

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

+ **WRIT PETITION (CIVIL) No. 11059/2015**

% **Reserved on:** 20th March, 2017
Date of Decision : 31st July, 2017

UNION OF INDIAPetitioner
Through Mr. Ruchir Mishra, Advocate.

Versus

A.C. MATHUR ...Respondent
Through Ms. Rekha Palli, Sr. Advocate with Mr.
Ashish Nischal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The impugned order dated 7th July, 2015 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi (Tribunal, for short) allows O.A.No.3591/2013 and quashes the Memorandum dated 8th November, 2012 initiating disciplinary proceedings for imposition of minor penalty against A.C. Mathur, the respondent, under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (Rules, for short).

2. In short, the Tribunal has held that the respondent was earlier given a recordable warning for the same charge and, therefore, it is impermissible for the petitioners to initiate proceedings against him for minor penalty.

3. The contention of the petitioners is that the memorandum of recordable warning dated 20th July, 2009 is not a “punishment” as per Rule 11 of the aforesaid Rules and hence, the petitioners under the law are entitled to initiate proceedings for minor penalty against the respondent on the same charges.

4. To decide the said controversy, we would first record in brief the relevant facts. The respondent was sent on deputation to the National Highways Authority of India (NHAI) as Deputy General Manager (Technical) and Project Director. He was issued memorandum of recordable warning dated 20th July, 2009 on account of irregularities mentioned therein. The memorandum dated 20th July, 2009 reads as under:-

“Dated the 20th July, 2009

MEMORANDUM

WHEREAS Shri A. C. Mathur, DGM (Tech) & project Director, PIU-Moradabad while working in the aforesaid capacity in National Highways Authority of India on deputation was liable to abide by NHAI (Conduct, Discipline and Appeal) regulations 1997 further orders in discharge of his duties and confirm his conduct appropriately by virtue of regulation No. 4 read with rule 20 & 21 of CCS (CCA) Rules, 1965. The regulation No. 6 of said Regulations stipulates that every officer or employee shall serve the Authority honestly and faithfully, use his utmost endeavour to promote the interests of the Authority and shall show courtesy and attention in all transaction and dealings between the authority and any other body or authority.

AND WHEREAS while working in the aforesaid capacity; a decision was taken in the 42nd meeting of SPV Board (BOD) of Moradabad Toll Road Co. Ltd., held on 28.03.2008 at NHAI

Hqrs., to process the replacement of the present DGR sponsored agency for toll collection work at Moradabad bypass toll plaza on NH-24. Thereafter, the said officer called the fresh names of ex-servicemen from DGR vide letter dated 29.03.2008.

AND WHEREAS DGR vide letter dated 8.4.2008 forwarded the following six names of ex-service men :

- (i) Col. Videsh Kumar (Retd.)
- (ii) Col. Ram Jiwan Singh (Retd.,)
- (iii) Major RSS Kushwaha (Retd.)
- (iv) Col. S.R. Mehta (Retd.,)
- (v) Col. R.S. Vasudev (Retd.,)
- (vi) Col. Shyam Sunder Sharma (Retd.)

AND WHEREAS the said officer vide letter dated 22.05.2008, addressed to Lt. Col. J. Akhtar, GM(PC-II) NHAI, stated that the ibid letter of DGR dated 08.04.2008 sponsoring the names of ex-servicemen was received only on 21.04.2008 in PIU, Moradabad but later on, vide his statement recorded by vigilance team on 24.07.2008, he stated that the ibid letter was received on 19.04.2008 and put up to him on 21.04.2008. It is also observed from the copy of the envelope that it bears the stamp dated 16.04.2008 of Moradabad post office. Apart from that, this letter of DGR is also not diarized in PIU, Moradabad office as evident from the entries in the diary register. Further, the said officer stated that this letter was kept in confidential file and action was taken by him to send the call letters to the ex-servicemen.

AND WHEREAS the said officer vide letter dated 23.04.2008 informed all six ex-servicemen for submission of bids/documents and interview to be conducted on 28.04.2008 at 2.00 PM onwards. These letters were sent through courier agency viz. Blaze-flash Couriers Ltd., on 23.04.2008. Thereafter, the said officer vide letter dated 25.04.2008 constituted a committee consisting of himself and other three officers.

AND WHEREAS it was observed from the said letter dated 23.04.2008 issued to ex-servicemen, the ex-servicemen were to appear for personal interview on 28.04.2008 at 2.00 PM in PIU Office, along with original documents and it was also incumbent

upon them to submit the copies of documents up to 11.AM on 28.04.2008 for scrutiny and examination. Apart from that, an undertaking and affidavit on non judicial stamp paper duly notarized was also one of the conditions to be fulfilled by the ex-servicemen before the interview. The six receipts in original for sending the letter dated 23.04.2008 through courier were available in the records but only four original proof of delivery were available. The said officer did not make available the proof of delivery in respect of Retd. Col. Ram Jiwan Singh and Retd. Col. R. S. Vasudev during vigilance investigation. Both these ex-servicemen appeared in the interview held on 28.04.2008 and Col. R. S. Vasudev was recommended for award of toll collection. Due to non-availability, of proof of delivery of letters in respect of these two ex-servicemen, it is not comprehensible how these two ex-servicemen were informed about the interview and other formalities particularly when these ex-servicemen had also appeared in the interview. It was also observed that the said officer had scheduled the interview on 28.04.2008 and conducted the same but before convening of this interview, the proof of delivery were not available with the PIU headed by the said officer to indicate whether the ibid letter dated 23.04.2008 had been duly received by all the ex-servicemen or not. The proof of delivery in respect of Retd. Major Kushwaha bears the remarks "shifted, R.T.O., Sd/01.05". It indicates that the said letter was sought to be delivered on 01.05.2008 i.e. after the date of interview. Also, proof of delivery in respect of Retd. Col. S. R. Mehta (bid not submitted) does not indicate when the letter was delivered. Before conducting the interview, the said officer neither tried to ascertain whether the letter dated 23.04.2008 was received by all the ex-servicemen or not nor he informed other members of the committee in this regard. Apart from this, it was observed that the letter dated 23.04.2008 (Wednesday) was dispatched through courier to ex-servicemen for submission of documents and appearance for interview on 28.04.2008(Monday). The reasonability of the time gap between the date of dispatch of the letter and date of interview was examined in the light of relevant material and statement of members of the committee recorded during vigilance investigation and it was deduced that :

- (a) The said officer stated that normal delivery time through courier was 24 hrs to 48 hrs.
- (b) The said officer was specifically asked to explain the reasonability of this time gap since effectively only two days (25.04.2008-26.04.2008) time was available with the ex-servicemen for arrangements of documents and preparation/appearance for interview. Since the letter would have been received earliest by 24.04.2008 and 27.04.2008 was Sunday, ample of time was not given deliberately due to ulterior motives. The said officer stated that the ex-servicemen would have been already aware, since the letter of DGR dated 8.4.2008 was also dispatched to them but he could not explain when he had purportedly received the said letter dated 08.04.2008 on 21.04.2008 then how he was sure that this letter had already been received by the ex-servicemen. He also could not explain as to the requirements to be fulfilled by the ex-servicemen as were asked in this regard vide his letter dated 23.04.2008 whereas the DGR letter dated 8.4.2008 did not sought compliance of such requirements.
- (c) The said officer further stated that 2 to 3 days time was sufficient as documents called from ex-servicemen were supposed to be in personal possession of them. However, he could not satisfactorily explained that vide his letter dated 23.04.2008, the ex-servicemen were to furnish one undertaking and one affidavit on non-judicial stamp paper duly notarized and those documents were not supposed to be in the personal possession of them.

AND WHEREAS the bids of ex-servicemen and documents were to be submitted by 11.00 AM on 28.04.2008 for examination and scrutiny before the interview which was scheduled for 2.00 P.M on same day but the bids of 3 ex-servicemen were opened during their interview only. During the interview conducted on 28.04.2008, only three ex-servicemen namely (i) Col. Videsh Kumar (retd.) (ii) Col. Ram Jiwan Singh (retd.) and (iii) Col. R. S. Vasudev (retd.) appeared in person and one ex-serviceman, Col. Shyam Sunder Sharma submitted his papers in a sealed envelope through messenger and did not turn up for the personal interview. The Committee

recommended the name of Col. R. S. Vasudev (retd.) for his deployment in connection with collection of toll on Moradabad By-Pass at NH-24. The bid submitted by retd. Col. Shaym Sunder Sharma was not opened and the said officer in his statement had stated that bid was submitted by the messenger and the messenger had stated that Col. Sharma will not appear for interview. However, no such fact was recorded by the Committee in its minutes. Sh. K. P. Singh, one of the members of the Committee, stated that he was not aware of this unopened bid and committee did not deliberate about receiving of said bid as Project Director had not informed about this unopened bid. He further stated that he reached PIU Office at about 12.30 hrs and the interview meeting started at about 16.00 hrs. Therefore, it is evident that although the interview was scheduled for 2.00 P.M. but it started at about 4.00 P.M. and bid documents were not scrutinized and examined before the interview.

AND WHEREAS, it is evident that award of toll collection to DGR sponsored agency at Moradabad by-pass was processed in undue haste resulting into number of lapses particularly curtailing into undue gain to Col. R. S. Vasudev who was finally selected in the reduced competition and some potential bidders were kept out against the interest of the Authority. Not only that, the said circumstances suggest that the said officer had awarded the work of toll collection to Col. R. S. Vasudev in premeditated manner with malafide intention.

AND WHEREAS, the competent authority has decided to issue recordable warning to the said officer for committing the said irregularities.

Receipt of this memorandum shall be acknowledged by Sh. A. C. Mathur, EE(C), Deptt. Of Posts.

(Gervasis Kulampallil)
Under Secretary (CWG)''

5. The respondent made a representation dated 30th September, 2009 against the recordable warning, which is still pending and has not been disposed of.

6. The petitioners vide memorandum dated 8th November, 2012 issued show cause notice under Rule 16 of the Rules for imposition of minor penalty enclosing therewith statement of imputation of misconduct. The said statement reads as under:-

“Statement of Imputations of misconduct or misbehaviour on which action is proposed to be taken against of Shri Atulesh Chandra Mathur, the then Deputy General Manager, (Tech.)/PD, National Highways Authority of India (NHAI), presently, EE (Civil), Postal Division, Bhopal.

Shri Atulesh Chandra Mathur, DGM (Tech.) and project Director, PIU- Moradabad while working as such in National Highways Authority of India (NHAI) on deputation from Department of Telecommunication, Government of India, was liable to abide by NHAI (Conduct, Discipline and Appeal), Regulations 1997 in discharge of his duties and confirm his conduct appropriately by virtue of Regulation no. 4 read with Rule 20 & 21 of CCS (CCA) Rules 1965. The Regulation No.6 of the said Regulations stipulates that every officer or employee shall serve the Authority honestly and faithfully, use his utmost endeavours to promote the interests of the Authority and shall show courtesy and attention in all transactions and dealings between the Authority and any other body or Authority.

2. That during the tenure of Shri A.C. Mathur, DGM(T) while working as project Director , Project Implementation Unit- Moradabad, a decision was taken in the 42nd meeting of SPV Board (BOD) of Moradabad Toll Road Co.ltd., held on 28/03/2008 at NHAI, HQ to process the proposal for replacement of the present /then DGR sponsored agency for toll collection work at Moradabad By-pass Toll plaza on NH-24. Thereafter, the said Shri Mathur called the fresh names of Ex-servicemen agencies from DGR vide PIU – Moradabad’s letter dated 29/03/2008.

3. Directorate General of Re-settlement (DGR) vide letter no. 1786/DGR/Self-Emp/Govt-NHAI/MBD/NH-24 dated 08/04/2008 forwarded/sponsored the following six names of Ex-servicemen (Officers) for the purpose:

- (a) Col. Videsh Kumar (Retd.)
- (b) Col. Ram Jiwan Singh (Retd.)
- (c) Major RSS Kushwaha (Retd.)
- (d) Col. S.R. Mehta (Retd.)
- (e) Col. R.S. Vasudev (Retd.)
- (f) Col. Shyam Sunder Sharma (Retd.)

4. Although, Shri Mathur vide his letter No. 21011/1/2006/PIU-MBD/4899 dated 22/05/2008 addressed to Lt. Col.J. Akhtar, General Manager (PC-II)-NHAI, stated that the aforesaid letter of DGR dated 08/04/2008 sponsoring the names of six agencies was received only on 21/04/2008 in PIU Moradabad but later on, vide his statement recorded by the Vigilance team consisting of Shri Sunil Jindal, DGM (Vigilance) and Shri Rajesh Suri, Manager (Vigilance) on 24/07/2008, Shri Mathur stated that the DGR's letter of 08.04.2008 was actually received on 19/04/2008, and put up to him on 21/04/2008. It was also revealed from the copy of the envelope that it had the stamp dated 16/04/2008 of Moradabad post office. Apart from that, this letter of DGR was also not diarized in PIU, Moradabad office as evident from the entries in the diary register. Further, Shri Mathur states that this letter was kept in confidential file and action was taken by him to send the call letters to the DGR sponsored agencies.

5. Shri Mathur vide PIU letter no. 21011/1/2006/PIU-MBD/35-C to 40 C dated 23/04/2008 informed all six ex-servicemen officers (Agencies) for submission of bids/documents and called them for interview to be conducted on 28/04/2008 at 2.00 P.M. onwards. These call letters were sent through courier agency Blazeflash Couriers Limited on 23/04/2008.

6. Thereafter, the said Shri Mathur constituted a committee of following officers vide PIU letter dated 25/04/2008 for conducting interviews:-

- (a) Shri R.K. Chalwa, P.D. CMU-Mathura (now, PIU-Sarita Vihar)
- (b) Shri R. Venkateshwarju, Manager NHAI HQ(now PIU-Ananthpur)
- (c) Shri K.P. Singh, Accounts officer, NHAI, HQ
- (d) Shri A.C. Mathur, P.D. PIU, Moradabad

7. It was observed from the above-referred call letters, dated 23/04/2008 issued by the said Shri Mathur to ESMs agencies sponsored by DGR, that these ESMs were to appear for personal interview on 28/04/2008 at 2.00 PM in PIU office along with original documents and it was also incumbent upon the agencies to submit the copies of documents up to 11 A.M. on 28/04/2008 for scrutiny and examination. Apart from the above, an undertaking along with an affidavit duly notarized was also one of the conditions which was required to be fulfilled by these ESMs agencies before the interview. The six receipts, in original for sending these call letters dated 23/04/2008 through courier are available in the records. But only four original Proof of Delivery (PODs) are available. The said Shri Mathur could not make available/produce the PODs in respect of two agencies viz. Retd. Col Ram Jiwan Singh and Retd. Col. R.S. Vasudev during vigilance investigation. Both these ESMs agencies appeared in the interview held on 28/04/2008 and Col. R.S. Vasudev (Retd)'s agency was recommended for award of toll collection. Due to non availability of PODs in respect of these two ESMs agencies, it is not comprehensible as to how these two ESMs agencies came to know about the date of interview and other formalities and appeared for the interview.

8. It was also observed that the said Shri Mathur had scheduled the interview on 28/04/2008 and conducted the said interview but before convening of this interview failed/overlooked the facts that the PODs were not available with the PIU headed by said Shri Mathur to indicate as to whether the call letters dated

23/04/2008 had been duly served on/received by all the ESMs agencies or not. The POD in respect of the Retd. Major Kushwaha's agency had the remarks 'Shifted, TRO, sd/01.05". It indicates that the said letter was sought to be delivered 01/05/2008 i.e. after the date of interview held on 28.04.2008. Also the POD in respect of Retd. Col. S.R. Mehta's agency (Bid not submitted) had no indication as to when the letter was delivered. Before conducting the interview, Shri Mathur, Project Director, PIU Moradabad neither tried to ascertain whether the letters dated 23/04/2008 were received by all the ESMs agencies or not nor he informed the other members of the Committee in this regard.

9. Apart from above, it is also observed that letters dated 23/04/2008 (Wednesday) were dispatched through courier to ESMs agencies for submission of documents and appearance for interview on 28/04/2008 (Monday). The reasonability of the time gap between the date of dispatch of these letters and date of interview was examined in the light of relevant material and statement of members of the committee recorded during vigilance investigation and it is deduced that:-

(a) Shri Mathur stated that normal delivery time through courier is 24 hrs to 48 hrs.

(b) Shri Mathur was specifically asked to explain the reasonability of this time gap since effectively only two days (25/04/2008-26/04/2008) time was available with the ESMs agencies for arrangement of documents and preparation/appearance for interview. Since the call letters would have been delivered/received earliest by 24/04/2008 and 27/04/2008 being Sunday ample time was not given deliberately due to ulterior motive. In reply Shri Mathur clarified/stated that the ESMs agencies would have already been aware of the matter, since the letter of DGR dated 08/04/2008 was also dispatched to them. But Shri Mathur could not explain when he purportedly had received the said letter dated 08/04/2008 on 21/04/2008 then how he can be sure that this letter had already been received by ESMs agencies. He also failed to explain as to why the requirements to be fulfilled by the ESMs agencies were desired

vide his letter dated 23/04/2008, whereas, the DGR did not specify compliance of such requirements.

(c) Shri Mathur further contended/stated that 2 to 3 days time was sufficient as documents called from ESMs agencies were supposed to be in their personal possession. However, Shri Mathur failed to explain satisfactorily as to how the requirements of furnishing one undertaking and one affidavit on non-judicial stamp paper duly notarized could be in the personal possession of ESMs agencies.

10. That although, the bid of ESMs agencies and documents were to be submitted by 11.00 AM on 28/04.2008 for examination and scrutiny before the interview which was scheduled for 2.00 PM on same day but the bids of 3 ESMs agencies were opened during their interview only. During the interview conducted on 28/04/2008 only three ex-servicemen officers namely (a) Col. Videsh Kumar (Retd.) (b) Col. Ram Jiwan Singh (Retd.) (c) Col.R.S. Vasudev (Retd.) appeared in person and one ex-serviceman officer namely Col. Shyam Sunder Sharma submitted his bid/papers in a sealed envelope through messenger and did not turn up for the personal interview. The Committee recommended the name of Col. R.S. Vasudev (reted.) for his deployment in connection with collection of toll on Moradabad By-Pass at NH-24. The bid submitted by Retd. Col. Shyam Sunder Sharma was not opened and the said Shri Mathur in his statement recorded during vigilance investigation stated that bid was submitted through the messenger and the messenger had intimated that Col. Sharma will not appear for interview. However, no such fact was recorded by the Committee in its minutes. Shri K.P. Singh one of the member of the Committee asserted that he was not aware of this unopened bid and Committee did not deliberate about it. The interview meeting was scheduled for 2.00 P.M. but it started at bout(sic) 1600 hrs. And it was evident that the bid documents were not scrutinized and examined before the interview.

11. In view of the aforesaid, it is evident that award of toll collection to DGR sponsored agency at Moradabad bypass was

processed with undue haste resulting into number of lapses committed by Shri A.C. Mathur particularly curtailing the competition to barest minimum. The act on the part of the said Shri A.C. Mathur resulted into undue pecuniary gain to Col. R.S. Vasudev's agency who was finally selected in the reduced competition and some potential bidders were kept out of bay forsaking the interest of the Authority. The above described circumstances vouch/suggest that the said Shri A.C. Mathur awarded the work of toll collection to Col. R. S. Vasudev's agencies in premeditated manner with malafide intention by adopting a non-transparent method.

Thus, it is evident by the above mentioned facts that the said Shri A. C. Mathur committed grave misconduct failed to maintain absolute integrity and devotion to duty, and thus acted in a manner which is unbecoming of an Government servant thereby contravened/violated Regulation No. 4 &6 of NHA (CDA) Regulations, 1997 and also contravened the provisions of Rule 3(1)(i), (ii) and (iii) of the CCS (Conduct) Rules, 1965".

A reading of the two memoranda would indicate similarities, the allegations contained in both are identical. On the same gravamen and facts, earlier the petitioner was awarded and given recordable warning vide order dated 20th July, 2009 and now after a gap of three years vide Memorandum dated 8th November, 2012 the petitioners have initiated proceedings for minor penalty for which recordable warning had been administered.

7. We would agree with the counsel for the petitioners that the question of double jeopardy may not strictly arise for the matter is of civil nature (see *Union of India and Another versus Purushottam* (2015) 3 SCC 779). However, this alone cannot be and would not be the reason to accept the plea of the petitioners. Indeed, we find there are good reasons why the present writ petition should be examined and decided substantially

upholding the final outcome, while leaving it open to the petitioner to invoke Rule 29-A of the Rules, if permissible. We would first refer to the legal position, notwithstanding our conclusion that principle of double jeopardy, is not literally applicable.

8. Recordable warning, we would also accept, is not a minor punishment under the Rules. The distinction between "recordable warning" and "censure" has been aptly explained in ***Dr. Gopal Bhagat versus Municipal Corporation of Delhi and Others***, (1995) III AD (Delhi) 894 in the following words:-

“14. Censure and warning may appear to be something similar in as much as the object behind both is to reprimand an erring employee. However the two have distinct connotation and perception in service jurisprudence. The penalty of censure punishes an employee for something done in the past, alleged and found proved in a process in which employee has a right to participate. Warning does not punish an employee: it puts an employee on its guard for future and is issued on facts enabling formation satisfactorily of a bonafide opinion, though such facts may be found in a process in which the employee did not have the opportunity (much less a right) of participation. Penalty is for the past: warning is for the future. Penalty proceeds on a decision: warning wishes - let there be no occasion for a decision.

15. Thus a warning is not necessarily a penalty of Censure. Warning may be oral or in writing. If it is oral, it remains a matter between the officer issuing the warning and the employee receiving it. All its efficacy is lost no sooner one of them is transferred or shifted so as to snap the proximity of relationship between the two.

16. If the warning is in writing or a recordable warning, it is in its legal implication akin to an adverse entry in the

confidential records of the employee. Though the employee was not intended to be penalised yet being a recordable warning it goes in the personal record of the employee and becomes relevant for the purpose of assessing the overall performance of the employee. A recordable warning shall, therefore, have to be dealt with on lines similar to ACRs. Though no opportunity of hearing or a notice to show cause against need precede the issuance of a warning yet the employee must have an opportunity of making a representation against and such a representation if made shall have to be considered and disposed of by the authority issuing the warning or its superior authority. This alone will be consistent with the principles of natural justice and fair play.

17. To our mind, comparatively placed the distinction between censure and warning can be brought out as under:-

<u>CENSURE</u>	<u>WARNING</u>
(i) is a penalty	(i) is not a penalty; merely conveys displeasure or disapproval of an authority.
(ii) must be preceded by an opportunity of showing cause against.	(ii) need not be preceded by an opportunity of hearing or showing cause against.
(iii) Order is final in so far as the authority passing the same is concerned.	(iii) is available for reconsideration by the same authority on post-decisional hearing.
(iv) is a pronouncement of opinion followed by a penalty on past (mis)conduct.	(iv) is a warning for future fore-telling an invitation to penalty, if such or similar action or conduct (though not held to be misconduct at present) was repeated.

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This judgment clarifies that a warning is not a punishment, but recordable warning when in writing has implications and goes in the personal record of the employee. It becomes relevant for the purpose of assessing his overall performance.

9. There is an earlier judgment of Delhi High Court in ***Nadhan Singh versus Union of India***, (1968) Lab. I.C. 1364 which had drawn similarities between recordable warning and censure in the factual matrix of the said case. This decision was distinguished in ***Dr. Gopal Bhagat*** (supra) for the following reasons:-

“**19.1** The memorandum issued by the Authority stated that the employee was guilty of misconduct and that the copy of the memorandum should be placed in his character roll. The learned Judge held that notwithstanding the word ‘Warning’ used in the memorandum it really imposed a penalty of censure on the employee which could not have been done except by following the rules for imposing a minor penalty.

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19.3 The decision of Shri Nadhan Singh’s case is clearly distinguishable and does not apply to the case at hand.”

10. Thus, in some cases, recordable warning can be more or less in the nature of holding an employee guilty of misconduct or wrong doing. In the context of the present case, when we read the memorandum imposing recordable warning, the same not only refers to the factual assertions, but states that the officer, i.e., the respondent had processed the case for allotment of award of toll collection at Moradabad bypass in undue haste resulting in number of lapses, which had caused undue gain to one party,

who was selected in reduced competition and some potential bidders were kept out. It holds that the officer i.e. the respondent had committed irregularities.

11. It would be apposite to refer another Division Bench judgment of the Delhi High Court in ***R.K. Gupta versus Union of India***, (1981) 1 SLR 752. This judgment refers to the aforesaid Rules and holds that Rule 29 thereof does not permit the President to review its earlier orders by which the petitioner therein had been exonerated and, therefore, the subsequent notice dated 15th February, 1975 was null and void. We shall subsequently refer to Rule 29 and the amendments made in the Rules with enactment of Rules 29-A but would note that the petitioner therein had faced departmental proceedings and was exonerated as the proceedings were dropped by the President as per memorandum dated 4th September, 1973. The President subsequently had reviewed the earlier order and had issued memorandum dated 15th February, 1975. It was held relying upon ***Bachhittar Singh versus State of Punjab and Another***, AIR 1963 SC 395, that an order passed by the President exonerating the petitioner therein could not have been reviewed unless there was a specific power conferred by the statute and as the said power had not been conferred, no second or review departmental enquiry on the same facts could be ordered. Power of review was not an inherent power and must be conferred either specifically or by necessary implication (see also ***Harbhajan Singh versus Karam Singh and Others***, AIR 1966 SC 641 and ***Patel Narsi Thakersi and Others versus Pradhyumansinghi***, (1971) 3 SCC 844). More appropriate and pertinent are the observations of the Division Bench with reference to a decision of the Privy Council in ***R.T. Rangachari versus Secretary of***

State, AIR 1937 PC 27. In the said case, there were charges against a Sub-Inspector of Police. The disciplinary authority upon consideration of the matter decided to drop the charges and granted pension. Subsequently, the successor disciplinary authority took a different view and nullified grant of pension and passed an order of removal from service. The decision was that there was material to show that the charges were proved. The Privy Council reversed the said decision observing as under:-

“In these circumstances the case becomes a case in which after Government officials duly competent and duly authorized in that behalf have arrived honestly at one decision, their successors in office after the decision has been acted upon and is in effective operation, purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained.”

12. A Division Bench in *R.K. Gupta* (supra) has held as under:-

“18. Now very unambiguous and strong words were used in the order of the President of 4-9-1973 that he had after careful consideration of all the circumstances agreed with the findings and found the charges not proved. Nothing fresh has happened in between which might persuade the President to review his earlier order.”

Reference was also made to the judgments under the Income Tax Act, 1961 relating to finality assessment and power of re-opening under Section 147 of the said Act, to observe that there did not seem to be any principle or logic in rendering unfettered or uncivilized power to authorities

concerned to reopen a case against the Government servant, more especially after exoneration and convert the finding into one of guilty. This would be destructive of the security of tenure of the Government servant so pre-eminently enshrined in Article 311 of the Constitution. One could understand that if a Government servant had by his own fraud misled the disciplinary authority when the latter took the earlier decision or a very vital event was either not placed before the Disciplinary Authority or withheld, but this was not the case. On the evidence, that was on record, the disciplinary authority had taken one view at the first instance. It was felt that to concede the power of reopening would lead to flood gates or arbitrariness, inconsistent with the existence of Rule of law. It would result in protracted inquiry spread over years.

13. We may record here that in ***Bachhittar Singh's*** case (supra), the Constitution Bench of the Supreme Court had held that an order once communicated to the person affected by it cannot be reopened again unless such power is conferred. However, this precept would not apply if the order is not communicated to the affected party for the authority could reconsider and re-examine the issue till the order was communicated. Writing or observations on the file would not confer any right.

14. There is distinction between quasi-judicial and administrative orders and there is also case law, which holds that quasi-judicial order can be reviewed, only when permitted by the statute, whereas the power of review of administrative order does not require any such stipulation (see ***R.R. Verma and Others versus Union of India and Others***, (1980) 3 SCC 402).

15. In our view, the memorandum dated 20th July, 2009 should not be construed as a mere administrative order. The authority issuing the said memorandum had exercised and passed a quasi-judicial order. A quasi-judicial decision is a species of administrative decisions when the function performed by law is required to be exercised in some aspects as if it is judicial. Administrative decisions are dictated by policy and expediency, which may require the authorities to act fairly *albeit* a quasi-judicial decision is subject to some measure of judicial procedure. Duty to act judicially may arise from the very nature of functions to be performed. Quasi- Judicial act seems to be an act done by a competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. Absence of two parties may not in given cases be decisive in taking the act out of the category of the quasi-judicial act; if the authority is nevertheless required by the statute to act judicially. In ***Indian National Congress (I) versus Institute of Social Welfare and Others***, (2002) 5 SCC 685, following principles were laid on the question of general principles when an act of statutory authority would be a quasi-judicial act:

“Where (a) a statutory authority empowered under a statute to do any act (b) which would prejudicially affect the subject (c) although there is no *lis* or two contending parties and the contest is between the authority and the subject and (d) the statutory authority is required to act judicially under the statute, the decision of the said authority is quasi-judicial.”

Thus, the contention that the essence of judicial proceedings or judicial order is that there should be two or more parties or a *lis* between them, which is subject matter of adjudication, was held was not the *sine*

qua non. No doubt, such orders would be quasi-judicial orders, but absence of lis between two parties and adjudication necessarily is not determinative test. Earlier in *Shankarlal Aggarwal versus Shankarlal Poddar* AIR 1965 SC 507, the Supreme Court had held:

“It is not correct to say that every order of the Court, merely for the reason that it is passed in the course of the realisation of the assets of the Company, must always be treated merely as an administrative one. The question ultimately depends upon the nature of the order that is passed. An order according sanction to a sale undoubtedly involves a discretion and cannot be termed merely an administrative order, for before confirming the sale the Court has to be satisfied, particularly where the confirmation is opposed, that the sale has been held in accordance with the conditions subject to which alone the liquidator has been permitted to effect it, and that even otherwise the sale has been fair and has not resulted in any loss to the parties who would ultimately have to share the realisation.

It is not possible to formulate a definition which would satisfactorily distinguish between an administrative and a judicial order. That the power is entrusted to or wielded by a person who functions as a court is not decisive of the question whether the act or decision is administrative or judicial. An administrative order would be one which is directed to the regulation or supervision of matters as distinguished from an order which decides the rights of parties or confers or refuses to confer rights to property which are the subject of adjudication before the court. One of the tests would be whether a matter which involves the exercise of discretion is left for the decision of the authority, particularly if that authority were a court, and if the discretion has to be exercised on objective, as distinguished from a purely

subjective consideration, it would be a judicial decision. It has sometimes been said that the essence of a judicial proceeding or of a judicial order is that there would be two parties and a lis between them which is the subject of adjudication, as a result of that order or a decision on an issue between a proposal and an opposition. No doubt it would not be possible to describe an order passed deciding a lis between the authority that is not a judicial order but it does not follow that the absence of a lis necessarily negatives the order being judicial.

Thus, when two point are presented and the authority is required to decide between them and the decision vitally affects the rights of the party, it could be constructed and treated as a quasi- judicial order.

16. In ***SBP and Company versus Patel Engineering Limited and Another***, (2005) 8 SCC 618, the Constitution Bench of the Supreme Court dealing with Section 11 of the Arbitration and Conciliation Act, 1996 approved the aforesaid dictum in ***Shankarlal Aggarwala and Others*** (supra). In ***State of Orissa versus Dr.(Miss) Binapani Dei and Others***, AIR 1967 SC 1269 it was observed that action on the part of the statutory authority that ensues civil consequences, principles of natural justice must be followed. In such cases, there is hardly any distinction between an administrative and a quasi -judicial order. (Also, see ***Rajesh Kumar and Others versus Deputy CIT and Others***, (2007) 2 SCC 181). The expression “civil consequences” in ***Mohinder Singh Gill and Another versus Chief Election Commissioner, New Delhi and Others***, (1978) 1 SCC 405 was explained as covering infraction of not merely property or personal rights but also civil liberties, material deprivations and non-

pecuniary damages. It is a comprehensive connotation that everything that affects a citizen in his civil life inflicts a civil consequence.

17. What has been observed and held in the aforesaid judgments, is also the position in law, as understood by the petitioners. OM No. 39/21/56-Estt. (A) dated 13th December, 1956 draws a distinction between 'censure' and 'warning', an aspect we have dealt with and referred to above. Another OM No. 134/1/2006-AVD-1 dated 31st August, 2006 states that a warning should be necessarily issued only where there is some lapse, which could not be considered serious enough to invite disciplinary proceedings, but serious enough to convey to the officer a 'caution warning/displeasure of the Government'. Such warning must be served on the officer concerned by the department and placed in the ACR dossier as part of the ACR of the relevant year. Rule 17 of the CCS (CCA) Rules, 1965 deals with the communication of the orders passed by the disciplinary authority.

18. We have referred to the Rule 29 and the decision of the Division Bench of the Delhi High Court in *R.K. Gupta* (Supra), interpreting the said Rule. Rule 29A was thereafter enacted and notified on 6th August, 1981 and is to the following effect:-

“29-A. Review

The President may, at any time, either on his own motion or otherwise review any order passed under these rules, when any new material or evidence which could not be produced or was not available at the time of passing the order under review and which has the effect of changing the nature of the case, has come, or has been brought, to his notice:

Provided that no order imposing or enhancing any penalty shall be made by the President unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed or where it is proposed to impose any of the major penalties specified in Rule 11 or to enhance the minor penalty imposed by the order sought to be reviewed to any of the major penalties and if an enquiry under Rule 14 has not already been held in the case, no such penalty shall be imposed except after inquiring in the manner laid down in Rule 14, subject to the provisions of Rule 19, and except after consultation with the Commission where such consultation is necessary and the Government servant has been given an opportunity of representing against the advice of the Commission.”

19. OM No. 11012/1/80-Ests (A) dated 3rd September, 1981 explains the reason why the aforesaid Rule 29A was enacted. As the said OM is relevant, the same is reproduced:-

“President’s power of review.—

Attention is invited to Notification of even number dated the 6th August, 1981, amending Rule 29 of the CCS (CCA) Rules, 1965, and introducing Rule 29-A therein. The amendment has been necessitated by the judgment of the Delhi High Court in the case of Shri R.K.Gupta V. Union of India and another (Civil Writ Petition Nos. 196 of 1978 and 322 of 1979-1981, Vol. 26, SLR 752) in which the High Court has held that under Rule 29 of the CCS (CCA) Rules, 1965 –

(1) the President has power to review any order under the CCS (CCA) Rules, 1965 including an order of exoneration, and

(2) the aforesaid power of review is in the nature of revisionary power and not in the nature of reviewing one’s own order.

The matter has been examined in consultation with the Ministry of Law who have observed that the judgment of the Delhi High Court would indicate that the President cannot exercise his revisionary powers in a case in which the power had already

been exercised after full consideration of the facts and circumstances of the case. There is, however, no objection to providing for a review by the President of an order passed by him earlier in revision if some new fact or material having the nature of changing the entire complexion of the case comes to his notice later. Accordingly, Rule 29 of the CCS(CCA) Rules, 1965, has been amended to make it clear that the power available under that Rule is the power of revision and a new Rule, Rule 29-A, has been introduced specifying the powers of the President to make a review of any order passed earlier, including an order passed in revision under Rule 29, when any new fact or material which has the effect of changing the nature of the case comes to his notice. It may also be noted that while the President and other authorities enumerated in Rule 29 of the CCS (CCA) Rules, 1965 exercise the power of revision under that rule, the power of review under Rule 29-A is vested in the President only and not in any other authority. With the amendment of Rule 29 and the introduction of Rule 29-A, the heading of Part- VIII of the CCS (CCA) Rules, 1965, has also been appropriately changed as "Revision and Review."

20. To reach our finding and conclusion in the present factual matrix, that the memorandum dated 20th July, 2009 was a quasi- judicial order, we have examined the original departmental file. A detailed note on the basis of facts found and ascertained was prepared on 1st May, 2009 and submitted for perusal and orders of the senior officers. Based upon findings and conclusions issued in the note it was observed that a recordable warning may be issued for procedural irregularities committed by the respondent in the process of selection of the agency. If approved, the case should be processed for approval of the competent authority. The competent authority in the present case was the Minister of State. Thereafter the issues, facts, and "quantum" were examined by higher officers, who had opined that they may ask NHAI for draft charge-sheet

for minor penalty proceedings, to submit the file for recordable warning. However, subsequently, the note itself was put up before the Minister of State and was approved on 3rd July, 2009. Thereupon, the memorandum imposing recordable warning was issued. The first memorandum had determined the facts, examined the nature of violation, effect thereof, quantum or nature of punishment, etc. The authorities did not go by the dictates of policy, but had determined the wrong, its nature, and whether and what “penalty” should be imposed. This decision was based upon evidence and reflected exercise of discretion after applying fixed standards on existence of facts and was an informed and considered decision. The respondent thereupon had made a representation for quashing /removing the recordable warning. The said representation as noticed above has not been decided. After four years in 2012 it was decided that minor penalty proceedings should be initiated. In these circumstances we are of the view that the present case the order imposing recordable warning should be treated as a quasi-judicial order and not an administrative or ministerial order.

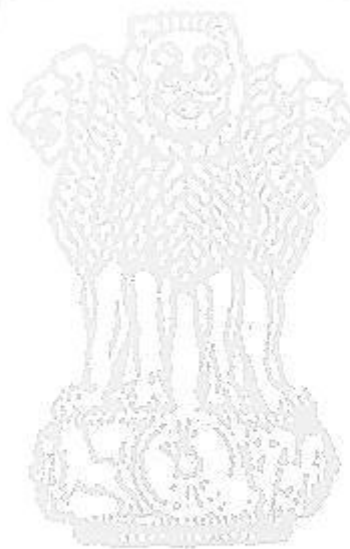
21. In light of the aforesaid discussion we would dismiss the writ petition but with the observation and clarification that it is open to the petitioner to invoke the power under Rule 29A of the Rules in terms thereof. We would also clarify that in a given case power of revision, where available and granted under the Rules, can be invoked. Reference has not been made to any such power in the present case, possibly because the first Memorandum dated 20th July, 2009 was issued by the highest ranking authority. Review or re-examination unless permitted and

sanctioned by law, would not be permitted. In the facts of the case there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

JULY 31st, 2017
VKR/ssn



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