

IN THE HIGH COURT AT CALCUTTA

APPELLATE SIDE

BEFORE:

The Hon'ble Mr. Justice Soumen Sen

The Hon'ble Mr. Justice Hiranmay Bhattacharyya

WPCT 44 of 2021

Union of India & Ors.

Vs.

Shyama Prasad Chattopadhyay

For the Petitioner	: Mr. Sandip Kumar Bhattacharyya, Adv.
For the Respondent	: Mr. Soumya Majumder, Sr. Adv. Mr. Victor Chatterjee, Adv.
Hearing concluded on	: 27 th August, 2021
Judgment on	: 7 th September, 2021

Soumen Sen, J.: - The writ petition is directed against the order passed by the Central Administrative Tribunal, Calcutta Bench on July 17, 2019, in connection with an original application filed by Shyama Prasad Chattopadhyay (hereinafter referred to as 'the Respondent') in which the Respondent had, inter alia, challenged the imposition of penalty of compulsory retirement and rejection of his appeal by the Appellate Authority.

Pithily put, the facts are thus:

Shri Shyama Prasad Chattopadhyay, the Respondent herein, was a Senior Audit Officer in the office of the Director-General of Audit, Central, Kolkata. The respondent while working, as such, had come across an advertisement in the website of the Asiatic Society inviting applications for the post of Controller of

Finance on deputation. As he was interested in the said post, he made an application on September 9, 2013, to the Director General of Audit, Central under the Comptroller and Auditor General of India (in short 'CAG') requesting the said Authority to forward his name to the Asiatic Society on deputation. The competent Authority accepted the request for deputation, and his bio-data was accordingly forwarded by a letter dated September 24, 2013, to the Asiatic Society for consideration.

The Asiatic Society accepted the said application and the letter of appointment dated October 30, 2013 clearly states that the appointment was made on Foreign Service terms and conditions. The initial appointment to the said post was initially for one year which may be extended for such period as may be decided by the authority of the Society. The respondent was requested to join the post immediately within a fortnight from the date of receipt of the said letter.

Consequent upon the selection of the respondent to the post of Controller of Finance in the Asiatic Society, Calcutta, the Director General of Audit, Central, Kolkata on deputation basis, released the respondent from his office with effect from the afternoon on November 11, 2013. The period of deputation was initially for one year which may be extended and, thereafter the appointment was made on Foreign Service terms and conditions. The Respondent joined the Asiatic Society on November 11, 2013.

On completion of the period of deputation of one year, the Asiatic Society, Kolkata vide office order no.162 dated September 5, 2014, granted an extension

of the deputation period of the Respondent up to the date of his retirement, i.e., on January 31, 2016. The said office order reads:

*“Office Order No. 162
Dated.05.09.2014*

The Council of the Asiatic Society, Kolkata in its meeting held on August 29, 2014 considered the letter (No. Admn./C/Deptn./CIR/11-12/Vol-II/1085 dated 6.8.2014) from Sr. Audit Officer, Administration, Indian Audit & Accounts Department, Office of the Director General of Audit, Central, Kolkata, regarding extension of term of deputation of Shri S.P. Chattopadhyay, Sr. Audit Officer, working as Controller of Finance in the Asiatic Society and approved the extension of his deputation in the Society from 11.11.2014 till his superannuation.”(Emphasis supplied)

The said office order was also forwarded to Senior Audit Officer (Administration) Indian Audit & Accounts Department, Officer of the Director General of Audit, Kolkata.

Prior to the aforesaid letter on August 6, 2014, the Senior Audit Officer of CAG issued a letter to the General Secretary, Asiatic Society regarding extension of the term of deputation of Shri Chattopadhyay requesting him to intimate if the service of the Respondent would be required in the Asiatic Society for a further term and in the event, the Society requires his service a proposal for further extension of his term on deputation could be sent to the CAG along with the willingness of the official concerned for necessary action. This letter was an internal communication between two offices and was not marked to the Respondent.

The petitioners in response to the office order dated September 5, 2014, expressed their unwillingness to grant extension of tenure of deputation of the respondent till his superannuation as requested. The petitioners accordingly,

requested the Asiatic Society to relieve the respondent on the afternoon of January 15, 2015 from the Asiatic Society with the direction upon the respondent to report to the office of the Director General, Audit on the forenoon of June 16, 2016. The said letter was endorsed to the respondent. This period was however, extended by the Director General, Audit in its letter dated February 10, 2015 till February 20, 2015 so that Shri Chattopadhyay can report to the office of the Director General of Audit by that time.

On March 2, 2015 a further reminder was sent to the General Secretary, Asiatic Society for repatriation of the respondents. It was reiterated that as per existing provisions the borrowing organisation cannot unilaterally grant extension to borrowed official without consent of the lending organisation beyond the term of deputation agreed upon by the lending organisation. Accordingly, it was contended that the retention of the respondent on deputation for the two-year term up to forenoon of June 31, 2016 in the Society does not conform to the existing terms and conditions of deputation. The said letter was also endorsed to the respondent.

In view of reluctance of the Asiatic Society to release the respondent, the writ petitioners directly addressed a letter to Mr. Chattopadhyay dated May 6, 2015 contending that Asiatic Society (borrowing organisation) cannot unilaterally grant extension to his tenure on deputation in the Asiatic Society without consent of the lending organisation in terms of the DoPT's O.M. No. AB. 14017/30/2006-Estt, (RR) dated November 29, 2006. It is necessary that the deputationist should not go by the presumption that he needs to join his parent cadre only after being formally relieved by the borrowing department and in the

event of overstay he would be liable to disciplinary action and other adverse Civil/Service consequence which would include the period of unauthorised overstay which shall not count against service for the purpose of pension and any increment due during the period of unauthorised overstay till date on which officer rejoins the parent cadre. The respondent accordingly was directed to report for duties in the said office not later than May 29, 2015 failing which disciplinary action would be initiated against Mr. Chattopadhyay as per extant rules and provisions. It was reiterated that the continuation of Mr. Chattopadhyay in the Asiatic Society is irregular and there is no requirement of him being released formerly from the Asiatic Society for reporting to his parent office.

Mr. Chattopadhyay did not report to duty on May 29, 2015. The writ petitioners send a further request for repatriation of Shri Chattopadhyay to the Asiatic Society on June 9, 2015. The Society was requested to repatriate the respondent latest by June 30, 2015 failing which the respondent would be liable to disciplinary action. The Asiatic Society, however, declined to release the respondent before his retirement on the plea that the borrowing organisation was competent enough to grant an extension to the borrowed official up to three years in terms of Appendix V paragraph 8.2 of Fundamental Rules and Supplementary Rules (FRSR) and such decision was duly communicated to the writ petitioners by letters dated June 6, 2015 and June 29, 2015 respectively.

The Asiatic Society in response to the aforesaid letter refused to release the respondent before his retirement on July 31, 2016 and the said decision was communicated to the writ petitioners by a letter dated June 29, 2015.

However, subsequently the Asiatic Society, by a letter dated July 9, 2015, intimated the cancellation of its previous letters and communicated the same to the petitioners with a copy forwarded to the respondent, their decision to release the respondent from deputation. This release from deputation was to commence from July 10, 2015 (Afternoon).

The Respondent thereafter was requested to join his parent office on July 13, 2015 (Forenoon) as July 11, 2015, and July 12, 2015, were Saturday and Sunday, respectively.

On July 10, 2015, the Applicant before being formally released submitted one application for Earned Leave to the General Secretary, Asiatic Society for 30 days' leave from July 13, 2015 to August 11, 2015, "due to private affairs and illness of his wife." The said application claimed to have been allowed by the General Secretary, Asiatic Society as per deputation terms and conditions vide DOPT OM No.648/2009-Estt. [PayII-paragraph 7.6 (c)] dated June 17, 2010.

The Respondent did not join the office on July 13, 2015, and hence was given an Office Memo dated July 14, 2015, to join the office of the Director General of Audit, Central, Kolkata, immediately on receipt of the Memo. The Applicant was asked to explain, within seven days as to why a disciplinary action should not be initiated against him for failing to follow the orders of the competent Authority.

The Respondent responded to the letter dated July 14, 2015, stating that he had submitted an application for earned leave on July 10, 2015 to the General Secretary, Asiatic Society as mentioned above, and would join the Audit Office on August 12, 2015. However, if his wife recovers early from the post-operative pain of left intertrochanteric fracture and knee replacements, he would join the office immediately by cancelling the leave.

The disciplinary Authority was requested to drop the charges by accepting the said explanation.

The Respondent ultimately joined the parent organization on September 7, 2015.

However, the authorities did not accept the explanation for not being able to join the organization on June 30, 2015, and initiated a disciplinary proceeding under the Rule 14 of the Central Civil Services (Clarification Control and Appeal) Rules, 1965 were initiated against the Respondent under Memo no.Confdl/C/Disc/Proc/ Spe /207 dated 23rd July, 2015.

In view of such failure on the part of the Respondent to join the lending institution within June 30, 2015, the writ petitioners treating such act as wilful insubordination as well as deliberate failure to comply with the written order of the competent Authority initiated a disciplinary proceeding for violation of rule 3(1) (iii) and 3(1) (ii) of C.C.S. (Conduct) Rules, 1964. The writ petitioner framed the following charges:

Article-I

Shri Shyamaprasad Chattopadhyay, while holding the post of Senior Audit Officer in the office of the Director-General of Audit, Central, Kolkata vide his application dated 09.09.2013, requested to forward his name for the post of 'Controller of Finance,' Asiatic Society, Kolkata on deputation basis which the Competent Authority accepted and his bio-data was forwarded to the Asiatic Society for consideration vide this office letter dt. 24.09.2013. Shri Chattopadhyay was selected for the post and released from this office on 11.11.2013 (A/N) to enable him to join the deputation post vide office order (Admn.) No.226 dt. 07.11.2013. It was specifically mentioned in the said order that the period of the deputation will be initially for one year, which may be extended thereafter. Shri Chattopadhyay joined the Asiatic Society on 11.11.2013. On completion of deputation period of one year, the Asiatic Society, Kolkata vide Office Order No.162 dated 05.09.2014 unilaterally granted extension of deputation term of Shri Chattopadhyay up to the date of his retirement i.e., 31.01.2016. Since the Competent Authority had not given consent for extension to his tenure of deputation in the Asiatic Society beyond 10.11.2014, it had been brought to the notice of Shri Chattopadhyay vide this office letters dated 01.01.2015, 10.02.2015 and 02.03.2015 addressed to the Asiatic Society, copies of which were endorsed to Shri Chattopadhyay, that the borrowing organisation cannot unilaterally grant extension to his tenure of deputation without consent of lending organisation beyond the terms of deputation agreed upon by the lending organisation and as per extant rules his overstayal on deputation for any reason whatsoever, causes him liable to

disciplinary action and other adverse Civil/Service consequences. Shri Chattopadhyay was also informed vide this office letter no. Admn/C/Deptn./Cir/11-12/Vol.II/485 dated May 6 2015 that his continuation in the Asiatic Society, Kolkata on deputation basis is irregular and he should not go by the presumption that he needs to join his parent cadre only after being formally relieved by the borrowing department as per DoPT's O.M. No.14017/30/2006-Estt, (R.R.) dt. 29.11.2006. He was also directed vide the letter dt. 06.05.2015 mentioned ibid to report for duty to this office immediately after receipt of the said letter and in any case not later than May 29, 2015. However, Shri Chattopadhyay failed to join for duty within May 29, 2015 as directed. Further, it had also been brought to the notice of Shri Chattopadhyay vide this office letter no. Admn./C/Deptn/CIR/11-12/Vol.- II/1236 dated 09.06.2015 addressed to the Asiatic Society, copy of which was endorsed to Shri Chattopadhyay for compliance, that in case he fails to join duty within 30.06.2015, he will be liable to disciplinary action and other adverse consequences. However, Shri Chattopadhyay again failed to join for duty within June 30, 2015, as directed. It is evident from the foregoing facts that the act on the part of Shri Shyamaprasad Chattopadhyay, Sr. Audit Officer is tantamount to wilful insubordination as well as deliberate failure to comply with the written orders of the competent Authority which was unbecoming of a government servant and thereby, he violated Rule 3(1)(iii) of C.C.S. (Conduct) Rules, 1964.

Article-II

The said Shri Shyamaprasad Chattopadhyay, Sr. Audit Officer while holding the post of 'Controller of Finance' in the Asiatic Society, Kolkata on deputation basis

was released from the post of 'Controller of Finance' with effect from 10.07.2015, (A/N) with the direction to report his parent office immediately vide Ref. No.4223 dated 09.07.2015. However, Shri Chattopadhyay again failed to report this office for duty till date. Further, Shri Chattopadhyay was directed vide memo No. Confdl/C/SP Chattopadhyay/2015/192 dated 14.07.2015 to join this office immediately on receipt of the said memo. However, Shri Chattopadhyay again failed to report for duty in this office till date as directed It would be evident from the foregoing facts that the act on the part of Shri Chattopadhyay is tantamount to wilful disobedience as well as dereliction of duty which constitute gross misconduct and thereby, he failed to maintain devotion to duty and violated Rule 3(1)(ii) of C.C.S. (Conduct) Rules, 1964.

In the disciplinary proceedings the charges against the respondent were partly proved.

The findings of the inquiry officer in his report dated October 13, 2015, are:

"I) The period of overstayal of the C.O. in the Society has been mentioned as 10-11-2014 to 10-07-2015 under Article I of Statement of Articles of Charge. On the basis of documents furnished by D.A. and the Society, the same should be from 11-11-2014 to 10-07-2015.

II) The CO cannot be treated as guilty for the offence charged from 11-11-2014 to 15-01-2015 under Rule 3(1) (III) of the CCS (Conduct) Rules, 1964.

III) the C.O. is found guilty from 16th January, 2015 to 10th July, 2015 for the offence charged under Article-I.

IV) The CO is found guilty for the offence charged under Rule 3(1) (ii) of C.C.S. (Conduct) Rules, 1964 (Article-II of Articles of Charge)."

The Copy of the Enquiry Report was forwarded to the respondent as per Rule 15 of the C.C.S. (C.C.A.) Rules, 1965 under the letter dated October 19, 2015.

The respondent made a representation against the proposed punishment. The disciplinary authority in purported consideration of the record of the enquiry proceeding and the representation made by the respondent, in purported exercise of its power under Rule 11, 12, 14, and 15 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965 read with part-I of Section E of the Comptroller and Auditor General's Manual of Standing Orders (Administrative), Volume II by an order dated December 11, 2015, imposed a major penalty of "Compulsory Retirement" with immediate effect from December 11, 2015.

The respondent preferred an appeal for reconsideration of a major penalty of compulsory retirement on June 7, 2016, before the Deputy Controller and Auditor General of India, in which he has reiterated the aforesaid facts and furnished specific additional facts for consideration. The relevant portions of the additional materials are:

"i) During my deputation tenure with the Asiatic Society, Kolkata, the Secretary of The Asiatic Society Employees Union, Dr. Asesh Ranjan Misra (64 years) Senior Cataloguer of the Society had been charged with sexual harassment, molestation, etc. in September-October, 2014 and the survivor (30 years) lodged an F.I.R. dated 18.11.2014 against him and moved Court (3 Newspaper clippings enclosed and also broadcast this news in 2 leading Bengali T.V. channels). At this juncture, Dr.

Misra being the Union Secretary of the Society, forced the borrowing Authority to retain me beyond my sanctioned deputation tenure i.e., 10.11.2014/15.11.2015 expecting that the being the highest Government officer in the Society, would under threat help him to hush up the case and influence the survivor to withdraw the said F.I.R.

Thereafter, the Hon'ble Minister of Culture, Government of India Dr. Mahesh Sharma held a meeting on 07.07.2015 at Kolkata with the survivor (in camera), me and other officials of the Society in this regard. Dr. Misra retaliated and using his power as the Union Secretary of the Society met the General Secretary. The Asiatic Society to ensure my repatriation order on 09.07.2015 and subsequently continued harassment in all respects. Such was the case of my delayed repatriation which may kindly be excused for my Brave heart.

I made mistake by not informing my employer the Director General of Audit at the time of enquiry in fear of my security.

ii) The above Earned Leave was subsequently revised as under;

a) Earned leave from 13.07.2015 to 09.08.2015 for 28 days and

b) Commuted leave application dated 07.09.2015 for 26 days.

(Revised Leave application dated 07.09.2015 submitted to the Asiatic Society, Kolkata on 07.09.2015 by speed post-copy enclosed)

I joined the parent office on 07.09.2015 (F.N.), and my joining report was approved by the Director-General of Audit, Central, Kolkata.

Further, my retirement from service was due on 31.01.2016, and the 7th C.P.C. has recommended the effect from 01.01.2016, whereas I was handed over the compulsory retirement w.e.f. 11.12.2015 for the above charges without direct fault on this front. This deprived me of the benefit of the 7th C.P.C. and also lost my prestige for the said penalty after rendering 36 years of Government service, including three years of service in the C&AG Office, New Delhi, and five years foreign service in Bhutan.” (Emphasis supplied)

The respondent has submitted that he would lose gratuity along with Rs. 6.90 lakh plus leave encashment dues of about Rs. 1.80 Lakh aggregating to

(Total Rs. 8.70 lakh) on account of being deprived of getting the benefits under the 7th Pay Commission due to his compulsory retirement.

The appellate authority rejected the said appeal. The submission concerning sanction of leave was found without merit, and the harassment due to Dr. Mishra's sexual misconduct was found irrelevant since the deputationist was deemed to have been relieved on the date of expiry of the deputation period unless the competent authority extends the tenure in writing prior to the expiry of the approved term of deputation. It was found that he overstayed the period between 16.01.2015 to 10.07.2015.

A revision petition was filed on September 1, 2015, before the Comptroller and Auditor General. The revisionary authority concurred with the decision of the appellate authority and rejected the petition by a speaking order dated September 5, 2015.

This had resulted in filing OA/350/929/2017 before the Central Administrative Tribunal, Kolkata challenging, inter alia, the charge sheet, the orders of the Disciplinary Authority, Appellate Authority, and Revisionary Authority dated December 11, 2015, July 1, 2016, and April 5, 2017, respectively.

The learned Tribunal by an order dated July 17, 2020, quashed the order of the Appellate Authority and disposed of the OA/350/929/2017 by remanding the matter back to the Appellate Authority for issuing appropriate penalty order taking a lenient view.

The writ petitioners approached the Ld. Tribunal with a modification application being MA/350/160/2020 with a prayer for a direction upon the Revisionary Authority to pass appropriate order instead of the Appellate Authority. The said application was allowed on September 18, 2020

The contention of the original Applicant before the Tribunal as well as before us was that the respondent was not in a position to join duty in the parent organization before July 10, 2015, as he was not formally released by the Asiatic Society. He was formally released in the afternoon of July 10, 2015, and he submitted an application for Earned Leave on July 10, 2015 due to severe illness of his wife and for personal reasons to the Asiatic Society as per his understanding of the deputation terms and conditions vide.DOPT/OM No.648/2009-Estt. (Pay II-Paragraph 7.6 (c)) dated June 17, 2010. He was carrying an impression that in terms of the said office memorandum the said leave was granted by the Society authorized to sanction such leave, and thereafter, he made a further application for revised leave and finally could join duty on September 7, 2015. It was specifically contended that there was no intentional absence from duty or overstay for the aforesaid period and for the subsequent periods till he finally joined on September 7, 2015. It was thus contended that the aforesaid period of few months should not be treated as wilful abstention from work.

The Learned Tribunal, on consideration of the conclusion of the Inquiry Officer and the disciplinary authority, observed that the respondent, after his release from the borrowing organization, ought to have sought leave from the lending organization. Nevertheless, the factum of seeking leave from borrowing

organization was not in dispute. The observations of the Enquiry Officer and Disciplinary Authority considered in granting relief to the respondent are mentioned in paragraphs 5 and 6 of the impugned order, which reads:

“5. We discern that the conclusion of the enquiry officer in his report dated 13.10.2015 is as under:

“i) The period of overstayal of the CO in the Society has been mentioned as 10-11-2014 to 10-07-2015 under Article I of statement of Articles of Charge. On the basis of documents furnished by D.A and the Society, the same should be from 11.11.2014 to 10.07.2015.

ii) The CO cannot be treated as guilty for the offence charged from 11.11.2014 to 15.01.2015 under Rule 3(1) (iii) of the CCS (Conduct) Rules, 1964.

iii) The CO is found guilty from 16.01.2015 to 10.07.2015 for the offence charged under Article-I.

iv) The CO is found guilty for the offence charged under Rule 3(1) (ii) of CCS (Conduct) Rules, 1964 (Article-II of Articles of charge).”

6. In his order, the Disciplinary Authority has observed as under:

“After going through from his deputation post in Asiatic Society, Kolkata on 10.07.2015 (AN) and he should have joined his parent office on 13.07.2015 (11.07.2015 & 12.07.2015 being Saturday and Sunday respectively). However, he did not join duty on that day though he was specifically directed by the office authority to join office immediately. The contention of the CO was that he applied for Earned Leave for the period from 13.07.2015 to 11.08.2015 to the authority of Asiatic Society, Kolkata who is the competent authority to sanction his earned leave and in support of his contention he cited the following three documents: -

- 1. DOPT's OM No.2/29/91-Estt (Pay-II) dt. 05.01.1994*
- 2. DOPT letter No.29018/5/2001-AIS (II) dt. 21.08.2002*
- 3. DOPT OM No. 6/8/2009-Estt/ (Pay-II) dt. 17.06.2010*

It is seen that the CO misinterpreted the various provision of DoPT OMs as cited by him. After release from a deputation post, the borrowing authority is not competent to sanction any leave for a period beyond deputation period. As such the CO nowhere in his defence has stated that the leave so applied for was sanctioned by the borrowing organisation. He reiterated that he submitted leave application on 10.07.2015.

From proceedings of the Inquiry, it is seen that the CO mentioned that he had submitted his application of leave to the borrowing authority. The Presenting

Officer (PO) stated that no such application had been received from the borrowing authority in this office. The CO further informed that he had communicated about his leave application to D.G.A (Central), Kolkata vide his letter dated 21.07.2015. This aspect was highlighted by the PO in his written brief.

In regard to charge in Article-II of articles of charge the CO in his written brief stated the following: -

“In respect of the second charge, I fully accept the Written brief of the Presenting Officer and my application of leave initially submitted to the borrowing authority on 10.07.2015 and revised it subsequently may kindly be sanctioned by the parent department accordingly.”

Thus, it is accepted by the CO that his leave for the period from 13.07.2015 onwards as was applied by him from time to time was not sanctioned by the competent authority and at the conclusion of the Inquiry, he requested to sanction such leave.

Moreover, in in representation on the Report of Inquiry the CO did not contradict the findings of the Inquiry Officer in regard to Article-II of Articles of Charge.

Thus, it is established that the CO on being relieved from his deputation post did not join office and wilfully disobeyed the written order of this office authority.

I, therefore, fully agree with the findings of the Inquiry Officer in regard to charges made in Article-II of the Articles of Charge and I find the CO guilty of violation of Rule 3(1) (ii) of CCS (Conduct) Rules, 1964.

10. xxx xxx xxx. I have come to the firm conclusion that the charge in Article-I of Articles of charge have been proved for the period from 16.01.2015 to 10.07.2015 and charge in Article-II or Articles of charge framed against the CO have been proved beyond all reasonable doubts and suspicious and I find the CO guilty of violating rule 3(1) (iii) and 3(1) (ii) of CCS (Conduct) Rules, 1964.

11. Considering the totality of the incident, the submissions of the CO and having regard to his age and service records I have decided to impose a major penalty on the CO for his misconduct. Accordingly, in exercise of powers conferred under Rule 11,12,14 & 15 of Central Civil Services (Classification, Control Appeal) Rules, 1965 read with Part-I of Section E of Comptroller & Auditor General's Manual of Standing Orders (Administrative), Volume-II, I do hereby impose the major penalty of **“Compulsory Retirement”** on Shri Shyamaprasad Chattopadhyay, Senior Audit Office with immediate effect.”

The Tribunal, however, did not find that there has been a wilful or deliberate act of insubordination and considering the fact that the Applicant applied to the borrowing organization prior to the expiry of the period of deputation for leave and the stay leave was extended by the borrowing organization, the Tribunal was of the opinion that there exist extenuating circumstances which call for a lenient view despite some lapses on the part of the Applicant. The conclusion was based on the said observations of the Inquiry Officer and Disciplinary Authority. On such consideration, the order of Appellate Authority was quashed, and the matter was remanded to the appellate Authority for issuing appropriate penalty order taking a lenient view. The said order dated July 17, 2019 was modified at the instance of the writ petitioners on September 18, 2020 by which the word 'Appellate Authority' was substituted by the 'Revisionary Authority'.

The order dated July 17, 2019 is under challenge before us.

Mr. Sandip Bhattacharya the learned Counsel representing the writ petitioners and Mr. Soumya Majumdar the learned Senior Counsel representing the sole respondent made their submissions and have filed their respective convenient notes/written notes of argument.

Before we finally decide on the merits of the orders passed by the Central Administrative Tribunal by which the authority was directed to take lenient view, we feel it necessary to briefly indicate the arguments made on behalf of the parties.

Mr. Sandip Kumar Bhattacharyya, learned Counsel appearing on behalf of the petitioner, submits that the respondent adopted a defiant attitude in not joining his parent organisation on July 13, 2015 claiming that he has applied for earned leave from Asiatic Society on July 10, 2015 for a period of two months. He reiterated it in his application on September 7, 2015 praying for revised leave. It is submitted that the application for leave to the Asiatic Society is contrary to the Government of India Department of Personnel and Training Office memo no. AB-14017/30/2006-Estt (RR), dated November 29, 2006. The explanation being unsatisfactory for not joining the parent organisation in spite of repeated reminders is a clear, wilful and, deliberate neglect on his part which attracts a major penalty under Rule 11(VII) of the Central Civil Service (Classification, Control and Appellate) Rules, 1965. It is submitted that office memo dated November 29, 2006, clearly specifies the implication for overstay while on deputation.

Mr. Bhattacharyya has referred to the memo dated November 29, 2006 and submits that the terms and conditions of deputation clearly stipulates that the deputationist officer including those who are on deputation on November 29, 2006 would be deemed to have been relieved on the date of expiry of the deputation period unless the competent authority on request for approval in writing to extend the period of deputation extends the said period beyond the date of its expiry. In the event the officer overstayed for any reason whatsoever, he would be liable to disciplinary action and other adverse Civil/Service consequences. The disciplinary authority on consideration of the report of the enquiry officer has found that the respondent had violated the office

memorandum dated November 29, 2006, and, thereby, had taken action for overstay of leave. The period of absence was treated to be unauthorized as inspite of giving repeated opportunities to him, he refused to join the parent organisation knowing fully well that after the period of expiry of the initial period of one year, unless the parent organisation extends the period suitably in writing, any further continuance in the borrowing organization would be considered as unauthorized absence or overstay which attracts disciplinary proceedings and adverse civil consequences.

Our attention is drawn to Appendix-V of FRSR which deals with deputation within India and the relevant portion of the Government order dated November 29, 2006 which deals with the implication of overstay while on deputation. The relevant portions of the said rules on which reliance has been placed are set out below: -

“Implication of overstay while on deputation. - *It has been brought to notice of the Government that even though the terms and conditions of deputation issued by the various Ministries/Departments/Offices specify the period of deputation, there have been a number of cases of overstay without the approval of the Competent Authority. A number of proposals for regularization of such overstay are also being received for approval by the Competent Authority. It is necessary to ensure that there is no laxity on the part of the controlling authorities in relieving the deputationist, and the deputationist should not go by the presumption that he needs to join his parent cadre only after being formally relieved by the borrowing department. It has, therefore, been decided that in future, all cases of deputation shall be regulated by the following conditions, viz: -*

(i) The terms and conditions of deputation shall clearly lay down not only period of deputation as per the Recruitment Rules, for the post or as approved by the Competent Authority, but also the date of relieving of the deputationist. No further order for relieving the officer will be necessary;

(ii) The deputationist officer including those who are presently on deputation would be deemed to have been relieved on the date of expiry of the deputation period unless the Competent Authority has with requisite approvals, extended the period of deputation, in writing, prior to the date of its expiry. It will be the

responsibility of the immediate superior officer to ensure that the deputationist does not overstay. In cases where officers are on deputation on the date of issue of these orders and the normal tenures are getting over in a period of six months, the concerned Officers/Organizations may be allowed an extension of not more than one month, on a case-to-case basis with the approval of the DoP&T.

(iii) That in the event of the officer overstaying for any reason whatsoever, he is liable to disciplinary action and other adverse Civil/Service consequences which would include that the period of unauthorized overstay shall not count against service for the purpose of pension and that any increment due during the period of unauthorized overstay shall be deferred, with cumulative effect, till the date on which the officer rejoins his parent cadre.”

Mr. Bhattacharyya submitted that Rule 11 of the CCS (CCA) Rules clearly stipulates that if a Government Servant remained absent unauthorizedly without proper permission, he should be proceeded against immediately, and this should not be put off till the absence exceeds the limit prescribed in Rule 32(2)(a) of the CCS (Leave) Rules, 1972. It was in the exercise of power under this Rule the disciplinary authority proceeded with the matter and imposed major penalty by following the procedure laid down Rule 14 of the CCS (CCA) Rules. It is submitted that in the absence of any material to show that there has been any procedural irregularity resulting in miscarriage of justice or violation of principles of natural justice, the Court in a judicial review must not interfere with the decision finally arrived at by the authorities on examination of record. The duty of the Court is limited to the extent of finding out whether there is any procedural infraction or impropriety in the decision-making process and not to examine the decision itself. The Tribunal has no jurisdiction to go into the correctness or truth of the charges and cannot take over the function of the Disciplinary Authority. This submission is made relying upon the decisions of the Hon’ble Supreme Court in **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Ors.**, reported in

1992 Supp (2) SCC 312, Deputy Commissioner, Kendriya Vidyalaya Sangathan & Ors., v J. Hussain, reported in **2013(10) SCC 106** and **Union of India & Ors. v Upendra Singh** reported in **1994 (3) SCC 357**.

The respondent has not challenged the Government notification dated November 29, 2006. The authority is duty-bound and obligated to proceed departmentally against the respondent in terms of the said memorandum and the extant rules and, in such proceedings, have found the petitioner guilty of the charges. Our attention is drawn to Rule 21, and Rule 7(21) of the Central Civil Services (Leave) Rules to show that leave cannot be claimed as of right, and leave ordinarily begins on the day on which the transfer of charge is effected and ends on the day preceding that on which the charge is resumed. In view of the fact that the respondent did not join his parent office on July 13, 2015, there could not have been any transfer of charge under Rule 21 of the Central Civil Services (Leave) Rules, 1972, and accordingly, the respondent does not come within the ambit of any of the provisions of Rule 27(1), (a) to (e) nor under Rule 27(2) of the Pension Rule of the Central Civil Services (Pension) Rules, 1972.

It is strenuously argued that the period of unauthorized absence is to be treated as interruption of service, and in view of the fact that the petitioner does not come within Rule 27(1)(a) to (e) of the said Rules, the effect of interruption in service is clearly spelt out in F.R. 17 & F.R. 17-A(iii) as well as Rule 27(1) of the CCS (Pension), Rules 1972 entailing forfeiture of past service arising as a consequence of his interruption in service. The question of appointing authority to commute the period of absence retrospectively without leave, as an

extraordinary leave, in this case, does not arise since he did not rejoin his parent organization to be within the organization for considerations of leave of any kind indulging 'unauthorized absence' in continuance of absence so long as the post of the absentee is not filled up as envisaged under Rule 27(1)(b) of the aforesaid Rules.

It is submitted that the respondents in the said proceeding the written submission dated September 30, 2015, has stated: -

"1) A copy of the Written brief dated 28.09.2015 from the Presenting Officer has been received by me, and all the events mentioned therein are also admitted by me.

2) In respect of the first charge, the presenting Officer has rightfully stated in his above Written brief as under.

"The charged Officer mentioned that the borrowing authority was not willing to release him even after completion of sanctioned tenure of deputation" (page 2, 2nd para).

This has also been clearly stated with facts and figures in my earlier reply to Memorandum no. Confdl/C/Disc_Proc/SPC/207 dated 23.7.2015 submitted to the Director General of Audit, Central, Kolkata on 30.7.2015. I have nothing to add further on this front.

3. In respect of the second charge, I fully accept the Written brief of the Presenting Officer and my application of leave initially submitted to the borrowing authority on 10.07.2015 and revised it subsequently may kindly be sanctioned by the parent department accordingly."

There was also no compulsion on the revisionary authority or appellate authority to give reasons in the event they concur with the findings of the disciplinary authority as held in **Tara Chand Khatri vs Municipal Corporation of Delhi & Ors.**, reported in 1977 (1) SCC 472.

In view of the fact that the most humane and beneficial punishment has been imposed upon the charged official in the conspectus of the facts and law governing the field the penalty imposed cannot be treated to be harsh. The learned Counsel in this regard has relied upon the **Deputy Commission** (*supra*)

Mr. Bhattacharyya accordingly submits that the tribunal ought not to have interfered with the penalty imposed by the authorities concerned and has prayed for setting aside of the order of the learned Tribunal.

Per contra, Mr. Soumya Mazumdar, learned Senior Counsel appearing on behalf of the respondent has submitted that there has been no manifest injustice caused to the writ petitioner by the impugned order. In fact, the writ petitioners filed a modification application with a view to comply with the order passed by the learned Tribunal and pursued the learned Tribunal to drop the contempt petition filed by the respondent on the assurance that the revisionary authority would consider the aspect of imposing a lenient penalty instead of the appellate authority. This conduct of the writ petitioners, therefore, does not demonstrate the sufferance of manifest injustice to cause any interference with the impugned order. The Enquiry Officer did not find the charge to be proved in his entirety, and it was partly proved to the extent of the period of unauthorized absence. The said finding is against the admitted facts wherein dispute between the borrowing and lending departments as regards the release of the respondent from the Asiatic Society is apparent. The Appellate Authority as well the Revising Authority of the parent department held that the respondent had misinterpreted the provisions of OM dated November 29, 2016 and, in this regard, Mr Mazumdar has specifically drawn our attention to the following observation of the office of the Comptroller and Auditor on June 5, 2017 in the revisional order:

“The Petitioner has misinterpreted the provisions of OM dated 29.11.2006 because a government order cannot be divided in proposal and decision parts as suggested by him. It is settled position of law that a document has to be read as whole. On reading the whole OM, it becomes clear that the controlling authorities

are to ensure that there is no laxity in relieving the deputationist but the deputationist is not to go by the presumption that he needs to join his parent cadre only after being formally relieved by the borrowing department. In order to ensure regulation of deputations accordingly, it lays down conditions which, inter alia, make it further clear that the deputationist would be deemed to have been relieved on the date of expiry of deputation period unless the competent authority has with requisite approval, extended the period of deputation. It also makes it clear that in the event of the officer overstaying for any reason whatsoever, he is liable to disciplinary action and other consequences.”
(Emphasis supplied)

It is further submitted that the Appellate Authority has also in its order observed that the charged employee had misinterpreted the observation of the Enquiry Officer by citing only a part of the concerned paragraph of the report. The appellate authority had also noticed that the delayed joining was due to the misinterpretation of the relevant rules by the charged employee. The clear findings of the appellate authority and the revisional authority would reveal that no ill-motive or guilty mind could be imputed into the action of the respondent. The application for Earned Leave submitted to the borrowing department and granted by the said department for 30 days owing to wife's illness, has been understood by the Appellate Authority and the Revisionary Authority to be a misinterpretation of OM dated November 29, 2006 of the respondent. An error of judgment cannot constitute misconduct as held in ***Union of India v J. Ahmed***, reported in **1979(2) SCC 286** (paragraphs 10 and 11).

The parent department having directed the respondent to join on July 10, 2015, no charge of unauthorized absence prior to said date could have been levelled against the respondent. The authorities concerned did not take any conscious decision to forfeit past service of the respondent and/or to treat any part of the respondent's service as dies non. The reference to Rule 27 of the

CCS (Pensions) Rules, is also inapplicable in this case since none of the exception clause in Rule 27 applies to the alleged absence of the respondent.

In any event, the respondent has resumed duty on expiry of the period of authorized leave of the lending department. The application written to the lending department for EL arose out of a misinterpretation of a circular as admitted by the department and hence it cannot be treated as a major misconduct which may warrant a major penalty.

On such consideration Mr. Mazumdar submitted that the Court may substitute the penalty by an appropriate minor penalty by considering the length of the proceeding and the respondent being notionally retired from service and in this regard, reliance was placed on ***Government of India vs George Phillip***, reported in **2006(13) SCC 1** (paragraph 11)

The only issue required to be considered and decided in the present writ petition is, whether, the nature of the punishment imposed on an employee who had served the organisation for almost 36 years with an unblemished service record could be served with a major penalty of compulsory retirement due to his alleged overstay in the borrowing organisation. In other words, having regard to the facts revealed from record if a lenient view to his alleged overstay should have been taken by the authorities concerned.

The Learned Tribunal has concluded that the Applicant had erred in not obtaining the leave from the lending organization. It was also considered that despite the same, the factum of seeking leave was not in dispute. Thus, in view of the extenuating circumstances, the Learned Tribunal was of the opinion that

the said lapse ought to be viewed leniently and quashed the appellate order and the revisional order and remanded the matter back to the Appellate Authority for issuing appropriate penalty order taking a lenient view. At the instance of the writ petitioners the Appellate Authority was replaced by the Revising Authority.

The respondent appears to have been caught in the cross-fire of the borrowing and the lending organization. It cannot be disputed that the lending organization had allowed the respondent to join Asiatic Society on a deputation which can be extended for a period upto three years.

Deputation is a service outside the cadre or the department on a temporary basis. The deputationist is liable to be repatriated to his present cadre/department on the expiry of the period of deputation. There can be no deputation without the consent of the person so deputed [See ***State of Punjab & Ors. v Inder Singh & Ors.*** reported in **1997(8) SCC 372**,]. It involves a voluntary decision of the lending authority, borrowing authority, and the employee concerned. [See. ***Umapati Choudhary v. State of Bihar & Anr.*** reported in **1999(4) SCC 659**]

The narration of events would show that the borrowing organization did not release the respondent on a misinterpretation of the rules, notwithstanding repeated demands by the petitioners. The petitioners had never contended that the respondent is required to join on the completion of the deputation period immediately as his service was absolutely essential and required by the lending organization. The correspondence exchanged between the lending, and the borrowing organization would show that the period to join the parent

organization was extended till July 10, 2015 afternoon. The contents of the letters exchanged by and between the lending and the borrowing organization and their conduct would show that the sole respondent had suffered due to the tussle in decision and interpretation of the Rules governing the deputation of the respondent. The respondent also felt that having regard to the fact that the Society was reluctant to release the respondent and having not formerly released the respondent prior to July 10, 2015 in the afternoon the respondent would not stand released by the Asiatic Society, and he might lose service benefits.

The record would not show that the respondent has wilfully and deliberately violated any lawful order or there has been a deliberate refusal on his part to join his parent organization. He also, on a misinterpretation of the rules applied for earned leave before his release to the Society, carried with him the impression that the Society was the competent authority to grant Earned Leave prior to his formal release by the Society as until he is released the Society remains as his employer. The respondent has very candidly stated such facts in his representation and did not conceal any fact from the authorities concerned. He appears to be the victim of circumstances.

The ambit of 'misconduct' 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. Taking to drink by itself may not be a misconduct. Out of office hours one may take to drink and remain in the house. But being on duty in a disciplined service like police service, the personnel shall maintain discipline and shall not resort to

drink or be in a drunken state. When such a person in a drunken state wanders in the market with service revolver and abuses the medical officer on duty, it constitutes gravest misconduct warranting dismissal from service. [See, ***State of Punjab v Ram Singh Ex-Constable***, reported in **1992(4) SCC 54**, ***State of Uttarakhand v Prem Ram***, reported in **2020 (12) SCC 658**]. The reason being that his conduct was unbecoming that of a public servant. Conduct that is blameworthy for the government servant in the context of conduct rules would be construed as misconduct. If a servant conducts himself in a way inconsistent with the due and faithful discharge of his duty in services, it is misconduct.

In Stroud's Judicial Dictionary, misconduct is defined as:

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

A disregard of an essential condition of the contract of service may constitute misconduct. 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, it may amount to misconduct. Such deficiencies in capacity like inefficiency, lack of qualities of leadership and deficiency in the faculty of decision making would not constitute misconduct. [***Union of India v J Ahmed***, reported in **1979(3) SCR 504**].

The word misconduct on reflection receives its connotation from the context.

The power of judicial review exercised under Article 226 of the Constitution of India is circumscribed by limits of correcting errors of law or procedural errors leading to manifest injustice or the violation of the principles of natural justice and is not akin to adjudication of case on merits as an appellate authority. The limited scope of enquiry is confined to find out whether (i) inquiry was held by competent authority; (ii) whether there was compliance with the principles of natural justice, and (iii) whether findings are based on some evidence and the jurisdiction of the authority to arrive at such conclusion. In addition, thereto, the courts would not interfere with findings of fact arrived at in the disciplinary proceedings except in cases of mala fides or perversity. Perversity would mean where there is no evidence to support finding or findings is such that no reasonable person could arrive at such a decision. Another facet of perversity is if the finding is based on mere suspicion since “a mere suspicion or presumption should not be allowed to take the place of proof even in domestic inquiry. The evidential material must be such that it amounts to the guilt of the employee in relation to the charge levelled against him with some degree of definiteness [See: ***SBI v. Ajay Kumar Srivastava***, reported in **2021 (2) SCC 612**; ***Union of India v H.C. Goel*** reported in **AIR 1964 SC 364**; ***Nand Kishore Prasad v State of Bihar*** reported in **AIR 1978 SC 1277: 78(3) SCC 366**] In this proceeding on the basis of the materials available to the disciplinary authority and the appellate authority, it cannot be said that the decision was proper or that a reasonable authority on the basis of the materials on record could have arrived at the said conclusion and impose a major penalty by way of compulsory retirement.

The quantum of punishment in disciplinary matters is primarily for the disciplinary authority to decide, and the jurisdiction of the High Court under Article 226 of the Constitution or of the Administrative Tribunals is limited and is confined to the applicability of one or the other of the well-known principles known as the Wednesbury principles. Interference with the order of punishment in a disciplinary proceeding is not permissible unless the order is contrary to law, or if relevant factors have not been considered, or if irrelevant factors have been considered, or if the decision is one which no reasonable person could have taken. These principles were consistently followed in the UK and India to judge the validity of administrative actions. (***Om Kumar & Ors v. Union of India*; 2001(2) SCC 386**, paragraphs 24 and 26).

The doctrine of unreasonableness is giving way to the doctrine of proportionality and on certain aspects even judicial review of fact is permissible [See ***Moni Shankar v Union of India & Ors.*** reported in **2008(3) SCC 484.**]

In ***George Philip*** (supra), one of the questions that arose for consideration was whether, in view of the findings of the Inquiry Officer since affirmed by the Tribunal, that the respondent violated the undertaking given by him by registering for a Ph.D. degree and further not reporting to the duty after expiry of leave on August 23, 1984, and overstayed his leave by more than two years, the punishment of compulsory retirement imposed upon him can be said to be suffering from such illegality which may warrant interference either by the Tribunal or by the High Court in the exercise of jurisdiction under Article 226 of the Constitution. The Apex Court, on consideration of various decisions on this point, has observed that “*the jurisdiction exercised by the Tribunal or the High*

Court is a limited one and while exercising the power of judicial review, they cannot set aside the punishment altogether or impose some other penalty unless they find that there has been a substantial non-compliance with the rules of procedure or a gross violation of rules of natural justice which has caused prejudice to the employee and has resulted in miscarriage of justice or the punishment is shockingly disproportionate to the gravamen of the charge.”

Further it has also been observed in, **B.C. Chaturvedi v Union of India** reported in **1995(6) SCC 749**, that,

“18. A review of the above legal position would establish that the disciplinary authority, and on appeal, the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment, keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.” (Emphasis supplied)

Unless the decision is illegal or suffers from procedural impropriety or is shocking to the conscience of the Court in a sense that it was in defiance of logic or moral standards, the Court would not go into the correctness of the choice made by the authority concerned and the Court should not substitute its decision to that of the competent authority. While considering the quantum of the punishment, the role of administrative authority is primary, and that of the Court is secondary, confined to see if discretion exercised by the Disciplinary Authority caused extensive infringement of the rights.

In **Upendra Singh** (supra) the Respondent was a member of the Indian Revenue Service (I.R.S.) and at the relevant time he was working as a Deputy Commissioner of Income Tax. The memorandum of charges against him shows that he gave illegal and improper directions to the assessing officer to compel the assessment of the assessee under the summary assessment scheme of the Amnesty scheme of the CBDT. Mr. Singh approached the tribunal for quashing the charges as soon as the Memo of charges was served.

The tribunal by an interim order restrained the authority from proceeding with the disciplinary action.

While deprecating the practice of passing interim order thereby restraining the disciplinary authority to proceed with disciplinary action, the Apex Court has defined the contours of the jurisdiction of Writ Court in judicial review in the following words in paragraph 6:

"6. In the case of the charges framed in the disciplinary inquiry the Tribunal or Court can enquire only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage the Tribunal has no jurisdiction to go into the correctness or truth of the charges. The Tribunal cannot take over the functions of the Disciplinary Authority. The truth or otherwise of the charges is a matter of Disciplinary Authority to go into. Indeed, even after the conclusion of the Disciplinary proceedings, if the matter comes to Court of the Tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the Disciplinary Authority or the appellant authority as a case may be. The function of the Court/Tribunal is one of judicial review, the parameters of which are repeatedly laid down by this Court."

In the instant case the Tribunal exercised the role of the judicial reviewer within the parameters laid down by the Apex Court. The Tribunal did not exceed its jurisdiction and had merely asked for a lenient penalty to be imposed on the respondent. The correctness or the legality of the punishment is not

imputed herein, but consideration is evaluated whether leniency can be shown to the government servant in question by applying the doctrine of proportionality.

In ***Deputy Commissioner Kendriya Vidyalaya Sangathan & Ors.*** (*supra*), the respondent employee entered the school premises during working hours in an inebriated condition and forcibly barged into the Principal's room. The respondent was removed from the service. This order of punishment was substituted for lesser punishment by the High Court. In deciding the power of the High Court to interfere with the quantum of punishment it was held:

*“8. The order of the appellate authority while having a relook at the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the disciplinary authority. Such a power which vests with the appellate authority departmentally is ordinarily not available to the Court or a tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts. (See *UT of Dadra & Nagar Haveli v Gulabhia M. Lad.*) In exercise of power of judicial review, however, the Court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when the punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the Court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.*

9. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with the doctrine of Wednesbury rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the Court and the Court is forced to believe that it is totally unreasonable and arbitrary.....

Moreover, while interfering therewith, the High Court has itself prescribed the punishment which, according to it, “would meet the ends of justice”, little realising that the Court cannot act as a disciplinary authority and impose a particular penalty. Even in that case where it is found that the punishment is disproportionate to the nature of charge, the Court can only refer the matter back to the disciplinary

authority to take appropriate view by imposing lesser punishment, rather than directing itself the exact nature of penalty in a given case." (Emphasis supplied)

In the aforementioned case it cannot be doubted that when the respondent/employee had gone to the place of work in a fully drunk state, the same would itself be a serious act of misconduct, and what compounds the gravity of delinquency is that the place of work is not any commercial establishment but a school that is the temple of learning.

In **H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Ors.** (supra), the Hon'ble Supreme Court has discussed the purpose, nature, and scope of judicial review of administrative action in paragraph 8 in the following words:

"8. But here what was assailed was a correctness of finding as if before an appellate forum. Judicial review, it is trite, is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the Authority after agreeing fair treatment reaches, on a matter which is authorized by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only of the correctness of the decision-making process but also of the correctness of the decision itself."(Emphasis supplied)

In the instant case the major punishment of way of compulsory retirement was imposed due to overstaying leave.

In **Tara Chand Khatri** (supra) the appellant was appointed and later confirmed in 1959 as an assistant teacher by the Education Department of the Municipal Corporation of Delhi. On receipt of the complaint of commission of an immoral act on a student, the appellant was suspended, and a disciplinary proceeding was initiated. The Inquiry Officer found that the charges against the

delinquent was proved and proposed the penalty of dismissal and on recommendations of the Inquiry officer. One of the issues raised was whether the disciplinary authority while concurring with the finding of the Inquiry Officer would be required to state reasons. In paragraph 19 of the said judgment, it was stated thus:

“19. In the instant case, the incorrectness of the first limb of the contention is apparent from a bare reading of the aforesaid order passed by the Deputy Commissioner on May 20, 1969 which clearly states that he agrees with the findings of the enquiring officer. Reading the order as a whole, it becomes crystal clear that the disciplinary authority held the charge drawn up against the appellant as proved.”

On facts, it was found that the punishing authority did record its concurrence with the findings of the enquiry officer.

Apart from the aforementioned cases, it has been understood that ‘unauthorized absence unless wilful and deliberate may be considered to be an act of indiscipline’.

In ***State of Punjab v. Dr. P.L. Singla***, reported in **2008(8) SCC 469**, in paragraph 11, the law on this point was lucidly discussed in the following words:

*"11. Unauthorized absence (or overstaying leave) is an act of indiscipline. Whenever there is an unauthorized absence by an employee, **two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence, in which event the misconduct stood condoned. The second is to treat the unauthorized absence as misconduct, hold an enquiry and impose a punishment for the misconduct.**"*(Emphasis supplied)

Again, while dealing with the concept of punishment, the Court ruled as follows: (**P.L. Singla** (supra) paragraphs 13, 14)

"13. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months, and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned."

14. Where the employee who is unauthorizedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence."(Emphasis supplied)

Thus, the unauthorized absence by an employee, as a misconduct, cannot be put into a straitjacket formula for the imposition of punishment. It will depend upon many a factor as has been laid down in **P.L. Singla** (supra).

Further in Krushnakant **B. Parmar v. Union of India; 2012 (3) SCC 178**, in paragraphs 17 and 18 it has been reiterated that absence from duty may not always be wilful. It is stated thus: -

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a government-servant."

18. in a Departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary Authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct."(Emphasis supplied)

This principle was followed, approved, and reiterated in the case of **Chairman cum Managing Director, Coal India Limited v. Mukul Kumar Chaudhuri and Ors; (2009) 15 SCC 620** in which the Supreme Court have

laid down the following principles which need to be borne in mind while dealing with the proportionality of punishment. It is stated thus:

"19. The doctrine of proportionality is, thus, well-recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment."

It is the duty of the competent authority to exercise judicial discretion in selecting a particular punishment having regard to the gravity of the offence, reasons which led to the offence, past record of the offender, or any other aggravating or extenuating circumstances. Normally, the courts are extremely chary in interfering with the discretion exercised by the competent authority in selecting a particular punishment, and such discretion normally cannot be questioned in a judicial review. However, whether the management had applied its mind or not to the quantum of punishment can be judged from the circumstances and it is not necessary that this should actually appear on the record of enquiry. If it appears to the Court that the competent authority has proceeded with the matter with a closed or biased mind, i.e., with a view to resort to any harsh punishment when lighter punishment would serve the useful purpose, it is the duty of the Court in a judicial review either to remit the matter to the competent authority to revisit the punishment imposed or if the circumstances are justified to substitute the said punishment with any of the

punishments that are available under the Service Rules. However, the later exercise should be done in extraordinary situation and in the rarest of cases.

In the enquiry proceedings, some of the charges were not proved. Ordinarily there will be no interference with the punishment imposed if, even one of the charges proved was sufficient to impose the penalty, the disciplinary authority in imposing the penalty is required to take into consideration any mitigating factors or extenuating circumstances. In exercise of its power of judicial review the Court can take into account mitigating factors and impose any lesser punishment than what the disciplinary authority can impose (See. ***Om Kumar vs. Union of India***, reported in **AIR 2000 SC 3689**).

In exercising its power of judicial review, the Court will not substitute its own judgment for the decision of the disciplinary authority unless:

- i. The order shocks the conscience of the Court;
- ii. No reasonable man would impose such punishment;
- iii. The decision-maker must have taken leave of his sense.

The Court has to weigh all factors, like nature of charges proved against, the past conduct, penalty imposed earlier, nature of duties assigned, having due regard to their sensitiveness, exactness expected of and discipline required to be maintained and the department/establishment where the delinquent works. [See. ***Director General FPF v Sai Babu, 2003(4) SCC 331; State Bank of Hyderabad v P Kata Rao, (2008) 15 SCC 657. Commr. Of Police v Sat Narayan Kaushik, (2016) 6 SCC 303.***]

The punishment or penalty to be imposed must be commensurate with the gravity of the misconduct. A disproportionate penalty would be violative of Article 14 of the Constitution. (See. ***Bhagwan Ram vs. State of Himachal Pradesh; (1983) 2 SCC 442*** and ***State of Uttar Pradesh vs. Raj Pal Singh; (2010) 5 SCC 783***)

The authorities do not have the unfettered power to impose punishment at its own whims, fancies and ipsi dixit. The discretion must suit the offence and it should not be vindictive or unduly harsh or so disproportionate to the offence so as to shock the conscience and amount in itself to conclusive evidence of bias (See. ***Ranjit Thakur v Union of India***, reported in **1987(4) SCC 611**).

In ***Ranjit Thakur*** (supra) the Hon'ble Supreme Court applied the emergent doctrine of proportionality in administrative law. Proportionality is in effect a facet of the principle of reasonableness. The principle of Wednesbury reasonableness is applicable.

As a leading authority on administrative law has pointed out: *"Where attempts have been made to rely upon proportionality, judges have tended to equate it with reasonableness."*

But the same authority has also discerned the stultification of its growth in English domestic law. Since Article 14 of the Constitution does not permit arbitrary exercise of power, the disproportionate exercise of power would be unreasonable and arbitrary, and therefore, the doctrine of proportionality can be said to be entrenched as a Constitutional right in India and not susceptible to any doubts regarding its applicability as in other jurisdictions. (See. Law Relating to Public Service by Samaraditya Pal, 4th Edition)

The principle of proportionality has been discussed at length in *Om Kumar v. Union of India* where Jagannadha Rao explained:

"By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of

measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority “maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve”. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality”.

Judicial Review will be competent when the punishment is totally irrational i.e., in outrageous defiance of logic. (See. Law Relating to Public Service by Samaraditya Pal, 4th Edition)

In **Coimbatore District Central Coop. Bank v Employees Association**, reported at **(2007) 4 SCC 669** the Apex Court held that if punishment imposed on an employee is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny based on the doctrine of proportionately. It was observed:

“17. So far as the doctrine of proportionality is concerned, there is no gain saying that the said doctrine has not only arrived in our legal system but has come to stay. With the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by courts. If an action taken by any authority is contrary to law, improper, irrational or otherwise unreasonable, a court of law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the ‘doctrine of proportionality’.

18. ‘Proportionality’ is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise—the elaboration of a rule of permissible priorities.

19. *de Smith* states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. (Emphasis supplied)

In ***Uttar Pradesh State Road Transport Corporation v Compotar*** reported in **2008(14) SCC 444**, it was observed that "Normally in exercise of power of 'judicial review', a writ court will not substitute its own judgment or decision for the judgment or decision of a disciplinary authority unless it comes to the conclusion that it has shocked the conscience of the Court or the punishment is such that 'reasonable man' would not impose such punishment, or the decision is so absurd that the decision-maker at the time of making the decision 'must have taken leave of his sense'." (Emphasis supplied)

The decision to impose major penalty by way of compulsory retirement in our view is unduly harsh and unreasonable in the facts and circumstances of the case.

In the letter dated August 6, 2014 issued by the Senior Audit Officer (Administration) addressed to the General Secretary, Asiatic Society, the parent organisation did not contend that any extension beyond November 10, 2014 (1st Year) was impermissible or contrary to any Rules. The said letter is in the form of a request to the General Secretary, Asiatic Society to intimate if the services of Shri Chattopadhyay would be required at Asiatic Society for a further term and if the services are required a proposal for further extension of his term of deputation may be sent to the office of the Director General of Audit along with willingness of the officer for necessary action. This letter does not give an impression that the service of Shri Chattopadhyay would be immediately required by the Director General of Audit, on the contrary, it gives a clear message that the period of deputation can be extended and is extendable. In

fact, the Rules permit deputation for a period of three years. Asiatic Society did not release Shri Chattopadhyay till afternoon of July 10, 2015. It clearly shows that Shri Chattopadhyay was required by the Asiatic Society. Shri Chattopadhyay has given his own explanation for not being able to join the parent organisation. The explanations offered are neither unreasonable or fanciful or implausible. It is based on misinterpretation of relevant rules both at the ends of the Asiatic Society and the respondents. Moreover, the illness of his wife was another reason for delayed joining. It certainly cannot amount to any grave misconduct. The honesty, integrity and ability of Mr. Chattopadhyay to perform his job diligently is borne out from record and if any reference is called for, we may conveniently refer to the Letter of Appreciation issued by the Director General of Audit Central, Kolkata, on September 9, 2013. In appreciation of his performance the Director had certified that:

“Your devotion to duty and high standard of performance during the year 2012-13 has been noteworthy and is being placed on record. I am sure you will continue to maintain your high standards and be a source of inspiration to others.

A copy of this Letter of Appreciation is being placed in your CR/APAR dossier.”

This letter forms part of the record of the proceedings but ignored by the authorities in considering the quantum of punishment. The petitioners did not suffer due to delayed joining by Sri Chattopadhyay. He has clearly stated that her wife was sick and had mentioned in detail the nature of sickness. Mr. Chattopadhyay has fairly admitted that there was delay on his part to join the parent organisation but has given cogent reasons for the delay. He has clearly stated that he had no intention to defy or disobey any lawful order. The delay in

joining was not wilful or intentional. The order of compulsory retirement would cause immense hardship in terms of financial benefits as well as his reputation and would wipe off all good works he had done in his 36 years of unblemished service record. He would carry a stigma for the rest of his life.

A reasonable employer is expected to take into consideration the facts we have discussed earlier in detail including the aforesaid factors and the measure, magnitude and the degree of misconduct along with all other relevant and extenuating circumstances before proceeding further in the matter. In fact, the employer would have been merciful in completely absolving and the respondent from all the charges and could have taken a lenient view, having regard to the facts and circumstances of the case. We feel that the respondent could have been completely exonerated for his alleged overstay and delayed joining in the parent organisation. In fact, Mr. Chattopadhyay was allowed to join the parent organisation after being relieved by the Asiatic Society without being served with any charge-sheet for his alleged overstay in the Asiatic Society. In our view no reasonable employer would have imposed a major penalty by way of compulsory retirement to such an employee who had devoted all his life for the institution and has earned appreciation from the Director of Audit. The punishment is not only unduly harsh but in excess to the allegations. The respondent has already retired from service. On such consideration we are of the view that the Tribunal was justified in directing the revising authority to take a lenient view. In fact, it is important to note that the writ petitioners have accepted the order of the Tribunal and approached the tribunal for modification of its order by replacing the appellate authority with

the revising authority. No explanation was offered for not immediately filing the writ petition challenging the order of the tribunal although it was open to them and to that extent, we accept the submission of Mr. Majumdar, that the petitioners having accepted the order impugned cannot now seek a judicial review of the order passed by the tribunal.

In fact, in the application for modification it is stated:

“That after conclusion of hearing their Lordships were pleased to pass an order dated 17.07.2019 thereby quashing the appellate order and dispose of the O.A. application by remanding the matter back to the appellate authority for issuing appropriate penalty order taking a lenient view.

That your applicants herein submit that the Hon’ble Tribunal has quashed the order of the Appellate Authority i.e., Deputy Comptroller and Auditor General and remanded the matter back to the Appellate Authority without commenting on the decision of Revising Authority i.e., Comptroller and Auditor General of India while Revising Authority is superior to the Appellate Authority.

That your applicants herein submit that the Appellate Authority is to act as per the decisions taken by the Revising authority which is superior than the Appellate Authority. If Revising Authority has not been directed by the Tribunal to comply the order of the Hon’ble Court, the Appellate Authority as a subordinate Authority to Revising Authority, cannot supersede the decisions of the Revising Authority.

That your applicants herein submit that in the above situation the order dated 17.07.2019 should be modified and direction upon the Revising Authority is also required. A photo copy of the certified copy of the order dated 17.07.2019 is annexed herewith and marked as Annexure M-1.”

The said application was disposed of on September 18, 2019 by the following order:

“The respondents of O.A. preferred this M.A. for modification of the order dated 17.07.2019 passed in the O.A. so that a direction is issued to the Revisional Authority to pass appropriate order modifying the mention of the Appellate Authority.

2. Heard ld. Counsel for the parties.

3. In view of the fact that the Comptroller and Auditor General of India being the Revisional Authority had already issued an order on 05.04.2017 on the revision petition dated 01.09.2016 and upheld the order of the Appellate Authority, we modify Para 9 of the order passed in O.A.350/929/2017 in the following manner: -

‘Accordingly, we quash the order of the Revisional Authority and dispose of the O.A. by remanding the matter back to the Revisional Authority for issuing appropriate order taking a lenient view.’

Other paragraphs of the order dated 17.07.2019 would remain unaltered.

4. Accordingly the M.A. stands disposed of. No costs.

5. Let corrected order be issued to the parties.”

There is nothing on record to show that the said application was filed “without prejudice”. The writ petitioner have virtually accepted the order dated July 17, 2019 by moving the application almost after two months for modification of the said order only to the extent of replacing the Appellate Authority with the Revisionary Authority. The writ petitioners having accepted the order dated July 17, 2019 cannot now challenge the said order.

In any event we are of the view the order of the Revisionary Authority was unduly harsh and in the facts and circumstances of the case the tribunal has taken a just and fair view.

In view of the pendency of the writ petition the Revisionary Authority is now directed to act in terms of the order dated July 17, 2019 passed by the Central Administrative Tribunal within two months from date.

The said authority shall be guided by the observations made by us in the order in deciding the matter. We reiterate that we expect the Revisionary Authority to take a lenient view in the matter as we feel that the respondent deserves to be treated fairly and leniently. It would be open for the Revisionary

Authority even to exonerate the respondent completely of all charges by taking a merciful view.

The writ petition is accordingly hereby disposed of with the aforesaid direction. However, there shall be no order as to costs.

(Soumen Sen, J.)

I agree

(Hiranmay Bhattacharyya, J.)