

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

% Judgment delivered on 19.04.2012

+ W.P.(C) 89/2009

UNION OF INDIA & ORS. ... Petitioners

versus

SULEKH CHAND ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Jitendra Kumar Singh

For the Respondent : Mr. Manjeet Singh

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT

BADAR DURREZ AHMED, J. (ORAL)

1. The Union of India is aggrieved by the order dated 17.9.2008 passed in OA No. 2162/2007 by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'Tribunal') by which the respondent's said original application was allowed and the impugned order of penalty of reduction of pay for a period of six years was set aside. By virtue of the impugned order, the petitioner was also directed to restore the pay of the respondent in the original grade with all consequential benefits within two months from the date of receipt of

a copy of the order.

2. The facts in brief are that the respondent was working as a Head Booking Clerk in the Northern Railways. He was stationed at Panipat, Haryana. On 29.9.2004, a vigilance raid was conducted and a decoy customer Som Pal proceeded to the counter where the respondent was booking tickets. The decoy customer asked for two railway tickets for a journey from Panipat to Darbhanga in Bihar. The respondent stated that the cost of the tickets would be Rs.470/-. Thereupon, the decoy customer handed over a government currency note of Rs.500/- denomination to the respondent. After the tickets were printed, they were handed back to the decoy customer along with a sum of Rs.30/-. The decoy customer then left the counter. Thereafter, the cash available with the respondent was checked by the vigilance team and it was found that there was a shortfall of Rs.101/- in government cash and a shortfall in private cash of Rs.50/-.

3. A charge memorandum was issued to the respondent on 16.2.2005. The articles of charge were as under:

“1. Sh. Sulekh Chand/BC/PNP had charged Rs.40/- excess from the decoy/passenger by way of demanding and accepting Rs.470/- against the actual fare of Rs.430/- for 2 tickets of ex. PNP to DBG.

2. Rs.101/- in Govt. Cash and Rs.50/- in private cash were found short during the check.

By the above acts of omission and commission Sh.

Sulekh Chand/BC/PNP failed to maintain absolute integrity, exhibited lack of devotion to duty and acted in a manner unbecoming of a Railway servant, thereby contravened the provisions of Rule 3.1(i),(ii)&(iii) of Railway Service Conduct Rules 1996.”

Thereafter, the respondent submitted his written statement in which he took the following stand:-

“2. That the alleged amount of Rs.470/-, said to have been demanded from the decoy passenger was due to wrong calculations. Because there are three routes for journey from Panipat to Darbhanga i.e., one via DLI-MB-LKO-GKP, second via DLI-CNB-ALD-MGS and third via DLI-LKO-SLN-BSB, Ballia and Chapra.

3. That at the time when the said ticket were issued train Shahid Express had to arrive and as such there was heavy rush of passengers at the counter. Further also there is no direct ticket for Darbhanga station on the SPTM system and as such in this case the SPTM ticket for the farthest destination was to be issued and extension of journey for the required destination Darbhanga had to be issued through EFT.

4. That in the process of making calculation as such in the said circumstances, for Darbhanga station keeping in view three different routes, the calculation so made happened to be wrong. As a result of the mistake at the first instance `470/- was taken from the passenger.

5. That after SPTM ticket No. 80217177 from Panipat to Samastipur and EFT. No. 193913 extension up to Darbhanga, was prepared, it had come to the notice that the actual fare for these tickets was Rs.430/-.

6. That while the said tickets were picked up by the

decoy passenger, to return the balance of Rs.40/- I had called decoy but the decoy had ignored my call and did not wait to collect the balance. However, since it was actually correct and the calling of the decoy passenger (PW-1) by me for collecting balance of Rs.40/- was ignored by decoy passenger yet the independent witness Shri Ishwar Kumar (PW-2) had heard the call made by me and he has also confirmed this fact during the DAR enquiry proceedings before your goodself.

7. That at the time of drawing the check proceeding by Shri Subhash Singh BC Panipat vide Ex-P2, the fact of my calling to the decoy passenger to return Rs.40/- balance was also mentioned by me before the Vigilance Team. Neither the Vigilance Team allowed Shri Subhash Singh to record my version in right perspective but also forced Shri Subhash Singh to take on the record of proceedings as suited to the Vigilance Team.

8. That since it was actually correct that I had called the decoy passenger to take the balance of Rs.40/-, which due to wrong calculation was access taken and Shri Subhash Singh who had recorded the proceedings on Ex-P2 was fully convinced, he in the capacity of PW-3 during DAR enquiry had categorically deposed in favour of CO.

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As regards the shortage of Rs.101/- in the Government Cash as mentioned in Ex.-P4, it is a recorded fact that the shortage was found on the time of check which may have been due to heavy rush. However at the close of the shift the remittance was made correctly. Regarding shortage in private cash, as alleged is correct as per cash details prepared but as per the existing provisions in the matter of private cash there is no attraction of violation of any rules what so ever.”

Thereafter, the Enquiry Officer proceeded with the enquiry and submitted a report dated 8.8.2005. The Disciplinary Authority passed the penalty order on 14.11.2005 imposing a penalty of reduction of pay for a period of three years. Being aggrieved thereby, the respondent preferred an appeal before the Appellate Authority, who rejected the respondent's appeal by an order dated 16.1.2006. Thereafter, the respondent filed an Original Application before the Tribunal, being OA No. 501/2006, against the penalty order. During the pendency of the said original application, the Revisional Authority passed an order dated 28.6.2006 enhancing the penalty of reduction of pay for a period of six years. Thereafter, the Tribunal disposed of the said OA No. 501/2006 by an order dated 04.08.2007 directing that the respondent could prefer an appeal against the enhancement order. The respondent, consequently, preferred an appeal before the higher appellate authority which was also rejected by an order dated 14.11.2007. Being aggrieved thereby, the respondent filed an original application being OA No. 2162/2007 which has been allowed by the Tribunal by virtue of the impugned order dated 17.9.2008. The reasoning adopted by the Tribunal is indicated by the contents of paragraph 15 of the impugned judgment which reads as under:-

“15. On careful consideration of the rival contentions of the parties, in our considered view in a judicial review though we cannot sit as an appellate authority to reappraise the evidence but once an illegality has been cropped up and it is found that findings are recorded on

suspicion and are perverse without any evidence, interference is called for. From the discussion of evidence though the decoy passenger and other shadow witnesses clearly admitted that the applicant had called the decoy witness who was in hurry to return the excess amount, which was taken under a confusion and on wrong calculation of the fare clearly shows that the over charge was not deliberate or without any malafide intention. It was an error of judgment. This is sheer negligence without any culpable loss and motive would not amount to any misconduct.”

4. This is, in so far as the first charge is concerned, with regard to the tickets from Panipat to Darbhanga, Bihar. In respect of the second charge of shortfall, the Tribunal again held in favour of the respondent by applying the Board’s Circular dated 13.3.2006 wherein it was indicated that a shortfall of an amount upto Rs.100/- was permissible and did not amount to misconduct. The Tribunal also concluded that there was non-compliance with paragraphs 704 and 705 of the Vigilance Manual which, according to the Tribunal, ought to have been strictly complied with, but had not been complied with in as much as in the present case, the independent “gazette” witnesses had not been associated in the said raid and check.

5. We shall consider, first of all, the conclusion arrived at by the Tribunal in respect of the first charge. According to the Tribunal, the findings recorded in the enquiry report as well as by the Disciplinary Authority and other authorities below

were merely on the basis of suspicion and were, therefore, perverse without any evidence. In such a case, according to the Tribunal, interference was called for. We may point out that the present case is not one of “no evidence”. It is a case where there is evidence that the incident with regard to the purchase of the tickets happened in the manner indicated in the charge memo. First of all, there is evidence of the decoy passenger (Som Pal) who appeared as PW1 and supported the stand of the petitioner. He clearly stated that he had asked for tickets from Panipat to Darbhanga, Bihar and that the respondent had informed that it would cost him Rs.470/- . When the tickets were prepared, the same were handed back to the decoy passenger along with a sum of Rs.30/- only. Although, the tickets were actually for Rs.430/-, the respondent returned only the said sum of Rs.30/-, implying thereby, that he had pocketed a sum of Rs.40/-.

6. The respondent had taken the defence that he had realised that he had made a calculation error, and therefore, started calling the decoy passenger back to the counter, but he did not return. In support of this, evidence of PW2 does indicate that the decoy passenger was called back by the respondent but because of a heavy rush and the entire hall being noisy, the decoy passenger had not heard the same. However, we find that even as per the statement of the respondent himself, there is sufficient material to draw the inference of his complicity in the said incident. The explanation given as per the defence note reads as under:-

“a. That it is incorrect to allege that CO had overcharged Rs.40/- from the decoy passenger by way of demanding and accepting Rs.470/- against the actual fare of Rs.430/- for two tickets from Panipat to Darbanga, because due to heavy rush at the counter at the time the said tickets were issued and also there being no possibility of issuing the direct ticket from Panipat to Darbanga on available SPTM system, initially Rs.470/- was asked to be paid by the decoy passenger. It was also due to the fact that there were three different via available for journey from Panipat to Darbanga thus it was a real factor that the error in the calculation had come. However when the SPTM ticket No.80217177 was issued along with EFT No. 193913 extending journey up to Darbanga, the relevant re-calculation had shown the actual fare to be Rs.430/-, the remaining balance of Rs.40/- was offered to the decoy passenger Shri Som Pal but he deliberately ignored the call in this connection made by the CO and left the counter picking up the tickets and Rs.30/- which was already returned to him when decoy had given Rs.500/-.....”

(Underlining added)

7. According to the explanation given above, even if we go by that explanation, we feel that there is enough evidence in support of the conclusion arrived at by the Enquiry Officer as well as the Disciplinary Authority. From the above extract, it is absolutely clear that a sum of Rs.470/- was asked to be paid by the respondent. The Decoy passenger paid a sum of Rs.500/- by virtue of one currency note of that denomination. Thereafter the tickets were taken out and the actual fare of the tickets was Rs.430/-, therefore, there was no scope for the respondent to submit that mistakenly, he had only paid a sum of Rs.30/- only when the tickets and

balance amount of Rs.30/- were handed over to the decoy passenger simultaneously. The inference and the conclusion arrived at by the Enquiry Officer and the Disciplinary Authority cannot be considered to be such which no reasonable person could have arrived at on the basis of the material available on record, therefore, it would be difficult for us to hold that the conclusion arrived at by the Enquiry Officer and the Disciplinary Authority was perverse.

8. We may also point out that the Tribunal has observed in paragraph 15 of the impugned judgment that from the discussion of the evidence, the decoy passenger had clearly admitted that the respondent had called the decoy passenger and that the respondent was in a hurry to return the excess amount which was taken under confusion and on a wrong calculation. Unfortunately, this is not borne out by the evidence on record. The decoy passenger has nowhere admitted that the respondent had called out at him in order to return the excess amount. Therefore, the conclusion arrived at by the Tribunal is wrong on this count also. We note that the Tribunal in its judgment has correctly stated the position in law that in the case of judicial review, the Tribunal does not sit as an Appellate Authority and does not re-appraise the evidence and that it can only interfere with the findings if the same are recorded merely on suspicion or are perverse and/or are not backed by any evidence. Unfortunately, the Tribunal has not applied this principle correctly in as much as it came to the wrong conclusion that the findings recorded were perverse.

We see no perversity in the findings and we have already indicated above that this is not a case of ‘no evidence’. There is some evidence and it is for the concerned authority to appraise the evidence in order to return a finding. The Tribunal could not have substituted its view or findings in place of the findings returned by the Enquiry Officer and the Disciplinary Authority. Consequently, the view, taken by the Tribunal on the first charge, is untenable and is liable to be set aside.

9. In so far as the second charge is concerned, we feel that the Tribunal has erred in this respect also. The shortfall in the Govt. cash was admittedly of Rs.101/- . The Tribunal placed reliance on the Board’s Circular dated 13.3.2006, whereas the date on which the raid was conducted was 29.9.2004. Even the Circular dated 13.3.2006 specifically mentions that prior to the issuance of the Circular, the permissible amount was upto Rs.30/- and that it was “now” being increased to Rs.100/-, therefore, the view adopted by the Tribunal is not tenable in law. In any event, the amount of shortfall was of Rs.101/- which is more than the maximum prescribed amount i.e., Rs.100/-, even as per the Board’s Circular dated 13.3.2006. Therefore, the Tribunal could not have held that a shortfall to the extent of Rs.101/- in the Govt. cash did not amount to misconduct.

10. Paragraphs 704 and 705 of the Vigilance Manual have also been examined by us. The Supreme Court in the case of *Moni Shanker v. Union of India and Anr. (2008) 1 SCC (L&S) 819*, observed that non-adherence to the instructions

laid down therein would not invalidate departmental proceedings. This has been stated in paragraph 14 of the said decision of the Supreme Court after placing reliance on the earlier decision of the Supreme Court in the case of ***Chief Commercial Manager, South Central Railway v. G. Ratnam (2007) 8 SCC 212.***

We may also observe that in ***Moni Shanker (supra)***, the Supreme Court, while proceeding on the assumption that said paragraphs 704 and 705, being executive instructions, did not create any legal right, emphasized that the ‘total’ violation of the guidelines together with other factors could be taken into consideration for the purpose of arriving at a conclusion as to whether the department has been able to prove a charge against the delinquent official or not. It is in this backdrop that we have considered the provisions of paragraphs 704 and 705 of the Vigilance Manual and we do not find that there has been ‘total’ violation of the guidelines prescribed therein. In any event, in so far as the facts of the present case are concerned, those guidelines would not be very material because it is the respondent’s own case that he had demanded Rs.470/- in the first instance and returned only Rs.30/- along with the tickets. Therefore, the question of having two gazetted officers as witnesses etc., was of no consequence because, even on the basis of the admitted facts as stated by the respondent himself, there was enough material before the Enquiry Officer and the Disciplinary Authority to have arrived at the conclusion that they did.

11. Finally, a plea had been taken by the learned counsel for the respondent that in any event the punishment could not have been enhanced by the Revisional Authority. He sought to place reliance on a Railway Board's Circular dated 12.12.1972 which is as under:-

“In terms of Rule 22 of RS (D&A) Rule, 1968 the appellate authority while considering an appeal preferred to it has full discretion to decide whether the penalty imposed by the lower authority is adequate, inadequate or excessive and pass such orders on the appeal as it thinks fit. Rule 25 of the said rules also empowers the authorities specified therein to review the punishment passed in any disciplinary case at any time, either on their own motion or otherwise, and enhance the original penalty already imposed on an employee, where it is considered that the seriousness of the offence requires the imposition of a higher penalty, subject to the observance of the procedure indicated in Rules 22 and 25 as the case may be.

2. A point has been raised as to whether in case where a penalty is awarded and enforced and thereafter it is proposed to impose a higher penalty, it would be in order to do so if the higher penalty is of a nature that does not amount to just enhancement of the previous penalty but amounts to an additional penalty. For example, in a case where an employee may have been punished with the stoppage of privilege passes for three months and may have already undergone the punishment, the competent authority may yet impose a higher penalty, say removal from service.

3. The Board are advised that Rules 22 and 25 vest full discretion on the appellate and higher authorities to review a case and pass final orders upholding, reducing or enhancing the original penalty. The enhancement of

the penalty need not necessarily be a prolongation of the same penalty but can be a fresh penalty higher to the original one and there is no objection to infliction of such additional penalty.

4. The Board, however, desire that in cases where an employee has already undergone the original penalty in whole or in part, this fact would be taken into account by the reviewing/appellate authority when deciding upon the higher penalty, so that unintended hardship is not caused to the employee. Alternatively, the feasibility of cancelling the original penalty while imposing the higher penalty may be considered.”

12. Learned counsel for the respondent, in particular, placed reliance on paragraph 4 of the above Circular and stated that in as much as the respondent had undergone the original penalty in part, this fact ought to have been taken into account by the Revisional Authority when deciding upon the enhanced penalty. The object being that no intended hardship is caused to the respondent. We are of the view that no support can be taken by the respondent from the said paragraph of the Circular in as much as it pertains to a case where there is an imposition of a ‘fresh higher penalty’ and does not apply to a case of enhancement of penalty by prolongation of the same penalty. The distinction has been made out in paragraph 3 of the said Circular itself where it has been noticed that enhancement of the penalty need not necessarily be a prolongation of the same penalty but can be a fresh penalty higher to the original one and that there can be no objection to infliction of

such additional penalty. The present case falls in the former category i.e., of prolongation of the same penalty and does not fall in the category of ‘fresh higher penalty’. Therefore, paragraph 4 would not come to the aid of the respondent. Consequently, even this submission of the learned counsel for the respondent is not acceptable.

In view of the foregoing discussions, we set aside the impugned order. There shall be no order as to costs.

BADAR DURREZ AHMED, J

V.K.JAIN, J

APRIL 19, 2012
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