

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

% *Judgment Reserved on: July 15, 2013*
Judgment Pronounced on: August 19, 2013

+ **WP(C)No.2850/2011**

UOI & ORS. Petitioners

Represented by: Mr.Saqib, Advocate

versus

PRADEEP KUMAR MODWILL & ANR. Respondents

Represented by: Mr.V.Shekhar, Sr.Advocate,
Instructed by Mr.Vishal Saxena
and Mr.Piyush Jain, Advocates

WP(C)No.2854/2011

UOI & ORS. Petitioners

Represented by: Mr.Saqib, Advocate

versus

PRADEEP KUMAR MODWILL & ANR. Respondents

Represented by: Mr.V.Shekhar, Sr.Advocate,
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and Mr.Piyush Jain, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR.JUSTICE V.KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. The factual backdrop leading to filing of the above captioned petitions is that on June 27, 1981 P.K. Modwill (hereinafter referred to as the 'Modwill' was appointed on the post of Clerk in the office of District Judge, Moradabad, U.P. and rendered service on said post till June 09, 1986. On June 10, 1986 Modwill joined Intelligence Bureau on the post of ACIO-II/G. In order to avail promotion to the post of ACIO-I/(G), Modwill joined State Intelligence Bureau (hereinafter referred to as the 'SIB'), Jammu on July 14, 1997. (Be it noted here that the period of service rendered by Modwill in the office of District Judge was treated as 'qualifying service')

2. Earning a promotion and joining SIB, Jammu on July 14, 1997 Modwill sought for and was granted 5 days' casual leave from July 21, 1997 to July 25, 1997 and on expiry of the leave he did not join duty and was thus treated as absent from duty. On September 25, 1997, the department issued a memo to Modwill requiring him to resume duty immediately; but to no avail.

3. Sometime thereafter Modwill submitted an application to IB Headquarters seeking his transfer from SIB, Jammu to IB Headquarters in Delhi, which application was rejected on October 03, 1997. On November 05, 1997 the department issued another memo to Modwill requiring him to resume duty immediately and informed him that his request for transfer was rejected, but Modwill did not join duty.

4. Thereafter Modwill submitted another application to IB Headquarters requesting for his transfer from SIB, Jammu to IB Headquarters in Delhi, which application was rejected on November

17, 1997. Yet again, on December 12, 1997 Modwill submitted an application to IB Headquarters reiterating his request for transfer. Vide memo dated March 27, 1998 IB Headquarters informed Modwill that aforesaid application dated December 27, 1997 submitted by him stands rejected and required him to resume duty at SIB, Jammu by April 16, 1998 failing which departmental enquiry would be initiated against him.

5. Sometime thereafter Modwill sent a letter to the department requesting for grant of two weeks' leave with effect from April 16, 1998, which request was not acceded to by the department.

6. When Modwill continued to remain absent from service despite issuance of aforesaid memos, on June 15, 1998 the department issued a memorandum to Modwill proposing to hold an enquiry against him under Rule 14 of CCS (CCA) Rules, 1965. Two Articles of charge were framed against Modwill as under:-

“ARTICLE-I

Shri P.K. Modwill joined SIB, Jammu on 14.7.97 to avail promotion as ACIO-I(G). He proceeded on 5 days CL w.e.f. 21.07.97 to 25.7.97 on the grounds of domestic work and w.e.f. 21.7.97 he continued to be absent on medical grounds. He was directed several times to resume duty but he disobeyed the orders of competent authority. He is, therefore, charged for disobedience of lawful orders of competent authority.

ARTICLE-II

Shri P.K. Modwill, ACIO-I(G) despite the clear directives from the competent authority to resume duty did

not obey the same and exhibited himself in most irresponsible manner unbecoming of the Govt. servant. He is, therefore, charged for his misdemeanor and indiscipline.”
(Emphasis Supplied)

7. On receipt of aforesaid memorandum, Modwill wrote a letter to the department stating therein that he was unable to resume duty after expiry of (5 days’) leave granted to him on account of his illness stating that he was suffering from disc prolapse.

8. On receipt of aforesaid letter, the department got Modwill examined from a Medical Board consisting of doctors working at District Hospital, Moradabad, U.P. inasmuch as Modwill was residing at Moradabad during the period of his absence from service.

9. On May 06, 1999 Chief Medical Superintendent, District Hospital, Moradabad, U.P. wrote a letter to the department regarding examination of Modwill by the Medical Board, the relevant portion whereof reads as under:-

“The Medical Board informed that Shri Pradeep Kumar Modwill aged 36 years was suffering from Lumbago with fibrosities back with nerve compression and is now fit for duty but Sh. Pradeep Kumar Modwill has been advised by the Board to avoid stressful work, forward bending, climbing altitude, walking on uneven surface (ground) and cold climate.” (Emphasis Supplied)

10. In the meantime, enquiry proceedings commenced at Jammu in respect of memorandum dated June 15, 1998. Modwill requested for shifting of venue of enquiry from Delhi to Jammu on ground of his ill-health, which request was allowed and venue of enquiry was shifted

from Jammu to Delhi. However, even after shifting of venue of enquiry from Jammu to Delhi Modwill chose to remain absent at the enquiry proceedings.

11. Vide his report dated March 30, 2000 it was opined by the Enquiry Officer that the record of the case establishes that Modwill remained unauthorizedly absent from service with effect from May 06, 1999 i.e. the date on which Modwill was declared fit for duty by the Medical Board and thus the charges leveled against him stand proved. With regard to the period from July 28, 1999 to May 05, 1999 it was opined by the Enquiry Officer that the medical documents produced by Modwill show that Modwill was unable to resume his duty during said period due to his ill-health.

12. Vide order dated November 13, 2000 the Disciplinary Authority agreed with the findings of the Enquiry Officer and imposed the penalty of 'dismissal from service' upon Modwill. The Disciplinary Authority further held that the period from July 26, 1997 to May 05, 1999 during which Modwill remained absent from service shall be regularized by granting him leave of the kind due/admissible to him and the period from May 06, 1999 i.e. the date when he was declared fit for duty by the Medical Board to November 13, 2000 i.e. the date of passing of order by the Disciplinary Authority during which he remained unauthorizedly absent from service shall be treated as Dies-Non.

13. Aggrieved by the aforesaid, Modwill submitted an appeal to the President of India i.e. the Appellate Authority, which appeal was

forwarded to the UPSC for its advice. Vide its advice dated August 16, 2001 the UPSC advised that the appeal submitted by Modwill should be allowed and penalty order dated November 13, 2000 passed by the Disciplinary Authority should be set aside for the reasons:- (i) charges framed against Modwill which relate to his absence from duty for the period till May 05, 1999 do not stand proved inasmuch as the Disciplinary Authority has regularized said period of absence of Modwill by granting various kinds of leave to Modwill; (ii) the Enquiry Officer committed an illegality in dealing with absence of Modwill from duty for the period beyond May 05, 1999 for the said period do not come within the purview of the charge sheet dated June 15, 1998 issued to Modwill and (iii) imposing a penalty for disobedience and unauthorized absence for the period beyond May 05, 1999 which is a new charge against Modwill is not proper. Furthermore, the Commission was of the view that the Disciplinary Authority is at liberty to issue a separate charge sheet to Modwill for his absence of duty for the period beyond May 06, 1999.

14. Vide order dated July 23, 2002 the Appellate Authority agreed with the aforesaid advice tendered by the UPSC; set aside the penalty of dismissal from service imposed upon Modwill and granted liberty to the Disciplinary Authority to initiate fresh disciplinary proceedings against Modwill for his absence from duty for the period from May 06, 1999.

15. On August 12, 2002 Modwill finally resumed duty at SIB, Jammu. Yet again, on October 22, 2002 Modwill absented himself from service and continued to remain absent till September 16, 2005.

16. In the meantime, on November 05, 2002 the department issued (2nd) memorandum/charge sheet to Modwill regarding his absence from duty for the period from May 06, 1999 to July 23, 2002.

17. On January 30, 2003 an order was issued by the department prescribing therein that the memorandum/charge sheet dated November 05, 2002 issued to Modwill stands cancelled for the reason there were discrepancies in said charge sheet and that a fresh charge sheet would be issued to Modwill after rectification of said discrepancies.

18. On April 07, 2003 Modwill submitted an application to the competent authority stating therein that he is desirous of seeking voluntary retirement from service under Rule 48-A of the CCS (Pension) Rules, 1972 on account of his ill-health and that instant application be treated as three months' notice for voluntary retirement.

19. On April 24, 2003 the department issued a (3Rd) memorandum to Modwill proposing to hold an enquiry against him under Rule 14 of CCS (CCA) Rules, 1965. The charge against Modwill reads as under:-

“ARTICLE-I

Shri P.K. Modwill, ACIO-I(G) was issued a charge sheet on 15-6-1998 for his unauthorized absence. The Disciplinary Authority imposed upon him the penalty of dismissal from service with further directions to regularize the period of

absence w.e.f. 26.7.97 to 5.5.99 by granting leave of the kind due. Shri Modwill preferred an appeal to Appellate Authority against the order of DA and the Appellate Authority set aside the penalty of dismissal from service and ordered his reinstatement with further directions to initiate D.E. against him for his unauthorized absence w.e.f. 6.5.1999 to 13.11.2000 (i.e. the date of issue of penalty order) as he was declared fit by the Medical Board for duty w.e.f. 6.5.99 but he remained absent unauthorisedly. He is, therefore, charged for his unauthorized absence w.e.f. 6.5.1999 to the date of issue of penalty order i.e. 13.11.2000.” (Emphasis Supplied)

20. On receipt of above memorandum, Modwill sent a letter dated June 06, 2003 to the department stating therein that on several occasions after to May 06, 1999 he had submitted applications to the department seeking his transfer from Jammu to Delhi on medical grounds but he did not receive any intimation from department in said regards. He stated that in view of advice of Medical Board dated May 06, 1999 that he should avoid stressful work, forward bending, climbing altitude, walking on uneven surface (ground) and cold climate exposure he could not resume his duties at SIB, Jammu for the reason his travelling to Jammu would have amounted to violation of advice of the Medical Board. When at no point of time after May 06, 1999 the department asked him to resume duty he remained under the bona fide impression the department is considering his request for transfer and thus did not join duty, particularly when the department did not intimate him anything in relation to his request for transfer.

21. On July 18, 2003 the Enquiry Officer issued first notice to Modwill informing him that the preliminary hearing is fixed for August 12, 2003 and that venue of enquiry is Jammu. However,

Modwill did not appear on the scheduled date but instead sent a letter to the Enquiry Officer requesting for shifting of venue of enquiry from Jammu and Delhi on account of his ill-health. In view thereof, the Enquiry Officer directed Modwill to appear before the Chief Medical Superintendent, Govt. Hospital, Moradabad and obtain a certificate from him in respect of his illness. In response thereto, Modwill sent a letter to the Enquiry Officer expressing his inability to appear before any Medical Authority stating that he stood retired from service with effect from July 07, 2003 inasmuch as he had served three months' notice to the Department for voluntary retirement which expired on July 06, 2003.

22. In the meantime, on July 31, 2003 the department issued a memorandum to Modwill informing him that since he had not completed requisite 20 years of qualifying service his notice/application for voluntary retirement is not tenable. Thereafter on September 18, 2003 the department issued a memorandum stating therein that the period from May 06, 1999 to August 11, 2002 during which Modwill remained absent from service was being treated as 'undecided' since a departmental enquiry was pending against Modwill in respect of said period and as a necessary corollary thereof Modwill has not completed requisite qualifying service of 20 years for purpose of voluntary retirement.

23. In view of the above, the Enquiry Officer issued several notices to Modwill requiring Modwill to attend the enquiry proceedings. On one occasion i.e. on November 08, 2004 Modwill appeared before the

Enquiry Officer and denied the charge framed against him. Thereafter the enquiry proceedings were held on November 23, 2004, November 29, 2004, December 22, 2004 and January 17, 2005 but Modwill did not appear before the Enquiry Officer on said dates. On account of his repeated failure to appear before the Enquiry Officer, Modwill was proceeded ex-parte. Even after being proceeded ex-parte various notices were issued to Modwill for attending enquiry proceedings but to no avail. Thereafter an opportunity was provided to Modwill to submit his statement of defense to the Enquiry Officer. Whereas the Enquiry Officer claimed that Modwill did not submit his statement of defence Modwill claims to the contrary.

24. On conclusion of the enquiry proceedings, the Enquiry Officer submitted his report dated May 06, 2005 opining therein that the charge of unauthorized absence framed against Modwill stands established. In coming to said conclusion, it was opined by the Enquiry Officer, that:- (i) the plea taken by Modwill that his travelling/posting to Jammu would have amounted to violation of advice of Medical Board dated May 06, 1999 is misconceived inasmuch as Modwill has not elaborated as to how his travelling to Jammu would have amounted to the violation of advice of Medical Board and that at no stage the Board had opined that health condition of Modwill would deteriorate or worsen in case of his continued posting at Jammu; (ii) Modwill has tried to avoid joining duties at Jammu by taking ruse to the opinion of the Medical Board which had merely advised him to take certain precautions but had not opined that Modwill is unfit to resume duties at

Jammu but on the other hand declared him fit for his duty; (iii) the record of the case shows that Modwill had ever shown any serious intention to join duties at SIB, Jammu despite being declared fit for duty by the Medical Board; (iv) there is no substance in the plea taken by Modwill that he did not join duties as he was under bona fide impression that the department is considering his request for transfer from Jammu to Delhi for the reason it was incumbent upon him to have joined his duties as soon as he was declared fit for duty by the Medical Board and thereafter he could have sought redressal of his grievance relating to transfer; (v) the plea taken by Modwill that the department never asked him to join duties after May 06, 1999 is misconceived for the reason it is the responsibility of the Govt. servant who has been declared fit for duty to join his duties immediately or within a reasonable time of such declaration and in any case the order dated November 13, 2000 issued by the Disciplinary Authority clearly records that such a notice was issued to him after he was declared fit by the Medical Board, which recording has not been contested by Modwill; and (vi) had Modwill been suffering from any ailment on May 06, 1999 the Medical Board would not have declared him fit for duty on said date or in case had there been any likelihood of deterioration of his health by travelling/posting to Jammu the Medical Board would have made a mention of said fact in its report. (Be it noted here that the Enquiry Report records that Modwill has not submitted his written statement of defence to the Enquiry Officer despite being given an opportunity to do the same).

25. On May 31, 2005 Modwill submitted a representation/reply to the report of the Enquiry essentially reiterating the stand taken by him in the letter dated June 06, 2003 written by him in response to the memorandum/charge sheet dated April 24, 2003.

26. Vide order dated September 16, 2005 the Disciplinary Authority agreed with the findings of the Enquiry Officer and again imposed the penalty of 'dismissal from service' upon Modwill. It was further held that the absence from duty of Modwill for the period from May 06, 1999 and November 13, 2000 shall be treated as Dies-Non.

27. On October 13, 2005 Modwill filed an appeal before the Appellate Authority i.e. the President of India challenging the legality of the penalty order dated September 16, 2005 issued by the Disciplinary Authority as also the action of the department of rejecting his application/notice for voluntary retirement from service.

28. Vide order dated February 22, 2007 the competent authority issued an order recording therein that period from October 22, 2002 to September 16, 2005 (the date of his dismissal from service) during which Modwill remained absent from service shall be treated as dies-non.

29. In the meantime, Modwill filed an application under Section 19 of the Administrative Tribunals Act, 1985 being O.A. No.1655/2006 before the Central Administrative Tribunal, Principal Bench, New Delhi assailing the legality of the action of the department of rejecting his application/notice for voluntary retirement from service. Vide order

dated June 05, 2007 the Tribunal dismissed the aforesaid OA filed by Modwill, the relevant portion whereof reads as under:-

“23. Taking into totality of facts and circumstances of the case into consideration, we come to the conclusion that since the applicant has sent his notice for voluntary retirement without verifying the fact whether he had completed 20 years of qualifying service, his notice had no validity in the eyes of law. Under the circumstances, the failure of the respondents to respond to the said notice within the stipulated period of three months, did not create vested right in favor of the applicant. Thus, the applicant has not been able to establish any irregularity in the action taken by the respondents requiring judicial intervention.”

30. Thereafter Modwill filed another application being O.A. No.1372/2007 before the Tribunal seeking disposal of the appeal dated October 13, 2005 filed by him by the Appellate Authority. Vide order August 08, 2007 the Tribunal directed the competent authority to dispose of the appeal dated October 13, 2005 filed by Modwill within a period of three months from the date of receipt of said order.

31. Pursuant thereto, the Appellate Authority forwarded the appeal dated October 13, 2005 filed by Modwill to the UPSC for its advice. Vide its advice dated April 28, 2008 the UPSC advised that there is no merit in the appeal dated October 13, 2005 filed by Modwill and that the same should be rejected. It would be relevant to note the following portion of the advice of the UPSC:-

“5.0 The Commission observe that though it is not denied that the CO/Appellant was suffering from serious back problem (‘Lumbago-C-Fibrosities’ back-C nerve compression) on account of which he could not join his

duties and stayed at Moradabad, it is to be noted that at one stage, according to CMO, District Hospital, Moradabad, he was declared “fit to join duties”. The Doctors, also mentioned in the certificate of fitness that he should avoid, stressful work, forward bending, climbing high altitudes, walking on uneven surface and cold climate. Some of these conditions are normally prescribed in all chronic cases of backache and other related problems, and as such, there is nothing very special on account of which the CO/Appellant did not join his duties at Jammu. The Medical Certificate was issued in May 1999, when there is no question of cold climate in Jammu. The CO/Appellant could have joined his duties at his place of posting, instead of continuing to remain absent.

5.1 The Commission observe that CO/Appellant’s plea that he did not travel to Jammu on account of the medical advice given to him is very specious and based on his imagination. The advice declared him “fit for duty” and not prescribed any continuous bed rest. The officer could have undertaken his journey to Jammu by train, which he did not undertake. He did not make any effort to proceed to his Headquarters at Delhi, which is a short rail journey from Moradabad.

5.2 The Commission observe that the CO/Appellant was serving in a sensitive organization where highest degree of discipline and dedication to duty is called for. DA’s action to impose the penalty of “Dismissal from Service” is commensurate with the gravity of misconduct proved against the CO/Appellant, requiring the Appeal to be dismissed.”

32. Based on the aforesaid advice of the UPSC, vide order dated May 29, 2008 the Appellate Authority rejected the appeal filed by Modwill.

33. On November 05, 2008 the Competent Authority issued an order recording therein that Modwill would be paid half-average pay for the

period from November 13, 2000 (the date of setting aside of 1st penalty order by the Appellate Authority) to August 11, 2002 during which he remained absent from service and that said period would be treated as period spent on 'non-duty' for all purposes.

34. Aggrieved by the aforesaid, Modwill 2 applications being O.A. Nos.1728/2008 and 646/2009 before the Tribunal. Vide O.A. No.1728/2008 filed by him Modwill assailed the legality of the penalty of dismissal from service imposed upon him. Vide O.A. No.646/2009 Modwill assailed the legality of the (2) orders dated February 22, 2007 and November 05, 2008 whereby the competent authority directed that the period from October 22, 2000 to September 16, 2005 during which Modwill remained absent from service shall be treated as '*dies-non*' and that Modwill shall be paid average half pay for the period from November 13, 2000 to August 11, 2002 respectively.

35. Vide judgment dated December 09, 2010 the Tribunal decided both the aforesaid OAs filed by Modwill together. The Tribunal allowed O.A. No.1728/2008 filed by Modwill and remitted the case back to the department to reconsider the matter from the stage of examination of Modwill by the Enquiry Officer under Rule 14(18) of the CCS (CCA) Rules, 1965 on the grounds that: - (i) the Enquiry Officer has violated the mandatory provisions of Rule 14(18) of the CCS (CCA) Rules, 1965, in that, he had not examined Modwill with reference to the evidence appearing against him in the enquiry; (ii) the fact that Modwill did not appear before the Enquiry Officer despite issuance of several notices/communications by the Enquiry Officer in

said regard would not justify violation of provisions of Rule 14(18) by the Enquiry Officer in view of the ratio of law laid down by the Supreme Court in the decision reported as (1998) 3 SCC 227 Ministry of Finance vs. S.B.Ramesh and the fact that none of the notices/communications issued by the Enquiry Officer mentioned about the examination of Modwill under Rule 14(18) of the CCS (CCA) Rules, 1965 and (iii) the aforesaid omission on the part of Enquiry Officer had greatly prejudiced the defence of Modwill particularly when the Enquiry Officer did not deal with the statement of defence submitted by Modwill even though it was submitted to him before he completed his report and the Disciplinary/Appellate Authorities have not dealt with the representation against Enquiry Report/appeal submitted by Modwill in a satisfactory manner.

36. With respect to OA No.646/2009 it was held by the Tribunal that in view of the fact the order dated February 22, 2007 dealing with the period from October 22, 2000 to September 16, 2005 was based upon the (2nd) penalty order dated September 16, 2005 passed by the Disciplinary Authority has been set aside inasmuch as the matter has been remanded to the department for reconsideration in view of its decision in OA No.1728/2008 the order dated February 22, 2007 automatically gets set aside requiring the department to take a fresh decision in respect of said period on the basis of fresh decision taken by it in OA No.1728/2008. With respect to the period from November 13, 2000 to August 11, 2002 it was held by the Tribunal that: - (i) a conjunctive reading of the provisions of FR 54(1) and instruction No.4

issued by the Government of India on said subject brings out that a Government servant is required to be paid full pay and allowances for the period he remained absent from service due to his being dismissed from service when the order of dismissal was passed without following the provisions of Article 311 of the Constitution of India; and (ii) Modwill is required to be paid full pay and allowances for the period from November 13, 2000 to August 11, 2002 for the reason the order dated November 13, 2000 passed by the Disciplinary Authority dismissing Modwill from service was in clear violation of Article 311 of the Constitution of India inasmuch as Modwill was punished for unauthorized absence for the period which was different from the period mentioned in the (1st) charge sheet dated June 15, 1998 and therefore Modwill neither had been informed about said charge nor given an adequate opportunity to defend himself against said charge.

37. Aggrieved by the aforesaid, the department has filed the above captioned petitions challenging the legality of the judgment (s) dated December 09, 2010 passed by the Tribunal in OA Nos.1728/2008 and 646/2009 filed by Modwill.

38. In order to determine whether the impugned judgment(s) dated December 09, 2010 passed by the Tribunal is legal or not, let us recap the basic facts of the present case.

39. On July 14, 1997 Modwill joined State Intelligence Bureau. It is not in dispute that Modwill got promoted to the post of ACIO-I(G) on account of his joining SIB, Jammu. However, immediately after

getting promoted to the post of ACIO-I(G) started the medical problems of Modwill.

40. On July 16, 1997 Modwill applied for 5 days' casual leave and got leave for a period from July 21, 1997 to July 25, 1997. However, on expiry of period of 5 days leave Modwill did not join duty and remained absent from service till June 14, 1998. During said period, Modwill made several requests to the department for his transfer from Jammu to Delhi on account of his ill-health, which requests were turned down.

41. Tired of his absenteeism from service, on June 15, 1998 the department issued (1st) charge sheet to Modwill regarding his absence of service since July 21, 1997.

42. On May 06, 1999 Modwill was examined by a Medical Board consisting of doctors of Government Hospital, Moradabad, U.P. The Medical Board diagnosed that Modwill is suffering from Lumbago (Low Back Pain). Before proceeding further, we again reproduce here the advice of the Medical Board:-

“The Medical Board informed that Shri Pradeep Kumar Modwill aged 36 years was suffering from Lumbago with fibrosities back with nerve compression and is now fit for duty but Sh. Pradeep Kumar Modwill has been advised by the Board to avoid stressful work, forward bending, climbing altitude, walking on uneven surface (ground) and cold climate.” (Emphasis Supplied)

43. Despite being declared 'fit for duty' by the Medical Board Modwill refrained from joining duty at Jammu on the ground that his

travelling to Jammu would amount to violation of advice given to him by the Medical Board. We fail to comprehend as to how Modwill's travelling to Jammu would have violated the advice given to him by the Medical Board. It was not as if Modwill was required to travel from Moradabad (the place where he was residing during his period of absence from service) to Jammu by foot.

44. Be that as it may, Modwill did not turn up for duty till November 12, 2000.

45. In the meantime, the enquiry proceedings commenced at Jammu. Modwill sought shifting of venue of enquiry from Jammu to Delhi on account of his ill-health, which request was allowed by the Enquiry Officer. But even thereafter Modwill did not participate in the enquiry proceedings. The fact that Modwill did not participate in the enquiry proceedings despite venue of enquiry being shifted from Jammu to Delhi goes to show that Modwill never intended to participate in the enquiry proceedings and fabricated an excuse to avoid attending the enquiry proceedings. Modwill probably thought the department would not allow his request for shifting of venue of enquiry from Jammu to Delhi but the department called off his bluff by allowing said request of Modwill.

46. Vide his report dated May 30, 2000 the Enquiry Officer opined that Modwill had unauthorizedly remained absent from service with effect from May 06, 2000 i.e. the date he was declared fit for duty by the Medical Board, which finding was accepted by the Disciplinary Authority and inflicted the penalty of dismissal from service upon

Modwill on November 13, 2000. On July 23, 2002 the Appellate Authority set aside the penalty order dated November 13, 2000 on the ground that absence of Modwill from service for the period beyond May 06, 1999 did not come within the purview of charge sheet dated June 15, 1998. However, liberty was granted to the Disciplinary Authority to initiate fresh departmental action against Modwill in respect of his absence from service for the period beyond May 06, 1999.

47. Finally, Modwill joined duty at Jammu on August 12, 2002 but not for long and again absented himself from service with effect from October 22, 2002.

48. On November 05, 2002 the department issued (2nd) charge sheet to Modwill relating to his absence from service for the period from May 06, 1999 to July 23, 2002 but the same was cancelled due to some discrepancies occurring therein.

49. On April 24, 2003 the department issued (3rd) charge sheet to Modwill relating to his absence from service for the period from May 06, 1999 to November 13, 2000. On July 18, 2003 the enquiry commenced at Jammu but Modwill again sought shifting of venue of enquiry from Jammu to Delhi. This time, the department did not immediately agree to the request of Modwill but asked him to appear before the Chief Medical Superintendent, Government Hospital, Moradabad for ascertaining whether Modwill is genuinely ill or not. However, Modwill refused to appear before the Chief Medical Superintendent on the ground that he stands retired from service with

effect from July 06, 2003 on account of the fact that three months' notice dated April 07, 2003 for voluntary retirement served by him upon the department stood expired on July 06, 2003.

50. The department informed Modwill that notice dated April 07, 2003 sent by him is not tenable as he had not completed requisite 20 years of qualifying service for voluntary retirement and thus he should either appear before the Chief Medical Superintendent or participate in the enquiry proceedings. However, Modwill continued with his obstinate attitude and continued to remain absent in the enquiry proceedings as also shied away from appearing before the Chief Medical Superintendent. Save and except one date i.e. November 08, 2004 Modwill did not attend enquiry proceedings and was proceeded ex-parte. Even after being proceeded ex-parte the Enquiry Officer issued several notices to Modwill to participate in the enquiry proceedings but in vain.

51. Vide his report dated May 06, 2005 the Enquiry Officer submitted his report opining that Modwill unauthorizedly remained absent from service for the period from May 06, 1999 to November 13, 2000, which finding was accepted by the Disciplinary Authority and inflicted penalty of dismissal from service upon him on September 16, 2005. Pertinently, all this while Modwill remained absent from service. On November 29, 2008 the Appellate Authority rejected the appeal filed by Modwill against the penalty order dated September 16, 2005.

52. It is this penalty order dated September 16, 2005 dismissing him from service which was challenged by Modwill in OA No.1728/2008 filed by him.

53. Vide judgment dated December 09, 2010 the Tribunal had set aside the penalty order September 16, 2005 and remanded the matter to the department essentially on the ground that Enquiry Officer violated the mandatory provisions of Rule 14(18) of the CCS (CCA) Rules, 1965, in that he did not examine Modwill with reference to the evidence appearing against him in the enquiry.

54. Rule 14(18) of the CCS (CCA) Rules, 1965 reads as under:-

“14. Procedure for imposing major penalties

(1)-(17).....

(18) The inquiring authority may, after the Government servant closes his case, and shall, if the Government servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government servant to explain any circumstances appearing in the evidence against him.”

55. In this regards, it is most apposite to note the decision of 3-Judge Bench of the decision of Supreme Court reported as (1980) 3 SCC 304 Sunil Kumar Banerjee vs. State of West Bengal & Ors dealing with Rule 8(19) of the All India Service Disciplinary Rules, 1969, which is pari materia with Rule 14(18) of the CCS (CCA) Rules, 1965. In said case, one of the contentions advanced by the appellant therein who was challenging a penalty inflicted upon him in a departmental action

initiated against him was that the Enquiry Officer did not question him with reference to the circumstances appearing against him as provided by sub-rule (19) of Rule 8 of the All India Service Disciplinary Rules, 1969 and thus was denied an opportunity of explaining the circumstances which weighed in the mind of the Enquiry Officer. The Court repelled the aforesaid contention advanced by the appellant in the following terms:-

“...It is, however, true that the appellant was not questioned by the Enquiry Officer under Rule 8(19) which provided as follows:

The inquiring authority may, after the member of the service closes his case, and shall, if the member has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the member of service to explain any circumstances appearing in the evidence against him.

It may be noticed straightaway that this provision is akin to Section 342 of the Criminal Procedure Code of 1898 and Section 313 of the Criminal Procedure Code of 1974. It is now well established that mere non examination or defective examination under Section 342 of the 1898 Code is not a ground for interference unless prejudice is established, vide, K.C. Mathew v. State of Travancore-Cochin 1956 Cri.L.J. 444, Bibhuti Bhushan Das Gupta and Anr. v. State of West Bengal 1969 Cri.L.J. 654. We are similarly of the view that failure to comply with the requirements of Rule 8(19) of the 1969 rules does not vitiate the enquiry unless the delinquent officer is able to establish prejudice. In this case the learned Single Judge of the High Court as well as the learned Judges of the Division Bench found that the appellant was in no way prejudiced by the failure to observe the requirement of Rule 8(19). The appellant cross-examined the witnesses himself, submitted

his defence in writing in great detail and argued the case himself at all stages. The appellant was fully alive to the allegations against him and dealt with all aspects of the allegation in his written defence. We do not think that he was least prejudiced by the failure of the Enquiry Officer to question him in accordance with Rule 8(19).”

56. From the afore-noted observations, the ratio of law which is discernible from the decision in Sunil Kumar’s case (supra) is that non-adherence to Rule 8(19) of the All India Service Rules, 1969 by the Enquiry Officer is fatal only if it is shown that a delinquent was prejudiced on account of such non-adherence. A somewhat discordant note was struck by the 2-Judge Bench of the Supreme Court in the decisions reported as (2008) 3 SCC 484 Moni Shankar vs. Union of India and (1998) 3 SCC 227 Ministry of Finance vs. S.B. Ramesh which decisions have not noted the earlier 3-Judge Bench decision in Sunil Kumar Banerjee’s case (supra) and thus we are bound by ratio of law laid down by the 3-Judge Bench in Sunil Kumar’s case (supra).

57. In the instant case, Modwill has not shown as to how he has been prejudiced due to Enquiry Officer not examining him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965. A perusal of the statement of defense submitted by Modwill goes to show that he was fully alive to the allegations against him and dealt with all aspects of the allegations in his statement of defense. We do not think that he was least prejudiced by the failure of the Enquiry Officer to examine him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965. Such being the position, nothing turns upon the failure of the Enquiry Officer to examine him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965.

58. The matter can also be looked at from another angle.

59. In the decision reported as (2008) 11 SCC 502 Board of Directors, HPTC vs. K.C. Rahi the respondent therein chose to remain absent in the departmental enquiry initiated against him due to which enquiry was proceeded ex-parte. One of the contentions advanced by the respondent to challenge the termination order passed against him was that the enquiry was conducted in his absence and thus the termination order suffers from non-compliance of principles of natural justice. The aforesaid contention was repelled by the Court in the following terms:-

“The principles of natural justice cannot be put in a straight jacket formula. Its application depends upon the facts and circumstances of each case. to sustain a complaint of non-compliance of the principles of natural justice, one must establish that he has been prejudiced thereby for non-compliance of principles of natural justice.

In the instant case, we have been taken through various documents and also from representation dated 19.10.1993 filed by the respondent himself it would clearly show that he knew that a departmental enquiry was initiated against him yet he chose not to participate in the enquiry proceeding at his own risk. In such event plea of principle of natural justice is deemed to have been waived and he is estopped from raising the question of non compliance of principles of natural justice. In the representation submitted by him on 19.10.1993 the subject itself reads “DEPARTMENTAL ENQUIRIES”. It is stated at the Bar that the respondent is a law graduate, therefore, he cannot take a plea of ignorance of law. Ignorance of law is of no excuse such less by a person who is a law graduate himself. (Emphasis Supplied)

60. In the instant case, Modwill chose to not participate in the enquiry proceedings despite issuance of several notices by the Enquiry Officer in said regard. Due to his absence in the enquiry proceedings, the Enquiry Officer could not examine Modwill to examine him in terms of the provisions of Rule 14(18) of the CCS (CCA) Rules, 1965. Having not participated in the enquiry proceedings, it does not lie in the mouth of Modwill to complain that he was not examined by the Enquiry Officer in terms of the provisions of Rule 14(18) of the CCS (CCA) Rules, 1965

61. In view of aforesaid, we hold that the Tribunal committed an illegality in setting aside the penalty order dated September 16, 2005 passed by the Disciplinary Authority and remanding the matter to the department on account of non-adherence by the Enquiry Officer to the provisions of Rule 14(18) of the CCS (CCA) Rules, 1965.

62. We next need to determine whether the departmental authorities were justified in inflicting penalty of dismissal from service upon Modwill.

63. It has not been disputed by Modwill that he was absent from service for the period from May 06, 1999 to November 13, 2000 i.e. the period in respect whereof penalty order dated September 16, 2005 has been passed. The explanation furnished by Modwill for said absence is that he did not join duty during said period as he was under bona fide impression that the department is considering the request (s) made by him for his transfer to Delhi from Jammu on account of his illness, particularly when at no point of time after May 06, 1999 the

department asked him to join duty or informed him about the fate of his requests of transfer.

64. The aforesaid explanation furnished by Modwill is most flimsy. The Enquiry Officer has noted in his report that the order dated November 13, 2000 passed by the Disciplinary Authority records that the department had issued a letter to Modwill on December 27, 1998 requiring him to join duty and that Modwill has not disputed correctness of said recording. The said factual recording contained in the order dated November 13, 2000 has not been disputed by Modwill even before us. Thus, Modwill is not correct in contending that department never issued any notice to him after May 06, 1999 requiring him to join duty. Even assuming no notice was issued by the department to Modwill after May 06, 1999 requiring him to join duty, the Enquiry Officer is right in opining that it is obligatory upon the government servant to join his duty within a reasonable time of being declared fit for duty. Surely, the department was not required to send invitation card to Modwill for joining duty once he was declared fit for duty by the Medical Board. Modwill joined Jammu on July 14, 1997 and promoted to the post of ACIO-I(G). We again highlight here that Modwill got promoted to the post of ACIO-I(G) by virtue of his joining SIB at Jammu. However, all of a sudden on joining SIB, Jammu started the medical problems of Modwill. The timing of medical problems faced by Modwill coupled with his conduct of not attending (1st) enquiry proceedings initiated against him despite venue of enquiry changed from Jammu to Delhi at his request and his

obstinacy of appearing before the Chief Medical Superintendent during (2nd) enquiry proceedings for ascertainment of extent of his illness goes to show that Modwill had joined SIB, Jammu in order to get promoted to the post of ACIO-I(G) and thereafter attempted to use the disease of Lumbago suffered by him, particularly the advice of the Medical Board whereby he was advised to take certain precautions, as a ruse to get transferred from Jammu to Delhi. In case Modwill's health was genuinely getting deteriorated by being posted at Jammu as claimed by him, Modwill ought to have taken legal recourse for his transfer from Jammu and Delhi and not just absented himself from service as done by him. We find that in a period spanning 3 years Modwill filed 4 applications before the Tribunal claiming different reliefs. We fail to understand what stopped Modwill from filing one more application seeking his transfer from Jammu to Delhi if his health would have deteriorated at Jammu as claimed by him. Such being the position, we find no infirmity in the decision of the departmental authorities in inflicting penalty of dismissal from service upon Modwill.

65. This takes us to the decision of the Tribunal in the OA No.646/2009 filed by Modwill.

66. The decision of the Tribunal with respect to the order dated February 22, 2007 issued by the department dealing with period from October 22, 2000 to September 16, 2005 was based upon the premise that it had set aside the penalty order dated September 16, 2005 passed by the Disciplinary Authority which formed the basis of the order dated February 22, 2007 and remanded the matter to the department.

Since we have not agreed with the decision of the Tribunal of setting aside the penalty order dated September 16, 2005 the necessary corollary thereof is that the order dated February 22, 2007 issued by the department stays. We need not say anything more on this aspect of the matter.

67. Coming to the decision of the Tribunal of quashing the order dated February 05, 2008 passed by the department dealing with period from November 13, 2000 to August 11, 2002 we find that the Tribunal had quashed said order on the premise that vide its order dated July 23, 2002 the Appellate Authority had set aside the penalty order dated November 13, 2000 passed by the Disciplinary Authority dismissing Modwill from service. However, while doing so the Tribunal failed to realize that though the Appellate Authority set aside the penalty order dated November 13, 2000 passed by the Disciplinary Authority it granted liberty to the Disciplinary Authority to initiate fresh departmental action against Modwill in respect of the period of absence of Modwill from service forming the subject-matter of the penalty order dated November 13, 2000. The aforesaid liberty granted by the Appellate Authority was availed by the Disciplinary Authority and fresh charge sheet was issued to Modwill in respect of the period forming subject-matter of the penalty order dated November 13, 2000. In that view of the matter, the decision of the Tribunal quashing the order dated November 05, 2008 cannot be sustained.

68. The net result of the above discussion is that the judgment(s) dated December 09, 2010 passed by the Tribunal are set aside. The

above captioned petitions filed by the department are allowed. As a necessary corollary thereof, OA Nos.1728/2008 and 646/2009 filed by Modwill stand dismissed.

69. However, keeping in view the service rendered by Modwill, we would recommend to the department that if Modwill files an application seeking compensation allowance to be paid to him as per Rule 49 of the CCS Pension Rules, 1972 which permits grant of a compensation allowance to a person who has been dismissed or removed from service, the same should be considered sympathetically.

70. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(V.KAMESWAR RAO)
JUDGE

AUGUST 19, 2013

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