

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 93 OF 2017

Shri Aashit Patil

..... Petitioner

V e r s u s

Commissioner Central Excise
and Service Tax & 2 Ors.

..... Respondents

Mr. G. Sardesai and Mr. Avalon Alton Carvalho, Advocates for the Petitioner.

Mr. C. A. Ferreira, Advocate for the Respondents.

**Coram : DR.MANJULA CHELLUR, C.J. &
F. M. REIS, J.**

Date : 27th January, 2017.

ORAL ORDER

Heard.

The Petitioner is before us in a second round of litigation mainly complaining the non-disclosure of the notings or the office note upon which the CVC second advice was sent to him. According to him, this is nothing but violation of principles of natural justice as held in the case of ***State Bank of India & Ors. vs. D. C. Aggarwal & anr.*** reported in ***(1993) 1 SCC 13*** at paras 4 and 5.

2. It is not in dispute that a Departmental Inquiry was initiated against the Petitioner herein which ended by a report of Inquiring Authority in terms of 4.6.1 of the Vigilance Manual published by Central Vigilance

Commission. The stage for issuance of second advice was completed when the Petitioner was intimated with the Inquiry Report and the second stage of CVC advice.

3. According to the Respondents, in the earlier round of litigation also he complained non-furnishing of documents when he approached this Court and this Court directed the Respondent-Authorities to comply with the procedure contemplated. No laches on the part of the Respondent's/Authorities in the earlier round of litigation is seen from records since it is ascertainable from copy of the Order furnished along with the papers.

4. At this stage, the point that arises for our consideration is whether there are any procedural lapses or violation of principles of natural justice. According to the Petitioner, the background/material/office note which became the basis for second stage of CVC advice has to be furnished and if it is not furnished, therefore it amounts to withholding of material information thereby amounts to violation of principles of natural justice.

5. Learned Counsel appearing for the Respondents-Authorities distinguishing the principles laid down in the case ***D. C. Aggarwal & anr.*** (supra) with reference to the facts under which the said decision was rendered, relies upon the decisions reported in ***(2011) 2 SCC 316*** in the case

of **State Bank of India & Ors vs. Bidyut Kumar Mitra & Ors.** and also **2016 SCC Online Bom 10022** in the case of **Gopal Vajani vs. State Bank of India.** According to the Respondents and also as noticed from papers, apparently the second stage of CVC advice is communicated to the Petitioner.

6. In the case of **D. C. Aggarwal & anr.** (supra), such recommendation of CVC second advice was not at all communicated and in those circumstances, Their Lordships, opined in terms of paragraphs 4 and 5 which reads as under:-

5. Although correctness of the order passed by the High Court was assailed from various aspects, including the power of the High Court to interfere on quantum of punishment, in writ jurisdiction, but we propose to confine only to the question of effect of non-supply of CVC recommendations as if the order was invalid and void on this score only it is not necessary to decide any other issue. Law on natural justice is so well settled for series of decisions of this Court that it leaves one bewildered, at times, that such bodies like State Bank of India, who are assisted by hierarchy of law officers, commit such basic and fundamental procedural errors that courts are left with no option except to set aside such orders. Imposition of punishment to an employee, on material which is not only not supplied but not disclosed to him, has not been countenanced by this Court. Procedural fairness is as much essence of right and liberty as the substantive law itself.

6. Reliance was placed on Sub-rule 5 of Rule 50 which reads as under:

(5) Orders made by the Disciplinary Authority or the Appointing Authority as the case may be under Sub-rules (3) and (4) shall be communicated to the employee concerned, who

shall also be supplied with a copy of the report of inquiry, if any.

It was urged that copy of the inquiry report having been supplied to the respondent the rule was complied with and the High Court committed an error in coming to conclusion that principle of natural justice was violated. Learned Additional Solicitor General urged that the principle of natural justice having been incorporated and the same having been observed the Court was not justified in misinterpreting the rule. The learned Counsel urged that the Bank was very fair to the respondent and the Disciplinary Authority after application of mind and careful analysis of the material on record on its own evaluation, uninfluenced by the CVC recommendation passed the order. It was emphasised that if the exercise would have been mechanical the Disciplinary Authority would not have disagreed with CVC recommendations on punishment. Learned Counsel submitted that, in any case, the Disciplinary Authority having passed detailed order discussing every material on record and the respondent having filed appeal there was no prejudice caused to him. None of these submissions are of any help. The order is vitiated not because of mechanical exercise of power or for non-supply of the inquiry report but for relying and acting on material which was not only irrelevant but could not have been looked into. Purpose of supplying document is to contest its veracity or give explanation. Effect of non-supply of the report of Inquiry Officer before imposition of punishment need not be gone into nor it is necessary to consider validity of Rule 5. But non-supply of CVC recommendation which was prepared behind the back of respondent without his participation, and one does not know on what material which was not only sent to the Disciplinary Authority but was examined and relied, was certainly violative of procedural safeguard and contrary to fair and just inquiry. From letter produced by the respondent, the authenticity of which has been verified by the learned Additional Solicitor General, it appears the Bank turned down the request of the respondent for a copy of CVC recommendation as, 'The correspondence with the Central Vigilance Commission is a privileged communication and cannot be forwarded as the order passed by the Appointing Authority deals with the recommendation to the CVC which is considered sufficient'. Taking action against an employee on confidential document which is the foundation of order exhibits

complete misapprehension about the procedure that is required to be followed by the Disciplinary Authority. May be that the Disciplinary Authority has recorded its own findings and it may be coincidental that the reasoning and basis of returning the finding of guilt are same as in the CVC report but it being a material obtained behind back of the respondent without his knowledge or supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order. No supply of the Vigilance report was one of the ground taken in appeal. But that was so because the respondent prior to service of the order passed by the Disciplinary Authority did not have any occasion to know that CVC had submitted some report against him. The submission of the learned Addl. Solicitor General that CVC recommendations are confidential copy, of which, could not be supplied cannot be accepted. Recommendations of Vigilance prior to initiation of proceedings are different that CVC recommendation which was the basis of the order passed by the Disciplinary Authority.

7 In the latter decisions of ***State Bank of India & Ors vs. Bidyut Kumar Mitra & Ors.*** (supra) as indicated at para 35, we notice that Their Lordships after referring to ***D. C. Aggarwal & anr.***(supra) were of the opinion that in the absence of CVC advice becoming the basis for final opinion of the Disciplinary Authority, non-communication of the same is not fatal.

7. So far as Nagpur Bench decision, the relevant paragraphs are paras 15, 16 and 25 to 28 which read as under :

“15. It is the submission of learned Senior Counsel that the impugned order must go, since second stage advice of the Central Vigilance Commission [hereinafter referred to as “CVC”, for short] was not forwarded to the petitioner along with the Show-cause-Notice given by the Disciplinary

Authority for the proposed penalty. He submitted that the said was forwarded to the petitioner along with the order of punishment dated 16th January, 2004. On this count, it is his submission that at least from the stage of issuance of the show cause to the proposed punishment, the action of the Bank is vitiated. Thus, according to him, matter needs to be remanded to furnish his submission to the Disciplinary Authority in the light of second stage advice of CVC.

16. He invited our attention in that behalf to a communication dated 28th September, 2000, issued to all Chief Vigilance Officers of Ministries/Departments of Govt. of India/Nationalized Banks/Public Sector Undertakings/Autonomous Bodies/Societies etc. This communication is from the Officer on Special Duty of CVC. The learned Senior Counsel read out the said communication. He submitted that from the said, it is clear that the CVC, at present, is being consulted at two stages in disciplinary proceedings, i.e., first stage is an advice is obtained on the investigation report before issuance of the chargesheet and second stage advice is obtained either on receipt of reply to the charge-sheet or on receipt of enquiry report. According to him, since second stage advice is not forwarded to the petitioner, it breaches principles of natural justice, as CVC recommendation was prepared behind the back of the petitioner and without his participation and, therefore, unless the petitioner's views are obtained, the entire action must fall. He relied on the decision of Hon'ble Apex Court in *State Bank of India & others Vs. D.C. Aggarwal & another* [(1993) 1 SCC 13].

25 In so far as first submission of the learned Senior Counsel for the petitioner is concerned, it rallies behind the

communication dated 28th September, 2000. To a pertinent question from the Court, the learned Senior Counsel fairly submitted that there is no whisper in respect of the second stage advice in the order of punishment imposed by the Disciplinary Authority.

26 Thus, it is crystal clear that the second stage advice of CVC was not considered by the Disciplinary Authority. Further, it is clear from the impugned order of punishment that neither the second stage advice of the CVC was a foundation, nor it weighed in the mind of the Disciplinary Authority before imposing the punishment. Further, though the petitioner in the petition has pleaded that non-issuance of CVC's recommendation resulted into violation of principles of natural justice, the petition is blissfully silent regarding the prejudice. In our view, since the Disciplinary Authority has not considered the second stage advice of the CVC, the question of prejudice is completely ruled out.

27 It would be beneficial to reproduce paragraph 35 from the judgment of the Apex Court in the case of State Bank of India & ors. Vs. Bidyut Kumar Mitra & others [cited supra], which reads thus:-

“35. In our opinion, the Division Bench has erroneously relied on the judgment in D.C. Aggarwal case . As rightly observed by the learned Single Judge, in that case this Court considered a situation where the disciplinary authority passed an elaborate order regarding findings against the charge-sheeted officer agreeing on each charge on which CVC had found against him. In these circumstances, this Court observed that : (SCC p. 16, para 5) “5.The order is vitiated not because of mechanical exercise of powers or for

non-supply of the inquiry report but for relying and acting on material which was not only irrelevant but could not have been looked into. Purpose of supplying document is to contest its veracity or give explanation. Effect of non-supply of the report of inquiry officer before imposition of punishment need not be gone into nor is it necessary to consider validity of sub-rule (5). But nonsupply of CVC's recommendation which was prepared behind the back of the respondent without his participation, and one does not know on what material which was not only sent to the disciplinary authority but was examined and relied on, was certainly violative of procedural safeguard and contrary to fair and just enquiry." These observations would not be applicable in the facts of the present case as the disciplinary authority did not take into consideration any recommendations of CVC,. The judgment was, therefore, rightly distinguished by the learned Single Judge."

28 Since it is abundantly clear that the recommendations of CVC were not taken into consideration by the authority concerned, in our view, the submission put forth by the learned Senior Counsel that the petition needs to be allowed on this short count is required to be rejected.

8. In the present case, so far as the second stage advice of CVC, the Petitioner apparently is given an opportunity to make representation or reply or explanation whatsoever. The Disciplinary Authority has not yet proceeded with the final decision. The Petitioner is before this Court challenging the procedure in not supplying the office note or notings for the second stage advice of CVC.

9. When a show cause notice is given, he has approached this Court. He is entitled to mention all these contentions while giving a reply to the show cause notice. There is no procedure which contemplates that even the notings or the office note for formation of opinion for second stage of advice of CVC has to be notified to the delinquent. In the absence of such procedure, whether Disciplinary Authority is relying on the second advice of CVC only is to be seen.

10. Under these circumstances, when a report or second advice of CVC is furnished to the Petitioner and he is also given an opportunity to answer the show cause notice, we are of the opinion that non-furnishing of the office note or the note for CVC second advice opinion will not amount to prejudice of any kind. The Disciplinary Authority can take note of such submission if made, in the reply.

11. In the light of above observations, we are of the opinion that the Petition deserves to be dismissed and accordingly dismissed.

(F. M. REIS, J.)

(CHIEF JUSTICE)

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