has been perused in order to ascertain whether his deposition reflects any cogent evidence against the respondent or not. Rather the plea of the petitioner himself is that the finding of the enquiry officer is not supported by the oral evidence of the said witness but is based on strong circumstantial evidence.

22. The statement of Sh. Rajiv Saxena does not implicate the respondent in any manner which is apparent from the perusal of the same. Though the learned counsel for the petitioner has tried to rely on a portion of the deposition in the examination in chief, however, perusal of cross examination reveals that he himself has contradicted and has

categorically admitted that the respondent was not responsible for the loading of the ballast in DMT. The said witness Sh. Rajiv Saxena further deposed that he was not a member of the technical audit team. He also deposed that the inspection of the ballast was only by visible observation which is contrary to the charge framed that 20% of the ballast was being retained on the 40 mm square mesh for one out of three samples taken from Zone No. 1. To a specific question as to who was directly supervising the loading of ballast in DMT for training out, the said witness was categorical in stating that Sh. Sushil Kumar of PWI/RMU supervised the loading of ballast into DMT at BTO. He further clarified that although PWI is in charge of the section but MCC, Sushil Kumar actually supervises the loading of DMT at depot who was directly responsible for supervision. To a categorical question put to the witness of the petitioner whether there was any failure of PWI in respect of loading as MCC, Sushil Kumar actually supervised the job, the said witness categorically answered that it was the duty of MCC, Sushil Kumar to obey the instructions of PWI/RMU and act accordingly. The said witness was also put a clear-cut question whether the technical audit team had carried out any sieve analysis or any other physical check or was it only by a visual inspection, the said witness showed rather his ignorance and stated that the three stacks were rejected as per instructions of the superiors. From his testimony it is apparent that there is no evidence against the respondent. Perusal of the entire

statement of the said witness Sh. Rajiv Saxena reflects that the respondent has not been inculpated in any manner by the said witness and consequently the finding of the Tribunal that there is no evidence against the respondent on the basis of the testimony of the witness produced by the petitioner, cannot be faulted.

23. The learned counsel for the petitioner has also not been able to explain as to why other relevant witnesses, the members of the technical audit team could not be examined who could have deposed as to what tests were carried out to ascertain whether the ballast was sub standard or not. The learned counsel for the petitioner is also unable to show any other evidence which would have implicated the respondent. Though it was alleged that by letter dated 28th November, 1998 and 21st December, 1998 the relevant information was communicated but even those letters have not been produced before the enquiry officer and not proved. The findings of the enquiry officer are also that the respondent in connivance with Sh.Rajiv Saxena, the sole witness of the petitioner as SW1 himself had passed the sub standard ballast to cover up an elaborate game plan which was evolved by them, by creating a false charge sheet against Sh.Sushil Kumar for destroying the evidence. This was not the scope of enquiry of the enquiry officer nor was such a charge framed against the respondent. In any case perusal of the record reveals that there is no evidence on the basis of which the inference

that the respondent was responsible for destroying/not preserving the material has been shown by the learned counsel for the petitioner. The plea that the oral evidence is also supported by strong circumstantial evidence is also without any basis as no other circumstantial evidence except the oral statement of Sh.Rajiv Saxena SW-1 has been produced before the enquiry officer. If the whole case of the petitioner is based on the oral evidence of the said witness then what other circumstantial evidence can be relied on by the petitioner has not been explained by the learned counsel for the petitioner.

24. The finding of the Tribunal that the proceedings launched against Sh.Munna Lal, SEN/C, Rajiv Saxena, AEN/C/Budget and Sh.Sushil Kumar, MCC/PW1/RMU cannot be extrapolated to the case of the respondent, cannot be faulted either. If some evidence was produced in those other cases which could have implicated or could have had any repercussion on the role of the respondent, the same evidence should have been produced in the enquiry against the respondent and the respondent should have been confronted with the same. In the circumstances the inference of the Tribunal that the petitioners have relied on extraneous material which has been prejudicial to the interest of the respondent cannot be termed to be illegal or unsustainable. The inference of the Tribunal in the facts and circumstances that there is no other evidence against the respondent on the basis of which it can be

held that the charges against the respondent are proved cannot be faulted.

25. If there was no evidence against the respondent, the ground that the punishment order was not passed by a competent authority only becomes academic. In any case this Court concurs with the reasoning of the Tribunal that the appointing authority of the respondent was the DRM and the Senior Personnel Manager was merely a subordinate authority who had communicated the decision of the appointing authority. Consequently the punishment orders having not been passed by DRM or Additional DRM, would be orders passed by incompetent authority.

26. Since the respondent has been absolved of all the charges against him and the enquiry proceedings and the punishment imposed against the respondent cannot be sustained against the respondent, the respondent shall be entitled for full back wages for the period of suspension and the said period should also be treated as the period spent on duty and to that extent the order of the Tribunal cannot be held to be perverse so as to require any interference by this Court. The Supreme Court in case of Union of India and others v. K.V. Janakiraman, (1991) 4 SCC 109, had held that benefits to the employee cannot be denied on the principle of 'no work no pay' as the normal rule

of “no work no pay” is not applicable to such case where the employee is completely exonerated and is not found blameworthy of the lis and is not visited with penalty of even censure. The reason given was that in such cases an employee although is willing to work is kept away from the work by the authorities for no fault of his and basing a case where the employee remains away from work for no reason, although the work is offered to him and in the circumstances applying fundamental rules 17(1), the emoluments cannot be denied in such cases. The Supreme Court had held in paras 25 and 26 of K.V. Janakiraman (supra) as follows:-

25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of “no work no pay” is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases.

26. We are, therefore, broadly in agreement with the finding of the Tribunal that when an employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty even of censure, he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/ criminal proceedings. However, there may be cases where the proceedings, whether disciplinary or criminal, are, for example, delayed at the instance of the employee or the clearance in the disciplinary proceedings or acquittal in the criminal proceedings is with benefit of doubt or on account of non-availability of evidence due to the acts attributable to the employee etc. In such circumstances, the concerned authorities must be vested with the power to decide whether the employee at all

deserves any salary for the intervening period and if he does, the extent to which he deserves it. Life being complex, it is not possible to anticipate and enumerate exhaustively all the circumstances under which such consideration may become necessary. To ignore, however, such circumstances when they exist and lay down an inflexible rule that in every case when an employee is exonerated in disciplinary/criminal proceedings he should be entitled to all salary for the intervening period is to undermine discipline in the administration and jeopardise public interests. We are, therefore, unable to agree with the Tribunal that to deny the salary to an employee would in all circumstances be illegal. While, therefore, we do not approve of the said last sentence in the first sub-paragraph after clause (iii) of paragraph 3 of the said Memorandum, viz., "but no arrears of pay shall be payable to him for the period of notional promotion preceding the date of actual promotion", we direct that in place of the said sentence the following sentence be read in the Memorandum:

"However, whether the officer concerned will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion, and if so to what extent, will be decided by the concerned authority by taking into consideration all the facts and circumstances of the disciplinary proceeding/criminal prosecution. Where the authority denies arrears of salary or part of it, it will record its reasons for doing so."

27. In the totality of facts and circumstances, the learned counsel for the petitioner has not been able to make out any ground on the basis of which this Court would be impelled to interfere with the order of the Tribunal setting aside the punishment order passed against the respondent. In the circumstances the order dated 18th May, 2005 is sustainable and the writ petition is, therefore, dismissed. The interim order dated 7th October, 2005 is vacated and petitioner shall implement

the order of the Tribunal forthwith. With these directions, the writ petition is dismissed. Parties are, however, left to bear their own cost.

ANIL KUMAR, J.

APRIL 26, 2011
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SUDERSHAN KUMAR MISRA, J.