

Dasappa Vs. Southern Railways

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Court : Karnataka

Decided On : Jun-27-1983

Reported in : ILR1986KAR301

Judge : Rama Jois, J.

Acts : [Constitution of India](#) - Article 136, 226, 409 and 411(2)

Appeal No. : W.P.No. 1866 of 1982

Appellant : Dasappa

Respondent : Southern Railways

Advocate for Def. : G. Dayananda, Adv.

Advocate for Pet/Ap. : M. Raghavendrachar, Adv.

Judgement :

ORDER

Rama Jois, J.

1. In this Writ petition, in which an ex railway servant, has questioned the legality of the order dated 21-12-1981 (Annexure-D) made by the General Manager, Southern Railway, dismissing the appeal of the petitioner and confirming the order dated 19-10-1981 (Annexure C) made by the Chief Operating Superintendent, by

which the penalty of reduction in rank for a period of one year imposed by the disciplinary authority and confirmed by the appellate authority, was reviewed and the penalty of compulsory retirement was imposed, the following important question of law arises for consideration :--

Whether the High Court, in exercise of its jurisdiction and power under Article 226 of the Constitution, can modify the penalty imposed on a civil servant, by an authority competent under the service rules to impose such penalty and impose a lesser penalty?

2. The facts of the case are as follows :--

The petitioner was working as a Driver in the Southern Railways. A departmental inquiry was instituted against him on the following charge :

'That Shri K. Dasappa, while functioning as Driver of Train No. 3034 Goods on 14/15-11-1979 committed misconduct in that passed the reception signals of Tondebhavi station and run through Road 3 bursting top Point No. 103, passed the stop board of Road 3 and common starter at danger. He also entered Tondebhavi Maklidurg Block Section without proper authority over carrying the incoming token pertaining to Gouribidanur-Tondebhavi Block station.

Thus the Said Sri. K. Dasappa violated GRS 78 and 79 and contravened Rule 3(i)(ii) of Railway Services (Conduct) Rules, 1966'.

The Chief Mechanical Engineer, Mysore, who was the disciplinary authority held that the petitioner was guilty of the charge. He imposed the penalty of reduction in rank to the post of Shunter, for a period of one year with effect from 1st July, 1981. The said penalty was confirmed by the Appellate Authority by its order dated 4-9-1980. The Chief Operating Superintendent, Madras, being of the view that the penalty imposed should be enhanced having regard to the gravity of the charges proposed to enhance the penalty to one of removal from service and issued notice dated

3-3-1981 (Annexure-A) calling upon the petitioner to show-cause as to why that penalty should not be enhanced. The notice reads --

SOUTHERN RAILWAYS

Headquarters Office, Personnel Branch, Madras-3, No. P(A)90/Y/38 dated 3-3-1981.

NOTICE TO PROPOSAL FOR ENHANCEMENT OF THE PENALTY IMPOSED.

Shri K. Dasappa, Driver 'C'/YPR, was awarded by DME/ MYS the penalty of reduction to the post of Shunter on pay Rs. 400/- in scale Rs. 290-400 for a period of one year with effect from 1-7-1981 (non-recurring), vide penalty Advice No. Y/T5/82/79 dated 19/25-6-1980 for the following offence which he had accepted vide his representation dated 20-5-1980 in reply to the Charge Memorandum No. Y/T5/82/79 dated 23-4-1980 issued to him :

'That Shri K. Dasappa, while functioning as Driver of Train No. 3034 Goods on 14/15-11-1979 committed misconduct in that he passed the reception signals of Thondebhavi station and run through Road 3 bursting top Point No. 103, passed the stop board of Road 3 and common starter at danger. He also entered Tondebhavi Maklidurg Block Section without proper authority over carrying the incoming token pertaining to Gouribidanur-Tondebhavi Block station.

Thus the said Sri. K. Dasappa violated GRS 78 and 79 and contravened Rule 3(i)(ii) of Railway Services (Conduct) Rules, 1966'.

2. On appeal, the penalty was confirmed by the DBI, vide advice No. Y/T4/79 dated 4-9-1980.

3. The undersigned on a review of this case, in terms of Rule 25 of the Railway Servants (Discipline and Appeal) Rules, 1968, considers that the gravity of the offence committed by Shri Dasappa is such as to warrant a more severe penalty being imposed on him and has, therefore, provisionally come to the conclusion that the penalty already imposed on him should be enhanced to one of removal from service.

4. Shri Dasappa is hereby given an opportunity of making representation on the penalty proposed. Such representation, if any, should be made in writing and submitted through proper channel so as to reach the undersigned not later than 10

days from the date of receipt of this notice to him.

5. The receipt of this notice should be acknowledged by Shri Dasappa.

Sd/- S.K. Nair

Chief Operating Supdt.'

To the said notice, the petitioner submitted his reply on 17-7-1981 (Annexure-B). After considering the representation of the petitioner, the Chief Operating Superintendent made the final order dated 19 10 1981 (Annexure C) imposing the penalty of compulsory retirement with effect from 1-11-1981. The said order reads :

SOUTHERN RAILWAYS

No. P(A) 90/Y/38 Head Quarters Office, Shri C. Dasappa, Personal Branch, Driver C/YPR. Madras 3, 19-10-1981 Thro' DRM(P) SBC:

PENALTY ADVICE

Your representation dated 11-7-1981 in reply to this office Notice No. P(A) 90/A/38 dated 3-3-1981 has been carefully considered by the undersigned.

(i) You accept that you had no difficulty in controlling train right upto Tondebhavi and in between you had stopped at a number of points. Even after the incident you stated that you had no further difficulty in backing the train into the station.

You and your Assistant have given contradictory statements in regard to calling for assistance from the Guard for whistle. You have said that you did not do so whereas the Assistant said Driver did whistle for the Guard's assistance.

The check conducted on the formation with the loco by the Supervisory officials, viz., CWS & FO shows that the entire formation was in order and that adequate vacuum was created both in the engine and in the breakvan.

(ii) It is also noted that later on when the train was running from Thondebhavi onwards to Yeshwantpur there was some difficulty at an intermediate point and

this was due to some blockage in one of the hose pipes. The supervisory officials, who have conducted the test and who accompanied were clear that this obstruction must not have come in before Tondebhavi and must have been the mischief of someone. Obviously, no one except the engine crew would be interested in such a mischief.

(iii) The pilot name was produced by you as evidence of having been stopped at the outer before entering the station. This cannot be entirely accepted because the points man carrying the pilot memo has stated that the train did not stop at the outer and that he had left the pilot memo book with all folios intact on the ASK's table. It would have been easy for anyone to remove the concerned pilot memo foil, particularly in the confusion that would have prevailed. The production of a memo cannot be taken as conclusive evidence of the train having been stopped, especially in the case of the evidence given by the points man and the S.M.

(iv) You have mentioned of earlier instances of drivers passing signals at danger and having been given comparatively mild punishments. This cannot be treated as an extenuating circumstance. In fact it can even be interpreted that the light punishments given earlier resulted in a reduction in the sense of discipline of driving staff in observing signals.

(v) Further, even if it is assumed that you had stopped at the outer, there is no reason for you to burst the point and cross the starter. This could not be due to poor brake power as subsequent tests have revealed.

(vi) It is also noted that you have had two prior occasions when you were punished-

(a) On 29/30-6-75 entered the block section-NTR-SPGR without proper authority ; and

(b) On 23-7-80 for passing starter signal at danger at KRB.

3. The undersigned, therefore, considers that you should no longer continue in Railway service. However, in view of your age, you are compulsorily retired from service of this administration with effect from 1-11-1981.

4. You are to hand over to the DRM(T)/SBC the Railway Property, if any, which is in your possession and advise where and how you wish to be settled up to receive payment of your dues.

5. You are required to vacate the railway quarters, if any, within one month from 1-11-1981. If you fail to vacate the railway quarters within the period specified above, you will be treated as a trespasser and dealt with under the rules for such unauthorised and wrongful occupation of the same.

6. The above penalty has been awarded by the undersigned and the appellate authority is the General Manager, Madras. Appeal hereon, if any, is to be submitted through proper channel within 45 days from the date of receipt of this order.

7. You are to acknowledge this.

Sd/- R. Srinivasan,

Designation : Chief Operating

Superintendent.'

The petitioner preferred an appeal against the said order to the General Manager. The appeal was rejected by order dated 21-12-1981 (Annexure D). Aggrieved by these orders, the petitioner has presented this Writ Petition.

3. Sri Raghavendrachar, Learned Counsel appearing for the petitioner, urged the following contentions :

(i) The Chief Operating Superintendent was not competent to review the punishment and pass the impugned order.

(ii) As the petitioner's Revision Petition against the appellate order was pending before the General Manager, the Chief Operating Superintendent has no authority to initiate review proceedings.

(iii) The Chief Operating Superintendent had, in his final order, taken into account, the alleged past misconduct of the petitioner for the purpose of enhancing the penalty which was not made part of the show cause notice and, therefore, the order was liable to be quashed on the ground of violation of principles of natural justice.

(iv) The penalty of reduction in rank imposed earlier was more than sufficient penalty for the gravity of the misconduct held to have been proved against the petitioner and, therefore, the penalty of compulsory retirement should be substituted by the lesser penalty imposed by the disciplinary authority.

(v) As the petitioner had already undergone the punishment of reduction in rank to the post of Shunter for a period of one year imposed by the disciplinary authority, the imposition of compulsory retirement amounts to imposition of double punishment for the same charge and, therefore, invalid.

4. Answer to the first and second contentions depends solely on the wording of Rule 25 of the Railway Servants (Discipline & Appeal) Rules, 1968, ('the Rules' for short). Relevant part of it reads :

'25. REVIEW :-- (i) Notwithstanding anything contained in these rules.--

(i) the President, or

(ii) the Railway Board, or

(iii) the General Manager of a Zonal Railway or an authority of that status in any other Railway Unit or Administration, in the case of a Railway servant serving under his or its control, or

(iv) The appellate authority not below the rank of a Deputy Head of Department or a Divisional Superintendent in cases where no appeal has been preferred or

(v) any other authority not below the rank of a Deputy Head of Department or a Divisional Superintendent, in the case of a railway servant serving under its control ; may at any time, either on his or its own motion or otherwise, call for the records of any inquiry and review any order made under these rules or under the

rules repealed by Rule 29 and may, after consultation with the Commission where such consultation is necessary--

(a) confirm, modify or set aside the order ; or

(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed ; or

(c) remit the case to the authority which made the order or to any other authority directing such authority to make such further inquiry as it may consider proper in the circumstances Of the ease ; or

(d) pass such other orders as it may deem fit :

XX XX XX Provided further that no power of review shall be exercised under this rule :

(i) by the appellate or reviewing authority where it has already considered the appeal or the case and passed orders thereon; and

(ii) by a reviewing authority unless it is higher than the appellate authority, where an appeal has been preferred or where no appeal has been preferred and the time limit laid down for review by the appellate authority has expired.

Note :- This proviso shall not apply in cases of review by the President,

XX XX XX(2) No proceeding for review shall be commenced until after-

(i) the expiry of the period of limitation for an appeal ; or

(ii) the disposal of the appeal where any such appeal has been preferred ;
Provided that the provisions of this sub-rule, shall not apply to the review of punishment in case of railway accidents.'

Sub-rule (1) of Rule 25 of the Rules among others specifies that the appellate authority not below the rank of a Deputy Head of Department/Divisional Superintendent or any other authority not below the rank of a Deputy Head of Department is conferred with the power of review.

5. In the Indian Railway Establishment Code, Vol. II (V Reprint) p. 262, the list of officers declared as Heads of Department are furnished. The Chief Operating Superintendent is one of them. Therefore there can be no doubt that the Chief Operating Superintendent is an officer higher in rank than the Deputy Head of the Department. He himself being the Head of the Department, was fully competent to exercise the powers of review. In fact after the list of Heads of Department was pointed out by the Learned Counsel for the Railways, Learned Counsel for the petitioner, had no answer. Thus there is no merit in the first contention and it fails.

6. The restrictions regarding exercise of power of review are found in the second proviso to Rule 25(1) and Sub-rule (2) of Rule 25 of the Rules.

(i) The proviso imposes two restrictions :

(a) The first is that the power of review is not exercisable by the appellate authority if it has already considered the appeal and has passed orders thereon. In view of this, if the Chief Operating Superintendent himself was an appellate authority and had disposed of the appeal of the petitioner, confirming the penalty of reduction in rank, it would not have been competent for him to initiate review proceedings. In the present case, admittedly it is the Divisional Railway Manager, who was the appellate authority, who is an officer lower in rank to that of Chief Operating Superintendent. Therefore the first restriction imposed in the proviso to Rule 25(1) of the Rules is not applicable.

(b) The second restriction contained in the proviso, is, if the reviewing authority is not an authority higher than the appellate authority, such authority cannot exercise the power of review during the pendency of the appeal or if no appeal had been preferred until the period of limitation for preferring an appeal was over. In the present case, the reviewing authority is admittedly an officer higher in rank than the appellate authority. Further the power was being exercised after the appeal had been disposed of by the appellate authority.

(ii) Sub-rule (2) of Rule 25 of the Rules impose again two restrictions regarding exercise of power to review. They are.

(a) Until after the expiry of period of limitation for appeal ; or

(b) Till the disposal of the appeal where such appeal had been preferred the review power cannot be exercised.

This rule has a proviso according to which the aforesaid restrictions are not applicable to review of punishments in case of railway accidents.

In the present case, as stated earlier, the review power was being exercised after the disposal of the appeal and, therefore, there was no contravention of Sub-rule (2) of Rule 25. Hence there is no substance in the second contention. Learned Counsel for the petitioner, however, contended that the petitioner had preferred a Revision Petition to the General Manager and during the pendency of the Revision Petition also the Chief Operating Superintendent had no authority to initiate proceedings. Neither the second proviso to Rule 25(1) nor Sub-rule (2) of Rule 25 of the Rules imposes any such restriction.

7. The third contention urged for the petitioner is that as two instances of past misconduct had been made the basis in the final order of the Chief Operating Superintendent for giving enhanced penalty to the petitioner and as that was not one of the grounds set out in the show cause notice issued to the petitioner, the order of the Chief Operating Superintendent imposing penalty of compulsory retirement was liable to be set aside on the ground of violation of principles of natural justice. In support of this submission, Learned Counsel for the petitioner relied on the judgment of the Supreme Court in *State of Mysore v. Manchegowda*, : [1964]4SCR540 . In the said case, the Supreme Court held that reliance on past conduct for giving higher penalty without disclosing the same in the show cause notice issued to the concerned civil servant, renders the final order invalid on the ground of violation of principles of natural justice.

In the present case, the show cause notice was issued by the Chief Operating Superintendent on 3-3-1981 (Annexure-A). The said authority proposed to impose penalty of removal from service on the petitioner on the basis of the same charge on which the disciplinary authority had imposed penalty of reduction of rank which order has been confirmed in appeal by the Divisional Railway Manager. The

contents of the notice indicate that the alleged previous misconduct of the petitioner had not been set out as one of the ground for giving enhanced penalty. In the final order at paragraph 2(iv) two instances of earlier punishments imposed on the petitioner were also set out as the basis for imposing enhanced penalty of compulsory retirement. In the Petition, the petitioner has stated that as far as the penalty said to have been imposed on 23-7-1980 is concerned, it was factually incorrect. Whatever that may be, the fact remains that in the final order two instances of past misconduct were set out as the basis for imposing the higher penalty of compulsory retirement. Still what is of significance is that penalty of removal from service was proposed to be imposed in the show cause notice, but a lesser penalty of compulsory retirement was imposed in the final order. Even so, if the order of the Chief Operating Superintendent alone remained as the final order made against the petitioner, there would have been considerable force in the contention that the order was liable to be quashed applying the ratio of the judgment of the Supreme Court in Manchegowda's, : [1964]4SCR540 case. But in the present case, admittedly the petitioner had preferred an appeal to the General Manager against the order of the Chief Operating Superintendent. A copy of the appeal memo was produced at the time of hearing and it is taken on and kept along with the record. In the appeal, the petitioner took no objection to the reliance placed on the two instances of past conduct by the Chief Operating Superintendent as an additional ground for enhancement of penalty. Whatever that may be, it is seen from the order of the appellate authority that it placed reliance only on the charge proved against the petitioner and not on past misconduct. The relevant portion of the order of the appellate authority reads :

'In his present appeal dated 31-10-81 to me Shri Dasappa has not brought out any fresh points about charges as such. He has merely requested for reinstatement as driver. He has stated that the procedure followed in enhancing the penalty is not in order.

He has not asked for a personal hearing. The appeal is being considered in terms of Rule 23(2) of the D & A Rules. The enhancement of the penalty has been done after following the regular procedure and giving due notice to the employee to represent his case. As such there is no violation of principles of natural justice.

The importance of taking prompt and deterrent action against staff held responsible in accident cases, needs no emphasis and has been impressed upon the Railways even by the Railway Board from time to time. In fact, the punishment against drivers passing signals at danger should not be light and must be exemplary. In the present case, it was providential that there was no disaster. The seriousness and dangerous consequences of a train disregarding signals and running through a station can well be imagined. Hence the necessity of adequate punitive action arises in the case of drivers passing signal at danger.

Having considered all these aspects, I see no reason for any change in the penalty imposed by the COPS, As such the appeal is rejected. The penalty of compulsory retirement imposed earlier shall stand'.

Thus it may be seen, the appellate authority was of the view that the charge levelled against the petitioner was a serious one and it was only providential that there was no disaster and that enhancement of higher penalty was justified on the basis of the charge.

This being the final order which is impugned in the petition, unless a similar defect as sought to be pointed out in respect of the original order, is also made out in respect of the appellate order, the petitioner cannot succeed. In fact this position is made clear from the judgment of the Supreme Court in *Somnath Sahu v. The State of Orissa*, 1969 (1) SCWR 851.

The relevant portion of the judgment reads :

'6. We shall, however, assume in favour of the appellant that the order of Respondent No. 4 dated the 11th March 1960 was illegal because no enquiry into the alleged misconduct was made before making that order. Even on that assumption we are of opinion that the appellant is not entitled to the grant of a writ under Article 226 of the Constitution. The reason is that the appellant preferred an appeal to the State Government against the order of Respondent No. 4 under Rule 6(2) of the Orissa Welfare Officers' (Recruitment and Conditions of Service) Rules, 1961.

XXX XXX XXX XXXThe appellant was heard by the State Government in support of his appeal and ultimately the State Government dismissed the appeal in its order dated the 2nd January, 1962. In these circumstances we are of opinion that the order of Respondent No. 4 dated the 11th March 1960 has merged in the appellate order of the State Government dated the 2nd January, 1962 and it is the appellate decision alone which subsists and is operative in law and is capable of enforcement. In other words the original decision of Respondent No. 4 dated the 11th March, 1960 no longer subsists for it has merged in the appellate decision of the State Government and unless the appellant is able to establish that the appellate decision of the State Government is defective in law the appellant will not be entitled to the grant of any relief. There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a tribunal the decision of the appellate authority is the operative decision in law if the appellate authority modifies or reverses it. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which is subsisting and is operative and capable of enforcement. (See the decisions of this Court in *C.I.T. v. Amritlal Bhagilal & Co.* 1959 S.C.R 713 and *Madan Gopal Rungta v. Secretary to the Government of Orissa* 1962 Supp. 3 SCR 906)

7. It is not, however, shown by the appellant in the present case that the appellate order of the State Government dated the 2nd January 1962 is defective in law.'

As pointed out earlier, the appellate authority placed reliance only on the charge which was the subject matter of the inquiry and did not place reliance on any other past conduct of the petitioner. Therefore there being no infirmity in the appellate order, the third contention fails.

8. The fourth contention urged for the petitioner was that having regard to the nature and gravity of the charge proved against the petitioner, the imposition of penalty of compulsory retirement was capricious and arbitrary, and therefore this Court should set aside the said order holding that the penalty imposed by the

disciplinary authority and confirmed by the appellate authority was quite sufficient. In support of the submission, he relied on the judgment of the Supreme Court in *Bhagat Ram v. State of Himachal Pradesh*, : (1983)ILLJ1SC . In particular he relied on para 15 of the judgment. It reads:

'15. The question is once we quash the order, is it open to us to give any direction which would not permit a fresh inquiry to be held? After all what is the purpose of holding a fresh inquiry? Obviously it must be to impose some penalty. It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. Having been influenced by all these relevant considerations, we are of the opinion that no useful purpose would be served by a fresh inquiry. What option is open to us in exercise of our jurisdiction under Article 136 to make an appropriate order? We believe that justice and fair play demand that we make an order of minor penalty here and now without being unduly technical about jurisdiction. We are fortified in this view by the decision of this Court in *Hindustan Steels Ltd., Rourkela v. A.K.Roy* : (1970)ILLJ228SC where this Court after quashing the order of reinstatement proceeded to examine whether the party should be left to pursue further remedy. Other alternative was to remand the matter that being a case of an industrial dispute to the Tribunal. It is possible that on such a remand this Court further observed, that the Tribunal may pass an appropriate order but that would mean prolonging the dispute which would hardly be fair or conducive to the interest of the parties. This Court in such circumstances proceeded to make an appropriate order by awarding compensation. We may adopt the same approach. Keeping in view, the nature of misconduct, gravity of charge and no consequential loss, a penalty of withholding his increments with future effect will meet the ends of justice. Accordingly, two increments with future effect of the appellant be withheld and he must be paid 50% of the arrears from the date of termination till the date of reinstatement.'

9. Learned Counsel for the petitioner submitted that in the aforesaid paragraph, the Supreme Court has held that it was open for the Court to examine the reasonableness of the quantum of penalty imposed and if the Court is of the

opinion that a lesser penalty should be imposed, the Court itself can impose the penalty, substituting the penalty imposed by the competent authority under the Rules. That being the position, this Court should, in the circumstances of the case hold that the penalty of compulsory retirement imposed by the Chief Operating Superintendent was excessive and should impose a lesser penalty and as the disciplinary authority had imposed the penalty of reduction in rank, the same could be imposed by this Court.

10. As against the above submission, Sri. G. Dayananda, Learned Counsel for the Railways, submitted as follows : The finding that the petitioner was guilty of the charge framed against him has become final on its being confirmed by the appellate authority. In this writ petition, the petitioner has not challenged the legality of the orders either of the disciplinary authority or of the appellate authority. The validity of the disciplinary proceedings including the finding recorded therein is not the subject matter of this writ petition. Once the finding that a civil servant is guilty of one or more of the charges framed against him, this Court has no jurisdiction to go into the reasonableness of the quantum of penalty and to set aside the same or substitute a lesser penalty. In the case of BHAGAT RAM, : (1983)IILLJ1SC the validity of the disciplinary proceedings including the findings recorded therein and the penalty imposed thereon, were challenged. The Supreme Court declared that the disciplinary proceedings and the orders passed thereon were invalid as is evident from paragraph-12. It reads :

'12. In the facts and circumstances of this case herein threadbare discussed we are of the opinion that the appellant was not afforded a reasonable opportunity to defend himself and accordingly the enquiry and consequential order of removal from service are vitiated.'

No doubt the Supreme Court, after quashing the entire proceedings, considered expedient to close the matter by imposing a minor penalty on the appellant therein and accordingly gave finality to the case by imposing a minor penalty on the charges levelled against BHAGAT RAM, : (1983)IILLJ1SC holding that a de novo inquiry would prolong the matter and, therefore, not expedient. In paragraph 12 of the judgment on which the petitioner relied, the Supreme Court had only laid down

what the Supreme Court could do in exercise of its power under Article 136 of the Constitution and not what the High Court could do in exercise of its power under Article 226 of the Constitution. As far as the power of the High Court under Article 226 of the Constitution in such matters, the position is clear from the judgment of the Supreme Court in the case of *State of Orissa v. Bidya Bhushan*, : (1963)ILLJ239SC .

11. In the light of the submissions made by the learned Counsel for the petitioner and the respondent, the important question of law set out first arises for consideration.

12. The power to impose penalty on a civil servant is conferred on a designated authority by law i.e., either by or under an Act of Legislature or Rules framed by the competent authority under proviso to Article 409 of the Constitution. The said power has got to be exercised in accordance with the rules of procedure for holding disciplinary proceeding as laid down by law. If any mandatory rule of procedure or rules of natural justice wherever applicable or provisions of Article 411(2) of the Constitution, are found to have been violated, such proceedings are liable to be set aside by the issue of writ of certiorari by the High Court in exercise of its power under Article 226 of the Constitution. To this extent there is no controversy. But the question which is raised by the petitioner is, even if the disciplinary inquiry held against the petitioner was valid and even if the finding of guilt recorded against the petitioner on the charge framed against him is good, it is open for this Court to take the view that the penalty imposed by the Chief Operating Superintendent was excessive and on that basis set aside the same and impose a lesser penalty which this Court considers appropriate having due regard to the gravity of the charges. In support of this proposition, the learned Counsel for the petitioner says, that he derives support from para-15 of the judgment of the Supreme Court in *Bhagat Ram's*, : (1983)ILLJ1SC case. Learned Counsel for the Railways however submitted that para-15 of the judgment in that case only expounded the scope of the power of the Supreme Court under Article 136. of the Constitution and had no application to the exercise of power under Article 226 of the Constitution by the High Court. He maintained mat the High Court cannot, in exercise of the power under Article 226 of the Constitution go into

the reasonableness of the penalty.

13. As can be seen from para-15 of the judgment of the Supreme Court extracted earlier, the Supreme Court posed the question 'What option is open to us in exercise of our jurisdiction under Article 136 to make the appropriate order' and then proceeded to state that it was open for the Supreme Court itself to impose the penalty in substitution of the penalty imposed by the competent departmental authority. Therefore, the Learned Counsel for the Railways is right in submitting that the Supreme Court was interpreting the scope of Article 136 of the Constitution under which an appeal lies to the Supreme Court against any order passed by any subordinate Court or Tribunal, interim or final. I find it difficult to agree that the power under Article 226 of the Constitution is as wide enough as the power of the Supreme Court under Article 136 and, therefore, this Court can substitute a minor penalty for a major penalty imposed by a competent authority or to set aside the enhanced penalty holding that the original penalty imposed by the disciplinary authority or appellate authority should stand affirmed.

14(1). In fact the question is not *res integra*. In the case of *Bidya Bushan*, : (1963)ILLJ239SC the Supreme Court considered as to whether it was open for the High Court to direct the competent disciplinary authority to reconsider the quantum of penalty even after the High Court coming to the conclusion that findings on some of the charges framed against a civil servant were unsustainable. The Supreme Court emphatically laid down that the High Court, in exercise of powers under Article 226 of the Constitution, has no such power. The relevant portion of the judgment is found at para-9. It reads-

'9. The High Court has held that there was evidence to support the findings on heads (c) and (d) of Charge (1) and on Charge (2). In respect of charge 1(b) the respondent was acquitted by the Tribunal and it did not fall to be considered by the Governor. In respect of charges 1(a) and 1(e) in the view of the High Court 'the rules of natural justice had not been observed.' The recommendation of the Tribunal was undoubtedly founded on its findings on charges 1(a), 1(e) 1(c), 1(d) and Charge (2). The High Court was of the opinion that the findings on two of the heads under Charge (1) could not be sustained, because in arriving at the findings

the Tribunal had violated rules of natural justice. The High Court therefore directed that the Government of the State of Orissa should decide whether 'on the basis of these charges the punishment of dismissal should be maintained or else whether a lesser punishment would suffice.' It is not necessary for us to consider whether the High Court was right in holding that the findings of the Tribunal on charges 1(a) and 1(e) were vitiated for reasons set out by it, because in our judgment the order of the High Court directing the Government to reconsider the question of punishment cannot, for reasons we will presently set out, be sustained. If the order of dismissal was based on the findings on charges 1(a) and 1(e) alone the Court would have jurisdiction to declare the order of dismissal illegal but when the findings of the Tribunal relating to the two out of five heads of the first charge and the second charge was found not liable to be interfered with by the High Court and those findings established that the Respondent was prima facie guilty of grave delinquency, in our view the High Court had no power to direct the Governor of Orissa to reconsider the order of dismissal. The constitutional guarantee afforded to a public servant is that he shall not be dismissed or removed by an authority subordinate to that by which he was appointed, and that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. The reasonable opportunity contemplated has manifestly to be in accordance with the rules framed under Article 409 of the Constitution. But the Court in a case in which an order of dismissal of a public servant is impugned, is not concerned to decide whether the sentence imposed, is appropriate having regard to the gravity of the misdemeanour established. The reasons which induce the punishing authority, if there has been an enquiry consistent with the prescribed rules, are not justiciable: nor is the penalty open to review by the Court. If the High Court is satisfied that if some but not all of the findings of the Tribunal were 'unassailable', the order of the Governor on whose powers by the rules no restrictions in determining the appropriate punishment are placed was final, and the High Court had no jurisdiction to direct the Governor to review the penalty for as we have already observed the order of dismissal passed by a competent authority on a public servant, if the conditions of the constitutional protection have been complied with is not justifiable. Therefore if the order may be supported on any finding as to

substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction if the findings of the enquiry officer or the Tribunal prima facie make out a case of misdemeanour, to direct the authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice. The High Court was, in our judgment, in error in directing the Governor of Orissa to reconsider the question.'

(Underlined by me)

The above judgment is a complete answer to the contention urged for the petitioner. This view has been reiterated by the Supreme Court in the following subsequent decisions :

(a) Railway Board v. Niranjan Singh, : (1969)11LLJ743SC (b) State of U.P. v. O.P. Gupta, : AIR 1970 SC679 (c) Union of India v. Sardhar Bahadur, SLR 1972 SC 355.

(2) In these decisions, it is laid down that if in a given case, the finding on some of the charges on the basis of which the penalty was imposed are quashed by the High Court, it has no jurisdiction to set aside the penalty if it could be lawfully imposed on the remaining charge or charges. In the present case, there was only one charge and the petitioner has been found guilty of the same. Learned Counsel for the petitioner was unable to make out that the penalty of compulsory retirement could not have been lawfully imposed on that charge. All that he says is that the penalty of reduction in rank was sufficient and the penalty of compulsory retirement was uncalled for and therefore this Court should reduce the penalty. That is not the same thing as saying that it could not have been lawfully imposed. According to the rules a penalty could be imposed for good and sufficient reasons. What is good and sufficient reason for imposing a particular penalty is a matter for consideration by the competent authority in each case.

(3) It may be that in a given case, the nature of the charge or charges in respect of which the finding is quashed was serious and indicative of substantial

misdemeanour and the charge in respect of which the finding is sustained may be a very minor one. In such cases also whether a major penalty inflicted on the basis of the serious as well as of minor charges, cannot be quashed by the Court in the light of the ratio in Bidya Bhushan's, : (1963)ILLJ239SC case, may require careful examination. For instance a civil servant is dismissed on the basis of two charges, the one being a charge of acceptance of illegal gratification and the other of being unauthorisedly absent from duty for a day. If the finding on the first is quashed and the second is upheld, is or is it not open to the Court to quash the penalty of dismissal from service? Even on the basis that could be done, the order has to be quashed and the concerned authority should be directed to reconsider the question of quantum of penalty.

15. Learned Counsel for the petitioner, however, maintained that if the High Court is of the view that a lesser penalty alone is justified it could itself substitute such penalty in place of the higher penalty imposed by the competent authority. He argued that there was no difference between the power of the Supreme Court under Article 136 and of the High Court under Article 226 and, therefore, it was open to this Court also to substitute a minor penalty for a major penalty imposed by the competent authority and that this position was evident from the ratio of the judgments of the Supreme Court in Bhagatram's, : (1983)ILLJ1SC case and Gujarat Steel Tubes Ltd., v. Its Mazdoor Sabha, : (1980)ILLJ137SC . In the latter case, it is stated thus :

'146. In the second chapter of our sum-up, the first thing we decide is that Article 226, however restrictive in practice, is a power wide enough, in all conscience, to be a friend in need when (he summons comes in a crisis from a victim of injustice ; and, more importantly, this extraordinary reserve power is unsheathed to grant final relief without necessary recourse to a remand What the tribunal may, in its discretion, do, the High Court too, under Article 226, can, if facts compel, do.'

In that case, the Supreme Court was interpreting the provisions of Section 11-A of the Industrial Disputes Act which empowers the Industrial Court to substitute a lesser penalty in place of a higher penalty imposed by the employer. The Supreme Court held that if the Tribunal had failed to exercise its power under Section 11A

properly or had failed to exercise the discretion given of it under Section 11A, in a Petition under Article 226 presented to the High Court against the order of the Industrial Court, the High Court itself could do what the Tribunal could have done under Section 11A. Thus, it may be seen, that decision of the Supreme Court was in the context of Section 11A of the Industrial Disputes Act which expressly confers power on the Tribunal to reduce the penalty imposed by the employer and, therefore, cannot be taken an authority for the proposition that the High Court in exercise of its power under Article 226 of the Constitution can substitute a lower penalty in place of a higher penalty imposed by a competent authority in exercise of the powers given to it under law or rules made under Article 409 of the Constitution.

16. Learned Counsel for the petitioner, however, submitted that the two decisions put together support the contention urged for the petitioner and these decisions being the latest are binding on this Court.

17. On a careful consideration of para-15 of the judgment in Bhagat Ram's, : (1983)ILLJ1SC case and para-146 in Gujarat Steel Tubes's, : (1980)ILLJ137SC case, on which the Learned Counsel for the petitioner relied it appears to me that they do not support the contention urged for the petitioner, namely, that this Court, in exercise of its power under Article 226 of the Constitution can substitute a lesser penalty in place of a higher penalty imposed by the competent authority exercising powers under the rules framed under Article 409 of the Constitution. Even if the Learned Counsel for the petitioner is right, in my opinion, he is not ; it would mean that there is a conflict between the two decisions on which he relies and the decision in Bidyabushan's, : (1963)ILLJ239SC case. In that situation also, the ratio of the decision in Bidyabushan's, : (1963)ILLJ239SC case prevails as it was rendered by the Constitution Bench consisting of five judges and the decision in Bhagat Ram's, : (1983)ILLJ1SC case was rendered by a Bench of two Judges and the Gujarat Steel Tubes Ltd's, : (1963)ILLJ239SC case by a Bench of three Judges. A Full Bench of this Court in the case of Gavindanaik G. Kalaghatigi v. West Patent Press Co., Ltd, : AIR1980 Kant92 has laid down that if two decisions of the Supreme Court on a question cannot be reconciled and one of them is by a larger Bench, while the other is by a smaller Bench, the decision of the larger

Bench, whether rendered earlier or later, in point of time should be followed by the High Court and other Courts.

18. In the light of the above discussion, I answer the question set out first in the negative in that I hold that it is not open for this Court to set aside the higher penalty imposed by the competent authority and to substitute the same by lesser penalty.

19. The fifth contention urged for the petitioner is that as the petitioner had already undergone the penalty of reduction in rank as imposed by the disciplinary authority and confirmed by the appellate authority, the imposition of penalty of compulsory retirement amounts to imposition of double penalty for the same charge and, therefore, the impugned order is liable to be set aside.

20. It is not disputed that the petitioner was reverted to the post of Shunter in accordance with the order passed by the disciplinary authority and that he had undergone the said penalty. The mere fact that the penalty imposed by the disciplinary authority had been undergone by the petitioner, does not deprive the reviewing authority of its power to enhance the penalty. The effect of enhancement does not however amount to the imposition of double penalty, for the reason, the effect of enhancement is that the lesser penalty inflicted earlier stands substituted by the enhanced penalty imposed. Therefore, I am of the view that the punishment of reduction in rank imposed by the disciplinary authority and confirmed by the appellate authority must be deemed to have been substituted by the punishment of compulsory retirement with effect from 1-7-1981 and as a consequence the petitioner must be deemed to have continued in the post of driver upto 1-7-1981 and the respondents are bound to pay salary and allowances to the petitioner as if he had continued in the post of Driver till 1-7-1981 with effect from which date the punishment of compulsory retirement was imposed, notwithstanding the fact that during the period he was made to work as Shunter. This position is clear from a Division Bench Judgment of this Court in *Gururajachar v. State of Mysore*, 1972(1) Mys. L.J. 142. In the said case, the petitioner therein was in the first instance subject to a punishment of stoppage of five increments. After the petitioner had undergone that punishment, the penalty was enhanced to one of dismissal from

service. Rejecting the argument that it amounted to double penalty, the Division Bench stated thus :

'14. The argument of double jeopardy is also without substance because the clear legal effect of the Governor's order of dismissal is that the said punishment of dismissal gets substituted for the original lesser punishment of stoppage of five increments. The enhancement in punishment, which means the imposition of a higher punishment than the one originally imposed, means and can mean only that in lieu or in the place of the earlier lesser punishment the higher punishment is imposed. The contention that he has already suffered the punishment in the sense that five increments are actually withheld from him cannot make any difference to the principle because when he suffers the punishment of dismissal the increments withheld from him will have to be given to him in the same way as fine is refunded in a criminal prosecution when in lieu of a substantive sentence of imprisonment is imposed by way of enhancement.'

(Underlined by me)

The Court held that the enhanced punishment of dismissal replaced the earlier penalty of stoppage of five increments and as a result the amount of increments so withheld would have to be paid to the petitioner therein. The same principle holds good for the present case.

21. For the reasons aforesaid, I make the following order :

(i) The Writ Petition is partly allowed; (ii) The Petition in so far it relates to the imposition of penalty of compulsory retirement by the impugned orders is concerned, it is dismissed; (iii) The Respondents are directed to treat the petitioner as having continued in the post of Driver from the date of his reversion upto 1-7-1981 notwithstanding the fact that the petitioner had been made to work as Shunter during that period and to pay him consequential difference of salary; (iv) The retirement benefits of the petitioner shall also be computed on the basis that the petitioner continued as Driver and retired as such with effect from 1-7-1981; (v) No costs.

