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

***Judgment delivered on: June 23, 2021***

\+ W.P.(C) 2209/2017, CM No. 9667/2017

SAMIR KUMAR DAS

..... Petitioner

Through: Dr. Samir Kumar Das, petitioner in person.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr. Rakesh Kumar, CGSC with Mr. Raghav Nagar, Adv. for UOI/R-1, R-2, R-4, R-5 & R-6

**CORAM:**
**HON'BLE MR. JUSTICE V. KAMESWAR RAO**

**J U D G M E N T**

**V. KAMESWAR RAO, J**

1. The present petition has been filed by the petitioners with the following prayers: -

> *"It is, most respectfully prayed that this Hon'ble Court may graciously be pleased to take this present Writ Petition into the consideration and issue the appropriate writ or order or directions:*
>
> *a) Issue writ in nature of certiorari quashing the order dated 01.12.2016 and extract note dated 25.11.2016 as arbitrary, illegal and unconstitutional; and/or*
>
> *b) Issue writ in nature of mandamus/certiorari quashing the office memorandum dated 15.12.2016 issued*

*Respondent No. 1 & 2 as illegal and unconstitutional; and/or*

*c) Issue writ in nature of mandamus directing the Respondent No. 1 & 2 to reinstate the petitioner as the Chairman & Managing Director of FCI Aravali Gypsum & Mineral India Limited in terms of circulars dated 31.03.2011, 13.05.2011, 28.06.2011 & 30.10.2014 with effect from 01.12.2016 with full back wages and benefits and/or*

*d) Issue writ in nature of mandamus to the Respondent No. 1 & 2 to pay full pay and allowances along with interest considering the petitioner as on duty from the date of illegal removal till the date when one would have superannuated/retired in normal course i.e. on attaining age of 60 years. The present petitioner would be attaining age of 60 yrs on 27.10.2019; and/or*

*e) Pass any other further orders as is deemed to be fit and proper in the discharge of justice in favour of the petitioner."*

2. In effect, the Writ Petition has been filed by the petitioner to set aside the office order dated December 01, 2016, whereby on the completion of tenure of the petitioner as the Chairman and Managing Director ('CMD', for short), of F.C.I. Aravali Gypsum and Minerals India Limited ('FAGMIL', for short), he was relieved of his duties and for a direction that the respondent Nos. 1 and 2 reinstate the petitioner as CMD, FAGMIL, the respondent No. 4 in this petition.

3. The facts as noted from the petition and submitted by the petitioner are that while he was working at Project and Development India Limited ('PDIL', for short), the Public Enterprises Selection Board ('PESB', for short), under the administrative control of the Department

of Fertilizers advertised the post of CMD, FAGMIL. He forwarded his bio-data to PESB along with vigilance clearance from PDIL. He was selected and consequent thereto, PESB and the Ministry of Chemicals and Fertilizers, after taking clearance from the Central Vigilance Commission ("CVC", for short), through a presidential directive vide letter No. 90/2/2010-HR-I dated March 03, 2011, appointed the petitioner as the CMD of respondent No. 4. He was allowed to retain his lien in PDIL for a period of five years with effect from March 07, 2011, vide the PDIL office memorandum dated March 07, 2011 in consonance with the Department of Public Enterprises ('DPE', for short) O.M. No. 23/19/98/GL-014/DPE dated January 13, 1999.

4. It was stated by the petitioner that the appointment of the petitioner as CMD of respondent No. 4 was for 5 years and the said period was extendable till superannuation on the basis of the criteria fixed by the Appointment Committee of the Cabinet ('ACC', for short), Department of Personnel and Training ('DoPT', for short), DPE and PESB.

5. He stated that as per ACC rules issued on March 31, 2011, all proposals where incumbents meet the benchmark and the Ministry decides to recommend extension shall be referred to the ACC for approval not later than two months before the scheduled expiry of the term, and that in a Schedule 'C' company, extension can be granted by the Cabinet Minister, but for non-extension/termination, the ACC is the competent authority.

6. It was contended by the petitioner that he is entitled for extension beyond the period of five years because according to the PESB letter dated May 13, 2011, the date of superannuation of the

petitioner is October 31, 2019. The petitioner further stated that on June 16. 2015, he submitted self-appraisal documents and requested for the extension of service till his superannuation. He also stated that as per PESB letter dated June 28, 2011, an overall performance score of 80 out of a maximum 100 marks, is the bench mark fixed for extension of the tenure of CMD/MD, without reference to the PESB. He has been awarded an overall special performance score of 95 marks out of 100, by the competent authority, i.e., the Department of Fertilizers. However, his service was cut short by the office order dated December 01, 2016 whereby he was relieved of his post.

7. The petitioner submitted that the approval of the Cabinet Minister for the impugned order was sought on the basis of an extract note dated November 25, 2016 which reads that the petitioner is relieved on the ground that: -

> "*Irregularities were committed to the extent that L1 party i.e., M/s Raj Gypsum was denied contract and job was offered to another party which had not even bid. After the examination of the matter, it has been decided with the approval of the disciplinary authority to recommend to the CVC issuance of charge sheet for inflicting major penalty against the officers, including CMD, FAGMIL.*"

8. The petitioner stated that the contention of there being malice on part of respondent Nos. 1 and 2 gained support from an article published on a website namely www.indianmandarins.com, on November 17, 2016 wherein it was said that the tenure of service of the petitioner might be cut short. He further contends that the said information was published on the website a week before the preparation of the extract

note on November 25, 2016 and fifteen days before the impugned order dated December 01, 2016.

9. It was also stated by the petitioner that he had filed a writ petition W.P.(C) 11400/2016 before this Court seeking relief in the form of extension of his tenure and that it was only during the hearing of the said petition, on December 02. 2016 that he was informed of the impugned order.

10. The petitioner further submitted that a complaint had been filed by M/s Raj Gypsum Udyog, an unsuccessful party in a tender/bid to the Chief Vigilance Officer ("CVO", for short), of respondent No. 4, who in turn vide letter dated March 03, 2015 directed to put the tender process on hold. The petitioner further stated that the above-mentioned case of denial of contract to M/s Raj Gypsum Udyog has already been examined, and Director Vigilance, namely Mr. Neeraj Singhal, who was also Director, PSU (Respondent No. 2) and vide his letter dated January 27, 2016 had informed that no substance was found in the allegations and accordingly the case was closed, with the approval of the CVC. It is the case of the petitioner that thus, the order dated December 01, 2016, is not in consonance with the principles of natural justice and the legal principle "*nemo debet bis vexari, si constat curice quod sit pro una iti eadem causa*", i.e., causing double jeopardy, and is in violation of Article 20(2) and Article 14 of the Constitution of India.

11. The petitioner stated that as per CVC Circular No. 01/01/2015 dated January 23, 2015, if a complaint received by the CVO contains specific and verifiable allegations of corruption or a vigilance angle, it must first be sent back to the complainant for owning/disowning. Relevant portion of the circular reads as under: -

*"2. As regards complaints received directly by the CVOs of Ministries/Departments/Organisations, if a complaint contains specific and verifiable allegations of corruption/vigilance angle and it is proposed to take cognizance of such complaints, the complaint will be first sent to the complainant for owning/disowning, as the case may be. If no response is received from the complainant within 15 days of sending the complaint, a reminder will be sent. 15 days after sending the reminder, if still nothing is heard, the said complaint may be filed as pseudonymous by the CVO of the Ministry/Department/Organisation concerned. CVOs are advised that in no case, any enquiry/investigation be initiated on complaints without receipt of confirmation from the complainant on any complaint."*

12. It was also submitted by the petitioner that the CVO of respondent No. 4, upon receiving a letter on March 02, 2015 from respondent No. 1 to investigate the matter, sent a letter for maintaining the status quo with respect to the tender process, in total violation of the above-mentioned circulars/mandatory guidelines. It is the case of the petitioner that as per the DOPT and CVC guidelines, the complaint of Ms/ Raj Gypsum Udyog is pseudonymous as no confirmation was received before the initiation of the investigation and that the enquiry itself is *void ab initio* because due process of law had not been followed.

13. The petitioner also submitted that the respondent Nos. 1 & 2 have shown duplicity in following the mandatory procedure set by the DOPT/CVC circular which is applicable to all Ministries/Departments as per DOPT circular No. 104/76/2011-AVD-01 dated October 18, 2013, wherein guidelines have been prescribed regarding the handling of complaints in Ministries/Departments, the same reads as below: -

"*i. No action is required to be initiated on anonymous complaint, irrespective of nature of allegations and such complaint needs to be simply filed.*

*ii. The complaint containing vague allegations could also be filed without verification of identity of the complainant.*
*iii. If a complaint contains verifiable allegations, the administrative department may take cognizance of such complaint, with the approval of competent authority to be designated by the ministry as per, distribution of work, in such cases, the complaint will be first sent to the complainant for owning/disowning as case may be. If no response is received a reminder will be sent after waiting for 15 days after sending the reminder, if nothing is heard the said complaint may be filed as pseudonymous by the ministry."*

It was contended by the petitioner that as per DOPT and CVC guidelines, the instant complaint of M/s Raj Gypsum Udyog is pseudonymous as no confirmation had been received before initiation of the investigation of the complaint.

14. According to the petitioner, respondent Nos. 1 & 2 cannot, by any stretch of their imagination be permitted to say that it is optional for them to follow the CVC procedure as mentioned above. In this regard, the petitioner has placed reliance upon the judgement of the Supreme Court in ***Union of India and Anr. vs. Vineet Ohri, 2009 SCC OnLine Del 1881***. It was further stated by the petitioner that it is apparent from the pleadings that respondent Nos. 1 & 2 have at one end chosen not to follow the prescribed procedure of sending the complaint back to the complainant owning/disowning in the case of M/s Raj Gypsum Udyog, whereas in the complaint of one Harish, respondent Nos. 1 & 2 did follow the procedure, seeking confirmation from the so-called complainant. The petitioner further stated that the vindictive, mala fide approach of the then Secretary (Fertilizer), namely Sh. Vijay Shanker Pandey is exposed from the very action that despite the above complaint

being treated pseudonymous, he, in gross violation of the mandatory guidelines of the CVC, went ahead beyond the limit permissible in law.

15. That apart, the petitioner stated that Rakesh Sharma, owner of M/s Raj Gypsum Udyog had also filed four writ petitions before the High Court of Rajasthan, regarding non-opening of the price bid, but they were subsequently withdrawn. The petitioner also stated that Mr. Kumar of M/s. Raj Gypsum Udyog had threatened him with dire consequences if his technical bid was not approved by him in his capacity as the approving authority. The same had been brought to the knowledge of the Department of Fertilizers and was recorded in the counter affidavits filed by respondent No. 4 in all four writ petitions mentioned above. It is the case of the petitioner that since the Writ Petitions filed by M/s Raj Gypsum Udyog were discontinued, their complaint on the same matter is infructuous and without substance. In support of his argument, the petitioner has referred to the judgement of the Supreme Court ***in Kalabharati Advertising vs. Hemant Vimalnath Narichania and Ors., AIR 2010 SC 3745***.

16. The petitioner submitted that there is no vigilance case against the petitioner as the vigilance case for a Board level executive shall only be from the date of CVC order the initiation of vigilance case and there is no such order against the petitioner.

17. It was the contended by the petitioner that the ACC, vide letter dated March 31, 2011 stated that all proposals wherein the incumbents meet the benchmark and the ministry decides to recommend extension, shall be referred to the ACC for approval at least 2 months before the scheduled expiry of the tenure of the incumbents. It was also submitted by the petitioner that the circular dated March 31, 2011 further speaks of

the cases wherein the incumbents meet the benchmark, but have some other issues such as vigilance etc., for which the Ministry/Department is not inclined to recommend extension, the same shall be referred to the ACC for consideration six months before the scheduled expiry of the tenure of the incumbents.

18. The petitioner has further submitted that, as per the circular of the ACC dated October 30, 2014, the services of a Board level employee cannot be terminated on completion of his final term if he/she is due for extension, without specific orders of the ACC, subject to him/her being free from the vigilance angle and meeting the prescribed performance parameters. It was also contended by the petitioner that as per point (ii) of the said letter, the department was to take a conscious decision on whether to extend the term of a Board level appointee at least one year in advance of completion of his initial term, so that adequate time is available for the department to obtain CVC clearance. It is also stated therein that taking into account the vigilance status as on the date six months before the terminal date of initial appointment, the CVC may give its clearance within two months of receiving the reference from the administrative ministry. The limit of two months will include time taken for back references, CBI reference/enquiry etc.

19. It was also stated by the petitioner that as per Point V (a) of the aforementioned letter dated October 30, 2014, in cases where CVC clearance has been delayed beyond the prescribed timeline, merely on account of procedural reasons and where there is no denial of clearance, the case of extension could be processed without waiting any further. It was the contention of the petitioner that from the reading of the said circular, it is evident that there was a responsibility cast upon the

administrative ministry for processing the case at least one year in advance and to communicate it to the incumbent. In support of his argument, the petitioner has referred to the judgement of this Court in ***A.K. Verma vs. Union of India and Ors.*, *2004 SCC OnLine Del 282*** where it was held that, the right to be considered for appointment would include the right of continuation or reappointment.

20. According to the petitioner, the impugned order dated December 01, 2016 could be looked, at as one of compulsory retirement, as the respondent Nos. 1 & 2 with an intent to scuttle down the mandatory guideline stated in circular dated October 30, 2014, have used the term "relieved upon of completion of 5 years of tenure". It was stated by the petitioner that the said order is prima facie mala fide for the reason that the petitioner had already completed his tenure of five years on March 07, 2016. He also stated that his lien in PDIL, issued March 07, 2011 in consonance with DPE OM No.23/19/98/GL-014/DPE expired on March 6, 2016 leaving him without a parent cadre to return to on non-extension of tenure of the post of CMD, FAGMIL. It was his contention that if the respondent No. 1 was not considering the extension of service of the petitioner beyond March 07, 2016, they ought to have relieved the petitioner so that he could have served for three more years until his superannuation as the General Manager, PDIL.

21. It was further contended by the petitioner that despite his tenure as CMD of respondent No. 4 having expired on March 07, 2016, he was not relieved of his charge and by way of implied conduct on the part of respondent Nos. 1 and 2, the petitioner was permitted to continue in his post for a further period of nine months, and that it was only when the petitioner had sought redressal of his grievance by way of this writ

petition, the respondent Nos. 1 & 2 maliciously passed the order dated December 01, 2016 which was communicated to the petitioner only during the course of hearing of the petition. According to him, the implied conduct on the part of respondent Nos. 1 and 2 gave rise to a legitimate expectation that his tenure would be extended. In this regard, he has placed reliance upon the judgement of the Supreme Court in ***H.M. Singh vs. Union of India and Ors., AIR 2014 SC 1128.***

22. It was the case of the petitioner that in light of admitted fact of there being no CVC recommendation till date given to respondent No. 1 for initiating departmental/penalty proceeding, the impugned order arbitrarily relieving the petitioner is bad in law and further the extract note dated November 25, 2016 is also bad in law when the same is read along with letter dated January 27, 2016.

23. It was also stated by the petitioner that in the absence of any communication from the CVC that the petitioner is not clear from vigilance angle, it was not within the scope and jurisdiction of respondent Nos. 1 & 2 to say the petitioner is not clear from vigilance angle. In support of this argument, he has relied upon to the judgement of the Supreme Court in ***Educ. Cons. (I) Ltd. SC/ST Empl. Wel. Asso. Vs. Union of India and Ors., (2016) 8 SCC 271***.

24. The petitioner placed reliance upon a report by the Parliamentary Committee on Pensions dated February 06, 2015, wherein, according to the petitioner, in respect to a similar fact, it was observed and emphasized that in a situation where a board level appointee has been removed maliciously without following due procedure of law, the aggrieved is entitled to compensation for the loss suffered mentally and socially. The Committee recommended the

concerned ministry to release full pay and allowances along with interest considering the petitioner as on duty, from the date of illegal removal till the date when one would have superannuated/retired in normal course.

25. A counter affidavit to the petition has been duly filed by the respondent Nos. 1,2, 4, 5 and 6. It is the case of the respondents that the tenure of the petitioner was not extended beyond December 01, 2016 due to a lack of vigilance clearance and he was relieved from the post of CMD, FAGMIL on December 01, 2016 with the approval of the competent authority (Minister-in-Charge), and that the Department of Fertilizers has taken up the matter for ex-post facto approval of the ACC vide O.M. dated December 15, 2016, which was granted on July 30, 2017.

26. Mr. Rakesh Kumar, learned counsel appearing on behalf of the respondents submitted that FAGMIL is a schedule 'C' Central Public Sector Enterprise ("CPSE", for short) under the administrative control of the Department of Fertilizers. The competent authority to approve board level appointments in schedule 'C' and 'D' CPSEs is the Minister-in-Charge, provided the Ministry does not deviate from PESB's recommendation. It was further submitted by Mr. Kumar that, in terms of para 3 (ii) of ACC's instructions dated April 03, 2001 read with para 5 of ACC's instruction dated March 31, 2011, proposals for extension/non-extension in tenure of Board level appointees in Schedule 'C and 'D' CPSEs are required to be referred to the ACC only in cases where the concerned department proposes to deviate from PESB's recommendations.

27. Mr. Kumar further stated that the then Secretary (Fertilizers) had advised that the proposal for non-extension of the tenure of the

petitioner may be processed in anticipation of ACC approval. Accordingly, the matter was forwarded to the ACC for ex-post facto approval and the same was received on July 13, 2017.

28. It was submitted by Mr. Kumar that, in relation to the matter of extension/non-extension of the petitioner, views of the ACC had been obtained where the ACC had referred to para (3)(d) of its circular dated March 31, 2011 which reads as under: -

> "*All proposals, wherein the incumbents meet the benchmark, but have some other issue such as vigilance etc for which the Ministry/ Department is not inclined to recommend extension, shall be referred to the ACC for consideration six months before the scheduled expiry of tenure of the incumbent.*"

29. Mr. Kumar then referred to para (5) of the above said circular with respect to scope of the circular. Para (5) reads as under: -

> *"While these guidelines relate to appointment/confirmation and extension of CMD/ MD/ Functional Directors of schedule A and B PSEs, the same would apply to those belonging to schedule C and D except that the final decision would be taken by the Ministry, as present, and no reference to the ACC would be needed."*

30. It was submitted by Mr. Kumar that a complaint was received in Department of Fertilizers on February 16, 2015 from M/s Raj Gypsum Udyog, Jaipur, Rajasthan, alleging corruption and irregularity by the management of FAGMIL in the tendering process for mining gypsum. Subsequently, CVO, FAGMIL was advised to send a detailed report on the complaint vide the Department of Fertilizers' letter dated March 03, 2015. A detailed report was sent by the CVO, FAGMIL vide his letter dated June 23, 2015. Mr. Kumar stated that the complaint of M/s Raj Gypsum Udyog dated February 16, 2015 was forwarded by Vigilance Division, Department of Fertilizers, to the CVO, FAGMIL vide letter

No.1/3/2015-VIG dated March 03, 2015 with the request to conduct an inquiry in the matter and submit the preliminary report at an early date to take further necessary action. He also stated that with regard to the CVC circulars dated November 25, 2014, January 23, 2015 and March 07, 2016, the complaint was lodged by M/s Raj Gypsum Udyog, who was an existing contractor of FAGMIL, on their letterhead. They had lodged complaints in the past and therefore, it was not a case of anonymous/pseudonymous complaint.

31. Mr. Kumar submitted that after consideration of the matter, lapses had been found on the part of Tender Committee which recommended non-admission of bids of M/s Raj Gypsum Udyog on the grounds of not having the relevant experience certificate required for the tender and non-execution of previous work assigned in another matter. The GM, FAGMIL and the CMD, FAGMIL had also been found responsible for approving the recommendations of the Tender Committee and that a report in the prescribed proforma vide letter dated July 01, 2016 had been sent to CVC to seek its first stage advice in the matter. Mr. Kumar further stated that the matter had been considered in consultation with CVC, and the Secretary (Fertilizers) vide his note dated November 25, 2016 had recommended for the imposition of major penalty on the petitioner and other officers involved in the matter. Secretary (Fertilizers) had also recommended for issuance of charge-sheet to the petitioner and other officers asking them to explain their conduct. According to Mr. Kumar, the recommendations of the Secretary (Fertilizers) have been approved by the disciplinary authority i.e., the Minister (Chemicals & Fertilizers). It was further submitted that an interim communication was also sent to the CVC vide letter dated

December 01, 2016 with regards to the imposition of major penalty on officers of FAGMIL.

32. Mr. Kumar also stated that on August 05, 2015, the Department of Fertilizers initiated the proposal for extension/non-extension of the petitioner. In this regard, HR-I Section of FAGMIL, vide its O.M. dated November 19, 2015 solicited CVC clearance in respect of the petitioner, for extension/non-extension of his service beyond March 07, 2016. In response to HR-I Section's O.M. dated November 19, 2015, Department of Fertilizers vide letter dated November 26, 2015 had sent the particulars to the CVC, seeking clearance. Mr. Kumar stated, that included the particulars of two cases, one wherein the CVC had recommended closure and another case regarding the complaint from M/s. Raj Gypsum Udyog to the Department of Fertilizers wherein the CVO, FAGMIL in his later report dated June 23, 2015 has fixed responsibility on the petitioner. According to Mr. Kumar, the Secretary (Fertilizers) vide his note dated November 25, 2016 proposed that the tenure of the petitioner should not be extended and that he should be relieved of his duties with immediate effect, in anticipation of ACC approval. The proposal of the Secretary (Fertilizers) was approved by the Cabinet Minister on November 28, 2016. Mr. Kumar contended that it was absolutely baseless to say that the approval of Cabinet Minister was taken at his back date.

33. It was also stated by Mr. Kumar that the CVC vide O.M dated March 14, 2017 had advised for initiation of major penalty proceedings against the officers below board level and while considering the relieving of the petitioner on December 01, 2016, had advised the Department of Fertilizers to take appropriate action under the extant

rules against the petitioner. It was further submitted that the advice of the CVC has been accepted by the Disciplinary Authority.

34. Mr. Kumar further stated that guidelines of the CVC for handling anonymous/pseudonymous complaints were strictly followed. The complaint of M/s. Raj Gypsum Udyog was neither anonymous nor pseudonymous. Mr. Kumar further submitted that as per CVC circular dated March 07, 2016 the opinion of the learned Attorney General was sought and the same is furnished as under:

> *"Material/evidence gathered during the investigation/verification of anonymous complaint when the action was prohibited on such complaints or where such enquiry was initiated without the approval of CVC, can be utilized for further initiation of disciplinary proceedings on misconducts noticed in such verifications/enquiry*"

It was contended by Mr. Kumar that therefore, there is no violation of the mandatory guidelines of the CVC.

35. Mr. Kumar further stated that in regard to the Writ Petitions filed by M/s Raj Gypsum Udyog in the High Court of Rajasthan, the petitions were dismissed as withdrawn, on request by the petitioner therein, with liberty to avail appropriate remedy, if any, under general law and that they continued to seek remedy from the Department of Fertilizers. It was further stated by Mr. Kumar that therefore it is not true that the complaint was infructuous.

36. It was submitted by Mr. Kumar that the case referred to in the Parliamentary Committee Report dated February 06, 2015 (of one Ms. Rita Kunur) is entirely different from the present case. Ms. Rita Kunur was granted extension in service of one year from November 03, 2000 to November 02, 2001 and her services were terminated on June 22, 2001 i.e., four months and ten days before the scheduled expiry of her

tenure. It was stated that in the present case no extension was accorded to the petitioner beyond March 07, 2016 and his matter was pending for want of vigilance clearance and therefore, opinion of the Parliamentary Committee provided in the Report is not applicable in the instant case.

37. Mr. Kumar further stated that the petitioner had not submitted any request for relieving him to join his parent Department before the expiry of his lien and that he was not forcibly made to serve FAGMIL beyond March 07, 2016.

38. Mr. Kumar also submitted that the petitioner was relieved in terms of Presidential Order No. 90/2/2010-HR-I dated March 03, 2011 on completion of five years term and that further extension is not a right. According to Mr. Kumar, the Department may or may not extend the services as per applicable guidelines. He further stated that per circular dated October 30, 2014 of ACC, the Department is not bound to extend the services, if the incumbent is not free from vigilance angle.

39. It was submitted by Mr. Kumar that, as per ACC circular dated March 31, 2011, the final decision for extension of CMD/MD/Functional Director belonging to schedule C & D CPSE would be taken by the Ministry and no reference to the ACC would be needed, and therefore the non-extension of the petitioner was approved by the competent authority, i.e., the Minister-in-Charge of the administrative ministry on November 28, 2016 and no approval of ACC was needed. He also submitted that the proposal for extension/non-extension of the tenure of the petitioner was in consideration in the Ministry seven months before the scheduled expiry of his tenure.

40. It was also contended by Mr. Kumar that there is no difference between approval and ex-post facto approval which may affect the legality of the decision.

41. Mr. Kumar stated that there is no reference in any circular that board level appointees involved in vigilance cases should be given extension automatically, till they get final advice from CVC. Mr. Kumar also submitted that, giving extension beyond normal tenure to board level appointees and taking action in vigilance cases are two different issues and it is not obligatory on the part of the Government to give further extension if it is not inclined to do so. It was further stated by Mr. Kumar that however, action in vigilance cases is to be taken as per the advice of CVC, and that in the instant case, the CVC vide its OM dated March 14, 2017 had furnished the advice for major penalty proceedings against officers below board level and while considering the reliving of the petitioner on December 01, 2016 had advised to take appropriate action against the petitioner. It is the contention of Mr. Kumar that, had it been mandatory on the part of the organization to seek CVC advice before terminating the services of the petitioner, the CVC would have raised that issue in the communication dated March 14, 2017.

42. Mr. Kumar submitted that yet another complaint dated June 30, 2016 with regard to recruitment of officers in FAGMIL is also pending, in which the name of the petitioner has also been mentioned. It was contended by Mr. Kumar that two complaints were pending against the petitioner and the disciplinary authority had approved major penalty proceedings and the issuance of charge sheet against him. It was contended by Mr. Kumar that vigilance clearance is one of the primary

requirements for extension of tenure of a Board level employee, and since the petitioner was not clear from vigilance angle, the Ministry had decided not to extend the petitioner's tenure. The matter was communicated to the CVC and the ACC and ex post facto approval of the ACC was sought. The ACC vide its letter dated July 3, 2017 has granted ex-post facto approval to the order relieving the petitioner from his post as CMD, FAGMIL.

43. Mr. Kumar submitted that advice was sought from the Department of Legal Affairs ('DOLA', for short) whether charge sheet can be issued against the petitioner for initiation of major penalty proceedings, as he had already been relieved from his post. On November 16, 2017, DOLA tendered their advice recommending the initiation of departmental proceedings as per Rule 9(2)(b) of the CCS (Pension) Rules, and accordingly charge sheet was issued to the petitioner on November 27, 2017. The petitioner filed a writ petition W.P.(C) 407/2018 in this Court challenging the issuance of charge sheet. The court inter-alia stated that the Union of India to come to a conclusion whether the petitioner can be proceeded against, under CCS(Pension) Rules, 1972 and if not, to also consider whether the petitioner can be proceeded against, under the CCS(Conduct) Rules, 1964. It was stated by Mr. Kumar that as per the advice of DOLA received vide letter dated March 05, 2018, the matter had been referred to DoP&T and DPPW. He further submitted that it was evident from these facts that as on the date of relieving, the petitioner was not free from vigilance angle.

44. A rejoinder was duly filed by the petitioner to the counter affidavit filed by the respondents. In addition to reiterating his

contentions from the writ petition, the petitioner has placed reliance upon the Annual Report of the Central Vigilance Commission, placed before the President of India, the relevant part of which reads as under: -

> *"The advisory role of the Commission extends to all the matters on vigilance administration referred to it by any Department/Organisation of the Central Government. It is mandatory on the part of the organisation to seek Commission advice before proceeding further in a matter where earlier a report was called for by the organisation"*

45. He contended that when mandatory instructions or guidelines have been issued by the CVC to the extent that a department or an organization ought not to proceed further unless the CVC has tendered its advice, the duplicity of Respondent No. 1 & 2 is reflected from their own admission that the first stage advice from the CVC was sought for vide letter dated July 01, 2016, to which the CVC replied, calling upon the respondent Nos. 1 and 2 to place before it, the proposed action/report, which it intends to take against the petitioner and other officials. It was further stated by the petitioner that respondent Nos. 1 and 2 have admitted that they have forwarded the proposed action/report which they intended to take against the petitioner and other officials on December 01, 2016, therefore, without having awaited the decision of the CVC on the first stage advice, it was not open/permissible for/to the respondent Nos. 1 and 2 to pass the illegal order dated December 01, 2016.

46. It was submitted by the petitioner that the prior approval of ACC was required for the non-extension of the petitioner's tenure. However, against prescribed rules, ex-post facto approval of ACC has been obtained. The petitioner contended that it is a settled legal preposition

that if an order is bad in its inception, it does not get sanctified at a later stage, that is subsequent action/development cannot validate an action which was not lawful at inception, for the reason that illegality strikes at the root of that order, and that it would be beyond the competence of any authority to validate such an order. To buttress his arguments, the petitioner relied upon the judgement of this Court in ***Ajay Kumar Joshi and Ors. vs. Union of India and Ors., MANU/DE/3081/2011*** wherein it was inter alia held that a post facto concurrence would not validate a promotion.

47. The petitioner stated that, post facto approval given by the ACC after seven months of an illegal order will have no effect as the order itself is ab initio void. In this regard he placed reliance upon the judgement of the Supreme Court in ***State of Orissa and Ors. vs. Mamata Mohanty, (2011) SCC 436***.

48. It was further submitted by the petitioner that the Minister had not passed any order and had just put his signature without applying his independent mind and without verification of the facts. In support of his argument, the petitioner referred to the judgement of the Supreme Court in ***Chairman-cum-M.D., Coal India Ltd. and Ors. vs. Ananta Saha and Ors. (2011) 5 SCC 142***. He also relied upon the judgment of the Supreme Court in ***State of Maharashtra v. Sanjay Thakre 1995 Supp. 2 SCC 407*** and the judgment of this Court in the case titled ***Dr. Sahadeva Singh v. Union of India, W.P.(C) 2623/2010, decided on April 20, 2010,*** in support of his contention that there should be strict compliance of executive orders / rules / circulars.

49. On the aspect of stigmatic termination without holding inquiry or even by serving the charge sheet / show cause notice, he relied upon

the judgment reported as ***Surinder Pal Kaul v. State of Punjab, (2005) 1 LLN 954*** and ***State Bank of India v. Palak Modi, (2013) 3 SCC 607.*** On the aspect of evasive and non-specific denial in written statement he relied upon the judgment of this Court in the case of ***Anant Construction v. Ram Niwas, ILR 1995 II Delhi 76***.

50. Having heard the petitioner and the learned counsel for the respondents and perused the record, the issue which arises for consideration in this petition is whether the impugned order relieving the petitioner as CMD of FAGMIL and not extending / renewing his appointment on the said post is justified.

51. The submissions made by the petitioner can be summed up as under:

(i) That he is entitled to extension as CMD FAGMIL beyond the period of five years post March 07, 2016 as his date of superannuation was October 31, 2019.

(ii) As per letter of PESB June 28, 2011 the overall performance by securing 80 out of maximum marks of 100 is the benchmark to be achieved for extension and the petitioner has achieved 95 marks.

(iii) The petitioner is fit from Vigilance angle, inasmuch as even the complaint of M/s Raj Gypsum Udyog has already been examined by Director (Vigilance), who vide his letter dated January 27, 2016 directed closure of the case and the case was closed with the approval of CVC.

(iv) As per CVC circulars dated January 01, 2015 and January 23, 2015, if a complaint is received with specific allegations, then the same needs to be sent back to the complainant for owning / disowning and in this case no confirmation was received before initiation of investigation.

(v) The writ petitions filed by M/s Raj Gypsum Udyog have been withdrawn and as such all the complaints have become infructuous and without any substance. In terms of circular dated March 31, 2011, all proposals wherein the incumbents meet the benchmark but have some other issue such as vigilance etc. for which the Ministry/Department is not inclined to recommend extension, same shall be referred to ACC for consideration six months before the schedule expiry of the tenure.

(vi) As per the circular dated October 30, 2014 the services of a Board level employee cannot be terminated on completion of his initial term, if he / she is due for extension without specific orders of ACC.

(vii) The impugned order dated December 01, 2016 is an order of compulsory retirement as the services of the petitioner have been scuttled prematurely, otherwise the petitioner would have superannuated in the year 2019.

(viii) Despite the first term expiring on March 07, 2016, the petitioner was continued on the post of CMD for nine months and it is only when the petitioner sought redressal of his grievance in this Court that the respondents have passed the impugned order.

(ix) Till such time, there is a communication from the CVC that the petitioner is not clear from the vigilance angle it was not within the scope and jurisdiction of the respondent

Nos.1 and 2 to say that the petitioner is not clear from vigilance angle.

(x) The prior approval and not post facto approval of ACC is required for non-extension of the petitioner's tenure. The same will not validate the action which is not lawful.

52. Having noted the submissions made by the petitioner, I may at the outset state that the appointment letter of the petitioner as CMD FAGMIL dated March 03, 2011 clearly stipulated that the appointment is for a period of five years or till the date of superannuation or until further orders, which ever event occurs earlier. The said stipulation contemplates that the tenure of the petitioner may not necessarily be continued till superannuation, as sought to be contended. It can be either for five years or even for a lesser period.

53. Having said that, I may also state, the submissions made by the petitioner as noted above are primarily on the premise that there was only one complaint filed against him by M/s Raj Gypsum Udyog which having been closed, and no other complaint being pending which can be an impediment for the petitioner to continue on the post of CMD FAGMIL, is fallacious. As has been contended by Mr. Rakesh Kumar, and also stated in the affidavit filed by the respondents to the rejoinder affidavit filed by the petitioner that there were two more complaints filed against the petitioner, viz. (i) complaint dated February 16, 2015 by the same company M/s Raj Gypsum Udyog; and (ii) complaint dated June 30, 2016 by one Harish with respect to recruitment of officers made in FAGMIL, post 2010 and manipulations of TA Rules, which show that the petitioner was not free from vigilance angle, is appealing. The matter regarding M/s Raj Gypsum Udyog was sent to CVC vide

letter dated July 01, 2016 to seek first stage advice in the matter. The CVC vide its letter dated July 19, 2016 had stated that in order to examine the matter, proposed penalty proceedings against each Officer and bio-data of all accused Officers may be furnished to the Commission. On November 25, 2016, recommendation was made for initiating major penalty proceedings against the petitioner and other Officers of FAGMIL which was approved by the Minister In-charge, i.e., Disciplinary Authority on November 28, 2016. The matter was again sent to the CVC with the draft charge sheet. It transpired that the CVC vide its OM dated March 14, 2017 had furnished its advice for taking action against the petitioner under the extent rules. In the meantime, on December 01, 2016 with the approval of the Minister, the petitioner stood relieved from FAGMIL.

54. Suffice to state, on November 27, 2017 a charge sheet under Rule 9(2)(b) of the CCS Pension Rules 1972 was issued to the petitioner. It appears that the said charge sheet was challenged by the petitioner in this Court by filing writ petition being W.P.(C) 407/2018. The writ petition was disposed of on February 07, 2018 directing Union of India to consider whether the petitioner can be proceeded under the Conduct rules. It is not known as to what decision has been taken by the Union of India.

55. Be that as it may, the aforesaid reveals that on December 01, 2016 the petitioner was not free from vigilance angle as a decision was already taken by the Disciplinary Authority to initiate major penalty proceedings against the petitioner and as such his tenure could not have been extended further. The plea of the petitioner was that till such time, the CVC takes a decision on any complaint made against the petitioner,

the petitioner cannot be said to be unfit from vigilance angle, though sounds appealing on a first blush but on a deeper consideration the fact that a decision is taken to initiate major penalty proceedings and the CVC vide its O.M. dated February 07, 2017 did recommend action against the petitioner as per rules and the fact that a charge sheet was issued to the petitioner under Rule 9 of the CCS Pension Rules 1972, though later, cannot be overlooked and the same suggest that the petitioner was not fit from vigilance angle.

56. The plea of the petitioner was that the complaint dated February 16, 2015 being pseudonymous and no confirmation has been received from the complainant before acting on the same could not have been acted upon is unmerited. This plea is contested by the respondents by stating that the complaint being of M/s Raj Gypsum Udyog, it was neither anonymous nor pseudonymous as the said entity is a registered contractor in FAGMIL. Further, M/s Raj Gypsum Udyog had filed four petitions challenging the action of FAGMIL on the tender, as such its identity is known and the genuineness of the complaint cannot be doubted.

57. Insofar as the plea of the petitioner that the services of the Board level employee cannot be terminated if he / she is due to extension without specific order of ACC is concerned, in this regard I may state, though the petitioner was relieved from his duties as the CMD FAGMIL on December 01, 2016, the approval of the ACC was sought only on December 15, 2016 after the impugned relieving order was issued and the petitioner had filed a petition before this Court which was pending. The ACC vide communication dated July 13, 2017 gave its approval for non renewal of tenure of the petitioner and had regularised the period

between March 08, 2016 and December 01, 2016 during which period the petitioner continued to discharge the duties of CMD FAGMIL.

58. The submission of Mr. Kumar on this plea is that there is no difference between approval and ex-post-facto approval and the same shall not affect the legality of the decision.

59. The petitioner had relied upon the OM's dated March 31, 2011 and October 30, 2014, whereas the respondents apart from the above circulars have also referred to OM dated April 03, 2001. A reading of the above OMs, the following position is noted:

(i) In the eventuality, the recommendation of PESB for continuance is not accepted, then the approval of the Competent Authority / ACC is to be sought.

(ii) All proposals wherein the incumbents meet the benchmark, but on some other issue such as vigilance etc., the Ministry / Department is not inclined to recommend extension, the proposal shall be referred to the ACC for consideration six months before schedule of expiry of tenure of the incumbent.

(iii) The circular dated October 30, 2014 only records in the first paragraph, the position under the extant policy, inasmuch as in case the initial term of five years of a Board level appointee comes to an end prior to his / her date of superannuation, extension of his / her tenure up to the date of superannuation is considered with the approval of the ACC subject to his / her being free from vigilance angle and meeting the prescribed performance and parameters. In terms of the instructions, the services of any Board level appointee cannot be terminated on completion of his initial term, if he / she is due for extension without specific orders of the ACC.

60. I may state here that OM's of 2001 / 2011 / 2014 contemplates the non-renewal of the tenure of the Board level appointee shall be upon consideration and with the approval / specific orders of ACC.

61. The plea of the petitioner was that prior approval of the ACC is required, before relieving the petitioner from duties as CMD, FAGMIL.

62. I am of the view, the said requirement has been met. This I say so for the following reasons:

(1) the effect of the instructions / OM's is that the appointee shall not be relieved till such time approval / specific orders of the ACC are sought.

(2) the petitioner was relieved, only after taking approval / orders of the ACC.

(3) the delayed consideration enured to the benefit of the petitioner as he continued to work as CMD, till such time, the ACC approved, the decision of the Ministry / Department, not to extend the tenure, and the said period of nine months was regularised in favour of the petitioner.

63. The plea of the petitioner that the order dated December 01, 2016 is an order of compulsory retirement as the petitioner still had service till 2019, is not appealing. This, I say so, on demitting the office of CMD, FAGMIL, the petitioner should have reverted back to his parent organisation PDIL provided he had maintained his lien there. The lien of the petitioner on his appointment was maintained for five years. There is nothing on record to show that his lien beyond five years was also maintained in PDIL. Even if he has applied, the same has not been

maintained. The remedy for the petitioner was to seek an order against PDIL in that regard. No such prayer has been made in this petition nor has PDIL been made a party. Hence, the non renewal of the tenure of the petitioner cannot be construed as compulsory retirement. It is a simple case where the tenure has not been extended beyond five years and nine months, which is permissible under the terms of appointment and also as per the decision of the ACC.

64. Insofar as the plea of the petitioner by placing reliance on the Parliamentary Committee report dated February 06, 2015 to claim compensation is concerned, the same is without merit in view of my above conclusion justifying the non-renewal of tenure. Even the compensation granted in favour of Ms. Rita Kunur was because her tenure was terminated despite extension, which is not the case here. The petitioner cannot seek any parity qua Ms. Rita Kunur.

65. The petitioner has relied upon the judgment of the Division Bench of this Court in the case of ***Ajay Kumar Joshi and Ors. (supra)*** to contend that the prior approval of ACC is required before he could be relieved. I have already said prior approval of ACC was taken before the petitioner was relieved. In any case, the said judgment has no applicability in the facts of this case, inasmuch as the relevant rule which was interpreted by the Division Bench to hold that obtaining prior concurrence from the Central Government is mandatory and post fact concurrence would not validate the promotion is the following *"appointment of a member of the service in the case of selection grade and above shall be subject to availability of vacancies in these grades and for this purpose it shall be mandatory upon the said cadres or the joint cadres authorities as the case may be to seek prior concurrence of*

*the Central Government on the number of available vacancies in each grade".* The Division Bench has held that the word "prior" occurring in the rule suggest the prior approval of the Central Government and not post facto concurrence. In fact, the reliance on the judgment is misplaced.

66. The petitioner has also relied upon the judgment in the case of ***Union of India (supra)*** in support of his contention that pseudonymous complaint cannot be taken into consideration in terms of the circular issued by the CVC. Suffice to state that I have already held that the complaint dated February 16, 2016 was not a pseudonymous complaint, but a complaint made by M/s Raj Gypsum Udyog whose identity is known as it had filed four petitions before the High Court and there was no requirement to refer the complaint to the said Company for owning it.

67. The judgment in the case of ***H.M. Singh (supra)*** relied upon by the petitioner has no applicability in the facts of this case inasmuch as the terms of appointment as noted above, stipulate that the appointment is for five years or for a lesser period or till superannuation. Such terms cannot give rise to legitimate expectation to the petitioner that his tenure shall be extended. Even the circulars/orders issued by the respondents which contemplate non-renewal of tenure but with the approval of the ACC, suggest there cannot be any legitimate expectation for extension of tenure. The reliance on the judgment in the case of ***Educ. Cons. (I) Ltd. SC/ST Empl. Wel. Asso. (Supra)*** is misplaced, in as much as the decision of the Disciplinary Authority to initiate major penalty proceedings and a charge sheet having been issued, it is clear the petitioner was not clear from vigilance angle.

68. The plea of the petitioner that the Minister had not passed any order and had just put his signature without applying his independent mind and without verification of the facts is also not appealing. This submission of the petitioner is in view of the extract note dated November 25, 2016 reproduced in para 7 above. The note was approved by the Minister pursuant to which the petitioner was relieved. The decision to relieve the petitioner from the post of CMD, FAGMIL is an administrative act which does not require a detailed order by the Minister unlike the quasi judicial decision. Further the plea has no basis as a physical copy of the note has not been placed on record. The petitioner has placed reliance on the judgment of the Supreme Court in ***Chairman-cum-MD, Coal India Ltd. (supra)*** is misplaced. As the order with which the Supreme Court was concerned was an order reviving the disciplinary proceedings which are quasi judicial proceedings obligating the authority to pass a reasoned order unlike the decision in this case relieving the petitioner of his duties being a purely administrative decision.

69. The petitioner who has also relied upon the judgment of the Supreme Court in ***Kalabharati Advertising (supra)*** in support of his submission that with the withdrawal of the writ petitions on February 16, 2016, the complaints of M/s Raj Gypsum Udyog have lost their relevance is concerned, suffice to state the writ petitions were withdrawn with liberty to avail remedy if any under general law. I find M/s Raj Gypsum Udyog had already availed the remedy of filing the complaint on February 15, 2016, one day before the withdrawal of the Writ Petitions, on which a decision was taken by the Minister In-charge, the Disciplinary Authority to initiate penalty proceedings. So, despite

withdrawal of the writ petition, there is a decision against the petitioner which shows there is a justifiable ground to relieve the petitioner. The judgment for the proposition advanced has no applicability.

70. The judgment in the case of ***State of Maharashtra (supra)*** and ***Dr. Sahadeva (supra)*** relied upon by the petitioner in support of his submission that executive orders / rules / circulars need to be strictly complied with have no applicability in the facts of this case and also in view of my conclusion above.

71. The reliance placed by the petitioner in the case of ***Surender Pal Kaul (supra)*** and ***State Bank of India (supra)*** in support of his contention that termination without an inquiry / show cause notice is stigmatic in nature is concerned, the said judgments have no applicability in the facts of this case wherein the terms of appointment as noted above are very clear, inasmuch as that the appointment of the petitioner as CMD, FAGMIL was for a period of five years or till the age of superannuation or even for a lesser period and also in view of my conclusion above justifying non-renewal of tenure of the petitioner on the ground that he is not clear from vigilance angle. Even the order of relieving the petitioner is an order simpliciter without detailing the reasons for not renewing the tenure/appointment.

72. Insofar as the judgment in the case of ***Anant Construction (supra)*** and ***A.K. Verma (supra)*** are concerned, they have no applicability in the facts of this case.

73. In view of my discussion above, I find no merit in this petition, the same is dismissed. No costs.

**C.M. APPL. 9667/2017**

In view of my conclusion in the writ petition, the present application is dismissed.

**V. KAMESWAR RAO, J**

**JUNE 23, 2021**/*jg*