

(2023) 03 OHC CK 0045

In the Orissa High Court

Case No : Writ Petition (C) No. 18043 Of 2018

General Manager, East Coast Railway, Bhubaneswar And
Others

APPELLANT

Vs

Hemanta Kumar Tripathy

RESPONDENT

Date of Decision : 09-03-2023

Acts Referred:

Evidence Act, 1872 — Section 57

Citation : (2023) 03 OHC CK 0045

Hon'ble Judges : Dr. B.R. Sarangi, J;M.S. Sahoo, J

Bench : Division Bench

Advocate : D.R.Mohapatra, N.R. Routray

Final Decision : Dismissed

Judgement

M.S.Sahoo, J

1. The petitioners are functionaries of East Coast Railway; who were respondents before the learned Central Administrative Tribunal, have filed the writ application seeking to quash the judgment and order dated 15.03.2018 passed in O.A. No.260/00816 of 2011.

The opposite party-employee, who was working as a Head Clerk (working in the Accounts & Stores Establishment, East Coast Railway, Talcher (Constructions), had filed the Original Application challenging the order dated 28.11.2009 under Annexure-6 passed by the Disciplinary Authority-Deputy Chief Manager (Construction)-I/SBP (Petitioner No.4) imposing major penalty of removal from service confirmed by the Appellate Authority-the Chief Manager (Construction)-III, East Coast Railway, (Petitioner No.2) vide order dated 19.07.2010 in Annexure-7 and also affirmed in Annexure-8 by the Revisional Authority-Chief Administrative Officer (Construction), East Coast Railway, Bhubaneswar, Petitioner No.3 vide order dated 03.08.2010.

Factual background

2. The facts that emerge from the pleadings are that the opposite party-employee was initially appointed as a casual gangman and was engaged under the administrative control of the D.R.M., the, then S.E. Railway, Chakradharpur and after working some years, he was posted as Junior Clerk vide order dated 09.11.1989 and was deputed to construction Division, Talcher. Thereafter the opposite party-employee appeared in the suitability test and promoted to the post of Senior Clerk/Head Clerk.

While working as such as a Deputationist at Talcher under the administrative control of the petitioner no.4, on 02.07.1994 a trap was laid by the Central Bureau of Investigation (C.B.I. for short) against the opposite party-employee on the allegation of demanding illegal gratification from another Railway employee. The CBI did not proceed further after the said trap but a disciplinary proceeding/departmental proceeding was initiated against the opposite party-employee on the basis of report of CBI and memorandum of Articles/charge-sheet was served upon the opposite party-employee on 31.03.1995.

2.1 The article of charges framed against Sri H.K.Tripathy (opposite party) issued as per the Railway Servants Discipline & Appeal Rules, 1968 contain the following imputations :

"That Sri H.K.Tripathy during his incumbency as in-charge DSK(C)/SERly, Talcher acted in a manner unbecoming of a Railway Servant in as much as he demanded and accepted illegal gratification of Rs.100/- from the complainant Sri S.K.Mohanty, Senior Clerk for his timely relieve to S.E.Rly., Angul transferred vide office order no.59/94 dt.23.06.94 and thereby committed misconduct in contravention of Rule 3 Clauses (i) & (iii) Railway Service Conduct Rule-1966 as detailed in the statement of imputation of misconduct."

2.2 Pursuant to the above charge, an ex-parte enquiry was conducted, and report was submitted accordingly. Basing upon the said enquiry report, the disciplinary authority vide order dated 25.12.1999 passed an order of removal from service against the opposite party-employee which was subsequently upheld by the appellate authority vide order dated 25.02.2000. Against the same, the opposite party-employee filed O.A. No.131/2000 before the learned Central Administrative Tribunal which was dismissed vide order dated 26.02.2001. Against the said order of dismissal of O.A., the opposite party-employee filed OJC No.2948/2001 before this Court, which was allowed by judgment dated 11.10.2007, wherein the ordering portion reads as follows :

"In the result, the writ petition is allowed in part. The impugned order passed by the Tribunal, the departmental proceeding conducted from 29.12.1997 and the order of removal as well as the appellate order are quashed. It will be open to the opposite parties to conduct de novo enquiry as directed above after providing opportunity to the petitioner to defend himself in accordance with the rules. However, if the proceeding is not started within a period of three months from the date of production of a copy of this order, the petitioner shall be entitled to

reinstatement with all consequential service benefits.”

2.4 After about a month of receiving the above order passed by this Court, the petitioner no.4 issued a letter to the opposite party-employee intimating him regarding appointment of new Enquiry Officer and presenting officer to conduct the de-novo enquiry pursuant to the direction of this Court dated 11.10.2007.

2.5 The opposite party-employee again approached the learned Central Administrative Tribunal by filing O.A. No.72/2008 praying therein to direct the respondents to reinstate him in his earlier post as well as to complete the de-novo enquiry within a specific period, but the O.A. was dismissed by the learned Tribunal vide order dated 25.06.2008 and the said order was challenged before this Court in W.P.(C) No.10638/2008, which was disposed of vide order dated 25.09.2008, observing as follows :

“The order of removal from service having been set aside by this Court in the aforesaid writ application, the petitioner should have been relegated to the post which he was holding on the date of removal from service. If on the date of removal from service he was continuing, he should be allowed to continue and if on the said date he was under suspension, he should be paid subsistence allowance. The learned counsel for the opposite parties inform us that pursuant to the direction of this Court, a de novo inquiry has already commenced. It is, therefore, further observed that it is open for the opposite parties to pass orders for placing the petitioner under suspension pending disposal of the departmental proceeding. However, this observation may not be considered as a direction.

With the above direction, the writ application is disposed of.”

2.6 The de-novo enquiry was completed and the enquiry report was submitted by the enquiry officer on 01.11.2008 in which the charges leveled against the opposite party-employee were held to be established. After receiving a copy of the inquiry report, the opposite party-employee submitted his defence to the inquiry report on 19.11.2008. During enquiry the petitioner no.4 vide order dated 01.12.2008 placed the opp. Party under suspension. The opposite party-employee again approached the learned Central Administrative Tribunal by filing O.A. No.110/2009 praying therein to quash the order of suspension as well as the charges leveled against him. The said O.A. was dismissed by the learned Tribunal vide order dated 20.04.2009 and challenging the order, the opposite party-employee approached this Court in W.P.(C) No.7834/2009 which was disposed of vide order dated 30.06.2009 with a direction to the Authority to complete the Departmental proceeding as early as possible. Thereafter, petitioner no.4 being disciplinary authority passed order of removal from service dated 28.11.2009 which states as follows :

The following findings were given by the Disciplinary Authority :

“(i) In all the hearings, CO attended the inquiry. All the reasonable opportunities including adequate time for submission of defence brief, representation on

Inquiry Report etc. were given to CO duly observing the principles of Natural Justice.

(ii) The undersigned have carefully gone through the Major Penalty Charge Sheet No.SPMANGL/Steno/Conf/D&A/HKT/24, Dated 31.03.1995 made against the charged official, Sri H.K.Tripathy, Head Clerk, Stores & Accounts/Con/Talcher, articles of charges, Statement of imputations therein, defence brief of the charge official, Statement of witnesses made during de-novo inquiry, evidence produced, reports and findings of the Inquiry Officer, P.O.'s brief and representation of the party on the inquiry report.

(iii) On careful consideration of all the above, the undersigned accept the P.O's brief and findings of the Inquiry Officer and holds the charges mentioned in the above Charge Sheet No. SPM/ANGL/Steno/ Conf/D&A/HKT/24, Dated 31.03.1995 been established & proved and the undersigned is satisfied that Sri H.K.Tripathy is guilty of the charges leveled against him.

(i) As per Clause specified in the Railway Servant (D&A) Rules, 1968, one of the following penalties should normally be imposed, in trap case.

a. Dismissal.

b. Removal from service.

c. Compulsory retirement (When superannuation is at least five years away)

In view of the above, the undersigned, being DA has decided that Sri H.K.Tripathy is not a fit person to be retained in Railway Service and now, therefore, in exercise of powers conferred by Rules of Disciplinary Powers of RS (D&A) Rules 1968 decided for punishment of "Removal from Service".

2.7 The opposite party-employee preferred an appeal before the appellate authority/petitioner no.2 which was dismissed vide order dated 19.07.2010. Against the order passed by the appellate authority the opposite party-employee preferred a revision on 03.08.2010 before the Revisional Authority/petitioner no.3 who in turn confirmed the order of disciplinary authority as well as the Appellate Authority against which the Original Application No. 260/00816 of 2011, was filed before the learned Central Administrative Tribunal with the following prayers :

"(a) To issue notice to the respondents.

(b) To quash/set aside the order of removal dated 27/28.11.2009 passed by the respondent no.4 (Annexure-6)

(c) To quash the order dated 15.02.2011 passed by the respondent no.3 in the revision (Annexure-9)

(d) To direct the respondents to pay the applicant all consequential service benefits treating him in service.

(e) To pass any other order(s), direction(s), as this Hon'ble Tribunal may deem fit and proper to meet the ends of justice and equity."

3.1 Counter was filed by the authorities/present petitioners before the learned Tribunal, after giving due opportunity, the learned Tribunal allowed the Original Application by judgment dated 15.03.2018 stating as follows :

"5. Before delving into the merit of this case, it may be stated at the outset that this is peculiar case where in spite of a CBI trap laid by the CBI staff, there was no criminal case under Prevention of Corruption Act and rather the department swung into action in view of a CBI trap. Had the CBI case proceeded against the delinquent employee (present applicant) certainly the department could have initiated a simultaneous departmental proceeding against the applicant but such a liberty is not available to the department when CBI itself has not proceeded with the CBI case. Had there been separate report to the authority (department) regarding demand of bribe, certainly the department could have initiated an action. Admittedly, the decoy/informant has not made any complaint either before the higher authority of the present applicant or before any authority of the department to strengthen the case of harassment by a colleague. The FIR was lodged before the CBI authority and not before the department and initiation of a departmental proceeding when CBI did not initiate a criminal case speaks of malafide and vindictive attitude of the department. When no CBI case pending, initiating a departmental proceeding on the same issue is a futile departmental exercise.

6. Coming to the legal lacuna, it is noticed that except the solitary statement of demand of bribe by the decoy informant, there is no corroborative evidence either of demand of bribe or acceptance of bribe. Except the informant, not a single departmental or independent witness came forward to say that he has heard demand of bribe or about acceptance of bribe or even harassment by the applicant at any point of time. Knowing fully well that no corroborative evidence could be established the CBI has not charge sheeted the accused. There are judicial pronouncements to that effect which the CBI sleuths knew very well for which they did not venture to file a charge-sheet against the applicant in the CBI court. In the case of Panalal Damodar Rathi v. State of Maharashtra reported in 1979 (4) SCC 526, a Three judge Bench of the Hon'ble Apex Court have authoritatively held that when there was no corroboration of testimony of complaint regarding demand or acceptance of bribe, it is to be accepted that the version of the complainant is not corroborated and version of the complainant cannot be relied upon. The Disciplinary Authority, the Appellate Authority and the Revisional Authority have nowhere whispered, who is the second departmental witness who vouchsafe regarding authenticity of the statement of the informant, Mr. S.K. Mohanty. Furthermore, in view of the decisions rendered in the case of Suraj Mal v. State (Delhi Administration) reported in 1979 (4) SCC 725. Their Lordships have categorically held that "mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict

the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained.” We have every reason to hold that the evidence of Mr. S.K. Mohanty is not reliable because of the prevailing and surrounding circumstances. Once, there is a transfer order, the person, who is authorized for relieving that person for retaining that person or delaying the relieve date, can demand bribe and that is understood but for immediate giving effect to the transfer order the demand of bribe becomes remote because if the concerned officer does not relieve the employee in time, he has ample scope to approach his higher authority for not obeying the transfer order. So, in the present case demand of bribe for an early relieve becomes unacceptable on the backdrop when the informant candidly admitted that, only once he had approached the applicant on 30.06.1994. In view of such statement, the question of harassment also does not arise.

[Emphasis Supplied]

7. To sum up, had the CBI charge-sheeted the accused certainly the department would have been right in initiating a proceeding and to deal with the case by way of independent evidence but such liberty is not available when the CBI itself failed to substantiate its case for which the accused did not face trial before the CBI court and initiating a departmental proceeding on an unfounded criminal case amounts to misuse of official dissertation. In a departmental proceeding generally we do not go into the details of the evidence but in this case we have scanned the entire proceeding to examine if there is any legal evidence on record to hold the delinquent employee guilty of misconduct. In the case of *State of Tamil Nadu v. S. Subramaniam* reported in 1996 SCC (L&S) 627. Their lordships observed that the only consideration of the Tribunal in its judicial review is whether the acquisition is based on evidence on record to support the finding and whether its conclusion is based on no evidence. Here, there is absolutely no legal evidence to come to a finding of demand and acceptance of bribe and it is unsafe to rely on the uncorroborated testimony of the complaint in view of the Trade Union rivalry. Since, legally the charge could not be proved for want of reliable evidence, the findings recorded by the Disciplinary Authority, Appellate Authority and the Revisional Authority becomes vulnerable and is liable to be set aside in her larger interest of justice, equity and good conscience. Hence ordered.”

[Emphasis Supplied]

4. Being aggrieved by the judgment of the Central Administrative Tribunal dated 15.03.2018 the petitioners have filed this application. This Court heard Shri Deb Ranjan Mohapatra, learned Central Government Counsel for the petitioners and Mr. N.R. Routray, learned counsel for opposite party-employee and perused the records available in the present proceeding as well as pleadings before the

learned Tribunal in O.A. No.260/00816 of 2011 disposed of on 15.03.2018. With the consent of the parties, the matter is disposed of at the stage of admission.

Contentions of the petitioners and judgments relied on.

Learned Central Government Counsel has relied on the decisions dated 20.05.2022 & dated 02.09.2022 rendered by the Hon'ble Supreme Court in Civil Appeal No. 3490 of 2022 (State Bank of India and another v. K.S.Vishwanath) and in Civil Appeal No. 5930 of 2022 (arising out of SLP(C) No.11195 of 2021 (The State of Rajasthan and others v. Phool Singh) respectively. He has further relied on the decision rendered by the Hon'ble Supreme Court on 29.10.2020 in the State of Rajasthan and others v. Heem Singh : Civil Appeal No.3340 of 2020.

The petitioners' case rests on the contention that the learned Tribunal failed to appreciate that the procedure in a criminal case as compared to a departmental enquiry is separate and distinct. Relying on Phool Singh (supra) and Heem Singh (supra), it is contended in a criminal case, the guilt is to be proved beyond all reasonable doubt and in case of departmental proceeding, the delinquency has to be proved on the basis of preponderance of probabilities. Relying on K.S.Vishwanath (supra) & Heem Singh (supra), it is submitted that the learned Tribunal could not have re-assessed the evidence presented before the disciplinary authority, who came to the conclusion of holding the employee guilty and as such the order of the disciplinary authority having been passed following due procedure, is to be upheld by interfering with the order passed by the learned Tribunal.

Contentions raised by the learned counsel for opposite party and judgments relied on

5. Per contra, Mr. Routrary, learned counsel for the opposite party supports the conclusion arrived at by the learned Tribunal and the reasoning given by the learned Tribunal are also reiterated. The learned counsel for the opposite party-employee brings to the notice the Railway Board Guideline vide RBE No.54/1995 :

"3. However, if the facts, circumstances and the charges in the Departmental Proceedings are exactly identical to those in the criminal case and the employee is exonerated/acquitted in the criminal case on merit (without benefit of doubt or on technical ground) then the departmental case may be reviewed if the employee concerned makes a representation in this regard."

5.1 It is contended that the enlisted witnesses presented before the Inquiry Officer, I.O. did not support the case of the departmental authority in presenting the allegations. Referring to the statement of Sri N.L.S.V.B. Kameswar Rao and Sri S.B. Mohapatra, it is contended that the witnesses did not support, which is also indicated in the enquiry report dated 14.08.2008 as rendered by the Inquiry Officer:

"Of course, from the deposition of the so called independent witnesses Sri J.K. Padhy (P.W.1) & Sri Radhakrishna (P.W.II), it is felt that the prosecution could not

produce concrete evidence to establish the demand of the illegal gratification by the CO.

5.2 It is further contended by the learned counsel for opposite party that the decision relied upon by the petitioners-Union of India particularly K.S.Vishwanath (supra) is in respect of completely different set of facts and therefore, the ratio is not applicable to the present case.

Learned counsel for the opposite party relies on the decision of the Hon'ble Supreme Court reported in G.M. Tank v. State of Gujarat and others: (2006) 5 SCC 446, particularly paragraph-30 (of SCC) :

"30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand."

5.3 Learned counsel for the opposite party further relies on the judgment rendered by a Single Bench of this Court dated 10.08.2021 in WPC(OAC) No.1052 of 2013 in the case of Samir Ranjan Sahoo v. State of Orissa & others : 2021 (II) ILR-CUT-787 regarding inapplicability of K.S.Vishwanath (supra).

Learned counsel relies on the decision rendered by the Hon'ble Supreme Court in The State Financial Corporation and another v. M/s. Jagadamba Oil Mills and Another : AIR 2002 SC 834, particularly the principle laid down in paragraph-21 of the said decision which is quoted herein :

"21.Circumstantial flexibility, one additional or different fact may make a world of

difference between conclusion in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.”

Analysis

6. Apparently the Disciplinary Proceeding was initiated on the basis of the complaint lodged before the Central Bureau of Investigation and the subsequent action of the CBI in laying a trap as indicated in the report of the Disciplinary Authority (at internal page-3 : Annexure-2, paragraph-2). The list of documents and witnesses examined by the Disciplinary Authority are indicated by him in paragraph-2 as follows :

(A) List of documents examined:

(i) Complaint dt.30.06.1994 (RUD-1)

(ii) Pre Trap memorandum (RUD-2)

(iii) Post Trap Memorandum (RUD-3)

(iv) G.C. Notes bearing No. 4NE 680438-Rs.50/, 94E 072304-Rs.20/-, 66N-402983-Rs.10/-, 08T 784576-Rs.10/- and 99A 965617-Rs.10/-. (RUD-4).

(v) CFSL repot vide No.CFSL/E/94 (G/1)-392/4058 dt.12.08.94 (RUD-5)

(vi) Spot map (RUD-6)

All these above documents by which the Article of charge framed against the CO proposed to be sustained were taken on record and marked as exhibits RUD-1 to 6. In addition to this, the following documents produced by the CO were also taken on to records and marked as exhibits D1.

(1) Copy of SPE department of Personnel Cabinet Secretariat INVOICE No.224 dt.22.09.98 together with copy of CBI letter addressed to the Co; Return of documents seized in RC 48/94 dt. 11.04.2000 along with a copy of the typed unsigned letter of Sri Kameswara Rao as an enclosure.

(B) List of witness examined :

(i) Sri J.K. Padhy, the then A.S.O., Mahanadi Coal field Ltd., Dera/Talcher (now Sr. Survey Officer, MCL/Talcher).

(ii) Sri M. Radhakrishna, the then AVO, Fertilizer Corporation of India, Talcher (now Retd Sr. Vigilance Officer/FCIL/Ramagundam Unit).

(iii) Sri S.K. Dash, the then Inspector, CBI/Bhubaneswar (now officer, B.O.I., Keonjhar Branch).

(iv) Sri K.K. Dash, the then HC/CBI/Bhubaneswar (now ASI/Vigilance Directorate/Cuttack.)’

(v) Sri K.Rath, the then RSO, CBI/Cuttack (now Sr. TI/Optg.BBS)

(vi) Sri S.K. Mohanty, the then Sr. Clerk O/o DSK (C)/SERly/Talcher (now Sr. Clerk O/o Sr. DOM/KUR).

(vii) Sri D.P. Majumdar, the then Inspector/CBI/Bhubaneswar (now Addl. DCP/ Cuttack).

(viii) Sri N.L.S.V.B.Kameswara Rao, CA to Dy. COM(P&P) (ex.Sr. Steno, CAO/BBS)

(ix) Sri S.B. Mohapatra, Sr. Steno to Dy.CE/Con/P&P/BBS (ex.Jr. Steno, SPM/ ANGL).

During the course of regular hearing, all the prosecution witness at Sl.No.(i) to (vii) were examined on behalf of the prosecution and cross examined by the CO/ DC. Further, the two defence witnesses at Sl.No.(Viii) & (ix), cited by the Co, were also examined by CO/DC and cross examined by PO on behalf of prosecution.”

6.1 It is further evident from the summary of evidence adduced that the Disciplinary Authority examined the complainant before the CBI and the persons who participated in the operation of the CBI in laying the trap.

It is apparent that the CBI thought it prudent not to proceed further after conducting the trap in accordance with law, by not filing any police report before the competent court, rather it chose to send a ‘closure report’ after completion of the investigation. The Inspector, CBI, Bhubaneswar was also examined as a witness by the Disciplinary Authority.

6.2 The peculiar facts those have emerged are that there was no complaint by the complainant before the Departmental Authority. The CBI in response to the complaint of the complainant acted by laying a trap but ultimately did not proceed further as per the procedure established by law that is the Prevention of Corruption Act and Code of Criminal Procedure. But the Disciplinary Authority proceeded to analyse the various acts of CBI and the statements of witnesses those were said to have been part of the CBI operation laying trap, to arrive at a conclusion holding the employee guilty.

6.3 As indicated above, article of charges indicate that the enquiry was wholly based on the exercises undertaken by the CBI under the provisions of the Prevention of Corruption Act by laying a trap arranging different witnesses. For the reasons best known to the Investigating Agency, the matter was not proceeded and in fact the records and papers were returned to the Department.

6.4 On perusal of the available materials on record and the pleadings, it is indicated that the findings of the learned Tribunal regarding no departmental proceeding having been initiated as per the complaint of the complainant-Mr. S.K.Mohanty before the departmental authority, remains uncontroverted. Learned counsel for the petitioners was specifically asked to point out the material filed by the petitioners herein/respondents before the learned Tribunal to indicate if any material was presented before the learned Tribunal to show that

a complaint was made by the employee, Sri S.K.Mohanty before the authority against the respondent. Learned counsel fairly submitted that he cannot go beyond the pleadings before the Tribunal and there is no other materials that was placed before the learned Tribunal to show that a departmental proceeding was ever initiated on the basis of a complaint made by the employee. Learned counsel though argued with lot of vehemence and emphasis but had to accept the fact as it remains that in the Disciplinary Proceeding the trap witnesses those were drafted in by the CBI, were examined along with the documents those were examined by the CBI in a proposed case to be initiated under the Prevention of Corruption Act.

The Special Police Establishment, CBI in their letter dated 30.07.1994 annexed to the writ petition marked as Annexure-1 at paragraph-10 (vi) have indicated the following :

"vi) Conclusion whether the allegation is:

a) Proved against each of the suspect/accused: The allegation against the suspect is proved.

b) Doubtful or not fully proved : NIL.

c) Not substantiated or proved to be false : NIL."

The said communication at paragraph-11 states the following :

"Final Recommendations.

(i) Prosecution: Nil

(ii) R.D.A.

Considering the facts and circumstances of the case, R.D.A. Major Penalty is recommended against Sri H.K.Tripathy.

(iii) To be referred to the Ministry/Deptt. for such action as may be considered appropriate.

NIL.

(b) To be closed and dropped for lack of proof.

(c) Taking action against the complainant for making false and malicious allegations.

NIL"

7. The decisions relied upon by the learned Central Government Counsel are dealing with the issue where the delinquent employee is proceeded against departmentally by initiating departmental proceeding whereas he has been acquitted in the criminal case arising out of the same set of facts. The facts of the present case are different as the investigating/ prosecuting agency after

planning and proceeding to lay the trap did not proceed for trial in accordance with law and gave a report to the department for proceeding departmentally, observing that "the allegation against the suspect is proved".

8. The Hon'ble Supreme Court dealt with somewhat similar facts and circumstances as those have emerged in the case at hand in the decision rendered in *Moni Shankar v. Union of India and another* : (2008) 3 SCC 484. The relevant paragraphs of the said decision are quoted herein :

"8. Mr A.K. Sanghi, learned counsel appearing on behalf of the appellant would submit that:

1. The High Court committed a serious error insofar as it failed to take into consideration that the Railway Authorities were required to follow Paras 704 and 705 of the Manual scrupulously.

2. The appellant having not examined any defence witness, he should have been examined in terms of Rule 9(21) of the Rules, which being mandatory in nature, non-compliance therewith would vitiate the entire proceeding.

3. The shortage in cash having repaid by the appellant, no charge could have been framed in that behalf.

4. The findings of the High Court that the appellant was found to have been in possession of an excess sum of Rs 5 was beyond record.

9. Dr. R.G. Padia, learned Senior Counsel, appearing on behalf of the respondents, on the other hand, would contend:

1. That finding of fact having been arrived at by the disciplinary authority, the same should not have been interfered with by the Tribunal particularly when some evidences have been led on behalf of the Department.

2. The High Court has rightly opined that Paras 704 and 705 of the Manual pertaining to the manner in which the trap could be laid, contain only administrative instructions and are, thus, not enforceable in a court of law.

3. Since there was sufficient compliance with Rule 9(21), the impugned judgment should not be interfered with.

10. We may at the outset notice that with a view to protect innocent employees from such traps, appropriate safeguards have been provided in the Railway Manual. Paras 704 and 705 thereof read thus:

"704. Traps.—(i)-(iv)***

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

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

put up by the accused.

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

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

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

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

(vi)-(vii)***

705. Departmental traps.—For departmental traps, the following instructions in addition to those contained under Para 704 are to be followed:

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

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

(b) The decoy will present the money which he will give to the defaulting officers/employees as bribe money on demand. A memo should be prepared by the investigating officer/Inspector in the presence of the independent witnesses and the decoy indicating the numbers of the GC notes for legal and illegal transactions. The memo, thus prepared should bear the signature of decoy, independent witnesses and the investigating officer/Inspector. Another memo, for returning the GD notes to the decoy will be prepared for making over the GC notes to the delinquent employee on demand. This memo should also contain signatures of decoy, witnesses and investigating officer/Inspector. The

independent witnesses will take up position at such a place wherefrom they can see the transaction and also hear the conversation between the decoy and delinquent, with a view to satisfy themselves that the money was demanded, given and accepted as bribe a fact to which they will be deposing in the departmental proceeding at a later date.

xxx xxx xxx [Emphasis Supplied)

xxx xxx xxx

14. While we say so we must place on record that this Court in Chief Commercial Manager, South Central Railway v. G. Ratnam [(2007) 8 SCC 212 : (2007) 2 SCC (L&S) 851] opined that non-adherence to the instructions laid down in Paras 704 and 705 of the Vigilance Manual would not invalidate a departmental proceeding, stating : (SCC pp. 220-21, paras 17-18)

“17. We shall now examine whether on the facts and the material available on record, non-adherence of the instructions as laid down in Paras 704 and 705 of the Manual would invalidate the departmental proceedings initiated against the respondents and rendering the consequential orders of penalty imposed upon the respondents by the authorities, as held by the High Court in the impugned order.

...

.... In the facts and circumstances of the matters, the Tribunal held that the investigations were conducted by the investigating officers in violation of the mandatory instructions contained in Paras 704 and 705 of the Vigilance Manual, 1996, on the basis of which inquiries were held by the enquiry officer which finally resulted in the imposition of penalty upon the respondents by the Railway Authority. The High Court in its impugned judgment has come to the conclusion that the inquiry reports in the absence of joining any independent witnesses in the departmental traps, are found inadequate and where the instructions relating to such departmental trap cases are not fully adhered to, the punishment imposed upon the basis of such defective traps are not sustainable under law. The High Court has observed that in the present cases the service of some RPF constables and railway staff attached to the Vigilance Wing were utilised as decoy passengers and they were also associated as witnesses in the traps. The RPF constables, in no terms, can be said to be independent witnesses and non-association of independent witnesses by the investigating officers in the investigation of the departmental trap cases has caused prejudice to the rights of the respondents in their defence before the enquiry officers.

(Emphasis Supplied)

18. We are not inclined to agree that the non-adherence of the mandatory instructions and guidelines contained in Paras 704 and 705 of the Vigilance Manual has vitiated the departmental proceedings initiated against the respondents by the Railway Authority. In our view, such finding and reasoning are wholly unjustified and cannot be sustained.”

15. It has been noticed in that judgment that Paras 704 and 705 cover the procedures and guidelines to be followed by the investigating officers, who are entrusted with the task of investigation of trap cases and departmental trap cases against the railway officials. This Court proceeded on the premise that the executive orders do not confer any legally enforceable rights on any person and impose no legal obligation on the subordinate authorities for whose guidance they are issued.

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17. The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See *State of U.P. v. Sheo Shanker Lal Srivastava* [(2006) 3 SCC 276 : 2006 SCC (L&S) 521] and *Coimbatore District Central Coop. Bank v. Employees Assn.* [(2007) 4 SCC 669 : (2007) 2 SCC (L&S) 68])

[Emphasis Supplied]

18. We must also place on record that on certain aspects even judicial review of fact is permissible. (*E v. Secy. of State for the Home Deptt.* [2004 QB 1044 : (2004) 2 WLR 1351 (CA)])

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22. The High Court, on the other hand, as indicated hereinbefore, proceeded to opine that the Tribunal committed a serious illegality in entering into the realm of evidence. It is permissible in law to look to the evidence for the purpose of ascertaining as to whether the statutory requirement had been complied with or not.

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24. The High Court unfortunately even without any material on record held that some excess amount was found from the appellant which itself was sufficient to raise a presumption that it had been recovered from the decoy passenger. No such presumption could be raised. In any event there was no material brought on record by the department for drawing the said inference. The High Court itself

was exercising the power of judicial review. It could not have drawn any presumption without there being any factual foundation therefor. It could not have taken judicial notice of a fact which did not come within the purview of Section 57 of the Indian Evidence Act. [Emphasis supplied]

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26. The High Court has only noticed paragraph 704 of the Manual and not the paragraph 705 thereof. Paragraph 705 was very relevant and in any event both the provisions were required to be read together. The High Court, thus, committed a serious error in not taking into consideration paragraph 705 of the Manual. The approach of the High Court, in our opinion, was not entirely correct. If the safeguards are provided to avoid false implication of a railway employee, the procedures laid down therein could not have been given a complete go-bye.

27. It is the High Court who posed unto itself a wrong question. The onus was not upon the appellant to prove any bias against the RPF, but it was for the department to establish that the charges levelled against the appellant.

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

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30. For the aforementioned purpose, the manner in which the enquiry proceeding was conducted was required to be taken into consideration by the High Court. The trap was not conducted in terms of the Manual; the Enquiry Officer acted as a Prosecutor and not as an independent quasi judicial authority; he did not comply with Rule 9(21) of the Rules, evidently, therefore, it was not a case where the order of the Tribunal warranted interference at the hands of the High Court.

[Emphasis supplied]

31. The impugned judgment, therefore, cannot be sustained. It is set aside accordingly and that of the Tribunal restored. The appeal is allowed with costs. Counsel fee assessed at Rs.25,000/-."

9. The facts presented in the case at hand are somewhat peculiar to the extent that though the trap was to be laid following paragraph-704 of the Manual by the investigating agency and it is not a departmental trap as further envisaged in paragraph-705, however, the departmental proceeding proceeded on the basis of the report given by the investigating agency. Somehow, compliance with the paragraphs-704 and 705 of the Railway Vigilance Manual is not mentioned in the entire disciplinary proceeding that was undertaken by the departmental authority, i.e., petitioner no.4. As indicated above, the Inquiring Officer has given a finding in inquiry report dated 14.08.2008 Annexure-2 to the writ petition at

pages-36 and 37 (internal pages-15 & 16 of the inquiry report), which is quoted herein :

"... ..Of course, from the deposition of the so called independent witnesses Sri J.K. Padhy (P.W.1) and Sri Radhakrishna (P.W.II), it is felt that the prosecution could not produce concrete evidence to establish the demand of the illegal gratification by the CO."

10. As laid down in [E.v. Secy. of State for the Home Deptt.: 2004 QB 1044: [2004] 2 WLR 1351 (CA)], relied on in *Moni Shankar* (supra), it has to be held that on certain aspects, judicial review of facts is permissible. The relevant paragraph of the decision rendered by Court of Appeal in *E.v. Secy of State* (supra) are produced herein (Paragraphs-63, 64 & 66 as reported in the WLR)

"63. In our view, the Criminal Injuries Compensation Board case [1999] 2 AC 330 points the way to a separate ground of review, based on the principle of fairness. It is true that Lord Slynn distinguished between "ignorance of fact" and "unfairness" as grounds of review. However, we doubt if there is a real distinction. The decision turned, not on issues of fault or lack of fault on either side; it was sufficient that "objectively" there was unfairness. On analysis, the "unfairness" arose from the combination of five factors : (i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning.

64. If that is the correct analysis, then it provides a convincing explanation of the cases where decisions have been set aside on grounds of mistake of fact. Although planning inquiries are also adversarial, the planning authority has a public interest, shared with the Secretary of State through his inspector, in ensuring that development control is carried out on the correct factual basis.

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66. In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result."

[Emphasis supplied]

Conclusions

11. Applying the principles laid down in *Moni Shankar* (supra) relying on *E.v.*

Secy of State (supra), particularly at paragraphs-10, 11, 12, 15, 16 and 17 (of SCC), it has to be held that although the provisions of the Evidence Act are not strictly applicable in the departmental proceeding under challenge, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere.

12. As noted by the Hon'ble Supreme Court in paragraphs-6 & 10 of the decision in *Moni Shankar* (supra), Rule-9 (21) of the Railway Servants (Discipline and Appeal) Rules, 1968 and also paragraphs-704 and 705 of the Railway Vigilance Manual, which ensure compliance with principle of natural justice & fairness in action of the authority, have to be substantially complied with which is not the case as presented by the department.

13. In our considered opinion, on the basis of evidence presented by the department in the departmental enquiry the test of doctrine of proportionality has not been satisfied and the Tribunal was well within its jurisdiction to interfere with the conclusions. Applying the principles enunciated in *E.v. Secy of State* (supra), it has to be held that in the present case, the learned Tribunal was entitled to arrive at its own conclusion on the premise that whether the evidence adduced by the department even after it is taken at its face value to be correct in its entirety, meet the requirements of burden of proof, i.e., preponderance of probability.

The Enquiring Officer after arriving at a conclusion in his enquiry report dated 14.08.2008 that "from the deposition of the independent witnesses Sri J.K. Padhy (P.W.1) and Sri Radhakrishna (P.W.II), it is felt that the prosecution could not produce concrete evidence to establish the demand of the illegal gratification by the CO..." could not have proceeded further to hold that "it could be concluded that there was demand of illegal gratification under 'Preponderance of probability' as there was no hesitation registered for accepting the illegal gratification in this case.", whereas the witness who offered was decoy and was acting as per the planned trap laid by the investigating agency.

14. The contention raised by the petitioners regarding limited scope of review by the learned Tribunal of the evidence presented by the department is rejected in the facts and circumstances of the present case. The judgment of the learned Tribunal is upheld being just and proper there being no error apparent on the face of the record.

15. During deliberations before this Court, it is noticed that the period of suspension of the opposite party-employee has not been dealt with by the authority while passing the order of dismissal. It is agreed by the learned counsel for the opposite party that having received the subsistence allowance, the opposite party-employee will not lay any further claim qua wages for the said period. In the interest of justice, it is directed that the period of suspension of the opposite party-employee shall be treated to be leave of the kind due, for continuity in service. The notional benefits like benefits of fixation of Pay, D.A. and other allowances as due and admissible to the employee shall be granted to him. As the petitioner has retired from service on attaining age of superannuation in the year about 2012-13, his retiral dues shall be calculated after notionally fixing the last pay drawn. The arrears of differential salary, retiral dues, if any, after notional fixation shall be calculated and paid to the opposite party-employee within three months from the date of communication of this order. In case of any delay, that would be caused in payment of such amount, interest @ 6% per annum shall be payable to the petitioner from the date of this order.

In the result, the writ petition is dismissed being devoid of any merit, the order of the learned Tribunal is upheld with the further directions as indicated above. There shall be no order as to costs.

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