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

Reserved on: 9th February, 2018

Pronounced on: 6th July, 2018

+ W.P.(C) 5482/2004

PARESH NATH SHARMA

..... Petitioner

Through: Mr. Sanat Kumar, Sr. Advocate
with Mr. Awnish Kumar, Mr.
Anish Chawla & Ms. Shirya,
Advocates.

versus

UOI & ORS.

..... Respondents

Through Mr. B.S. Shukla, CGSC for R-
1, 2 & 4
Mr. Rahul Chaudhary, Sr.
Standing Counsel for R-3
Mr. Sanjay Sharma, Advocate
for R-3

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

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JUDGMENT

C. HARI SHANKAR, J.

1. Disciplinary proceedings, initiated against the petitioner *vide* charge-sheet dated 4th May, 2001 proceeded, via Inquiry Report dated 26th June, 2002, to their culmination by way of order dated 9th December, 2002, whereby the petitioner was dismissed from service, and his gratuity forfeited. An application, filed by the petitioner, seeking review of the said decision, was also dismissed, *vide* order dated 2nd September, 2003. The petitioner prays that the Inquiry

Report dated 26th June, 2002, the order dated 9th December, 2002 and the order dated 2nd September, 2003, be quashed and set-aside.

2. On 10th April, 1995, the petitioner was appointed Director (Finance) in the office of respondent No.3 (hereinafter referred as “MMTC”), for a tenure of five years. The said tenure expired on 14th May, 2000. A selection board recommended re-appointment of the petitioner for five more years, pending which the petitioner was continued as Director (Finance) *vide* order dated 13th November, 2000. As, in the interregnum, a preliminary inquiry was conducted, into certain complaints against the petitioner, this second appointment never fructified.

3. On 4th May, 2001, a charge-sheet was issued to the petitioner, proposing holding of an inquiry, against him, under Rule 25 of the MMTC Employees Conduct, Discipline and Appeal Rules, 1975. It contained five Articles of Charge. The petitioner filed his reply, to the charge-sheet, on 10th May, 2001. Apparently finding the same insufficient to drop the Charges, regular departmental inquiry was conducted. The Inquiry Officer (hereinafter referred to as “IO”), in his Inquiry Report dated 26th June, 2002, held Articles I, IV and V of the Articles of Charge against the petitioner not to have been proved, Article-III to be partly proved and Article-II to have been proved. The Disciplinary Authority (hereinafter referred to as “DA”) disagreed with the findings of the IO as, in his view, all Articles of Charge, against the petitioner, stood duly proved. The DA, therefore, referred the matter to the Central Vigilance Commission (CVC), for its

“second stage advice”, enclosing, therewith, the records of the case, including the reasons for its disagreement with the findings of the IO, insofar as they held some of the Articles of Charge, against the petitioner, not to have been proved, or only to have been partly proved. The CVC responded, *vide* Note dated 13th September, 2002, concurring with the view of the DA. The DA, accordingly, issued Memorandum, dated 17th September, 2002, to the petitioner, communicating its disagreement with the findings, in the Inquiry Report dated 26th June, 2002, insofar as they were in the petitioner’s favour, and enclosing, therewith, the Memo issued by the CVC. The petitioner’s response, thereto, is not on record; however, *vide* order dated 9th December, 2002 (impugned by the petitioner), the DA, reiterating the view expressed by him in his disagreement memo, held all the Articles of Charge, against the petitioner, to have been proved and, consequently, imposed, on the petitioner, the penalty of dismissal from service, accompanied by forfeiture of his entire gratuity and disqualification from future employment in the Government and its organisations. The petitioner filed an application, before the Minister of Commerce and Industry, seeking a review of the impugned decision, dated 9th December, 2002, of the DA. *Vide* order dated 2nd September, 2003 (also impugned by the petitioner), the said application for review was also dismissed as “devoid of any merit”. The petitioner, consequently, is before me, having invoked, against the aforementioned decisions of the DA and the reviewing authority, the jurisdiction of this Court under Article 226 of the Constitution of India.

4. It is necessary to note here, that the petitioner had earlier moved this Court, consequent on issuance, to him, of the charge-sheet on 4th May, 2001, by way of CWP 4946/2001. The petitioner prayed, in the said proceedings, that he be permitted to continue in service pending conclusion of the DA initiated against him *vide* the said charge-sheet. The said prayer was, however, expressly rejected by a learned Single Judge of this Court, *vide* judgment dated 29th April, 2002, which held, in unambiguous terms, that “the petitioner cannot claim any right to continue in service”.

5. Given the limited nature of the controversy, it would be appropriate to deal, *seriatim*, at the outset, with the various Articles of Charge, in the charge-sheet dated 4th May, 2001(*supra*), issued to the petitioner.

6. The charge-sheet, which proposed holding of an inquiry, against the petitioner under Rule 25 of the MMTC Employees Discipline and Appeal Rules, 1975, contained five Articles of Charge. All five Articles of Charge dealt with the period when the petitioner held dual Charge as Director (Finance) and Director (Agro) of the Respondent No.3-Corporation (hereinafter referred to as “MMTC”).

7. Article I

7.1 Article-I dealt with a contract, for export of 50,000 MT of white rice to Indonesia, through MTPL, Singapore, a wholly-owned

subsidiary of MMTC. It was alleged that, while the delegation of powers, within the MMTC, stipulated that contracts, of value in excess of ₹ 5 crores, could be concluded only with the approval of the Sale Purchase Committee (SPC) of the MMTC, the petitioner, without obtaining such approval, concluded the aforementioned contract, of export of 50,000 MT white rice to Indonesia, at his own level, by approving the signing of the contract, even though the value of the contract was ₹ 43 crores. The contract, it was stated, was concluded, by the petitioner, over fax dated 8th August, 1995, with the shipments requiring to be dispatched between 15th September, 1995 and 31st October, 1995. It was alleged that, on 17th August, 1995, a note had been put up by the Agro Products Division of the MMTC, seeking SPC approval for the contract, followed by another Draft Note, dated 21st August, 1995, put up to the petitioner by the General Manager (Agro), for consideration by the SPC, in which modifications were suggested. The petitioner, however, it was alleged, did not put up the note to the SPC and, instead, approved signing of the contract, as already noted hereinabove, at his own level. Pointing out that there was no valid reason given, for not obtaining approval of the SPC for finalisation of the said contract, it was alleged that, because of the petitioner's action, the SPC did not have the opportunity to deliberate on all aspects of profitability of the transaction.

7.2 The petitioner, answering the said Article of Charge, submitted that the contract for supply of 50,000 MT white rice, to Indonesia, was actually a continuation of an ongoing contract, whereunder supply of an earlier quantity of 30,000 MT had already been approved,

concluded and signed on fax. Submitting that the contract for the subsequent quantity of 50,000 MT had been sent for approval to the SPC, but was not put up by the Company Secretary, as certain modifications were required to be incorporated, it was pointed out that, on 19th September, 1995, the Board of Directors of MTPL, which was chaired by the then Chairman-cum-Managing Director (CMD) of MMTC, who was also the CMD of MTPL, approved the said contract. The petitioner further pointed out that the Board of Directors (BOD) of MTPL consisted of all the functional directors of MMTC, who were also members of the SPC of MMTC. All these directors had, therefore, approved the said contract. In the circumstances, it was submitted that it was incorrect to allege that the approval, of the contract for supply of 50,000 MT white rice, to Indonesia, was finalised behind the back of the SPC. At worst, it was submitted that a technical omission may have been said to have occurred. In any case, submitted the petitioner, the entire transaction was approved, by the SPC of MMTC on 19th March, 1996, without any reservation/comments/qualification whatsoever.

7.3 The Inquiry officer (hereinafter referred to as “the IO”), consequent upon a detailed analysis of the facts, held this Article of Charge not to have been proved against the petitioner. The reasoning of the IO, as contained in his Inquiry Report dated 26th June, 2002, may be set out thus:

- (i) The petitioner was informed, vide note dated 25th August, 1995, that MTPL had already entered into a contract, for supply of 50,000 MT white rice, on 8th August, 1995, with the same

Indonesian buyer, as a repeat order, on the strength of backup offers already made by MMTC. In this manner, MTPL expressed urgency in signing back-to-back contract with MMTC, to cover the commitment thus already made by them with the foreign buyer. This was also evident from Exhibit S-7, which was a fax message from the Managing Director (MD) of the MTPL, to the effect that, if acceptance, for the contract, was not received till September, 1995, the contract might possibly be offered to some other supplier.

(ii) Immediately, an agenda note was initiated and sent for obtaining the approval of the SPC, on 13th September, 1995.

(iii) However, the note was returned by the Company Secretary on 15th September, 1995, for incorporating certain modifications, obviously under the instructions of the then CMD.

(iv) In the meantime, the contract with MTPL had to be approved for signature, keeping in view the urgency expressed.

(v) Thus, after obtaining oral instructions of the CMD, the contract was approved for signature. This was vouchsafed by the respondent's witness SW-1 (Dharampal), in his examination-in-chief during the inquiry proceedings.

(vi) Before the modifications could be incorporated in the Agenda Note and re-submitted to the SPC, the Board of MTPL approved the contract between MMTC and MTPL, on 19th September, 1995. The Board of MTPL consisted of the Chairman and other functional Directors of MMTC, as

confirmed by DW-5 in the course of inquiry. The SPC of MMTC also consisted of its Chairman and functional Directors, as confirmed by SW-3. Effectively, therefore, the SPC was already seized of the matter, and had assessed the viability of the contract.

(viii) The above contract, for 50,000 MT, was signed on the same analogy as was done in the case of the previous contract of 30,000 MT entered into, by MTPL, for supply of rice to the same buyer, which was approved by the petitioner's predecessor, though it had been approved only by the MTPL Board, consisting of the Chairman and other functional Directors of MMTC, which was considered sufficient. No SPC approval had been obtained in that case either.

(ix) Moreover, there was mutuality of interest between MMTC and MTPL, which was its wholly-owned subsidiary; it was, therefore, inconceivable that, while approving a contract as the Board of MTPL, it would not be approved by the same Chairman and other functional Directors, in their capacity as Members of the SPC of Directors in the MMTC.

(x) Another important issue was the commitment, made by MTPL, to an outside agency in Indonesia, for supply of 50,000 MT. The contract was entered into, on 8th August, 1995, by MTPL. MTPL, thereby, was irrevocably committed to fulfil its contractual obligation, so that the back-to-back contract with MMTC was essentially an internal arrangement, duly approved by the MTPL Board, which included the members who were

also the Chairman and functional Directors of the SPC of MMTC.

(xi) *Ex post facto* approval, to the entire transaction, was accorded in the 435th meeting of the SPC of MMTC, held on 19th March, 1996. The Agenda Note for the said meeting (Ex. D-16) provided complete disclosure of the contract between MTPL and MMTC which, therefore, stood approved in the said meeting without any reservation whatsoever.

(xii) The existing delegation of powers of the MMTC (Ex. S-1) defined the power of the Director to include entering into purchase and sale contracts by open tender, limited tender or negotiation, within the policy accepted by the Board, in respect of imports, exports and internal procurement.

(xiii) The contention, of the petitioner, that the system of “*ex post facto*” sanction was discontinued, by the decision of the Board of Directors of MMTC in December, 1995, was not correct. The MMTC had, in the list of documents sought to be relied upon by it and annexed to the charge-sheet issued to the petitioner, enlisted, at Serial No 9, a document, purporting to be a policy decision, taken in December, 1995, to the effect that no *ex post facto* approval should be permitted; however, this document stood withdrawn, from the charge-sheet, vide Corrigendum dated 28th May, 2002, so that it no longer lay in the mouth of MMTC to contend that *ex post facto* approvals were impermissible. Moreover, Ex.D-21, which was specifically shown to SW-3 in cross-examination, indicated that

the SPC had been giving *ex post facto* approvals regularly and routinely, even after December, 1995. SW-3 was a functional Director in MMTC and was also a member of the SPC and was a party to the decisions taken by the SPC. He was, therefore, estopped from denying the validity of such decisions. In fact, more than 50% of the cases, where the SPC granted *ex post facto* approvals, related to transactions during the period 1994 to 1998, for which charge was held by SW-3, and this fact had not been denied by SW-3, when pointedly put to him in cross-examination. The grant of *ex post facto* approval, of the SPC, to the finalisation of the contract, for supply of 50,000 MT to the Indonesian buyer, therefore, had sanctity. Reliance was also placed, in this connection, on the judgement of the Supreme Court in *L.I.C. of India v. Escorts, AIR 1986 SC 1370*, which held that “approval” included *ex post facto* approval, and that no distinction could be drawn between the two. This was also corroborated by the reply, of SW-2, the General Manager of MMTC, to Question No 4 put to him.

7.4 The Disciplinary Authority, on examining the above findings of the IO, tentatively expressed its disagreement therewith, in the following terms, and sought the opinion of the Central Vigilance Commission (CVC) thereon:

“ The Inquiry Officer in his findings has held the Charge is not proved on the grounds that (a) the copy of the document regarding the decision of the policy division against post-facto approval was deleted by the DEA/not produced by the prosecution and (b) ‘although the Charged

officer has acted in haste to keep the commitments made to the buyer in this transaction the fact that his decision has been endorsed by SPC subsequently, he should not be held responsible for any lapse at this stage’.

The Disciplinary Authority disagrees with (a) above in that the Charge relates to violation of delegation of powers which is evident and therefore the IO’s views are not tenable regarding the deletion/existence or otherwise of policy decision regarding post-facto approval.

As regards (b) above, the Disciplinary Authority holds that the contention of the Inquiry Officer that the decision of the Charged officer has been endorsed by Sale/Purchase Committee (SPC) subsequently is not correct/tenable. The SPC in its 435th meeting held on 19.3.96 as per agenda note dated 26.2.96 item no 5 (referred defence documents D-16) approved the procurement/purchase of rice laced under split orders from 7 new parties for supplying quantity of 32932 MTs of value of ₹ 2745.77 lakhs and disposal thereof. The approval given by Shri PN Sharma for signing of the contract for export of rice from Kandla to Indonesia and amount of ₹ 43 crore was beyond his delegated powers of ₹ 5 crores.

The Charge thus stands proved.”

7.5 The CVC, for its part, merely observed, in its noting dated 13th September, 2002, whereunder the file was sent back to the MMTC, that it “concur with the Departments viewpoint”.

7.6 *Vide* Memorandum dated 17th September, 2002, the DA communicated, to the petitioner, its proposed disagreement with the findings of the IO and enclosed, with the said Memorandum, the “advice” of the CVC.

7.7 It appears that the petitioner responded, thereto, *vide* letter dated 3rd October, 2002; however, no copy of the said response has been filed by the petitioner.

7.8 *Vide* order dated 9th December, 2002 (impugned by the petitioner), the DA held Article-I, of the Articles of Charge against the petitioner, to have been proved. The observations, in this regard, as contained in the said Order, read thus:

“ That Shri PN Sharma has violated the delegation of powers by approving the signing of the contract for export of rice for ₹ 43 crores as against his delegation of powers up to ₹ 5 crores. This again was violated as the same was to be exercised to be jointly by Director (Finance) with one other Director to be nominated by the Chairman.

The Sale/Purchase Committee (SPC) had not approved/ratified the contract of ₹ 43 crores for export of rice to MTPL, Singapore through Kandla in its 435th Meeting held on 19.3.1996.

Even the SPC approval for local procurement from 7 private parties of 33,000 MT at a cost of ₹ 27.46 crores and disposal thereof does not indicate the Division/director/date/transaction.

The withdrawal of document/Exhibit No S-39 of the Chargesheet relating to banning of ex post facto approval does not change the fact of violation of Delegation of Powers.”

7.9 In his review petition, the petitioner challenged the above view of the DA, qua Article-I of the Articles of Charge against him, contending that (i) the withdrawal of Document No 29, in the list of documents attached to the charge-sheet issued to the petitioner,

indicated that the procedure for grant of *ex post facto* approval continued to be in vogue, (ii) Ex.D-21, in fact, contained a list of more than 40 decisions of the SPC according similar *ex post facto* approval, (iii) as such, the decision of the petitioner having been ratified by the SPC, no violation of the rules relating to delegation of powers in the MMTC could be alleged against him and (iv) the Agenda Note, dated 26th February, 1996 (Ex.D-16), which was circulated to the SPC at the time of grant of such *ex post facto* approval, made specific reference to the contract, with MTPL, for supply of 50,000 MT rice, as a repeat order from MTPL. As such, it was submitted, the approval, of the said Agenda Item, by the SPC, in his 435th meeting held on 19th March, 1996, justified the decision of the petitioner *in toto*. The petitioner also drew attention, in his review petition, to the other observations, entered by the IO in his favour, to which no allusion was to be found in any of the communications of the DA.

7.10 The impugned Order, dated 2nd September, 2003, whereby the review petition of the petitioner was rejected, merely reiterates the observation, in the earlier communications of the DA, to the effect that “the Charged Officer had signed the contract for export of 50,000 MT Indian white rice to Indonesia for an amount of ₹ 43 crores whereas the Charged Officer had the delegated powers upto ₹ 5 crores only be exercised jointly along with another Director” and that “the entire transaction was handled without adhering to basic systems and procedures and requisite approvals”. As such, it was opined, in the said Order, that the Review Petition, of the petitioner, did not contain

any “new point of fact/material” and that it, therefore, merited rejection.

8. Article-II

8.1 This Article of Charge dealt with the procedure followed for procuring rice from the local market, on inability being expressed, by the Food Corporation of India (FCI), to supply the requisite quantity of rice for export. It was alleged that the petitioner failed to adopt a systematic and transparent process for procuring rice from the local market, and did not follow any norms/procedures in this regard. Specifically, the following lapses, in the manner in which the said rice was procured from the local market, were alleged:

- (i) The press advertisements, inviting offers, did not mention any closing date for submission thereof.
- (ii) Though twenty-eight parties had submitted offers, in response to the advertisement, including Punjab State Cooperative Supply and Marketing Federation Ltd, none of the said offers were considered; instead, discussions were held with three parties who had offered to supply, but were not among the said twenty-eight parties. Intent letters were, ultimately, placed on six parties, who, too, were not among the said twenty-eight. As such, the basis of identification, and selection, of the parties, for supply of rice, was not clear. It appeared that rice had arbitrarily been procured from six selected parties.
- (iii) The offer of one of the parties, namely M/s Neelkanth International (hereinafter referred to as “Neelkanth”) was sent

directly to the petitioner, instead of being deposited in the Box Number indicated in the advertisement.

(iv) There was no indication as to why the possibility of procuring rice from State Cooperatives, which had abundant stocks, was not explored.

(v) Though the procurement, from the domestic market, was made between October, 1995 and February, 1996, prior approval of the SPC was not taken, thereby violating the delegation of powers in the MMTC. *Ex post facto* approval, to the procurement, was accorded, by the SPC, on 19th March, 1996; however, by then, the system of granting *ex post facto* approval had been done away with.

(vi) The selected parties did not deliver rice as per schedule, resulting in the contract having to be cancelled by MTPL and resultant loss to MMTC.

8.2 The petitioner, in his reply, dated 10th May, 2001, to the charge-sheet, responded, to Article-II of the Articles of Charge against him, thus:

(i) Consequent on refusal and failure, of FCI, to supply the requisite quantity of rice, vigorous efforts were made, to secure supply from FCI, including personal efforts of the CMD, MMTC, who met the Minister of Food and Civil Supplies, the Secretary, Department of Food and the Chairman, FCI, but without any result. As such, in order to honour the contractual commitment made with the Indonesian buyer, efforts had to be

made to procure rice from other sources on an urgent basis, as the time for complying with the contract was fast running out.

(ii) The twenty-eight parties, who responded the advertisement, were unwilling to provide any firm commitment as to quantity, value or delivery schedule.

(iii) In the case of Punjab State Cooperative Supply and Marketing Federation Ltd (hereinafter referred to as 'MARKFED'), the General Manager (Agro) had personally contacted his counterpart, in MARKFED for finalisation of the contract, but MARKFED declined the offer, as they were unable to meet the delivery schedule set by MMTC. This stood confirmed by a letter issued by the Corporation, which was annexed to the reply.

(iv) Apart from M/s Vinod Associates, Kota, no other party, who responded to the Notice inviting Tenders, turned up for discussions; consequently, no further action was taken on their offers, as per notings on the file.

(v) It was much later that orders were placed on other suppliers. The Order on M/s Jumbhu Kumar and Sons was placed on 2nd November, 1995, and the order on Neelkanth was placed on 17th November, 1995. Orders on other prospective suppliers were placed later.

(vi) As the fact that MMTC required rice was, by then, well known in the market, other parties approached MMTC, with offers. Given the urgency of the situation, the Agro Division had no option but to negotiate with these parties.

(vii) In any event, the procurement, from the domestic market, was duly approved by the SPC, in its 435th meeting held on 19th March, 1996, without any reservation. The SPC was informed that, owing to lack of response, offers submitted outside the tender, by other parties, had to be negotiated and procurement done on the basis thereof, keeping in mind best prices available.

(viii) In the circumstances, the above process, for procuring rice, was the only available alternative, and was wholly fair and transparent. The contractual obligations, with the existing foreign buyer, could not have been fulfilled otherwise.

(ix) Adequate quantities of rice were supplied, by the parties, by the end of December, 1995, with the remaining quantity being supplied by 10th January, 1996. The allegation that the parties had failed to perform was, therefore, incorrect. The cancellation of the contract was not owing to failure, on the part of the contacted parties, to supply rice, but was attributable to the failure, on the part of M/s TRANSCART (the chartering wing of the Ministry of Surface Transport) to provide suitable vessels. The cargo was available at port; however, owing to the failure of TRANSCART to provide vessels, the contract had to be cancelled. Reference was invited, in this context, to a communication, dated 28th December, 1995, from TRANSCART, wherein TRANSCART expressed its inability to provide vessels in time. Vessels, which were initially offered by TRANSCART and accepted by the Agro Division of MMTC, were also rejected, at the end of

TRANSCHART itself, for one reason or the other. As such, the cancellation of the contract was owing to non-availability of vessels and the failure of TRANSCHART in this regard.

8.3 Before the IO, the petitioner contended, additionally, thus:

(i) The offers submitted by the 27 parties, who responded, to the newspaper advertisement, had been analyzed, as was evident from notes dated 18th October, 1995 and 27th October, 1995 (Ex. D-13). SW-1 Dharampal, who was the Deputy General Manager of Agro Division, after analyzing the offers, came to the conclusion that the offers were not suitable. He shortlisted only two parties, of which, M/s Vinod Associates, Kota, was contacted by SW-1, but he did not turn up for negotiations. MARKFED, Punjab, the second “viable supplier” were also contacted, but was not in a position to supply rice as per the stipulated delivery schedule, and indicated that they were in a position to supply after March, 1996. This was confirmed by DW-1, who was Senior Manager of MARKFED, and was the person who had made the offer to MMTC, in his deposition before the IO. Ex.D-13, which was the note containing the analysis of the offers received consequent to the newspaper advertisement, was proved by SW-1 and confirmed in his cross-examination.

(ii) In these circumstances, as time was running out, and the commitments to the Indonesian buyer had to be honoured, action was required to be taken on a war footing. It was in these circumstances, that the offers received directly in MMTC were

considered. SW-1 had admitted, in reply to Question No.13 put to him that, owing to the tight schedule, sincere efforts were made by senior officers to procure rice from private parties. The allegation that the process followed was not transparent, therefore, stood belied, even by the evidence of SW-1 in examination-in-chief.

(iii) The allegations regarding non-following of proper procedure for procurement of rice from the local market and arbitrary selection of suppliers without following due procedure, was not proved by any of the witnesses produced by the respondent. No “prescribed procedure” had been referred to, by the respondent. In the absence of any stipulated or prescribed procedure, the petitioner had necessarily acted on the basis of a need-based assessment, especially in view of the time constraint and lack of serious bidders, as those who responded to the advertisement were unable to guarantee compliance within the prescribed delivery schedule. In such circumstances, the manner in which procurement of the rice was effected, by the petitioner, was wholly justified, and was, on the face of it, fair and transparent. In international contracts, the overriding priority was to honour commitments made, so that the goodwill and stature of the respondent, in the international market, was maintained.

(iv) Selection of parties, out of offers received in the Agro Division, was the practice followed even at the time SW-3 was holding Charge thereof, and stood vouchsafed by Ex.D-9, D-10

and D-11, which related to contracts awarded to parties on negotiation basis, by SW-3 himself, in his capacity as Director (Agro).

(v) The allegation that the contract was cancelled owing to non-supply of sufficient rice, in time, by the selected supplier, was contrary to facts. Rice, in the required quantity, was available at port within the prescribed and scheduled time, but could not be exported owing to failure, on the part of TRANSCART to provide vessels, as already noted hereinabove. This was also proved by the evidence of SW-1, as well as fax message dated 22nd December, 1995, from SW-1 to MTPL, which clearly showed that over 16,000 MT rice had already reached Kandla. This clearly indicated that, even on 22nd December, 1995, the Agro Division was in a position to start shipment, and was hindered from doing so only owing to non-availability of vessels, which was entirely attributable to failure on the part of TRANSCART.

(vi) In fact, the Agro Division, too, made every effort to ensure availability of vessels. The remarks of DW-6, the Chief General Manager (Shipping), in Ex.D-19, indicated that two vessels, namely M.V. Megdelena and M.V Arunachal Pradesh, offered by TRANSCART, were accepted by MMTC. However, TRANSCART failed to finally fix the vessels, and ultimately withdrew the vessels offered earlier. This was corroborated by DW-6 in his deposition before the IO. As such, the allegation that cancellation of the contract by MTPL was

owing to non-supply of rice within the scheduled time by the supplier selected by the petitioner, was incorrect.

8.4 The IO, in his Inquiry Report, observed as under:

(i) In the newspaper advertisement, no mention had been made regarding the last date for responding thereto, the terms for supply, quantities required and other terms and conditions of the offer, including supply schedule.

(ii) None of the twenty-eight parties, who responded to the advertisement, was selected for supply of rice. The parties selected had directly approached the Agro Division of MMTC, and personally discussed the matter with the petitioner.

(iii) Though there was, undoubtedly, urgency involved, owing to the commitments made by the MMTC to the Indonesian buyer, the procedure adopted for finalising the deal with private parties, who approached the MMTC directly, lacked transparency.

(iv) As the amount involved was substantial (about ₹ 43 crores), it was obligatory on the part of the petitioner to follow a procedure which was proper and transparent in all respects.

(v) A perusal of the record reveal that no last date, for submitting offers, was indicated in the advertisement. As supplies were to be made in a time bound manner, it was necessary to fix a target date for responding to the advertisement.

(vi) There was no evidence to indicate that the offers received in response to the advertisement were duly considered by the competent authority, and comparative statement with regard to rates, schedule or supply of goods etc. was made by the petitioner. The petitioner should have made a comparative statement of rates etc. for arriving at a fair and transparent decision.

(vii) It was not clear as to how the parties, who were ultimately selected, could come into contact with MMTC directly. As the amount involved was substantial, the right course for MMTC would have been to re-advertise in the newspaper, for supplies, rather than for negotiating with a few parties who had approached MMTC. In case, the petitioner felt that time was short, he should have pre-planned well in advance and ensured guaranteed supply of rice from assured suppliers for further export, before entering into the contract with MTPL.

(viii) If the supply was not forthcoming from FCI, the contract should have been allowed to lapse, rather than acting in haste and purchasing rice through private parties in a non-transparent and hurried manner. This reflected “over enthusiasm and haste on the part of the CO, which is against the general principles and canons of financial propriety”.

On the basis of the above reasoning, the IO held Articles of Charge-II, against the petitioner, to stand proved.

8.5 A copy of the above Inquiry Report was forwarded, to the petitioner, by the DA, along with his Disagreement Memo dated 17th September, 2002 (*supra*). It appears, from the record, that the petitioner filed submissions, in response thereto, on 3rd October, 2002, which were received by the DA on 10th/11th October, 2002. However, as already noted hereinbefore, no copy of the said representation has been placed on record by the petitioner.

8.6 *Vide* the order dated 9th December, 2002 (*supra*), which is impugned by the petitioner and to which reference has already been made hereinabove, the DA held, in respect of Article-II of the Articles of Charges against the petitioner, as under:

“The advertisements issued in various newspapers in the first week of October was for clearly for procurement and not for ‘empanelment’ because an amount of 31,000 MT rice was procured upto the first quarter of 1996 and put in private warehouses in Kandla for executing the contract with MTPL.

The contract was cancelled because the MMTC scheduled and re-scheduled/rejected the fixing of vessels offered on 28.12.1995, 10.1.96 and three other vessels were also rejected by the Agro Division and no due to inability of TRANSHART to provide vessels. Only 26,000 MT of rice as against contracted 50,000 MT had converged at Kandla upto the cancellation of the contract i.e. on 18.1.1996.

There is no evidence of analysis of the offers from 27 parties which were arbitrarily rejected. Rice was procured arbitrarily from selected parties who failed to deliver the quantity which ultimately led to cancellation of the contract”

8.7 The petitioner, in his review petition, preferred against the aforementioned order dated 9th December, 2002, submitted that the IO

had entirely overlooked Ex.D-13, which clearly indicated that offers received from the twenty-seven parties, who responded to the advertisement, were duly analyzed vide notes dated 18th October, 1995 and 27th October, 1995 of the DGM (Agro), on the basis of which analysis two parties were short-listed for supply of rice. However, neither of the said two parties came forward to make supplies as per the delivery schedule suggested by MMTC. It was further pointed out that the finding, of the IO, to the effect, that there was no analysis of the twenty-seven offers received, was contrary to Ex. D-13 as well as the evidence of SW-1, DGM (Agro), who was in-Charge of the Agro Division. The suggestion, of the IO, that MMTC should have issued fresh advertisement in the newspaper for exploring other possibilities, it was submitted, was impossible, as MMTC was already running out of time, and there was a commitment to be honoured. Similarly, the suggestion, of the IO, that the petitioner should have allowed the contract to lapse, indicated that the IO was unconscious of the consequence of violation of the contract, which would not only have resulted in MMTC having to incur huge amounts by way of penalties and damages, but would have also eroded the reputation of MMTC in the international market. In fact, submitted the petitioner, he had made all sincere efforts to fulfill the contract and, owing to default on the part of TRANSCART, the contract could not fructify. Regarding the further observation, of the IO, to the effect that MMTC ought to have made assured arrangement for supply of rice, the petitioner submitted that FCI had given a full back-up after accepting the earnest money deposit of ₹ 60 lacs. The petitioner further submitted that it was never

the intention of MMTC to purchase the rice from private buyers, and that it was compelled to do so owing only to the circumstances in which it was placed. The allegation that proper procedure had not been followed, it was submitted, was effectively without any evidence having been led by MMTC, regarding the alleged “prescribed procedure”; rather, Ex. D-8 clearly indicated that decisions were to be taken on case to case basis. Further, Ex. S-1 indicated that purchases could be made either through open tender, limited tender or negotiation. It was only because of the reneging, by FCI, towards the end of October, 1995, on its commitment to supply rice, that, in order to meet its export commitment, advertisements were issued by MMTC, through the petitioner, for empanelment of suppliers. This position stood confirmed by the evidence of SW-1. Besides, this procedure was not unprecedented, as was apparent from Ex. D-9, D-10 and D-11, which were similar contracts, approved by the petitioner’s predecessor and awarded to private parties, based on negotiations. The offers of twenty-seven parties, who had responded to the advertisement, it was pointed out, had been analyzed by SW-1 (Dharampal), the DGM (Argo), who came to the conclusion that the offers, except in the case of two parties, were not suitable. Of the said two parties, M/s Vinod Associates never turned up for negotiations, and MARKFED, Punjab was in a position to supply rice as per the stipulated delivery schedule, as confirmed by DW-1, the Senior Manager of MARKFED, in his deposition before the IO. Ex. D-13, it was pointed out, was the note wherein the offers received, pursuant to the newspaper advertisement, had been analyzed, and this fact stood

acknowledged by SW-1 during cross-examination. In these circumstances, the petitioner submitted that the manner in which he had sourced rice, from local suppliers, consequent on the failure, by FCI, to live up its commitments, was entirely transparent and in the interests of ensuring that there was no breach of the contract entered into, by MMTC, with the Indonesian supplier, as also to safeguard the reputation of MMTC in the international market.

8.8 As already noted hereinabove, the aforementioned review petition, submitted by the petitioner, was rejected by an effectively non-speaking order dated 2nd September, 2003, which is impugned in the present proceedings.

9. Article III

9.1 Article-III of the Articles of Charge against the petitioner alleged that preferential treatment had been extended, by the petitioner, to Neelkanth and to M/s Jwalaji Trading Company (hereinafter referred to as “Jwalaji”). In the case of Neelkanth, this allegation was founded on the following three facts:

- (i) Whereas other suppliers were required to furnish bank guarantee equivalent to 2% of the FOB value of the rice, Neelkanth, which supplied a bulk of the quantity, was permitted to furnish only Fixed Deposit Receipt (FDR) which, unlike a bank guarantee, would not be readily encashable.

(ii) While all other parties were required to bear the godown rent, in the case of Neelkanth, godown rent, beyond 45 days of receipt of the rice, was required to be borne by MMTC.

(iii) Rice, supplied by Neelkanth, was accepted even after cancellation of the contract, and payment released thereagainst, as approved, by the petitioner, on 9th January, 1996.

In the case of Jwalaji, it was alleged that, despite the party having failed to supply rice, the bank guarantee furnished by it was not invoked and was, instead, allowed to be utilized for supply of rice against another contract.

9.2 The petitioner in its reply dated 10th May, 2001, to the charge-sheet, categorically denied having extended any preferential treatment either to Neelkanth or to Jwalaji. Regarding the allegation of preferential treatment to Neelkanth, it was submitted as under:

(i) The requirement of FDR, from Neelkanth, required endorsement from the bank, which rendered it as good as cash. It was pointed out that the FDR was available at the disposal of MMTC, and could have been encashed without any reference to Neelkanth. While Bank Guarantees could be arranged with 10 to 15% deposit, FDRs required 100% cash backing and were, therefore, considered good and sound security in commercial trading activities. It was further pointed out that, in MMTC, FDRs had been frequently accepted, for ensuring performance by the contracting parties. Further, in the case of FDRs, the risk of stay by courts was also lessened.

(ii) Insofar as charging of godown rent was concerned, the petitioner submitted that godown rent was uniformly charged from all suppliers upto 45 days, whereafter ground rent was borne by MMTC and that no special favour had been shown to Neelkanth.

(iii) Regarding the third allegation, to the effect that rice had been accepted from Neelkanth even after cancellation of the contract, and payment released thereagainst, it was submitted that, while the petitioner had taken a decision to stop procurement with effect from 9th January, 1996, Dharampal, the DGM (Agro), put up a note (Annexure-XII to the reply) recommending acceptance of 3084.95 MT rice, delivered by Neelkanth, after 9th January, 1996. On verification from MMTC, Kandla, it was ascertained that the said quantity of rice already stood delivered and accepted in the godown after completion of all documentation. Inasmuch as the rice stood accepted by MMTC, Kandla, it was submitted that the petitioner was presented with a *fait accompli*, leaving him no option but to release payment against the rice so accepted.

Regarding Jwalaji, it was submitted that, before the vessel, on which the rice supplied by it was to be loaded, could take berth and the rice loaded thereon, a message was received, to the effect that port operations stood closed. MTPL refused to extend the shipment period, as a result of which the contract was cancelled. As the vessel had not yet reported for loading, it was decided not to accept the rice supplied

by Jwalaji, so that no question of invocation of bank guarantee could arise.

9.3 Further, before the IO, the petitioner denied the allegation that FDRs were not readily encashable or that, by accepting FDRs from Neelkanth, undue favour had been shown to it. In actual fact, a Call Deposit Receipt (wrongly referred to as an FDR) had been obtained from Neelkanth, which was equivalent to a cash deposit in MMTC's current account and could be withdrawn by MMTC any time. That apart, DW-4 had, in his deposition before the IO, clearly stated that FDRs were frequently accepted in MMTC in lieu of bank guarantees, and that, in fact, FDRs were more secure, as the funds would be lying in the name of MMTC and could be withdrawn at any time. Regarding payment of godown rent, it was submitted that there was no expectation that the cargo would remain held up at the port due to cancellation of contract, and what was expected was that the cargo would reach within one month of its arrival. Payment of godown rent, by MMTC, beyond 45 days, was eventually agreed for all suppliers; the only difference being that, in the case of Neelkanth, the condition was entered in its Letter of Intent during negotiation. As such, no favour had been shown to Neelkanth even in this respect.

9.4 The IO, in his Inquiry Report, dealing with this Article of Charge, held, nevertheless, that, while the contention, of the petitioner, that there were various alternatives available for obtaining security for ensuring performance, and that FDR was equal to cash deposit and

could be withdrawn by MMTC at any time at its discretion, “*may be true*, the CEO should have followed a uniform pattern in respect of all the parties and the fact that he has accepted FDR in favour of one party whereas Bank guarantee in respect of other parties, shows a discriminatory and favourable treatment extended to one party *even though both could be invoked/encashed eventually in case of need.*” It was further observed that, “going by the logic explanation given by the CEO for obtaining FDR, the same holds good in respect of other parties in which case he should have extended this condition uniformly to all the other parties if it was in the interest of MMTC.” Further, with respect to the payment, by MMTC, of godown rent, to the extent of storage of the rice in stock beyond 45 days, in the case of Neelkanth, the IO holds that the insertion of a clause, to this effect, in the terms and conditions of the Letter of Intent issued to Neelkanth, whereas no such condition was to be found in Letters of Intent issued to other parties, “also shows that discriminatory treatment was shown to Neelkanth”. The IO, however, accepted the explanation proffered by the petitioner, with respect to the acceptance of rice, from Neelkanth, beyond the date of cancellation of contract and release of payment thereagainst, as also the contention that no preferential treatment had been extended to Jwalaji.

9.5 Qua this Article of Charge against the petitioner, the DA did not express any disagreement with the findings of the IO. As such, in the punishment order dated 9th December, 2002, the DA merely reiterated the finding, of the IO, that preferential treatment had been extended to

Neelkanth, by permitting it to furnish an FDR, instead of a Bank Guarantee.

9.6 In the circumstances, the petitioner, in his review petition, again urged the following submissions which had neither been taken into account by the IO, nor by the DA:

(i) Re. Permission, to Neelkanth, to furnish FDR/Call Deposit Receipt:

(a) Inasmuch as Neelkanth had been permitted to give cash deposit, instead of bank guarantee, it was not possible to understand how it could be alleged that favourable treatment had been extended to it.

(b) FDRs/CDRs were routinely accepted, in MMTC, in view of bank guarantee. As such, it could not be alleged that the petitioner had departed from any prevalent norms.

(c) CDR was much better security, as the entire cash was available to MMTC at its will, as compared to a bank guarantee, which could be obtained at nil/10%/20% margin, to invoke which MMTC would have been at the mercy of the bank.

(d) All that was required was that a performance guarantee be obtained from the supplier. Such performance guarantee could be in the form of a bank guarantee, FDR, CDR or any other type of guarantee, which was capable of invocation.

- (ii) Re. Payment of ground rent, by MMTC, in the event of rice continuing to remain in the godown beyond 45 days:

This, it was reiterated, was a facility extended to all suppliers, and not just to Neelkanth. The only difference was that, in the case of Neelkanth, a clause, to that effect, had been inserted in the Letter of Intent. The allegation that favourable treatment had been extended to Neelkanth, thereby, was, therefore, unsubstantiated. In fact, non-charging of ground rent beyond 45 days, was a fair trade practice, as the stocks were held up owing to non-availability of the vessel and cancellation of the contract, for which the suppliers were in no way responsible.

9.7 The review petition of the petitioner, as already noted hereunder, was rejected by an unreasoned and non-speaking order.

10. Article IV:

10.1 Article IV of the Articles of Charge against the petitioner was directed against his decision to release 85% of payment, to suppliers of rice, on the basis of Trust Receipts given by them, without actual weighment or independent verification of quantity. These Trust Receipts had been furnished by the suppliers. Subsequent to cancellation of the export order, the stock of rice was taken by MMTC, into possession, on joint custody basis, again without actual

weighment, on the basis of Trust Receipts and the Surveyor's Report. The Surveyors Report itself stated that no actual weighment had been done, and used the words "said to be" and "as declared". It was further alleged that shifting of stock, amongst the godowns, also took place without actual weighment, resulting in non-reconciliation of the stocks. As a result of such want of proper verification by the petitioner, it was alleged that MMTC had suffered loss of ₹ 17.39 crores.

10.2 Responding to the above Article of Charge, the petitioner submitted, before the IO, that

- (i) as per the Letters of Intent, the load report results, in respect of quality, quantity and backing of the shipment, were to be treated as final and, on the basis thereof, 85% of the payment was required to be made on presentation of godown receipts showing receipt of goods, the goods themselves being hypothecated to MMTC, along with the certificate, of M/s S.G.S. International, regarding quality, weight and specifications,
- (ii) Item No.13 in of the Letters of Intent further provided that the balance 15% would be released after the shipment was fully completed, and all requisite documents were furnished by the party to the satisfaction of the buyer,
- (iii) in the case of FOB contracts ensuring supply of the contracted quantity and quality of rice, on board the ship, was

the responsibility of the seller, at whose end actual weighment was to be done,

(iv) the payment of 85%, made at the time of arrival of the contracted material was, therefore, purely provisional in nature,

(v) it was not correct to allege that payments were made only on the basis of "Trust Receipts" issued by the suppliers agents; the officers at the Kandla office of MMTC had duly countersigned the "Trust Receipts", after physically counting the rice bags supplied, as was apparent, *inter alia*, from Exhibit S-19, which was a note, dated 29th January, 1996, regarding payment made to Neelkanth,

(vi) SW-2, the General Manager of MMTC had, in reply to a question put to him, clearly deposed that the "Trust Receipts" had been in vogue in MMTC, and extensively used for purchase of material during the course of exports, and that such a procedure was a matter of routine; to similar effect was the deposition of DW-4, the then Chief General Manager (Finance) of MMTC,

(vii) final payment for supplies was to be made only after adjustment of shortages, etc., noticed, if any, on actual weighment while loading the vessels,

(viii) it was over a year after he had handed over Charge as Director (Agro) on 31st March, 1996, that a shortage of 147 MT of rice was reported and recovered from the suppliers; as against this, physical verification of the stocks, even in March,

1997, did not reveal any abnormal shortages, as deposed by DW-4, and evidenced by Ex. D-28,

(ix) on cancellation of the contract, the rice in the godowns remained in the joint custody of MMTC and the suppliers, pending final weighment and finalisation of payment, as was deposed by DW-4 in his examination-in-chief,

(x) as such, it was incorrect and unfair to allege that losses had occurred owing to part/provisional payment having been made, on the basis of the assessed weight reflected in “Trust Receipts”, which had been duly acknowledged by the officials of MMTC at Kandla,

(xi) the Trading Accounts for rice, at Kandla (Ex. D-28) indicated that, as on 31st March, 1996, there was no shortage,

(xii) DW-4 had explained, in replies to specific questions put to him, that physical verification of the stores was carried out, and report of excesses and shortages, where they were abnormal, prepared and, on the basis of the recommendations of the Commodity Director, put up to the Board, and that the Trading Accounts, prepared on the basis of physical verification, showed no losses in the year ending 31st March, 1996, on which date the petitioner handed over charge as Director (Agro),

(xiii) as such, it could not be alleged that any shortage of rice occurred during the tenure of the petitioner,

(xiv) the alleged statement of shortages was unverified and unsigned by any authority, and had not been confirmed by SW-

4 or SW-5; in any event, no witness had attributed the shortage, if any, to short supply by the suppliers, and

(xv) the evidence adduced by various witnesses (especially SW-4) indicated, in fact, that the shortages, found to have occurred, were attributable to natural causes such as deterioration, loss of moisture, spoilage and rodent infestation.

10.3 The IO, in his Inquiry Report, held, in respect of Article IV of the Articles of Charge against the petitioner, thus:

“After going through the prosecution and the defence arguments and documentary and oral evidences it is clear that trust receipts were accepted as a normal trade practice in the export of Agro and commodities and the shortage to the tune of 2885 MTs as alleged in the Charge could be as result of pilferage/order long storage resulting in moisture loss, loss on account of rodents for which the CEO cannot be held responsible.”

10.4 The DA, predictably, disagreed with the above finding, of the IO, with respect to Article IV, opining, in that regard, as under:

“The Inquiry Officer has held the Charge is not proved. The Disciplinary Authority however holds the Charges partly proved for the reason that the wrong practice of accepting goods without weighment was being followed by Shri PN Sharma while he held the Charge of Director (Finance)/Dir (Agro) in MMTC. Although the wrong procedure was followed by the officers of MMTC in Kandla Sh. PM Sharma was in the know and aware of the same and did not rectify the same.

The Charge therefore stands partially proved.”

10.5 In the impugned punishment order dated 9th December, 2002, the DA held thus, with respect to Article IV:

“ The total rice procured of 32,931.15 MT was accepted by MMTC on the basis of “Trust Receipts” furnished by respective handling agents, appointed by the suppliers. The Trust Proceeds further mentioned that the goods are ‘stated to be’ hype to MMTC. Payments were released to the suppliers by MMTC Corporate Office on the basis of quantities indicated in Trust Receipts.

Subsequent to cancellation of contract the stock of rice was taken by MMTC in possession in joint custody without actual weighment on the basis of Trust Receipts and surveyors reports. The Surveyor (M/s S. G. S. India Ltd) also relied upon the quantity as declared by the suppliers while certifying the quantity.

A shortage of 2885.426 mt was detected leading to a loss of rupees 2.41 crores. The total loss in the transaction due to disposal of rice in the domestic market after cancellation of the contract for export is ₹ 17.39 crores.”

10.6 Inasmuch as none of the contentions, advanced by the petitioner, in defence to the above Article of Charge, before the IO, was considered by the DA, either while expressing his disagreement with the findings of the IO, or while passing the impugned order, dismissing the petitioner from service, the petitioner, in his Review Petition, reiterated the said grounds. As the contentions of the petitioner already stand exhaustively enumerated hereinabove, they

are not being repeated here, so as not to burden this judgement – which is, possibly, already over-prolix – any further.

10.7 As has already been noticed hereinabove, the Review Petition of the petitioner was dismissed by an effectively non-speaking order, dated 2nd September, 2003, also impugned by the petitioner in these proceedings. With respect to the subject matter of Article IV, the said order merely records thus:

“Total rice procured was accepted by MMTC on the basis of ‘Trust Receipts’ furnished by respective handling agents, appointed by the suppliers. Subsequent to cancellation of contract, the stock of rice was taken by MMTC in possession in joint custody without actual weighment on the basis of Trust Receipts and surveyors report when price was disposed of in the domestic market, a shortage of 2885.426 MT was detected.”

Apart from the above, the order merely recites, as already noted hereinbefore, that “the review petition of Shri PN Sharma dated 14th May, 2003 contains no new point of fact/material”.

11. Article V:

11.1 Article V, of the Articles of Charge, against the petitioner, alleged that the petitioner had failed to supervise the performance of his subordinates in discharge of their duties, which was reflected in release of payment without proper weighment, leading to huge shortages in the stock at the time of the disposal, the loss for which had to be borne by the MMTC. It was also alleged that, owing to insufficient fumigation, the stock of rice was found to be infested with

live insects and weevils. As such, the only new allegation, in this Article of Charge, was essentially, the alleged infestation, of the stock of rice with insects etc., owing to insufficient fumigation thereof.

11.2 The IO has noticed that this Article of Charge was sought to be supported by Ex. S-26 to Ex. S-28 and Ex. S-30, which reflected shortage in stock observed at the time of disposal of rice in 1998, more than two years after taking delivery of the stock, as also after the relinquishment, by the petitioner, of charges as Director (Agro) on 31st March, 1996. It had been pleaded by the petitioner, in response to this Article of Charge, that the said loss was not on account of any failure by his subordinates and, further, that there was no evidence of any loss during his incumbency. It was also pleaded that any loss, if at all, was attributable to the failure, of TRANSHAR, to provide vessels on time.

11.3 The IO found that the MMTC had not been able to produce any documentary and/or evidence in support of this Article of Charge. It was further found that it would be stretching the point too far, to hold the petitioner accountable for insufficient fumigation, resulting in infestation of rice, without any tangible, oral or documentary evidence in support thereof. As such, he held the charge not to be proved.

11.4 In its Disagreement Memo, the DA has observed, with respect to this Article of Charge as under:

“Article V-

The Inquiry Officer has held the charge as not proved. The Disciplinary Authority however holds the charge as proved for the reason that non-discovery of shortages at the time of disposal does not imply that there was no shortage while receiving delivery which was on the basis of mere Trust receipts without actual weighment. Further payments were released on the basis of mere certificates of suppliers and handling agents who were interested parties. As such Shri PN Sharma cannot be absolved of omissions and commissions as regards selection of suppliers and laxity shown in fixing of vessels during his tenure. Since this reflects on poor planning and execution of the whole transaction both while selecting the firms and fixing vessels, resulting in the huge losses of approximately Rs.17 crores to MMTC/government due to gross misconduct and acts of omission and commission.

This charge has been held to be proved.”

11.5 The impugned punishment order dated 9th December, 2002 observes, with respect to Article V, as under:

“During his tenure as Director (Finance) and Director (Commodity) the entire transaction has been handled by violating the delegation of powers, arbitrarily rejecting and selecting parties, accepting goods without actual weighment and on the basis of certificates of supplies/handling agents who were interested parties. Preferential treatment was extended to M/s. Neelkanth International. The proposal for export to Praha was processed in February, 1996 and a quantity of 11,000 MT exported to and rejected by M/s. ICC, Praha, Czech @ US\$ 260 per MT was found rotten due to inadequate fumigation at Kandla.”

11.6 In his review petition, the petitioner, after first submitting that the alleged lapses, referred to in Article V, already stood explained by him, went on, with reference to export of rice to ICC, Praha, to submit

that, in fact, the negotiated price was highly profitable and that 11000 MT rice was actually exported, resulting in a handsome profit to MMTC. This shipment, too, it was pointed out, was made six months after relinquishment, by the petitioner, of charge as Director (Agro). Further, it was pointed out that overseeing of the operations at Kandla constituted no part of petitioner's duty and that, in fact, no shortage was revealed in stock verification during the tenure of the petitioner. No responsibility for any shortage, discovered after demitting of office by the petitioner, it was submitted, could not be laid at his door.

11.7 As already noted hereinabove, the review petition of the petitioner was dismissed without reasons.

12. The petitioner is, now, before this Court.

Analysis

13. This Court is alive to, and conscious of, the fact that it does not sit in appeal over the decision of the disciplinary authority, and is not meant to re-appraise the evidence, which would result in a fresh inquisitorial expedition into the thickets of the charges against the petitioner. The peripheries of the jurisdiction of this Court, whether under Article 226 or Article 227 of the Constitution of India, are well-demarcated and well-delineated. There are decisions, galore, of the Supreme Court on the point, many of which have been overtly critical of the tendency, of constitutional courts exercising high prerogative

writ jurisdiction, to convert themselves into appellate authorities, re-examining, threadbare, the charges against the employee concerned, and scanning, with a tooth-comb as it were, the findings of the Inquiry Officer, and the decision of the disciplinary authority that follows as a sequel thereto.

14. Having said that, the policy of restraint, which the court observes while dealing with administrative, or even quasi-judicial, decisions of administrative authorities, is self-imposed, and is intended to be a reflection of the federal structure of our polity, which mandates mutual respect, and maintenance of a healthy distance between the legislature, executive and judiciary, with each organ confining its peregrinations to its own well-recognized boundaries. The proscription, against courts from venturing into the domain of the executive, whether such executive exercises its authority administratively, or quasi-judicially, is the sole consideration that has prompted courts, time and again, from travelling that one extra mile, while exercising their power of judicial review. If, however, justice has, in fact, set up residence that one extra mile beyond, it is the duty of the court, in its unending quest to ensure the availability of justice to every denizen of this country, to strain its sinews and travel the distance. While adhering to this policy of self-imposed restraint, the court is always required to be conscious of the fact that, in the ultimate eventuate, its constitutional duty is to render, and uphold the rendition of, justice. Justice is the high watermark of all that a judicial authority can hope, or aspire, to attain, and the attainment of that

zenith has, at each and every instant of its functioning, to guide its discretion, and the manner of exercise thereof. Where justice has, apparently, been sacrificed by the authorities below, no restraint, whatsoever, can operate, to chain the court, or prevent it from forging ahead and undoing the wrong, the commission of which the facts, as placed before the court, apparently disclose. If, in its zeal to exercise restraint, and not interfere beyond a point, with the decision of the executive authority below, the court consciously allows injustice to go unredressed, it has failed, and failed unpardonably.

15. A delicate balance has, therefore, necessarily to be struck, by the court, between upholding the ultimate cause of justice, and undoing injustice, where it has occurred, and the fossilized policy of judicial restraint, while reviewing, judicially, decisions of executive, or quasi-judicial authorities. Which of the two considerations predominates, however, can never really be in doubt. Where injustice has apparently occurred, the court cannot refuse to redress the situation, or remedy the injustice, merely because, in doing so, the restraining shackles of judicial review may suffer damage. If they do, so be it.

16. It is with the above approach in mind, that I have embarked, even if somewhat riskily, on the above detailed analysis of the charges against the petitioner, his response thereto, the findings of the IO thereon, and the ultimate decision of the DA. In doing so, I find that a somewhat startling picture emerges.

17. What are the actions, of the petitioner, for which he has been faulted, and where, in the estimation of the disciplinary authority, has he faltered, and faltered so inexcusably as to render his continuance in the petitioner-organization an impossibility? For the DA, clearly, has left no stone unturned in chastising the petitioner for his transgressions; he has not only dismissed the petitioner from service, but has also forfeited his entire gratuity and further directed that the petitioner would not be eligible for any other governmental job; in short, the highest and most extreme punishment that could possibly have been imposed.

18. Is this justified ?

19. Let me revisit the acts of the petitioner, and the manner in which, according to the MMTC, he misconducted himself.

20. A Revisitation

20.1 As a repeat order to earlier supply of 30,000 MT, the Indonesian buyer placed another order for 50,000 MT. As the value of the order was in excess of ₹ 5 crores, an immediate proposal was put up, for obtaining the approval of the SPC of MMTC, to the contract. However, the Company Secretary suggested certain modifications and, by the time the modified proposal was ready for being put up to the SPC, the Board of Directors of MTPL approved

the contract. As the members of the Board of Directors of the MTPL were also the members of the SPC of MMTC, the petitioner approved conclusion of the contract. This was the same practice, as had been followed in the case of the earlier dispatch of 30,000 MT white rice, to the same Indonesian supplier, and to which the contract of 50,000 MT was a repeat order. *Ex post facto* approval, to the contract, was also accorded, by the SPC of MMTC, in its meeting held on 19th March, 1996. In these circumstances, the IO held that the petitioner could not be said to have misconducted himself, in approving conclusion of the contract for supply of 50,000 MT white rice. Ignoring all these facts, the DA chose to disagree with the finding of the IO, observing, in the process, that the IO had based his decision on the *ex post facto* approval, granted to the contract, by the SPC. No heed was paid, by the DA, to the repeated submission, of the petitioner, that, in fact, no impropriety, procedural or otherwise, the said to have taken place, in the petitioner approving signature of the contract for supply of 50,000 MT on the basis of the approval, thereof, by the Board of Directors of MTPL, who were also the members of the SPC of MMTC, without waiting for the same persons again, to accord their approval to the contract, in their capacity as members of the SPC. The DA opined that the charge, against the petitioner, of not having followed the prescribed procedure, by concluding the contract without prior approval of the SPC, and without any justification for not obtaining such prior approval, stood proved. It is obvious that this finding, of the DA, returned without any application of mind to the facts, or the circumstances in which the petitioner, following the

procedure which had earlier been adopted in the case of supply of 30,000 MT rice to the same foreign buyer, approved conclusion of the contract, suffers from manifest perversity.

20.2 When FCI defaulted in supply of the requisite quantity of rice for export, advertisement was issued, in the newspaper, inviting offers from other domestic suppliers. 27 suppliers responded. The offers extended by all the suppliers were duly considered by Dharampal, the DGM, as manifested by a detailed note recorded, in this regard, and exhibited as Ex. D-13, which found the offers of only two suppliers as meriting consideration, as none of the other suppliers were willing to supply the stipulated quantity of rice within the stipulated time period. These two suppliers were Vinod Associates and MARKFED, Punjab, who were, therefore, invited. Vinod Associates did not, however, respond, and MARKFED expressed its inability to meet the delivery schedule stipulated by MMTC. As time was of the essence, and fulfilment of the contract was being held up, the offers, which had been received independently from outside parties, were considered, and accepted. These parties supplied the requisite quantity of rice within time; however, the rice could not be exported owing to failure, on the part of TRANSCART, in providing vessels, on which the rice could be loaded and sent, in time. All these facts were vouchsafed and evidenced by the documents on record, as well as by the depositions of witnesses, including witnesses of MMTC, who had appeared before the IO and tendered evidence. In these circumstances, the charge, against the petitioner, that the reason, and

the manner, in which contract had been concluded with domestic suppliers who had not responded to the advertisement published in the newspaper, was difficult to understand, obviously had no merit. By acting as he did, the petitioner ensured that the requisite quantity of rice, ready for export, was available at the port in time. Instead of appreciating the manner in which the petitioner acted in this case, the IO found the petitioner to have misconducted himself, solely because he did not proceed in the manner in which, according to the IO, he ought to have proceeded. The IO opined, in his Inquiry Report, that the petitioner should have prepared a comparative statement with regard to rates and supply of goods, or re-advertised the contract in the newspaper, or preplanned the supply well in advance to ensure guaranteed supply of rice from assured suppliers for further export or, failing everything, allowed the contract to lapse. The basis for the suggestions, of the IO, is not forthcoming anywhere on the record. Neither, for that matter, did the chargesheet, issued to the petitioner, advance any such “suggestions”, regarding the manner in which the petitioner ought to have acted, consequent on the default of the FCI. The petitioner, in his subsequent representations to the DA, clearly pointed out that the suggestions were not only impractical and, in fact, impossible to implement, but that, had the petitioner allowed the contract to lapse, MMTC would have had to suffer heavy amounts by way of damages and penalty, as well as significant erosion of its worth in the international market. How, and in what manner, the acts of the petitioner had prejudiced the MMTC, or its interests, is not forthcoming anywhere on the record. Even if, for that matter, it were

to be assumed that the petitioner could have acted in the manner suggested by the IO, the fact that he did not, and chose, instead, to accept the rice from the suppliers who directly contacted the MMTC, cannot be categorised as “misconduct”. Significantly, there is no allegation, or finding, that the petitioner was attempting to favour the private parties from whom the rice was procured and sent to port. In the absence of any such suggestion, far less evidence, the decision, of the petitioner, to accept rice from the suppliers with whom contract were ultimately finalised, instead of proceeding in the manner in which the IO suggested he ought to have proceeded, it could hardly be suggested that the petitioner had committed any “misconduct”.

20.3 Next came the charge that the petitioner had favoured Neelkanth. This, it was alleged, was evidenced by the fact that, instead of bank guarantee, security from Neelkanth was taken in the form of FDR/Cash Deposit Receipt, and that godown charges were recovered, from Neelkanth, only up to a period of 45 days, whereafter they were borne by MMTC. There was no allegation that acceptance of security had necessarily to be by way of bank guarantee. The IO, significantly, found no difference, security-wise, between the FDR and the Bank Guarantee; his only finding was that the petitioner ought to have followed a uniform practice. Assuming, for a moment, that lack of uniformity, in the manner in which security was ensured, by the petitioner, from the suppliers of rice, it is not possible to comprehend how the petitioner could be said to have favoured, or

extended preferential treatment to, Neelkanth, by requiring an FDR to be submitted by it, instead of a bank guarantee.

20.4 The charge that preferential treatment had been extended to Neelkanth by requiring to pay rent, on the stocks remaining in the godown, only up to 45 days, with MMTC shouldering the burden thereafter, was incorrect even on facts. The petitioner clearly pointed out that godown rent, from all suppliers, was recovered only up to a period of 45 days, whereafter MMTC bore the rent, as the continued detention of the stock could not be attributed to any act, or omission, on the part of the suppliers. This submission, of the petitioner, has not been doubted or questioned, either by the IO or by the DA. Even so, the IO, as well as the DA, held the allegation of preferential treatment having been extended, by the petitioner to Neelkanth, to stand proved, merely because, in the Letter of Intent issued to Neelkanth, a specific clause, limiting the liability of Neelkanth to godown rent only till 45 days, was inserted, whereas no such specific clause was to be found in the Letters of Intent issued to the other suppliers. Once it was admitted that, in fact, as a uniform practice, godown rent from the suppliers of rice was charged only for 45 days, whereafter MMTC bore the burden for further delay in export of the goods, and that this practice was uniformly followed across the board in respect of all suppliers, it is impossible to understand how the allegation of preferential treatment having extended, by the petitioner, to Neelkanth, could be said to have been proved. The submissions of the

petitioner, on this aspect of the matter, have been ignored by IO as well as DA.

20.5 The fourth, and, effectively, the last substantive Article of Charge against the petitioner, was that he had accepted rice, from the suppliers, without actual weighment, on the basis of “Trust Receipts”, furnished by them, as well as “Surveyor’s Reports”. The petitioner pointed out that, even as per the clauses of the Letters of Intent placed on the suppliers, 85% of payment was required to be released to them on the basis of the Trust Receipts and estimation provided by the Surveyor, i.e. S. G. S. International. It was further pointed out that at least two of the witnesses, SW-1 and DW-4, had deposed, during inquiry, that release of payment, against “Trust Receipts” was a matter of routine practice. The concomitant allegation, that, as a result of the petitioner having accepted the supplies without actual weighment, loss had resulted to MMTC, as the rice was found, on actual weighment at a later point of time, to be short, was also factually incorrect, as, at the time of handing over, by the petitioner, of charge as Director (Agro) on 31st March, 1996, the stocks were reconciled, and no shortage was found. The petitioner contended, and justifiably, that, if any shortage was detected later, responsibility therefor could hardly be laid at the door of the petitioner. In any event, once the submission, of the petitioner, that release of 85% payment against “Trust Receipts”, was a matter of practice, and routinely followed, was accepted, the very basis of the Article of Charge stood demolished. The IO, correctly appreciating this fact, held that release of payment against Trust

Receipts was actually a matter of routine practice, and that the petitioner could not, therefore, have been faulted in following the same. The DA, significantly, also accepts that release of payments against Trust Receipts was a practice followed the past, by other officers of the MMTC, but faults the petitioner for not having “rectified the matter”. How, and why, the petitioner should have done so, is left to the realm of conjecture. That apart, this finding, of the IO, clearly travels beyond the boundaries of the chargesheet issued to the petitioner, which contained no such allegation. The DA, too, is conspicuously silent regarding the established procedure in this regard, or the alternate procedure which, in his estimation, the petitioner ought to have adopted.

20.6 The allegation of supervisory failure, as leveled against the petitioner in Article V of the Articles of Charge, hardly merits any consideration. There is complete non-application of mind, by the MMTC, on this aspect. The petitioner clearly pointed out, in his review petition, that the allegation of loss having been incurred in the export of rice to ICC, Praha was actually incorrect and that, in fact, MMTC had earned handsome profits in the said transaction. It was again reiterated, by the petitioner, that no shortages had been discovered during his tenure, submitting, further, in this regard, that any shortage discovered after the relinquished charges as Director (Agro) could obviously not be attributed to the petitioner. These submissions have fallen on deaf ears.

20.7 I am constrained, in the circumstances, to agree that the opinion, of the IO, that this charge was effectively just thrown up in the air without any evidence, documentary or otherwise, to support it. This is quite apart from the fact that the allegations, as contained in the Disagreement Memo of the DA and, thereafter, in the findings returned by the DA in the punishment order dated 9th December, 2002, were beyond the Article of Charge itself.

21. The picture that emerges from a holistic appreciation of the above facts, is, as already observed hereinabove, stark. Significantly, there is no allegation, against the petitioner, of his having been actuated by corrupt motives, or with any intent to favour a particular party. Though certain oblique allegations, regarding preferential treatment having been extended to Neelkanth, were made, the petitioner satisfactorily explained that no such preferential treatment, had, in fact, been shown to the said party. It is clear that the petitioner had, placed in the circumstances in which we found himself, acted according to his best judgment, and that, while there may have been a difference of opinion, on the part of the IO and/or DA, regarding the practicability, or even the correctness, of the procedure adopted by the petitioner, no impropriety, far less illegality, could be attributed to him. Decisions taken by the petitioner, which were subsequently, duly approved by the SPC, have also sought to be questioned, and used as a basis to penalize the petitioner. The decisions of the petitioner, which have formed the basis of the disciplinary proceedings to which he had been subjected, were decisions taken in his administrative capacity,

within the authority vested in him to do so, and there is nothing to indicate that, in taking the said decisions, the petitioner was actuated by any, except the most *bona fide* motives. The petitioner, clearly, explained each and every action of his, which had been sought to be questioned, by the MMTC; unfortunately for him, however, his explanation has not received adequate consideration, at least by the DA, even while disagreeing with the findings of the IO. It is most disconcerting to note that the only stage at which any application of mind, to the petitioner's defence, or to the sustainability of charges against him, appears to have been accorded, was by the IO. The DA, clearly, has, blindly, sought to disagree with the IO and, having done so, has not entered any finding on the submissions of the petitioner in his defence. The review petition of the petitioner has met with an identical fate.

22. In fact, the entire exercise, once the ink on the Inquiry Report of the IO had dried, was an apparent eyewash, with the possible intention of doing lip service to the principles of due process and fair play. The reasons for disagreement, cited by the DA, are no more than a reiteration of the allegations against the petitioner in the charge-sheet. Given the fact that the IO had arrived at his conclusions after a detailed analysis, the least that the DA was expected to do, when expressing such strong disagreement with the findings of the IO, was to address the reasons provided by the IO for arriving at the said findings. No attempt, even perfunctory, to undertake any such exercise, by the DA, is apparent on record. This court is constrained

to observe that the manner in which the DA has proceeded, after the submission of Inquiry Report by the IO, indicates a preconceived decision to remove the petitioner from service. This impression is fortified by the total warrant of consideration, either in the impugned punishment order dated 9th December, 2002 or, subsequently, in the impugned review order dated 2nd September, 2003, to any of the submissions advanced by the petitioner. As a result, the petitioner, who, placed in an unenviable position, addressed the issues that came up before him to the best of his ability and judgement, has had, unnecessarily, to face the rigours of a disciplinary proceeding, followed by the ignoring of an order dismissing him from service and, as a result, has had to endure the pendency of the present litigation, in this court, for over a decade and a half.

23. “Misconduct”, deconstructed

23.1 It is necessary, before parting company with this case, to reiterate the legal principles regarding the scope and ambit of the expression “misconduct”, when used in service jurisprudence. It may be mentioned that Rule 5 of the MMTC Employees Conduct, Discipline and Appeal Rules, 1975 and lists, “without prejudice to the generality of the term ‘misconduct’”, as many as thirty acts which, if committed, “shall be treated as misconduct”. Of these, clause (5) covers “acting in a manner prejudicial to the interests of the Company” and clause (9) covers “neglect of work or negligence in the performance of duty including malingering or slowing down of

work”. The other clauses of Rule 5 have no application, and it is not necessary to burden this decision by any reference thereto.

23.2 The Supreme Court has, in decision after decision, explained, in a manner which leaves no room for doubt, the scope and ambit of the expression “misconduct”. In paras 5 and 6 of its decision in ***State of Punjab vs Ram Singh, (1992) 4 SCC 54***, the Supreme Court rules thus:

“5. Misconduct has been defined in *Black's Law Dictionary*, Sixth Edition at page 999 thus:

“A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, wilful in character, improper or wrong behavior, its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense, but not negligence or carelessness.”

Misconduct in office has been defined as:

“Any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.”

P. Ramanatha Aiyar's *Law Lexicon*, Reprint Edition 1987 at page 821 defines ‘misconduct’ thus:

“The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being

construed. Misconduct literally means *wrong conduct or improper conduct*. In usual parlance, misconduct means *a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.*”

6. Thus it could be seen that the word ‘misconduct’ though not capable of precise definition, on reflection receives its connotation from the context, *the delinquency in its performance and its effect on the discipline and the nature of the duty*. It may involve moral turpitude, *it must be improper or wrong behaviour; unlawful behaviour, wilful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character*. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order.”

(Emphasis supplied)

23.3 Paras 9 to 12 of the earlier decision of the Supreme Court, in ***U.O.I. v. J. Ahmed, (1979) 2 SCC 286***, are instructive on the point:

“9. *The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some*

lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, Charge 2 refers to the quality of lack of leadership and Charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. *These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules.* The words “act or omission” contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 (“Conduct Rules” for short). The Government has prescribed by Conduct Rules a code of conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. *Failure to come up to the highest expectations of an officer holding responsible post or lack of aptitude or qualities of leadership would not constitute as failure to maintain devotion to duty.* The expression “devotion to duty” appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can be safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline

and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. *It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.*

10. It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that *conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct* (see ***Pierce v. Foster***, [17 QB 536, 542]). A disregard of an essential condition of the contract of service may constitute misconduct [see ***Laws v. London Chronicle (Indicator Newspapers)***, [(1959) 1 WLR 698]]. This view was adopted in ***Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur***, [61 Bom LR 1596], and ***Satubha K. Vaghela v. Moosa Raza***, [10 Guj LR 23]. The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under:

“Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct.”

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik*, AIR 1966 SC 1051 : (1966) 2 SCR 434 : (1966) 1 LLJ 398 : 28 FJR 131 in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In *S. Govinda Menon v. Union of India*, (1967) 2 SCR 566 : AIR 1967 SC 1274 : (1967) 2 LLJ 249 the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in *P.H. Kalyani v. Air France, Calcutta*, AIR 1963 SC 1756 : (1964) 2 SCR 104 : (1963) 1 LLJ 679 : 24 FJR 464 wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. *It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip*

*through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see **Navinchandra Shakerchand Shah v. Manager, Ahmedabad Coop. Department Stores Ltd.**, (1978) 19 Guj LR 108, 120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.*

12. The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea. We find it difficult to subscribe to this view because *gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings.*”

(Emphasis supplied)

23.4 The contours of the expression “misconduct” were subjected, once again, to incisive examination, by the Supreme Court, in **Ravi Yashwant Bhoir v. Collector**, (2012) 4 SCC 407, in which, after referring to the definitions of “misconduct”, in Black’s Law Dictionary and P. Ramanatha Aiyar’s “Law Lexicon” (which have already been noted hereinabove), it was held as under:

“13. *Mere error of judgment resulting in doing of negligent act does not amount to misconduct. However, in exceptional circumstances, not working diligently may be a misconduct. An action which is detrimental to the prestige of the institution may also amount to misconduct. Acting beyond authority may be a misconduct. When the office-bearer is*

expected to act with absolute integrity and honesty in handling the work, any misappropriation, even temporary, of the funds, etc. constitutes a serious misconduct, inviting severe punishment. (*Vide Disciplinary Authority-cum-Regl. Manager v. Nikunja Bihari Patnaik* (1996) 9 SCC 69 : 1996 SCC (L&S) 1194, *Govt. of T.N. v. K.N. Ramamurthy* [(1997) 7 SCC 101 : 1997 SCC (L&S) 1749 : (1997) 7 SCC 101 : AIR 1997 SC 3571], *Inspector Prem Chand v. Govt. of NCT of Delhi* [(2007) 4 SCC 566 : (2007) 2 SCC (L&S) 58] and *SBI v. S.N. Goyal* [(2008) 8 SCC 92 : (2008) 2 SCC (L&S) 678 : (2008) 8 SCC 92 : AIR 2008 SC 2594].)

14. In *Govt. of A.P. v. P. Posetty* [(2000) 2 SCC 220 : 2000 SCC (L&S) 254], this Court held that since acting in derogation to the prestige of the institution/body and placing his present position in any kind of embarrassment may amount to misconduct, for the reason, that such conduct may ultimately lead that the delinquent had behaved in a manner which is unbecoming of an incumbent of the post.

15. In *M.M. Malhotra v. Union of India* [(2005) 8 SCC 351 : 2005 SCC (L&S) 1139 : AIR 2006 SC 80], this Court explained as under: (SCC p. 362, para 17)

“17. ... It has, therefore, to be noted that the word ‘misconduct’ is not capable of precise definition. But at the same time though incapable of precise definition, the word ‘misconduct’ on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. *The act complained of must bear a forbidden quality or character* and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.” A similar view has been reiterated in *Baldev Singh Gandhi v. State of Punjab* [(2002) 3 SCC 667 : AIR 2002 SC 1124].

16. *Conclusions about the absence or lack of personal qualities in the incumbent do not amount to misconduct*

holding the person concerned liable for punishment. (See Union of India v. J. Ahmed [(1979) 2 SCC 286 : 1979 SCC (L&S) 157 : (1979) 2 SCC 286 : AIR 1979 SC 1022].)

17. It is also a settled legal proposition that misconduct must necessarily be measured in terms of the nature of the misconduct and the court must examine as to whether misconduct has been detrimental to the public interest. (Vide **Bank of India v. Mohd. Nizamuddin [(2006) 7 SCC 410 : 2006 SCC (L&S) 1663 : AIR 2006 SC 3290].**)

18. The expression “misconduct” has to be understood as a *transgression of some established and definite rule of action, a forbidden act, unlawful behaviour, wilful in character. It may be synonymous as misdemeanour in propriety and mismanagement. In a particular case, negligence or carelessness may also be a misconduct for example, when a watchman leaves his duty and goes to watch cinema, though there may be no theft or loss to the institution but leaving the place of duty itself amounts to misconduct. It may be more serious in case of disciplinary forces.*

19. Further, the expression “misconduct” has to be construed and understood in reference to the subject-matter and context wherein the term occurs taking into consideration the scope and object of the statute which is being construed. Misconduct is to be measured in the terms of the nature of misconduct and it should be viewed with the consequences of misconduct as to whether it has been detrimental to the public interest.”

23.5 The tone, and tenor, of the expressions used, to delineate the scope and ambit of “misconduct”, are unmistakable. The decisions cited above refer to misconduct as “a transgression of *some established and definite rule of action*, where *no discretion is left, except what necessity may demand*”, “a forbidden action”, “dereliction from duty”, “*unlawful behaviour, wilful in character*”, “*improper or wrong behaviour*”, acts which the officer concerned in

“had *no right to perform*”, “failure to act *in the face of an affirmative duty to act*”, “*wrongful intention*”, “*violation of definite law*”, conduct, of the officer “*inconsistent with due and faithful discharge of his duty*”, “arising from *ill motive*”. It has been emphasised that the act complained of “must bear a *forbidden quality or character*”.

23.6 While, thus, setting out the nature of the acts which would tantamount to “misconduct”, the decisions cited above also emphasise what would *not* constitute “misconduct”. Thus, it is held, in the above decisions, that “a mere error of judgement”, *mere* “negligence”, “unskilfulness”, “carelessness”, “mere negligence in performance of duty”, “lack of leadership”, “ineptitude”, “lack of foresight”, indecisiveness, lack of “competence for the post”, “capability to hold the same”, “efficiency requested for a post” or “ability to discharge functions attached to the post”, “failure to come up to the highest expectations of an officer holding a responsible post”, “lack of aptitude”, “failure to attain the highest standard of administrative ability while holding a high post”, or “deficiencies in personal character or personal ability”, would not constitute misconduct. Carelessness or negligence, too, it has been held, would ordinarily not amount to “misconduct”, though, in exceptional cases, they might. These exceptional cases, however, are cases similar to “the sentry who sleeps at his post and allows the enemy to slip through”, “a railway cabin man signalling in a train on the same track where there is a stationary train causing head-on collision”, “a nurse giving intravenous injection which ought to be given intramuscularly,

causing instantaneous death”, or “a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life”. In such extreme cases, it has been held by the Supreme Court, though the act may not be tainted by wrongful or culpable intention, and may not be deliberate, it would still amount to “misconduct”, given the seriousness of the consequences resulting from the act, and the nature and degree of care and caution expected to be exercised by the officer concerned, given the position in which he is placed. The significance of these examples, as cited by the Supreme Court in *J. Ahmed (supra)*, cannot be lost. Obviously, the Supreme Court has taken pains to emphasise that, save and except in such extreme cases, resulting in serious loss to life and limb, or equally catastrophic consequences, acts which may be negligent, or careless, could not, *ordinarily*, be characterised as “misconduct”.

23.7 This court has, in its recent decision in *T. C. Jindgar v. Rural Electrification Co., 2018 SCC Online 8575*, culled out the following propositions, relating to the jurisprudential contours of the expression “misconduct”, as emerging from the above decisions:

- (i) Mere negligence or carelessness is not “misconduct”.
- (ii) Incompetence, incapability to hold a post, and want of requisite efficiency are also not “misconduct”.
- (iii) Failure to come up to the highest expectations of an officer holding a responsible post, lack of aptitude or qualities of leadership are also not “misconduct”. “Misconduct” implies *blameworthy* conduct.

- (iv) Conduct inconsistent with due and faithful discharge of duty is “misconduct”.
- (v) Disregard of a mandatory condition of the contract of service of an employee may constitute “misconduct”.
- (vi) “Misconduct” means conduct arising from ill-motive.
- (vii) A single act of omission, or error of judgment, would not ordinarily constitute “misconduct”; however, if such act or error results in serious or atrocious consequences it may amount to “misconduct”.
- (viii) Similarly, carelessness or negligence resulting in atrocious consequences, may constitute “misconduct”. This would ordinarily apply in extreme cases, as is apparent from the illustrative examples given by the Supreme Court, akin to a sentry sleeping at his post; thereby allowing the enemy to slip through a railwayman signaling in a train on a track which there already stood a stationary train, resulting in a head-on collision, a nurse giving an injection intravenously instead of muscularly, thereby causing instantaneous death, or error on the part of a pilot in overlooking a snag in the engine, resulting in the crash of the aircraft, causing heavy loss of life. The consequences contemplated in these examples, i.e. the enemy slipping in through the border, head on collision between two trains, death owing to erroneous administration of an injection, and a crash of an aircraft resulting in heavy loss of life, make it clear that it is only the most extreme and drastic consequences which could

justify categorization of mere carelessness or negligence, on the part of an officer, as “misconduct”.

(viii) Gross or habitual negligence in performance of duty may, however, constitute “misconduct”, even in the absence of *mens rea*.

(ix) Misconduct must ordinarily be willful in character, and not merely an error of judgment. It must involve a transgression of some established or definite rule of conduct, or doing of some act which is forbidden.

(x) Action which is detrimental to the prejudice of an institution, may in given cases, amount to “misconduct”.

23.8. On the issue of negligence, a clarificatory caveat would be in place. While simple cases of negligence would not amount to “misconduct”, extreme cases of negligence, as noted above, which result in disastrous catastrophic consequences, would. There is, however, an intermediate species of cases, which are generally parenthesized as cases of “gross or habitual negligence”. Such cases, too, as noted above, may constitute “misconduct”. It is in cases such as these, that the court has to maintain a fine balance. Cases of gross or habitual negligence are, needless to say, actionable by way of disciplinary proceedings; after all, employees do not have a *carte blanche* to be negligent, and are not employed in an organisation so that they discharge their duties negligently. Negligence has, therefore, to necessarily invite corrective action. Where the negligence is simple, such corrective action may only be by way of an

administrative warning, or an adverse entry in the employee's confidential report, or his being superseded for promotion or suffering loss of seniority, etc. Where, however, the negligence is found to be gross, or habitual, disciplinary action is undoubtedly warranted. The court has always to be alive to the fact that there is a fundamental distinction between "mere negligence" and "gross or habitual negligence". In cases of disciplinary action, and consequent punishment, in cases of "gross" or "habitual" negligence, on the part of the employee, the exercise of jurisdiction, by the writ Court, is largely confined to examining whether the punishment awarded, or imposed, on the employee concerned, was, or was not, proportionate to the misconduct committed by him.

23.9 This court has, in a recent decision, had occasion to cogitate on the higher degree of probity, and propriety, expected of senior functionaries in government departments, as well as in public sector undertakings, in the honest and efficient discharge of whose duties the landlord and the landless have, alike, a pre-eminent public interest. The obverse is, however, equally true. If senior officials in public sector undertakings are expected to be circumspect in the manner in which they discharge their duties, equal circumspection is expected, of the undertaking itself, while seeking to question, or fault, decisions taken by such officials in lawful exercise of the discretion vested in them. Where the exercise of such discretion, or the discharge of duty by the official, is tainted by *mala fides* or corrupt motives, or is found to be callously negligent, disciplinary action is undoubtedly

warranted. In other cases, however, it would be wholly unjustified to subject the officer concerned, to the indignity of a disciplinary proceeding, and all its agonizing sequelae, merely because, in the opinion of the disciplinary authority, the officer could have acted otherwise, or exercise his discretion in another manner. Decisions have, often, to be taken by such officers on the spur of the moment, keeping in mind the best interests of the organisation or department, of which they are an integral part. To start subjecting such decisions, taken *bona fide*, to a microscopic analysis, and proceed against the officer(s) on the ground that the decision lacked in the requisite degree of prudence – *as opposed to propriety* – would not only be grossly unfair to the officer, but would, in the ultimate analysis, be deleterious to the interests of the organisation and, therefore, to public interest itself. This Court has come across several such instances, in which, *sans* any element of want of *bona fides* in acting as he did, the officer has been subjected to disciplinary proceedings merely because, had he acted otherwise, financial loss, which the organisation has had to suffer, could have been avoided. It is undoubtedly true that the financial interests of an organisation, especially where the organisation is a department of the government, or a public sector undertaking, has, at all times, to guide the decisions of officials, and employees, of such departments or undertakings. At the same time, where there is nothing to indicate that the officer, or employee, has acted in conscious disregard of such financial interests, the fact of loss having ensued cannot, by itself, constitute the basis to allege commission of “misconduct”, by the officer. Officers cannot

be penalised for losses suffered by the organisation, where they have acted in the best interests of the organisation, and as per their best judgement, untainted by *mala fides*, ulterior motives, or corrupt considerations. Else, the proverbial sword would forever be hanging over the heads of these officers, thereby inhibiting them from acting on the basis of their best judgement, or analysis, of the situation – a position which no civilised legal system can tolerate.

24. Tested on this anvil, it is clear that no misconduct can be attributed to the petitioner. There is no evidence of any of the acts, regarding which he was subjected to disciplinary proceedings, having been tainted by *mens rea*, or any wilful intention to transgress an established rule of conduct. It is unfortunate that, despite the Supreme Court having taken such pains, to set out, extensively, the ambit of the expression “misconduct”, subjective decisions, of officers holding responsible positions, taken in the exigencies of the circumstances in which they find themselves, are, even today, being made subject matter of disciplinary proceedings, causing endless hardship and trauma to the officer concerned. Undoubtedly, if the acts of an officer are tainted by malice, a wilful intention to transgress propriety, or corrupt motives, no leniency, whatsoever, can be shown to him, or her, and the officer concerned has to endure the inevitable consequences of his, or her, action. It would be folly, however, to, as in the present case, subject executive decisions taken by officers holding responsible positions, such as the petitioner, to a microscopic scrutiny and, merely because, in the perception of the establishment,

the action was imprudent, negligent or careless, proceed against the officer departmentally. The entire exercise of disciplinary action, taken in the present case against the petitioner, stands vitiated, *ab initio*, having been initiated, and proceeded with, in complete ignorance, or, possibly, in deliberate disregard, of what constitutes “misconduct”, as to justify action against the officer guilty thereof. This court is convinced that, placed in the circumstances in which he found himself, the petitioner acted in the best interests of the organisation, trusting his judgment in the bargain. It is impossible, in these circumstances, to hold that any misconduct had been committed by the petitioner.

25. This Court is constrained to observe that the petitioner has met with a very raw deal at the hands of the respondents. *Bona fide* decisions taken by him have been treated as the justification to dismiss him from service, with scant regard to the detailed explanation, submitted by him, at every stage explaining his conduct. Most of the actions taken by the petitioner were on the lines of the actions taken by his predecessors in similar circumstances, and were, in every case, actuated by the urgency of the situation which, significantly, has not been questioned, at any stage, either by the IO or by the DA. In the circumstances, basic civility demanded that, before throwing the petitioner out of his job, some modicum of application of mind, to his defence and to the various submissions made by him, was extended. This Court is constrained to presume that, for reasons recondite, a concerted effort, to remove the petitioner from the

organization, was made, and was successful. As a result, the petitioner lost his job, and has had to suffer the ordeal of this litigation for over a decade and half as on date.

26. The nature of the punishment awarded to the petitioner also convinces this court that the disciplinary authority, in proceeding against him, was not acting *bona fide*. This court has had occasion, in the past, to emphasise the consequences of removing an employee from service. In the present case, the punishment imposed on the petitioner was not mere “removal”, but dismissal, with forfeiture of his entire gratuity, and an added caveat that he would be ineligible to secure any other governmental employment. It is obvious that the petitioner has, deliberately, been visited with the most extreme punishment which, under the applicable Rules, could be imposed on him. The punishment awarded to the petitioner is, indeed, so severe, as to result in civil death, wiping out the petitioner, as well as his family and those dependent on him, financially, professionally and socially. In deciding to terminate the service of an employee, every employer is expected to exercise the highest degree of caution, and display the greatest degree of circumspection, indicating that a conscious decision has been taken, to the effect that, given the magnitude of the misconduct committed by the officer, the possibility of imposition of any lesser punishment stands unequivocally ruled out. No such application of mind is, needless to say, forthcoming in the present case.

27. The proceedings against the petitioner, starting from the issuance of the charge-sheet dated 4th May, 2001, therefore, stand, completely vitiated on facts as well as law.

28. Having thus adjudicated on the legality of the disciplinary proceedings instituted against the petitioner by the MMTC, and having held the said proceedings, as also the order of dismissal, of the petitioner, from service, passed as a culmination thereof, to be unjust and illegal, this Court finds itself in a piquant situation. As has been observed at the start of this judgment, the petitioner's five year tenure, as Director (Finance), in the MMTC, came to an end on 14th May, 2000. He was actually recommended, by the competent selection board, for continuation of his tenure as Director (Finance) for a further term of five years, *vide* decision dated 13th November, 2000. This decision could never, however, fructify, as in the interregnum, preliminary inquiry was initiated, against the petitioner, on complaint received against him, which resulted in the issuance, to him, of the charge-sheet dated 4th May, 2001, which is the genesis of the present proceedings. The petitioner, in these circumstances, had moved this Court, by way of CWP 4946/2001, praying that he be allowed to continue in service as Director (Finance), pending completion of the disciplinary proceedings against him. The said writ petition was disposed of, by a learned Single Judge of this Court, *vide* judgment dated 29th April, 2002. The prayer, of the petitioner, for being allowed to continue in service as Director (Finance) in the MMTC, pending completion of the disciplinary proceedings instituted, against him, was categorically rejected, holding, in unambiguous terms, "the petitioner

cannot claim any right to continue in service". The MMTC, was, however, given liberty to continue with, and conclude, the disciplinary proceedings expeditiously. While granting the said liberty, this Court also observed that "there is no doubt that once there is cessation of the service of the petitioner, there will be no question involved of termination of his services as a consequent of departmental proceedings". At the same time, the learned Single Judge also directed that, though the MMTC could not be restrained from filling up the post of Director (Finance), "if the petitioner is exonerated after departmental proceedings and the post has still not been filled up, the case of the petitioner shall be considered favourably in view of the fact that the petitioner had been selected by PESB and only impediment in the appointment of the petitioner was the refusal of respondent No.4 to issue the vigilance certificate". As it happened, the departmental proceedings concluded, not in the petitioner's exoneration, but in his dismissal from service. The petitioner has contended, and rightly, that, apart from the departmental proceedings against him being vitiated on merits, the respondent could not have dismissed him from service, once his tenure as Director (Finance) already stood expired on 14th May, 2000, and his prayer for extension of the said tenure stood rejected by this Court. As such, even for this reason, the decision, of the DA, to dismiss the petitioner from service, was clearly illegal. So far as the petitioner is concerned, that, however, is neither not there, as there could be no question of reinstating him in the service of the MMTC, or even of deeming him

to have been reinstated in the service of the MMTC, his tenure as Director (Finance) having come to an end on 14th May, 2000.

29. In any event, in view of my decision, hereinabove, that the order of punishment dated 9th December, 2002, was unsustainable in law, the direction to withhold the petitioner's gratuity would also, per consequence, be set aside. The sequitur would be that the petitioner would be entitled to all the retiral benefits due to him, assuming his service, with the MMTC, to have come to an end on 14th May, 2000.

30. I have queried, of the petitioner, regarding the practical consequence that would follow, were he to succeed in the writ petition. He has submitted, forthrightly, that, in practical terms, the only benefit to which he would be entitled would be by way of release of his gratuity which stands withheld as a consequence of the impugned orders. Apart from this, the petitioner submits that his main effort was to ensure that the blemish, cast on him by the impugned orders, was removed.

31. The writ petition of the petitioner, is, therefore, allowed, in terms of the prayers contained therein, by quashing the inquiry report dated 4th May, 2001, the order of punishment dated 9th December, 2002 and the review order dated 2nd September, 2003.

32. Consequent to the setting aside, by me, of the inquiry report, the order of punishment and the review order, passed against the petitioner, the respondent is directed to release, to the petitioner, his

entire gratuity which stands withheld by the respondent as a result of the impugned orders.

33. This Court is convinced that the petitioner was subjected to protracted disciplinary proceedings, an entirely illegal order of dismissal from service and, thereafter, to suffer the ordeal of the present proceedings before this Court, for no fault of his. This Court is also convinced that the above acts of the MMTC were completely wanting in bonafides, and, as the petitioner alleges, appears to have been instituted with the intention of ensuring that the petitioner was not reappointed as Director (Finance) for five years after 4th May, 2000. Given the agony and hardship that the petitioner has, undoubtedly, had to undergo as a result of the acts of the MMTC, this Court is of the view that the MMTC is required to be burdened with costs, which are quantified at ₹ 50,000/-.

34. All payments, in accordance with the directions contained in paras 32 and 33 hereinabove, are directed to be released, to the petitioner, by MMTC, within a period of four weeks from the date of receipt of a certified copy of this judgment.

35. The writ petition is allowed in the above terms.

**C.HARI SHANKAR
(JUDGE)**

JULY 6, 2018
dsn/bh