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

Date of decision: May 01, 2013

+ **W.P.(C) 2680/2012**

C.D.SHARMA Petitioner
Represented by: Ms. Jyoti Singh, Senior Advocate
with Mr. A.K. Trivedi, Mr. Tinu Bajwa and
Ms. Sahilla Lamba, Advocates

versus

UNION OF INDIA AND ORS. Respondents
Represented by: Mr. R.L. Dhawan, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. The challenge in the writ petition is to the order dated February 18, 2011 passed by the Central Administrative Tribunal, Principal Bench in OA No.242/2010, whereby the OA filed by the petitioner was dismissed by the Tribunal. The brief facts are, that the petitioner while working as AEN with the respondents was charge-sheeted on October 29, 1997. Four charges were framed as under:-

"Article 1

He knowingly and intentionally has got recorded the false measurements of supply of ballast by Shri S.C.Saxena, CPWI(S) in Measurement Book No.AGC/347 against 14th on account bill for stack

No.93 for a total quantity of 158.999 cum of ballast and has done 100% test check of false measurements of this stack which has been shown as trained out although no permission was taken for training out the same from Sr.DEN/AEN. This amount of fictitious/false test check and as such excess payment to contractor amount to ₹48,972 and corresponding loss to the Railways.

Article 2

He knowingly and intentionally has got recorded the false measurements of ballast for stack No.101 measuring 145.4 cum by CPWI(S) Shri S.C.Saxena/AGC and has done 100% test check of measurement of ballast of Jajau Yard for which no supply was taken at the time of recording measurements in Measurement Book No.AGC/347 in 15th on account Bill for stack No.101 but as the matter came to the notice of regular AEN and higher officers, the stack was reconstructed. Thus, he made efforts to defraud the Railways but on intervention of regular AEN, he could not succeed.

Article 3

He knowingly and intentionally has got measured the ballast of M/s S.P.Associates lying at Jajau Yard in the contract of M/s Mittal Associates even though the JJ Yard location was not covered in the scope of their work. This ballast supply was earlier rejected by the then AEN Shri B.K.Mishra as it was not conforming to the specification of that contract, subsequently a proposal was moved by CPWI for taking 800 cum ballast at JJ Yard in the contract of M/s. Mittal Associates based on flimsy grounds and this fact was not brought out in the proposal that this ballast has been earlier supplied by M/s S.P.Associates and was rejected.

Article 4

He knowingly and intentionally recorded 100% test check on measurements which was not recorded directly in the Measurement Book by CPWI(S) Shri S.C.Saxena for supply of ballast as stipulated in the Engineering Code para 1319, on 15.2.1996. In fact, the relevant Measurement Book was available at Jhansi on 15.2.1996 in connection with passing of the 14th on account bill and was brought to AGC at 23.55 hrs. on 15.2.96. The Statements given by S/Shri S.C.Saxena/CPWI(S), C.D.Sharma/AEN and J.P.Gupta/O.S. are confusing and incorrect. There was no other reason for the AEN Shri C.D.Sharma not to test check the measurements directly in the Measurement Book as stipulated in the Engineering Code except for the reason that regular AEN was resuming on 17.2.1996 and CPWI(S) Shri Saxena and Shri Sharma, AEN would have not succeeded in their designs for accepting the rejected ballast in JJ Yard and also for accepting false measurements for stack No.101 which was not available at the time of recording measurements.”

2. The Inquiry Officer conducted the enquiry and submitted his enquiry report on October 16, 2000 by holding the charges as proved. The petitioner submitted his objection to the said report mainly on the ground of non-production and non-examination of the prosecution witnesses, and not affording a reasonable opportunity to the petitioner to cross-examine the PWs. The Disciplinary Authority after considering the enquiry report remitted the case to the Inquiry Officer for further enquiry by examination/cross-examination of some witnesses. Pursuant thereto, the Inquiry Officer after holding further enquiry submitted his report dated

March 24, 2003, holding all the charges framed against the petitioner as not proved. The Disciplinary Authority did not agree with the findings of the Inquiry Officer and vide a Disagreement Note dated July 15, 2004, holding provisionally all the charges as proved, intimated the petitioner and afforded him an opportunity to submit a representation on the Disagreement Note dated July 15, 2004 which the petitioner did vide a reply dated August 03, 2004.

3. The Disciplinary Authority considered the representation of the writ petitioner, came to the conclusion on the said disagreement, which was challenged by the petitioner in the Allahabad Bench of the Tribunal in OA No.417/2005. The OA was allowed. The matter was taken in appeal by the respondents before the High Court at Allahabad in Civil Misc. Writ Petition No.57536/2005, which remanded the case back to the Tribunal for deciding the matter afresh. The Allahabad Bench of the Tribunal considered the matter afresh and decided on June 08, 2007, that the OA is not maintainable as being premature and dismissed the same.

4. In the meantime, the petitioner retired from service on June 30, 2007. As the proceedings have not culminated in a final order, the proceedings continued under Rule 9 of the Railway Services Pension Rules, 1993. On August 12, 2009 the case was finally decided by the Disciplinary Authority in consultation with UPSC, which was of the view that the charges have been proved, and constituted a 'grave misconduct' on the part of the petitioner and thereby imposed a penalty of 20% cut in monthly pension of the petitioner for a period of five years.

5. According to the order dated August 12, 2009, which was challenged by the petitioner before the Tribunal by filing OA No.242/2010, the

petitioner primarily raised two issues. One: whether the penalty imposed on the petitioner is legally sustainable, and two: whether the petitioner would be entitled to parity claimed of exoneration of the co-accused Mr.S.C.Saxena. The Tribunal in so far as issue No.2 above is concerned was of the following view:-

“We may first consider the issue of similar treatment and parity claimed by the applicant with the co-delinquent (Shri S. C. Saxena). The applicant has sought exoneration of all charges on the basis of exoneration of Shri S. C. Saxena, ADEN/G/Jhansi (Retd.). This issue has been very comprehensively dealt by the Disciplinary Authority in the Penalty Order dated 12.8.2009. In case of Shri Saxena, he was issued major penalty Charge Memorandum in 1997, but after considering defence statement the Charge Memorandum was quashed and a fresh Charge Memorandum was issued on 05.02.1998. After considering representation of Shri Saxena on the findings of the IO who had held all the Charges as proved, the DA imposed a major Penalty on 26.7.2001. After consideration of his appeal, the Appellate Authority quashed the penalty imposed on him and remanded to the IO for further inquiry. The IO submitted his supplementary Inquiry Report and held all Charges as not proved which was not accepted by the Disciplinary Authority. A Memorandum of Disagreement was issued to Shri Saxena holding all the Articles of Charge as proved. After considering his representation penalty was imposed on him by the Disciplinary Authority on 20.10.2004. Shri Saxena preferred an appeal to Railway Board, which quashed the disciplinary proceedings from the stage of issue of Memorandum of Disagreement. On consideration of his representation against the Memorandum of Disagreement, the Disciplinary Authority imposed a major penalty on Shri Saxena. In his appeal to Railway Board, Shri Saxena again pointed out some procedural lapses against the said order. After

considering the whole case, the Railway Board felt that Shri Saxena had already faced enough mental agony during ten years of the proceedings and quashed the proceedings again from the stage of imposition of penalty due to procedural lapse. Therefore, the disciplinary proceedings against him were dropped by the competent authority. It is apt to note that the circumstances of Shri S. C. Saxena and those of the applicant are different. The Disciplinary Authority found that parity did not exist. The dropping of the disciplinary proceedings against Shri Saxena would not be the adequate reason for exonerating the Applicant. The Disciplinary Authority considered the mitigating factors such as (i) long duration of the departmental proceedings, (ii) exoneration of the co-accused, and (iii) the Applicant in his letter dated 17.07.2007 did not comment on the facts of the Memorandum of Disagreement issued by Railway Board and held all the four Charges as proved. As discussed above, we find that the magnitude of the misconduct in case of Shri S. C. Saxena being different from that of the applicant the claim for similar treatment for the Applicant would not be applicable. We find from the above that the competent authority has compared the Applicant and co-delinquent in so far as their culpability in the alleged misconduct is concerned and held the case of the Applicant as 'grave misconduct' and imposed the penalty. We are in full agreement of the said findings."

6. In so far as the issue No.1 is concerned, the Tribunal had concluded that the prescribed procedure was followed while taking disciplinary action against the petitioner and rejected the said issue.

7. While arguing the case on behalf of the petitioner, Ms.Jyoti Singh, learned senior counsel for the petitioner would primarily reiterate the same contention which was contended on behalf of the petitioner before the Tribunal i.e. whether the petitioner would be entitled to parity claimed with

respect to the exoneration of the co-accused Mr.S.C.Saxena. To understand and decide the issue it would be important for us to first see the charges which have been framed against Mr.S.C.Saxena which are as under:-

“Article 1

He knowingly and intentionally has recorded the false measurements of ballast for stack No. 93 in the MB No. AGC/347 against 14th on account bill in connivance with looking after AEN and contractor, which was not actually stacked at the time of recording measurements and has been shown as trained out although no permission was taken for training out the same from Sr. DEN/AEN this amounts to fictitious/false measurements and as such excess payment to contractor amounting to Rs. 48,972/- and corresponding loss to the Rlys.

Article 2

He knowingly and intentionally has recorded the false measurements of ballast for stack No. 101 measuring 145.4 cum in MB no. AGC/347 at Jajau Yard for which no supply measurements against 15th on account but as the matter came to the notice of regular AEN and higher officers, the stack was reconstructed. Thus, he made efforts to defraud the Rlys but for intervention of regular AEN, he could not succeed.

Article 3

He knowingly and intentionally measured the ballast lying at Jajau Yard in the contract of M/s. Mittal Associates even though the JJ Yard location was not, covered in the scope of work. This ballast was supplied by M/s. S. P. Associates and was rejected by the then regular AEN Shri B K Misra as it was not conforming to the specification of that contract. He moved a proposal for taking 800 cum ballast at JJ Yard in the contract of

M/s. Mittal Associates based on flimsy grounds.

Article 4

He knowingly and intentionally failed to record measurements for supply of ballast directly in the MB as stipulated in the Engineering Code para 1319, on 15.2.96. In fact, the relevant MB was available at Jhansi on 15.2.96 in connection with passing of the 14th on account bill and was brought to AGC at 2355 hrs. The statements given by S/Shri S C Saxena/CPWI(S), CD Sharma/AEN and J P Gupta/OS. Are confusing and incorrect. There was no other reason for the CPWI(S) not to record measurements directly in the MB as stipulated in the Engineering Code except for the reason that regular AEN resuming on 17.2.96 and CPWI(S) Shri Saxena would have not succeeded in his designs for accepting the rejected ballasting in JJ Yard and also for recording false measurements for stack No. 101 which was not available at the time of recording measurements.

By the above act of omission and commission, Shri S. C. Saxena, CPWI/AGC has failed to maintain absolute integrity, devotion to duty and acted in a manner of unbecoming of a Railway servant contravening Rule 3 (1)(i),(ii) and (iii) of Railway Service (Conduct) Rules, 1966.”

8. The articles framed against Mr.S.C.Saxena would show that he was alleged to have committed the misconduct in connivance with the petitioner. It is noted by us that in so far as Mr.S.C.Saxena is concerned, all the charges against him stood proved and the Disciplinary Authority imposed a major penalty on July 26, 2001. Considering his appeal, the Appellate Authority quashed the penalty imposed upon Mr.S.C.Saxena and remanded the case to Inquiry Officer for further enquiry. The Inquiry

Officer held as not proved the charges. The Disciplinary Authority did not agree with the Inquiry Officer. A Memorandum of Disagreement was issued to Mr.S.C.Saxena holding all the articles as proved. After considering his representation penalty was imposed on him by the Disciplinary Authority on October 20, 2004. This order was challenged by Mr.S.C.Saxena before the Appellate Authority which quashed the disciplinary proceedings from the stage of issue of Memorandum of Disagreement. On a fresh re-consideration, the Disciplinary Authority vide order dated August 22, 2006, again imposed a major penalty on Mr.S.C.Saxena of “Reduction to two stages below in the time scale of pay in his present grade of ₹7500-12000 for a period of six months with further directions that after expiry of this period, the reduction will not have the effect of postponing the future increments of his pay.” In his appeal Mr.S.C.Saxena had pointed out some procedural lapses against the said order. The appeal was considered by the Appellate Authority which quashed the proceedings again from the stage of imposition of penalty due to procedural lapse. Ultimately, the disciplinary proceedings against him were dropped by the Appellate Authority. The relevant order dated September 10, 2007 of the Appellate Authority in the case of Mr.S.C.Saxena reads as under:-

“In this case, the only Article of Charge held proved by the DA against the Appellant pertains to non-recording of measurement for 15th On Account Bill directly in MB on 15.2.96 violating provisions of Para 1319 of Engineering Code. Though it is an irregularity, it does not warrant imposition of a major register and the MB have been brought out. Major penalty imposed on the appellant in this case would affect his pension for life,

which is considered rather harsh.

In view of above, after considering the nature of irregularity committed by Shri Saxema, points raised by him in his appeal, mental sufferings endured by him during ten years of DAR proceedings and his superannuation on 31.7.2007, DAR proceedings against Shri S C Saxena, Retd. AXEN/Plg./Central Railway are dropped.”

9. Ms.Jyoti Singh, learned senior counsel for the petitioner would argue that the charges against both the officers i.e. petitioner and Mr.S.C.Saxena are identical and their acts of misconduct are in connivance with each other. Further she would submit that, the charges which have been proved against the petitioner would not stand as, identical charge(s) of connivance have not been proved against Mr.S.C.Saxena. She further states that if no variation between records on ballast passing register and the MB have been brought out against Mr.S.C.Saxena, the same would also hold in favour of the petitioner. She would further contend that the mental sufferings endured by Mr.S.C.Saxena during ten years of DAR proceedings would hold good in the case of petitioner as well and the petitioner had superannuated on June 30, 2007 one month before Mr.S.C.Saxena had retired i.e. on July 31, 2007. There is no reason why the petitioner should be treated differently from Mr.S.C.Saxena when the facts which are the subject matter of the article of charges against both of them are based on the same set of facts and no distinguishing features exist.

10. Ms. Jyoti Singh, learned senior counsel for the petitioner would rely upon the judgment of the Supreme Court in Man Singh v. State of Haryana, Civil Appeal No.3186/2008 decided on May 01, 2008, in support of her

contention that there should be no distinction in the matter of penalty of similar nature, wherein the Supreme Court has held as under:-

“18. In view of the factual backdrop and the above-stated statement of HC Vijay Pal, we are of the opinion that the respondents cannot be permitted to resort to selective treatment to the appellant and HC Vijay Pal, who was involved in criminal case besides departmental proceedings. HC Vijay Pal has been exonerated by the appellate authority mainly on the ground of his acquittal in the criminal case, whereas in departmental proceedings he has been found guilty by the disciplinary authority and was awarded punishment for serious misconduct committed by him as police personnel.

19. We may reiterate the settled position of law for the benefit of the administrative authorities that any act of the repository of power whether legislative or administrative or quasi-judicial is open to challenge if it is so arbitrary or unreasonable that no fair minded authority could ever have made it. The concept of equality as enshrined in Article 14 of the Constitution of India embraces the entire realm of State action. It would extend to an individual as well not only when he is discriminated against in the matter of exercise of right, but also in the matter of imposing liability upon him. Equal is to be treated equally even in the matter of executive or administrative action. As a matter of fact, the doctrine of equality is now turned as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a governmental action. The administrative action is to be just on the test of 'fair play' and reasonableness. We have, therefore, examined the case of the appellant in the light of the established doctrine of equality and fair play. The principle is the same, namely, that there should be no discrimination between the appellant and HC Vijay Pal as regards the criteria of punishment of similar nature in departmental

proceedings. The appellant and HC Vijay Pal were both similarly situated, in fact, HC Vijay Pal was the real culprit who, besides departmental proceedings, was an accused in the excise case filed against him by the Excise Staff of Andhra Pradesh for violating the Excise Prohibition Orders operating in the State. The appellate authority exonerated HC Vijay Pal mainly on the ground of his acquittal by the criminal court in the Excise case and after exoneration, he has been promoted to the higher post, whereas the appeal and the revision filed by the appellant against the order of punishment have been rejected on technical ground that he has not exercised proper and effective control over HC Vijay Pal at the time of commission of the Excise offence by him in the State of Andhra Pradesh. The order of the disciplinary authority would reveal that for the last about three decades the appellant has served the Police Department of Haryana in different capacity with unblemished record of service”.

11. On the other hand, Mr. R.L.Dhawan, appearing for the respondents would submit that there is a clear distinction in the case of the petitioner and Mr.S.C.Saxena on facts.

12. Having heard the learned counsel for the parties, we at the outset made a comparison between the charges framed against Mr.S.C.Saxena and the petitioner. As observed above, the Articles of alleged charge against the officers show that commission of misconduct is primarily in connivance with each other. Whatever has been held in favour of Mr.S.C.Saxena, in so far as merit of charges are concerned, must hold good in favour of the petitioner. In the case of petitioner the penalty imposed on the petitioner was 20% cut in his monthly pension for a period of five years. In a similar way petitioner faced the departmental enquiry for a

period of ten years inasmuch as the proceedings were initiated in the year 1997. It assumes importance to note that, if at all, the role of Mr.S.C.Saxena was deeper. It was he who had allegedly recorded false measurements in the Measurement Book. He had got the measurement effected. If at all, petitioner's lapse was lack of proper supervision; or at best the two acting in concert. Thus if Mr.S.C.Saxena was exonerated, the petitioner could not be treated differently.

13. On parity, in so far as penalty is concerned, the Supreme Court in the judgment reported as State of Uttar Pradesh and Ors. V. Raj Pal Singh, (2010) 5 SCC 783, dealing with identical facts where the charges levelled against the employees who were proceeded departmentally, as held, that it was not open for the Disciplinary Authority to impose different penalty for different delinquents. In para 5 of the said judgment the Supreme Court dealing with the submission that once the charges have been held to be established, it was not proper for the High Court to interfere with the quantum of penalty, has held as under:-

“Though, on principle the ratio in aforesaid cases would ordinarily apply, but in the case in hand, the High Court appears to have considered the nature of charges levelled against the five employees who stood charged on account of the incident that happened on the same day and then the High Court came to the conclusion that since the gravity of charges was the same, it was not open for the disciplinary authority to impose different punishments for different delinquents. The reasoning given by the High court cannot be faulted with since the State is not able to indicate as to any difference in the delinquency of these employees.”

The judgment of Supreme Court in Raj Pal Singh's case (supra) was

considered and distinguished by the Supreme Court in a later judgment which is reported as Administrator, Union Territory of Dadra and Nagar Haveli v. Gulabhia M.Lad, (2010) 5 SCC 775. In para 15 the Supreme Court has on facts has held as under:-

“15. In a matter of imposition of punishment where joint disciplinary enquiry is held against more than one delinquent, the same or similarity of charges is not decisive but many factors as noticed above may be vital in decision making. A single distinguishing feature in the nature of duties or degree of responsibility may make a difference insofar as award of punishment is concerned. To avoid multiplicity of proceedings and overlapping adducing of evidence, a joint enquiry may be conducted against all the delinquent officers but imposition of different punishment on proved charges may not be impermissible if the responsibilities and duties of the co-delinquents differ or where distinguishing features exist. In such a case, there would not be any question of selective or invidious discrimination.”

Further in para 21 the Supreme Court has by referring to and distinguishing Raj Pal Singh's case (supra) has opined as under:-

“21. Similarly, the decision of this Court in Raj Pal Singh has no application to the present case. It was found therein that the charges proved against the delinquents were same and identical. No dissimilarity was found and, therefore, it was held that it was not open for the disciplinary authority to impose different punishments for different delinquents.”

14. In the case in hand the charges framed against the petitioner and Mr.S.C.Saxena are based on same set of facts. The charges are that they in connivance with each other committed misconduct. If the connivance is

not proved then the charges against both the persons must fall. We see there are no dissimilarity in the case of the petitioner as well as Mr.S.C.Saxena. Further what is important is that the factors which weighed with the competent authority in the case of Mr.S.C.Saxena should have also weighed with the competent authority qua the petitioner. The petitioner has raised the issue of parity qua Mr.S.C.Saxena before the authority, who in its order dated August 12, 2009 on the issue of parity has stated that the cases of Mr.S.C.Saxena and Mr.C.D.Sharma, petitioner herein, are different, dropping DAR proceedings against Mr.S.C.Saxena cannot be the adequate reason for exonerating Mr.Sharma. Surprisingly, the Appellate Authority considers the factors like long duration of DAR proceedings and exoneration of co-accused as a mitigating factor for imposing the penalty of 20% cut in monthly pension of the petitioner for a period of five years. This we fail to understand as to how there would be construed as mitigating factors for imposing penalty, and not for dropping the charges against the petitioner. The same factors were taken by the competent authority for dropping the charges against Mr.S.C.Saxena and the same should have also weighed with the competent authority to drop the charges against the petitioner as well. Since no other factors like responsibility, duties have been taken into consideration by the authorities while imposing the penalty against the petitioner we see that the penalty imposed against the petitioner is discriminatory and the petitioner is entitled to parity qua Mr.S.C.Saxena. For these reasons we hold that, on facts, the judgment of the Supreme Court in the case of Raj Pal Singh's case (supra) is applicable and as such the penalty order dated August 12, 2009 is liable to be set aside. We do so. We set aside the order of the

Tribunal dated February 18, 2011 passed in OA No.242/2010. The petitioner shall be paid full pension on superannuation. The arrears of pension shall be paid to the petitioner within a period of two months from the receipt of copy of this order. If the arrears are not paid within two months then the payment thereafter would entail interest at the rate of 9% per annum.

15. The writ petition is allowed.

16. No costs.

(V.KAMESWAR RAO)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

MAY 01, 2013
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