

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

% *Judgment Reserved on: July 11, 2013*
Judgment pronounced on: July 15, 2013

+ **W.P.(C) 4539/2012**

UNION OF INDIA AND ANR Petitioners

Represented by: Mr.R.V.Sinha, Advocate with
Mr.A.S.Singh, Advocates

versus

BISWABIJOYEE PANIGARIHI AND ANR Respondents

Represented by: None for R-1
Mr.Naresh Kaushik, Advocate for R-2

W.P.(C) 6156/2012

UNION OF INDIA AND ANR Petitioners

Represented by: Mr.R.V.Sinha, Advocate with
Mr.A.S.Singh, Advocates

versus

T.R.MALIK AND ANR Respondents

Represented by: Mr.A.K.Singh and Mr.K.S.Prasad,
Advocates for R-1
Mr.Naresh Kaushik, Advocate for
UPSC.

W.P.(C) 6157/2012

UNION OF INDIA AND ORS Petitioner

Represented by: Mr.R.V.Sinha, Advocate with
Mr.A.S.Singh, Advocates

versus

R.P.S. PANWAR

..... Respondent

Represented by: Mr.R.P.Kapur, Advocate for R-1
Mr.Naresh Kaushik, Advocate for R-2

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE V. KAMESWAR RAO

PRADEEP NANDRAJOG, J.

1. A common question of law arises for consideration in the three above captioned writ petitions. With one additional point urged in W.P.(C) No.6156/2012 pertaining to the reasons to be recorded by the Disciplinary Authority while levying penalty if it agrees with the report of the Inquiry Officer. Lest there be a confusion with reference to the record of this Court we may note at the outset that after arguments were heard on July 11, 2013 and matter was reserved for judgment, the order dated July 11, 2013 wrongly records the writ number in which the additional point was urged. The recording in the order that the additional point was urged in W.P.(C) No.6157/2012 is incorrect. The additional point was urged in W.P.(C) No.6156/2012.

2. The common point in all the three writ petitions pertains to whether advice obtained from UPSC by the Competent Authority before levying penalty was required to be supplied to the charged officer when report of the Inquiry Officer was forwarded to him and not along with the order levying penalty.

3. In a short decision, which incidentally does not note Rule 32 of the

CCS (CCA) Rules, 1965, decided on January 30, 2004, but reported in the year 2011, as (2011) 4 SCC 591 S.N.Narula Vs. UOI & Ors. a two Judge Bench of the Supreme Court held that the advisory opinion obtained from UPSC had to be communicated to the charged officer before the Disciplinary Authority inflicted the punishment and not after inflicting the punishment. In other words the requirement would be to forward advice received from UPSC along with the report of the inquiry while seeking response of the charged officer to the report of the Inquiry Officer.

4. In a reasoned decision, taking note of Rule 32 of the CCS (CCA) Rules, 1965 and noting the decision reported as AIR 1957 SC 912 State of U.P. Vs. Manbodhan Lal Srivastava which considered Article 320 of the Constitution of India, reported as (2007) 4 SCC 785 UOI & Anr. Vs. T.V.Patel, a two Judge Bench of the Supreme Court held that advice received from UPSC was not to be sent to the charged officer when report of the Inquiry Officer was forwarded for his response and that as per the mandate of Rule 32 of the CCS (CCA) Pension, 1965 it would be sufficient compliance with law that the advice received from UPSC was sent along with a copy of the order levying penalty passed by the Competent Authority.

5. Probably for the reason the earlier decision in S.N.Narula's case (supra) was not published when T.V.Patel's case was decided on April 19, 2007 the attention of the Bench which decided T.V.Patel's case was not drawn to the decision in S.N.Narula's case.

6. Deciding Civil Appeal No.5341/2006 on March 16, 2011, an opinion reported as (2011) 4 SCC 589 UOI & Ors. Vs. S.K.Kapoor, noting the conflicting destinations reached by two co-ordinate Benches of the Supreme Court in S.N.Narula's case (supra) and T.V.Patel's case (supra) a two Judge

Bench of the Supreme Court observed that it being well-settled that if a subsequent Co-ordinate Bench of equal strength wants to differ with a view taken earlier on it has to refer the matter to a Larger Bench otherwise the prior decision of the Co-ordinate Bench has to be treated as binding on subsequent Bench of equal strength.

7. Only on aforesaid reasoning in S.K.Kapoor's case (supra), law declared in T.V.Patel's case was not followed.

8. In the three impugned decisions the Tribunal has applied the law declared in S.N.Narula's case.

9. Rule 32 of the CCS (CCA) Rules, 1965 which deals with supply of copy of advice received from UPSC reads as under:-

“32. Supply of copy of Commission's advice –

Whenever the Commission is consulted as provided in these Rules, a copy of the advice by the Commission and where such advice has not been accepted, also a brief statement of the reasons for such non-acceptance, shall be furnished to the government servant concerned along with a copy of the order passed in the case by the authority making the order.”

10. Dealing with the interplay of Rule 32, Article 320 of the Constitution of India, which refers to the advisory jurisdiction of UPSC, and the decision of the Constitution Bench of the Supreme Court in Manbodhan Lal Srivastava's case, in paragraphs 17 to 21 of its opinion in T.V.Patel's case the Supreme Court observed as under:-

“17. As already noticed, Rule 32 of the Rules deals with the supply of a copy of Commission's advice. Rule read as it is, is mandatory in character. The Rule contemplates that whenever a Commission is consulted, as provided under the Rules, a copy of the advice of the Commission and where such advice has not been accepted, also a brief statement of the reasons for such

non-acceptance shall be furnished to the Government servant along with a copy of the order passed in the case, by the authority making the order. Reading of the Rule would show that it contemplates two situations; if a copy of advice is tendered by the Commission, the same shall be furnished to the government servant along with a copy of the order passed in the case by the authority making the order. The second situation is that if a copy of the advice tendered by the Commission has not been accepted, a copy of which along with a brief statement of the reasons for such non-acceptance shall also be furnished to the government servant along with a copy of the order passed in the case, by the authority making the order. In our view, the language employed in Rule 32, namely, "along with a copy of the order passed in the case, by the authority making the order" would mean the final order passed by the authority imposing penalty on the delinquent government servant.

18. Article 320 of the Constitution deals with the functions of Public Service Commission and provides that it shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

19. Article 320(3)(c) reads:

“(c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

20. A Constitution Bench of this Court in the case of State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912 considered the question as to whether the consultation of the Commission under Article 320(3)(c) is mandatory and binding on the appropriate authority.

21. The arguments that the non-compliance of Article 320(3)(c) vitiates the order passed by the appropriate authority have been repelled by the Court at **SCR. pp 543-544**: (AIR pp.916-17, paras 7-9)

“7. ...Perhaps, because of the use of word ‘shall’ in several parts of Article 320, the High Court was led to assume that the provisions of Article 320(3)(c) were mandatory, but in our opinion, there are several cogent reasons for holding to the contrary. In the first place, the proviso to Article 320, itself, contemplates that the President or the Governor, as the case may be,

‘may make regulations specifying the matters in which either generally, or in any particular class of case or in particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.’

The words quoted above give a clear indication of the intention of the Constitution makers that they did envisage certain cases or classes of cases in which the Commission need not be consulted. If the provisions of Article 320 were of a mandatory character, the Constitution would not have left it to the discretion of the Head of the Executive Government to undo those provisions by making regulations to the contrary. If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted. Once, relevant regulations have been made, they are meant to be

followed in letter and in spirit and it goes without saying that consultation with the Commission on all disciplinary matters affecting a public servant has been specifically provided for, in order, first, to give an assurance to the Services that a wholly independent body, not directly concerned with the making of orders adversely affecting public servants, has considered the action proposed to be taken against a particular public servant, with an open mind; and, secondly, to afford the Government unbiased advice and opinion on matters vitally affecting the morale of public services. It is, therefore, incumbent upon the Executive Government when it proposes to take any disciplinary action against a public servant, to consult the Commission as to whether the action proposed to be taken was justified and was not in excess of the requirements of the situation.

8. *Secondly, it is clear that the requirement of the consultation with the Commission does not extend to making the advice of the Commission on those matters, binding on the Government. Of course, the Government, when it consults the Commission on matters like these, does it, not by way of a mere formality, but, with a view to getting proper assistance in assessing the guilt or otherwise of the person proceeded against and of the suitability and adequacy of the penalty proposed to be imposed. If the opinion of the Commission were binding on the Government, it may have been argued with greater force that non-compliance with the rule for consultation would have been fatal to the validity of the order proposed to be passed against a public servant. In the absence of such a binding character, it is difficult to see how non-compliance with the provisions of Article 320(3)(c) could have the effect of nullifying the final order passed by the Government.*

9. *Thirdly, Article 320 or the other articles in Chapter II of Part XIV of the Constitution deal with the*

constitution of the Commission and appointment and removal of the Chairman or other members of the Commission and their terms of service as also their duties and functions. Chapter II deals with the relation between Government and the Commission but not between the Commission and a public servant. Chapter II containing Article 320, does not, in terms, confer any rights or privileges on an individual public servant nor any constitutional guarantee of the nature contained in Chapter I of that Part particularly Article 311. Article 311, therefore, is not, in any way, controlled by the provisions of Chapter II of Part XIV, with particular reference to Article 320.”

Finally, at page SCR p.547 it was held as under: (AIR p.918, para 12)

“12. We have already indicated that Article 320(3)(c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation, should not afford him a cause of action in a court of law, or entitle him to relief under the special powers of a High Court under Article 226 of the Constitution or of this Court under Article 32. It is not a right which could be recognized and enforced by a writ. On the other hand, Article 311 of the Constitution has been construed as conferring a right on a civil servant of the Union or a State, which he can enforce in a court of law. Hence, if the provisions of Article 311, have been complied with in this case - and it has not been contended at any stage that they had not been complied with - he has no remedy against any irregularity that the State Government may have committed.

Unless, it can be held, and we are not prepared to hold, that Article 320(3)(c) is in the nature of a rider or proviso to Article 311, it is not possible to construe

Article 320(3)(c) in the sense of affording a cause of action to a public servant against whom some action has been taken by his employer.”

11. Elaborate reasons have been given by the Bench with reference to the view taken by a Constitution Bench decision, and we highlight, after noting Rule 32 of the CCS (CCA) Rules, 1965. The decision in S.N.Narula’s case and S.K.Kapoor’s case do not note either Article 320 of the Constitution of India nor do they note Rule 32 of the CCS (CCA) Rules, 1965 nor do they note the Constitution Bench decision.

12. What is the law of stare decisis and precedent?

13. Faced with the difficult task of choosing between two decisions of equal authority which were directly in conflict with each other, way back in the year 1877 the learned Jessel M.R. (Master of the Rolls), in the decision reported as (1877) 5 Ch.D. 183 Hampton Vs. Hallman observed:-

*“Now I take it that both the cases to which I have referred are not to be reconciled with **(1828) 38 ER 822 Hayes Vs. Hayes** at all events, they differ from it so far as to leave me at liberty now to say that Hayes Vs. Hayes is not sound law; indeed it appears that Sir John Leach himself was dissatisfied with his decision.”*

14. Kay J., faced with two decision of equal weight which could not be reconciled, in the opinion reported as (1883) 24 Ch. D. 633 Miles Vs. Jarvis observed:-

*“The question is which of these two decisions I should follow, and, it seems to me that I ought to follow that of the Master of the Rolls as being the **better** in point of law.”*

15. In the decision reported as (1944) KV 718 Young Vs. Bristol Aeroplane Co.Ltd. two contradictory opinions cited as precedents were

resolved observing that the one which expresses the law better in point would be the precedent.

16. In the Indian context the consistent view taken is that the aforesaid legal principle is correct and faced with a situation where two Co-ordinate Benches of the same Court or the Supreme Court have taken inconsistent views the Court should apply the test of which decision is better in point of law. To wit: AIR 1980 Karnataka 92 Govindnaik G. Kalaghatigi Vs. West Patent Press Co. Ltd., AIR 1981 P&H 213 Indo Swiss Time Ltd. Vs. Umrao, AIR 1988 Bom. 9 The Special Land Acquisition Officer Vs. The Municipal Corporation of Greater Bombay and ILR (2009) Supp. Delhi 61 Smt. Gopa Manish Vora Vs. UOI.

17. Where the High Court adopted the approach: I don't know what to do because you cite before me two conflicting opinions of the Supreme Court. You are better advised to approach the Supreme Court! In the decision reported as AIR 2001 SC 3510 Indian Petro Chemicals Corporation Ltd. Vs. Shramik Seva the Supreme Court depreciated such an attitude/approach directing that it was expected of the High Court to decide the matters on merits according to its own interpretation of the two conflicting judgments of the Supreme Court. Indeed, the opinion of the Supreme Court echoed the views of Lord Denning J. in the opinion reported as (1949) 2 All. ER. 155 Seaford Court Estates Ltd. Vs. Asher that when a Judge comes up against such a truck, he is not to fold his hands and it is his duty to iron out the creases.

18. It may not be the province of a High Court to comment on the judgment of the Supreme Court which are entitled to respect and in the interest of justice it would be the duty of the High Court to respectfully

follow a law declared by the Supreme Court. But faced with conflicting judgments the correct approach by a High Court would be to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgments.

19. Now, the constitutional vision pertaining to the role of UPSC is to confer upon it an advisory jurisdiction pertaining to disciplinary matters, which is evidenced from the use of the expression ‘*may*’ in sub-Article 3 of Article 320 of the Constitution of India. Opinions by UPSC on disciplinary matters are not binding on the Disciplinary Authority which has to apply its own independent mind as was explained in *T.V.Patel*’s case (supra). Now, logic and commonsense guides us that where an opinion has to be sought after Inquiry Officer records evidence and pens a report it would better serve the purpose of the person likely to be affected by such an opinion i.e. the charged officer, if before seeking the opinion his version is obtained and placed before the opinion maker. This would also be a better compliance with the principles of natural justice. That natural justice demands that it be made known to a person whose interest is in issue as to what is the material which would be used by the decision maker would not be attracted in a situation of the kind i.e. the decision maker who is seized with the report of an Inquiry Officer seeks advice of UPSC and the said advice sought is on the report of the Inquiry Officer without the response of the charged officer thereon.

20. This would be our additional reason to go by the law declared by the Supreme Court in *T.V.Patel*’s case which we find is a reasoned opinion.

21. Turning to the second point urged in W.P.(C) No.6156/2012, suffice would it be to note that where a Disciplinary Authority agrees with the

report of the Inquiry Officer elaborate reasons have not to be given and as long as the order self evidences that the Disciplinary Authority has applied its mind there would be compliance with law. After all, an Inquiry Officer is appointed to record evidence and place a report after considering all the pros and cons for the benefit of the Disciplinary Authority. No law enjoins that the Disciplinary Authority should re-pen a further opinion.

22. The three writ petitions are allowed. Impugned order dated January 30, 2012 challenged in W.P.(C) No.4539/2012 is set aside. Impugned order dated April 27, 2012 challenged in W.P.(C) No.6156/2012 is set aside. Impugned order dated November 24, 2011 challenged in W.P.(C) No.6157/2012 is set aside.

23. Since we find that in the Original Applications filed by the respective respondents they have urged other contentions as well we restore OA No.2559/2011, OA No.581/2011 and OA No.4140/2010 for adjudication on other contentions urged.

24. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(V. KAMESWAR RAO)
JUDGE

JULY 15, 2013
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