

**IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side**

**Present:- Hon'ble Mr. Justice Subrata Talukdar
And
Hon'ble Mr. Justice Aniruddha Roy**

**FMA 4516 of 2014
With
CAN 1 of 2014 (Old No. CAN 8550 of 2014)
CAN 2 of 2020 CAN 3 of 2020**

**Dr. Sunirmal Sarkar
vs.
Union of India & Ors**

For the Appellant: Mr. Kalyan Bandyopadhyay, Sr. Adv.,
Mr. Joytosh Majumdar, Adv.,
Mr. Siddhartha Ghosh, Adv.,
Mr. Sayan Sinha, Adv.

For the Respondents: Mr. Kumar Jyoti Tewari, Adv.,
Mr. Tarun Jyoti Tewari, Adv.,
Ms. Arpita Chatterjee, Adv.

Reserved on: 19.01.2023

Judgment on: 08.05.2023

ANIRUDDHA ROY, J.:

1. This mandamus appeal had arisen from the impugned judgment and order dated May 07, 2014 passed in WP No. 2131(W) of 2011 (Dr. Sunirmal Sarkar vs. Union of India & Ors.) whereunder the writ petition filed by the appellant was partially allowed only to the extent allowing the appellant to receive the provisional pension.

Facts:-

2. The appellant writ petitioner is a qualified Homeopathy Doctor. He was an employee of the **National Institute of Homeopathy** (for short, NIH) and had served his employer in various capacities and posts from time to time. The appellant opted for voluntary retirement on and with effect from **March 20, 2008** from his employment and was governed under the provisions of the **Central Civil Services (Pension) Rules, 1972** (for short, CCS Pension Rules).
3. Having opted for the said voluntary retirement from his service, the appellant did not receive his pension and retiral benefits. The appellant after about 2 years from his retirement received a letter dated January 07, 2010 **Annexure P-3 to the writ petition** from the fourth respondent informing the appellant that he had declared an amount of Rs. 1,65,492/- as income under the heading "**income from business or profession**" for the **assessment year 2005-06** while filing his income tax return and the said income was not shown under the head "**income from other sources**" or any other head in the statement containing the declaration of income for the financial year 2004-05. The appellant was requested to furnish the details and nature of the source of income to the aforesaid extent of Rs. 1,65,492/- as declared by the appellant.
4. The appellant immediately by his letter dated January 15, 2010, **Annexure P-4 to the writ petition** replied to the said letter of his employer dated January 07, 2010 and informed that since none of the relevant papers upon which the respondents purportedly relied on were supplied to the appellant, the appellant was not in a position to deal with the charge. It was also

informed by the appellant that upon the relevant materials being furnished to the appellant he would be in a position to respond thereto.

5. By a letter dated February 10, 2010 **Annexure P-5 to the writ petition**, the fourth respondent instead of providing the necessary materials to the appellant called upon the appellant to furnish the requisite documents in connection with the declaration of the said income of Rs. 1,65,492/- as stated above.
6. On March 24, 2010 the appellant received an impugned order dated March 24, 2010 stating that the appellant while serving the second respondent at the post of **Reader**, filed a saral/income tax return for the **assessment year 2004-05** before the Income Tax Department in **March, 2006** in which he declared his income to the extent of **Rs. 1,65,492/-** from business or profession while the appellant at the relevant point of time also drew the **"non-practicing allowance"**. It was also mentioned that the **appellant did not obtain any prior consent from his employer** to carryout his private practice, thus, the appellant alleged to have committed grave misconduct by concealing the truth from his employer. The departmental proceeding was initiated with the sanction of the competent authority under the said **CCS Pension Rules read with the bye-laws of the second respondent** governing the condition of service of the appellant. Along with the said decision of the employer, the alleged memorandum, statement of article of charges, statement of imputations of misconduct or misbehavior in support the article of charges framed against the appellant and the list of documents on the basis of which the article of charges were framed against the

appellant, were furnished to the appellant, **Annexure P-6 to the writ petition.**

7. In response to the said memorandum and its annexures dated March 24, 2010, the appellant by its letter dated April 03, 2010, **Annexure P-7 to the writ petition**, replied thereto denying that there was any misconduct or misbehavior on his part and he also stated that he did not undertake any private practice while he was drawing the non practicing allowance during the period 2004-05. The appellant also stated that no such charges or allegation was raised against the appellant during his service tenure. He had an unblemished career record. The initiation of the disciplinary proceeding was mala fide exercise by the second respondent at the behest of some of its employees.
8. Subsequent to the said letter dated April 03, 2010 submitted by the appellant, which was not replied to by his employer, the appellant submitted two further letters dated June 23, 2010 and July 16, 2010 **Annexure P-8 to the writ petition**. The appellant demanded his pension and other retiral benefits.
9. Both the said letters dated June 23, 2010 and July 16, 2010 were also not replied to by the second respondent. The appellant then through his advocate served a legal notice dated October 09, 2010, **Annexure P-9 to the writ petition** with a demand to release the pension and other retiral benefits in his favour.
10. The appellant contended that the enquiry officer and the disciplinary authority was the same which is ex facie in violation of the settled legal principles and the disciplinary proceeding proceeded wholly without

jurisdiction. The respondents could not produce any witness to prove their case against the appellant. The respondents in fact were unable to prove the alleged charges against the appellant.

11. The appellant further contended that the appellant and his family members possessed certain cultivable lands at Bishnupur, Police Station Gaighata. Several crops were cultivated. The sale produce from such agricultural products arising out of the said lands constituted the family income of the appellant which was shown to be Rs.1,65,492/- for the year 2005-06. Challenging the said action of the respondents, the appellant filed the writ petition with the following prayers:-

“a) A writ or writs in the nature of mandamus be kindly issued commanding the respondent authorities, its servants, assigns, men and agents to forthwith release the pension and other retiral benefits due to the petitioner from the. Respondent No.2, without any further delay.

b) A writ or writs in the nature of mandamus be Kindly issued quashing the instant disciplinary proceedings initiated against the petitioner vide the said memorandum no.A-20012/1/85/NIH/ SS/4123 dated 24.03.2010 issued by the respondent No.4 and all its annexures.

c) A writ of certiorari be kindly issued commanding the Respondent authorities, its servants, assigns, men and agents to certify and transmit the records pertaining to this case before this Hon'ble Court so that conscionable Justice may be done.

d) A writ of prohibition be kindly issued prohibiting the respondent authorities, its servants, assigns, men and agents from withholding the person and other retiral benefits due to the petitioner from the Respondent No.2.

e) A Writ of Prohibition be kindly issued prohibiting the respondent authorities, its servants, assigns, men and agents from giving any further effect to the said memorandum no.A-20012/1/85/ NIH/ SS/4123 dated 24.03.2010 issued by the respondent No.4 and all its annexures.

f) Rule NISI in terms of prayers above.

g) An interim order may kindly be passed commanding the respondent authorities, its servants, assigns, men and agents to forthwith release 50% of the pension and other retiral benefits due to the petitioner from the Respondent No.2, without any further delay.

h) An interim order may kindly be passed staying the instant disciplinary proceedings initiated against the petitioner vide the said memorandum no.A-20012/1-85/NIH/SS/4123 dated 24.03.2010 issued by the respondent No.4 and all its annexures, till disposal of the instant application..

i) Ad-interim orders may kindly be issued prohibiting the respondent authorities, its servants, assigns, men and agents from giving any further effect to the said memorandum no.A-20012/1/85/NIH/SS/4123 dated 24.03.2010 issued by the respondent No.4 and all its annexures, till disposal of the instant application.

j) Ad-interim orders in terms of prayers (g)-(i) above.

k) Any further order/orders be kindly passed as Your Lordships may deem fit and proper".

12. Pursuant to the direction made by the Writ Court the respondent no.2 to 4 filed their affidavit-in-opposition affirmed on July 07, 2011 and the appellant filed its affidavit in reply affirmed on July 22, 2011.
13. The writ petition was dismissed by the said impugned judgment and order dated May 07, 2014.

Submissions:-

14. Mr. Kalyan Bandyopadhyay learned senior counsel being ably assisted by Mr. Jyotosh Majumder, learned counsel appearing for the appellant writ petitioner submitted that, the charge sheet would show that the alleged offence pertains to the Assessment Year 2005-2006. The respondents in paragraph 3(d) to its affidavit-in-opposition stated that the alleged offence of the appellant was for the year 2004-2005.

15. Mr. Bandyopadhyay then referred to **Clause 9(2)(b)(ii)** of the CCS Pension Rules and submitted that, the departmental proceeding, if not instituted while the Government Servant was in service, whether before his retirement or during his reemployment, shall not be in respect of any event which took place more than **four years** before such institution of departmental proceeding. Relying heavily upon this provision, the learned senior counsel for the appellant submitted that, if the alleged offence for the year 2004-2005 the statutory period for issuing charge sheet was due to expire on expiry of the four years after the occurrence of the alleged offence, i.e. on March 31, 2009. As such, the charge sheet issued on **March 24, 2010**, which was issued after four years having expired on **March 31, 2009**, was expressly barred by limitation and liable to be set aside on this ground alone.
16. The learned senior counsel then submitted that, the appellant had filed his Income Tax Return for the Assessment Year 2005-2006 on March 20, 2006 as would be evident from the appellant's intimation under Section 143(1) of the Income Tax Act, 1961 issued by the Income Tax Department, the same was filed before this Court at the time of hearing. It was submitted that even if, assuming but not admitting that filing of the Income Tax Returns by the appellant was to be taken as the starting point of limitation, even then the charge sheet was to be filed by March 19, 2010, i.e., by a period of four years from the date of the relevant offence in terms of the said **Clause 9(2)(b)(ii)** of the CCS Pension Rules. The charge sheet admittedly having been issued on March 24, 2010 was, therefore, expressly barred by law of limitation and was liable to be set aside.

17. **Clause 9(2)(b)(iii)** of the CCS Pension Rules provided for the departmental proceeding to be conducted by such authority and in such place as the **President** may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal of service would be made in relation to the Government Servant during his service.
18. He submitted that, while framing the said Rule under CCS Pension Rules, the framers of the rule contemplated the expression **“President”** to be the **President of India**. **Clause 9** of the CCS Pension Rules provided for the right of President to withhold/withdraw the pension of Central Government employee. It is, thus, the exclusive domain and authority of the **President of India** and no other authority to exercise its power under Clause 9 of the CCS Pension Rules and not the President of the NIH. The Scheme of Rule 9 and particularly **Clause 9(b)** of the CCS Pension Rules made it very clear that where the disciplinary proceeding, had not been instituted, while government servant was in service whether before his retirement, or during his re-employment, the same should not be instituted **save with sanction of the President of India** and shall be conducted by such authority and in such place as the President of India may direct and in accordance with the procedure applicable to the departmental proceeding against the said alleged delinquent employee.
19. Mr. Bandyopadhyay, learned senior counsel, submitted that, on a careful scrutiny of the records in this case, it would be evident that at no stage of the disciplinary proceeding any sanction was obtained from the President of India far to speak of before initiation thereof against the appellant. He submitted that, the entire disciplinary proceeding including its initiation

from the stage of issuance of charge sheet suffered from serious infirmities in law and de hors the provisions laid down under Clause 9 of the CCS Pension Rules. The entire proceeding was wholly without jurisdiction and beyond authority. By no stretch of imagination the president of the NIH can be treated as the **“President”** as mentioned under Rule 9 of the CCS Pension Rules.

20. Mr. Bandopadhyay then proceeded to submit that, **assuming though not admitting** the president of the NIH had the power to sanction the disciplinary proceeding against the appellant, such sanction was invalid in absence of the delegation of such power upon the president of NIH by the governing body of NIH and/or ratification of action of the president taken for emergency purpose, by the governing body of NIH.
21. The senior counsel then referred to **Clause 10.1, 10.3, 10.6 and 10.7** from the **National Institute of Homeopathy Rules** (for short, NIH Rules).
22. He submitted that, it would appear from a plain reading of the provisions laid down under Clause 10.1 and Clause 10.3 of the NIH Rules that the Governing Body of NIH shall have general control over the affairs of NIH and shall have full power to formulate its by laws, as they are essential for regulation of business of NIH and in particular with reference to the objects mentioned in Clause 10.3 of the NIH Rules.
23. Referring to Clause 10.6 of the NIH Rules he submitted that the Governing Body had the power to delegate to the president of NIH, powers for conducting its business, as the Governing Body deems fit, subject to confirmation of the actions of the President. No such powers vested with Governing Body was delegated by the Governing Body to the President of

NIH nor any subsequent ratification of such action of the President of NIH by the Governing Body was granted by the Governing Body so that the President could take the disciplinary action against the appellant. In absence of such delegation, the president of NIH did not have the power and authority to initiate disciplinary proceeding against the appellant.

24. Referring to Clause 10.7 from the NIH Rules, learned senior counsel submitted that the President of NIH had the power to exercise the functions of the Governing Body only in case of emergency for furtherance of the objects of NIH and to remove any deadlock. The action of the President in such event shall have to be reported to the Governing Body for necessary ratification and necessary ratification should come from the Governing Body in this regard. No such ratification was either called for by the President of NIH to initiate disciplinary proceeding against the appellant nor was there any.
25. Mr. Bandyopadhyay further submitted that the voluntary retirement obtained by the appellant w.e.f. March 20, 2008 was an event subsequent to vigilance proceeding against the appellant. The NIH authority having knowledge of such vigilance proceeding against the appellant allowed the appellant for his voluntary retirement without raising any objection thereto contemporaneously. The NIH Authority, thus, could not contend anything to the contrary after accepting the voluntary retirement of the appellant without any objection and, therefore, the NIH authority at this belated stage cannot withhold the terminal benefits of the appellant. The conduct of the NIH authority was not only illegal or wrongful but also in mala fide exercise of their power and discretion.

26. In support of his contentions learned senior counsel for the appellant had relied upon the following decisions:-

- (i) ***The decision of the Hon'ble Supreme Court In the matter of: Punjab State Power Corpn. Ltd. Vs. Atma Singh Grewal, reported in 2014 (13) SCC 666 (Prs. 2-4).***
- (ii) ***The decision of the Hon'ble Supreme Court In matter of: Brajendra Singh Yambem vs. Union of India, reported in 1967 SCC Online SC 1/1972 SLR 44 (pr.13).***
- (iii) ***The decision of the Hon'ble Supreme Court In matter of: State of Assam and Another vs. Raghava Rajgopalachari, reported in 1967 SCC Online SC 1/1972 SLR 44 (Pr.13.)***

27. Mr. Bandyopadhyay referring to **Article 309** of the Constitution of India submitted that the provisions laid down thereunder dealt with the recruitment and conditions of service of persons serving the Union or a State of the country. It provided that subject to the provisions of the Constitution, acts of the appropriate legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. The said provisions also, inter alia, provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, to make rules regulating the recruitment and the conditions of service of persons appointed to, such services and posts until provision in that behalf is made by or under an act of appropriate legislature under Article 309 of the Constitution and any rules made shall have effect subject to the provisions of any such act.

Pursuant to the said provisions of the Constitution, the said CCS Pension Rule was framed.

28. He then submitted that, from a conjoint reading of **Article 309** of Constitution and **Rule 9** of the CCS Pension Rules, it is clear that, the **President**, meaning thereby the **President of India**, reserves the right of withholding a pension or gratuity or both either in full or part of a government servant, who had suffered, inter alia, a departmental proceeding and found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement and the Union Public Service Commission shall be consulted before any final order is to be passed.
29. Mr. Bandyopadhyay further submitted that the punishment inflicted upon the appellant is totally disproportionate. The allegation related to a sum of **Rs.1,65,492/-** for which the entire retiral benefits of the appellant was withheld after serving the employer for more than 30 years. Mr. Bandyopadhyay submitted that, the writ petition should be allowed directing the respondents authorities to forthwith release and pay the retiral benefits to the appellant without any further delay and the entire disciplinary proceeding should be declared as illegal and void and be set aside.
30. **Mr. Kumar Jyoti Tewari**, learned counsel appearing for the **respondents**, submitted that the appellant had received the **Non Practising Allowance** from the Government of India for working as Assistant Professor of NIH in March, 2006. The appellant submitted **FORM SARAL** with the Income Tax Department with a disclosure of his income at a sum of Rs. 1,65,492/-. On enquiry it was detected that the appellant drew non practising allowance

during the period despite giving a undertaking not to do any private practice without taking prior approval from the competent authority. This was his service condition.

31. Mr. Tewari further submitted that on the basis of the Office Memorandum issued by the Director, Central Vigilance Commission (for short, CVC) on March 22, 2010, the President of NIH issued a charge sheet on March 24, 2010 (at **Page 70** to the Paper Book). In his reply to the said Memorandum dated March 24, 2010 the appellant admitted that he made a mistake while signing his Income Tax declaration prepared by his tax consultant at **page 77** to the Paper Book. The appellant writ petitioner filed a writ petition before this Court praying for release of the pensionary benefit and other retiral dues and also sought for quashing of the disciplinary proceeding under the said Memorandum dated March 24, 2010.
32. By the impugned Judgment and Order dated May 07, 2014 the Writ Court refused to quash the disciplinary proceeding but directed the respondents to release provisional pension till the conclusion of the disciplinary proceeding. Challenging the said impugned Judgment and Order dated May 07, 2014, the instant appeal was filed.
33. Mr. Tewari also submitted that learned senior counsel appearing for the appellant had raised the two principal issues for consideration in the instant appeal which, inter alia, as follows:-

“1) The charge Sheet was issued in respect of an event which took place more than four years before the issuance of such Memorandum dated 24.03.2010. Accordingly, it is barred by law in view of Rule (2)(b) (ii) of The Central Civil Services (Pension) Rules, 1972.

2) Charge Sheet was issued without the sanction the President of India in violation of Rule (2)(b)(i) of The Central Civil Services (Pension) Rules, 1972”.

34. By way of reply to the aforesaid two issues, Mr. Tewari referring to **page 64** of the Paper Book submitted that the income disclosed by the appellant in respect of the **Assessment Year 2005-2006**, i.e. for the period between **April 01, 2005 and March 31, 2005** was as shown therein. He submitted that, the Assessment Year is the year which comes after the Financial Year. This was the time in which the income earned during the Financial Year was assessed and tax, if any, was paid. **SARAL FORM** submitted by the appellant was in **March, 2006** for the income earned by him during **Financial Year 2004-2005 (for the period April 01, 2005 to March 31, 2006)**, whereas in the facts of the present case, the incident took place in **March 2006** and the **last date of submitting return was March 31, 2006**. The charge sheet was issued within time on March 24, 2010 in terms of **Rule 9 (2)(b)(ii)** of the said CCS Pension Rules. Such fact, according to Mr. Tewari, was admitted by the appellant in his writ petition at **paragraph 50** thereof.
35. Mr. Tewari then relied upon **Sub-Article 3 to Article 77** of the Constitution of India. He submitted that the President of India shall make rules for the convenient transaction of the business of the Government of India and for the allocation amongst ministers of the said business. He then referred to **Rules 2, 3 and 4 of the Government of India (Allocation of Business) Rules, 1961** (for short, the said 1961 Rules). He submitted that, the said 1961 Rules was framed on January 14, 1961. From a combined and harmonious reading of Rules 2, 3 and 4 of the said Rules, it would appear

that, the business of the Government of India shall be transacted through the Ministries of various departments, Secretariat and offices specified in the **First Schedule** to the said 1961 Rules.

36. He further submitted that, **Sub-Rule 1 to Rule 4** of the said 1961 Rules stated that the business of the Government of India allocated to Cabinet Secretariat was and shall always be deemed to have been allotted by the Prime Minister. **Sub-Rule 1 to Rule 3** of the said 1961 Rules stated that the distribution of subjects amongst the departments shall be specified under the **Second Schedule** of the Business Rules, 1961 and shall include all attached and subordinate officers or organizations including public sector undertakings with their respective areas of work.
37. Mr. Tewari further submitted that sanction for any person in respect of any offence was required to be accorded in the manner as provided under **Sub-Rule 3 to Rule 3** of the 1961, Rules. Referring to the **Serial No. 2** under the **First Schedule (Rule2)** to the said 1961 Rules which dealt with the Ministry of Ayurveda, Yoga and Naturopathy, Unani, Siddha and **Homeopathy (Ayush)** Ayurveda Yoga Aur Prakratic Chikitsa, Unani, Siddha or **Homeopathy (Ayush)** Mantralaya. **Serial No. 15** dealt with the Ministry of Health and Family Welfare (Swasthya Aur Parivar Kalyan Mantralaya). He submitted that, all the issues and matters requiring taking action at the level of Government in regard to **National Institute of Homeopathy** shall be in charge of the concerned ministers. From the said 1961 Rules, it would further be evident that, the President would act through the concerned ministers and the personal satisfaction of the President was not at all required in view of the decision rendered. In support the learned counsel for

the respondents had relied upon the following decisions of the Hon'ble Supreme Court:-

- (i) ***In the matter of: Samsher Singh vs. The State of Punjab & Anr., reported at (1974) 2 SCC 831.***
- (ii) ***In the matter of: State of M.P. & Ors. Vs. Dr. Yashwant Trimbak, reported at (1996) 2 SCC 305.***
- (iii) ***In the matter of: PU Myllai Hlychho & Ors. Vs. State of Mizoram & Ors., reported at (2005) 2 SCC 92.***

38. Mr. Tewari then submitted that whenever the Constitution provided for the satisfaction of the Governor/President as the case may be for exercise of any power or function, it was not meant that a personal satisfaction was required to be achieved by the President or the Governor but the satisfaction was in the constitutional sense under the Cabinet System of Government. Sanction by the President of India, according to him, meant the sanction granted by the Minister-in-Charge of the concerned department of the Government of India as the President of India functions with the aid and advice of the **Council of Ministers** of Government of India. He then submitted that, in the instant case, as per Memorandum of Association of NIH, the Union Minister of Health and Family Welfare, Government of India or Union Minister for the State with the Health and Family Welfare dealing with the Department of Ayush or Deputy Minister of Health and Family Welfare dealing with the Department of **Ayush** is the **President of NIH**. Nobody can be the President of the Governing Body of **NIH** save and except the Hon'ble Minister, of Ministry of Health and Family Welfare, Government of India. Sanction was granted by the President of NIH, that is, the President

of the Governing Body of NIH being the concerned minister of the concerned department and the same shall be treated as sanction granted by the President of India in view of the said 1961 Rules.

39. He then submitted that in view of **Sub-Article 3 to Article 77** of the Constitution of India, the said 1961 Rules considering the ratio of the decision of the Hon'ble Supreme Court ***In the matter of: Samsher Singh (supra)***, the necessary sanction was granted by the President of NIH being the concerned Minister-in-Charge of the concerned Department should be and should have to be treated as the **Sanction granted by the President of India.**
40. In view of the above submissions, Mr. Tewari further submitted that, the present appeal should be dismissed and NIH should be permitted to complete the disciplinary proceeding against the appellant.

Decision:

41. After considering the rival contentions of the appearing parties and on perusal of materials on record, at the outset on a close scrutiny of the averments made in the writ petition and the impugned judgment dated May 07, 2014, it appears to this Court that, the point taken and the issue raised before this **Appellate Court** by Mr. Kalyan Bandyopadhyay learned senior counsel appearing for the appellant that **to initiate the disciplinary proceeding against the appellant a prior sanction was required to be obtained from the President of India in view of the provisions laid down under Rule 9(2)(b) of the CCS Rules and in absence of such prior sanction, as in the instant case, the initiation and fate of the disciplinary proceeding was bad in law and stood vitiated and in**

absence of any delegation of power to initiate such a disciplinary proceeding in favour of the President of NIH by the President of India, the disciplinary proceeding against the appellant stood vitiated were not raised either in the writ petition or argued before the Hon'ble Single Judge during the adjudication of the writ petition. In the above factual backdrop, this Appellate Court first proceeds to deal with the permissibility of raising the aforesaid issues on behalf of the appellant **for the first time** before this Appellate Court.

42. On a careful consideration of the point argued and the issue raised on behalf of the appellant, as narrated above, for the first time before this Appellate Court, it appears to this Court that those issues travel to the root of the matter. If the disciplinary proceeding is declared to be bad in law, a nullity and stood vitiated then the entire gamut of the appellant's case would be of a different complexion.
43. It is trite that the Appellate Court in exercise of its Appellate Jurisdiction is authorized to exercise the power and jurisdiction of the Trial Court in its entirety and in addition the Appellate Court is vested with the power and authority to set the clock right, if it finds that otherwise a serious miscarriage of justice would take place. It is equally trite that an issue on a point of law, even if not argued or taken before the Trial Court and if such a point of law travels to the root of the cause which could change the entire gamut of the matter in a particular fact situation, the Appellate Court has jurisdiction and authority to examine those points of law raised before it even for the first time.

44. In exercise of such power and authority of an Appellate Court, this Court first proceeds to examine and consider the said two points raised **for the first time** on behalf of the appellant before this Appellate Court.
45. The relevant provisions from the Constitution and the Rules as mentioned above, on which the parties had made much deliberations at the outset, are quoted below:-

“Constitution of India:-

309. Recruitment and conditions of service of persons serving the Union or a State.- *subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:*

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this Article, and any rules so made shall have effect subject to the provisions of any such Act.

77. Conduct of business of the Government of India.-*(1) All executive action of the Government of India shall be expressed to be taken in the name of the President.*

(2) Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.

(3) The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

CCS Pension Rules:-

9. Right of President to withhold or withdraw pension

[(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees three hundred and seventy-five (Rupees Three thousand five hundred from 1-1-2006-see GID below Rule 49) per mensem.]

(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall continued and concluded by the authority by which they were commenced in the same manner as of the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before this retirement, or during his re-employment,-

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in

accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) Deleted.

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where the departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(5) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule,-

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

Rules and Regulations of NIH:-

“10. Powers of the Governing Body

10.1 The governing Body shall have general control of the affairs of the Institute and shall have Authority to do, exercise and perform all the powers, acts deeds for the planning. Establishment and running of the Institute, consistent with the aims and objects of the Institute.

10.2 The Governing Body shall have powers to create posts, subject to specific provision in the budget on scales of pay applicable to similar posts under the Government of India or on scales of pay approved by Government of India, classify them into grades and specify their designations, provided that no post carrying an initial salary of Rs. 1,100/- or more may be created except with the previous approval of the Government of India. In all other matters, the Governing Body shall have full powers in the matter of expenditure from the funds of the Institute save in the matter of pay, allowances and concessions to Government servants on foreign service which shall be no greater than those admissible under the code rules of the Government.

10.3 The Governing Body shall have full powers to make such Bye-Laws as they shall think essential for the regulation of the business of the Institute and in a particular with reference to (i) the keeping of accounts, (ii) the preparation and sanction of budget estimates, (iii) the sanctioning of expenditure of expenditure, (iv) entering into contracts, (v) any other purpose that may be necessary.

10.4 Subject to prior approval of the Government, the Governing Body may alter, modify, rescind or add to the Rules and Regulations of the Institute at any time by a resolution passed by a majority of three-fifths of members present and voting at any meeting of the Governing Body which shall have been convened for the purpose after giving due notice of such resolution to the members of the Governing Body.

10.5 The Governing Body may accept the management and administration of any endowment or trust fund or any subscription or donation provided that the same is unaccompanied by any condition inconsistent or in conflict with the nature and object for which the Institution is established.

10.6 The Governing Body may by resolution delegate to the President and to the Secretary such of its powers for the conduct of business as the Governing Body deem fit, subject to the condition that action taken by the President or by the Secretary shall be reported for confirmation at the meeting of the Governing Body.

10.7 Nothing in the rules and regulations of the National Institute of Homeopathy, Calcutta, shall prevent the President from exercising any or all the powers of the Governing Body in case of emergency for the furtherance

of the object of the National Institute of Homeopathy and the action taken by the President on such occasions shall be reported to the Governing Body subsequently for ratification”.

46. **Article 309** of the Constitution provides that subject to the provisions of the Constitution, acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State. It shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affair of the Union to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under any act of the appropriate legislature under the said Article of the Constitution. Following the said constitutional mandate the provisions relating to pension and gratuity including family pension, which were spread over the Civil Services Regulations and various executive instructions, were codified in 1972, in the form of **Statutory Rules** and the said CCS (Pension) Rules, 1972 was framed. Under **Rule 9** of the said CCS (Pension) Rules the President reserved to himself the right of withholding a pension or gratuity, or both, either in full or in part in respect of a pensioner. The expression **“President”** used under Rule 9 had not been defined specifically under Rule 3 being the definition section of the CCS Pension Rules or even elsewhere in the said CCS Pension Rules. The expression **“President”**, therefore, must be construed and understood in the light of the provisions laid down under Article 309 of the Constitution of India, which was the source and authority of framing the said CCS Pension

Rules being the **President of India**. There was nothing in the language of Rule 9 to construe any restriction on the right of the President to withhold pension under this provision. On the other hand, the words “**withholding**” and “**withdrawing a pension**” clearly convey the meaning that the President is competent to withhold or withdraw full pension. Therefore, it was only the President of the country, whose exclusive domain and authority to withhold the pension of the appellant. This clearly inferred that to withhold the pension of the appellant, it should have been the Act and Decision of the **President of India** and not the **President of NIH**.

47. In the facts of this case, the appellant had voluntarily retired on and w.e.f. March 20, 2008 and the departmental proceeding was initiated by issuing the charge sheet dated March 24, 2010 at **page 70** to the Paper Book. On the same date the President of NIH had accorded sanction for initiation of the said departmental proceeding against the appellant at **page 68** to the Paper Book. It is, thus, evident that, the departmental proceeding against the appellant was not instituted while he was in service. In such fact situation **Rule 9(2)(b)(i)** mandated a clear **prohibition** that such a departmental proceeding against the appellant should not have been instituted **save with the sanction of the President of India**. From a close scrutiny of the materials on record, it would be evident that, a sanction was accorded by the President of NIH appearing at **page 68** to the Paper Book and there was no sanction received by the NIH or its appropriate authority from the President of India to institute the departmental proceeding against the appellant. In absence of a prior sanction from the President of India in terms of **Rule 9(2)(b)(i) of the CCS Pension Rules** the initiation of the

departmental proceeding against the appellant was bad in law and *ultra vires* to Rule 9 of the CCS Pension Rules and accordingly stood vitiated.

48. Save and except the said document at **page 68** to the Paper Book which was a prior sanction granted by the president of NIH, the respondents also did not produce any other document or evidence to show that any prior sanction was obtained from the President of India to institute the departmental proceeding against the appellant. Learned counsel for the respondent relying upon the decision ***In the matter of: Samsher Singh (supra)*** submitted that, whenever the Constitution required the satisfaction of the President for exercise of any of its power or function, the satisfaction required by the Constitution need not to be a personal satisfaction of the President of India but the satisfaction in the constitutional sense under the Cabinet system of Government. His submission was based upon the expression used **“sanction of the President”** in **Rule 9(2)(b)(i)** of the CCS Pension Rules which denoted and meant the sanction by President of India granted by the Minister-in-Charge of the concerned Department of the Government of India since the President of India functions with the aid and advice of the Council of Ministers of the Government of India.
49. Referring to the document at **page 68** to the Paper Book Mr. Tewari submitted that since the President of NIH who is the Union Minister of Health and Family Welfare, Government of India under which the NIH functions, had accorded sanction, the same should be construed as the **sanction of the President of India** in terms of **Rule 9(2)(b)(i)** of the CCS Pension Rules. This contention raised on behalf of the respondents are negated by this Court at the threshold upon a meaningful reading of the

said **Rule 9(2)(b)(i)** of the CCS Pension Rules which mandated sanction of the President and no other mode had been mentioned therein for such sanction. The framers of the said CCS Pension Rules did not think it fit to provide for any other alternative mode but for granting sanction by the President of India under the said CCS Pension Rules. Hence if the contention raised on behalf of the respondents are accepted the same would amount to amending, altering or modifying the relevant Rules of the CCS Pension Rules by introducing a further provision, which the said Rule did not even contemplate at all. Such an act is not permissible within the domain of this Court while exercising its power under judicial review. Hence the contention of the respondents are negated by this Court.

50. **Article 77** of the Constitution under **Part V** dealt with the Conduct of Government Business and the executive powers and authorities of the President and Vice President of the country. **Article 77** of the Constitution, *inter alia*, provided that all executive action of the Government of India shall be expressed to be taken in the name of the President. The orders and other instruments made and executed in the name of the President of India shall be authenticated in such manner as may be specified in the rules to be made by the President of the country and the validity of an order or instrument which is to be so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President of India. The President of India shall make Rules for more convenient transaction of the business of the Government of India and for the allocation among the Ministers of the business.

51. Whereas **Article 309** of the Constitution under **Part XIV** dealt with the **services under the Union and the States**, it dealt with the recruitment and conditions of service of persons serving the Union or a State. From purposive reading of the said two Articles of Constitution, this Court is of the view that the scope and extent of application of those two articles are completely different from each other with their respective independent limbs in two different fields.
52. The power and authority to be exercised by the President of India for a public service employee serving the Union is different from the general executive power of the President of India as laid down under Article 77 of the Constitution. Under **Article 309** the President of India shall be competent or, such persons as he may direct in the case of service and post in connection with the affairs of the Union, to make rules regulating the recruitment and the conditions of service of persons appointed to such Union service and posts until provision in that behalf is made by or under an act of the appropriate legislature under Article 309 of the Constitution and any rules so made shall have the effect **subject to the provisions of such Act**.
53. In exercise of such an independent power the said CCS Pension Rule was framed governing the service condition of the appellant. In terms of **Rule 9(2)(b)(i) of the CCS Pension Rules**, the departmental proceeding as in the instant case allegedly instituted against the appellant admittedly after his retirement and **without the sanction of the President of India**. In the light of the provisions laid down under Article 309 read with the said **Rule 9(2)(b)(i) of the CCS Pension Rules**, the prior sanction of the President of

India was a mandatory requirement and the same was not obtained in the fact of this case.

54. ***In the matter of: Samsher Singh (supra)*** the constitutional provision which was in issue before the Hon'ble Supreme Court was **Article 166** of the Constitution which is akin to and identical with **Article 77** of the Constitution of India and different from **Article 309** of the Constitution of India. As narrated above, both **Articles 77 and 309** of the Constitution are independent to each other and govern two different fields. One being the general executive power of the President, the other being the power of the President in respect of recruitment and conditions of service of persons serving the Union, as in the instant case. In view of Article 309 when a special rule, namely, CCS Pension Rules was been framed and **Rule 9 (2)(b)(ii)** thereunder specifically provided for a mandatory pre-requirement for obtaining the sanction of the President of India before institution of the departmental proceeding against the appellant after his retirement. In absence of compliance of such mandatory pre-requirement, the subject departmental proceeding stood vitiated inasmuch as the respondents in the instant case has also not produced any decision of the Council of Ministers to grant sanction under the directive of the President of India to initiate the departmental proceeding against the appellant. Hence the ratio laid down ***In the matter of: Samsher Singh (supra)*** has no application in the facts and circumstances of the case.
55. **The moment the CCS Pension Rule was framed in exercise of power under Article 309 of the Constitution, the provisions thereunder had acquired and received a flavor with a statutory sanction. When such**

statute envisaged a specific provision, any action taken in exercise of such provision must be taken strictly in adherence thereto and not in any other mode whatsoever and any action taken in any mode without compliance of such specific statutory provision would be expressly forbidden in law. Accordingly, any action taken without compliance of specific provisions of the said Rule, would be vitiated in law and wholly without jurisdiction. The moment a statutory provision is engrafted in terms of Article 309, the same cannot be treated merely as subjected to an executive function of the President under Article 77 of the Constitution of India but would be an exercise under a specific statute.

56. ***In the matter of :Yashwant Trimbak (supra)*** the issue before the Hon'ble Supreme Court arose under Article 166 of the Constitution of India which was akin to and identical with Article 77 of the Constitution of India. To distinguish this judgment, Mr. Bandyopadhyay, Ld. Senior Counsel, in reply relied upon a judgment of the Hon'ble Supreme Court ***In the matter of: Brajendra Singh Yambem vs. Union of India & Anr., reported at (2016) 9 SCC 20.***

57. The relevant observations of the Hon'ble Supreme Court ***In the matter of: Brajendra Singh Yambem (supra)*** are quoted hereinbelow:

“43. The order of sanction to be granted by the President of India as provided under Rule 9(2)(b)(i) of the CCS (Pension) Rules, 1972 is for initiation of the disciplinary proceedings against the appellant, which cannot be treated as an executive action of the Government of India. Rather, it is a statutory exercise of power by the President, under Rule 9(2)(b)(i) of the CCS (Pension) Rules, 1972. The said Rules are framed by the President of India in exercise of legislative power conferred under Article 309 of the Constitution of India.

45. *Discussing the scope and powers of the President and Governor under Article 309, a Constitution Bench of this Court in B.S. Yadav v. State of Haryana [B.S. Yadav v. State of Haryana, 1980 Supp SCC 524 : 1981 SCC (L&S) 343 : AIR 1981 SC 561] , held as under: (SCC pp. 546-47, paras 44-45)*

*“44. It is in this context that the proviso to Article 309 assumes relevance and importance. The State Legislature has the power to pass laws regulating the recruitment and conditions of service of judicial officers of the State. But it was necessary to make a suitable provision enabling the exercise of that [Ed.: Emphasis in original.] power until the passing of the law by the legislature on that subject. The Constitution furnishes by its provisions ample evidence that it abhors a vacuum. It has therefore made provisions to deal with situations which arise on account of the ultimate repository of a power not exercising that power. The proviso to Article 309 provides, insofar as material, that until the State Legislature passes a law on the particular subject, it shall be competent to the Governor of the State to make rules regulating the recruitment and the conditions of service of the judicial officers of the State. The Governor thus steps in when the legislature does not act. The power, exercised by the Governor under the proviso is thus a power which the legislature is competent to exercise but has in fact not yet exercised. **It partakes of the characteristics of the legislative, not executive, power. It is legislative power.***

45. That the Governor possesses legislative power under our Constitution is incontrovertible and, therefore, there is nothing unique about the Governor's power under the proviso to Article 309 being in the nature of a legislative power. By Article 158, the Governor of a State is a part of the legislature of the State. And the most obvious exercise of legislative power by the Governor is the power given to him by Article 213 to promulgate ordinances when the legislature is not in session. Under that article, he exercises a power of the same kind which the legislature normally exercises: the power to make laws. The heading of Chapter IV of Part VI of the Constitution, in which Article 213 occurs, is significant: “Legislative Power of the Governor”. The power of the Governor under the proviso to Article 309 to make appropriate rules is of the same kind. It is legislative power. Under Article 213, he substitutes for the legislature because the legislature is in recess. Under the proviso to Article 309, he substitutes for the legislature because the legislature has not yet exercised its power to pass an appropriate law on the subject.”

46. *The distinction between the powers under Articles 77(3), 166(3) and 309, regarding the framing of Rules and Regulations was discussed by a Constitution Bench of this Court in Sampat Prakash v. State of J&K [Sampat Prakash v. State of J&K, AIR 1970 SC 1118] , as under: (AIR p. 1124, para 11)*

“11. ... As an example, under Article 77(3), the President, and, under Article 166(3) the Governor of a State are empowered to make rules for the more convenient transaction of the business of the Government of India or the Government of the State, as the case may be, and for the allocation among Ministers of the said business. If, for the interpretation of these provisions, Section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would forever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying Section 21 of the General Clauses Act. There are other similar rule-making powers, such as the power of making service rules under Article 309 of the Constitution. That power must also be exercisable from time to time and must include within it the power to add to, amend, vary or rescind any of those rules.”

47. *It becomes clear from a perusal of the constitutional provisions and the decisions by the Constitution Benches of this Court referred to supra that the powers under Articles 77(3), 166(3) and 309 operate in completely different fields. It would thus, be clear that the Rules framed in exercise of power under Articles 77(3) and 166(3) cannot be compared while exercising power under Article 309 of the Constitution and framing rules and regulations for recruitment and conditions of service of persons appointed to such posts either in connection with the affairs of the Union Government or a State Government. It is for this reason that the statutory exercise of power by the President of India under Rules 9(2)(b)(i) and (ii) of the CCS (Pension) Rules, 1972 cannot be equated with power exercised under Article 77(2) of the Constitution of India.*

48. *The High Courts and this Court can exercise power of judicial review under Articles 226 and 32, respectively, of the Constitution of India in cases of statutory exercise of power by the President or Governor. In Yashwant Trimbak [State of M.P. v. Yashwant Trimbak, (1996) 2 SCC 305 : 1996 SCC*

(L&S) 510] , this Court held that the power of judicial review is not available in case of executive exercise of power by the President or the Governor. The said observation made by this Court in the said case is not tenable in law in view of the decision of this Court in the landmark judgment of *Kesavananda Bharati v. State of Kerala* [*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225] wherein this Court has clearly held that the power of judicial review is part of the basic structure of the Constitution of India.

49. The relevant portion of the judgment is extracted hereunder: (*Kesavananda Bharati case* [*Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225] , SCC p. 452, para 577)

“577. ... The observations of Patanjali Sastri, C.J., in *State of Madras v. V.G. Row* [*State of Madras v. V.G. Row*, (1952) 1 SCC 410 : AIR 1952 SC 196 : 1952 Cri LJ 966] which have become locus classicus need alone be repeated in this connection. Judicial review is undertaken by the courts ‘not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid down upon them by the Constitution’. The respondents have also contended that to let the court have judicial review over constitutional amendments would mean involving the court in political questions. To this the answer may be given in the words of Lord Porter in *Commonwealth of Australia v. Bank of New South Wales* [*Commonwealth of Australia v. Bank of New South Wales*, 1950 AC 235 at p. 310 (PC)] : (AC p. 310)

‘... The problem to be solved will often be not so much legal as political, social or economic, yet it must be solved by a court of law. For where the dispute is, as here, not only between Commonwealth and citizen but between Commonwealth and intervening States on the one hand and citizens and States on the other, it is only the court that can decide the issue, it is vain to invoke the voice of Parliament.’

There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so pre-dominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United States Constitution yet it envisages such a separation to a degree as was found in *Ranasinghe case* [*Bribery Commr. v. Pedrick Ranasinghe*, 1965 AC 172 : (1964) 2

WLR 1301 (PC)] . The judicial review provided expressly in our Constitution by means of Articles 226 and 32 is one of the features upon which hinges the system of checks and balances.”

50. The observation made by this Court in *Yashwant Trimbak [State of M.P. v. Yashwant Trimbak, (1996) 2 SCC 305 : 1996 SCC (L&S) 510]* to the extent that orders of sanction granted by the Governor are outside the scope of judicial review, is untenable in law. The same is contrary not only to the law laid down by this Court referred to *supra*, but also the provisions of Articles 77(2) and 166(2) of the Constitution of India. Therefore, the same has no application to the fact situation for the reason that the President has exercised his statutory power for grant of sanction under Rule 9(2)(b)(i) of the CCS (Pension) Rules, 1972 to initiate the disciplinary action but not the executive action against the appellant.

51. In the instant case, the action of the disciplinary authority is untenable in law for the reason that the interpretation of the CCS (Pension) Rules, 1972 which is sought to be made by the learned Additional Solicitor General on behalf of the respondents amounts to deprivation of the fundamental rights guaranteed to the appellant under Part III of the Constitution of India. Therefore, we have to hold that the disciplinary proceedings initiated by the disciplinary authority after obtaining sanction from the President of India under Rule 9(2)(b)(i) of the CCS (Pension) Rules, 1972 are liable to be quashed”.

58. In view of the above the ratio of the judgment ***In the matter of: Brajendra Singh Yambem (supra)***, the ratio ***In the matter of: Yashwant Trimbak (supra)*** shall not apply in the facts of this case.
59. ***In the matter of: Pu Myllai Hlychho (supra)***, in view of the discussions already made hereinabove while distinguishing the previous two judgments relied upon on behalf of the respondents and such discussion stands reiterated. The ratio of the said judgment ***In the matter of: Pu Myllai Hlychho (supra)*** shall not apply in the fact of this case. Inasmuch as, in the fact of this case the respondents did not produce any sanction from the Council of Ministers also.

60. Then comes the **question of limitation** in terms of **Rule 9(ii)(b) of the CCS Pension Rules**. To decide this issue the relevant factors are discussed hereinafter. The appellant was assessed under the Income Tax Act for the for the **Assessment Year 2005-06**. This would make it evident that the alleged incident of disclosure of income had happened for the **Financial Year 2004-05 ended as on March 31, 2005**. The appellant **retired on and w.e.f. November 22, 2007**. The NIH was allegedly intimated by the vigilance commission by its letter **dated January 25, 2008** as to the alleged discrepancy in the income declared by the appellant. **By a letter dated January 07, 2010** the appellant was requested by the NIH to furnish the details regarding the alleged discrepancy in income disclosed by the appellant. The appellant then received an intimation dated **March 24, 2010** issued by NIH with the Articles of Charges against the appellant.
61. From the bundle of facts mentioned above, it would be evident that the moment the appellant had filed **Form 16 for the Assessment Year 2005-06** this being a record in the public domain, the NIH had its knowledge and/or deemed knowledge of the same on the alleged incident. The discrepancy in income was disclosed by the appellant on/or before March 31, 2004. The NIH served the Article of Charges upon the appellant on March 24, 2010, after four years of the alleged event took place for instituting the departmental proceeding against the appellant. Hence, the initiation of the departmental proceeding against the appellant was also in violation of **Rule 9(2)(b)(ii) of the CCS Pension Rules**.
62. Now comes the **Doctrine of Proportionality/disproportionality**. Admittedly the appellant had served the NIH for more than 30 years with an

unblemished career record. Even after the knowledge of the vigilance intervention, NIH accepted the proposal of voluntarily retirement of the appellant and allowed him to retire as such on and w.e.f. November 22, 2007. The alleged departmental proceeding was initiated by NIH on March 24, 2010 when the appellant was served with the article of alleged charges. The allegation was wrong description of income and discrepancy in the income disclosed by the appellant for the **Financial Year 2004-05** and the **Assessment Year 2005-06**. The quantum involved was allegedly for a sum of **Rs. 1,65,492.00/-**. It is trite that even if a delinquent employee is found to be guilty of any misconduct, the employer has to balance the **rule of proportionality and disproportionality** while inflicting punishment. In the instant case the appellant had also not been found to be guilty, as yet, in terms of the alleged charges. Taking into account the quantum of money involved, i.e. only a sum of Rs. 1,65,492.00/-, the entire retiral benefits including pension, gratuity and everything should not have been withheld by the NIH. This clearly shows a perverse exercise of authority by the employer. The punishment stands to be thoroughly **disproportionate**.

63. In view of the foregoing discussion and reasons, this Court finds that the initiation of the departmental proceeding against the appellant was in violation of the relevant provisions laid down under CCS Pension Rules and as such the same is found to be without jurisdiction and stands **vitiated**. **The departmental proceeding including all incidental and consequential orders passed therein against, the appellant stand thus, quashed.**

64. NIH shall release and pay the appellant all his retiral dues in entirety as payable to him within a period of 8 weeks from the date of communication of this order, taking into account as if there was no departmental proceeding initiated against the appellant at any point of time.
65. **The impugned order dated May 07, 2014 at page 143 to the paper-book** stands modified to the extent mentioned above.
66. Both the instant appeal being **FMA 4516 of 2014, MAT 1512 of 2014** and the writ petition **WP No. 2131(w) of 2011 stand allowed.**

I agree.

(Subrata Takukdar, J.)

(Aniruddha Roy, J.)