

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

Judgment reserved on July 28, 2015

Judgment delivered on August 31, 2015

+ **W.P.(C) 11487/2009**

G.L. SAGAR

..... Petitioner

Through: Mr.S.D.Singh, Adv. with
Mr.Rahul Kumar Singh,
Mr.Vijay Pratap Singh, Advs.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Ms.Shobha, Adv. with
Ms.Akanksha Kaushik, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. The challenge in this writ petition is to the enquiry report dated June 06, 2008; order dated September 09, 2008, whereby the petitioner was imposed the penalty of dismissal and to the order dated February 20, 2009, whereby the appellate authority rejected the appeal of the petitioner.

2. Mr.S.D. Singh, learned counsel appearing for the petitioner has challenged the impugned orders on seven grounds. According to him, there is a violation of Rule 25(15) of the Educational Consultant India Limited (Conduct, Discipline and Appeal), Rules, 2003 (in short “Rules of 2003”) which mandates questioning the Charged Officer on the circumstances appearing against him in the evidence if he has not examined himself. According to learned counsel for the petitioner, the

petitioner has examined PW1 to PW5 and DW1 & DW2, where the evidence has come against him, should have been put to him. Therefore the mandatory procedure was required to be followed. On violation, the enquiry stands vitiated and the same needs to be set aside. He relied upon judgment reported as **2007 (1) SCC 437 Mathura Prasad vs. Union of India** and **2010 (2) SCC 497 G. Vallikumari vs. Andhra Education Society**.

3. The second challenge is on the ground that the appeal filed by the petitioner on October 07, 2008 was not decided by the appellate authority as per Rule 32 of the Rules of 2003. It is his submission that the appeal has not been heard by the Board of Directors nor even opportunity of personal hearing has been given. An order was communicated, which was signed by the Presenting Officer, who had no jurisdiction to pass such an order, which is in violation of principles of natural justice and serious prejudice has been caused to the petitioner and the impugned order dated February 20, 2009 needs to be set aside on this ground also. He would rely upon the judgments reported as **1986 (3) SCC 103 Ram Chandar vs. Union of India & Ors.**, **2010 (11) SCC 278 Indu Bhushan Dwivedi vs. State of Jharkhand & Ors.**, and **2010 (9) SCC 496 Kranti Associates Pvt. Ltd. vs. Masood Ahmed Khan & Ors.**

4. He would also challenge the impugned orders on the ground that

reasonable opportunity was denied to him inasmuch as the procedure as prescribed under Rules of 2003 has not been followed by the Enquiry Officer, Appellate Authority by not granting an opportunity of personal hearing; opportunity to examine witnesses; no opportunity to explain the case by making oral submissions and non-supply of documents. He would qualify the said submissions by stating that the relevant documents which have been relied upon by the Enquiry Officer in terms of order sheet dated August 20, 2007 other than the documents at serial Nos.3,5,11,13 & 14 of the list of additional documents sought by him have not been given. He states, no opportunity to cross examine witness-Mr.A.K. Srivastava was given. Even for examining the witnesses, a very short time was given, as first witness was examined on January 24, 2008 and second witness was examined on February 05, 2008 and on which date the evidence was closed. That apart, it is his submission that there were five major penalties prescribed under Rule 23(f) to (j) of Rules of 2003 and the imposition of penalty as prescribed under Rule 23(i) and (j) of the Rules of 2003 i.e. removal and dismissal from service could be imposed only in case of charges of possession of assets disproportionate to the known sources of income or the charge of acceptance from any person of any gratification, other than legal remuneration. It is his submission, that the second proviso to the Rule 23(j) would make it clear

that in case of illegal gratification and to possess the disproportionate assets the penalty lesser than removal from service and dismissal from service can be imposed. Therefore, according to him, the imposition of extreme penalty of dismissal against the petitioner is contrary to the Rules and is unjustified.

5. One of the grounds of challenge as canvassed during the submissions was mala-fide of CMD and Director as they were bearing grudge against the petitioner. He would rely upon the past conduct and the action against the petitioner before January 12, 2007. He also relied upon the documents available on record, during submissions. He had also relied upon the order of this Court dated April 27, 2004 with regard to an earlier petition filed by the petitioner wherein the Court had held that the respondent had malice against the petitioner. That apart he would state that on certain charges more specifically Article IV with regard to domestic training which has not been established by the Enquiry Officer has been disagreed by the disciplinary authority. Similarly with regard to Article VII which stipulated that the petitioner absented himself from duty on December 11, 2006 in an unauthorized manner was not proved by the Enquiry Officer, but was disagreed by the Disciplinary Authority, who held that the Charged Officer was absent on December 11, 2006. Similarly, Article IX which was not established by

the Enquiry Officer was disagreed by the disciplinary authority but no note of disagreement was given to the petitioner before imposing the penalty. He would state had the Disciplinary Authority given the note of disagreement he could have justified the conclusion of the Enquiry Officer on those articles of charge which had a bearing on the ultimate penalty imposed on the petitioner.

6. On the other hand, learned counsel appearing for the respondents would justify the impugned orders. It is her case that the scope of judicial review in cases of this nature where an employee has challenged his dismissal pursuant to charge-sheet issued to him for certain omissions and commissions is of very limited nature inasmuch as the Court would not interfere and re-appreciate the evidence to reach its own conclusion. That apart, according to her it is not a case of a perverse finding. Proper opportunity was given by the Enquiry Officer to the petitioner to defend himself in the enquiry. She would rely upon the judgments of Supreme Court in the case reported as **1996 (7) SCC 509 State of Tamil Nadu & Anr. vs. S. Subramaniam, 2003 (3) SCC 583 Lalit Popli vs. Canara Bank & Ors., 2004 (12) SCC 579 Principal Secretary, Government of Andhra Pradesh and Ors. vs. M. Adinarayana, 2008 (9) SCC 161 Bachan Singh vs. Union of India & Ors., 2009 (8) SCC 310 State of Uttar Pradesh & Anr. vs. Manmohan**

Nath Sinha, 2009 (15) SCC 620 Chairman cum Managing Director, Coal India Ltd. & Anr. vs. Mukul Kumar Chaudhary & Anr. and 2011 (10) SCC 249 SBI vs. Ram Lal Bhaskar & Anr.

7. On the first submission of Mr.Singh, it is the submission of Ms.Shobha that no such grievance was ever raised by the petitioner during the enquiry or till the passing of the order by the disciplinary authority. According to her, the ground of violation of Rule 25(15) of the Rules of 2003 was made in the appeal. In this regard she would state that the deposition of PW6 was recorded on December 02, 2007, when the management case was also closed by the Presenting Officer. The petitioner was asked to bring a written brief statement of defence and list of defence witnesses on December 16, 2007. On two occasions the date of hearing was re-scheduled and was listed on January 13, 2008 when the petitioner submitted written defence statement, which was taken on record by the Enquiry Officer. Examination in Chief of DW1 was completed. The hearing was fixed for January 24, 2008 for the cross examination of DW1 and deposition of other defence witnesses. On January 24, 2008, cross examination of DW1 was recorded and the next date of hearing was fixed as February 05, 2008 for the other two defence witnesses. On February 05, 2008 the deposition of DW2 was recorded, on which date the petitioner desired to examine one Mr.A.K. Srivastava,

ex-employee of Ed.CIL as his third defence witness instead of Dr. R.K. Suri. The Enquiry Officer was of the view that the deposition of Mr.Srivastava could be of repetitive in nature, and therefore declined the permission. The case from the petitioner side was closed. The Presenting Officer was directed to give written brief by February 20, 2008 and the petitioner was directed to give his written brief by March 07, 2008. The petitioner made a request for copy of written brief submitted by the Presenting Officer in his letter dated March 18, 2008. In the said letter no grievance was raised regarding non-compliance of Rule 25(15) of the Rules of 2003 or that he should be questioned by the Enquiry Officer. The petitioner submitted his written brief on April 17, 2008, wherein he has not raised any grievance regarding non-compliance of Rule 25(15) of the Rules of 2003 or that he should have been questioned by the Enquiry Officer. On July 06, 2008 the Enquiry Officer submitted his report. The petitioner submitted his representation on the report submitted by the Enquiry Officer vide his letter dated July 18, 2008. No grievance was raised in the representation regarding non-compliance of Rule 25(15) of the Rules of 2003 or that he should have been questioned by the Enquiry Officer. On September 09, 2008, the disciplinary authority imposed the penalty of dismissal on the petitioner from the services of Ed.CIL. On October 07, 2008 the petitioner preferred an appeal under the Rules of

2003. It was for the first time in the appeal that the petitioner had taken the ground of non-compliance of Rule 25(15) of the Rules of 2003 which is nothing but a deliberate and incorrect case set up by the CO contrary to the proceedings dated December 02, 2007 and January 13, 2008.

8. It is her submission that the aforesaid facts would reveal that the plea as taken in the appeal and now taken in the petition is just an afterthought to improve upon his case. She states, no prejudice has been caused to the petitioner inasmuch as the petitioner was given copy of the enquiry report, wherein all the material which was against the petitioner including in the deposition of PWs as well as DWs were put to the petitioner for his response and the petitioner had infact responded to it and the enquiry cannot be vitiated on this ground. She would rely upon the judgments of the Supreme Court reported as **2008 (9) SCC 31 Haryana Financial Corporation & Anr. vs. Kailash Chandra Ahuja, 2001 (6) SCC 392 State of Uttar Pradesh vs. Harendra Arora & Anr., and 1980 (3) SCC 304 Sunil Kumar Banerjee vs. State of West Bengal & Ors.** to contend, prejudice not only to be pleaded but has to be proved which according to her in the facts the petitioner has not been able to prove.

9. Insofar as the denial of reasonable opportunity is concerned, the learned counsel for the respondents in her submission would justify that

the proceedings were held in accordance with the Rules and Principles of Natural Justice. She has taken me through some of the factual aspects which according to her, would demonstrate that proper opportunity was given to the petitioner. Similarly, the learned counsel for the respondents has justified the penalty of dismissal imposed on the petitioner. She states that even the allegations of malice are not sustainable, more particularly, in view of the fact that the petitioner has not even impleaded authority concerned to substantiate the allegations. That apart, insofar as the submission of Mr.Singh that the disciplinary authority has disagreed with the findings of the Enquiry Officer and without issuing a note of disagreement has passed the order of penalty is concerned, she would state that in the order the Disciplinary Authority, CMD has spelt out the reasons for accepting the findings of the Enquiry Officer on the charges proved against the petitioner and also on the charges not established, after considering the evidence on record. It is her case, even if note of disagreement has not been given/tendered, the petitioner had exercised the right of appeal against the order of the Disciplinary Authority and as such no prejudice has been caused to the petitioner and the impugned action cannot be faulted. It has been her endeavor to contend that there is sufficient material on record for the authorities to prove the charges against the petitioner. That apart, she

would state that no hearing is necessary by the Appellate Authority, as such a stipulation is not there in the rules. She would rely upon the following judgments of the Supreme Court in support of her contention:

(i) (1993) 4 SCC 727 M.D, ECIL & Ors v. B. Karunakar and Ors.

(ii) (2005) 1 SCC 13 Ganesh Santaram Sirur vs. SBI and Another.

(iii) (2011) 8 SCC 695 Oriental Bank of Commerce and Another vs. R.K. Uppal.

10. In the last, it is her case that the charges framed against the petitioner, demonstrates that the petitioner has not maintained the discipline at the work place. The acts of the petitioner were pre-judicial to the interest of the employer i.e Ed.CIL. The charges framed, which stands proved are serious enough to justify the penalty of the dismissal and this Court would not interfere with the quantum of the penalty/punishment unless the punishment imposed is shockingly disproportionate which is not in the case relying upon the judgment of the Supreme Court reported as ***(2013) 10 SCC 106 Deputy Commissioner, Kendriya Vidyalaya Sangathan Vs. J. Hussain; (2008) 7 SCC 580 State of Meghalaya vs. Mecken Singh. N. Marak.***

11. Having heard the learned counsel for the parties, I note that even though the learned counsel for the petitioner has raised several grounds to challenge the impugned orders and at the same time learned counsel

along with a group of other employees, which tantamount to illegal strike, prevented other employees from attending the office.	In totality of the evidence, while the CO should have attended office on 11.12.2006 and <u>his declaration that management had resorted to illegal lockout is incorrect.</u> (Proved) Charge <u>PARTLY</u> established.	absentation on 11.12.2006 was illegal. On being asked for reason of absence individually, joint reply was given which is subversion of authority. IA took it as normal absence and could not realize the gravity of misconduct and as such I DISAGREE with the conclusion in regard to absence of CO on 11.12.2006. Reliance was placed on testimony of PW1 where she said that she was prevented from entering the office. Exh. P-11, letter initiated and signed by CO says that <u>"employees are standing outside the office as symbolic mass protest."</u> As per record of the evidence, it has also been proved beyond doubt that his instigation of the employees on 8.12.2006 and 11.12.2006 vitiated the atmosphere of the office. (PARTLY DISAGREED) CHARGE PROVED.
<u>ARTICLE IX</u> Made false and baseless allegations against the Ed. Cil Management for resorting to illegal lockout	There was no lockout. Same reasoning as given under Article VII that <u>his declaration that management had resorted to illegal lockout is incorrect.</u> (proved, but benefit given). Charge not established.	IA observed that there was no lock out. Giving false facts to the Highest authorities of Ed. CIL's management i.e. Board of Directors and even to Chief Labour Commissioner, is a serious misconduct. The accusation by an officer of the rank of General Manager, third in line of hierarchy from CMD, Ed. CIL that there was a lockout in Ed. CIL by management on 8.12.2006 is inexcusable misconduct.

		In addition, his address to press and electronic media was a direct assault on the reputation of the organization. (DISAGREED) CHARGE PROVED.
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12. From the perusal of the findings of the Enquiry Officer and the order of the disciplinary authority, the disciplinary authority, against a particular component of Article IV has held that the conclusion of the Enquiry Officer is not correct. Insofar as Article VII is concerned, Enquiry Officer who had partially proved the charge, the disciplinary authority, disagreed with the Enquiry Officer and has held that the charge stands proved. Similarly, Article IX, which was not established by the Enquiry Officer, was disagreed by the disciplinary authority by holding that the same stands proved.

13. I note that the Charged Officer in his representation to the enquiry report vide his letter dated July 18, 2008 under the heading “Additional General Comments in relation to charges” in para No.(iv) has stated as under:-

“(iv) Even the Hon’ble I.A. after the completion the inquiry against C.O. has not found any worthwhile circumstances appearing against me in the evidence produced during the inquiry which may go in favour of establishing the charges framed.”

14. That apart, the Charged Officer in his appeal dated October 07, 2008 under Rule 32 of the Rules of 2003 addressed to the appellate authority in para No.4(v) has taken the following ground:-

“4(v) Because, the perusal of order dated 09-09-2008 imposing major penalty shows that Disciplinary Authority has differed with the findings of IA without following the first option of remitting the inquiry report back to IO fearing that IO may not oblige her and have imposed the penalty in haste without complying with inquiry procedure and without applying her mind on all issues arisen/come out in the inquiry report. Moreover, as laid down in the Rule 26(2) of Ed.CIL (conduct, discipline and appeal) Rule, 2003 the points of difference of Disciplinary Authority with the findings of IA were not communicated to the appellant alongwith the inquiry report, for making my submissions before taking the decision for imposing penalty and thus the whole action of the Disciplinary Authority is illegal, discriminatory/one sided against all the norms and justice which deserve to be set-aside.”

15. The Appellate Authority except stating that the petitioner has raised 10 grounds has not dealt with the aforesaid ground. Further, Rule 26(2) of the Rules of 2003 stipulate as under:-

“26(2) The disciplinary authority shall, if it disagrees with the findings of the Inquiring Authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.”

16. The petitioner has in the writ petition pleaded ground (u) that the Disciplinary Authority without any justification by overlooking the facts and even contrary to the enquiry report, without affording any

opportunity to the petitioner to explain the same arrived at a conclusion that the charges levelled against the petitioner warranted the imposition of most severe and harsh punishment i.e. dismissal from the service.

17. It is not denied that the disciplinary authority has not given the note of disagreement on the findings on which it disagreed with the Enquiry Officer. It is a settled position of law in terms of the judgment of the Supreme Court in the case of *Punjab National Bank vs. Kunj Behari Misra (1998) 7 SCC 84*, wherein the Supreme Court was dealing with a case where against two employees disciplinary proceedings were initiated. Against Kunj Behari Misra, 6 charges were framed and against Shanti Prasad Goel 7 charges were framed. The Enquiry Officer in his report in the case of Kunj Behari Misra found him guilty of one charge but exonerated him of the charges 2 to 6 while in the case of Shanti Prasad Goel the Enquiry Officer had not found him guilty of any charge and exonerated him. The Disciplinary Authority did not agree in the case of Kunj Behari Misra with the findings of the Enquiry Officer in respect of charges 2 to 6, passed an order holding that Misra was responsible for the shortage in question and held that the minor penalty of proportionate recovery ought to be imposed on Misra for the loss of Rs.1 lakh cash to the bank. Similarly, the Disciplinary Authority did not agree with the Enquiry Officer's report in the case of Shanti Prasad Goel and ordered

the recovery of Rs.1 lakh loss to the bank. In the aforesaid background, the Supreme Court in para No.19 has held as under:-

“19.The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority, which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

18. The aforesaid position has been reiterated by the Supreme Court in the case of ***Yoginath D. Bagde vs. State of Maharashtra (1999) 7 SCC 739***, wherein the Supreme Court has held as under:-

"a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry

Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution."

19. Even this Court in the case of ***K.C. Sharma vs. BSES Yamuna***

Power Ltd. LPA No.646/2013, decided on March 18, 2015 , this Court

has in para Nos.15 to 18 has held as under:-

“15. In the decisions reported as (1998) 7 SCC 84 Punjab National Bank & Ors. Vs. Kunj Bihari Misra and (1999) 7 SCC 739 Yoginath D. Bagde Vs. State of Maharashtra & Anr., the Supreme Court held that a facet of the principles of natural justice was that if the Disciplinary Authority disagreed with the findings returned by an Enquiry Officer it should record tentative reasons for the disagreement, leaving scope for an open mind to consider the response of the charged officer, give the tentative reasons for the disagreement to the charged officer and invite his response and then dealing with the response pass a reasoned order.

16. The jurisprudence behind said principle of law is that unless a person is given an opportunity to respond to a tentative reason to disagree, the person affected loses a valuable right of being heard before a decision adverse to his interest is taken and that the final decision must contain the reasons because it is these reasons which would determine the appellate remedy of the person whose interest is adversely affected by the decision.

17. In Yoginath D. Bagde's case (supra), the Supreme Court held :

"a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before

reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution."

18. An argument was advanced in Yoginath Bagde's case before the Supreme Court that a post-decisional hearing may be granted. The Supreme Court negative the plea holding that the same would not be adequate because the Disciplinary Authority had already closed its mind by taking a determinative view."

20. In view of the aforesaid discussion, the orders of the Disciplinary Authority dated September 09, 2008 and the Appellate Authority dated

February 20, 2009 needs to be set aside only on one ground noted above. The matter is remanded back to the Disciplinary Authority to give a tentative note of disagreement with regard to those charges which have not been substantiated by the Enquiry Officer but disagreed by him (Disciplinary Authority) and calling for a representation from the petitioner and by considering the same pass a fresh order. The petitioner shall be entitled to reinstatement with 50% back wages with effect from September 09, 2008 till the date of his reinstatement.

21. As the writ petition is allowed on the sole ground that the Disciplinary Authority has not given the note of disagreement, this Court is of the view, it may not be necessary for this Court to refer and consider all the judgments relied upon by learned counsel for the respondents.

22. The petition is allowed in terms of the above. No costs.

(V.KAMESWAR RAO)
JUDGE

AUGUST 31, 2015

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