

\$~1

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

+ **W.P. (C) 1194/2013**

%

Date of Judgment: 10th January, 2017

UNION OF INDIA & ANR.

..... Petitioners

Through: Mr. Ankur Chhibber, Advocate.

versus

LALMALSAWMA

..... Respondent

Through: Mr. Pragyan P. Sharma, Advocate
with Ms. Amita Singh Kalkal,
Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. With the consent of the parties, we set down the writ petition for final hearing and disposal.
2. The challenge in this writ petition is to the order passed by the Central Administrative Tribunal (hereinafter referred to as '*the Tribunal*') dated 19.04.2011 in O.A. No. 3173/2010 whereby the application filed by the respondent herein has been allowed.
3. Necessary facts required to be noticed for disposal of this writ petition are that the respondent was transferred to Goa and posted as 'Special Secretary (Planning)' and was given additional charge of Commissioner of Sales Tax and Excise, Goa from 01.06.1989

Thereafter, the respondent was promoted to the post of Commissioner on full-fledged basis from 08.08.1989. The respondent continued to serve at the said post until 24.05.1990.

4. During his tenure as Commissioner, the respondent approved the price/duty structure of the product 'Blue Stratos After Shave Lotion' of M/s PJM Pharmaceuticals Pvt. Ltd. at Rs.10/- per liter of pure alcohol content, which was infact the rate of excise duty for a medicinal product, though the product was a toilet product for which the excise duty was liable to be charged at 100% ad-valorem. After the respondent was transferred in the year 1991, the issue of wrong approval was addressed and a statement of short levy of duty on account of wrong classification was prepared. The department realized that on account of gross negligence of the respondent, a loss of Rs.92,43,684.08/- was suffered by the exchequer during the years 1989-1991. Upon quantification of the losses, a recovery notice was issued to M/s. Colfax Laboratories (India) Pvt. Ltd. and M/s. PJM Pharmaceuticals Pvt. Ltd, which resulted in a protracted litigation between the two companies and the department. During the course of proceedings and in pursuance of the orders passed by the High Court of Bombay, the then Commissioner of Excise adjudicated the issue as to whether an After Shave Lotion would be classified as a medicinal product or a toilet product. The Commissioner held that the same was infact a toilet product and subject to levy of excise at the rate of 100%, the decision of the commissioner was upheld by the High Court of Bombay as well.

5. In the year 1992, an FIR was registered against one, Ms. Naini Jayaseelan, who was the Commissioner of Excise prior to the transfer of the respondent. It was alleged that Ms. Naini had wrongly classified the 'Old Spice' toilet products of M/s. Colfax as medicinal products resulting in loss of excise duty. While the proceedings with respect to Ms. Naini were underway based on a report submitted by SP, CBI, Goa; the CBI vide letter dated 10.10.2002 requested for the sanction of prosecution against Ms.Naini and the present respondent. After the grant of approval, the case was referred to the Central Vigilance Commission ('CVC') for its advice on 12.03.2004. Accordingly on 29.04.2004, the CVC advised the initiation of regular departmental action for a major penalty against the respondent and Ms. Naini.
6. Following the opinion of the CVC, a chargesheet dated 20.08.2004 was issued to Ms. Naini, to which she submitted a representation dated 27.09.2004. Thereafter, the matter was taken up with the Ministry of Law, which in turn once again referred the matter to the CVC. The CVC again reiterated their earlier advice.
7. It is the case of the petitioners that since the case of Ms.Naini had been similar in nature to that of the respondent, it was felt that it would be prudent to await the outcome of the legal issues raised by Ms. Naini before initiating a regular departmental action for a major penalty against the respondent. An inquiry was initiated against Ms. Naini for which the inquiry officer was appointed on 07.06.2006.

8. Thereafter, Disciplinary proceedings were initiated against the respondent and articles of charge were issued on 06.09.2006. The respondent filed his written statement of defence on 27.09.2006, in which, according to the petitioners, the respondent admitted to his negligence claiming that he had signed the revised pay structure without going through to the relevant documents, choosing instead to rely on the judgment of the then ACE, one Shri Badri. After the finding of the Inquiry Officer which held the respondent guilty, the respondent filed an application before the Tribunal.
9. Meanwhile, Ms. Naini after issuance of chargesheet had approached the Tribunal by filing O.A. No. 2100/2006, which was decided in her favour on 07.03.2007. The Tribunal allowed the said OA and quashed the charge sheet as well as the order appointing the inquiry officer.
10. On an application filed by the respondent, the Tribunal held that the OA filed by the respondent herein was squarely covered by the order in the case of Ms.Naini and allowed the application by an order dated 19.04.2011, which has led to the filing of the present writ petition.
11. Learned counsel for the petitioners submits that the Tribunal has erred and failed to take into consideration that Ms.Naini had approached the Tribunal at the stage of issuance of the charge-sheet whereas the present respondent had filed his written statement of defence and admitted that he was negligent in passing the order reducing the excise duty from 100% to Rs.10 per litre. Mr.Chhibber submits that the Tribunal has failed to take into consideration that it is settled law that a charge-sheet and disciplinary proceedings should not be quashed in

routine and a delinquent officer must show that serious prejudice was caused to his right on account of the delay in issuance of the charge-sheet and conducting of enquiry proceedings. It is contended that the order of the Tribunal is arbitrary and illegal and has been passed without any application of mind. Learned counsel contends that the Tribunal has failed to take into account that the charge-sheet against the respondent was grave and serious and on account of his negligence, the department suffered a loss of Rs.92,43,684.08/-. It is contended that the Tribunal failed to take into account that the respondent did not maintain absolute integrity and devotion to duty, and committed an act unbecoming of a member of the service.

12. Counsel further submits that the negligence of the respondent stands duly proved by the subsequent order of the Commissioner of Excise, which was upheld by the Bombay High Court and thus, there was no justification on the part of the respondent to levy excise duty at 10/- per litre instead of 100% ad-valorem which was to be levied on a toiletry preparation and an after shave could not have classified as a medicinal product.
13. Learned counsel for the petitioners has sought to explain the delay as under:-

“(i) That the CBI vide their letter dated 18.11.2002 had requested for Sanction of Prosecution (SOP) on the basis of a report submitted by SP, CBI, Goa against Smt. Naini Jayaseelan, IAS (AGMU:80) and Shri. Lalmalsawma, IAS (AGMU:83). With the approval of the then Deputy PM and Home Minister, the case was referred to CVC for their advice on 12.03.2004 with the following recommendations:-

- a) A departmental inquiry against Smt. Naini Jayaseelan, IAS (AGMU:80), and
- b) As there is no case for departmental action or criminal prosecution, an administrative warning be issued to Shri. Lalmalsawma, IAS (AGMU:83).

(ii) That CVC vide their OM dated 29.04.2004 had advised as under:-

- a) Initiation of RDA for a major penalty against Smt. Naini Jayaseelan, IAS (AGMU:80); and
- b) Initiation of RDA for a major penalty against Shri. Lalmalsawma, IAS (AGMU:83).

(iii) That on receiving recommendations of the CBI vide letter dated 28.08.2003 for initiating RDA for a major penalty against Smt. Naini Jayaseelan, IAS (AGMU:83), the matter was examined and as per the approval of the then Deputy PM & Home Minister, charge-sheet dated 20.08.2004 was issued to Smt. Jayaseelan.

(iv) Jayaseelan submitted a representation dated 27.09.2004 in which she raised legal issues. The matter was accordingly taken up with the Ministry of Law, the matter was again referred to CVC for their advice on 16.06.2005. CVC vide their OM dated 23.08.2005 retreated their advice of initiation of RDA for a major penalty against Smt. Jayaseelan. CVC had also nominated Mrs. Deepa Bajwa, CDI as Inquiring Authority in the case vide OM dated 04.01.2006 and accordingly Order of appointment of IO/PO were issued on 12.06.2006 with the approval of the then HM to conduct an oral Inquiry against Smt. Naini Jayaseelan.

(v) That the case of Smt. Naini Jayaseelan was similar in nature and as Smt. Jayaseelan was the predecessor of Shri. Lalmalsawma, it was felt appropriate to await the outcome of the issues raised by Smt. Jayaseelan before initiating

RDA for major penalty against Shri. Lalmalsawma, as advised by CVC.

(vi) That after initiating Oral Inquiry against Smt. Jayaseelan and issuing of the order of appointment of IO/PO dated 07.06.06 in continuation of events, disciplinary proceedings against Shri. Lalmalsawma were also initiated with the approval of then HM on 08.08.06 and accordingly chargesheet was issued on 06.09.06 as initiation of disciplinary proceedings against both the officer was an outcome of disciplinary investigation conducted by CBI.”

14. In support of his submission that the delay in concluding of departmental inquiry is not always fatal and would depend upon the facts and circumstances of each case, the learned counsel for the petitioners has relied upon ***Secretary, Forest Department and others v. Abdur Rasul Chowdhury, (2009) 7 SCC 305***, paragraph 16 which reads as under:-

“16. The next issue is with regard to delay in concluding disciplinary proceedings. In our view the delay in concluding the domestic enquiry proceedings is not fatal to the proceedings. It depends on the facts and circumstances of each case. The unexplained protracted delay on the part of the employer may be one of the circumstances in not permitting the employer to continue with the disciplinary enquiry proceedings. At the same time, if the delay is explained satisfactorily then the proceedings should be permitted to continue.”

(Emphasis Supplied)

15. Reliance is also placed on ***Secretary, Ministry of Defence and others v. Prabhash Chandra Mirdha, (2012) 11 SCC 565***, paragraph 12 which read as under:-

“12. Thus, the law on the issue can be summarised to the effect that charge-sheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge-sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings.”

16. Mr.Sharma, learned counsel for the respondent, submits that there is no infirmity in the order passed by the Central Administrative Tribunal. The respondent stands on a better and higher footing than that of Ms.Naini who had approached the Tribunal after a charge-sheet was issued and by a detailed order dated 07.03.2007 the charge-sheet issued to her stands quashed. Mr.Sharma further submits that the petitioners have allowed the order dated 07.03.2007 to attain finality, thus, the respondent herein cannot be discriminated.
17. It is further contended that the departmental enquiry was initiated against the respondent after a delay of 17 years, which resulted in a denial of reasonable opportunity to defend to the respondent. Counsel contends that as noticed by the Tribunal, the Articles of Charge in the case of Ms.Naini and the respondent were identical and thus, once the Articles of Charge stands quashed with respect to Ms.Naini, the

petitioners cannot be allowed to penalize the respondent herein and follow a separate yardstick.

18. In support of his submissions, the learned counsel for the respondent has relied upon the following judgments:

- (i) ***State of Madhya Pradesh v. Bani Singh & Another*, AIR 1990 SC 1308:**

“4. ...The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April, 1977 there was doubt about the involvement of the officer in the said irregularities and the investigation were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage.”

(Emphasis Supplied)

- (ii) ***State of Andhra Pradesh v. N. Radhakishan*, (1998) 4 SCC 154:**

“19. ...The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is

serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.”

(Emphasis Supplied)

(iii) **P.V. Mahadevan v. M.D. Tamil Nadu Housing Board, (2005) 6**

SCC 636:

“Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer.”

(Emphasis Supplied)

(iv) **UOI v. Hari Singh, ILR (2014) 1 Delhi 443:**

“60. So far as the prejudice is concerned, the long period which has lapsed between the alleged transaction and issuance of charge sheet would by itself have caused memory to have blurred and records to have been lost by the delinquent. Therefore, the respondent would be hard put to trace out his defence. The prejudice to the respondent is writ large on the face of the record. The principles laid down by the Supreme Court as well as by this court in the judgments cited by the respondent and noted above squarely apply to the instant case.

...
66. The alleged misconduct claimed to have been done by the respondent Hari Singh has also not been treated to be a major delinquency by the respondent in the light of the principles laid down in Meera Rawther (Supra). It, therefore, has to be held that the delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges in the case and therefore, amounts to violation of principles of natural justice.”

(Emphasis Supplied)

(v) In **UOI v. Yuvraj Gupta & Ors, WP (C) No. 3051/2015 dated 07.10.2015** passed by Division Bench of this Court, of which one of us (G.S. Sistani, J.) dealing with identical facts whereby delay of 8 to 13 years had taken place in issuing Memo of Charges, held as under:-

“16. After perusing the above case laws, we are of the considered view that it is trite that delay which is unexplained and unreasonable would cause prejudice to the delinquent employee. Such delay clearly manifests the lack of seriousness on the part of the disciplinary authority in pursuing the charges against the employee. In the event of

any employee deviating from path of honesty, efficiency and diligence, action should be taken expeditiously as per the prescribed procedure. The Hon'ble Supreme Court has laid down the principles holding that unexplained and unreasonable delay per se results in prejudice to the charged officer except when the employer can show that the employee was responsible for delay or is otherwise able to explain the delay.

.....
18. *In view of the facts and circumstances of the present case, we are of the considered view that the delay in initiation of the proceedings certainly has lent room for allegations of bias, mala fide and misuse of powers against the respondent by the petitioners. Furthermore, we are of the view that the delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges resulting in violation of principles of natural justice.*

(Emphasis supplied)

19. Learned counsel for the respondent also submits that it is incorrect to suggest that the respondent had admitted to his negligence. While relying on the statement of defence, he submits that the respondent had denied all the charges framed against him.
20. We have heard the learned counsels for the parties and given our thoughtful consideration to the matter. We have also examined the rival submissions made by the counsels.
21. It may be noticed that the charge-sheet was issued to Ms.Naini in the year 2004 which reads as under:-

“ That Smt. Naini Jayaseelan, IAS, while posted and functioning as the Commissioner of Excise, Govt. of Goa, Daman & Diu during the year 1985 committed gross negligence and dereliction to duty in as much as she

reclassified the produce of 'Old Spice After Shave Lotion' of M/s Colfax Laboratories (India) Pvt. Ltd., Goa from toilet product to medicinal product, though it was in fact a toilet product, and thereby reduced the duty chargeable on this product from 100% ad valorem to Rs. 6.60 per litre of pure alcohol content, causing a loss to the tune of Rs.17,77,18,361=20, during the period 1985 to 1991, to the Government Exchequer

Thus she had failed to maintain absolute integrity and devotion to duty, and committed an act unbecoming of a member of the Service, and thereby contravened Rule 3 of the All India Service (Conduct) Rules, 1968."

22. Aggrieved by the charge sheet, Ms.Naini filed O.A. No. 2100/2006 before the Tribunal, which was allowed on 07.03.2007; relevant portion of which reads as under:

"11. Be that as it may, this is not germane to the issue of delay, which is not explained by the fact that the case was being agitated in different Courts and it was sub judice. Here in this case, the applicant was not even a party in the cases before the High Court and the Apex Court. The issue before the courts was whether the product of Colfax was a medicinal product or a toilet product. The issue was not the negligence of the officer in passing the order classifying the product as medicinal. That being the case, a plea cannot be taken that delay in issuing the charge-sheet was due to the case being sub judice. If another agency of the Government namely C.B.I. could file an FIR against the applicant seeking permission for her prosecution, while the above case was pending in Apex Court, there is no reason why the Government could not have initiated departmental proceedings. We think that there is no reasonable explanation given for the delay in initiating departmental proceedings and this is major flaw in issuing the charge-sheet against the applicant. It cannot be argued that the applicant has contributed to this abnormal delay. It has

also not been averred that nature and complexity of the charges was such that it need extraordinary effort, leading to delay, to collect the material to take action against the applicant. Government cannot plead ignorance of the facts of the case since 1985.”

(Emphasis Supplied)

23. It is not in dispute that this order of the Tribunal has attained finality.
24. In the year 2006, a charge sheet was issued to the respondent herein, which is identical in nature, which is extracted below:-

“ That Shri Lalmalsawma, IAS (AGMU: 83) while posted and functioning as the Commissioner of Excise, Govt. of Goa, during the year 1989 committed gross negligence and dereliction of duty in as much as he approved the Price/Duty Structure of the product Blue Startos After Shave Lotion of M/s PJM Pharmaceuticals Pvt. Ltd. with the rate of duty as Rs.10/- per litre of pure alcohol content, which was the rate of duty for a medicinal product, though the product Blue Stratos After Shave Lotion was, in fact, a toilet product for which the excise duty was liable to be charged @ 100% ad valorem, and thereby enabled the company to pay excise duty at such wrongly reduced rate, causing a loss to the tune of Rs. 92,43,684-08, during the period 1989 to 1991, to the Government exchequer.

Thus he failed to maintain absolute integrity and devotion to duty, and committed an act unbecoming of a member of the Service, and thereby contravened Rule 3 of the All India Service (Conduct) Rules, 1968.”

25. When Ms. Naini had approached the Tribunal, her submissions were twofold; firstly, that mere charge of negligence in quasi-judicial proceedings is not sufficient; and secondly, that there was an inordinate delay in initiation of the departmental enquiry proceedings.

Ms.Naini had urged that in 1991 when the Excise Commissioner had held that the reclassification done by the applicant was beyond her jurisdiction and at least, then the department enquiry could have been instituted against her, however, the Government chose to initiate departmental proceedings against her only in August, 2004, nearly 13 years after the order of the Excise Commissioner in 1991. It was argued that with the passage of time, the memory becomes dim and it would become difficult for the charged Officer to defend herself reasonably.

26. At this stage, it would be useful to reproduce the observations made by the Tribunal in paragraphs 3 and 4 of the impugned order in the present case, which read as under:

“3. ...The Memorandum of Charge and the order appointing the inquiry and presenting authorities was quashed by the Tribunal. The order was not challenged by the Government of NCT of Delhi and the Ministry of Home Affairs.

4. The learned counsel for the Respondents could not deny that the instant OA is fully covered by the order dated 07.03.2007 in the cited case of Naini Jayaseelan. In view of this the same relief has to be given to the Applicant as to the applicant in OA number 2100 of 2006.”

27. The next question which automatically arises for consideration is that whether the department can be allowed to take different stands *qua* different charged officers when identical chargesheets have been issued against them. We may notice that the delay in the case of the respondent is more than the case of Ms.Naini which the department

accepted after the order of the Tribunal dated 07.03.2007. Additionally, the role of the respondent was on a lesser footing than that of Ms.Naini, as she was the concerned Commissioner of Excise at a prior point of time than the respondent; while the respondent herein had merely followed a decision of his predecessor. By no stretch of imagination, it can be said that respondent had a greater or larger role to play in fixing the excise duty.

28. The submission of the learned counsel for the petitioners that since the respondent approached the Tribunal after the conclusion of the inquiry, it would make his case different to that of Ms.Naini, is unacceptable and without any force. In fact, the Supreme Court has time and again frowned upon the idea of rushing to the Tribunal or Court for quashing of charge-sheet except in exceptional cases and the respondent cannot be blamed or prejudiced for his being participated in the inquiry. [See **Prabhash Chandra Mirdha (Supra)** (paragraphs 10 and 12)]
29. Learned counsel for the respondent has also drawn the attention of the Court to the statement of defence wherein the respondent had categorically urged that an incident occurred during the period 1989-91, i.e. 15-17 years prior to the issuance of the chargesheet in 2006, when he was posted in Goa and by now, it is humanely impossible to recollect or reconstruct the incident or every detail of disposal of official businesses nor he would have full access to relevant proceedings and note-sheets of the related department of the

Government of Goa and thus, he would be unable to prepare a comprehensive defence.

30. Although the Tribunal has followed its previous order of Ms.Naini which the department did not choose to assail and thus attained finality; but to satisfy our conscious, we have examined as to whether the delay in this case is for reasonable and cogent reasons or as to whether the delay is unexplained. The reasons for the delay as per the petitioners have been extracted in paragraph 13 aforegoing. We find that the delay is not properly explained. The events as detailed by the petitioners do not explain the delay from the year 1991, when the lapse was detected, upto the year 2002, when the CBI was requested for sanction of prosecution. Thereafter, the advice of CVC' was obtained after a gap of two years in 2004. The CVC had advised initiation of regular departmental action and upon receiving of advice a charge-sheet was issued after 2 years against Ms.Naini and after 4 years against the respondent.
31. A faint explanation has been made that the charge-sheet issued against Ms.Naini was a test case and after two years against the respondent, a theory unknown in service law and even otherwise, if the purpose was to issue a charge-sheet against Ms.Naini as a test case, there is no explanation why the department did not wait for the final result in the case of Ms.Naini. While we are conscious of the fact that the delay is not always fatal to the inquiry as has been held by the Apex Court in the case of *Abdur Rasul Chowdhury (Supra)*, but the Apex Court had also emphasized that it would depend upon the facts and

circumstances of each case. Further in *Dy. Registrar, Coop. Societies v. Sachindra Nath Pandey*, (1995) 3 SCC 134 (paragraph 7), the Supreme Court had set-aside the judgment of the High Court where the delay of about 16 years could not be attributable to the Department alone and was also because of the attitude of the charged officer therein.

32. In the present case, we find that the respondent had raised the objection of delay at the first opportunity available at the time of filing his statement of defence and stated that with the passage of time, his memory would fail in recollection of the relevant materials and lack of files and note-sheets of a period of about 15 years prior would create serious prejudice to his rights and the preparation of a statement of defence. We agree with this submission of the respondent; more so because in cases where the proceedings have been initiated from quasi-judicial orders, the lapse of memory leads to much greater prejudice than other disciplinary proceedings.
33. Having regard to the facts of the case in hand and the settled position of law and also taking into consideration that the department agreed to accept the decision of the Tribunal in the case of Ms.Naini against whom an identical charge-sheet was issued, who had a greater role to play and also having regard to the fact that ultimately, the department was able to recover the entire amount, we find no grounds to interfere in the order passed by the Tribunal.

34. Therefore, the writ petition is without any merit. The same is accordingly dismissed.

G. S. SISTANI, J.

VINOD GOEL, J.

JANUARY 10, 2017

// Jitender/ka

