

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 20961 of 2004

Md. Y.Menon
Vs.
Union of India & Ors.

For the petitioner : Ms. Shraboni Sarkar

For the respondents : Mr. S.N.Dutta

Heard on : 4.11.2022, 06.12.2022, 16.12.2022, 17.01.2023

Judgment on : 10.02.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging the order of suspension dated 7th June 2002 and the charge sheet dated 13th September, 2004.
2. Records reveal that the petitioner, while employed with the Railway Protection Force (RPF), was issued an order of suspension dated 5th May, 1985. Subsequently, on 7th May, 1985, on the basis of a confidential report submitted by the Officer-in-Charge RPF post Shadol, the disciplinary authority of the petitioner was, *inter alia*, pleased to direct removal of the petitioner from service in terms of Rule 47(b) of the Railway

Protection Force Rules, 1959. Although a statutory appeal was filed, the same was rejected by order dated 10th May, 1996.

3. Challenging the aforesaid order of removal from service and the appellate order dated 10th May, 1996, a writ application was filed which was registered as CO. 10141 (W) of 1996. By judgment and order dated 12th September 2001, this Hon'ble Court while taking note of the factum of the removal from service without holding a regular enquiry, was, *inter alia*, pleased to quash the order of removal from service as also the appellate order.
4. Records further reveal that by order dated 7th June 2002, the respondents simultaneously, while reinstating the petitioner in service pursuant to the order passed in CO. 10141 (W) of 1996, put the petitioner under suspension and initiated a fresh enquiry on the self-same cause of action, wherein, it was, *inter alia*, recorded as follows:-

“Md. Y. Memon, Ex. Rakshak-8505 of Bilaspur division who was removed from service w.e.f. 7.5.85 A.N. vide S.O./RPF/Bilaspur's D.O. No. 210/85 dated 7.5.85, is hereby re-instated in service in pursuance of the order dated 12.9.2001 of the Hon'ble High Court, Calcutta, in C.O.No.10401 (W) of 1996, quashing the impugned order of removal from service.

However, a fresh disciplinary proceeding shall be started against Sri Memon on the self-same allegations and a regular departmental enquiry be held in the light of the aforesaid court's order dated

12.9.2001, which shall be completed expeditiously in accordance with law.

As the penalty of removal from service was imposed upon Sri Memon (Petitioner) while under suspension and the said penalty has been quashed by the Hon'ble Court on technical grounds, the order of his suspension is deemed to have continued in force on and from the date of such removal and shall remain in force until further orders as per RPF-Rules, 1987.

The above suspension period will be decided on finalisation of the fresh disciplinary proceeding."

5. Subsequently a charge-sheet dated 13th September, 2004 was served on the petitioner. The Article of charge as served on the petitioner is setout herein under:

"Article of the Charge.

Constable 8505 Md. Y.Memon of RPF Post SDL now attached at Train Escorting Company, Bilaspur for daily attendance is charged for serious misconduct in that he committed theft of 25 packages containing ceiling fans and parts booked under Railway mark HWH 360/386/BSPR loaded in wagon No. WR30370 ex. Shahdol to Manendragarh, in Shahdol Y and during the night of 16/17.04.85 in connivance with Sr. RSK 5599 B. Bhagat and Constable 2532 A.K.Bhakta, with intention to dispose of the same unlawfully and by manipulating lac seal.

His above act tantamount to violation of Rule 146.4 and 146.7(iii) of RPF Rule 1987, which renders him liable for disciplinary action."

6. Challenging the aforesaid order of suspension and the charge sheet dated 7th June 2002, the present writ application has been filed.
7. At the time of admission of the present writ application, this Hon'ble Court by order dated 18th February 2005, while affording liberty to the respondents to continue with the disciplinary proceedings by keeping the point of maintainability of the charge sheet open, directed the respondents to allow the petitioner to join the duty and to pay the entire salary of the petitioner which had fallen due. The operative portion of the order dated 18th February 2005 passed by this Court is extracted herein below:

“In that view of the matter, I direct the parties to file affidavit.

An affidavit-in-opposition be filed by the respondent within two weeks from date, reply thereto, if any two weeks thereafter.

Let the matter appear in the list under the heading “Hearing” marked as ‘Heard-in-part’ 8 (eight) weeks hence.

In the meantime the order of suspension being dated 7-6-02 being Annexure P-6 is stayed until further order.

The respondent authorities will allow the petitioner to join the duty and the respondent authority will pay the entire salary of the petitioner which has fallen due till date within a period of 6 (six) weeks from date. The respondent authorities will go on paying the salary month by month.

The respondent authorities are at liberty to continue with the proceedings and the petitioner will be at liberty to take the point of maintainability of the charge-sheet during the enquiry proceedings or thereafter if the situation so arises the petitioner is given liberty to pray before this Court for appropriate order and or further order.”

8. Despite direction passed this Court, the respondents chose not to file any affidavit-in-opposition to the present writ application.
9. It is also the petitioner's case that although a criminal proceeding was started against the petitioner before the Learned Judicial Magistrate, Raipur in Criminal Case No. 2291 of 1995 in respect of the selfsame charges, the learned Special Railway Magistrate, Raipur by a judgment and order dated 1st March, 1995 had acquitted the petitioner from the charges.
10. It is also the petitioner's case that from time to time, the petitioner had made several representations before the respondents including the Ministry of Railways for reconsideration of the petitioner case, however, the same did not yield any result.
11. Since then when the matter came up for final disposal, on 14th November 2022, it was represented on behalf of the petitioner that the petitioner during pendency of the writ petition had reached the age of superannuation on 31st December, 2016. Despite order dated 18th February, 2005, neither did the

respondents permit the petitioner to join the duty nor have they disbursed any salary in his favour. It is at that stage that the learned advocate representing the respondents had sought for an extension of time to file affidavit-in-opposition. Since the matter pertained to the year 2004, this Court refused such prayer, however, permitted the respondents to produce the records of this case.

12. Since then, the respondents have produced the records of this case, wherefrom it would appear that after completion of the enquiry, in connection with the charge-sheet dated 13th September, 2004 the enquiry officer had filed a report which was addressed to the disciplinary authority and in such report, the enquiry officer found that the petitioner was not guilty of the charges leveled against him. A copy of such report was also forwarded to the petitioner by cover of letter dated 8th August, 2005. The relevant excerpt of the aforesaid letter is reproduced herein below:

“Sub:- *Filings of the Enquiry Officer against you in connection with the proceeding case No. RPF/DA/R-153/08-04/6598 dated 13.09.04.*

.....

FINDINGS

As per the evidences on record collected during departmental enquiry, going through depth and detail the depositions of PWs, oral and defence statement,

the allegation against Sri. Md Y.Memon, C/1505 is not proved beyond reasonable doubts. Hence I hold the member charged not guilty of the charges levelled against him”

13. Records would reveal that the disciplinary authority, however, by an order dated 16th February, 2006 having held the petitioner guilty of the charges levelled against him, had inflicted a punishment of removal of service.
14. Since the learned advocate representing the petitioner claimed that the aforesaid order of removal had not been served on the petitioner and since the advocate for the respondents could not identify the document by which service of such order of removal had been effected on the petitioner, this Court by order dated 16th December, 2022 directed the respondents’ advocate to cause service of order of removal dated 16th February, 2006 on the petitioner’s advocate. Further since it was also not clear, whether the respondents had in compliance of the order dated 18th February, 2005, disbursed the salary of the petitioner, this Court had by order dated 6th December, 2022 had also directed the respondents to file an affidavit disclosing details of payments made to the petitioner pursuant to order dated 18th February, 2005.
15. Pursuant to the leave granted by this Court, copies of the aforesaid records including the order of removal dated 16th February, 2006 had been made over by the learned advocate

representing the respondents to the learned advocate representing the writ petitioner and the respondent no.4 had also filed an affidavit in compliance of the order dated 6th December 2022. In the said affidavit, the respondents had also disclosed the operative part of the final order of punishment passed against the petitioner.

16. The petitioner has since filed a supplementary affidavit, captioned as an exception to the affidavit filed by the respondent no. 4 to bring on record subsequent events, subsequent to filing of the writ application. In such affidavit, in paragraph 4 sub-para (q), the petitioner has, *inter alia*, challenged the final order passed by the disciplinary authority.
17. Ms. Sarkar, learned advocate representing the petitioner submits that perusal of the records and the final order dated 16th February, 2006 passed by the disciplinary authority would reveal that the same has been passed contrary to the provisions of the Railway Protection Force Act, 1957 (hereinafter the “said Act”) and the Rules framed thereunder.
18. She says that the enquiry officer had held the petitioner not guilty of the charges. As such, when the disciplinary authority had disagreed with the findings rendered by the enquiry officer, an obligation was cast on the enquiry officer to not only record his note of dissent and his tentative findings thereon, but also to issue a show cause notice on the petitioner, for the petitioner to

explain the reasons as to why he should not be held guilty of the charges leveled against him.

19. In the instant case, there has been violation of the principles of natural justice. The disciplinary authority without bothering to issue a show cause notice on the petitioner, had passed the final order of punishment, while disagreeing with the findings of the enquiry officer.
20. She says that in any event, the disciplinary proceeding was initiated in the year 1985, the same could not have been restarted in the year 2004. No leave was granted by this Court, by its order dated 12th September 2001 to proceed against the petitioner afresh.
21. She says that the enquiry proceeding including the final order of dismissal stands vitiated and the final order of dismissal cannot be sustained.
22. *Per contra*, Mr. Dutta, learned advocate representing the respondents submits that the original disciplinary proceeding which culminated in an order of removal dated 7th May 1985 was set aside on technical grounds. By referring to Rule 138 of the Railway Protection Force Rules 1987, (hereinafter referred to as the said Rules), it is submitted that where a penalty of removal from service is set aside by a decision of the Court on technical grounds, the said Rule, recognizes the right of the disciplinary authority to proceed afresh on the self-same cause of action.

23. He says that there is no irregularity on the part of the respondents in proceeding afresh in this matter. He says that the petitioner had been charged of theft. Subsequently, a fresh charge-sheet had been served on the petitioner. This Hon'ble Court while entertaining the present writ application, also did not interfere with the enquiry proceedings and by an order dated 18th February, 2005, granted liberty to the respondents to proceed with the enquiry so as to bring the same to a logical conclusion by removing the petitioner from service. He says that the petitioner was supplied with the copy of the enquiry report and the final order of removal from service.

24. By placing reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***Ajit Kumar Nag vs. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia & Ors.***, reported in **(2005) 7 SCC 764**, he says that merely because the writ petitioner had been acquitted in a criminal proceeding, the same does not preclude the respondents from proceeding further with the enquiry. He also says that the Hon'ble Supreme Court in paragraph 44 of the aforesaid judgment, in no uncertain terms has held that the principles of natural justice are not rigid and cannot be imprisoned in a straitjacket formula.

25. He says that there has been no challenge to the final order of the removal passed in the disciplinary proceedings. He says that there is an appellate authority and if the petitioner is interested

to challenge the final order, the petitioner may do so by filing an appeal before the appellate authority. Without filing of an appeal, no challenge to such order can be entertained by this Court. He further submits that the Hon'ble Court by its order dated 18th February, 2005 had categorically directed the respondents to pay the entire salary of the petitioner. There was no direction to make payment of any other allowances.

26. According to Mr. Dutta, the entire salary could only mean and include subsistence allowance, since the petitioner was already under suspension and as such the respondents have already complied with such direction and had been paying subsistence allowance till such time the petitioner was removed from service. He says that the present writ application is only confined to the challenge of charge-sheet and the order of suspension and the same should be dismissed with costs.

27. I have heard the learned advocates appearing for the respective parties and have considered the materials on record. I find that the present proceedings started with an order of suspension dated 5th May, 1985 and culminated into the order of removal from service dated 7th July, 1985 without holding any enquiry. Admittedly, such order of removal was quashed by this Hon'ble Court by its order dated 12th September, 2001. The respondents appear to have complied with the direction, though belatedly and had reinstated the petitioner in service by their office order dated

7th June, 2002. It also appears from the aforesaid order that simultaneously, while reinstating the petitioner, the respondents had put the petitioner under suspension. Subsequently, a charge-sheet dated 13th September, 2004 has been issued. Challenging the order of suspension, initiation of enquiry proceedings by issuing the charge-sheet dated 13th September, 2004, the present writ application has been filed.

28. Although it has been argued by Ms. Sarkar that the respondents, without any specific leave from this Court, could not have proceeded to initiate the disciplinary proceedings on the selfsame cause of action based on which the previous order of removal from service was passed, I am unable to accept such contention of Ms. Sarkar. As rightly pointed out by Mr. Dutta, that the aforesaid order of removal from service was quashed by an order dated 12th September, 2001, *inter alia*, on the ground that the same was passed without holding any enquiry. It is, thus, well within the jurisdiction of the Discipline Authority, in terms of Rule 138 of the said Rules to initiate and proceed with the disciplinary proceedings afresh. In this context Rule 138 of the said Rules is extracted herein below:-

“138. Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a member of the Force is set aside or declared or rendered void in consequence of or by a decision of a court and disciplinary authority on consideration of the

circumstance of the case, decides to hold a further inquiry against him on the allegations on which the punishment of dismissal, removal or compulsory punishment was originally imposed, the member of the Force shall be deemed to have been placed under suspension by the competent authority from the date of original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders:

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation which the court has passed an order purely on technical grounds without going into the merit of the case.”

As such, there cannot be any doubt that the respondents had the jurisdiction and authority to proceed against the petitioner afresh.

29. The next question, that falls for consideration in the present writ application, is whether the disciplinary authority could have disagreed with the findings of the enquiry officer and if so, was there may requirement to issue further show-cause. Mr. Dutta, learned advocate representing the respondents has strenuously argued that the disciplinary authority may disagree with the findings of the enquiry officer. The disciplinary authority is also entitled to inflict a major penalty and while imposing to such penalty, it is not necessary for the disciplinary authority to give the party charged any opportunity to make representation on the punishment proposed or to be imposed. To substantiate the

aforesaid argument, he has placed reliance on Rule 154.7 of the said Rules which is extracted herein below:

“154.7 If the disciplinary authority, having regard to its findings on all or any of the articles of charge and on the basis of evidence on record, is of the opinion that any of the major punishments should be imposed on the party charged, it shall make an order imposing such punishment and it shall not be necessary to give to the party charged any opportunity of making representation on the punishment proposed to be imposed.”

30. However, I find that Rule 154 and its various sub-Rules, deals with the action on enquiry report. It is Rule 154.5 and not 154.7 of the said Rules, which *inter alia* gives the authority and jurisdiction to the disciplinary authority to disagree with the findings of the enquiry officer. Rule 154.5 is also extracted herein below:-

“154.5 The disciplinary authority shall, if it disagree with the findings of the Inquiry Officer on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose”.

31. From the aforesaid, it would appear that in the event, the disciplinary authority disagrees with the findings of the enquiry officer with any article of charge, it is mandatory for him to record reasons for such disagreement and to record his own findings on such charge.

32. I find that the Hon'ble Supreme Court in the judgment delivered in the case of ***Lav Nigam v. Chariman & Md. ITI Ltd. & Another.***, reported in **(2006) 9 SCC 440**, while considering an identical issue had inter alia observed as follows:

“10. The conclusion of the High Court was contrary to the consistent view taken by this Court that incase the disciplinary authority differs with the view taken by the inquiry officer, he is bound to give a notice setting out his tentative conclusions to the appellant. It is only after hearing the appellant that the disciplinary authority would at all arrive at a final finding of guilt. Thereafter, the employee would again have to be served with a notice relating to the punishment proposed.

11. In Punjab National Bank v. Kunj Behari Misra [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783] a Bench of this Court considered Regulation 7(2) of the Punjab National Bank Officer Employees' (Discipline and Appeal) Regulations, 1977. The Regulation itself did not provide for the giving of any notice before the disciplinary authority differed with the view of the enquiry officer. This Court held: (SCC p. 97, para 19)

“The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The

report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

33. It is, thus, only natural that the principles of natural justice have to be read into Rule 154.5 of the said Rules. The order of removal is not only contrary to Rule 154.5 of the said Rules but the disciplinary authority instead of recording its own finding by issuing a show-cause has directly held the petitioner guilty of charges.

34. The disciplinary authority appears to have only considered the petitioner's reply to the report of the enquiry officer and treating such reply as an opportunity to defend had passed the final order. The final order does not show that any dissent note had at all been prepared or forwarded to the petitioner. The entire conduct of the disciplinary authority appears to somehow hold the petitioner guilty and remove him from service. Since the final order of punishment had been passed without giving an opportunity to the petitioner to respond to the dissent note, I am of the view that the same cannot be sustained. Mr. Dutta, learned advocate representing the respondents has however, argued that

the petitioner has not challenged the final order in the present writ application and unless an appeal is preferred therefrom, this Hon'ble Court should not entertain a challenge to such final order.

35. I find that the aforesaid submission made by the learned advocate representing the respondents to be high per technical. Further by filing the affidavit, the petitioner while bringing the subsequent events on record has questioned the Final Order. Final Order as noted above stands vitiated on account of failure to comply with the Rules and of natural justice. On repeated occasions since 1985, not only has the petitioner been punished without following basic principles of natural justice, but despite direction issued by this Court the petitioner was not paid his salary on reinstatement. He has since, reached his age of superannuation. As would be apparent from the discussions made herein above the order passed by the disciplinary authority cannot be sustained. There appears to be no decent note prepared at all. Although Mr. Dutt by relying on the operative part of the order of removal from service dated 16th February, 2006 has tried to claim, that the order of removal from service has been served on the petitioner, I am not at all convinced by the same. The operative part does not show that the disciplinary authority had passed the order of removal from service by

disagreeing with the findings of the enquiry officer. Without the Final Order dated 16th February, 2006 being disclosed in its entirety, the petitioner had no occasion to appreciate the same and to challenge the same. The judgment relied on by Mr. Dutta in the case of Ajit Kumar Nag (*supra*) does not assist the respondents and is otherwise distinguishable on facts.

36. Since the final order dated 16th February, 2006, is palpably illegal and bad, directing the petitioner to approach the authorities at this stage or to independently challenge the said order, would be travesty of justice. I am of the view that the order passed by the disciplinary authority dated 16th February, 2006, which otherwise cannot be sustained, should be and the same is, accordingly, set aside and quashed. Incidentally, since the petitioner has already reached the age of superannuation no useful purpose would be served to permit the respondents to continue with the enquiry from the stage of disagreement by the disciplinary authority, as employee-employer relationship has already come to an end. The petitioner shall be entitled to all consequential benefits, *inter alia*, including back wages, notional seniority and pay revision till the date of actual superannuation. The respondents are directed to recompute the entitlements of the petitioner, *inter alia*, including his retiral benefits and to disburse the same in his favour within eight (8) weeks from the communication of this order.

37. With the aforesaid observations and directions, the writ petition, being WPA 20961 of 2004 is disposed of.

38. There shall, however, be no order as to costs.

39. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J)

sb/swasta