

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 12th August, 2010

+ **W.P.(C) 7652/2009**

UOI & ANR. Petitioners
Through: Mr.H.K.Gangwani, Advocate

Versus

M.J.A.KHAN & ANR. Respondents
Through: Mr.G.S.Lohana, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

PRADEEP NANDRAJOG, J. (Oral)

1. Union of India is aggrieved by the impugned order dated 29.11.2007 by which the penalty imposed vide order dated 11.12.2006 effecting 10% cut in pension of the respondent for a period of 5 years has been set aside holding that the misdemeanour proved against the respondent was not a grave misconduct, a condition precedent for pension to be cut as per the language of Rule 9 of the CCS Pension Rules 1972 which reads as under:-

“9. Right of President to withhold or withdraw pension

(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole period, and of ordering recovery from a pension or a gratuity of the whole or part of any pecuniary loss

caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem.

2(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they are commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, --

(i) shall not be instituted save with the sanction of the President,

(ii) shall not in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of

dismissal from service could be made in relation to the Government servant during his service.

(3) *Deleted.*

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(5) Where the President decided not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule, -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted –

(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.”

2. In our decision dated 26.7.2010 deciding W.P.(C) No.2292/2010 UOI & Ors. Vs. Dr.V.T.Prabhakaran, the controversy whether only a misdemeanour which attracts a moral turpitude would alone amount to a grave misconduct or not was decided by us after noting the two rival view points.

We need only reiterate what we held by quoting the relevant extracts. In para 17 to 34 of the said decision, we had held as under:-

17. In the decision reported as 1990 (4) SCC 314 D.V.Kapoor vs. UOI & Ors., with reference to Rule 9 of the CCS (Pension) Rules 1972 the Supreme Court held that it was apparent that the President had reserved to himself the right to withhold pension in whole or in part, permanently or for a specified period, but, upon the condition that in the departmental inquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of a service. In para 9 of the decision it is observed: *"As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental inquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment."*

18. It were these observations in para 9 which were highlighted by learned counsel for the respondents.

19. It may be noted that the challenge in the proceedings which were considered by the Supreme Court was after the disciplinary authority had imposed the penalty and the order imposing the penalty had not opined that the misdemeanour proved against D.V.Kapoor was a grave misconduct.

20. We need not make a catalog of various decisions which have simply noted the aforesaid decision of the Supreme Court and have read para 9 thereof to mean that unless the inquiry report or the decision at the criminal trial indicts the government servant by expressly holding that it was a case of grave misconduct, penalty under Rule 9 of the Pension Rules cannot be imposed.

21. The other view is as expounded in the decision reported as 2007 (5) SCALE 421 Inspector Prem Chand vs. Govt. of NCT of Delhi & Ors. Where in para

12 it was held that the stage of so holding is when the disciplinary authority arises at a finding of fact qua the guilt.

22. We refrain from cataloging said decisions.

23. With the two viewpoints noted above, it assumes importance to note that evidenced by the decision of the Supreme Court reported as 1999 (7) SCC 739 Yoginath D. Bagde vs. State of Maharashtra & Ors., the jurisprudence in service law is that the disciplinary authority should not prejudge the gravamen of the allegations or for that matter even the charge, and should not use language which shows that the disciplinary authority has already made up its mind. It is only after the inquiry is over and the delinquent is heard with respect to the report of the inquiry officer; and when exonerated at the inquiry but the disciplinary authority not agreeing with the report, upon hearing him qua the note of disagreement, the final opinion has to be rendered. It is important to highlight that in Yoginath D. Bagde's case (supra) conclusive determination of the guilt by the disciplinary authority before giving an opportunity to the delinquent to respond to the note of disagreement was held to be a case of a closed mind qua the response of the delinquent, resulting in the disciplinary authority denuding himself the jurisdiction to decide with reference to the response of the delinquent to the note of disagreement.

24. Thus, requiring the law to be interpreted that either the charge sheet must allege the misconduct to be grave or the inquiry officer must hold so or the disciplinary authority should hold so while calling upon the delinquent to respond to the indictment, would mean that the disciplinary authority would be compelled to form an opinion without hearing the delinquent and if he would do so, would attract the charge that the disciplinary authority has already foreclosed its mind.

25. Rules, whether of procedure or of substance, have to be evolved harmoniously and not in a contradictory manner. Law cannot evolve in a

manner where two legal principles clash head on with each other.

26. Thus, we hold that the correct principle of law is that the stage for the disciplinary authority to hold that it is a case of a grave misconduct is when the penalty, by way of cut in pension or gratuity is inflicted under Rule 9 of the Pension Rules, and at no prior stage. This interpretation would be in harmony with the legal principle in Yoginath D. Bagde's case (supra) and would also be in conformity with the well known recognized judicial principle that the decision maker must take/make the decision after hearing the party likely to be affected by the decision and should not pollute his mind by prejudging the issue.

27. Now, can it be said that an offence of failure to maintain devotion to duty and/or unbecoming of a government servant can never be a grave misconduct?

28. 'Misconduct' has been defined in *Black's Law Dictionary*, Sixth Edition at page 999, thus:

"A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness."

29. 'Misconduct in office' has been defined as:

"Any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

30. In P. Ramanatha Aiyar's Law Lexicon, 3rd Edition, at page 3027, the term 'misconduct' has been defined as under:-

“The term ‘misconduct’ implies, a wrongful intention, and not involving error of judgment.

Misconduct is not necessarily the same thing as conduct involving moral turpitude.

The word ‘misconduct’ is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. ‘Misconduct’ literally means wrong conduct or improper conduct.”

31. The Supreme Court in the case reported as 1992 (4) SCC 54 State Bank of Punjab & Ors. vs. Ram Singh Ex Constable discussed and decided what misconduct is. The relevant paras of the judgment are reproduced below:-

“In usual parlance, misconduct means transgression of some established and defined rule of action, where no discretion is left, except that necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where, some direction is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.”

“Thus it could be seen that the word ‘misconduct’ though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere of judgment, carelessness or negligence in performance of the duty; the act

complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.”

32. Having understood what misconduct is, it becomes easy to understand what a grave misconduct would be. It has to be the aggravated form of misconduct.

33. Acts of moral turpitude, acts of dishonesty, bribery and corruption would obviously be an aggravated form of misconduct because of not only the morally depraving nature of the act but even the reason that they would be attracting the penal laws. There would be no problem in understanding the gravity of such kind of offences. But that would not mean that only such kind of indictments would be a grave misconduct. A ready example to which everybody would agree with as a case of grave misconduct, but within the realm of failure to maintain devotion to duty, would be where a fireman sleeps in the fire office and does not respond to an emergency call of fire in a building which ultimately results in the death of 10 persons. There is no dishonesty. There is no acceptance of bribe. There is no corruption. There is no moral turpitude. But none would say that the act of failure to maintain devotion to duty is not of a grave kind.

34. It would be difficult to put in a strait jacket formula as to what kinds of acts sans moral turpitude, dishonesty, bribery and corruption would constitute grave misconduct, but a ready touchstone would be where the *'integrity to the devotion to duty'* is missing and the *'lack of devotion'* is gross and culpable it would be a case of grave misconduct. The issue needs a little clarification here as to what would be meant by the expression *'integrity to the devotion to duty'*. Every concept has a core value and a fringe value. Similarly, every duty has a core and a fringe. Whatever is at the

core of a duty would be the integrity of the duty and whatever is at the fringe would not be the integrity of the duty but may be integral to the duty. It is in reference to this metaphysical concept that mottos are chosen by organizations. For example in the fire department the appropriate motto would be: '*Be always alert*'. It would be so for the reason the integrity of the duty of a fire officer i.e. the core value of his work would be to be '*always alert*'. Similarly, for a doctor the core value of his work would be '*duty to the extra vigilant*'. Thus, where a doctor conducts four operations one after the other and in between does not wash his hands and change the gloves resulting in the three subsequent patients contacting the disease of the first, notwithstanding there being no moral turpitude involved or corruption or bribery, the doctor would be guilty of a grave misconduct as his act has breached the core value of his duty. The example of the fireman given by us is self explanatory with reference to the core value of the duty of a fireman to be '*always alert*'."

3. Taking guidance from the aforesaid principle of law, let us advert to the facts of the instant case. Of the four articles of charge, the respondent has been indicted of only two and thus we note the misdemeanour and the relatable indictment. Vide Article II of the charge it was alleged against the respondent that of the three firms which had submitted the quotation in response to the NIT he penned a note that one tenderer be disqualified as the offer was for six section high mast as against the requirement of three section high mast and that he did not inform that of the other two, one was the manufacturer and the other was a supplier and thus he encouraged pooling of tenders. Vide Article III of the charge the indictment was of failure to bring to the notice of the Superintending Engineer that the rates quoted by the lowest firm were 100% above the provision in the administrative approval and expenditure sanction and as a result a work got awarded in excess of the allocated funds.

4. Article II stands proved only partially of not pointing out that one tenderer was the supplier of the manufacturer who was the second tenderer. The charge that the respondent was responsible for disqualification of the first tenderer was held not established. Article No.III of the charge was held to have been proved.

5. It may be noted that Article I and Article IV of the charge were held not proved. Penning a note of disagreement qua Article IV of the charge, and calling upon the respondent to respond thereto, the Disciplinary Authority has taken a view that even said charge was established. Thus, we note Article IV of the charge which alleges the misdemeanour of failure to verify and correct justification submitted by the Executive Engineer which led to the work being awarded to a contractor.

6. Suffice would it be to state that Article IV of the charge pertains to a lack of supervision and the other two indictments relate to not doing something which the respondent was supposed to do.

7. Qua Article III of the charge, suffice would it be to state that it is not the allegation that the respondent was instrumental, or by his act of inaction, in the work being awarded at a higher rate. The indictment is of not pointing out that the financial sanction was for a sum lesser than the rate quoted by the lowest tenderer. In respect of this indictment it can safely be said that the lapse cannot be called a grave misconduct for the obvious reason this issue was for the decision making authority i.e. the Superintending Engineer to have taken note of. Surely, the Superintending Engineer was to put the question as to whether the financial sanction matched the quote. At the highest, the misdemeanour alleged against the respondent and proved would be of not drawing the attention of the Superintending Engineer to said aspect.

8. As regards Article II of the charge, we find it to be a border line case. On a conservative view it can be said that the indictment is grave for the reason the respondent ought to have pointed out that of the three bidders, two were the alter ego of each other and especially for the reason the third was being disqualified on account of technical reasons.

9. We resolve the dead lock by noting the fact that it is not the case of the petitioner that any financial loss ensued.

10. Under the circumstances we concur with the view taken by the Tribunal that the instant case does not warrant the levy of any penalty under Rule 9 of the CCS (Pension) Rules 1972.

11. The writ petition is dismissed but without any order as to cost.

(PRADEEP NANDRAJOG)
JUDGE

(MOOL CHAND GARG)
JUDGE

AUGUST 12, 2010
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