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

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Date of Decision: 23.08.2017

% **W.P.(C) 7951/2014**

V.K. NEHRU

..... Petitioner

Through: Mr. Bimal Roy Jad, Advocate.

versus

CHAIRMAN & MANAGING DIRECTOR,
ITDC & ORS

..... Respondents

Through: Mr. Ujjwal Kumar Jha, Advocate for
respondents No.1 to 3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to assail the order dated 04.08.2014 passed in O.A. No.4424/2011, whereby the Tribunal has dismissed his said Original Application. In the said Original Application, the petitioner had laid a challenge to the inquiry proceedings and the consequent penalty imposed upon him by the respondents.

2. The petitioner, at the relevant time, was serving as Manager (Civil) and was responsible for completion of project work for the work of Quila Rai Pithora (Sanjay Van) Earth Work (IInd Phase). The petitioner was the

Site Engineer for the said work, which was awarded to a contractor M/s Bansal Enterprises for contract value of Rs.12,30,000/- vide work order dated 23.09.2004. In relation to the award of the said contract and execution of the said work, there were irregularities alleged in his functioning by the petitioner. Incidentally, the petitioner was arrested by the Central Bureau of Investigation (CBI) in another case in the evening of 28.12.2004 as he was caught red-handed accepting bribe from an unsuccessful bidder, namely Arjun Dass, for refunding the security deposit. He was suspended from service of the respondent Corporation immediately.

3. Subsequently, the Central Vigilance Commission (CVC) vide its order dated 12.06.2007 forwarded to the respondent Department, the complaint received in the said Commission, relating to irregularities in the development work of Quila Rai Pithora. As per the directions of the CVC, an investigation was carried out and a report submitted to the CVC. On the advice of CVC, vide OM dated 07.08.2007 disciplinary proceedings for imposition of major penalty were initiated against the petitioner.

4. Accordingly, a charge-sheet dated 28.09.2007 was issued to the petitioner leveling six charges against him. The respondent appointed the Inquiry Officer, who found the petitioner guilty of charges No. I, II, IV, V & VI, while he exonerated the petitioner in respect of charge No.III, vide his report dated 30.09.2009. The said inquiry report was accepted by the Disciplinary Authority, and eventually, the petitioner was subjected to the major penalty of reduction to a lower post by one rank with minimum basic pay in the reduced rank. He was placed as junior most in the reduced rank. Thus, he stood reduced in rank as Assistant Manager (C) with Basic Pay of

Rs.15,600 plus Grade Pay of Rs.5,400 in the Pay Band Rs.15600–39100 from the date of issue of the order under Rule 23(B) and 26 of the ITDC (CDA) Rules.

5. The Appellate Authority rejected the appeal and confirmed the penalty imposed upon the petitioner vide order dated 23.07.2010. Consequently, the petitioner preferred the aforesaid Original Application.

6. We may also mention that the petitioner stands convicted under the Prevention of Corruption Act and was sentenced to four years Rigorous Imprisonment apart from fine of Rs.20,000/-. The petitioner's appeal against his conviction is stated to be pending in the High Court.

7. The Original Application preferred by the petitioner was initially dismissed by the Tribunal vide order dated 21.12.2012. His Review Application was also dismissed. The petitioner assailed the said order in W.P.(C.) No.4954/2013. This Court set aside the order dated 21.12.2012 as well as the order dated 05.03.2013 passed in the Review Application, and remanded the case back to the Tribunal for reconsideration. The said order, insofar as it is relevant, is reproduced hereinbelow:

“2. Since the matter is being remanded to the Tribunal, lest any party is prejudiced before the Tribunal we only indicate the reason for the remand.

3. Of the documents sought for by the petitioner, one pertained to a file relating to development of Quilla Rai Pithora. The Tribunal has held that the petitioner has tried to be one too smart, by relying upon a search-cum-seizure memo evidencing that the file in question was recovered from the almirah belonging to the petitioner who was then working as the Senior Manager (Civil).

4. *But what the Tribunal has overlooked is that the said search-cum- seizure took place on January 14, 2005. The file was one out of over 150 files which were lying in the almirah of the petitioner in the office, and the files were rightly lying in the almirah in the office of the petitioner as they related to petitioner's working. The Tribunal overlooked the fact that the charge memo was issued in the year 2007 and thus it was a case where the relevant documents were with the Department when the inquiry commenced.*

5. *Impugned decision proceeds as if during the inquiry, petitioner was asking for certain documents which were taken by him and were in his possession, a fact which is wrongly assumed.*

6. *The second reason for the remand is that according to the petitioner it was a case of no evidence. The Tribunal has not noted the exact argument on which the petitioner was alleging it to be a case of no evidence. The Tribunal has dealt with the argument, without listing the specific facts on which the petitioner was urging that it is a case of no evidence by citing a plethora of case law on the subject it is not within the province of the Tribunal to re-appreciate the evidence.*

7. *Now, re-appreciation of evidence is an exercise entirely different than an exercise to be conducted on the plea that the penalty imposed is based upon a report of an Inquiry Officer which report in turn is based on no evidence.*

8. *Accordingly we set aside the impugned decision dated March 05, 2013 dismissing RA No.39/2013 as also the decision dated December 21, 2012 dismissing OA No.4424/2011."*

8. Consequently, the Tribunal heard the submissions of the parties and proceeded to dismiss the Original Application once again by the impugned order.

9. At this stage, we may set out the summary of charge Nos. I, II, IV, V & VI, as summarized by the Tribunal, in respect whereof the petitioner was

found guilty. The same read as follows:

“Article I and II : The charge is that the applicant in complete disregard of the rules and regulations, did not take action to upload the Notice Inviting Tender (NIT) relating to the work of development of Quila Rai Pithora (Sanjay Van) Earth Work on the ITDC website nor forwarded the NITs to the PWD, CPWD, municipal authorities and Contractors Association of the area concerned for display on their respective notice boards.

x x x x x x x x x x

Article IV: Though the excavation work was to be undertaken by mechanical means, in order to favour the prospective bidder, the applicant added transportation factor in the estimate for excavation by manual means to jack up the estimate.

Article V: The charge is that the applicant misled his superiors regarding misplacement of the case file relating to the work of development of Quila Rai Pithora (Sanjay Van) Earth Work and on this false pretext fraudulently obtained approval to cancel the tenders already invited, reframed the estimates and reinvited the tenders with ulterior motive. The file stated to have been misplaced was recovered from the records under the charge of the applicant by a duly constituted Committee after the applicant was arrested by the CBI.

Article-VI: The applicant did not maintain Level Book with regard to the excavation work in contravention of CPWD specifications and paid the first bill not on the basis of initial and intermediate levels but on average depth basis, arbitrarily.”

10. Learned counsel for the petitioner has advanced two submissions before us.

11. The first submission of learned counsel for the petitioner is that the petitioner was not supplied the relevant documents to establish his defence. Learned counsel submits that the petitioner had specifically asked for the file

relating to Quila Rai Pithora project. The said file contained the relevant documents to establish the defence of the petitioner in respect of the first two charges aforesaid. The substance of the first two charges against the petitioner was that the petitioner had clandestinely ensured non-publication of the NIT on the website of the respondent, and thereby avoided competition, and awarded the contract to M/s Bansal Enterprises.

12. The submission of the petitioner is that the file pertaining to Quila Rai Pithora was one of the files seized by the team constituted by the respondent after he had been suspended and arrested by the CBI on 28.12.2004. The files were seized from the Almirah of the petitioner behind his back. In this regard, he has placed reliance on Annexure P-7 (Colly.), which is a memorandum prepared in respect of the files and papers seized from the Almirah of the petitioner. In the said memorandum dated 14.01.2015, at serial No.20 of the list of files, the file pertaining to “*Quila Rai Pithora Wall Mehrouli Pathway along with Tender inside file*” having pages 1 to 229 was also seized. The submission of the petitioner is that the respondent adopted different stands in respect of the said file when sought for by the petitioner. At one stage, it was claimed that the said file was in the custody of the CBI, while at another stage, it was claimed that the said file was not traceable. By non-production of the said file, the petitioner was seriously prejudiced, since, if produced, the file would have shown that the tender was duly published.

13. Learned counsel for the petitioner further submits that in respect of other charges, he had sought production of several documents. The said request was answered vide letter dated 15.11.2008. In this communication,

the respondent had stated as follows:

“ This has reference to charge sheet No.- 22A/Hr/Disc/ITDC/07 dated 28/09/2007 the following defence documents are being sent to you regd. Post.

- A. The defence documents as desired by you at S.No.6 pertaining to all the original correspondence filed for the work at Quila rai Pithola were seized by the CBI and accordingly are not provided by Corporate Hqrs engg. Division.*
- B. The Defence documents as desired by you at S.No.7 of your request dated 18/02/2008 regarding copy of Engg. Manual is being provided herewith (100 pages)*
- C. The defence documents as desired by you at S.No.8 of your request dated 18/02/2008 regarding copy of CDA rules, the same is being provided herewith (38 pages)*
- D. The defence documents as desired by you at S.No.9 request dated 18/02/2008 regarding copy of DOP of all Engineering executives from AM to Sr VP regarding Financial and their administrative responsibilities all the copies of the orders in this regards are enclosed (22 pages)*
- E. The Defense documents as desired by you at S.No.10, copy of rate analysis for similar work i.e. earth work in excavation mechanically duly approved at Jharkhand project, is being provided herewith to you. (pages 3)*
- F. The Defense documents as desired by you at S.No.11, 12 and 13 copy of rate analysis for similar work i.e. earth work in excavation mechanically duly approved at Hotel Samrat Ashok and Janpath, have not made available by custodian, hence not available.*
- G. The Defense documents as desired by you at S. No.14, regarding P.W. statements are not the part of the investigation report hence not available. However, statements of Sh. Nehru, at S.No.16 of annexure III to*

the charge sheet dated 28/09/2007 has already been provided.

Since all the available listed and defense documents have been provided to you are requested not to delay the inquiry proceeding and co-operate in expediting the inquiry proceeding.” (emphasis supplied)

14. Learned counsel submits that Articles IV & V of the charge framed against the petitioner pertain to the alleged over-estimation of the costs of work at Rs.35.47 Lakhs, which, eventually, was awarded to the contractor for Rs.12.3 Lakhs, post negotiation.

15. Learned counsel submits that the petitioner had demanded copy of the rate analysis for the similar, i.e. earth work and excavation mechanically approved in respect of Hotel Samrat Ashok and Janpath. However, the same was not made available as per the aforesaid response of the respondents.

16. Learned counsel for the petitioner submits that there was no evidence led by the respondents to establish any of the charges against the petitioner, and it was not merely a case of appreciation of evidence, but a case of ‘no evidence’, which the Tribunal was obliged to examine.

17. Learned counsel places reliance on ***State of Uttar Pradesh & Others Vs. Saroj Kumar Sinha***, (2010) 2 SCC 772, in which non-supply of foundational documents on a lame excuse, that at the relevant time the delinquent was posted in the same division and hence, could access the documents, was held fatal to the inquiry proceedings.

18. No other submission has been advanced by learned counsel for the petitioner.

19. On the other hand, learned counsel for the respondent supports the impugned order. Learned counsel submits that the petitioner's claim that he was not supplied the documents relevant for his defence, is not correct. In this regard, he has referred to the recording made by the Inquiry Officer in the inquiry report, wherein he states that "*Incidentally, except one letter dated 18/02/2008 containing list of defence documents, the CO never reminded me in writing about non-receipt of defence documents*".

20. Learned counsel further submits that whatever documents were available and were relevant for the purpose of inquiry, were produced. In this regard, he also places reliance on the letter dated 15.11.2008, which shows that the petitioner was provided the available and relevant documents as demanded by the petitioner. All the relied upon documents in support of the charges were proved in the inquiry. Learned counsel submits that if the petitioner was so minded, he could have produced documents in his defence either on his own, or could have summoned the same from the concerned quarters. He did neither.

21. Learned counsel further submits that there was sufficient evidence led by the department to establish the charges against the petitioner. He further submits that the petitioner had failed to establish the prejudice suffered by him on account of some of the documents not being available.

22. Learned counsel further submits that the decision in **Saroj Kumar Sinha** (supra) is not attracted in the facts of the present case, since all the documents which could be described as "foundational documents" were, in fact, produced in the inquiry. Foundational documents are those documents

which are essential to prove the charge against the delinquent.

23. He has also referred to the decisions taken note by the Tribunal, namely *Chandrama Tewari Vs. Union of India*, 1987 (Supp) SCC 518, wherein the Supreme Court held that it is not necessary that each and every document must be supplied to the delinquent Government servant facing the charges. Instead, only material and relevant documents are necessary to be supplied to him. He also places reliance on *Syndicate Bank Vs. Venkatesh Gururao Kurati*, (2006) 3 SCC 150, wherein the Supreme Court held that non-supply of documents on which the Inquiry Officer does not rely during the course of inquiry, does not create any prejudice to the delinquent.

24. Having heard learned counsel for the parties and perused the impugned order as well as the documents relied upon on both sides, and having considered the decisions above referred to, we are of the view that there is no merit in this petition.

25. The submission of the petitioner, that he has not been supplied with the file pertaining to the project of Quila Rai Pithora, has no merit. The letter dated 15.11.2008 of the respondent shows that the file pertaining to the said project was seized by the CBI. The same was, therefore, not available with the respondent for it to be produced in the inquiry proceedings. We also do not find any inconsistency in the stand of the respondent with regard to non-availability of the said file. The statement that the file was not traceable and the statement that the same was lying with the CBI, cannot be said to be inconsistent for the reason that if the file was with the CBI, obviously, the same was not available with the respondents, and therefore,

could not be produced in the inquiry. Thus, the submission of the petitioner that he was not provided the relevant documents to establish charges No. I & II is rejected, as also his submission that it was a case of “no evidence” in respect of the said charges.

26. A perusal of the inquiry report shows that there was sufficient evidence led in the inquiry to establish that the NIT was indeed not put on the website of the respondent while inviting the bids. The same is evident from the following extract from the inquiry report:

“PW14 deposed that the work of sending NITs received in ARMS office for uploading on website was being done by PA to GM (ARMS) and he does not remember whether any documents mentioned in NITs at Exb.P21, P23, P26 were received or not in ARMS office. PW4 further added that he has checked the records available but has not found any records pertaining to putting up NITs on the website.”

27. The Inquiry Officer also observed that the petitioner/ Charged Officer did not produce any evidence regarding publication of the NIT on the website. His mere statement that the file pertaining to Quila Rai Pithora, if produced, would have established the said publication, is neither here nor there.

28. The submission of learned counsel for the petitioner, that he was not provided with the rate analysis in respect of the contracts pertaining to similar work, i.e. mechanical earth excavation in respect of the work at Hotel Samrat Ashok and Janpath, is also of no avail. Pertinently, the documents desired by the petitioner related to another contract, and not to the contract in question. The department had not relied on the said rate

analysis to prove the charge against the petitioner. The same, therefore, was of no relevance to prove the charges against the petitioner.

29. The substance of the charge against the petitioner in Articles IV & V was that he had inflated/ packed up the estimate of the work to Rs.45.73 Lakhs by repeatedly adding the transportation factor despite a decision taken by the VP (Engg.) not to consider the transportation factor and to execute excavation by mechanical means. However, upon scrutiny, the estimate was justified at Rs.11.73 Lakhs, and eventually, the contract was awarded to M/s Bansal Enterprises at Rs.12.3 Lakhs even though the contractor had initially quoted Rs.35.70 Lakhs for the work. The petitioner did not dispute the aforesaid facts & figures in the inquiry. The said facts & figures in themselves were highly revealing. As opposed to the petitioner's estimated cost of Rs.45.73 Lakhs, which was vetted by the Scrutiny Cell to only Rs.11.73 Lakhs, the contractor quoted an amount of Rs.35.70 Lakhs, which was 204% of the justified cost. The cat came out of the bag when the contractor accepted the work at Rs.12.30 Lakhs, after reducing his quotation by nearly three times, which initially stood at Rs.35.70 Lakhs. The aforesaid facts & figures clearly nail the petitioner. There was hardly any further evidence required to be led to establish his guilt in respect of the said charges.

30. The submission of learned counsel for the petitioner that the estimate prepared by him had been approved by the higher authority, who had not been proceeded against, is neither here nor there. Firstly, this does not appear to have been established by the petitioner in the inquiry. A perusal of Charges IV and V, and the findings returned thereon show how the

petitioner manipulated the record. In any event, the petitioner cannot claim negative equality, and just because the superior may have got away, is no reason to let off the petitioner.

31. Reliance placed on the decision in ***Saroj Kumar Sinha*** (supra), in our view, is completely misplaced. Firstly, the Supreme Court held that the foundational documents are required to be supplied to the delinquent employee. The documents above referred to, which the petitioner claims were not supplied to him, cannot by any stretch of imagination be described as foundational documents. To our understanding, foundational documents would be those documents which constitute the foundation of the charges leveled against the delinquent. All the foundational documents were produced in the inquiry.

32. Even otherwise, ***Saroj Kumar Sinha*** (supra) was a case where the department gave a lame excuse to not supply the documents which, apparently, were otherwise available and could be supplied. The lame excuse was that the respondent at the relevant time was posted in the same division and documents could have been received by him and reply given by him. The same cannot be said in the facts of the present case. We have extracted hereinabove one of the communications by which documents were supplied to the petitioner. From the same, it appears that the documents, which were available, were indeed supplied to him. The petitioner also produced these documents in the inquiry as is evident from the inquiry report.

33. In our view, the Tribunal aptly relied upon ***Chandrama Tewari***

(supra) and *Venkatesh Gururao Kurati* (supra) for what they hold. It is well-settled, that the standard of proof adopted in departmental proceedings is that of preponderance of probabilities. It would be sufficient, if some cogent evidence is led in the departmental inquiry to connect the delinquent with the misconduct alleged against him. In the present case, as we have noticed above, it cannot be said that the present was a case of ‘no evidence’ as claimed by the petitioner. Since there was cogent evidence led by the respondent to link up the petitioner with the charged misconduct, it was for the departmental authority – and not for the Tribunal or for this Court, to appreciate and assess the same.

34. In view of the aforesaid, we find no merit in this petition and dismiss the same.

VIPIN SANGHI, J.

REKHA PALLI, J.

AUGUST 23, 2017

B.S. Rohella