

IN THE HIGH COURT OF DELHI AT NEW DELHI

+WP(C) No.7982 of 2007.

Date of Hearing:07.03.2008.

Date of Decision:04.06.2008

#P.K.Mathur

....Petitioner

!

Through: Mr.G.D.Gupta,Sr.Adv
with Mr.S.K.Sinha,Advocate.

Versus

\$Union of India & Anr.

.....Respondents

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Through R.V.Sinha with Mr.R.N.Singh
and Mr.Arvind Kumar,Advocates.

CORAM :-

***THE HON'BLE MR.JUSTICE A.K.SIKRI**

THE HON'BLE MR. JUSTICE VIPIN SANGHI

- 1.Whether Reporters of Local papers may be allowed to see the Judgment?
- 2.To be referred to the Reporter or not?
- 3.Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.

:

- 1.The sole issue raised by the petitioner in the OA filed before the Tribunal was: whether, in the facts and circumstances of this case, belated charge-sheet could be issued to the petitioner herein and enquiry held on those charges?
- 2.It is settled principle of law that there is no absolute bar in charge-sheeting the delinquent employee in holding the

enquiry relating to the incident/misconduct occurred few years ago. However, there should be a proper justification and explanation for delayed action. On the other hand, if the charge sheeted employee is able to demonstrate that there was inordinate and unexplained delay in initiating and concluding the proceedings which has prejudiced his defence, the Courts are empowered to quash such departmental proceedings. The petitioner, however, has remained unsuccessful before the Tribunal as his OA has been dismissed. Against the order of the Tribunal this writ is preferred. Few facts germane to this issue would be necessary, before delving into the controversy involved.

3. The petitioner belongs to 1975 batch of Central Engineering Service. From June 1991 to October, 1991 which is the period relevant for our purpose, the petitioner was working as Executive Engineer, Bhopal, Central Division. In that capacity he was Incharge of a particular work executed by one M/s. Veena Construction. He had passed and paid the 4th running account bill. After more than 12 years, his explanation relating to the payment of said running bill was called for vide memorandum dated 5.6.2003 which was received by him on 11.8.2003. He was working as Superintendent Engineer, then. The alleged lapse as per that

memorandum was that he passed the 4th running account bill despite there were cutting in the same. It was also alleged that in the process over payment was made to the tune of Rs.1,00,000/- thus causing loss to public ex-chequer.

4. Vide his letter dated 1.9.2003, the petitioner demanded inspection of measurement books for the said work, 3rd running account bill and other relevant documents before he could submit proper explanation to the said memo. He stated that incident pertained to the period 12 years back and it was impossible to ascertain and counter the allegations made in the memorandum without inspection of those vital documents. According to the petitioner this inspection was declined by the Executive Engineer(Vigilance) vide his order dated 30.9.2003 on the ground that the same are not relevant. In these circumstances without such an inspection the petitioner submitted his explanation. He reiterated that the matter was 12 years old and pertaining to a very minor work. He was posted there only for four months at that time and therefore it was not possible for him to recall all facts and details by memory. His explanation was that basic record for payment to the Contractor is the measurement book in which the Junior Engineer records the measurements of various items of the work executed by the contractor and the

measurements are test checked by the Assistant Engineer and Executive Engineer to the extent prescribed for each in the CPWD Manual and then the bill is prepared under the guidance of Assistant Engineer by working out the quantities of various items based on the measurements recorded in the measurement book. He further stated that the measurement book was not shown to him for which the bill was prepared. He was also not given 3rd running account bill and measurement book in respect of the third running account bill and in the absence of these documents, he was severely handicapped to submit any effective explanation. He also pleaded that there were self- contradictions in the memo.

5. The explanation of the petitioner was not found satisfactory and vide the impugned memorandum of charges dated 30.9.2004 i.e. after 9 months from the explanation furnished by the petitioner, he was issued charge-sheet containing two articles of charges on the basis of allegations in memorandum dated 5.6.2003 issued earlier. Inquiry Officer was appointed. Before the Inquiry Officer the petitioner submitted a list of defence documents including the measurement book and copies of the running account bills. Inspection of these documents was allowed by directing the Presenting Officer to provide copies of defence documents and inspection thereof.

Though he was given the inspection of other documents, inspection or copies of measurement books and running account bills were not given on the plea that they were not available and had since been lost. The petitioner in these circumstances took the plea that in the absence of these documents, there could not have been any charge levelled against him. But the Inquiry Officer did not accept the plea. On 24.10.2005, the petitioner made representation to the Secretary, Ministry of Urban Development for dropping of the charges which was, however, not responded to.

6.The enquiry proceeded and ultimately Inquiry Officer submitted his report dated 7.3.2006 to the Ministry. It was forwarded to the petitioner with opportunity to represent against the same inasmuch as, as per the Inquiry Officer charge No.1 levelled against the petitioner stood proved. It was received by the petitioner on 20.6.2006 and he furnished his representation there against on 21.8.2006. No action was taken thereupon for more than one year.

7.The petitioner in the meantime became due for promotion to the post of Chief Engineer. His day of superannuation was also approaching which was 31.1.2008. In these circumstances after waiting for more than a year from the date when he made representation he preferred

OA.1600/2007 before the Tribunal. This OA was filed on 5.9.2007 with the prayer that charge-sheet against him as well as the enquiry report be quashed. The Tribunal has dismissed this OA in limini at the preliminary hearing itself vide impugned order dated 14.9.2007. Challenging this order, present petition is filed.

ORDER OF THE TRIBUNAL:

8. After recording the brief facts and the submissions of the counsel for the petitioner raising the plea of unexplained delay of 13-14 years in initiating departmental proceedings, the Tribunal rejected this contention primarily on the ground that the petitioner had participated in the departmental proceedings for a span of three years and had chosen to challenge the very memorandum of charges only after the charge no.1, which is more serious than charge no.2, has been held to be proved by the Inquiry Officer. The Tribunal was, therefore, of the view that when his representation against the Inquiry Officer was still pending consideration the petitioner could take up the plea of delay which could be considered by the Disciplinary Authority. En passe, the Tribunal also observed that the petitioner could not demonstrate as to how he had been prejudiced on account of delay in proceedings against him departmentally. The entire

discussion in this respect is contained in paras 6 and 7 of the impugned order which is reproduced below:

"In the context of the facts and circumstances of the case, we however, find no merit in the contention of the learned counsel, as noted above. The applicant voluntarily participated in the departmental proceedings for a span of 3 years and has chosen to challenge the very Memorandum proposing to initiate departmental proceedings against him only on finding of at least Charge No.1, which is more serious than Charge No. II, which has been held to be proved by the Enquiry Officer. It is too well settled that delay in proceeding against a delinquent may not be fatal in every case. It will depend upon facts and circumstances of each case. The delay in initiating proceedings against a delinquent would surely come in the way of the department if he is able to show that some prejudice has been caused to him due to lapse of time, and further that when it will be a case of unexplained delay. Nothing at all has been urged before us as to how the applicant has been prejudiced on account of delay in proceedings against him departmentally. The applicant has taken this plea and he may press the same before the concerned authority before whom his representation is pending consideration against the Report of the Enquiry Officer, insofar as Charge No.I is concerned, which shall be taken into consideration.

For the reason that the applicant participated all through in the departmental proceedings for a period of about 3 years and approached this Tribunal only when finding on Article of Charge No.1 was returned against him and for the further reason that at least, at this stage, the counsel is not able to point out that any prejudice that might have been caused to the applicant because of delay in initiating the proceedings against the applicant, we are not inclined to entertain this Application at this stage. We, however, give liberty to the applicant to raise this point, which has been already taken in the representation that has been filed against the Report of the Enquiry Officer before the concerned authority. We direct the concerned authority that while dealing with the representation of the applicant, besides considering the matter on merit, it would also take into consideration the plea of the applicant mentioned above".

9. It is clear from the above that the impugned order of the Tribunal is based on three reasons which are: (a) The

petitioner could not show any prejudice on account of delay in proceedings against him departmentally (b) Be that as it may, since the plea was taken before the Disciplinary Authority in the representation to the enquiry report, it could be considered by the said authority and (c) the Tribunal was not inclined to entertain the application at that stage when the petitioner approached the Tribunal after voluntarily participating in the departmental proceedings which went on for about three years and inviting findings against him as per the enquiry report.

THE CHALLENGE:

10. Mr.G.D.Gupta, learned senior counsel appearing for the petitioner vehemently contended that the Tribunal had not only gone wrong in approaching the issue and the way it proceeded, but also recording contradictory reasoning in the process and virtually returned the findings against the petitioner though at the same time relegating the petitioner to the Disciplinary Authority. His further submission was that the learned Tribunal failed to appreciate that the prejudice to the petitioner was proved on the basis of observations made by the Inquiry Officer himself in his report. Moreover, concededly relevant documents were not shown or produced which according to the department had been destroyed and in the

absence of those documents which were very material, it could be gathered that the petitioner was prejudiced in his defence. It was thus a clear case, submitted the counsel, where there was unexplained delay and laches and nothing prevented the Tribunal to nip the mischief in the bud rather than permitting the Disciplinary Authority to take action on the basis of report and making the petitioner undergo the rigmarole of departmental and then judicial remedies; more so when the petitioner had already retired from service.

11. In support of his submission that such an enquiry after abnormal delay would itself amount to causing prejudice to the petitioner and was thus violative of Principles of Natural Justice, he cited following judgments:

-Tirlok Nath Vs. Union of India and others,1967 SLR 759.

-M.V.Bijlani Vs. Union of India and others,(2006) 5 SCC 88.

12. Per Contra the learned counsel for the respondent Mr.R.V.Sinha submitted that the petitioner had not made out any case for judicial review of the order passed by the Tribunal. His submission was that the Tribunal rightly did not entertain the application of the petitioner at that stage when the petitioner had participated in the departmental enquiry for

more than three years. Such an OA was pre-mature. Further, it was for the Disciplinary Authority to consider in the first instance whether any prejudice was proved because of delay in the enquiry. He further submitted that documents demanded by the petitioner were supplied to him and the department had satisfactorily explained the reasons for serving the memo of charges in the year 2004 though it related to the conduct of the petitioner for the year 1991 and in view of satisfactorily explanation forthcoming with no prejudice to the petitioner enquiry proceedings could not be quashed. He also relied upon certain judgments of Supreme Court, namely, **Union of India and another Vs. Kunisetty Satyanarayana, 2007(1)SLT 452** and **Syndicate Bank and others Vs. Venkatesh Gururao Kurati, 2006(3)SCC 150** and some decisions of this Court.

THE LEGAL PRINCIPLE:

13. Though in the beginning itself we have stated the principle of law governing enquiries which are initiated after some delay, we would like to expand that principle and discuss the same with the aid of case law. In the case of **State of Madhya Pradesh Vs. Bani Singh, AIR 1990 SC 1308**, the Supreme Court quashed disciplinary proceedings when it found that there was delay and laches in initiating such

proceedings inasmuch as the department though aware of involvement of officer in alleged irregularities, initiated the proceedings against delinquent officer more than 12 years thereafter and no satisfactory explanation for inordinate delay in issuing the charge memo was provided by the State. The relevant observations of the Apex Court in the said judgment are extracted below:

“4. The appeal against the order dt. 16-12-1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned Counsel. The irregularities which were the subject-matter of the enquiry is said to have taken place between the years 1975-1977. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April, 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal.

14. The aforesaid judgment is followed and explained in number of cases. Instead of citing all these cases, it would suffice that we refer to few of them. One such case is **M.V.Bijlani Vs. Union of India and others,(2006) 5 SCC 88**. In that case delay of initiation of disciplinary proceedings by six years and continuance thereof for a period of seven

years was held to have resulted in prejudice to the delinquent officer and enquiry was quashed making following observations:

"So far as the second charge is concerned, it has not been shown as to what were the duties of the appellant in terms of the prescribed rules or otherwise. Furthermore, it has not been shown either by the disciplinary authority or the Appellate Authority as to how and in what manner the maintenance of ACE-8 Register by way of sheets which were found attached to the estimate file were not appropriate so as to arrive at the culpability or otherwise of the appellant. The Appellate Authority in its order stated that the appellant was not required to prepare ACE-8 Register twice. The appellant might have prepared another set of register presumably keeping in view the fact that he was asked to account for the same on the basis of the materials placed on records. The Tribunal as also the High Court failed to take into consideration that the disciplinary proceedings were initiated after six years and they continued for a period of seven years and, thus, initiation of the disciplinary proceedings as also continuance thereof after such a long time evidently prejudiced the delinquent officer".

15. The issue again cropped up before the Supreme Court in a recent judgment in the case of **The Government of Andhra Pradesh and Ors. Vs. V. Appala Swamy, 2007(3)SCALE**

1. It was observed in the said case that no hard and fast rule can be laid down in respect of those enquiries where delay has occurred. Each case will be considered on its own facts. In that case the Inquiry Officer submitted his report dated 8.1.1992 and before any action could be taken thereupon the delinquent officer had retired on 30.6.1992. The show cause notice was issued as to why 50% of the provisional pension be

not withheld. During the pendency of these proceedings the respondent had filed application before the State Administrative Tribunal which directed the State Govt. to conclude the departmental proceedings within a period of three months. This order was challenged by the respondent/employee before the High Court and the High Court directed the State Government to release full pension with interest @ 12% per annum. This direction of the High Court was set-aside by the Supreme Court. In the process, after taking note of various judgments and distinguishing its earlier judgment in **M.V.Bijlani case (supra)**, the Court held as under:

"It may be true that there was some delay on the part of the appellants to conclude the departmental proceedings. The Tribunal did not accept the contention raised on behalf of the respondent that only by reason thereof the entire departmental proceedings became vitiated. The High Court thus, in our opinion, was required to consider the question as to whether, in the facts and circumstances of this case, particularly in view of the nature of the charges levelled against the respondent as also the explanation offered by the appellants in this behalf, it was a case where the entire proceedings should have been quashed. The High Court in its impugned judgment did not address itself the said question.

It, as noticed hereinbefore, from the very beginning proceeded on the premise that the pension was payable to the respondent on his retirement. The High Court furthermore did not determine the question as to whether a proceeding could have been initiated against the respondent in terms of Rule 9 of the Andhra Pradesh Civil Service (CCA) Rules, 1963. If it is held that the second proceeding was maintainable in terms of the extant rules, ordinarily, the Tribunal or the High Court should not have interfered therewith.

So far as the question of delay in concluding the departmental proceedings as against a delinquent officer is concerned, in our opinion, no hard and fast rule can be laid down therefore. Each case must be determined on its own facts. The principles upon which a proceeding can be directed to be quashed on the ground of delay are: (1) where by reason of the delay, the employer condoned the lapses on the part of the employee; (2) Where the delay caused prejudice to the employee. Such a case of prejudice, however, is to be made out by the employee before the Inquiry Officer".

16. We may also quote a passage from Supreme Court judgment in the case of **State of A.P. Vs. N.Radhakishan (1998) 4 SCC 154** wherein the Supreme Court held that it was not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. The delinquent employee challenging enquiry on the ground of delay has to make out a case that delay has caused prejudice to him in defending the case before the Inquiry Officer/Disciplinary Authority. Observations in this respect are contained in the following passage:

“It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated, each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all the relevant factors and balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate

after delay, particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings, the court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained, prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path, he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.”

17. At this stage we may also note Division Bench judgment of this Court in the case of **Airports Authority of India Vs. M.A.Khan, 2006 (4) AD (Delhi) 693** and the judgment in the case of **Municipal Corporation of Delhi and Anr. Vs. R.V.Bansal, 2006 IV AD (Delhi) 185** cited by counsel for the respondent before us. These judgments reiterate the principle that delaying in issuing charge would not be fatal if charges are of serious nature. However, the present case is not of that nature.

ANALYSIS:

18. Keeping in mind the aforesaid principle, we have to determine as to whether approach of the learned Tribunal in

dismissing the OA of the petitioner herein in limini, is correct in law. We may state at the outset that though on the one hand the learned Tribunal had observed that it was not inclined to entertain the OA at that stage as the matter was still pending before the Disciplinary Authority before whom the petitioner had taken up the plea of prejudice caused to him on account of delay and which plea was to be considered by the Disciplinary Authority, at the same time the Tribunal has also observed that the petitioner could not point out as to how the petitioner was prejudiced on account of delay. We are of the opinion that it was not apt or prudent on the part of the Tribunal to make such observations. With these observations, nothing is left for the Disciplinary Authority to decide. If the Tribunal was of the opinion that application should not be entertained as the matter was still pending before the Disciplinary Authority and more so when the petitioner had voluntarily participated in the departmental proceedings for a span of three years, the Tribunal should have rested the case at that so that the Disciplinary Authority is able to apply its independent mind. The observations of the Tribunal that no prejudice is shown to it is definitely going to influence the decision making by the Disciplinary Authority.

19. However, the next question would be as to whether the

Tribunal was right in making the observations that the petitioner has not been able to point out any prejudice? On the basis of material shown on record, we do not think that these observations of the Tribunal are correct. Mr.G.D.Gupta, learned senior counsel appearing for the petitioner submitted that as per observations made by the Inquiry Officer itself the prejudice was writ large. In this behalf, he referred to the following narration contained in the Enquiry Report wherein the Inquiry Officer while starting the discussion on the "analysis of evidence" made these opening remarks:

"At the outset, it needs to be said that CO, while offering his defence, was handicapped by the fact that quite a few critical documents were denied to him either due to their reported non-availability/partial availability or on account of management's privilege claim over them. With this being the case and especially in the light of the fact that the CO was consequently forced to rely on his memory for reconstructing the missing parts of his defence in what happened to be a 14 year old case, the inquiry had to be concluded in a manner not really conducive to clear pinpointing of roles played by individuals, their real motives, and chain of events leading upto the contractor's undue gains and the corresponding government loss. Infact, there appears to be some merit in CO's contention that prosecution's inability/refusal to make available crucial documents, especially the MB, has also, in the process, undermined the prosecution case in some measure (para 5.1 of this Report). At the same time, there is enough circumstantial and documentary evidence available on record to examine CO's culpability or otherwise vis-a-vis the two articles of charge insofar as they fall short of alleging fraudulence on CO's part".

20. We are, therefore, of the opinion that it was an arguable point as to whether the petitioner had suffered any prejudice on account of delay or not. The observations of the Tribunal,

therefore, in any case are not correct. We may hasten to add that we are not deciding this question conclusively but the aforesaid remarks are in the context that arguable point was raised by the petitioner and, therefore, it was not proper for the Tribunal to dismiss the OA filed by the petitioner in limini without even calling for reply from the respondent.

21. The admitted facts are that there is a delay of 14 years in initiating the enquiry; crucial documents have not been produced by the respondent in the enquiry and as per the Inquiry Officer himself the petitioner was handicapped in putting his defence in a case which was 14 years old in the absence of those documents. Furthermore, in such circumstances onus was upon the respondent to give satisfactory explanation for the said delay. Without even calling for such an explanation in the form of reply the Tribunal did not deem it proper to issue notice and dismissed the OA at preliminary stage. In the facts of this case, such a course of action does not seem to be proper.

22. With this we come to the other reason given by the Tribunal in not entertaining the OA. The Tribunal felt that it was not inclined to exercise its jurisdiction to entertain the application 'at that stage' on the ground that the petitioner voluntarily participated in the enquiry and came to the Court

only after one of charges was proved. Normally, this can be a valid reason on the basis of which Tribunal can refuse to entertain such an application at that stage. However, in the present case, we find that while doing so, the learned Tribunal has glossed over an important aspect. Indubitably, even when the charge-sheet is given belatedly without showing the prejudice due to the said delay, the delinquent official would not be able to succeed in getting the same quashed. The petitioner did not approach earlier as he took chance before the enquiry officer to demonstrate that he is prejudiced in his defence. More importantly the Inquiry Officer has made some observations in favour of the petitioner. Armed with those remarks, it was permissible for the petitioner to approach the Tribunal at this stage. In the facts of this case, we also find that the petitioner almost waited for one year after submitting his representation against the Enquiry Report and was compelled to approach the Tribunal when his case was due for promotion to the post of Chief Engineer and he also was about to retire. The legitimate desire of the petitioner that his case be considered for promotion to the post of Chief Engineer could not be negated when it is the respondent who was delaying the matter and the Disciplinary Authority failed to pass any orders on the Enquiry Report for more than one year.

23. For all these reasons, we are of the opinion that it was not proper or justified on the part of the Tribunal to reject the OA in limini and should have considered the issues raised by the petitioner on merits. We, therefore, set-aside the impugned judgment and remand the case back to the Tribunal for adjudication of the OA on merits. The parties shall appear before the Tribunal on 21st July, 2008. The respondent shall file the reply to OA before the said date.
24. We may make it clear that matter is at large before the Tribunal which has to take final view. Our observations are only tentative with only focus in mind that the matter needed due consideration.
25. In the peculiar facts of this case, we are not passing any orders regarding costs.

(A.K. SIKRI)
JUDGE

June 04, 2008
skk

(VIPIN SANGHI)
JUDGE