

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

OP (CAT) .No. 117 of 2015 (Z)

(AGAINST THE ORDER/JUDGMENT IN OA 1149/2012 of CENTRAL
ADMINISTRATIVE TRIBUNAL,ERNAKULAM BENCH DATED 24-11-2012)

PETITIONERS:

1. UNION OF INDIA
REPRESENTED BY THE CHAIRMAN
RAILWAY BOARD & EX OFFICIO PRINCIPAL SECRETARY TO
GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS (RAILWAY BOARD), RAIL BHAVAN
NEW DELHI - 110 001.
2. GENERAL MANAGER
SOUTHERN RAILWAY, PARK TOWN, CHENNAI - 600 003
3. THE FINANCIAL ADVISER & CHIEF ACCOUNTS OFFICER
SOUTHERN RAILWAY, PARK TOWN, CHENNAI - 600 003.

BY ADV. SRI.C.S.DIAS,SC, RAILWAYS

RESPONDENTS:

1. P K KRISHNANKUTTY
S/O. SRI.KRISHNAN
RETD. SENIOR SECTION ENGINEER/WORKS
SOUTHERN RAILWAY, TRICHUR, NOW RESIDING AT ENRA C-39
ELANKATH NAGAR, VALIYAVILA, THIRUMALA P.O.
THIRUVANANTHAPURAM - 695 406.
2. UNION PUBLIC SERVICE COMMISSION
DHOLPUR HOUSE, SHAJAHAN ROAD, NEW DELHI - 110 069
REPRESENTED BY ITS SECRETARY.

R2 BY ADV. SRI.THOMAS MATHEW NELLIMOOTTIL,SC UPSC

THIS OP (CAT) HAVING COME UP FOR ADMISSION ON
16-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER(S) ' EXHIBITS

P1 - TRUE COPY OF THE OA NO. 1149/2012 DT. 24.11.12 FILED BY THE 1ST RESPONDENT BEFORE THE TRIBUNAL ALONG WITH THE ANNEXURES.

P2 - TRUE COPY OF THE REO;Y STATEMENT FILED BY THE PETITIONERS THROUGH ITS DEPUTY CHIEF PERSONNEL OFFICER DT. AUGUST, 2013 WITH ANNEXURES.

P3 - TRUE COPY OF THE REJOINDER FILED BY THE 1ST RESPONDENT DT. 13.9.13 BEFORE THE TRIBUNAL.

P4 - TRUE COPY OF THE FINAL ORDER DT. 15.9.14 PASSED BY THE TRIBUNAL IN OA NO. 1149/2012

P5 - TRUE COPY OF THE INTERIM ORDER DT. 02.7.13 IN S.L.P (CIVIL) NO. 17799/2013 PASSED BY THE HON'BLE SUPREME COURT OF INDIA.

RESPONDENT(S) ' EXHIBITS

/true copy/

P.S. TO JUDGE.

**P.R. RAMACHANDRA MENON
&
ANU SIVARAMAN, JJ.**

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O.P.(CAT)NO.117 OF 2015
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Dated this the 16th July, 2015

J U D G M E N T

P.R. Ramachandra Menon, J:

Whether a pre-decisional hearing is contemplated to be given to a retired employee in connection with 'deemed continuation' of disciplinary proceedings, before effecting any reduction of pension or gratuity invoking the power conferred upon the President of India under Rule 9 of the Railway Services (Pension)Rules, 1993, is the point requires to be answered in this Original Petition.

2. The case of the petitioners/Railways is that the departmental proceedings have been finalised against the first respondent, strictly in conformity with the relevant provisions of law. Opportunity was given to vindicate the stand in connection with the departmental enquiry, but since the first respondent subsequently retired from the service on attaining the age of

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superannuation, the proceedings were forwarded to the President along with all other relevant records, particularly the enquiry report and the disagreement recorded by the disciplinary authority. Based on the report submitted by the Central Vigilance Commissioner, the President sought to consult the UPSC , who in turn gave an advice that 20% of the pension be cut for a period of five years, instead of the suggested punishment of reduction of DCRG by 4% as proposed by the disciplinary authority. The order passed against the first respondent implementing the said advice given by the UPSC, by effecting necessary extent of cut in the pension, on challenge by the first respondent, has been interfered by the Tribunal, holding that an opportunity of hearing was necessarily to be given to the employee, after serving a copy of the advice given by the UPSC, before finalising the matter and implementing the decision. This is sought to be intercepted with reference to the law declared by the Apex Court as per the decision in **Union of**

India vs. T.V. Patel (2007) 4 SCC 785, which is stated as in support of the case of the Railways.

3. With regard to the factual position, it is to be noted that the first respondent herein, while working as Senior Section Engineer, Southern Railway, Trichur attained the age of superannuation on 30.09.2005. Just three days prior to the date of retirement, he was served with Annexure A1 charge sheet referring to some delinquency/misconduct on his part, in relation to the period '2001-2002'. The first respondent submitted Annexure -A2 reply. Being not satisfied with the reply, further steps were pursued, leading to departmental enquiry. Annexure A4(b) is the enquiry report . Copies of the relevant proceedings were served to the employee. It is stated that , as per the report of the Enquiry Officer, out of five charges, one alone was found true, which however was dissented by the disciplinary authority, based on some report stated as obtained from the Central Vigilance Commission, copy of which was never served to

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the employee,. Based on the said report of the Central Vigilance Commission, the disciplinary authority dissented from the findings of the enquiry officer and held that all the charges were proved and it was accordingly, that the proceedings were finalised leading to reduction of pension to an extent of 20% for five years, based on the advice given by the UPSC.

4. It has to be borne in mind that, though the proceedings were initiated just three days prior to the date of retirement in 2005, no proper and prompt steps were taken from the part of the Railways for about three years. As a matter of fact, the enquiry itself was ordered only in April 2007. The proceedings were sought to be finalised without further delay, by filing O.A.473/2010 , since the fate of first respondent was still to be decided. It was in furtherance to such steps, that the competent authority passed orders effecting reduction of pension as mentioned above. Being aggrieved of the impugned order, the first respondent approached the Tribunal by filing O.A. 1149 of

2012.

5. There is no dispute with regard to the factual position that no copy of the report of the Central Vigilance Commission was supplied to the first respondent before finalising the matter by the disciplinary authority, disagreeing with the findings of the enquiry officer nor was there any service of copy of the advice given by the UPSC before passing the impugned order of reduction of pension. Such a course was deprecated by the Apex Court as per the decision in **Union of India and others vs. S.K. Kapoor(2011)4 SCC 589** and it was accordingly, that the impugned order was set aside. The petitioners herein have been directed to serve a copy of the advice given by the UPSC to the applicant (first respondent herein) affording an opportunity of hearing and to have the matter finalised accordingly. Correctness and sustainability of the said finding is sought to be challenged in this Original Petition by the Railways.

6. The learned Standing Counsel appearing for the

petitioner submits that by virtue of amendment of the Constitution of India, particularly the 42nd amendment, no second opportunity is required to be given to the delinquent employee with regard to the punishment to be imposed and as such, there is no necessity to serve a copy of the advice given by the UPSC before inflicting the punishment involving deduction of pension. Reference is also made to the relevant rules, particularly Rule 9 of the Railway Services(Pension) Rules (hereinafter referred to as 'Pension Rules') besides referring to Rules 6,12 and 28 **of the Railway Servants (Discipline & Appeal) Rules, 1968 (hereinafter referred to as Discipline Rules)**

7. The learned Standing Counsel points out that the Apex Court, as per the decision in **Union of India vs. T.V. Patel (2007) 4 SCC 785,** has held that no copy of the advice tendered by the UPSC requires to be given before imposing penalty. This aspect was not properly considered by the Tribunal

and as such, Ext.P4 verdict requires to be interfered, submits the learned Counsel. In support of the contention as above, reliance is sought to be placed on the observation made by the Apex Court (Larger Bench) in **(Managing Director, ECIL vs. B. Karunakar (AIR 1994 SC 1074))**, particularly, paragraph '7' of the said verdict. According to the learned Counsel, it is not at all necessary to afford a second opportunity of hearing and as such, the course now ordered to be pursued (as per Ext.P4 order passed by the CAT), to serve a copy of the advice and to finalise the proceedings after affording an opportunity of hearing, is only a futile exercise, which is not contemplated or supported by any provisions of law. **Rule 12 of the Discipline Rules** also says that a copy of the relevant proceedings is to be served upon the employee concerned 'along with' the order to be passed by the disciplinary authority. Same is the position when it comes to **Rule 28 of the Discipline Rules** and since the field is covered by specific rules, the scope of the same

cannot be watered down by the Tribunal by extending the principles of natural justice, beyond the logical limits, submits the learned Standing Counsel.

8. We have gone through the entire proceedings, the relevant rules and the precedents as above. Before proceeding with the merits of the case, it will be better to go through the relevant provisions of law. The rule, based on which pension is sought to be deducted, is Rule 9 of the Pension Rules, which reads as follows:

9. Right of the President to withhold or withdraw pension.

(1) The President reserves to himself the right of withholding or withdrawing a pension or gratuity, or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Railway, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement;

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Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of ***rupees three thousand five hundred*** per mensem. **(Authority: Railway Boards letter No. 2011/F (E) III/1(1)9 dated 23.09.13)**

(2) The departmental proceedings referred to in sub-rule (1) - (a) if instituted while the railway servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the railway servant, be deemed to be proceeding under this rule and shall be continued and concluded by the authority by which they commenced in the same manner as if the railway servant had continued in service.

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President;

(b) if not instituted while the railway servant was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with the sanction of the President;

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(ii) shall not be in respect of any event which took place more than four years before such institution; and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which and order in relation to the railway servant during his service.

(3) In the case of a railway servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule **10** shall be sanctioned. **(Authority: Railway Boards letter No. F(E)III/99/PN 1/38 (Modification) dated 23.5.2000**

(4) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a railway servant.

(5) For the purpose of this rule -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or

pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognisance, is made; and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.”

9. There is no dispute to the fact that disciplinary proceedings were initiated against the first respondent, of course prior to the retirement from the service. Once the employee retired from the service, the disciplinary proceedings could be continued, by virtue of deeming fiction, for the limited purpose as contemplated under the relevant rules, that is to say, steps for recovery of loss if any or for the purpose of recovery from the gratuity or deduction of pension, to appropriate extent as permissible. With regard to delinquency/misconduct of an employee, it is necessary to comply with the procedural

formalities by way of a domestic enquiry and only on arriving at the guilt of the employee, after affording an opportunity of hearing, that the punishment can be imposed. Punishment may be a minor penalty or a major penalty. The relevant rule dealing with penalty is **Rule 6 of the Discipline Rules**, which (relevant to the extent /as applicable herein) is extracted below:

"6. **Penalties** : The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on a Railway servant, namely:-

Minor Penalties -

- (i) Censure;
- (ii) Withholding of his promotion for a specified period;
- (iii) Recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government or Railway Administration by negligence or breach of orders;
- (iii-a) Withholding of the Privilege Passes or Privilege Ticket Orders or both;
- (iii-b) Reduction to a lower stage in the time scale of pay by one stage for a period not exceeding three years, without cumulative effect and not adversely affecting his pension;
- (iv) Withholding of increments of pay for a specified period with further directions as to whether on the expiry of such period this will or will not have the effect of postponing the future increments of his pay;

Major Penalties -

(v) Save as provided for in clause (iii-b) reduction to a lower stage in the time-scale of pay for a specified period, with further directions as to whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(vi) Reduction to a lower time scale of pay, grade, post, or service, with or without further directions regarding conditions of restoration to the grade or post or service from which the Railway servant was reduced and his seniority and pay on such restoration to that grade, post or service;

(vii) Compulsory retirement;

(viii) Removal from service which shall not be a disqualification for future employment under the Government or Railway Administration;

(ix) Dismissal from service which shall ordinarily be a disqualification for future employment under the Government or Railway Administration:

Provided that in cases of persons found guilty of any act or omission which resulted or would have, ordinarily, resulted in collision of Railway trains, one of the penalties specified in clauses (viii) and (ix) shall, ordinarily, be imposed and in cases of passing Railway signals at danger, one of the penalties specified in clauses (v) to (ix) shall, ordinarily be imposed and where such penalty is not imposed, the reasons therefor shall be recorded in writing:

Provided further that in case of persons found guilty of possessing assets disproportionate to known sources of income or found guilty of having accepted or having obtained from any person any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, one of the penalties specified in clauses (viii) or (ix) shall ordinarily be imposed and where such penalty is not imposed, the reasons therefor shall be recorded in writing.

Explanation - The following shall not amount to a

penalty within the meaning of this rule, namely:-

(i) withholding of increments of pay of a Railway servant for failure to pass any departmental examination in accordance with the rules or orders governing the Service to which he belongs or post which he holds or the terms of his appointment;

(ii) stoppage of a Railway servant at the efficiency bar in the time-scale of pay on the ground of his unfitness to cross the bar;

(iii) non-promotion of a Railway servant, whether in a substantive or officiating capacity, after consideration of his case, to a Service, grade or post for promotion to which he is eligible;

(iv) reversion of a Railway servant officiating in higher Service, grade or post to a lower Service, grade or post, on the ground that he is considered to be unsuitable for such higher Service, grade or post, or on any administrative ground unconnected with his conduct;

(v) reversion of a Railway servant, appointed on probation to any other Service, grade or post, to his permanent Service, grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing such probation;

(vi) replacement of the services of a Railway servant, whose services had been borrowed from any other Ministry or Department of the Central Government or a State Government or an authority under the control of the Central Government or State Government, at the disposal of the Government or the authority from which the services of such Railway servant had been borrowed;

(vii) compulsory retirement of a Railway servant in accordance with the provisions relating to his superannuation or retirement;

(viii) termination of the services -

(a) of a Railway servant appointed on probation, during or at the end of the period of his probation,

in accordance with the terms of his appointment or the rules and orders governing such probation, or
(b) of a temporary Railway servant in accordance with rule 301 contained in Volume I of the Indian Railway Establishment Code (Fifth Edition -1985), or
(c) of a Railway servant employed under an agreement, in accordance with the terms of such agreement;
(ix) discharge of Railway servants -
(a) for inefficiency due to failure to conform to the requisite standard of physical fitness;
(b) on reduction of establishment..”

10. It is to be noted that reduction of pension or DCRG is not at all a punishment mentioned in Rule 6 of the Discipline Rules and it stands on a different pedestal, by virtue of separate provision for reduction of pension as envisaged under Rule 9 of the Pension Rules. The course to be pursued, if at all any reduction of pension is to be effected, is to be with reference to the mandate of Rule 9 of the Pension Rules. Pursuant to the retirement of an employee from service, the employer-employee relationship is cut off for ever, and no punishment prescribed under the relevant rules can be imposed upon the employee in respect of a misconduct , even if the same is proved in the

enquiry; except to the extent it is permissible to be proceeded against for the specific purpose as mentioned above. This is the law declared by the Apex Court as per the judgments rendered at different points of time. By virtue of the legal position as above, even if the finding of the disciplinary authority disagreeing with the finding of the enquiry officer could be held to be sustainable, no penalty prescribed under Rule 6 of the Discipline Rules could have been inflicted upon the first respondent under any circumstance .

11. The next question to be considered is whether the pension ordered to be deducted is a 'punishment' by itself, to be pursued, taking a different course than the course to be pursued with reference to imposition of punishment for the penalties stipulated under Rule 6 of the Discipline Rules. The circumstances leading to deduction of pension may have the effect of a punishment, traceable to the cause of action involving misconduct, resulting in loss or otherwise. But this is a

circumstance which requires to be dealt with separately by virtue of the scheme of the relevant rules. The authority to take a decision under such circumstance happens to be the President, of course in consultation with the UPSC as prescribed under the Rules. Before arriving at a decision by the competent authority, the material, based on which such a decision is to be taken, has necessarily to be given to the person who might be aggrieved of such decision, so as to enable the party to explain the position, if at all any mistake, (either on facts or law), is involved with reference to the material sought to be relied on. This aspect comes within the fundamental principles of natural justice, if it is not separately covered by the Rules.

12. It is true that the scope of Article 320 (3)(C) of the Constitution of India was considered by the Apex Court in the decision in **Union of India vs. T.V. Patel [(2007) 4 SCC 785]**. Reference is also made to a Constitution Bench decision rendered in **State of U.P. vs. Manbodhan Lal Srivasgava**

(AIR 1957 SC 912), whereby the nature of the provisions, as to whether it was mandatory or not, was subjected to analysis. The case considered by the Apex Court in **AIR 1957 SC 912** (*cited supra*), was in respect of the delinquency on the part of the employee who was serving the department, against whom proceedings were taken. He was a serving employee and after completion of enquiry, the disciplinary authority disagreed with the finding in the enquiry report and issued a notice to the employee calling for objections, if any. It was thereafter that an advice was sought for from the UPSC and after considering the advice of the UPSC, penalty of reduction of pay by one stage in the time scale of pay, till the particular date mentioned therein, without cumulative effect, was ordered and a copy of the advice obtained from the UPSC was also sent along with the final order imposing penalty. The position considered by the Apex Court was not with reference to the scope of 'Rule 9' of the Pension rules as involved herein or with reference to similar

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provision contained in Central Civil Services (Classification, Control and Appeal) Rules (in short CCS (CCA) rules). This is more evident from the observation contained in paragraph 13 of the verdict, wherein reference is made to Rule 15(3) of CCS (CCA) Rules, as to the right of the disciplinary authority to proceed with further steps to impose penalties, specified in sub clauses (1) to (4) of Rule 11 and the proviso stipulating consultation with the Commission, if necessary. Supply of copy of Commission's advice as provided under Rule 32 was also referred to in paragraph 14. It was thereafter that the scope of advice to be tendered by the PSC with reference to their power under Article 320 -3C was discussed and held, based on the decision rendered by the Constitution Bench of the Apex Court in Sri Vastava's case (cited supra), that consultation itself was not mandatory and that non-service of copy of the advice tendered by the UPSC, if any such advice is given, does not afford him a cause of action in a court of law. The aforesaid

judgment by itself cannot come to the rescue of the petitioners herein, by virtue of the difference in the facts and circumstances. That apart, the said decision came to be considered by a Co-ordinate Bench of the Apex Court in **Union of India and others vs. S.K. Kapoor [(2011)4 SCC 589]**. After detailed discussion, the Apex Court held that the verdict passed by the earlier Bench in **2007(4) SCC 785 (cited supra)** was without reference to the judgment rendered by another Co-ordinate Bench, rendered earlier in **S.N. Narula vs. Union of India** and hence it was declared as 'per incurium'. The decision in **S.N. Narula vs. Union of India** was also caused to be reported in **[(2011) 4 SCC 591]** finding that the same was not reported earlier. The Bench observed that no material could be relied on against an employee, in the course of departmental enquiry, if copy of same was not served to the employee concerned and an opportunity was given to explain the position with reference to the contents, failing which it would amount to

violation of principles of natural justice. Even if there was no reference in the judgment reported in **Union of India and others vs. S.K. Kapoor [(2011)4 SCC 589]**, to the earlier judgment rendered by the Co-ordinate Bench, reported in **2007 (4) SCC 785 (cited supra)**, by virtue of the legal position made clear by the Apex Court, the subsequent decision shall prevail, to be the binding precedent. But in **2011(4) SCC 589**, as mentioned already, the earlier decision was specifically referred to and observed that the said verdict was passed without quoting the still earlier verdict in **S.N. Narula's case** and hence it was 'per incurium'. This being the position, the law as it stands today is that, non-service of copy of the relevant proceedings, which made the disciplinary authority to take a difference view from that of the enquiry officer, is sufficient enough to intercept the proceedings. This has been rightly done by the Tribunal by passing Ext.P4 order, whereby the proceedings have not been declared as illegal in toto, but for making it obligatory for the

petitioners to serve a copy of the advice of the UPSC, call for objections, if any and proceed from that stage, to have the proceedings finalised. We do not find any infirmity or illegality in the direction given by the Tribunal .

13. Before parting with the case, it is also necessary to consider the scope of 42nd amendment to the Constitution of India and the way in which the alleged violation of principles of natural justice was subjected to analysis by the Apex Court as per the decision rendered by the Larger Bench in **AIR 1994 SC 1074 (Managing Director, ECIL vs. B. Karunakar)**. Non service of copy of the enquiry report was declared as fatal for the first time by the Apex Court, as per the decision in **Union of India vs. Mohd. Ramzan Khan (AIR 1991 SC 471)**. The effect was considered further by a larger Bench in **(Managing Director, ECIL vs. B. Karunakar (AIR 1994 SC 1074))**, whereby it was held that non service of copy of the enquiry report will definitely

involve violation of principles of natural justice, but that by itself will not vitiate the entire proceedings and that the proceedings could be pursued after rectifying the defect, on establishing prejudice by the delinquent employee, because of non service of the enquiry report .

14. The matter requires to be considered because of strong reliance sought to be placed by the learned Standing Counsel for the petitioners, as to the position which was existing prior to the amendment and the position that is available after the amendment of the Constitution of India; of course in the light of the Larger Bench decision of the Apex Court as mentioned already. Earlier, by virtue of Article 311 (2) of the Constitution, it was very much obligatory for the Government to have given a second opportunity even after arriving at the guilt, to offer remarks with regard to the punishment proposed to be imposed. By virtue of the 42nd amendment, the said provision was deleted. By virtue of deletion as above, it came to be wrongly understood

by many, that no opportunity needs to be given to the employee by serving a copy of the enquiry report, which in turn was accordingly considered by the Apex Court. The discussions as contained in paragraph 7 of the verdict in **Managing Director, ECIL vs. B. Karunakar (AIR 1994 SC 1074)**, to the extent it is relevant, are extracted below:

"7.. What emerges from the above survey of the law on the subject is as follows:

Since the Government of India Act, 1935 till the 42nd Amendment of the Constitution, the Government servant had always the right to receive report of the Inquiry Officer/authority and to represent against the findings recorded in it when the Inquiry Officer/authority was not the disciplinary authority. This right was however, exercisable by him at the second stage of the disciplinary proceedings viz., when he was served with a notice to show cause against the proposed penalty. The issuance of the notice to show cause against the penalty necessarily required the furnishing of a copy of the inquiry Officer's report since, as held by the Courts, the right to show cause against the penalty also implied the right to

represent against the findings on the charges. This was considered to be an essential part of the reasonable opportunity, incorporated earlier in Section 240 (3) of the GOI Act and later in Article 311(2) of the Constitution as originally enacted. The right to receive the Inquiry Officer's report and to show cause against the findings in the report was independent of the right to show cause against the penalty proposed. The two rights came to be confused with each other because as the law stood prior to the 42nd Amendment of the Constitution, the two rights arose simultaneously only at the stage when a notice to show cause against the proposed penalty was issued. If the disciplinary authority after considering the Inquiry Officer's report had dropped the proceedings or had decided to impose a penalty other than that of dismissal, removal or reduction in rank, there was no occasion for issuance of the notice to show cause against the proposed penalty. In that case, the employee had neither the right to receive the report and represent against the finding of guilt nor the right to show cause against the proposed penalty. The right to receive the report and to represent against the findings recorded in it was thus inextricably connected with the acceptance of the report by the disciplinary authority and the

nature of the penalty proposed. Since the 42nd Amendment of the Constitution dispensed with the issuance of the notice to show cause against the penalty proposed even if it was dismissal, removal or reduction in rank, some courts took the view that the Government servant was deprived of his right to represent against the findings of guilt as well. The error occurred on account of the failure to distinguish the two rights which were independent of each other.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report. the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment.

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The position in law can also be looked at from a slightly different angle. Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry Officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. What is further, when the proviso to the said Article states that "where it is proposed after such inquiry to impose upon him any such penalty such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed", it in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary authority (the Inquiry Officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the Inquiry Officer's report and consideration of such reply by the disciplinary authority also constitute an integral

part of such inquiry. The second stage follows the inquiry so carried out and it consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the Inquiry Officer. The latter right was always there. But before the 42nd Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the 42nd Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry Officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges.

Hence it has to be held that when the Inquiry Officer is not the disciplinary authority, the

delinquent employee has right to receive a copy of the inquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

15. From the above, it is very much evident that non service of copy of the enquiry report to the delinquent employee would give rise to a cause of action as to the violation of principles of natural justice. It stands declared that the delinquent employee is entitled to get a copy of the enquiry report before the disciplinary authority takes a decision regarding his innocence, and that copy has to be served to the employee even if the statutory rules are silent or against him.

The Apex Court further made it clear that the said position will apply to employees in all establishments whether, Government, non-Government, public or private. It was also made clear that the decision rendered by the Apex Court in **Union of India vs. Mohd. Ramzan Khan (AIR 1991 SC 471)** could have only prospective application, i.e.. w.e.f. 20.11.1990 and that the relief granted to the petitioner in the said case , i.e. Mohd. Ramzan Khan and his companions, because of non service of a copy of the enquiry report, was held as 'per incurium'. The said decision rendered by majority still holds good.

16. The crux of the legal position that emerges from the said decision is that, even though second opportunity to explain the position with regard to the 'proposed punishment' has been taken away by virtue of the 42nd amendment of the Constitution of India, the necessity to serve a copy of the enquiry report to prove innocence of the delinquent employee by making submissions against the contents of the enquiry report,

before a decision is taken by the disciplinary authority, still stands. The said dictum is equally applicable in respect of a proceeding stipulating for 'reduction of pension or cut off gratuity' as envisaged under Rule 9 of the Discipline Rules, as it has got far reaching consequences, in so far as the rights and interests of the delinquent employee are concerned. In the instant case itself, the finding of the enquiry officer was more in favour of the first respondent/employee, except on 'one' charge, which however was dissented by the disciplinary authority, based on the report of the 'CVC', copy of which was admittedly not given to the first respondent. Still further, the UPSC, pursuant to the consultation ordered by the President, gave an advice to deduct 20% of pension for 'five' years, which was not even suggested by the disciplinary authority. The appellant has every right to contend that the facts or legal position do not warrant any such inference in view of the available materials on record and to say, why the advice given

by the UPSC cannot be accepted. This process has not taken place, as no opportunity was given to the first respondent before passing the order.

17. In the above circumstance, this Court finds that the verdict passed by the Tribunal vide Ext.P4 is within the four walls of law and does not call for any interference. The Original Petition is devoid of any merit and it is dismissed.

**P.R. RAMACHANDRA MENON,
JUDGE.**

**ANU SIVARAMAN,
JUDGE.**