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

% *Date of Judgment: 15th March, 2017*

+ **W.P. (C) 5913/2002**

UNION OF INDIA & ORS Petitioners
Through : Mr. R.V. Sinha, Mr. R.N. Singh and
Mr. A.S. Singh, Advocates

versus

R.P. TIWARI Respondent
Through : Mr. L.R. Khatana, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Rule DB was issued in this matter on 01.10.2002.
2. While issuing notice in the application for stay, the operation of the impugned order was stayed and was made absolute till the disposal of the writ petition on 24.02.2003.
3. Challenge in this writ petition is to the orders dated 19.04.1999 in OA 1209/1987 and 19.04.2002 in RA 145/1999 passed by the Central Administrative Tribunal (in short the '*Tribunal*') whereby the OA filed by the applicant/respondent herein was allowed and the consequent review by the petitioners has been dismissed.
4. Aggrieved by the order dated 11.07.1986 passed by the disciplinary authority by which the respondent (since deceased, but referred to as '*respondent*' for the sake of convenience) was compulsorily retired from service and the subsequent order dated 24.01.1987 passed by the

appellate authority rejecting his appeal, the respondent had approached the Tribunal.

5. Brief background in this case is that a departmental action was initiated against the respondent on the ground that while functioning as a Heavy Vehicle Driver ('HVD') in the Delhi Milk Scheme ('DMS') and posted on milk distribution duty at Route No.52 (M), Van No.109 on 10.09.1984, the respondent intentionally got loaded three crates containing 60 filled milk bottles over and above the quantities mentioned in the route schedule in connivance with other officers on duty. The inquiry officer held the charges as proved, which was accepted by the disciplinary authority and a punishment of compulsory retirement was imposed on the respondent by an order dated 11.07.1986.
6. The Tribunal by the impugned order dated 19.04.1999 allowed the OA only on the ground that the respondent was appointed by the Chairman, DMS by an order dated 22.04.1961, but has been compulsorily retired by the impugned order of 11.07.1986 by the 'Deputy General Manager (Admn.)', who is subordinate to the appointing authority and thus, there has been a violation of Article 311(1) of the Constitution as well as Rule 12 (4) (a) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 ['CCS (CCA) Rules'].
7. The stand of the petitioners (respondents before the Tribunal) was that while the Chairman had appointed the respondent as a temporary employee way back in the year 1961, it was the substantive appointment of the respondent as 'Mate' that would be relevant and in

the present case his substantial appointment as Mate was made by an order dated 26.12.1964 by the Officer on Special Duty ('OSD'). As the Deputy General Manager (Admn.) was not subordinate to the OSD, there has been no violation of rules. Article 311(1) of the Constitution and Rule 12(4)(a) of CCS (CCA) Rules would be attracted only in the case of a substantive appointment. It was also contended before the Tribunal that by a Gazette Notification dated 07.07.1984 with regard to all posts in General Central Services Groups 'C', the Deputy General Manager (Admn.) has been designated as the appointing authority and also the disciplinary authority in regard to penalties listed under Rule 11 of CCS (CCA) Rules and hence, there has been no violation of Rule 12 CCS (CCA) Rules in the present case.

8. An identical argument has been raised before us by Mr. Sinha, counsel for the UOI, the petitioner herein. Mr. Sinha further submits that since the penalty order has been passed by an authority superior than the appointing authority, the penalty order could not have been faulted with.
9. Strong reliance is placed on the notification dated 07.07.1984 to show that the appointing authority in the case of the respondent was the Deputy General Manager (Admn.) and consequently, authority competent to impose penalty was also the Deputy General Manager (Admn.). The sum and substance of the argument of Mr. Sinha, learned counsel for the petitioners is that the respondent was appointed on 26.12.1964 on a substantial post under the signature of Officer on Special Duty (OSD) thus, the Deputy General Manager(Admn.)

would be the competent Disciplinary Authority. Mr. Sinha places reliance on the judgments in the cases of *State of Assam and Another v. Mahendra Kumar Das and Others*, (1970) 1 SCC 709 (paragraphs 13, 29-31); *Awadhesh Singh v. The Board of Revenue, U.P. and Others*, 1994 ALL. L.J. 726 (paragraphs 11 and 13); and *Dr. G. Valayya Pantulu v. Government of Andhra (now Andhra Pradesh)*, AIR 1956 AP 240 (paragraphs 28 and 30).

10. Alternatively, Mr. Sinha submits that when the Tribunal had reached a conclusion that the order was not passed by the competent authority, the Tribunal could not have modified the order, but should have remanded the matter back for fresh adjudication by the competent authority.
11. Mr. Khatana, learned counsel appearing for the respondent, submits that there is no infirmity in the orders passed by the Tribunal which would require interference by this Court under Article 226 of the Constitution. He submits that the respondent was admittedly appointed by the Chairman, DMS, thus, no person below the rank of the Chairman can be appointed as the disciplinary authority. Mr. Khatana has drawn the attention of this Court to the Office Order No.220 dated 22.04.1961 whereby the respondent was appointed to the post of Mate. The Office Order was signed by Shri L.C. Sikka, Chairman.
12. Learned counsel contends that once the respondent was appointed, nothing more remained to be done and confirmation of the respondent post his period of probation cannot be considered as a fresh appointment. Mr. Khatana contends that the subsequent Office Order

No.20 of 1964 dated 26.12.1964 by which the respondent was confirmed under the signature of Officer on Special Duty was an order by which he was confirmed has no relevance and it would have no bearing as far as the appointing authority is concerned which would remain the Chairman. Reliance is placed on the judgment in the case of *The High Court of Punjab and Haryana and Others. v. The State of Haryana and Others*, (1975) 1 SCC 843 (paragraph 49)

13. In response to the reliance placed by the petitioners upon the notification dated 07.07.1984, Mr.Khatana submits that the appointing authority shall remain the Chairman and the subsequent notification has no bearing upon the matter. To fortify his submission that subsequent notification declaring the appointing authority and disciplinary authority does not change the appointing authority, Mr. Khatana has placed reliance on the judgment in the case of *Krishna Kumar v. Divisional Assistant Electrical Engineer and Others*, (1979) 4 SCC 289 (paragraph 4-7). Controverting the same, Mr. Sinha submits that the law enunciated in the case of *Krishna Kumar (Supra)* is not applicable to the facts of the present case.
14. Mr. Khatana has also relied upon the judgment in the case of *Om Prakash Gupta Swadheen v. Union of India and Others*, (1976) 1 SCC 594 (paragraphs 3-6).
15. We have heard the learned counsel for the parties and considered their rival contentions.
16. The undisputed facts which emerge in this case are that by an Office Order No. 220 dated 22.04.1961 issued by the Chairman, the respondent was appointed to the post of Mate on a temporary post in

the Delhi Milk Scheme. The said order also stipulated that respondent was to remain on probation for a period of two years. The appointment of the respondent was confirmed along with 30 other persons by a communication bearing Office Order No.20 of 1964 dated 26.12.1964 by the Officer on Special Duty w.e.f. 01.12.1963.

17. Subsequently, while the respondent was in service, by an order dated 07.07.1984 issued under Rule 12 (2) (b) of CCS (CCA) Rules, 1965, it was directed that in respect of Group 'C' Service, the Deputy General Manager (Administration) was nominated as the appointing authority and also the disciplinary authority. It is also not in dispute that article of charge framed against the respondent was issued on 06.02.1985. The Deputy General Manager (Admin.) on 11.07.1986 after considering the report of the inquiry officer imposed a punishment of compulsory retirement on the respondent. Thereafter, the respondent approached the Tribunal which allowed the application on the ground that the copy of the inquiry report was not supplied, which led to the filing of an SLP by the Government. However, the matter was remanded to the Tribunal by the Supreme Court. The Tribunal by the impugned order dated 19.04.1999 allowed the OA only on the ground that the order of punishment was passed by a subordinate authority than the appointing authority.
18. The sum and substance of the argument of Mr. Sinha, learned counsel for the petitioners, is that the substantive appointment of the respondent was by an Office Order No.20 of 1964 dated 26.12.1964 by the orders of Officer on Special Duty and the Deputy General Manager(Administration) who has passed the order of punishment was

not subordinate to him. Thus, there has been neither any violation of the CCS (CCA) Rules nor Article 311 (1) of the Constitution of India. The second argument of Mr. Sinha is that on the date of institution of the inquiry, as per the rules, the disciplinary authority was the Deputy General Manager who finally passed the order of punishment.

19. Two issues arise for our consideration: first, whether the OSD can be said to be the appointing authority of the respondent herein; and second, whether the Deputy General Manager (Admin.) became the competent disciplinary authority by the notification dated 07.07.1984 *qua* the respondent.

20. We deem it appropriate to reproduce Article 311 (1) of the Constitution of India, which reads as under:

“311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed.”

(Emphasis Supplied)

21. A bare perusal of the article shows that Article 311 merely states that the authority passing the order of dismissal or removal should not be junior to the authority which actually appointed the officer.

22. Rule 12 (4) (b) of the CCS (CCA) Rules reads as under:

“12. Disciplinary Authorities

(4) Notwithstanding anything contained in this rule-

(a) except where the penalty specified in Clause (v) or Clause (vi) of Rule 11 is imposed by the Comptroller and Auditor-General on a member of the Indian Audit and

Accounts Service, no penalty specified in Clauses (v) to (ix) of that rule shall be imposed by an authority subordinate to the Appointing Authority.”

(Emphasis Supplied)

23. The term ‘Appointing Authority’ has been defined in Rule 2 (a) as under:

“(a) “Appointing authority” in relation to a Government servant, means-

- (i) the authority empowered to make appointments to the Service of which the Government servant is for the time being a member or to the grade of the service in which the Government servant is for the time being included, or
- (ii) the authority empowered to make appointments to the post which the Government servant for the time being holds, or
- (iii) the authority which appointed the Government servant to such Service, grade or post, as the case may be, or
- (iv) where the Government servant having been a permanent member of any ether Service or having substantively held any other permanent post, has been in continuous employment of the Government, the authority which appointed him to that Service or to any grade in that Service or to that post, whichever authority is the highest authority.”

24. In respect of the first question arising for our consideration, we are unable to accept the contention of Mr.Sinha as the act of confirmation cannot be said to be a continuation of the process of appointment. In ***The High Court of Punjab and Haryana (Supra)***, a Constitution Bench of the Supreme Court discussed the scope of Articles 233 and 235 of the Constitution. The officer therein had been appointed to the post of District/Additional District and Sessions Judge by an order of

the Governor on probation of two years. The High Court and the Government were at odds as to which was the competent authority to confirm the appointment. One of the contentions of the State of Haryana was similar to the one raised before us. The learned advocate general had submitted as under:

“17. The contentions of the Advocate-General were these. Confirmation is the last step in the process of appointment which is made in the first instance on probation. Confirmation is nothing but the substantive appointment to service. The earlier tenure is precarious. Confirmation makes it firm. On a parity of reasoning given in S.N. Sen case [(1971) 2 SCC 889 : (1972) 2 SCR 251] that the authority which promotes should confirm it stands to reason that the power of confirmation should vest in the authority which appoints. Confirmation and non-confirmation are so inextricably mixed that it will be anomalous to say that the power of confirmation is with the High Court and the power of termination on non-confirmation is with the Government. Transfer has no analogy with confirmation. Transfer brings in no change in tenure of service while confirmation does. Confirmation can be on appointment as well as promotion. Since both powers of appointment and promotion are with the Governor under Article 233 the confirming authority is the Governor. Either confirmation is a power of appointment or it is a condition of service. In both the situations the power lies with the Governor. ...”

(Emphasis Supplied)

25. The submissions did not find favour with the Apex Court, which held that the confirmation cannot be said to be a fresh appointment or completion of the process of appointment. The Bench concluded that the power of confirmation was distinct from the power of appointment and therefore, the power to confirm remained with the High Court.

Chief Justice A.N. Ray, giving the opinion for the bench, observed as under:

“49. The confirmation of persons appointed to be or promoted to be District Judges is clearly within the control of the High Court for these reasons. When persons are appointed to be District Judges or persons are promoted to be District Judges the act of appointment as well as the act of promotion is complete and nothing more remains to be done. Confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment. Such a meaning of confirmation would make appointment a continuing process till confirmation. Confirmation of District Judges is vested in the control of the High Court for the reason that if after the appointment of District Judges the Governor will retain control over District Judges until confirmation there will be dual control of District Judges. The High Court in that case would have control over confirmed District Judges and the Governor would have control over unconfirmed District Judges. That is not Article 235.”

(Emphasis Supplied)

26. Accordingly, we reject the first contention of the learned counsel for the petitioners. The act of confirmation by the OSD, cannot make him the appointing authority as confirmation of an officer on successful completion of his period of probation is neither a fresh appointment nor completion of appointment.
27. The other submission of the learned counsel for the petitioners is that the Deputy General Manager (Admn.) was empowered to issue the penalty order by the notification dated 07.07.1984. We have already reproduced Rule 3 of the CCS (CCA) Rules in paragraph 23 aforegoing, it is clear that it differentiates between the ‘authority

empowered to make appointments’ and the ‘*authority which appointed*’ the government officer and continues to hold that whichever authority is the highest authority shall be the appointing authority. In the present case, the Deputy General Manager (Admn.) was the authority empowered by the notification dated 07.07.1984, while the authority which actually appointed was the Chairman, DMS. Consequently, the higher authority shall be the appointing authority for the purposes of Rule 12 of the CCS (CCA) Rules.

28. In effect, the appointing authority in this case cannot change either on account of termination of the respondent or on account of formulation of the disciplinary rules by the petitioners and the disciplinary authority cannot be a person subordinate to the appointing authority.
29. A somewhat similar situation came up for consideration in the case of ***Om Prakash Gupta Swadheen (Supra)*** and the definition of appointing authority was considered by the Apex Court. The appellant therein had been appointed by the Director General, Geological Survey of India, while the notice of termination was issued under the signature of Director of Administration. It was contended that the Director of Administration was empowered to make appointments by virtue of his being the head of the office. Referring to Rule 2(a) of the CCS (CCA) Rules, the Supreme Court held that the Director General would remain the appointing authority. The relevant portion of the judgment reads as under:

“6. Before us both sides proceeded on the footing, as the trial court did, that the case was governed by the definition of “appointing authority” in the Central Civil Services (Classification, Control and Appeal) Rules, 1965. ... But if

the parties are agreed on the point, as they seemed to be, that the definition of “appointing authority” in Rule 2(a) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 would apply to this case, there should be no doubt that Shri G.K. Moghe, assuming he was empowered to appoint the appellant, was not the appointing authority, the Director-General, Geological Survey of India, who in fact appointed the appellant being the higher authority. We do not see how the provisions of Rule 9(2) are repugnant to the definition of appointing authority in Rule 2(a), as the Division Bench of the High Court appears to have thought. Rule 2(a) refers to the authorities who have the power to appoint as also the authorities who did appoint a government servant and provides that whichever authority is the highest authority among them would be the appointing authority in relation to the government servant concerned. The definition plainly takes note of Rule 9(2) and no question can therefore arise that Rule 9(2) is repugnant to the definition of “appointing authority” in Rule 2(a).”

(Emphasis Supplied)

30. In our view, the judgment in the case of **Krishna Kumar (Supra)** would be applicable to the facts of the present case. The officer/appellant before the Supreme Court had been appointed as Train Lighting Inspector by the Chief Electrical Engineer, but was removed by the Divisional Assistant Engineer. Again it was contended that the Divisional Assistant Electrical Engineer had been given the power to make appointments to the post and thus, was vested with the power to remove him. The Supreme Court rejected the contention and held as under:

“5. In defence of the legality of the order of removal, counsel for the respondents relies on para 2 of Respondent 1's affidavit, dated January 7, 1978, wherein he has stated that the power to make Appointments to the post of the Train

Lighting Inspector was delegated to certain other officers including the Divisional Assistant Electrical Engineer. It is urged that since the Divisional Assistant Electrical Engineer has been given the power to make appointments to the post of the Train Lighting Inspector, he would have the power to remove any person from that post. We cannot accept this contention. Whether or not an authority is subordinate in rank to another has to be determined with reference to the state of affairs existing on the date of appointment. It is at that point of time that the constitutional guarantee under Article 311(1) becomes available to the person holding, for example, a civil post under the Union Government that he shall not be removed or dismissed by an authority subordinate to that which appointed him. The subsequent authorisation made in favour of Respondent 1 in regard to making appointments to the post held by the appellant cannot confer upon Respondent 1 the power to remove him. On the date of the appellant's appointment as a Train Lighting Inspector, Respondent 1 had no power to make that appointment. He cannot have, therefore, the power to remove him.

6. Besides, delegation of the power to make a particular appointment does not enhance or improve the hierarchical status of the delegate. An Officer subordinate to another will not become his equal in rank by reason of his coming to possess some of the powers of that another. The Divisional Engineer, in other words, does not cease to be subordinate in rank to the Chief Electrical Engineer merely because the latter's power to make appointments to certain posts has been delegated to him.”

(Emphasis Supplied)

31. We also note that none of the judgments relied upon by Mr.Sinha advance the case of the petitioners. In **Awadhesh Singh (Supra)**, the Single Judge of the Allahabad High Court was dealing with a circumstance where the employee in question had been promoted as

Head Clerk by the District Magistrate and also dismissed by the same authority, but contended that the appointing authority would remain the Land Reforms Commissioner which had made the initial appointment as *Ahalmad*. In this background, the dismissal order was upheld holding that the “*appointing authority has to be determined with reference to the post held by the employee at the time of the imposition of the penalty.*” The same has no bearing on the present case.

32. A Division Bench of the Andhra High Court in ***Dr. G. Valayya Pantulu (Supra)*** held that an authority legally and duly substituted may dismiss an employee and was not junior to the original appointing authority. In the present case, it is not the case of the petitioners that the original appointing authority, i.e. Chairman, had been substituted by the Deputy General Manager (Admn.).
33. In ***Mahendra Kumar Das (Supra)***, the State of Assam was in appeal from the order of the High Court quashing the penalty order and the disciplinary proceedings. The respondent/charged officer had *inter alia* contended that “*he had been appointed by the Inspector-General of Police and the order of dismissal by subordinate authority, viz., the Superintendent of Police, was illegal and void.*”; while the stand of State was that the appointing authority was the Superintendent of Police only. The contention was rejected on the ground that the Inspector-General of Police had merely selected the respondent, while the actual appointment order was passed by the Superintendent of Police, consequently, the Court concluded that the “*respondent was appointed permanent Sub-Inspector of Police not by the Inspector-*

General of Police but by the Superintendent of Police.” The judgment cannot be read as laying any principle of law that the confirming authority is the appointing authority.

34. Thus, in view of ***Om Prakash Gupta Swadheen (Supra)*** and ***Krishna Kumar (Supra)***, it is clear that the designation of the Deputy General Manager (Admn.) as the appointing and disciplinary authority by the notification dated 07.07.1984 cannot enable it to pass the penalty order.
35. To conclude, the Chairman, DMS was the appointing authority and hence the penalty order passed by the Deputy General Manager (Admn.), being subordinate to the Chairman, was in clear violation of the mandate of Article 311 (1) of the Constitution and Rule 12 (4) (a) of the CCS (CCA) Rules.
36. We also note that the order dated 24.01.1987 in appeal has been passed by the Chairman, DMS, but the same cannot cure the defect in the original penalty order as the same was *void ab initio* having been passed in contravention of Article 311 (1) of the Constitution [See ***Mysore SRTC v. Mirja Khasim Ali Beg, (1977) 2 SCC 457*** (paragraph 14)].
37. Although, there is no quarrel on the proposition of law as submitted by Mr. Sinha that the Tribunal should have remanded the matter back, but however, the Tribunal, in our view, rightly did not remand the matter back noting that the respondent in his verification had stated that he was aged about 49 years in August, 1987 itself and would be on the very verge of retirement on superannuation, if he had not retired

already and it would not be justified in remanding the case back for passing of a fresh order.

38. Resultantly, we find no merit in the writ petition. The same is dismissed accordingly.
39. At this stage, we may add that we are bound to note that the disciplinary authority had passed the order of compulsory retirement way back in the year 1986. The respondent was unable to receive his retiral benefits, including GPF, Leave Encashment etc. and not a single penny has been paid till date while the respondent died in the year 2003. During the pendency of this matter, the impugned order of the Tribunal was stayed. In effect, the respondent could still have been granted his retiral benefits which he was deprived of during his life time and his heirs have been deprived of till date.
40. The writ petition stands dismissed with cost of Rs.10,000/-.

G. S. SISTANI, J.

VINOD GOEL, J.

MARCH 15, 2017

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