

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

% **Decided on: 23.05.2017**

+ **W.P.(C) 4472/2017 and CM Nos. 19496/2017 and 19497/2017**

UNION OF INDIA AND ORS. Petitioners

Through: Mr. Rahul Sharma, Sr. Panel Counsel
with Mr. C.K. Bhatt, Adv.

versus

SH. ABHAY MANGLIK Respondents

Through: Mr. O.P. Kalshian, Advocate

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE DEEPA SHARMA

HON'BLE MS. JUSTICE DEEPA SHARMA (ORAL)

1. Vide the present writ petition, the petitioner has challenged the decision of the Central Administrative Tribunal ("the Tribunal") dated 21.10.2016 in OA No. 437/2012 filed by the respondent.

2. The respondent/Charged Officer (hereinafter referred to as "the CO") had filed the above-said OA challenging the major penalty imposed upon him vide Disciplinary Authority order dated 23.03.2011. He challenged the order of the Disciplinary Authority (hereinafter referred to as "the DA") before the Revisioning Authority (hereinafter referred to as "the RA") and his challenge was dismissed vide order dated 04.02.2013. The Tribunal vide impugned order set aside the major penalty imposed upon the CO.

3. The brief facts of the case are that the CO while working as an Executive Engineer was served with a Memorandum of Charges dated 25.04.2008 which accompanied the statement of Articles of Charge. Following charges were proposed against him:-

“1. That the said MES-263367 Shri Abhay Manglik, EE, while functioning as GE (1) R&D Delhi during, the period from Dec 2001 to Apr 2005, concluded the following contracts, in which irregularities such as higher rates compared to similar CAs in the succeeding year, not preparing the market analysis and accepting reduction in the CA amount by the contractor after last date for receipt of the tenders were committed, in violation of Rule 30 (k) of MES Regulations:-

(a) CA No. GE/R&D-36/2003-04: The work 'Periodical Services at M'House under GE (1) R&D Delhi'.

(b) CA No. GE/R&D-95/03-04: The work 'Certain repairs of leakage seepage in toilet and roof sanitary items etc. in KWC area under GE (1) (R&D) Delhi'

(c) CA No. GE/R&D-85/03-04: Comprehensive Maintenance of 14 Passenger Lifts.

(d) CA No. GE/R&D-105/2003-04: The work 'Maint and Operation of Pump House, DG Set, Elect Sub Stn at CFEEs under GE (I) (R&D) Delhi'.

2. MES-263367 Sh. Abhay Manglik, EE by the above act has displayed lack of devotion to duty, thereby violating Rule 3 (1)(ii) of CCS (Conduct) Rules, 1964.”

4. The CO denied all the charges in his reply and a Departmental Enquiry ensued. In the Departmental Enquiry, the CO duly participated. The Enquiry

Officer (EO) gave his report dated 29.04.2009. On the basis of evidences led before him, the EO found the following charges proved against CO:-

"8.0 Findings

On the basis of the documentary evidences and presentation of the case by the PO and the CO before me, the following points are established in this inquiry:-

(a) The market rate analysis not found on records and no documentary proof produced by the CO in support of having it got prepared in respect of the following CAs:-

- (i) CA No. GE/R&D-36/03-04*
- (ii) CA No. GE/R&D-05/04-05*
- (iii) CA No. GE/R&D-95/03-04*
- (iv) CA No. GE/R&D-105/03-04 (market analysis found for few items only)*
- (v) CA No. GE/R&D-73/04-05*
- (vi) CA No. GE/R&D-85/03-04*
- (vii) CA No. GE/R&D-59/04-05*

(b) There has been inadequate competition in CA No. GE/R&D-95/2003-04 and CA No. GE/R&D-105/2003-04

(c) The acceptance of tender with reduction from the quoted amount/deletion of certain items from Sch 'A' in CA Nos. GE/R&D-36/03-04, GE/R&D-95/03-04, GE/R&D-105 and GE/R&D-59/04-05 is un-ethical and incorrect.

5. However, the EO found that the Department had failed to prove the flowing charges ---

“(d) No documentary evidence produced to prove that the assessed market rates in respect of TS pertaining to CA No. GE/R&D-95/03-04 are on the higher side.

(d) *No documentary evidence produced to establish that the rates accepted in CA No.GE/R&D-105/03-04 were on the higher side.*

(e) *No concrete evidence could be produced to establish that the non-issue of tender to M/s OTIS Elevator Co. in CA No.GE/R&D-85/2003-04 was wrong.*

6. *I*
The EO finally concluded as under:-

“9.0 Conclusion

On the basis of the documentary and oral evidence adduced in this case and in view of the reasons given above I hold that the charge of non-preparation of market rate analysis, acceptance of tenders with reduction from the quoted amount and deletion of certain items and inadequate competition in tendering are proved.”

7. On the basis of the Enquiry Report, the petitioner sought CVC advice. Vide OM dated 08.11.2010, CVC advised for the imposition of major penalty on the CO. The copy of the Enquiry Report and CVC advice was served upon the CO and his explanation was sought. Considering the Enquiry Report and the representation of the CO, the DA vide order dated 23.03.2011 imposed the penalty of *reduction to a lower stage in the scale of pay for a period of five years with further direction that the applicant shall not earn increments of pay during the period and on expiry of this period the reduction will not have the effect of postponing the future increments of pay.*

8. On dismissal of his Review/Revision application by the RA, the order of imposition of penalty was challenged by the CO in the Tribunal.

9. In its challenge before the Tribunal, the CO had alleged that he had not committed any illegality in accepting rates lower than L-1 when there was no rule prohibiting the same, and that the lowest tenderer had voluntarily granted the reduction in the tender prices; no evidence has been adduced during Departmental Enquiry against him to prove that he had entered into negotiation with L-1, and; that no act of misconduct can be imputed upon him because no loss had occurred to the Government. Rather, the Government has earned and saved the public exchequer on account of L-1 reducing tender amount and that the procedure which was brought into effect in the year January, 2007 could not have been followed in the year 2003 and 2004. He directed that the evidences brought on record by him show a number of cases within the same zone, wherein the other officers had accepted voluntary reduction by L-1 without any objection, and these cases were not taken into consideration by the DA and RA. His contention was that no action against those officers was either taken, or proposed, and he alone was singled out and thereby the settled principle of law of parity amongst the officers allegedly guilty of the same misconduct has been denied. Another contention of the CO

before the Tribunal was that there was non-application of mind by the concerned Authorities. While The EO in his report has held that the charges of non-preparation of market analysis, acceptance of tender with reduction of quoted amount and deletion of certain items and inadequate competition in tendering stands proved, the DA vide its order 23.03.2011 imposed the major penalty holding the applicant guilty of ***'committed irregularities in procurement of stores'*** although there was no such charge given to the CO either in show-cause notice or in memorandum of charges. The RA, however, vide its order dated 04.02.2013 found the charged officer on the same enquiry report guilty of ***'irregularities in administration and execution of contracts'*** with which charge he was never charged. Besides that, the CO had also taken the plea that it was imperative to consult the UPSC before imposition of the penalty. Another plea taken by the CO before the Tribunal was that one Shri Brahmanand, JSW (QS and C) also faced disciplinary action on similar charges. The CO submitted that Shri Brahmanand was the one who had advised the CO in processing the tender matter. The memorandum of charges against Shri Brahmanand contained two articles of charge, out of which one was identical to that of the CO. The disciplinary proceedings, however, were dropped against Shri Brahmanand.

10. In its order, the Tribunal has summarized the grounds on which the penalty order was challenged by the CO as under:-

“(1) Applicant had never negotiated with L-1 for reduction in the rate. The vendors had reduced their rates voluntarily.

(2) He had prepared the market analysis but the same was not found in record. He could not be held responsible for non-maintenance of records properly by the concerned office.

(3) A new charge of 'irregularity in procurement of stores' was added by the respondents after completion of enquiry.

(4) There was an inordinate delay of about five years in initiating the case and three years in processing and finalising the same.

(5) The charges referred to the CVC at the time of seeking first stage advice were changed by the respondents without the knowledge of CVC. The charge of 'irregularity in procurement of stores' was not intimated to the applicant even while sending the report of the IO.

(6) The DA has decided the punishment by considering violation of para 3.14.1.4 of Instruction of Contract Manual, 2007 which came in force w.e.f. January 2007 while the contracts mentioned in the charge memo were accepted during the year 2003-04. Therefore, the aforesaid Manual cannot be enforced retrospectively.

(7) The respondents have not listed any document or provisions in the rules existing in 2003-04 that debar the acceptance of lowest and reasonable tender by considering the voluntary reduction offered by the lowest tenderer.

(8) The respondents have ignored the fact that during the relevant period of acceptance there were other accepting officers under the jurisdiction of same technical authority, i.e. ADG (OF and DRDO) who accepted contracts after considering voluntary reduction under 482 contracts, some of whom have been mentioned in para 5 (G) of the OA. There are other senior officers who also accepted contracts after voluntary reduction prior to 2007. During the DE the applicant had given details of 720 contracts by various accepting officers with similar reduction.

(9) In the Presidential order the penalty has been imposed on account of 'irregularities in procurement of stores' but the charge memo was issued with alleged irregularities in acceptance of tenders in execution of work and not on procurement of stores.

(10) There is discrimination and vindictiveness on the part of the respondents because in a case of similar nature one Sh. Suresh Chander, Chief Engineer Pathankot Zone during the year 2006-09 committed misconduct of not preparing market rate analysis in 12 contracts, accepted voluntary reduction in two contracts, violated Government Instructions, and obtained reduction by indulging in negotiation with LI despite para 3.14.1.4 of Contract Manual-2007 being in force. However, only the penalty of displeasure was awarded to Sh. Suresh Chander.

(11) The respondents did not make any reference to the UPSC as mandated under the CCS (CCA) Rules. ”

11. The petitioners had challenged the contentions of the CO before the Tribunal. Their plea was that the enquiry was conducted as per rules and law and the CO was given full opportunity to defend the charges and there was no shortcoming in the procedure. In the absence of any violation of procedure of

conduct of enquiry or principle of natural justice, the Tribunal could not intervene into the findings of the DA since it does not sit as an Appellate Court over the orders of DA. It was further contended that the consultation with UPSC was not necessary in case of the CO. The petitioner had also relied before the Tribunal on the decision in the case of ***State of U.P. and Anr vs. Man Mohan Nath Sinha & Ors.*** (2009) 8 SCC 310.

12. On the basis of the pleadings of the parties, the Tribunal formulated the main grounds of challenge before it as under:-

“(i) There was delay in initiating departmental action against the alleged lapses on the part of the applicant which prejudiced his defence.

(ii) The respondents were required under the law to consult UPSC before imposing any penalty on the applicant.

(iii) There was no application of mind as could be seen from the different versions of charge mentioned in the Show Cause Notice, memorandum of charge and in the order of the DA.

(iv) There has been large number of similar cases in the department prior to 2007 but no action was taken against the concerned persons.

(v) Sh. Brahmanand, JSW (QS&C) was equally responsible for the aforesaid lapses but the case against him was dropped.

(vi) The sole basis of initiating disciplinary action is the alleged violation of para 3.14.1.4 of Manual of Contracts, 2007 but the same could not be applied to the transactions taken place in the year 2003-04.

(vii) The penalty imposed was disproportionate.”

13. As far as the Grounds of Challenge No.(i), (ii), (v) and (vi) are concerned, the findings of the Tribunal is in favour of the petitioners. The Tribunal, however, also held that the DA in its order dated 23.03.2011—imposing major penalty, does not comment at all on the contention of CO in his representation that the evidence produced by him were not considered during the enquiry, and neither DA nor RA gave any finding on these contentions of the CO and, thereby, they have not applied their mind in respect of all the contentions raised by the CO and there was non-application of mind before imposition of penalty. The Tribunal found substance in the contention of CO and held as under--.

“15. There is, also, substance in the allegation made by the applicant that there was no application of mind on the part of the respondents in dealing with his case. The Show Cause Notice dated 15.02.2007 refers to “irregularities in execution of the contracts” which pertained to accepting rates in 2003-04 higher than the ones in 2004-05. In the statement of articles of charge the irregularities have been expanded to “higher rates compared to CAs in the succeeding year, not preparing the market analysis and accepting reduction in CA amount by the contractor after the last date for receipt of the tenders.” In the order passed

by the DA it had been stated that President had come to the conclusion that applicant had committed “irregularities in the procurement of stores”. The Revisioning Authority after considering the Revision Petition modified the charge. The order notes that the no new material or evidence which could not be produced or were not available at the time of passing earlier order and which has the effect of changing the nature of the case, had been brought out by the charged officer in the Review application. But the authority on the basis of the same material decided to modify the charge itself from “EE has committed irregularities in procurement of stores” to “EE has committed irregularities in administration and execution of contracts mentioned in the charge”. It is apparent that the respondents have been changing their minds from the stage of Show Cause Notice to final order passed on the Revision petition. It is a clear case of non-application of the mind in considering the replies submitted by the applicant at the stages of the Show Cause Notice, the report of EO and Revision. The orders passed by the authorities create an impression as if the authorities are trying to fit the “charges” to the penalty already decided to be imposed on the applicant.

16. The applicant was confronted with a situation where he did not know the exact charge levelled against him. It was a clear denial of opportunity of defence and violation of the principles of natural justice. Besides the shifting stand of the respondents regarding the charge, in the articles of charge the words used are “irregularities such as”. This is again a vague phrase taking shelter of which some new allegations can always be added. This is another indicator of the vagueness of charge and non-application of mind by the DA.

17. In the case of **Than Singh vs. U.O.I. and Others**, W.P.(C) No. 3448/1998 decided on 19.09.2002, the Hon’ble Delhi High Court has held that:

“It is now a well-settled principle of law that validity of a charge-sheet can be questioned on a limited

ground. It is also well-settled that normally the court of the Tribunal does not interfere at the stage of show-cause. However, once the disciplinary proceedings are over, there does not exist any bar in the way of delinquent officer to raise all contentions including ones relating to invalidity of the charge-sheet. The grounds upon which the correctness otherwise of the charge-sheet can be questioned are:

- i. If it is not in conformity with law.*
- ii. If it discloses bias or pre-judgment of the guilt of the charged employee.*
- iii. There is non-application of mind in issuing the charge-sheet.*
- iv. If it does not disclose any misconduct.*
- v. If it is vague.*
- vi. If it is based on stale allegations.*
- vii. If it is issued mala fide”.*

The charges against the applicant in this case suffer from non-application of mind and vagueness.”

14. For these reasons, the Tribunal set aside the penalty orders of DA and RA.

15. In its challenge to the decision of the Tribunal, the petitioner has contended that the Tribunal has acted erroneously and dealt with the matter as if it were an Appellate Authority. It is submitted that there were enough evidence on record, and the Tribunal could not have considered the adequacy or reliability of the evidence, nor it could probe if the charges stood proved

beyond reasonable doubt, like in a criminal case. That the standard of proof in disciplinary cases is of preponderance of probabilities, and some evidence on record may be sufficient to prove the charges against the delinquent employee. Once the necessary procedure under the CCS (CCA) Rules is followed and the principles of natural justice are observed and the respondent is given due, proper and full opportunity to represent his case, the Tribunal has no jurisdiction to interfere with such an enquiry. It is submitted that there are sufficient evidences on record to show that the respondent had not prepared the rate analysis and that he had negotiated with the lowest tenderer and secured reduction in tender amount, and thus, violated the instructions in the Manual. This was a serious violation of the procedure. Besides this, the respondent had committed other irregularities in the execution of the contract, like acceptance of contracts at higher rate. It is further contended that the expression used by the DA ***“irregularities in procurement of stores”*** was modified and corrected in review order dated 04.02.2013 to ***“EE has committed irregularities in administration and execution of contracts mentioned in the charge”***. It is further contended that the RA has duly dealt with all the contentions of the CO. It is also contended that the findings of the Tribunal to the effect that the evidences produced by the CO during enquiry

were not considered and that the RA also did not touch upon the points raised by the CO, is erroneous. The finding of the Tribunal that there was no application of mind on the part of the petitioners in dealing with the matter is contrary to the record. The Tribunal has erroneously concluded that it is a case of non-application of mind by the petitioners, merely because of the use of different expressions to describe the misconduct of the respondent, from the stage of show-cause notice to final order passed in the revision/review petition. It is submitted that the charges were cogent, clear and not vague and were well understood by the respondent, that is why he could respond to each and every charge. The finding of the Tribunal that the charges were vague is not tenable in the eye of law. On these contentions, it is submitted that the impugned order is liable to be set aside.

16. We have heard the arguments and have perused the record, which includes the complete record of the proceedings before the Tribunal, including the documents.

17. It is argued by the learned counsel that the findings of the Tribunal that the DA and the RA have not applied its mind and have failed to consider the pleas of the CO, in his reply and the evidences of the CO in the enquiry is totally erroneous. It is argued that the order of the DA and that of RA shows

that all the contentions of the CO were duly considered and no grievance of the CO were left unattended.

18. From the pleas raised by the CO in his OA, it is apparent that one of the grounds on which the orders of DA and RA was challenged was that they had failed to account for his pleas in his representation on enquiry report and that they had also failed to consider the evidences produced by him in support of his defence in the enquiry proceedings.

19. From the impugned order, it is clear that the Tribunal has recorded the fact that the show-cause notice dated 15.02.2007 refers to ***“irregularities in execution of the contracts”*** pertaining to accepting rates in the year 2003-2004 higher than the ones in the year 2004-2005. These irregularities were expanded to ***“higher rates compared to CAs in the succeeding year, not preparing the market analysis and accepting reduction in the CA amount by the contractor after the last date for receipt of the tenders”***. The Tribunal further observed that although this was the charge mentioned in the show-cause notice, the DA on examining the report of the Enquiry Officer came to the conclusion that CO had committed ***“irregularities in the procurement of stores”*** while there was no such charge imputed upon CO. The RA on the review application modified the misconduct from ***“EE has committed***

irregularities in execution of contract" to *"EE has committed irregularities in administration and execution of contracts mentioned in the charge"* and concluded that the Department had been changing its mind from the stage of show-cause notice to the final order which gave the impression that the Authorities were adamant to penalize the CO. Learned counsel for the petitioners has not denied these facts, however, it is argued that the DA has committed the mistake inadvertently in its findings that the CO had committed *"irregularities in procurement of stores"* and this inadvertent mistake was corrected by the RA by holding the CO was guilty of committing *"irregularities in administration and execution of contract mentioned in the charge"* and that the reliance of the Tribunal on this inadvertent mistake was misplaced and improper. It is argued that charges cannot be considered to be vague for that reason alone and the charges are well understood by the CO and they were duly supported by the documents.

20. We are not convinced by the arguments of the learned counsel for the petitioners. It is apparent that the petitioners have issued a show-cause notice dated 15.02.2007 to the CO for the irregularities in execution of four contracts i.e., (i) CA No.GE/R&D-36/2003-04 (hereinafter referred to as "the CA No.36 of 2003-04") (ii) CA No.GE/R&D/85/2003-04 (hereinafter

referred to as “the CA No.85 of 2003-04”) (iii) CA No.GE/R&D-105/2003-04 (hereinafter referred to as “CA No.105 of 2003-04”) (iv) CA No.GE/R&D-40/2003-04 (hereinafter referred to as “the CA No.40 of 2003-04”). However, on perusal of the show-cause notice, it is apparent that while para No.1 speaks of CA No.36, 85, 105 and 40 of the year 2003-04, the para 2—besides details of CA No.36 and 40, and 105, also contains some details of CA No.95 while this CA number is missing from para 1 of the notice. Also, while para 1 contains CA No.85, details of this CA is missing in para 2. Also, in para 2 in clause (d), there is mention of award of work relating to street lighting.

21. The relevant show-cause notice is reproduced as under:-

“FAX No. 080: 23470381

*Chief Engineer (Air Force)
No.2, DC Area , MES Road
Yeswanthpura Post,
Bangalore-560 022*

126002/AF/AM/03/EID

15 Feb. 2007

MES-2633667

*Shri Abhay Manglik,
EE, GE (AF) Sulur,
(Through CWE (AF), Trivandrum)*

SHOW CAUSE NOTICE

1. While you were functioning as GE (I), R&D Delhi during the period from Apr 2003 to Dec. 2004, you had concluded contracts

bearing CA No. GE/R&D-36/2003-04, No. GE/R&D-85/2003-04, CA No. CE/R&D-105/2003-04, and CA No. GE/R&D-40/2003-04.

2. The following irregularities have come to notice in execution of the above mention contracts:-

(a) The rates accepted in CA No. GE/R&D/36/2003-04 are higher compared to similar work under CA No. GE/R&D-05/2004-05. The total amount of CA No. GE/R&D-05/2004-05 is Rs. 2,36,350/- which works out to about 58.24% minus as compared to the Market Rate amounting to Rs.5,66,008.25, whereas in CA No. GE/R&D/36/2003-04 the amount of CA works out to Rs. 3,79,000/- which works out to 27.94% minus as compared to the Market Rate amounting Rs. 5,25,034/-

(b) The rates accepted in CA No. GE/R&D-95/2003-04 and GE/R&D/105/2003-04 are substantially higher than corresponding similar contracts awarded during 2004-05. The tender has been accepted for Rs.5,10,400/- during 2003-04, whereas the amount is Rs.3,25,975 during 2004-05. CA No. GE/R&D/105/2003-04 was accepted for Rs.10,59,929.70, whereas the CA amount is Rs.2,82,225/- for CA No. GE/R&D-73/2004-05.

(c) GI Pipe, 150 mm dia, qty. 350 RM has been incorporated in CA No. GE/R&D-40/2003-04 at the quoted rate of Rs.970/- per RM, whereas the item was on DGS&D rate contract, which works out to Rs. 640/- per RM (approx.). This is in violation of E-in-C's Branch policy letter No.19280/E8 dated 23 May 1973 and 19280/E8 dated 13 May 1974.

(d) Work pertaining to street lighting has been executed as contractor's supply in CA No. GE/R&D-03/04-05 against instructions in vogue."

3. You are hereby called upon to Show Cause within 10 days of receipt of the notice as to why disciplinary action should not be taken against you for the above mentioned irregularities. In case no reply is received within stipulated date, it shall be presumed that

you have nothing to say in your defence and appropriate action as deemed fit and necessary under the rules will be taken.

4. *Please acknowledge receipt.*

*(Surinder Sharma)
Brig.
Chief Engineer(AF) ”*

22. This show-cause notice was issued on the basis of complaint dated 04.02.2005. Advice was sought from CVC, which proposed for initiation of major penalty proceedings. Thereafter, vide memorandum dated 25.04.2008, the Article of Charge along with Statement of Imputation of Misconduct or Misbehavior in support of the Articles of Charge was given to the CO. There is marked difference between the misconduct imputed vide show-cause notice dated 15.02.2007, and the Article of Charge issued vide memorandum of charges dated 25.04.2008.

23. While the show-cause notice dated 15.02.2007 enumerates the irregularities in respect of the CA numbers enumerated therein in the preceding paragraphs, and for which the CO was called upon to file his reply within 10 days, the memorandum dated 25.04.2008 containing Article of Charges shows that it relates to CA Nos.36, 95, 85 and 105 of the years 2003 and 2004. While in the show-cause notice, no details of the irregularities in respect of CA No.85 of the year 2003 and 2004 was given, the Article of

Charge contain the details of the irregularity in respect of CA No.85 of the year 2003-2004. In the show-cause notice dated 15.02.2007, no details relating to irregularities committed in respect of **‘Maintenance of 14 Passenger Lifts’** was given, yet in the Articles of Charge, the CO was charged for this irregularity. Similarly, while para 3 of show-cause notice shows that the said notice relates to the above-mentioned irregularities for which the explanation of the CO was sought, the Article of Charge (para 2) contains an additional charge of **"displayed lack of devotion to duty"**. Also, as per the Article of Charge, the CO was charged for **"displayed lack of devotion to duty"** on account of the irregularities allegedly committed by him in the captioned tenders, however, from the order of DA, it is apparent that the DA held the CO guilty of **"irregularities in procurement of stores"**. As admitted by the petitioner subsequently, it was corrected by the RA and the RA held the CO guilty of **"irregularities in administration and execution of contracts"**. There is no finding either of DA or of RA that the CO had **"displayed lack of devotion to duty"** for which he was charged vide memo of charge dated 25.04.2008.

24. In the light of these facts, it is apparent that the petitioners have been modifying the charges from the stage of show-cause notice till the decision of

the RA, and the Tribunal has rightly concluded that this gives an impression *“as if the Authorities are trying to fit the “charges” to the penalty already decided to be imposed on the applicant”*. The ever changing imputation of charges certainly created confusion in the mind of the CO as to the certainty of the charges for which he was held guilty whether it was for the *"lack of devotion to duty"* for which he was charged, or for *"irregularities in procurement of stores"*, or for *“irregularities in administration and execution of the contract mentioned in the charge”*. In view of this, the Tribunal has rightly, relying on principles laid down by this Court in the case of *Than Singh vs. U.O.I. and Others*, W.P.(C) No. 3448/1998, decided on 19.09.2002, concluded that the findings on the charges suffered with non-application of mind and vagueness. We are in complete agreement with the findings of the Tribunal.

25. From the perusal of the order dated 23.03.2011 of the DA and the RA dated 04.02.2013, it is also clear that the representation of the CO dated 28.12.2010 submitted in response to the Enquiry Report was not considered and discussed. No heed was paid to his contentions and there was no discussion on the facts which he brought on record in the enquiry proceedings. His plea has always been that there were numerous cases

wherein several officers had acted in the similar manner in which he had acted, i.e., accepted the voluntary reduction of tender amount by the L-1, and no action was either taken or proposed against any of them while he has been singled out. There is no discussion on this plea of the CO and it was just brushed under the carpet. Also, at this stage the learned counsel for the petitioner has failed to point out any evidence which could show by preponderance that it was the CO who had negotiated with the L-1 tenderers for reduction in the tender price and it was not voluntary on the part of L-1 tenderers. For proving the irregularity in respect of CA No.95 of the year 2003-2004 and 105 of the year 2003 and 2004, the petitioners had compared the tender prices of the subsequent years to show that there was an irregularity and the tenders were accepted at higher price. In this regard, even the Enquiry Officer has held that the petitioners have failed to produce any documentary evidence to show that the rates accepted in respect of CA No.95 of the year 2003-2004 and CA No.105 of the year 2003-2004 were on higher side. As regards the charge relating to non-issuance of tender to M/s Otis Elevator Co., the Enquiry Officer held that no evidence was produced by the petitioner to prove that such a non-issue was wrong. This finding was given by the Enquiry officer because the petitioners had failed to produce any

evidence to show that the market rate was higher than the rate of the tender on which it was accepted by the CO. As per the rules, the prices quoted by the L-1 are supposed to be accepted and there is no allegation or imputation that the CO had not accepted in all these tenders, the tender price submitted by L-1. If at all, the petitioners wanted to prove the irregularities committed by the CO in respect of the tender charges being on the higher side, it needed to compare it with the tender prices of the previous years because those were available and supposed to be in the knowledge of the concerned officer. Even the Enquiry Officer in his report in para 7.3.7 has held that ***"the comparison of tenders received in the past with the ones received subsequently later is not justified. Market analysis can always be prepared for the past period also which only can decide whether the tender accepted was reasonable or not."***

26. The Tribunal has reached to the conclusion that the petitioners had proceeded with a pre-determined mind. We find no illegality in such a conclusion.

27. It is further argued by learned counsel for the petitioners that the Enquiry Officer has given a clear finding that the CO has failed to produce documentary proof that it had conducted market rate analysis before giving out the tender and there is a clear finding of the EO to this effect. It is argued

that the market rate analysis was not found on record and it was the duty of the CO to produce it on record. It is noteworthy that the CO had taken the plea that these documents had always been in possession of the Department and, therefore, he could not have produced it. Although the Enquiry Officer has opined that the CO had failed to produce the documentary evidence of preparation of market rate analysis, but it has also opined in para 7.3.7 that ***"Mere unavailability of market analysis does not become the basis for treating the lowest tender as unreasonable. The non-availability/non-preparation of market rate analysis and not keeping the same on record amounts to procedural lapses."***

28. The plea of the CO that he had prepared the market analysis and the record remained in possession of the Department finds support from Article-I(a)(i) of Statement of Imputation of Misconduct or Misbehaviour accompanying the Statement of Article of Charge dated 25.04.2008 which notes that ***"the market analysis, though mentioned to have been forming part of the noting sheet, has not been prepared and not found on record."***

29. The report of Enquiry Officer also states that notes of market analysis was found of some articles also renders support to the respondent plea that he had prepared the market analysis report. It is noteworthy that plea of the CO

that all these documents were in possession of the Department was neither paid heed by the DA, nor by RA, and there is no discussion on this point in their orders. Therefore, it cannot be said that there was sufficient evidence on record to conclude that it was the delinquent who had not intentionally done the market analysis before accepting the tenders, especially when the petitioners had not produced any evidence that the CO had accepted the tenders on a rate higher than the market rate and did not themselves submit market analysis of the relevant years before the Enquiry Officer.

30. The other leg of the argument of the petitioner is that the Tribunal cannot re-assess and re-appreciate the evidences on record and reach its decision as it does not sit as a Court of Appeal and has relied on the findings of the Supreme Court in the case of ***State of Uttar Pradesh vs. Man Mohan Nath Sinha and Anr.*** (2009) 8 SCC 310. In this case, the Court has discussed the power of the Tribunal. The relevant para is reproduced as under:-

"15. The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision-making process. The Court does not sit in judgment on merits of the decision. It is not open to the High Court to re-appreciate and reappraise the evidence led before the Inquiry Officer and examine the findings recorded by the Inquiry Officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it

was a court of appeal. The approach of the High Court in consideration of the matter suffers from manifest error and, in our thoughtful consideration, the matter requires fresh consideration by the High Court in accordance with law. On this short ground, we send the matter back to the High Court."

31. There is no dispute to the principle of law that the Tribunal does not sit in appellate jurisdiction and cannot re-assess or re-appreciate the evidences and cannot substitute his own findings to that of the DA or the RA.

32. This argument has no force in it. The impugned order itself shows that the Tribunal has found the charges to be vague and that there was no application of mind while issuing the charges and, subsequently holding the CO guilty. It has found that the petitioners had acted with dishonest intentions and pre-determined mind to penalize the CO and also failed to consider the defence/pleas of the delinquent/CO. This shows that the Tribunal has not acted in appellate capacity and re-appreciated the evidences. Rather, it found the charges itself being vague and quashed/set aside the same relying on the order of this Court in the case of ***Than Singh*** (*supra*).

33. From the discussions above, it is apparent that the impugned order does not suffer with any illegality or perversity. The present writ petition is devoid of any merit and the same is dismissed along with all the pending applications, leaving the parties to bear their respective costs. We make it

clear that this order has been passed in the facts of this case, and it may not be treated as a precedent for any proposition in any other case.

**DEEPA SHARMA
(JUDGE)**

**VIPIN SANGHI
(JUDGE)**

**MAY 23, 2017
BG**