

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 10048 OF 2011

- | | | | |
|----|--------------------------------|---|----------------|
| 1. | Union of India through |) | |
| | GENERAL MANAGER, |) | |
| | Central Railway, Mumbai CST. |) | |
| 2. | Sr. Divisional Comml. Manager, |) | |
| | Central Railway, Mumbai Divn., |) | |
| | Mumbai CST. |) | |
| 3. | Divisional Comml. Manager, |) | |
| | Central Railway, Mumbai Divn., |) | |
| | Mumbai CST. |) | ...Petitioners |

VERSUS

Mr. Chandrakant Sakharam Joshi	)	
residing at Jeevan Jyoti Chawl No.2,	)	
Room No. 1, Matushree Janaki Nagar,	)	
Kalwa (W).	)	... Respondent

...

Mr. A. A. Garge, for Petitioner.
Mr. Kunal Kumbhat, for Respondent.

...

**CORAM : S. V. GANGAPURWALA, ACJ &
SANDEEP V. MARNE, J.**

**RESERVED ON : 6th MARCH, 2023.
PRONOUNCED ON : 13th MARCH, 2023.**

JUDGMENT : (PER - SANDEEP V. MARNE, J.)

1. Rule. Rule is made returnable forthwith. By consent of parties, Petition is heard finally.

2. The Union of India set up a challenge to the judgment and order dated 25th November, 2010 passed by the Central Administrative Tribunal Mumbai (**Tribunal**) in Original Application No. 148 of 2006. The Tribunal has set aside the order passed by the disciplinary authority, appellate authority and reviewing authority and has directed reinstatement of respondent from the date of his removal from service. Petitioners have been further directed to determine the treatment to be given to the period from the date of removal to reinstatement. Respondent has been directed to be given all consequential benefits. When the present petition came up on 20th December 2011, this court while admitting the petition, stayed the order of Tribunal. On account of stay granted by this court, the order of Tribunal has not been implemented.

3. Respondent, while working as a Senior Booking Clerk in the Mumbai Division of Central Railway, was served with memorandum of charge sheet dated 15th March 2001. It was alleged in the charge sheet that he was found in possession with 24 earlier issued and accounted for tickets with an intention to resell them. It was further alleged that during vigilance check, an amount of Rs.300/- was found excess in his private cash and an amount of Rs.52.50 was found in short in railway cash. After holding departmental enquiry, the Inquiry Officer gave report dated 26th September 2001 holding

all three charges leveled against respondent as proved. The Disciplinary Authority passed order dated 14th December 2001 holding respondent guilty of all the 3 charges and imposed penalty of removal from service on him. The Appellate Authority rejected the appeal by order dated 5th March 2002. Revision petition filed by respondent was rejected by order dated 14th January 2005.

4. Respondent approached the Tribunal by filing Original Application No.148 of 2006. The original application was resisted by Petitioners by filing affidavit in reply. The Tribunal, after hearing both the sides, was pleased to allow the original application by its judgment and order dated 25th November 2010 setting aside the orders dated 14th December 2001, 4th February 2002 and 14th January 2005 directing reinstatement of respondent from the date of removal. The petitioners are directed to treat the intervening period and respondent is directed to be paid all consequential benefits. Aggrieved by the judgment and order passed by the Tribunal, the Railways have filed the present petition.

5. Appearing for petitioners, Mr. Garge the learned counsel would submit that the original application filed by respondent was barred by limitation. That the order of Revising Authority was passed on 14th January 2005 whereas the original application was filed on 3rd March, 2006. That in

absence of any application for condonation of delay, the tribunal could not have condoned the delay in filing the original application. Mr. Garge would further submit that the finding recorded by the Inquiry Officer and Disciplinary Enquiry Authority are supported by evidence on record and that the Tribunal erroneously interfered in those findings.

6. Mr. Garge would further submit that provisions of paragraph No.704 and 705 of the Vigilance Manual are merely in the nature of guidelines and cannot be enforced as if they are statutory rules. In support of his contention Mr. Garge would rely upon the judgment of the Supreme Court in **Chief Commercial Manager, South Central Railway Secunderabad & Ors. vs. G. Ratnam & Ors.** (2007) 8 SCC 212. He would also rely upon the judgment of the Allahabad High Court in **S. S. Dube vs. Union of India & Ors**, Manu/UP/2956/2017. He would also rely upon judgment of this court in **Vijay Kumar Upadhyay vs. Union of India & Ors.**, Writ Petition No.9253 of 2019 decided on 12th October 2022.

7. Mr. Garge would further submit that no prejudice is caused to respondent by the reason of Inquiry Officer performing role of presenting officer or by not conducting general examination of respondent under the provisions of Rule 9(21) of the Railway Services (Discipline & Appeal) Rules, 1968 (**Rules**). He would submit that possession of sold tickets is

admitted by respondent in the inquiry and that therefore the said factum was not even required to be proved by leading evidence. That since respondent set up a defence that the tickets were left at the counter by someone and he that intended hand over them to Chief Booking Supervisor, the burden of proving that defence rested on the shoulders of respondent, which he failed to discharge. That no interference was warranted by the Tribunal in the findings or in the penalty order.

8. Mr. Kumbhat the learned counsel appearing for respondent would oppose the petition and support the order passed by the Tribunal. He would submit that the case of respondent is fully covered by the judgment of the Supreme Court in **Moni Shankar vs. Union of India & Anr.** (2008) 1 SCC (L&S) 819. That all the 3 factors of *Moni Shankar* viz. (i) violation of paragraph Nos.704 and 705 of Vigilance Manual; (ii) Inquiry Officer acting as presenting officer and (iii) non-conduct of general examination of Respondent under Rule 9(21) are involved in the present case as well. That no attempt was made to prove actual selling of already-sold tickets by respondent. That mere possession of sold tickets is not a misconduct and that it was required to be proved that the Respondent actually sold or attempted to sell the tickets. That respondent offered adequate justification for possession of those tickets. That the findings recorded in the Inquiry are

perverse.

9. Mr. Kumbhat would further submit that the respondent had filed miscellaneous petition for condonation of delay on 13th June 2006 and that Tribunal has rightly condoned insignificant delay in filing the original application. Mr. Kumbhat would also rely upon the judgment of the Apex Court in **Union of India & Ors. vs. Ram Lakhan Sharma** (2018) 7 SCC 670 in support of contention that Inquiry Officer cannot perform the role of presenting officer.

10. Rival contentions of the parties now fall for our consideration.

11. Respondent faced 3 charges of possession of 24 sold tickets, excess amount of Rs.300/- in private cash and shortage of amount of Rs.52.50 in railway cash. So far as the shortage of amount of Rs.52.50 in the railway cash is concerned, we find the same to be merely a technical error as booking clerks are likely to have shortages in railway cash, especially on account of heavy rush of passengers at the booking counters. Also no presumption of any illegal earning from passengers can be drawn on account of shortage found in the railway cash. Therefore, we do not propose to delve further in respect of 3rd charge of shortage in the railway cash.

12. So far as the first article of charges is concerned, the respondent was found in possession of 24 tickets which were already sold and accounted for. In the second charge he is found guilty of possession of Rs.300/- excess in his private cash. It is alleged that the tickets were kept by respondent in his possession with intention of selling them. It is common ground that though vigilance check was conducted, the actual act of selling sold tickets was not attempted to be proved by sending a decoy passenger at the booking window manned by respondent. No doubt a booking clerk is not supposed to possess tickets which have already been sold to passengers. However, we need not go deeper into this aspect as the Tribunal set aside the penalty order essentially on account of procedural violations.

13. The first procedural violation noticed by the Tribunal is in respect of the procedure followed for conducting the vigilance check. The procedure is laid down in paragraph Nos.704 and 705 of Vigilance Manual, which read thus:

"704. Traps

(i) - (iv)

(v) When laying a trap, the following important points have to be kept in view:

(a) Two or more independent witnesses must hear the conversation, which should establish that the money was being passed as illegal gratification to meet the defence that the money was

actually received as a loan or something else, if put up by the accused.

(b) The transaction should be within the sight and hearing of two independent witnesses.

(c) There should be an opportunity to catch the culprit red-handed immediately after passing of the illegal gratification so that the accused may not be able to dispose it of.

(d) The witnesses selected should be responsible witnesses who have not appeared as witnesses in earlier cases of the department or the police and are men of status, considering the status of the accused. It is safer to take witnesses who are Government employees and of other departments.

(e) After satisfying the above conditions, the Investigating Officer should take the decoy to the SP/SPE and pass on the information to him for necessary action. If the office of the S.P., S.P.E., is not nearby and immediate action is required for laying the trap, the help of the local police may be obtained. It may be noted that the trap can be laid only by an officer not below the rank of Deputy Superintendent of Local Police. After the S.P.E. or local police official have been entrusted with the work, all arrangements for laying the trap and execution of the same should be done by them. All necessary help required by them should be rendered. (vi)-(vii).

705. Departmental Traps - For Departmental traps, the following instructions in addition to those contained under paras 704 are to be followed:

(a) The Investigating Officer/Inspector should arrange two gazetted officers from Railways to act as independent witnesses as far as possible. However, in certain exceptional cases where two gazetted officers are not available immediately, the services of non-gazetted staff can be utilised.

All employees, particularly, gazetted officers, should assist and witness a trap whenever they are approached by any officer or branch. The Head of Branch detail a suitable person or persons to be present at the scene of trap. Refusal to assist or witness a trap without a just cause/without sufficient reason may be regarded as a breach of duty, making him liable to disciplinary action.

(b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand. A memo should be prepared by the Investigating Officer/Inspector in the presence of the independent witnesses and the decoy indicating the numbers of the G.C. notes for legal and illegal transactions. The memo, thus prepared should bear the signature of decoy, independent witnesses and the Investigating Officer/Inspector. Another memo, for returning the G.D. notes to the decoy will be prepared for making over the G.C. notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and Investigating Officer/Inspector. The independent witnesses will take up position at such a place where from they can see the transaction and also hear the conversation between the decoy and delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe a fact to which they will be deposing in the departmental proceeding at a later date. After the money has been passed on, the Investigating Officer/Inspector should disclose the identity and demand, in the presence of the witnesses, to produce all money including private, and bribe money. Then the total money produced will be verified from relevant records and memo for seizure of the money and verification particulars will be prepared. The recovered notes will be kept in an envelope sealed in the presence of the witnesses, decoy and the accused as also his immediate superior who should be called as a witness in case the accused refuses to sign the recovery memo, and sealing of the notes in the envelope. (c) – (d).”

14. It is common ground that the provisions of paragraph No.704 and 705 have not been strictly adhered to while conducting the vigilance check as the vigilance team was not accompanied by any gazetted officer. However, in **G. Ratnam** (supra), the Apex Court held that non-adherence to instructions provided in paragraph Nos. 704 and 705 would not invalidate the departmental proceedings. Para.17 and 18 of the judgment read thus:

“17. We shall now examine whether on the facts and the material available on record, non-adherence of the instructions as laid down in paragraphs 704 and 705 of the Manual would invalidate the departmental proceedings initiated against the respondents and rendering the consequential orders of penalty imposed upon the respondents by the authorities, as held by the High Court in the impugned order. It is not in dispute that the departmental traps were conducted by the investigating officers when the respondents were on official duty undertaking journey on trains going from one destination to another destination. The Tribunal in its order noticed that the decoy passengers deployed by the investigation officers were RPF Constables in whose presence the respondents allegedly collected excess amount for arranging sleeper class reservation accommodation etc. to the passengers. The transaction between the decoy passengers and the respondents was reported to have been witnessed by the RPF Constables. In the facts and circumstances of the matters, the Tribunal held that the investigations were conducted by the investigating officers in violation of the mandatory Instructions contained in paragraphs 704 and 705 of the Vigilance Manual, 1996, on the basis of which inquiries were held by the Enquiry Officer which finally resulted in the imposition of penalty upon the respondents by the Railway Authority. The High Court in its impugned judgment has come to the conclusion that the Inquiry Reports in the absence of joining any independent witnesses in the departmental traps, are found inadequate and where the Instructions relating to such departmental trap cases are not fully adhered to, the punishment imposed upon the basis of such defective traps are not sustainable under law. The High Court has observed that in the present cases the service of some RPF Constables and Railway staff attached to the Vigilance Wing were utilised as decoy passengers and they were also associated as witnesses in the traps. The RPF Constables, in no terms, can be said to be independent witnesses and non- association of independent witnesses by the investigating officers in the investigation of the departmental trap cases has caused prejudice to the rights of the respondents in their defence before the Enquiry Officers.

18. We are not inclined to agree that the non-adherence of the mandatory Instructions and Guidelines contained in paragraphs 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway

Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained.”

15. The judgment in **G. Ratanam** (supra) was considered by the Apex court in subsequent judgment in **Moni Shankar** (supra). In *Moni Shankar*, in addition to violation of paragraph No.704 and 705 of the Vigilance Manual, two other violations were also involved, where the Inquiry Officer acted as presenting officer and the Inquiry Officer failed to generally examine the delinquent employee in respect of circumstances appearing against him in the evidence under Rule 9(21) of the Rules. The Apex Court took into consideration the cumulative effect of the 3 factors and held in paragraph Nos.16, 19, 24, 26, 28 and 29 as under.

“16. We have, as noticed hereinbefore, proceeded on the assumption that the said paragraphs being executive instructions do not create any legal right **but we intend to emphasise that 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 the charges against the delinquent official.**

19. We have been taken through the evidence of Shri S.B. Singh by Dr. Padia. **Significantly the examination-in-chief was conducted by the Enquiry Officer himself.** As the proceeding was for imposition of a major penalty, why the Presenting Officer, who must have been engaged by the department, did not examine the witness is beyond any comprehension. Even the minimum safeguard in regard to the manner in which examination-in-chief was conducted has not been preserved. The questions posed to him were leading questions. It is interesting to note that in answer to a question as to

whether he had asked the appellant to return Rs.5/-, he not only answered in the negative but according to him the said statement was made by him as instructed by the Vigilance Inspector. He although proved Exhibits P/1 and P/2 which were written in English language but also stated that he did not know what had been written therein. Strangely enough, the Enquiry Officer started reexamining him. Even in the re-examination he accepted that he could not read and write English.

24. The High Court unfortunately even without any material on record held that some excess amount was found from the appellant which itself was sufficient to raise a presumption that it had been recovered from the decoy passenger. **No such presumption could be raised. In any event there was no material brought on records by the department for drawing the said inference.** The High Court itself was exercising the power of judicial review. It could not have drawn any presumption without there being any factual foundation therefor. It could not have taken judicial notice of a fact which did not come within the purview of Section 57 of the Indian Evidence Act.

28. **The High Court also committed a serious error in opining that sub- rule (21) of Rule 9 of the Rules was not imperative.** The purpose for which the sub-rule has been framed is clear and unambiguous. The railway servant must get an opportunity to explain the circumstances appearing against him. In this case he has been denied from the said opportunity.

29. **The cumulative effect of the illegalities / irregularities was required to be taken into consideration to judge as to whether the departmental proceeding stood vitiated or not."**

(emphasis & underlining ours)

16. Thus, in *Moni Shankar* after taking into consideration the cumulative effect of the illegalities / irregularities, the Apex court set aside the order of the High Court and restored the order of the Tribunal which had set aside the order of penalty.

17. In the present case, all the 3 illegalities/irregularities that were involved in *Moni Shankar* (supra) are present. The procedure envisaged in paragraph No.704 and 705 of Vigilance Manual has admittedly not been followed. The Inquiry Officer has acted as a presenting officer. Respondent's general examination under Rule 9(21) of the Rules has not been conducted. While presence of merely one factor may not be a sufficient reason to set aside the order of penalty, the cumulative effect of the 3 factors, as held in *Moni Shankar*, would be sufficient to set aside the same. Additionally, there is fourth common factor in two cases, viz. raising of presumption of illegal earning by mere possession of excess amount. Here the presumption is on account of two factors, possession of sold tickets and possession on excess private cash.

18. We are conscious of the position that mere violation of procedure envisaged in para 704 and 705 of the vigilance manual by itself would not render the finding of guilt and penalty illegal. In addition to **G. Ratnam** (supra), such view has been taken by this Court in **Vijay Kumar Upadhyay** (supra) and by Allahabad High Court in **S. Dubey**. In **Vijay Kumar Upadhyay**, this court has considered the effect of non-adherence to procedure of Para 704 and 705 of the Vigilance Manual and has held that violation of procedure in Para 705 by itself would not be a reason to exonerate the employee. It is held thus:

21. The Tribunal has examined the aspect of alleged violation of paragraphs 704 and 705 of the Vigilance Manual. Based on the findings recorded in paragraphs 7 and 8 of the order, the Tribunal held that the provisions of the Manual had not been violated. One of the points raised on behalf of the petitioner that the witnesses of the trap case should have been gazetted officers was negated by the Tribunal by referring to paragraph 704 of the Vigilance Manual, which itself permitted non-gazetted officers to be trap witnesses. That apart, the Tribunal was of the view that paragraph 705 seeks to contemplate an ideal situation where the culprit is to be caught red-handed immediately after the bribe money has changed hands so that he may not get rid of it. The requirement to follow the Vigilance Manual entirely could be insisted upon in a criminal trial where the standard proof is different from the standard of proof that is applicable in disciplinary proceedings. However, since this is a case where the petitioner has been proceeded against departmentally, the Vigilance Manual was not required to be followed strictly on pain of invalidation. The evidence of the prosecution witnesses 1 and 2 noted above unmistakably points towards retention of Rs.180/- by the petitioner and such version of the said witnesses have been found by us to be creditworthy; therefore, even though the petitioner could not be caught red-handed, the direct evidence of PW 1 and PW 2 **together with other circumstantial evidence renders it difficult for us to arrive at a finding that since paragraph 705 of the Vigilance Manual has not been followed strictly, that by itself is a ground to exonerate the petitioner.**

(emphasis ours)

19. In **S. Dube** (supra), the Allahabad High Court held as under:

“28. The judgment in Chief Commercial Manager vs. **G. Ratnam** (supra) was referred to but explained to some extent in later decision, i.e., **Moni Shankar** vs. Union of India and Anr. (supra). **Both the judgments, however, are clear on the question that mere alleged non compliance of paras 704 and 705 of IRVM would not vitiate an otherwise valid order of punishment** passed after conducting a

departmental inquiry in accordance with Rules and based on due appreciation of evidence recorded during inquiry proceedings.”

(emphasis ours)

20. Thus the legal position seems settled that mere violation of procedure envisaged in Para 704 or 705 would, by itself, not render the proceedings invalid. However if there are multiple violation of procedures, as existed in **Moni Shankar**, the courts or tribunals would consider cumulative effect thereof. As observed above, there are three procedural violations in the present case on lines with **Moni Shankar**. We would have ignored the non-adherence to the procedure envisaged in para 704/705 of Vigilance Manual in the present case as the factum of recovery of sold tickets is not disputed by Respondent. Similarly, the inquiry officer conducting examination-in-chief would not be a ground, it itself, to render finding of guilt illegal in absence of any prejudice being demonstrated. However the third factor of violation of Rule 9 (21) is something which cannot be ignored.

21. Sub-Rule 21 of Rule 9 confers an important right on the delinquent employee to explain the circumstances appearing against him in the evidence. The provision reads thus:

9. Procedure for imposing Major Penalties -

(21) The inquiring authority may, after the Railway servant closes his case, and **shall**, if the Railway servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Railway servant to explain any circumstances appearing in the evidence against him.

(emphasis & underlining ours)

Thus in every case where the employee has not examined himself, the procedure under rule 9 (21) is required to be mandatorily followed as the word used in the provision is 'shall'.

22. In **Vijay v. Godavari Garments Ltd.**, (2011) 2 Mah LJ 983, division Bench of this Court, to which one of us (Acting Chief Justice) was a party, had an occasion to deal with effect of violation of a *pari materia* provision under Rule 8 (20) of the Maharashtra Civil Services (Discipline and Appeal) Rules 1979. This Court held:

7. The argument of Shri Joshi that Rule 8(20) of the said Rules, 1979 are not followed requires consideration. The said Rule 8(20) of Rules, 1979 reads as under:—

“(20) The inquiring authority may, after the Government servant closes his case and shall, if the Government servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him.”

8. On perusal of the said Rule, it is manifest that the said Rule mandates the inquiring authority to question the delinquent on the circumstances appearing against him in the evidence, so that the delinquent may get opportunity to explain any circumstances appearing in the evidence against him. In the present case, the delinquent has not examined himself. If the delinquent has not examined himself, in that case the Inquiry Officer is not left with any discretion but has to question the delinquent about the circumstances appearing against him. **The use of the word shall shows that the said provision is imperative and the same is mandatory. In the first part of the said sub-rule the legislature has used the word 'may', but when the delinquent has not examined himself has used the word "shall", which itself clarifies that the word shall has to be considered as mandatory. The use of the word 'may' at one place and 'shall' at another place in the same rule would strengthen the inference that these words have been used in their primary sense, and that 'shall' should be considered as mandatory. The use of the word 'shall' therein as against 'may' shows that the same is mandatory. The use of the word 'shall' with respect to one matter and the used word 'may' with respect to another matter, in the same rule, would lead to the conclusion that the word 'shall' imposes an obligation. Whereas the word 'may' confers a discretionary powers. If, the delinquent has not examined himself, then it is obligatory on the inquiring authority to question the delinquent on the circumstances appearing against him in the evidence for the purposes of enabling him to explain any circumstances appearing in the evidence against him, and if the delinquent has examined himself, then the discretion vests with the Inquiry Officer to question the delinquent or not.** In the present case, it is not disputed that the delinquent has not examined himself, in such circumstances it was mandatory for the Inquiry Officer to question the petitioner regarding the circumstances appearing against him. The said Rule has not been complied, and as such inquiry stands vitiated. The Division Bench of this Court in the case of Masuood Alam Khan-

Pathan v. State of Maharashtra referred supra has also observed that rule of Audi Alteram Partem is pregnant in the sub-rule (20) of Rule 8, departure therefrom would tantamount to violation of natural justice. On this count itself the inquiry vitiates, there cannot be any doubt that by non-observance of the said rule the petitioner could not get the opportunity to explain regarding the circumstances which were prejudicial to him in the evidence.

(emphasis ours)

23. This Court recently followed the decision in **Vijay** in its judgment in Ram **Sahodhar Rajwade Vs. Director General, Central Industrial Security Force** (2023) 1 Mah LJ 44 wherein violation of a *pari materia* provision under Rule 36 (18) (b) of Central Industrial Security Force Rules was involved. This Court held:

24. A disciplinary proceeding, it is well known, must be conducted in accordance with the governing rules. The procedure postulates that reasonable opportunity of being heard in respect of the charges is given to the delinquent. Reasonable opportunity of hearing is considered to be synonymous to 'fair hearing' and is an important ingredient of the rule of *audi alteram partem*. The rule of 'fair hearing', which embraces almost every facet of fair procedure, requires that the delinquent proceeded against and who could be affected by reason of any final order passed in the proceedings, is given the opportunity to meet the case against him effectively. What this means is that, reasonable and adequate opportunity to raise effective defence should be given to the delinquent or else the ultimate action of imposition of penalty based on such procedure which falls short of the requirements of a 'fair hearing' could be annulled if the procedural safeguards that the statutory rule envisages are not adhered to. The

facet of fair hearing which stems from the opportunity of the nature extended to a delinquent member of the CISF by a provision like clause (b) of sub-rule (18) of Rule 36 of the CISF Rules has to be regarded as an integral part of the principles of natural justice.

25. Division Benches of this Court in its decisions reported in (2011) 2 Mah LJ 983 (*Vijay s/o Shamrao Bhale v. Godavari Garments Ltd., Aurangabad*) and 2021 (5) ABR 470 (*The State of Maharashtra v. Wasudeo Madhukarrao Pande*), considering *pari materia* provisions in sub-rule (2) of Rule 20 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979, have construed the same to be mandatory. On the same reasoning, we hold the provision in clause (b) of sub-rule (18) of Rule 36 of the CISF Rules to be a mandatory requirement if, of course, the charged member of the CISF has not examined himself in defence.

This Court further considered the effect on non-raising of violation of provision for general examination during the course of enquiry and argument of waiver to that effect and held as under:

28. We are conscious of the decision reported in (1996) 3 SCC 364 (*State Bank of Patiala v. S.K. Sharma*), where the Supreme Court has held that a mandatory procedural provision, which is in the interest of the person proceeded against and not in public interest, could be waived by such person; and in such an eventuality, non-compliance with the mandatory procedural provision would not vitiate an action. The provision in clause (b) of sub-rule (18) of Rule 36, as observed above, undoubtedly incorporates natural justice principles of fairness in decision making process and is intended to offer the member of the CISF proceeded against protection against consideration of evidence without bringing to his notice the circumstances appearing in such evidence against him. Such a provision is indeed in the interest of the member proceeded against. Question is, notwithstanding the failure of the inquiry officer to act in terms of clause (b) of sub-rule (18) of Rule 36 of the CISF Rules and notwithstanding that the entire action of imposition of penalty under

Rule 34 thereof suffers from a statutory violation, whether, because of the omission of the petitioner to raise the point before the statutory authorities, such action of imposition of penalty which otherwise stands vitiated should be saved or not?

29. Our answer to the question is in the negative. The procedural safeguards incorporated in the CISF Rules, which are mandatory in nature, cannot be regarded as waived merely because the petitioner did not raise such issue initially before the inquiry officer and later before the disciplinary, appellate and revisional authorities in view of the several decisions of the Supreme Court which we propose to refer now.

34. Natural justice has, therefore, been regarded by the Supreme Court as part of Article 14 of the Constitution of India. We hold that breach of the procedural safeguard such as the one clause (b) of sub-rule (18) of Rule 36 of the CISF Rules envisages is not merely a violation of a statutory rule but also a breach of the principles of natural justice. That, in turn, is a violation of Article 14 of the Constitution. Drawing guidance from the aforesaid decisions, we also hold that the petitioner's right under Article 14 has been invaded, and such right could not have been waived. The prejudice being self-evident, *S.K. Sharma*(supra) will have no application. Contention of Mr. Shetty that the petitioner has waived the requirement to comply with clause (b) of sub-rule (18) of Rule 36 of the CISF Rules cannot be accepted in view of the authoritative pronouncements in *S.L. Kapoor* (supra), *Tulsiram Patel* (supra), *Olga Tellis* (supra) and *A.R. Antulay* (supra) and, accordingly, stands rejected.

24. The law thus now seems to be well settled that the provision for general examination of delinquent employee as to circumstances appearing against him in evidence is required to be mandatorily followed. Therefore, even if the first two infraction of non-following of procedure under para 704/705 of Vigilance Manual and inquiry officer acting as presenting officer were to be ignored, violation of the mandatory provision under Rule 9 (21)

would vitiate the inquiry. Therefore, following the course of action adopted by the Apex Court in **Moni Shankar** (supra), we would consider the cumulative effect of all three aberrations to hold that the penalty imposed on the Respondent in the disciplinary proceedings cannot be sustained. We are therefore of the considered view that the tribunal has correctly followed the judgment in **Moni Shankar** for allowing the original application filed by the respondent.

25. In the result, we find the order passed by the Tribunal unexceptionable. However, there is only one area where some clarification would be required. The Tribunal, while ordering reinstatement of respondent, directed petitioners to determine the treatment to be given to the intervening period from the date of removal till the date of reinstatement. It is further directed that the respondent would be entitled to all the consequential benefits. The order may be interpreted to mean as if the Tribunal has awarded full back wages during intervening period. Considering the fact that the penalty order is set aside for technical reasons of violation of guidelines and Rules, we are of the view that respondent shall not be entitled to any back wages. In normal circumstances the inquiry is required to be remitted for being conducting afresh on noticing any technical violation. However, in the present case violation of procedure envisaged in paragraph No.704 and 705 cannot now be corrected and therefore there is no question of remitting the inquiry for being conducted afresh. It is in the light of these circumstances that reinstatement of

respondent is required to be ordered. However, the same would not mean that petitioner-railway administration can be saddled with the responsibility of paying back wages to respondent for a long period from 13th December 2001 till his actual reinstatement. We therefore clarify that respondent shall not be entitled to any back wages from the date of removal till the date of reinstatement. That period shall however be computed as duty for all other purposes, including qualifying service for pension, increments, pay fixation, etc.

26. Subject to the above modification, the order passed by the tribunal is upheld and the writ petition is dismissed. There shall be no order as to costs. Rule is discharged.

SANDEEP V. MARNE, J.

S. V. GANGAPURWALA, ACJ

27. At this stage, the learned Counsel for the Petitioners seeks continuation of interim orders.

28. The learned Counsel for the Respondent opposes the said request.

29. Considering the fact that interim orders were enforced, the same would continue for a period of two weeks from today.

30. Needless to state that on lapse of two weeks, the said protection shall come to an end.

SANDEEP V. MARNE, J.

S. V. GANGAPURWALA, ACJ