

(1981) 12 BOM CK 0029

In the Bombay High Court

Case No : Appeal No. 92 of 1975 and Miscellaneous Petition No. 1133 of 1973

Air India Corporation

APPELLANT

Vs

Richard Rashid Khan

RESPONDENT

Date of Decision : 16-12-1981

Acts Referred:

Air Corporations Act, 1953 — Section 20(1), 45, 8(2)
Constitution of India, 1950 — Article 14, 16, 19(1), 226, 31
Customs Act, 1962 — Section 112, 119, 135(1)
Foreign Exchange Regulation Act, 1947 — Section 23(IA), 8(1)
Government of India Act, 1935 — Section 240
Imports and Exports (Control) Act, 1947 — Section 5
Penal Code, 1860 (IPC) — Section 34, 420, 468, 511
Probation of Offenders Act, 1958 — Section 12, 4
Railway Servants (Discipline and Appeal) Rules, 1968 — Rule 10, 11, 12, 13, 14

Citation : (1983) 1 LLJ 125

Hon'ble Judges : M.N. Chandurkar, J;D.M. Metha, J

Bench : Division Bench

Judgement

Chandurkar, J.—This appeal arises out of an order passed by Mukhi, J., allowing the respondent's petition for quashing the order of removal made by the Gebral Manager of Air-India, the appellant No. 1, removing the respondent from service with effect from the date of the order.

2. The respondent was a Deputy Director of Operations in the employment of Air-India. A proceeding was taken against him by the Additional Collector of Customs of Customs for violation of provision of the Customs Act, the Import (Control) Order of 1955 and a notification dated 21st February, 1963 issued u/s 8(1) of the Foreign Exchange Regulation Act, on the footing that 247 diamonds valued at Rs. 1,50,000, some drafts and cheques for Dollars 415.90 were found in a coat in his possession and that foreign currency of Dollars 91 was seized from the room of the respondent in the Sun-N-Sand Hotel where he was staying. By the same order dated 9th September, 1970 the Additional Collector of Customs ordered that all the diamonds, namely, 247 pieces and the drafts and cheques for Dollars

415. 90 seized from the check designed coat at Santa Cruz Airport and Dollars 91 seized from the respondent's residence along with the coat should be confiscation absolutely u/Ss. 111(d) and 119 of Customs Act, 1962. In addition to this order of confiscation, the Additional Collector also imposed a personal penalty of Rs. 20,000 on the respondent u/s 112 of the Customs Act, 1962. Relying on this order of the Additional Collector of Customs, the General Manager of Air-India after quoting the operative portion of the order of the Additional Collector of Customs, made the order of removal, the operative part of which reads as follows :

"The offence established against Cap. Khan constitutes serious misconduct. In view of the penal action taken against him by the Customs Authorities and in terms of sub-regulations (ii) of Regulation 44 of Air-India Employees' Service Regulations, I hereby order that Capt. R. Khan Deputy Director of Operations, be removed from the service of the Corporation with immediate effect."

3. To complete the resume of facts which have a bearing on the disposal of this petition, it is necessary to mention that the respondent was subsequently prosecuted for an offence u/S. 135(a) and S. 135(b) read with S. 135(1) of the Customs Act, 1962, as well as u/S. 5 of the Import and Export (Control) Act, 1947, and u/S. 8 read with S. 23(IA) of the Foreign exchange Regulation Act, 1947, in case No. 15/CW of 1972 in the Court of the Additional Chief Presidency Magistrate, 8th Court, Esplanade, Bombay it is not in dispute that the facts on which this prosecution was based were the same as the facts on which the order of the Additional Collector of Customs was based. The Additional Chief Presidency magistrate by his order dated 23rd March, 1973 acquitted the respondent of the offences with which he was charged. It is also not in dispute that an appeal was filed against the order of the Additional Chief Presidency Magistrate and in that appeal before a single Judge of this Court, the acquittal of the respondent was upheld. That event, however, took place after the petition was already decided by the learned single Judge.

4. In the meantime, after the Additional Collector has made his order of penalty on 9th September, 1970, the respondent had challenged that order by an appeal which came to be decided by the Central Board of Excise and Customs, who upheld the order of the Additional Collector. The order of the Board was challenged in a revision application filed before the Government of India, which came to be rejected and therefore a writ petition was referred to the Division Bench. That petitioner was first heard by us and we have upheld the orders of the Customs Authorities.

5. Now, after the respondent was acquitted by the criminal Court, he made an application on 17th April, 1973 to the General Manager claiming that since he had not been found guilty and he was acquitted of the various charges framed by the Customs Authorities, he stood completely exonerated from "complicity in the offence with which I have been charged", and, accordingly to him, the action of removal from service became unreasonable, illegal and against the laws of

natural justice and equity. He, therefore, claimed that he should be reinstated and compensated for the hardship and losses he had undergone. This representation was rejected by the Managing Director on 24th May, 1973.

6. The respondent then served another letter through his advocates on 21st July, 1973 alleging that the order of removal from service, which is dated 10th November, 1970, was improper and illegal and that "to contend contrary would be deliberate attempt at ignoring of a judgment of the Court, directly binding on you and Air-India". The letter was really in the form notice intimating to the appellant No. 1 that if the orders of suspension and removal were not withdrawn, the respondent would be free to take further steps. It appears that simultaneously the respondent had also preferred an appeal to the Chairman of Air-India in 20th July, 1973, that is, the date prior to the day on which the advocate's notice was sent. In the appeal, reliance was placed on the judgment of acquittal made by the criminal Court and it was alleged that the order dated 20th November, 1970 was bad and void. The order was challenged as being in violation of the principles of natural justice as no opportunity to show-cause was given to him. A personal hearing was also sought in the appeal. The appeal memo was forwarded by a forwarding letter of the Advocate, in which also a request was made for personal hearing. The appeal, however, came to be rejected on 18th October, 1973 and the result seems to have been communicated by the Deputy Managing Director, Air-India, stating that the Chairman had considered the respondent's appeal and has passed his order rejecting the appeal. The order rejecting the appeal states that the Chairman has carefully gone through and considered the Memorandum of Appeal and the various grounds mentioned therein but that the Chairman found no substance in the said ground to justify the setting aside of the order of removal from service. The respondent then filed the writ petition on 19th November, 1973.

7. In the petition it was alleged that there was no enquiry whatsoever into the alleged misconduct and that there was no charge-sheet framed or given to the petitioner to show-cause and no opportunity whatsoever was given to the petitioner, and that he was deprived of an opportunity of getting himself exonerated of the charge and get himself reinstate. Non-compliance with Regulation 44(i) of the Air-India Employees' Service Regulations (hereinafter referred as to as "the Regulations") was alleged. It was alleged that sub-regulation (ii) of Regn. 44, on which reliance was placed by the appellant, was in violation of principles of natural justice and/or Art. 14 and/or Art. 311 of the Constitution of India. The case of the respondent in the petition was that sub-Regn (ii) of Regn. 44 had no application whatsoever. Certain other grounds and/or Art. 311 of the Constitution of India. The case of the respondent in the petition was that sub-Regn (ii) of Regn. 44 had no application whatsoever. Certain other grounds have been made out in the petition, but for the disposal of the petition, only such grounds as were urged before us at the hearing will be referred to by us.

8. The appellants relied on Regn. 44(ii) and it is their case that it was neither necessary nor incumbent on them to give any notice to the petitioner or to issue a charge-sheet or to hold an enquiry or to give him any opportunity to submit any say in view of the order of the Additional Collector dated 20th November, 1970. That indeed appears to be the mainstay of the case of the appellants.

9. The learned single Judge, who decided the petition, took the view that Regn. 44(ii) could be availed of only when the penal action brought by the Customs Authorities or the Foreign Exchange Regulation Authorities successfully terminates in the imposition of a penalty and that Regn. 44(ii) disclosed an arrangement that if statutory authorities like the Customs Authorities or the Foreign Exchange Authorities have commenced proceedings for penal action against an employee in relation to activities which may constitute misconduct, then the Corporation may be at liberty to base its decision as to any punishment to be imposed on the result of such an enquiry held by the statutory authorities instead of holding an enquiry of its own under Regn. 44(i). He further held that there is no reason why the enquiry held by a statutory authority could not be used by the employer for the purpose of arriving at his own finding as to misconduct within the meaning of its Regulations. On a construction of Regns. 44(i) and 44(ii), the learned Judge observed that the rationale of sub-Regn. (i) of Regn. 44 was to eliminate the enquiry otherwise compulsory under sub-Regn. (i) of Regn. 44 and the adjudication proceedings and the order of the Customs Authorities and the findings arrived at therein appointed by the Corporation would have had to formulate as provided for in para 14 of Sch. II". It may be mentioned that this view has not been challenged by either of the parties before us.

10. The learned Judge, however, further held that although sub-Regn. (ii) of Regn. 44 does enable the Corporation, if it so choose to do to avoid holding its own enquiry, the requirements of para 15 of Sch. II are not and cannot be excluded. It is this view which has been the subject of considerable debate at the bar and on the correctness of which much turns in this appeal.

11. With regard to the value to be attached to the order of the Additional Collector of Customs in the penalty proceedings before us, the learned Judge, however, took the view that "even if the Customs Authorities have held a full-fledged enquiry and on evidence before him the Additional Collector of Customs has found the person charged guilty of an act amounting to smuggling and then imposed a personal penalty on him, the Corporation, as the employer, still has the power and the duty through its Competent Authority designated by the Regulations, to decide whether the enquiry held by the Customs Authorities and the adjudication order passed thereon furnish good and sufficient reason for imposing any punishment on the employee". The learned Judge equated the adjudication order made by the Additional Collector with the report of the Corporation's Committee of enquiry and then observed :

"The Competent Authority who is invested with the power to impose punishment

under Regn. 43 has still to satisfy himself that the enquiry conducted by the Customs authorities and the finding thereon is correct."

Consistent with this view, the learned Judge in a later part of the judgment came to the conclusion that the order of the Additional Collector of Customs was based on no evidence at all but was based on suspicions, conjectures and surmises and, in his view, there was nothing to connect the respondent with the possession of the snuff colored check designed coat containing the contraband, which coat was found in the Customs enclosure.

12. The learned Judge analysed Regn. 44 and he took the view that if an action is to be taken for misconduct under cl (xx) of Regn. 42, then the Competent Authority must satisfy itself that the conviction by the criminal Court is in fact for an offence involving moral turpitude and that if the Competent Authority after following the requirements of para 15 of Sch. II comes to the conclusion that the finding is correct and so the activities amounting to the misconduct alleged have been established, then it can proceed to impose appropriate punishment but before deciding on the quantum of punishment, the Competent Authority must consider the previous service record as well as extenuating as well as aggravating circumstances of the case, if any. In the view of the learned Judge, there was nothing in any of the regulations to exclude the requirement that when the Competent Authority proposes to act on the basis of a conviction or an adjudication order made by a Court or statutory authority other than the Corporation itself, the person concerned should not be allowed an opportunity to say or show nevertheless why no action should be taken by the Corporation in its capacity as the employer. Holding that the impugned order of removal does not show that the General Manager had cared to satisfy himself about the correctness of the findings by giving independent attention to the weightage of evidence, the learned Judge found that since para 15 of Sch. II had not been complied with the order of removal was bad and become a nullity.

13. Having taken this view, the learned Judge quashed the order of removal of the respondent and directed the respondent to be reinstated and to be paid all his dues as expeditiously as possible. This order is challenged in this appeal.

14. Before we go to the contentions advanced before us both on behalf of the appellants and the respondent, it is necessary to make a reference to the Regulations which are relevant. The Regulations have been made by Air-India in exercise of powers conferred by cl. (b) of sub-s. (2) of S. 45 read with Ss. 8(2) and 20(1) of the Air Corporations Act, 1953, with the approval of the Central Government as required by S. 45.

15. The first relevant Regulation to which a reference is necessary is Regn. 42 which deals with "misconduct". The two clauses of misconduct which have become relevant for the purposes of argument are (xx) and (xxiv) and Regn. 42 with these clauses in so far as it is material reads as follows :

"42. Misconduct :

Any breach of these regulations shall be deemed to constitute a misconduct punishable as provided hereinafter. Without prejudice to the generality of the term "misconduct". It shall be deemed to include the following :-

.....

(xx) Conviction in any court of law for any criminal offence involving moral turpitude.

.....

(xxiv) Smuggling, aiding, or being concerned in any way in smuggling, or carrying goods in the aircraft in circumstances which give rise to a presumption that it is done with the object of private trading or pecuniary gain or carrying currencies and/or instrument of exchange in contravention of any rules or regulations or the Governmental orders."

The opening part of Regn. 42 deals generally with misconduct and says that any breach of the Regulation shall constitute misconduct under Regn. 42. The clauses which specify the different kinds of misconduct in Regn. 42 are illustrative. We have referred to cl. (xx) and (xxiv) and they have a bearing on the construction of Regn. 44(ii). The punishments for misconduct are specified in Regn. 43 and 8 kinds of punishments are specified including censure, fine, withholding of increment, recovery of the whole or part of any loss caused to the Corporation by the employee's negligence, default for breach of any Regulation or orders, suspension on loss of pay and allowances, reduction to a lower grade of pay or lower stage in the time-scale of pay, removal from service and dismissal. Under Regn. 43 any one or more of these punishments can be imposed by Competent Authority on any employee of the Corporation "for good and sufficient reason". Regulation 43A deals with suspension pending enquiry, with which we are not concerned. Regulation 43-B deals with the Authority who can exercise the power to award punishment. Then comes Regn. 44 cls. (i) and (ii) of which read as follows :

"44 Procedure for awarding punishments :- (i) No punishment under Regulation 43 except censure, shall be awarded to an employee unless he has been informed in writing of the alleged misconduct and has been afforded an adequate opportunity of defending himself in accordance with the procedure laid down in this behalf in Schedule II.

(ii) Notwithstanding anything contained in these Regulations, it shall not be incumbent upon the authority competent to impose a punishment to follow the procedure herein prescribed before imposing any of the penalties enumerated in Regulation 43 on an employee, when such employee has been convicted by any Court or Tribunal on a criminal charge involving moral turpitude or any penal action has been brought against him by the Customs Authorities under the Sea Customs Act or Rules made thereunder or by the appropriate authorities under the Foreign Exchange Regulation Act, 1947 or rules made thereunder for

activities amounting to "misconduct" within the meaning of cl. (xxiv) of Regulation 42."

It is not necessary to reproduce in detail the provisions of Sch. II which are headed as "Procedure for Disciplinary Action" which is referred to in Regn. 44(i). Sch. II makes it clear that "where disciplinary action is to be taken against an employee under Regn. 44, the following procedure shall be followed". The procedure consists of several stages. Provision is made for the Competent Authority to investigate as to whether a prima facies case exists against an employee. When the Competent Authority receives any information or a report indicating that the employee has committed misconduct in a given case, the Competent Authority has been empowered to dispense with such investigation and proceed to issue or authorise the issuance of a charge-sheet to the employee concerned. Para 4 deals with the service of a charge-sheet on the employee and the employee being given reasonable time not less than 48 hours to submit his written explanation. Paras 5 to 12 deal with the manner in which the enquiry into the misconduct should be made. Under Para 5(ii) it is provided that if the employee admits in writing the misconduct alleged against him, the Enquiry Committee may not be constituted and the Authority competent to impose punishment under Regn. 43-B may proceed to pass an order of punishment under Regn. 42. However, in case an enquiry is required to be made, then the employee is to be informed of the date and time of the enquiry. The employee is entitled to be present during the hearing of witnesses alongwith the person permitted to defend him. The Enquiry Committee is required before examination of witnesses, to ask the employee whether he has anything further to say in addition to his written explanation. Para 10 specifies the kind of witnesses who are to be examined and the procedure to be adopted for recording their statement. Under para 13 the employee is given a further opportunity of making a final statement in his defence after all the relevant evidence has been recorded. This statement is required to be signed by the employee if he chooses to do so. In case he refuses to sign the statement this fact is to be recorded in the enquiry proceedings. Para 14 describes the manner in which the Committee of Enquiry should formulate its report. Then comes para 15 which reads as follows :

"15. The competent authority on receiving the report of the Enquiry Committee shall satisfy itself as to the correctness of the findings by giving its independent attention to the weightage of evidence both for and against the charges. Where the competent authority agrees with the findings of the Enquiry Committee, it is not necessary for it to give reasons for the acceptance of the report, but where it disagrees, it shall record the reasons for such disagreement. The Competent Authority shall thereafter issue an order of punishment. In awarding punishment, the competent authority shall take into consideration the extent and gravity of the misconduct, previous service record of the person charged and any extenuating or aggravating circumstances of the case."

Para 16 of Sch. II entitles the employee to a copy of the Enquiry Committee's report and statement recorded before the Enquiry Committee, if they are asked for. These are then the relevant Regulations.

16. It is not necessary for us to deal extensively with two submissions which were advanced on behalf of the respondent that the Air-India is a State and the employees of Air-India enjoy a statutory status and that the power to dismiss and employee of Air-India as and by way of punishment is a statutory power derived from the Air-Corporations Act, 1953, because none of these propositions seem to have been disputed either before the learned single Judge or in this appeal. It is not contended before us even on behalf of the appellants that if the respondent was found entitled to have the order of removal set aside, this Court will not be entitled to exercise its jurisdiction under Art. 226 of the Constitution in his favour, on the ground that a writ cannot issue to Air-India or that the power of Air-India to punish its employee is not a statutory power.

17. It is now well-established that in appropriate cases in the case of servants of the State or local authorities or statutory bodies, Courts have the power to declare the dismissal of employees to be invalid if the same is violative of the statutory rules or of natural justice. We may briefly refer to the three authorities which are cited before us, though no authorities are really necessary on behalf of the respondent.

18. In *Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, the Supreme Court observed as follows :

"In the case of servant of the State or of local authorities or statutory bodies, courts have declared inappropriate cases the dismissal to be invalid if the dismissal is contrary to rules of natural justice or if the dismissal is in violation of the provision of the statutes. Apart from the intervention of statute there would not be a declaration of nullity in the case of termination or dismissal of a servant of the State or of other local authorities or statutory bodies."

19. In *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation*, , it was pointed out by the Supreme Court that the statutory authorities cannot deviate from the conditions of service and any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and regulations.

20. Same is the law laid down in *Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee*, Referring with approval to the earlier decision of the Supreme Court in *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, , the Supreme Court observed as follows :

"Speaking through Vaidialingam, J. this Court held that a declaration to enforce a

contract of personal service will not normally be granted. It was noted that there are three exceptions to this rule : (i) appropriate cases of public servants who have been dismissed from service contravention of Art. 311, (ii) dismissed workers under industrial and labour law, and (iii) when a statutory body has acted in breach of a mandatory obligation imposed by a statute."

21. It is, however, argued by Mr. Nariman appearing on behalf of the appellants that Regn. 44(ii) expressly excludes any requirement of natural justice under para 15 of Sch. II and it is further argued that observance of the rules of natural justice are necessarily intended to prevent injustice or to prevent miscarriage of justice. The learned counsel mainly relying on the decision in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , has contended that this was not a case where the course of justice can be said to have been deflected apart from the fact that to be heard on a matter of punishment in a departmental enquiry is neither a fair nor a reasonable requirement and cannot be read into any regulation unless it is absolutely necessary. According to Mr. Nariman, there is not even an averments anywhere in the petition or even in the appeal that the punishment of removal awarded to the respondent is in any way harsh or is disproportionate to the misconduct and the learned counsel wanted to contend that before an order is set aside on the ground of any violation of the principles of natural justice, prejudice resulting from such non-compliance must be shown. The learned counsel has contended that even the respondent had always understood that the penalty of removal must follow from the order of adjudication of penalty and the learned counsel points out that it was not till after the criminal Court adjudicated the respondent not guilty that the respondent asked for reinstatement.

22. Mr. Singhavi appearing on behalf of the respondent has seriously disputed the proposition that Regn. 44(ii) excludes the operation of principles of natural justice and, according to the learned Counsel, the power of punishment under Regn. 43 can be exercised only in conformity with the principles of natural justice. On the scope of Regn. 44(ii) it was the contention of the respondent that all that it does is that it only avoids duplication of enquiry for finding out the guilt of the employee as an enquiry has already been made by a statutory authority, but that by reason of the said Regulation, the Competent Authority is not absolved from taking all the steps which he is otherwise required to take including service of notice regarding punishment and taking into consideration all the relevant factors, past record, extenuating circumstances, etc. which is a matter of substance and not of procedure. A large number of authorities have been cited on behalf of the respondent to which we shall refer later, but we may mention that the sheet anchor of the argument advanced before us is the decision of the Supreme Court in The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others, , which we shall discuss later. As another limb of the same argument, Mr. Singhavi has argued that the removal of the respondent is null and void because the mandatory provisions of para 15 of Sch. II were not followed before imposing the penalty and no notice

whatsoever was given by the Disciplinary Authority before making the order of removal.

23. Before we go to the argument founded on the violation of the principles of natural justice, it is first necessary to construe the scope of Regn. 44(ii). That necessitates a reference to the provisions made in Regn. 44(i) which is to be read with Sch. II. There can be hardly any dispute that in view of the provision in Regn. 44 where punishment except censure is to be (sic) awarded a full-fledged enquiry into the misconduct alleged against the employee has to be made and the procedure for that enquiry is prescribed in Sch. II. As we have already pointed out, Sch. II lays down the procedure for taking disciplinary action commencing from the investigation into a misconduct before deciding to institute an enquiry into the misconduct and terminating in making an order of punishment. These Regulations, which are made in the exercise of statutory power u/s. 45 of the Air Corporations Act, form a complete code as to the manner in which the disciplinary power is to be exercised by the Competent Authority. After the report of the Enquiry Committee is formulated, as required by para 14, what is provided under para 15 is that after the report of the Enquiry Committee is received by the Competent Authority, it has first to satisfy itself as to the correctness of the findings by giving its independent attention to the weightage of evidence both for and against the charges. This means that the Competent Authority is required by the Regulations to apply its mind to the correctness of the findings recorded by the Enquiry Committee and it must independently consider whether the findings recorded by the Enquiry Committee are supported by the evidence and it has to take into account such evidence as is adduced in rebuttal of the charges. Now, thereafter the second stage is that if the Competent Authority agrees with the findings of the Enquiry Committee, the Competent Authority shall issue an order of punishment. If the Competent Authority does not agree with the report of the Enquiry Committee, then the Competent Authority has to give its own reasons. There may be a case where the report of the Enquiry Committee discloses that the employee is not guilty and the Competent Authority disagrees with that finding. In such a case, the Competent Authority must give its reasons for the disagreement. If the Enquiry Committee's report discloses that the employee is guilty, it can accept that report.

24. Now, under para. 15, it is obligatory on the Competent Authority before issuing an order of punishment to take into consideration the extent and gravity of the misconduct, previous service record of the person charged and any extenuating or aggravating circumstances of the case. What appears to be the contention of the learned counsel for the appellant is that there is no element of natural justice implied in para 15 of Sch. II and, as already pointed out, the alternative argument is that even if any element of natural justice is implied in this procedure regarding punishment, even that is expressly excluded by Regn. 44(ii). Now, it is no doubt true that even a case where the Enquiry Committee has reported in favour of the employee, the Competent Authority has the

jurisdiction not to accept those findings of the Enquiry Committee and come to a contrary conclusion and para 15 by itself does not make any reference to any notice to show cause against punishment. It appears to us that it will be wholly contrary to the principles of natural justice to proceed to make an order of punishment against a person who has been found to be not guilty by the Enquiry Committee without giving an opportunity to him to satisfy the Competent Authority that the reasons given by it for departing from the view of the Enquiry Committee were not justified. This will also necessarily imply that a notice to show cause against punishment will also be necessary on the terms of para 15 in view of the latter part of para 15 because it is difficult for us to see how the Competent Authority can take into consideration any extenuating circumstances of the case unless the person for whose benefit the extenuating circumstances are to be taken into consideration is given an opportunity to put those circumstances before the Competent Authority.

25. A similar provision has been construed by the Supreme Court in Challappan's case (supra). That was a case dealing with R. 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, which read as follows :

"Notwithstanding anything contained in Rules 9 to 13 :

(i) where any penalty is on a railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereupon as it deems fit."

Now, we wish to make it clear at this stage that when we are referring to the decision in Challappan's case (supra), it is for the limited purpose of trying to understand the scope of the duty which is laid on the Competent Authority when it is required to consider certain things before making an order of punishment. As to whether such will necessarily be the case in the case of misconduct which falls within cl. (xx) or cl. (xxiv) of Regn. 42 shall be discussed later. While dealing with the scope of Rule 14, the Supreme Court has pointed out that in a case governed by Rule 14(i), while the conviction of the delinquent employee will be taken as sufficient proof of misconduct, "the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee" and that the "statutory provision referred to above merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fairplay." The construction placed by the Supreme Court turned on the use of the words "may consider the circumstances of the case". It was this phraseology which implied the requirement of an notice to the employee to show-cause against punishment. Para 15 of Sch. II is similarly worded. It is not, therefore, possible for us to accept the submission of the learned Counsel for the appellant that para 15 of Sch. II of the Air-India Employee's Service Regulations does not imply any principle of natural justice.

26. This, however, does not dispose of the matter so far as this appeal is concerned because what is relevant for our purpose is the true construction and the scope of Regn. 44(ii). Now, when we go to Regn. 44(ii), it is not difficult to find out what is the effect of that regulation on a bare reading of that regulation. Regn. 44(ii) carves out an exception and it uses the non-obstinate clause "Notwithstanding anything contained in these regulations". This clause will also include the first part of Regn. 44. As already pointed out, Regn. 44(i) expressly refers to the procedure for awarding punishments and the effect of Regn. 44(ii) must be that the operation of Regn. 44(i) will have to be restricted to cases which are not covered by Regn. 44(ii). Under Regn. 44(ii) it is expressly provided that in the matter of imposition of punishment, it is not incumbent upon the Competent Authority to follow the prescribed procedure before imposing any of the penalties enumerated in Regn. 43 on an employee in the two kinds of cases which are referred to therein. The two kinds of cases are (i) where an employee has been convicted by any Court or Tribunal on a criminal charge involving moral turpitude, and, (ii) where any penal action has been brought against him by the Customs Authorities under the Sea Customs Act or rules made thereunder or by the appropriate authorities under the Foreign Exchange Regulation Act or Rules made thereunder for activities amounting to "misconduct" within the meaning of cl. (xxiv) of Regn. 42. So far as the first category of cases is concerned, the prescribed procedure which admittedly is the procedure prescribed in Sch. II need not be followed by the Competent Authority where the employee has been convicted on a criminal charge involving moral turpitude by any Court or Tribunal. For the purposes of the second category of cases, we must go back to cl. (xxiv) of the misconduct which we have described above. The effect of Regn. 44(ii) is that if an employee is involved in any of the activities which are referred to in cl. (xxiv) such as smuggling, aiding or being concerned in any way in smuggling, which alone is material for our purpose, and these activities specifically amount to misconduct, and in case any penal action has been brought against the employee by the appropriate authorities under the Acts or Rules specified in Regn. 44(ii), then it is not necessary for the Competent Authority to follow the procedure prescribed in para 15 of Sch. II.

27. What is, however, argued before us on behalf of the respondent is that the effect of this clause is merely to obviate a second enquiry. The only procedure which need not be gone through according to the respondent, is the procedure leading to the report of the Enquiry Committee but that the later part of para 15 of Sch. II which require that "In awarding punishment, the competent authority shall take into consideration the extent and gravity of the misconduct, previous service record of the person charged and any extenuating or aggravating circumstances of the case", is really not a matter of procedure but is a matter of substance and the Competent Authority is not absolved from complying with this part of para 15 of Sch. II and, according to the learned counsel, any punishment awarded without complying with this last part of para 15 will be in violation of the principles of natural justice. As already pointed out, heavy reliance is placed

on the decision in Challappan's case (supra).

28. Now, so far as the principles of natural justice are concerned, we cannot overlook the fact that in the matter of punishment and enquiry into misconduct, the Regulations and the Schedule which is a part of the Regulations form a self-contained code. When we are now dealing with a case covered by Regn. 44(ii), the fact that in a case covered by Regn. 44(i) where the Competent Authority declines to accept the report of the Enquiry Committee which absolves the employee, a notice will be required to be given to the employee and in view of the decision in Challappan's case (supra), a notice to the employee will be required to be issued before any punishment is awarded to him, will not control the plain and grammatical meaning of the words of Regn. 44(ii) which expressly makes inapplicable the procedure prescribed in Sch. II.

29. Mr. Nariman, apart from relying on some decisions of the Supreme Court to which we shall presently refer, has also relied on a passage from Halsbury's Laws of England, Vol. 1, Fourth Edition, at para 64, page 76, where the following observations occur :

"The rules of natural justice, implicit in the concept of fair adjudication lies two cardinal principles, namely, that no man shall be a judge in his own cause (*nemo iudex in causasua*), and that no man shall be condemned up heard (*audi alteram partem*). These two principles, the rules of natural justify, must be observed by Courts. Tribunals, Arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication."

The learned counsel has referred to footnote where illustration of an express exclusion given as where an exhaustive procedural code has been prescribed by statute. Now, it is well known that the question as to what principles of natural justice can be imported in a particular case will really depend on several circumstances and where a complete code for making a domestic enquiry and for dealing with disciplinary matters is provided for and where in certain cases there is a specific provision to exclude that procedure having regard to certain facts or contingencies, unless the scheme of those rules or that code still warrants, any particular requirement of natural justice cannot be taken as necessarily implied.

30. We may usefully refer to the decision of the Supreme Court in Kraipak's case (supra) where in para 20, the Supreme Court has observed as follows :

"The aim of the rules of natural justify is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. The concept of natural justice has undergone a great deal of change in recent years What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the frameworks of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that

purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

Mr. Nariman has relied on this passage for two purposes. Firstly, according to Mr. Nariman, where the Regulations themselves exclude a particular procedure, a difference procedure cannot be required to be followed on the ground that there will be denial of the principles of natural justice and the second limb of the argument, which we shall consider later, was that in any case, there is no miscarriage of justice in the instant case, assuming that a notice to show cause against penalty was required to be issued.

31. To the same effect are the observations of the Supreme Court in *State of Uttar Pradesh Vs. Om Prakash Gupta*, . In para 10 of that judgment, after setting out the requirement of S. 240 of the Government of India Act, 1935, the Supreme Court has observed as follows :

"It is true that an enquiry u/s 240 of the Government of India Act, must be conducted in accordance with the principles of natural justice. But those principles are not embodied principles. What principle of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the Courts have to see is whether the non-observance of any of those principles in a given case is likely to have resulted in deflecting the course of justice."

32. Very relevant are the observations of the Supreme Court in *Union of India (UOI) Vs. Col. J.N. Sinha and Another*, , where after reproducing the observations of the Supreme Court in *Kraipak's* case (*supra*) that the rules of natural justice can operate only in areas not covered by any law validly made and they do not supplant the law but supplement it, the Supreme Court has observed as follows :

"It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the Legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of the power."

These observations of the Supreme Court leave no one in doubt that if there is an exclusion of the principles of natural justice on the words of the statute or the rules or regulations, then such rules cannot be overlooked and contrary to the

requirements of the mandate of those rules, the requirements of natural justice cannot be imported. When we earlier observed that para 15 of Sch. II of the Regulations, as it stands, has a provision which controls the final process of the enquiry, we were reading that regulation in consonance with the principles of natural justice, because it could not have been in the contemplation of the authority making the regulation that where the normal requirements of natural justice such as giving a delinquent a notice of the charges, giving him an opportunity of being heard, making the enquiry in the presence of the delinquent were specifically provided by the Regulations, when the occasion for determining the guilt and awarding the punishment arose, that would be done without hearing him when the Regulations expressly required consideration of extenuating circumstances because this could be done only after the delinquent is given an opportunity to satisfy the disciplinary authority about the extenuating circumstances on which a lesser punishment can be canvassed.

33. However, when we come to the mandate of Regn. 44(ii), the words therein are so wide and unambiguous that in the two kinds of cases contemplated thereby, the requirement of the whole of the Second Schedule has been dispensed with. Importing the concept of natural justice in a case which is governed by Regn. 44(ii) will be doing something which is expressly dispensed with by the express words of Regn. 44(ii). As we have already pointed out, Regn. 44(ii) operates only in a limited class of cases, indeed only in two classes of cases. We are really concerned in this case with cl. (xxiv) of Regn. 42 for the misconduct alleged and where a person against whom penal action has already been taken for the kind of activities which are enumerated in cl. (xxiv) of Regn. 42, it is obvious that it would have been wholly futile to have a second enquiry made in respect of the same fact which have been adjudicated upon by the Courts, Tribunals and Statutory Authorities referred to in Regn. 44(ii). Instead of making a fresh enquiry, the Competent Authority is entitled to accept the findings of the Court or the Statutory Authorities under the relevant statutes regarding the involvement of the concerned employee in the activities enumerated in cl. (xxiv). Once that adjudication has been made and is available to the Competent Authority, then the power to award the punishment under Regn. 42 can be exercised by the Competent Authority. Normally the power to award punishment is exercisable only in the manner prescribed or after following the procedure prescribed in Sch. II. But once the compliance with Sch. II is dispensed with, by Regn. 44(ii) it is difficult to see how compliance with the principles on which Sch. II itself is based can be imported indirectly in Regn. 44(ii). As already pointed out, Sch. II is nothing but an embodiment of principles of natural justice and that is really excluded by Regn. 44(ii) in certain cases, probably deliberately.

34. It is difficult to understand the argument of the learned counsel for the respondent as well as the view taken by the learned single Judge that the adjudication order has to be equated with an enquiry report and the proceedings with regard to punishment must, therefore, be controlled and regulated by the

latter part of para 15 of Sch. II. Dissecting of para 15 in this manner seems to us to be wholly impermissible not only having regard to the very clear mandate given to the Competent Authority by Regn. 44(ii) but also having regard to the scope and the manner in which para 15 of Sch. II itself is worded. As we have already pointed out, para 15 deals with a stage consisting firstly of the Competent Authority either accepting or not accepting the report of the Enquiry Committee and secondly of the follow up action on such acceptance or non-acceptance. When the last but one sentence of para 15 of Sch. II reads, "The Competent Authority shall there after issue an order of punishment", the word "thereafter" cannot be overlooked. Really speaking, there is a sequence in para 15 and the word "thereafter" clearly indicates that the power to issue an order of punishment, as specifically provided in para 15, follows the earlier stage of either agreeing or disagreeing with the report of the Enquiry Committee. In so far as para 15 controls the power to issue an order of punishment, it is conditioned upon acceptance or non-acceptance of the report of the Enquiry Committee. But the entire requirement of para 15 is dispensed with in certain cases by Regn. 44(ii) and the last part of para 15 cannot be separated from the earlier part of that para. Para 15, therefore, has to be read as a whole and isolating the last part of para 15, namely, that in awarding the punishments, the Competent Authority must take into consideration the extent and gravity of misconduct, previous service record of the person charged and any extenuating or aggravating circumstances of the case, would be impermissible. That part does not, in our view, seem to be attracted in a case where an employee is found guilty of misconduct consisting of conduct which has resulted in conviction for an offence involving moral turpitude or guilty of the activity which is covered by cl. (xxiv) of Regn. 42. If notice to show cause against the punishment became necessary only because of para 15 of the Second Schedule and not because of any principle of natural justice and Regn. 44(ii) could be read only as expressly excluding that requirement, then it is clear that the power to determine what punishment is to be awarded in the cases covered by Regn. 44(ii) has under the Regulations been left exclusively to the discretion of the Competent Authority.

35. As an aid to this argument, the learned counsel for the appellants has contended that it is no requirement of natural justice that a notice to show cause against punishment should be issued unless it is expressly provided that such a notice is necessary and reliance was placed on the manner in which the proviso to Art. 311 of the Constitution has been worded as well as the decision of the Supreme Court in *Management Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. Vs. S.S. Railway Workers' Union*, . That was a case dealing with certification of standing orders under the Industrial Employment Standing Orders Act, 1946 (hereinafter referred to as the Act). Under S. 4 of the Act power is given to the Regional Labour Commissioner to certify the standing orders and the appellate authority is the Chief Labour Commissioner. The workers' Union sought certain modifications in the standing orders and one of these modifications which was permitted was to the following effect (para 2) :

"In the case the management propose to remove the workman from service they shall serve on the workman separate show-cause notice to that effect."

The Standing Order in the original unamended form was as follows (Para 2) :

"Every person against whom departmental enquiry is being made shall be supplied with his dismissal and removal from service. The workman shall also be supplied with a copy of the proceedings of the enquiry committee as soon as possible after the conclusion of the enquiry proceedings in his case and be allowed to defend his case through union"s representative."

After the modification was allowed, that modification was challenged by the employer in the Supreme Court. The Supreme Court while dealing with the requirement as to whether a second show-cause notice is necessary pointed out that neither the ordinary law of the land nor the industrial law required an employer to give such a notice. The Supreme Court referred to the only class of cases where such a notice has been held to be necessary, that is, under Art. 311 of the Constitution, which had also been amended. This is clear from the following observations in para 18 of the judgments :

"As regards the modifications requiring a second show-cause notice, neither the ordinary law of the land nor the industrial law requires an employer to give such a notice. In none of the decision given by Courts or the Tribunals such a second show-cause notice in case of removal has ever been demanded or considered necessary. The only class of cases where such a notice has been held to be necessary are those arising under Art. 311. Even that has now been removed by the recent amendment of that Article. To import such a requirement from Art. 311 in industrial matters does not appear to be either necessary or proper and would be equating industrial employees with civil servants. In our view, there is no justification on any principle for such equation. Besides, such a requirement would unnecessarily prolong disciplinary enquiries which in the interest of industrial peace should be disposed of in as short a time as possible. In our view it is not possible to consider this modification as justifiable either on the ground of reasonableness or fairness and should therefore be set aside."

The Supreme Court, therefore, allowed the appeal and set aside the orders of the certifying authorities which permitted the proposed modification of the standing orders providing for the second show-cause notice at the stage when a decision about suitable punishment was to be made.

36. It is no doubt true that this decision arose under the industrial law. But what is important to point out is that when the Supreme Court observed that even under the ordinary law of the land such a second notice to show-cause against punishment is not required to be given and that provision with regard to the second show-cause notice could not be justified on the ground of reasonableness or fairness, it must necessarily follow that the absence of a requirement to issue a second show-cause notice in respect of punishment has not been considered by the Supreme Court as either being unfair or being unreasonable. The principles

of natural justice are intended only to ensure a fair and a just decision. If, according to the Supreme Court, absence of a provision with regard to a second notice to show-cause does not affect the fairness of the procedure or the reasonableness of the procedure, then, in our view, on the basis of this decision, it can safely be concluded that in a case where there is no positive rule requiring a second show-cause notice to be given in respect of punishment, the absence thereof and proceeding to decide the question of punishment without such a show-cause notice will not be contrary to the principles of natural justice. Therefore, if Regn. 44(ii) does away with the procedure prescribed in para 15 of the Second Schedule resulting in absence of a notice to show-cause against the punishment, there cannot be said to be any violation of the principles of natural justice.

37. We are supported in the view which we have taken by a decision of the Full Bench of the Delhi High Court in *Director of Postal Services v. Daya Nand* (1972) Lab IC 736. That was a case under proviso (a) to Art. 311(2) of the Constitution. Article 311(2) reads as follows :

"311(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry :

"Provided that this clause shall not apply -

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) & (c)"

In that case, two employees of the Indian Post and Telegraph Department were charged under S. 468 read with S. 34 and S. 420 read with S. 511 of the Penal Code and both of them pleaded guilty to the charges and were convicted of the same. However, instead of being sentenced, they were placed under probation for one year under S. 4 of the Probation of Offenders Act, 1958. Both of them were, however, dismissed under proviso (a) to Art. 311(2) of the Constitution without being given an opportunity either to rebut any charges or to show-cause against any proposed punishment. One of the grounds on which the orders of dismissed were challenged was that the orders were contrary to Art. 311(2) including the proviso (a) thereto independently of S. 12 of the Probation of Offenders Act and alternatively, the orders were contrary to Art. 311(2) including the proviso (a) thereto read with S. 12 of the Probation of Offenders Act. We are not concerned with that part of the judgment which deals with S. 12 of the Probation of Offenders Act. The Full Bench in that case held that though the punishing authority may not be prohibited by the proviso (a) to Art. 311(2) from

following the whole or part of the procedure under Art. 311(2), that authority cannot be compelled by the High Court to exercise such a discretion when proviso (a) clearly relieves the authority of the obligation to follow the said procedure. The Delhi High Court made reference to proviso (a) to Art. 311(2) as well as Rule 19 of the Central Civil Service (Classification, Control and Appeal) Rules and observed that these provisions dispense with the procedure after conviction in imposing other major penalties and the minor penalties listed in Rule 11 thereof, and then observed as follows :

"The law has thus been made consistent and no natural justice procedure is required to be followed in imposing a major or minor penalty after the conviction of the employee concerned of a criminal offence."

38. Now, it is possible to argue that in so far as these observations are made in respect of the scope of Rule 19, which is more or less identical with Rule 14 which was construed in Challappan's case, (supra), the view of the Full Bench may not be correct. But what we wish to point out is that so far as proviso (a) to Art. 311(2) is concerned, the view taken is that there is no requirement of natural justice in view of the proviso (a) to Art. 311(2) which does not require a notice to show cause against punishment to be given where the employee has been convicted for a criminal offence.

39. The Full Bench also dealt with the question as to whether after a conviction is recorded against the person concerned, the punishing authority could regard the conduct forming the criminal charge as not proved and posed two questions :

(1) Can the punishing authority regard the conduct forming the criminal charge as not proved ?

(2) Can it take a different view of the offence and come to the conclusion that the accused was not guilty ?

and answered the questions as follows :

"In our view, it is not only not required to do so, but is not even entitled to do so. The conviction is binding on the State as well as the accused. Proviso (a) to Art. 311(2) is based on the theory that the conduct is conclusively bad because of the conviction. If the punishing authority cannot take any other view of the conduct except the view which resulted in the conviction, it is not understandable why any sharp distinction between conduct and conviction should be made in taking action under proviso (a)."

The Full Bench of the Delhi High Court then observed as follows (Para 16) :

"Taking into account the standard of behaviour required of a Government servant, it is inconceivable that a person convicted of a criminal offence can be allowed to remain in Government service. Therefore, whenever a Government servant is convicted of a criminal offence (unless in an exceptional case the charge is a trivial or technical one like a traffic offence) the punishment of

dismissal would be inflicted on the convict as a matter of course. It is only in theory that it is true that the punishing authority has to consider which particular punishment should be imposed on the convicted person. In practice, however, continuance of a convict in Government service would be always regarded as undesirable unless the conviction was for a technical offence."

40. These observations would, in our view, apply with full force to a case to which Regn. 44(ii) would be attracted. We are dealing with a Corporation whose business is air transport of passengers and goods internationally. In respect of articles brought from outside within the country, there will always be regulations which will have to be operative such as the provisions of the Customs Act and the Foreign Exchange Regulation Act in the case of currency. If a Captain and a Pilot of a plane is found indulging in an activity which squarely falls within cl. (xxiv) of Regn. 42 and is proceeded against under the relevant law not necessarily in a criminal court but even before the departmental authorities and he is found guilty and liable to pay penalty, it is difficult to see what further evidence is necessary before the disciplinary action can be taken in view of the express provision in Regn. 44(ii). We are dealing with a case where a person has been found guilty of being concerned in smuggling of diamonds worth Rs. 1,50,000 and the penalty has been finally upheld by this Court. Removal or dismissal could be the only punishment in such a case because it will hardly do any credit to any airline company to have such a person in its employment and take the risk involved in any further similar conduct on his part. We do not find that there is anything illegal or wrong if in such specified type of cases, the awarding of punishment is kept exclusively in the discretion of the punishing authority as under proviso (a) to Art. 311(2). Needless to say that the power under Regn. 44(ii) will be subject to the punishment being inflicted for good and sufficient reason. A conviction by a criminal Court of an offence involving moral turpitude or by departmental authorities functioning under relevant statutes could be nothing else but good and sufficient reason unless the punishment is so grossly disproportionate to the misconduct that it can be treated as an arbitrary exercise of the power, so that the punishment awarded could not be said to be for good and sufficient reason.

41. Mr. Singhavi has relied on a Division Bench decision of this Court in First Appeal No. 819 of 1973 in support of his contention that if a notice to show-cause against punishment is not given, the order must be held to be bad. That decision is in First Appeal No. 819 of 1973 *Air India International Corporation v. J. A. R. Carvalho* decided on 30th November, 1981 by Dharmadhikari and S. J. Deshpande, JJ. The matter came to this Court in First Appeal arising out of a suit filed by the respondent, who was an engineer in the employment of Air-India. That was a case in which a regular charge-sheet was served upon the employee and a regular enquiry was held and he was removed from service. His appeal against the order of dismissal was also dismissed by the Chairman. The facts of that case show that that was not a case in which the power was exercised under Regn. 44(ii), but the enquiry proceedings were challenged on the ground that the

charge leveled against him was hopelessly vague and witnesses on whose statements the department put reliance for proving the charge against him were not even examined. It was also alleged in the suit that the alleged contraventions under the Foreign Exchange Regulation Act did not amount to misconduct and not only had the authorities not applied their mind to the facts of the case, but the defendant had failed to comply with the principles of natural justice, rules and regulations. One of the charges was that the plaintiff was associated in illegal activities with Messrs. Marshall, Khambatta in connection with smuggling of goods and it was admitted before the trial Court that for dismissal on the basis of this charge, the authorities had relied upon statements of Marshall and Khambatta and another person, but none of them could be examined during the course of enquiry, but what was contended was that the second charge was itself enough to sustain the dismissal. The trial Court had found that the second charge based on the contravention of the provisions of Foreign Exchange Regulations Act was not maintainable and the finding on the first charge having been vitiated as the principles of natural justice were not followed, the suit was liable to be decreed. The second charge consisted of an allegation that some gold coins and foreign exchange were found in his possession when his residence was raided and in respect of which proceedings were taken against him by the Enforcement Directorate and the gold coins and foreign exchange were confiscated. With regard to the second charge the authorities had relied upon what they thought was an admission of the plaintiff. As a matter of fact, his case with regard to the gold coins was that they were a part of his wife's jewellery, which was also the contention raised before the departmental authorities and the Director of Enforcement had observed in his order that, "Having regard to the fact that the contravention was committed under the impression that he was a Portuguese national and as such the Notification will not be attracted, I am not inclined to impose a penalty." On facts of that case, this Court took the view that though the Corporation had tried to support the order of dismissal only on the basis of the second charge, that is, the possession of gold coins, it could not be forgotten that the punishment of dismissal was imposed because the Enquiry Committee as well as the Competent Authority held him guilty of both the charges. The Division Bench further observed that the extreme penalty of dismissal could not have been imposed unless an opportunity of being heard was given to the plaintiff. It is no doubt true that the Division Bench held that the Competent Authority had to apply its mind to what would be adequate punishment, but it is difficult for us to see how this decision can be of any assistance to the respondent because we are dealing specifically with a case under Regn. 44(ii), while the case before the Division Bench was one in which a regular enquiry was held, but no notice to show-cause against punishment was given.

42. A large number of authorities which turned on the construction of Rule 14 of the Railway Servants (Discipline and Appeal) Rules or Rule 19 of the Central Services (Classification, Control and Appeal) Rules were cited before us by Mr.

Singhavi in support of the contention that even where punishment is awarded on the basis that the person has been convicted or found guilty on charges based on conduct which amounted to misconduct under the regulations, a notice to show-cause before punishment was necessary. We really do not think it necessary to refer to all those cases because with the similarity of the provisions, which were dealt with in those cases, with the provisions of Rule 14, which was considered in Challappan's case (supra), a reference to those cases would be futile because more important would be the view which was taken by the Supreme Court. We shall first deal with the decision of the Supreme Court in Challappan's case and then briefly notice the other cases relied upon which, in our view, were really not relevant for our purpose.

43. In Challappan's case, the rules concerned were the Railway Servants (Discipline and Appeal) Rules. That judgment of the Supreme Court disposes of three appeals which came on decisions of different High Courts. All the three employees who were the respondents in the respective appeals were convicted by criminal Courts in criminal cases but were released on probation and all these three persons came to be removed from service without making any further enquiry. Writ petitions filed by them were allowed and the orders of removal were quashed and the Union of India, therefore, filed an appeal. Rule 14(1) of the Rules relevant in those cases read as follows :

Notwithstanding anything contained in Rules 9 to 13 -

(i) where any penalty is imposed on a railway servant on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit."

Considering Rule 14, the Supreme Court observed that Rule 14(i) merely seeks to incorporate the principles contained in proviso (a) to Art. 311(2) of the Constitution. The Supreme Court analysed Art. 311(2) and pointed out that the constitutional guarantee therein contemplated three stages of departmental enquiry before an order of dismissal, removal or reduction can be passed. The first stage was the framing of the charges and the holding of the enquiry, the second stage was that the appointing authority had to come to a tentative conclusion regarding the penalty after the report of the enquiry is received and the third stage was that before imposing the penalty, a final notice to the delinquent to show-cause against penalty had to be given. The Supreme Court then pointed out that proviso (a) to Art. 311(2) completely dispenses with all the three stages of departmental enquiry when an employee is convicted on a criminal charge. The reason for this, according to the Supreme Court, is that in a criminal trial, the employee has already had a full and complete opportunity to contest the allegations against him and to make out his defence and the accused is given full opportunity to produce his defence and it is only after hearing the arguments that the Court passes the final order of conviction. The Supreme Court pointed out that if after a conviction by the Court a fresh departmental

enquiry is not dispensed with, it will lead to unnecessary waste of time and expense and fruitless duplication of the same proceedings all over again and that was why the founders of the Constitution thought that where once a delinquent employee has been convicted of a criminal offence, that should be treated as sufficient proof of his misconduct and the disciplinary authorities may be given the discretion to impose the penalties referred to in Art. 311(2), namely, dismissal, removal or reduction in rank. The Supreme Court pointed out that Rule 14(i) only incorporated the principle enshrined in Art. 311(2) of the Constitution. The observations on which reliance has been placed by Mr. Singhavi are as follows :

"In the instant case neither Art. 311(2) proviso (a) nor Rule 14(i) of the Rules of 1968 contain any express provision that the moment a person is found guilty of a misconduct on a criminal charge he will have to be automatically dismissed from service. Art. 311(2) proviso (a) is an enabling provision which merely dispenses with the various stages of the departmental inquiry and the show-cause notice. Rule 14 despite incorporating the principle of proviso (a) to Art. 311(2) enjoins on the disciplinary authority to consider the circumstances of the case before passing any order. Thus, in our opinion, it is a fallacy to presume that the conviction of a delinquent employee simpliciter without anything more will result in his automatic dismissal or removal from service."

44. Relying on these observations, it was contended by Mr. Singhavi that if we so read Regn. 44(ii) as to mean that no notice to show-cause against punishment is necessary, the logical result of it would be that dismissal of the employee must automatically follow either on conviction for an offence involving moral turpitude or if there is a penal proceeding taken against the employee.

45. Now, it is necessary to point out that the above quoted observations of the Supreme Court will show that though, according to the Supreme Court, the stage provided for in Art. 311(2), which required a notice to show-cause to be given, had been dispensed with, by virtue of the proviso and though Rule 14 is based on the same principle as the proviso (a), there was an additional provision in Rule 14 itself which required the authority to consider the circumstances of the case before making an order of punishment. Therefore, in Challappan's case (supra), the view that there is nothing in Rule 14 which makes dismissal automatic following on a conviction was a logical consequence of an additional provision in Rule 14 itself which requires the authority to consider the circumstances of the case before making an order of punishment. This is more clear in the further observations made in para 21 where Rule 14 was construed as conferring an additional power to consider the circumstances of the case before making an order of punishment. Construing the words "considering the circumstances of the case" in Rule 14(i), the Supreme Court observed as follows :

"The rule-making authority deliberately used the words "consider" and not "determine" because the word "determine" has a much wider scope. The word "consider" merely connotes that there should be active application of the mind

by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person. Such an inquiry would be a summary inquiry to be held by the disciplinary authority after hearing the delinquent employee. It is not at all necessary for the disciplinary authority to order a fresh departmental inquiry which is dispensed with under Rule 14 of the Rules of 1968 which incorporates the principle contained in Art. 311(2) proviso (a). This provision confers power on the disciplinary authority to decide whether in the facts and circumstances of a particular case what penalty, if at all, should be imposed on the delinquent employee. It is obvious that in considering this matter the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features if any present in the case and so on and so forth."

It is clear from these observations that Rule 14 has been so construed by the Supreme Court as not only embodying the principle of proviso (a) to Art. 311(2) but also further requiring the authority to make a summary enquiry which, according to the Supreme Court, could be made only after the employee is heard. It is clear that the duty to make the summary enquiry and to hear the delinquent was spelt out from the requirement of considering the circumstances of the case, which is expressly referred to in Rule 14. The decision in Challappan's case cannot, therefore, be treated as laying down that in a case which is analogous to a case under the proviso (a) to Art. 311(2) of the Constitution, there is a necessity to hear the delinquent on the matter of punishment.

46. That the decision in Challappan's case (supra) is not an authority for the proposition that even in a case which is analogous to a case covered by the proviso (a) to Art. 311(2) it is necessary to hear the delinquent on the matter of punishment is also clear from para 22 of the judgment. When it was argued before the Supreme Court that it may not be necessary for the disciplinary authority to hear the accused and consider the matter where no provision like Rule 14 exists because in such a case, the Government can in exercise of its executive power dismiss, remove or reduce in rank any employee who has been convicted on a criminal charge by force of proviso (a) to Art. 311(2) of the Constitution, and the further argument advanced was that in cases where proviso (a) to Art. 311(2) applied, a departmental enquiry is completely dispensed with and the disciplinary authority can on the doctrine of pleasure terminate the services of the delinquent employee, the Supreme Court did not express any opinion on this aspect of the matter because, according to the Supreme Court,

"the cases of all the three respondents before us are cases which clearly fall within Rule 14 of the Rules of 1968 where they have been removed from service without complying with the last part of Rule 14 of the Rules of 1968 as indicated above."

47. It is clear, therefore, that the decision in Challappan's case (*supra*) turned on the additional provision in Rule 14(i) which required the disciplinary authority to consider the circumstances of the case before making any order of punishment. The additional provision in Rule 14(i) has been described by the Supreme Court as a very statutory provision which has been enshrined in the Rules and one of the purposes for conferring this power was said to be that in cases where the disciplinary authority is satisfied that the delinquent employee is a youthful offender who is not convicted of any serious offence and shows poignant penitence or real repentance, he may be dealt with as lightly as possible. It is no doubt true that the Supreme Court in that case observed that the statutory provision in Rule 14 "merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. This is in keeping with the sense of justice and fair-play". These observations cannot, however, be construed as meaning that where by rules or regulations made in the exercise of statutory power a certain procedure is prescribed for dealing with disciplinary matters and that procedure is dispensed with in cases such as those specified in Regn. 44(ii), an opportunity to show-cause against punishment should still be treated as being incumbent on the part of the disciplinary authority.

48. Having considered the decision in Challappan's case (*supra*) we may now briefly refer to the other decisions cited on behalf of the respondent.

49. *Rajinder Singh, v. Punjab State* (1969) Serv L.R. 754 (Punj & Har), was a case under proviso (a) to Art. 311(2) where the Government Servant was convicted u/S 332 of the I.P.C. and sentenced for assaulting a bus conductor with whom he is alleged to have exchanged hot words on the latter's refusal to carry students studying in his school and refusing to make available to the petitioner the complaint book. Rule 4 of the Service Rules in that case enumerated the different penalties to be imposed for good and sufficient reasons and under sub-rule (1) of Rule 7 it was provided that no order of dismissal, removal or reduction could be passed against a person to whom those Rules were applicable unless he had been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. Sub-rule (2) laid down the procedure for the enquiry and proviso (b) of that sub-rule read as follows :

"(2) The provisions of the foregoing sub-rule shall not apply where a person is dismissed or removed or reduced on the ground of conduct which has led to his conviction or a criminal charge"

The argument in that case was that the extreme penalty of dismissal without enquiry could be only for an offence involving moral turpitude and that was

negated by the Division Bench on the ground that there was no warrant for imposing such a restriction on the powers of a dismissing authority on the plain language of the relevant provisions. The Division Bench no doubt pointed out that in taking action against a Government servant, who is convicted of a criminal offence, the authority concerned has to take into account not merely the fact of his conviction but also examine his conduct leading to his conviction and consider inter alia the nature and quantum of penalty to be imposed, but the decision does not go as far as to hold that the penalty cannot be imposed without giving a show-cause notice. The argument in that case proceeded on the footing that even though a show-cause notice and enquiry contemplated by Art. 311(2) was not necessary where one of the three major punishments specified was inflicted on a person in civil service for his conduct resulting in his conviction on a criminal charge, the authorities had to apply their mind to the facts of the case to determine whether his conduct leading to his conviction was such as to call for punishment. This argument was accepted and it was on this ground that the order was found to be on the face of it extremely vague as it did not even disclose the offence for which the petitioner was convicted nor the date of his conviction and that the Court had found him guilty. The order was, therefore, struck down on the ground of non-application of mind. There is, however, nothing in this decision on which it can be contended that a notice to show-cause is necessary before punishment is awarded.

50. Three other cases which are relied upon by Mr. Singhavi arose under Rule 19(i) of the Central Civil Services (classification, Control and Appeal) Rules 1965, and are *Om Prakash Vs. The Director Postal Services (Posts and Telegraphs Department), Ambala and Others*, *Hardyal Singh v. State of Himachal Pradesh* 1977 Lab I.C. 868 ; and *T. Jayant v. Union of India* (1981) 1 Serv L.R 226 (Andh Pra). Two other cases cited on behalf of the respondent turned on the construction of Rule 14(1) of the Railway Servants (Discipline and Appeal) Rules of 1968. Both these cases take the same view as is taken by the Supreme Court in *Challappan's* case (supra) and need not be discussed. They are *Union of India v. Rajendra Prasad Srivastava* (1977) 2 Serv. L.R. 81; and *Ramcharitra Sharma v. Union of India* 1977 Lab I.C. 174. It is not necessary to discuss the decision of the Full Bench of the Punjab and Haryana High Court in *Om Prakash v. Director of Postal Services, Punjab Circle*, because the view taken therein that the principles of natural justice contained in Rules 14 to 18 of the 1965 Rules have been specifically taken away by Rule 19 and in the face of that statutory provision, the Court cannot supplant the principles of natural justice so as to nullify the effect of Rule 19 would be contrary to the view taken by the Supreme Court in *Challappan's* case (supra) because Rule 19(i) is in almost identical terms as Rule 14(i) of the Railway Servants (Discipline and Appeal) Rules, 1968. The relevant part of Rule 19(i) reads as follows :

"Notwithstanding anything contained in Rules 14 to Rule 18 -

(i) where any penalty is imposed on a Government servant on the ground of

conduct which has led to his conviction on a criminal charge, or

(ii) & (iii)

the discipline authority may consider the circumstances of the case and make such orders thereon as it deems fit."

It may be pointed out that the petition of the petitioner directed against his termination on the ground of conviction in a criminal trial was allowed as the dismissal order was based only on conviction. The same is the case with the decision of the Himachal Pradesh High Court in Hardyal Singh's case (supra) in which it was held on a construction of Rule 19(i) that no show-cause notice or enquiry was necessary, though on the facts of that case it was held that the punishing authority had failed to apply its mind to the facts of that case with a view to select a proper form of punishment because the proper application of mind as regards selection of correct punishment having regard to the peculiar facts of each case was necessary. The decision of the learned single judge of the Andhra Pradesh High Court in T. Jayant's case (supra) also need not be discussed because the ratio of Challappan's case (supra) has been applied in that case.

51. A reference was made to a decision of a learned single Judge of the Andhra Pradesh High Court in Director of Operations, Andhra Pradesh State Road Transport Corporation, Hyderabad v. Industrial Tribunal (1973) 2 Serv L.R. 81. Regulation 13 of the Andhra Pradesh State Road Transport Corporation Employees (Classification, Control and Appeal) Regulations of 1967, which was relevant in that case, read as follows :

"Notwithstanding anything in Regulation 12 -

(i) where a penalty is imposed on an employee on the ground of conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit."

While construing that regulation, the learned single Judge held that the regulation contemplated that the authority imposing the punishment should necessarily apply its mind to the circumstances which show the conduct in relation to the offence and conviction in exercise of its discretion in imposing punishment, though it appears to have been held in that case that there was not right to hearing with regard to punishment. Having regard to the wording of Regn. 13, which is analogous to Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968, that view cannot be said to be correct.

52. Reliance was placed on a decision of the Rajasthan High Court in Union of India v. Tara Chand 1975 Lab I.C. 992 which did to really turn on the construction of a rule which was identical with Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968. Relevant Rule 1719 of the Railway Establishment Code was akin to Rule 14 of the Railway Servants (Discipline and

Appeal) Rules, 1968, and contained a provision that where a penalty is imposed on a railway servant on a ground of conduct which has led to a conviction on a criminal charge, the deciding authority may consider the circumstances of the case and pass such orders thereon as it deems fit. The decision in that case really turned on the question as to whether an order which merely referred to the conviction of the employee and stated "Since they have both been convicted, they are removed from service" was a valid order and the learned Judge held that the contents of an order made under Rule 1719(1) must lead to an inference that the authority had applied its mind to the conduct of the person leading to his conviction and had also taken the circumstances of the case into consideration while imposing the penalty. Reading the order as a whole, the learned Judge came to the conclusion that the punishing authority did not take into consideration the conduct of the employee leading to his conviction on a criminal charge nor the circumstances of the case. This decision will not take the case of the respondent further than the decision in Challappan's case (supra).

53. One more decision which was cited was of a learned single Judge of the Kerala High Court in Krishnankutty Vs. Senior Supt. of Post Offices and Others, . The question involved in that case turned on Rule 19(i) of the Central Civil Services (Classification, Control and Appeal) Rules, which was held to be inapplicable.

54. Some reference was made to a decision of this Court in Special Civil Application No. 2139 of 1974 which really dealt with the second and third clauses of Rule 14 of the Railway Servants (Discipline and Appeal) Rules, 1968. There was a difference of opinion between Deshpande J., as he then was, and Mridu, J., as will be clear from the order dated 23rd March, 1976 and the matter was referred to Deshmukh J., as he then was, who agreed with the view taken by Deshpande, J. The difference of opinion was on the question as to whether in that case under the provisions of Rule 14(ii) of the Railway Servants (Discipline and Appeal) Rules, an opportunity was required to be given to the delinquent against the punishment of dismissal and to bring forth the circumstances for the consideration of the Competent Authority regarding the quantum and nature of penalty imposed. Deshmukh J. held that Challappan's case (supra) does not interpret Rule 14(ii), which was analogous to proviso (b) to Art. 311(2) of the Constitution and that the approach of the Supreme Court in interpreting Rule 14(i) cannot be bodily implied in interpreting Rule 14(ii). In our view, it is not necessary to go into the detailed discussion of this decision because the regulation with which we are concerned is not analogous to Rule 14(ii), the scope of which fell for consideration before the learned Judge in that case.

55. It was further argued by Mr. Nariman that even assuming that the principles of natural justice had been violated, the present is not the case in which the Court should issue a writ as there is no miscarriage of justice. The authorities of the Supreme Court which he has cited before us show that it is not obligatory to issue a writ and quash the impugned order only on the ground that there is a

breach of natural justice. It is contended that no grievance has been made by the respondent at any stage that the punishment of removal was disproportionate or severe.

56. Mr. Singhavi, on the other hand, contended that the order of removal made in violation of rules of natural justice cannot be said to be valid. It is argued that it is not open to the appellants to say that even if the principles of natural justice had been violated, no useful purpose would have been served even if notice was given to the respondent and that the result would have been served even if notice was given to the respondent and that the result would have been the same. Heavy reliance was placed on the decision of the Supreme Court in *S.L. Kapoor Vs. Jagmohan and Others*, , to point out that where a person has been denied natural justice, no independent proof of prejudice is necessary and denial of natural justice in itself is a prejudice.

57. As already pointed out, Mr. Nariman has placed reliance on the earlier decision of the Supreme Court in *Kraipak's* case (*supra*) and it is contended that in the *S.L. Kapoor Vs. Jagmohan and Others*, the Supreme Court has not made any reference to the decision of a larger Bench in *Kraipak's* case. As already pointed out, in *Kraipak's* case, the Supreme Court has taken the view that whenever a complaint is made before a court that some principle of natural justice had been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case. Similarly, there are previous decisions of the Supreme Court in which a clear view seems to have been taken that unless there is prejudice, the impugned order need not necessarily be struck down. To cite few decisions where the test of prejudice was applied by the Supreme Court, we may refer to the decision in *The Keshav Mills Co. Ltd. and Another Vs. Union of India (UOI) and Others*, ; *Suresh Koshy George Vs. University of Kerala and Others*, , and *Tata Oil Mills Co. v. Its Workmen* 1963 I L.L.J. 78 . As a matter of fact there are clear observations of the Supreme Court in *Jankinath Sarangi Vs. State of Orissa*, , that actual prejudice which has been caused to a person by the supposed denial of a particular right to him must be considered. These observations are as follows :

"There is no doubt that if the principles of natural justice are violated and there is a gross case this Court would interfere by striking down the order of dismissal; but there are cases and cases. We have to look to what actual prejudice has been caused to a person by the supposed denial to him of a particular right."

58. As an illustration of the principle that an impugned order need not necessarily be struck down where principles of natural justice have been violated, reference was also made to the decision of the Supreme Court in *Swadeshi Cotton Mills Vs. Union of India (UOI)*, . It may, however, be pointed out that in that case, the Supreme Court has also taken the view that a quasi-judicial or administrative decision rendered in violation of the *audi alteram partem* rule, wherever it can be read as an implied requirement of the law, is null and void, though the decision in that case itself turned on whether under the relevant

provisions at the pre-takeover stage, the provisions of S. 18-AA of the Industrial Development and Regulation Act, 1951, expressly or by intendment excluded the audi alteram partem rule.

59. In the S.L. Kapoor Vs. Jagmohan and Others, , the Supreme Court observed as follows (Para 24) :

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to comply the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs."

Fortunately, we do not think we are called upon to decide in this case whether we should follow the later decision of the Supreme Court which seem to take a different view from the decision in Kraipak's cases (supra) because on the facts of the present case, we find that the respondent had sufficient opportunity to agitate his supposed grievance of being denied natural justice in the statutory appeal provided under the justice in the statutory appeal provided under the regulations. It appears that when the respondent agitated the matter after the decision of the criminal Court which acquitted him in March 1973, stress was essentially laid on the fact that the order of dismissal was passed without giving him any hearing and it was expressly argued before us that it opportunity was given to him to show cause when he asked for revocation of his order or removal, he would have shown to the authorities the order of acquittal of the criminal Court and could have on that basis attempted to convince that he was not guilty. Therefore, what was essentially complained of at that stage was that he was not given an opportunity to establish that he was innocent. As we shall presently show, it would not be permissible for the Competent Authority, having regard to the specific provisions in Regn. 44(ii), to go into the question whether the penal action taken against the respondent in the proceedings before the Additional Collector of Customs was justified or not. There was, therefore, no question of making any enquiry into his conduct which was adjudicated upon by the Additional Collector of Customs and on the ratio of the decision in Challappan's case (supra) that enquiry proceeding was obviated. What is now additionally argued before us is that the last part of para 15 of Such. II of the Air-India Employees' Service Regulations contemplates an opportunity to show cause against punishment. The argument, therefore, must in its final analysis come to this that assuming that the order of the Additional Collector of Customs could be taken as the basis of disciplinary action against the respondent, he was

still entitled to the opportunity to show that the punishment was too severe or that he could have shown cause against the punishment of removal.

60. In a writ petition we are entitled to consider, when such is the contention, as to whether such a contention was ever raised and that context, one circumstance which becomes very relevant is that for almost three years after the order of removal was passed till the judgment of acquittal was recorded by the criminal Court, the respondent never thought of agitating the matter with regard to removal. Now, even after the order of acquittal was passed and the respondent wrote a letter to the General Manager for reinstatement, the grievance was not with regard to quantum of punishment. The grievance was that he was not liable to be punished at all because he had been acquitted and, therefore, the order of removal was illegal and against the principles of natural justice. Even in the letter addressed by the petitioner's Advocates to the Managing Director of the appellant, dated 21st July, 1973, no grievance is made that the punishment of removal was harsh for the misconduct alleged. If we look at the appeal which was forwarded to the Chairman, no contention whatsoever has been made with regard to the quantum of punishment. Therefore, at no stage was any grievance made with regard to the quantum of punishment in respect of which it is now argued that opportunity should have been given to show cause against the nature of punishment.

61. Some reference was made on the basis of some documents on record that in one case of Capt. Kashyap, Air-India after having terminated his services reinstated him though he was convicted and had undergone imprisonment as a result of conviction. Now, when we go through those documents, it appears wholly incorrect to say that Capt. Kashyap was reinstated. As a matter of fact the documents show that he was re-appointed as an ordinary co-pilot on probation as a fresh employee, as will be clear from the letter dated 14/18th July, 1970 and he was clearly informed by this letter that his ultimate re-promotion to the post of senior Captain could not be claimed as a matter of right and he will be treated as a fresh employee as a co-pilot on probation and during probation, his service may be terminated at any time without assigning any reason.

62. It may be pointed out that the decision of the Supreme Court in *S.L. Kapoor Vs. Jagmohan and Others*, does not consider the question as to whether in a matter like the instant one, where there is an appellate authority which is capable of going into the question as to whether a person has been deprived of any opportunity to show cause and where the appellate authority is itself entitled to take into consideration something which the delinquent was prevented from putting forth before the authority which made the termination or dismissal order, it must necessarily follow that the impinged order was before to be quashed merely on the ground that before the trial authority the person had been deprived of an opportunity to show cause. It is an established proposition that an appellate authority has normally the same powers as the original authority and if, in our view, a breach of any principle of natural justice can be remedied by the

appellate jurisdiction, it will not be obligatory on the High Court to necessarily quash the order of the trial authority merely on the ground that there is a breach of natural justice. The question has been considered at some length in a Full Bench decision of this Court in *Shantilal v. H. A. Rangaswami* (1977) Mah. LJ 587, in which the Full Bench has taken the view that if there is any defect in the proceeding of the trial Tribunal arising out of violation of or non-compliance with any principle of natural justice and the appellate Tribunal is, under the appropriate rules, empowered to cure the defect, it will be difficult for the person concerned to contend that the order of the trial Tribunal should totally be ignored as a nullity on the ground that there is a breach of the principles of natural justice before the trial Tribunal. It has been held by the Full Bench that if a decision which, it is contended, is vitiated by violation of the principles of *audi alteram partem* could be subjected to scrutiny by the appellate Tribunal, it cannot be equated with a void decision as a decision without jurisdiction is.

63. Recently the observations of Mr. Justice Megarry in *Leary v. National Union of Vehicle Builders* (1971) 1 Ch 34, where he had observed that "a failure of natural justice in the trial justice in an appellate body" have been considered by the Privy Council as Megarry, J., having stated the principles too broadly. Referring to the decision of Megarry, J., the Privy Council observed as follows :

"In this judgment in that case the judge seems to have elevated the conclusion thought proper in that case into a rule of general application. In an eloquent passage he said, at p. 49 :

"If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal ? As a general rule I hold that a failure of natural justice in the hold body cannot be cured by a sufficiency of natural justice in an appellate body."

In their Lordships' opinion this is too broadly stated. It affirms a principle which may be found correct in a category of cases : these may very well include trade union cases, where movement solidarity and dislike of the rebel, or renegade, may make it difficult for appeals to be conducted in an atmosphere of detached impartiality and so make a fair trial at the first probably branch level an essential condition of justice. But to seek to apply it generally overlooks, in their Lordships' respectful opinion, both the existence of the first category, and the possibility that, intermediately, the conclusion to be reached, on the rules and on the contractual context, is that those who have joined in an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect.

The Privy Council pointed out that there may be instances where the defect is so flagrant, the consequences so severe, that the most perfect of the appeals or rehearing will not be sufficient to produce a just result, or there may be cases when the appeals process is itself less than perfect; it may be vitiated by the

same defect as the original proceedings, and it was pointed out that in such cases, it would not doubt be right to quash the original decision. Pointing out that these are all matters which the Court must consider, the Privy Council observed as follows :

"Whether these intermediate cases are to be regarded as exceptions from a general rules, as stated by Megarry, J., or as a parallel category covered by a rule of equal status, is not in their Lordships" judgment necessary to state, or indeed a matter of grate importance. What is important is the recognition that such cases exist, and that it is undesirable in many cases of domestic disputes, particularly in which an inquiry and appeal process has been established, to introduce too great a measure of formal judicialisation. While flagrant case of injustice, including corruption or bias, must always be firmly dealt with by the Courts, the tendency in their Lordships" opinion in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced."

64. Now, it has been argued before us that even in the appeal, the respondent has not been given a hearing. Regulation 45, which deals with appeals, does not provide for any right of hearing and such a right of hearing in an administrative appeal is not a necessary a matter of fact, as we find, the entire claim in the appeal was wholly misconceived in the sense that following an acquittal by the criminal Court, the respondent claimed to be reinstated. The memo of appeals itself is self-contained. No grievance was made about the quantum of punishment or about being deprived of any opportunity to show cause against the punishment. The appeal memo is drafted by Advocates and contains all the grounds on which the removal has been challenged. The appeal order says that the memorandum of appeal and the various grounds mentioned have been considered by the appellate authority. As in our view, the correctness of the order of the Additional Collector of Customs could not have been canvassed before the disciplinary authority and there was, therefore, no scope for interference with the order of removal, no grievance having been made that the punishment was vitiated as no opportunity to show cause against it was given, there was no error in the order of the appellant authority which was not bound to give a personal hearing.

65. Before the appellate authority the respondent had asked for inspection of the papers relied upon relating to the order of 20th November, 1970. While dealing with this request, the appellate authority has mentioned that the order of removal refers to two orders, one, order of suspension, and the other, the order of the Additional Collector of Customs. Both these orders were said to be with the respondent, which fact has not been disputed and could not be disputed because the respondent had filed an appeal against the order of the Additional Collector of Customs, and the suspension order was admittedly served on him. The appellate authority was, therefore, justified in observing that there was no question of giving inspection of these documents.

66. We are satisfied in this case that even assuming that the respondent was entitled to be heard on the question of punishment, which under the regulations was solely within the discretion of the disciplinary authority, he had never before made any such grievance even in appeal and that grievance now cannot be successfully canvassed. In any case, on the facts it was clear that he had never thought that that order worked to his prejudice on the ground that the punishment was grossly disproportionate or severe.

67. That takes us to the finding which is recorded by the learned Judge that the order of the Collector of Customs is perverse and without any basis. According to the appellant, the material on which the finding was recorded by the Additional Collector of Customs was not before the learned single Judge who was not entitled to go into the correctness of that finding. It is argued by Mr. Singhavi that not only was the learned single Judge entitled to go into the correctness of the finding entitled to go into the correctness of the finding of the Additional Collector of Customs, but even the disciplinary authority was entitled to go into the correctness of the finding of the Additional Collector of Customs. It is argued before us that Regn. 44 (ii) does to takes away the jurisdiction of the Competent Authority to go into the findings given by the Customs Authorities in adjudication proceedings for the purpose of taking disciplinary action against the employee against whom action had been taken by the Customs Authorities. It was contended that the order of the Additional Collector of Customs was based on no evidence, because it was based purely on the hearsay evidence, namely, the statements of Malap and Bhiva, the two drivers, coming behind the back of the respondent, which was not only retracted before the enquiry but also not independently proved.

68. We must first deal with the question as to whether it is open to the disciplinary authority acting under the Regulations to go into the correctness of the finding recorded by the Additional Collector of Customs. So far as the present case is concerned, the misconduct consisted of the respondent being concerned in smuggling inasmuch as he was alleged to be in unauthorised possession of diamonds worth Rs. 1,50,000 which were brought by him and were found in a coat which was alleged to be his. It is not doubt true that if an independent enquiry was made, that would have been required to be made according to the requirements of the Second Schedule. The procedure laid down therein would have to be followed. But by the express words of Regn. 44(ii), this enquiry has been obviated and if it is found in the instant case that the penal action has been brought against the respondent by the Customs Authorities for activities amounting to misconduct within the meaning of cl. (xxiv) of Regn. 42, then as already pointed out, the requirements of the Second Schedule need not have been complied with. Indeed the very purpose behind framing Regn. 44(ii) is the same as in the case of Rule 14(i) of the Railway Servants (Discipline and Appeal) Rules, 1968, minus the requirement to consider the circumstances of the case before imposing punishment, as in Challappan's case (*supra*). As already pointed out by the Supreme, Court, in the case of a conviction for conduct which amount

to misconduct under the rules, if a fresh departmental enquiry is again required to be made, it will lead to unnecessary waste of time and expense and fruitless duplication of the same proceeding all over again, in order to obviate which the provisions of proviso (a) to Art. 311(2) of the Constitution were made. Notwithstanding the acquittal of the respondent in the criminal proceeding, the order of the Additional Collector of Customs, which levied a penalty of Rs. 20,000 on him, continued to bind him and was effective against him. The acquittal by the criminal Court did not relieve the respondent of the liability which he had incurred as a result of the order of the Additional Collector of Customs. He was bound to pay that penalty and that penalty was based on the finding that he was concerned in smuggling of diamonds. If expressly by the Regn. 44(ii) action is permitted to be taken on the basis of such an order, it is difficult for us to appreciate how the respondent's claim that he was entitled to show to the disciplinary authority that he was not guilty could be canvassed successfully. To adopt any such course would be to render not only Regn. 44(ii) otiose but it will give discretion to the disciplinary authority to go into the correctness of the order of a statutory authority, which could be set aside only by one of the hierarchy of authorities under the relevant Act. The contention that the order was itself based on hearsay evidence can also be entertained because in so far as the respondent was concerned, the order had become binding on him and he was subjected to payment of penalty on a finding that he was concerned in smuggling. It was an order by an authority with jurisdiction and on the ground that it was based on some material which was inadmissible, it cannot be collaterally challenged. If the challenge to the order was that it was based on some inadmissible evidence, it had to be made before the appropriate forum and unfortunately for the respondent, not only had his appeal and revision failed but even this Court had found that the proceedings taken against him were well founded and had no infirmity in them. It will not, therefore, be possible to accept the contention that the respondent was entitled to show to the disciplinary authority that the order of the Additional Collector of Customs was wrong.

69. For the same reasons it is also difficult for us to appreciate how the learned single Judge could have taken the view that the order of the Additional Collector of Customs was perverse. As already pointed out, it continued to be binding against the respondent and that order could be set aside only by a regular appeal proceeding or a revisional proceeding or in writ jurisdiction of this Court directed against that order and there was no other manner in which any person affected thereby could ignore that order. Further the learned Judge did not have the entire material on which that order was passed. With great respect to the learned single Judge, therefore, we are unable to accept the view taken by him that the order of the Additional Collector of Customs was a void order or an illegal order or had been passed on inadmissible evidence.

70. It was only at almost the end of the argument that the learned Counsel for the respondent argued that the Regulations were ultra vires the Acts and illegal, they are ultra vires of Arts. 14, 16, 19(1)(f) and Art. 31 of the Constitution and

that the Regulations were also unreasonable. The petition does not disclose the grounds on which these challenges are based and how the Regulations are either in excess of the statutory power or ultra vires the provisions of the Constitution or unreasonable. As a matter of fact the Constitution itself seems to recognise the principle that where there is a conviction by a criminal Court for a conduct which can amount to misconduct, no enquiry proceeding need be taken in respect of that misconduct. Such provisions are now uniformly found in several Service Rules. Unless, therefore, adequate data is made available, it will not be possible to go into these challenges.

71. The order of removal is not order which is based merely on the fact that the respondent has been penalised. The order shows that the disciplinary authority had applied its mind to the facts of the case because the findings recorded by the Additional Collector of Customs are that the respondent had brought from abroad and cleared out to Customs without divulging the true contents of the coat, diamonds and foreign exchange. The fact that penalty has been imposed for this conduct has also been referred to an if for such an offence, a person has been removed, it would, in our view, not be proper exercise of discretion under Art. 226 to quash the order of removal on the ground that he was not heard on the question of punishment by the discipline authority. It appears to us that having regard to the nature of the punishments permissible, removal is the lighter to the two punishments between removal and dismissal, which has been awarded by the disciplinary authority. Even otherwise, therefore, we would not have been inclined to interfere with the order of removal.

72. Some argument was advanced by Mr. Nariman that the petition should be rejected on the ground of delay. We do not consider it proper to hold that the learned Judge should have rejected the petition on that short ground. It appears to us that the respondent carried the impression that he was entitled to the benefit of the order of acquittal by asking for revocation of his order of removal. It is important to bear in mind that the approached the authorities only after he was acquitted by the criminal Court because that, according to him, gave him a right of reinstatement. It is true that he had not earlier approached, but probably it would have been a futile exercise earlier to ask for revocation of the order of removal. In any case, his claim for reinstatement had to be decided on its own merits and it would not be proper to exercise our discretion to hold that the petition should have been rejected outright on the ground of delay.

73. In the result, the appeal is allowed. However, in the circumstances of the case, there will be no order as to costs.

74. Mr. Rana requests for leave to appeal to Supreme Court. It appears to us that Regn. 44(ii) on its plain language bears the meaning which we have given to it. We are, therefore, not inclined to grant leave to the respondent to appeal to the Supreme Court.

75. Mr. Rana requests that the amounts which are already lying deposited by the

appellant so far and lying in deposited should not be allowed to be withdrawn back by them because the respondent proposes to approach the Supreme Court. We, therefore, direct that the appellant shall not withdrawn any amount which is lying in deposit in this Court till 15th February, 1982. Mr. Vahanvati wants it to be clarified that the respondent shall also not withdraw any amounts. It is obvious that since the appeal has been allowed, the respondent has not any present right to withdrawn any amount.