

LIBRARY

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

CALCUTTA BENCH

O A No. 350/1550 of 2014

Manish Kumar,

Son of Shri Omprakash, aged about 33

years, working for gain in the post of

Assistant Audit Officer, in the Office of the

Accountant General (E&RSA), West

Bengal, 5th floor, 3rd MSO Building, CGO

Complex, D.F. Block, Salt Lake City, Sector

- I, Kolkata-700064 residing at AF-505,

CPWD Quarters, Old Campus, Baisakhi,

Salt Lake, Sector-I, Kolkata-700064

APPLICANT

VERSUS

Y/1. Union of India through
The Controller & Auditor General of

India, 9, Dindayal Upadhyaya Marg, New
Delhi-110124.

2. The Principal Accountant General
(G&SSA), West Bengal, Treasury
Buildings, 2, Government Place (West),
Kolkata-700 001.

3. The Accountant General (E&RSA),
West Bengal, 5th Floor, 3rd MSO Building,

CGO Complex, DF-Block, Salt Lake,
Sector-I, Kolkata-700 064.

4. The Deputy Accountant General
(Admin), Office of the Accountant
General(E&RSA), West Bengal, 5th Floor,
3rd MSO Building, CGO Complex, DF-
Block, Salt Lake, Sector-I, Kolkata-700 064.

5. Shri Goutam Choudhury, The
Deputy Director. (Admn.), Office of the
Director General of Audit (Central),
Kolkata, 8, K.S. Roy Road, G.I. Press
Building, Kolkata-700 001.

6. Smt. Mausami Ray Bhattacharya,
The Accountant General (E&RSA), West
Bengal, 5th Floor, 3rd MSO Building, CGO
Complex, DF-Block, Salt Lake, Sector-I,
Kolkata-700 064.

7. Sri Tapas Kumar Sen, Deputy
Accountant General, ESAW-I, Office of the
Accountant General(E&RSA), West Bengal,
5th Floor, 3rd MSO Building, CGO Complex,
DF-Block, Salt Lake, Sector-I, Kolkata-700
064.

8. Sri Piyush Kanti Gayen, Sr. Audit Officer, ESAW-I, Office of the Accountant General (E&RSA), West Bengal, 5th Floor, 3rd MSO Building, CGO Complex, DF-Block, Salt Lake, Sector-I, Kolkata-700 064.

9. Sri Biswajit Dam, Sr. Audit Officer, Office of the Principal Accountant General (G&SSA), West Bengal, Local Audit Department, Treasury Buildings, 2, Government Place (West), Kolkata-700 001.

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RESPONDENTS

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH

O.A.350/1550/2014

Date of Order: 29.5.2020

MA 855/2018



Coram: Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Manish KumarApplicant

Vrs.

Union of India & Ors.Respondents

For the Applicant(s): Applicant in person

For the Respondent(s): Mr. P. Bhattacharyya, Counsel

ORDER

Bidisha Banerjee, Member (J):

The applicant preferred this O.A. to seek the following reliefs:

"a) An order be passed setting aside the Memorandum of charges being Memo No. Admn.CC/Disc. Proceedings/MK/23 dated 24.04.2014 issued under the signature of the Accountant General (E&RSA) West Bengal being Annexure "A-25" hereto;

b) An order be passed setting aside the Memo being No. Admn.CC/Disc. Proceedings/M.K./62 dated 09.06.2014 issued under the signature of the Accountant General (E&RSA) West Bengal being part of Annexure "A-27" hereto;

c) An order be passed setting aside the Memo being No. Admn.CC/Disc. Proceedings/MK/52 dated 30.05.2014 issued under the signature of the Accountant General (E&RSA) West Bengal being part of Annexure "A-27" hereto;

d) A direction do issue upon the respondent authorities to produce and/or cause to be produced the entire records relating to the purported enquiry proceeding initiated against the applicant and on such production being made to render *conscionable justice* by quashing the same;

e) INJUNCTION do issue upon the respondent authorities restraining them, their men/ agents/ subordinates from acting in any manner

or any further manner on the basis of the Memorandum of charges being Memo No. Admn.CC/Disc. Proceedings/MK/23 dated 24.04.2014 issued under the signature of the Accountant General (E&RSA) West Bengal being Annexure "A-25" hereto pending disposal of the instant application.



f) Direction do issue for initiation of an enquiry/investigation by an appropriate authority/agency into the case of mental harassment and physical harm faced by the applicant as stated in the instant application and file a report before this Learned Tribunal for passing the orders as may commence to this Learned Tribunal for the ends of justice.

g) Direction do issue directing the respondent authority to release the applicant to join his deputation posting under the Order- "D.O. No. Admn.I/6-2/Dept/X/241 dated 17.07.13".

h) Cost and costs incidental hereto;

i) And/or to pass such other or further order or orders as to your Lordships may seem fit and proper."

2. After penalty and appellate orders were issued he preferred M.A. 855/2018

for the following reliefs:

"a) Stay/quash/rescind the impugned final order No. 20/Staff (Disc-II)/38-2016 dated 23.10.2018 passed by the Appellate Authority;

b) Stay/quash/rescind the impugned final order No. Admn.CC/Disc. Proceedings/MK/Vol.II/283 dated 22.03.2016 passed by the Disciplinary Authority;

c) Direction upon the respondents to issue an order for reinstatement of the applicant with immediate effect and consequential benefits and to treat the period between 01.11.18 to till the date of order in service for all practical purposes;

d) Any other order or orders and/or directions as this Hon'ble Tribunal may deem fit and proper;

e) Cost if any."

Interim prayer for stay was disallowed.

3. The long and short of the matter is that, the applicant was selected for the post of Section Officer (Audit) through SO(Audit) Examination of 2005 and was

appointed vide letter dated 22.05.2006. He had submitted Disability Certificate issued to him in 2004 and 2005, on the basis of which he was selected against OBC PH (Physically Handicapped) quota. He was chargesheeted vide Memo dated 09.06.2014 for suppressing facts and was penalized with reduction in pay by two stages for 2 years with cumulative effect of postponing future increments by the A.G., vide order dated 22.03.2016. His appeal was rejected on 23.10.2018 by the Addl. Dy. CAG, who enhanced the penalty to that of dismissal from service.

The gravamen of allegations against the applicant were that:

Prior to joining present employment (Audit), he served as LDC in the Ministry of Agriculture (DARE) from 18.08.2003 till 02.06.2006, as a non-PH candidate.

While, he joined as S.O.(Audit) (on probation) on 27.07.2006 under OBC "PH" category, under PH quota.

Again, he applied for the post of Dy. Director, ESIC on 18.05.2009 as OBC, "non-PH".

On the basis of Graduate Level Exam, 2006, he was recommended for appointment to the post of Inspector (Examiner) under CBEC, Ministry of Finance, Deptt. Of Revenue, and reported to the office of Commissioner of Customs (General), Mumbai on 26.10.2009 under OBC/ "PH" Category.

Medical Examination on 27.10.2009 and 28.10.2009 revealed no "constitutional weakness" or "bodily infirmity".

He was offered appointment on 1.12.2009, but it was kept in abeyance on a complaint, and subsequently cancelled on 05.07.2011.

So, on one hand he himself claimed as a non PH candidate by mentioning "NA" regarding his PH status in his application dated 18.05.2009 while applying for the post of Dy. Director, in Employees State Insurance Corporation and also passed medical and physical tests for the post of Inspector (Examiner) under non-PH category in the Office of the Commissioner of Customs (General),



Mumbai, while on the other hand he submitted PH certificate in the present office and has been drawing benefits meant for a PH, which is a deliberate attempt of taking undue advantage by suppressing the crucial fact of his PH status that tantamounted to gross misconduct on his part and attracted Rule 3(1)(i) and (iii) of CCS(Conduct) Rules, 1964.



The gist of the charges leveled against him as prepared by the Appellate Authority, are as under:

1. A charge sheet containing four Articles of charge was issued to him by the AG and the DA on 14.04.2014 under Rule 14 of CCS (CCA) Rules, 1965. Charge in Article-I, in brief, was that prior to joining as Section Officer (Audit) on probation on 27.06.2006 under OBC and PH category, he joined the Ministry of Agriculture as LDC on 18.08.2003, got confirmed on 07.06.2005, met with an accident and claimed for PH status which was not accepted by his employer, applied for the post of Deputy Director (DD) on 18.05.2009 in Employees State Insurance Corporation (ESIC) without indicating PH category, appeared for medical and physical test got conducted by the Commissioner of Customs, Mumbai on 27.10.2009 and 28.10.2009 for his appointment as Inspector (Examiner) under OBC (PH) category and the offer of appointment for that post was cancelled by the Commissioner of Customs (General), Mumbai due to suppression of some information and furnishing of some false information. Thus, he was alleged to have taken contradictory stand in a deliberate attempt to take undue advantage of suppressing facts.

2. Charge in Article-II was that in view of contradictory stands taken by him, he was directed to appear before the Zonal Medical Board of NRS Medical College and Hospital, Kolkata on 30.01.2013 for confirmation of his PH status followed by another date of 26.06.2013 (fixed for this purpose) but he deliberately and willfully ignored the official directions to appear before the Zonal Medical Board on both the dates and thereby disobeyed the orders of the authorities.

3. Charge in Article-III was that before joining on 27.06.2006 as Section Officer (Audit) on probation, he had submitted a declaration on 26.06.2006 to the effect that he shall neither apply for appointment elsewhere nor sit for any examination to qualify for other appointments during the period of his probation. However, he reported to the office of the Commissioner of Customs (General), Mumbai on 26.10.2009 for appointment to the post of Inspector (Examiner) under PH category without information to the office in violation of the terms and conditions of offer of appointment for the post of Section Officer (Audit).

4. According to Article-IV, he reported to the office of the Commissioner of Customs (General), Mumbai on 26.10.2009 for appointment to the post of Inspector (Examiner) by availing sanctioned EL for five days from 26.10.2009 to 30.10.2009 for visiting Mumbai for LTC. On joining on 09.11.2009, he submitted revised application for sanction of EL from 26.10.2009 to 06.11.2009 on ground of private affairs which was sanctioned on 13.11.2009. Charge against him was that he had suppressed the fact of his attendance in the office of the Commissioner of Customs (General), Mumbai.

4. The applicant while strongly denying the charges he was slapped with, had claimed as under:

(i) He met with an accident before joining as LDC against OBC category, in DARE on 18.08.2003.

(ii) On opening of plaster he found weakness in limb. A Medical Board certified his disability as 50% on 07.08.2004 and 05.11.2005, which certificates he produced to seek appointment in the present Department (DoAC).

(iii) He submitted NOC from DARE and was released by DARE to join DoAC with no objection about his PH status.

(iv) His application before ESIC as "non-PH", was a bonafide error.

(v) He appeared before two other Medical Boards in 2005 and 2014 both of which certified his disability.

Therefore, non-acceptance of his PH status by Customs should not have a bearing on his present case, unless his initial Disability Certificates were certified by the appropriate authority as fake.

(vi) Subsequently, having undergone a surgery, mobility of his arms that was restricted in 2005 has increased.

Therefore, any recent Medical Board opinion would differ from that of 2005 etc. It would never reveal the disability that existed in 2005, hence he refused to subject himself to an examination to ascertain the degree of his disability.



5. The respondents, vide their reply have disclosed four letters to the Chief Surgeon cum CMO, Chhapra, Bihar, dated 10.11.2010, 28.10.2010, 07.02.2011, 21.03.2011 by the Commr. Of Customs, requesting verification of genuinity of Medical Certificate dated 05.11.2005. They have failed to elicit any response. However, there is no whisper about any letters towards ascertaining the genuinity of Certificates of 07.08.2004 and 2014.
6. Be that as it may, in support of his disability that existed in 2004-05 and his treatment and surgery, the applicant has annexed all Medical Certificates and none of them have been certified as "fake" by any competent authority. He was penalized vide order dated 22.03.2016, a penalty of reduction of pay by two stages from Rs. 18,950/- to Rs. 17,570/- in the Pay Band of Rs. 9,300/- to Rs. 34,800/- in the post of AAO for a period of two years w.e.f. 01.04.2016 with cumulative effect adversely affecting his pension. It was also directed that he would not earn increments of pay during the period of such reduction and on the expiry of such period, the reduction will have the effect of postponing future increments of his pay.
7. The Appellate Order dated 23.10.2018 under challenge, whereby the penalty was enhanced to that of "Dismissal", records the following:



No. 20 /Staff(Disc-II)/38-2016

Dated: 23.10.2018

ORDER

Matter before me is an appeal dated 11.05.2016 of Shri Manish Kumar (Appellant), Assistant Audit Officer (AAO) against order dated 22.03.2016 of the Accountant General (Economic & Revenue Sector Audit), West Bengal and the Disciplinary Authority (AG and the DA). In impugned order dated 22.03.2016, a penalty of reduction of pay by two stages from Rs. 18,950/- to Rs. 17,570/- in the pay band of Rs. 17,300/- to Rs. 34,800/- in the post of AAO for a period of two years w.e.f. 01.04.2016 with cumulative effect and adversely affecting his pension was imposed upon him. It was also directed that he would not earn increments of pay during the period of such reduction and on the expiry of such period, the reduction will have the effect of postponing future increments of his pay.

2. The Appellant was appointed as Lower Division Clerk (LDC) as a non Physically Handicapped (PH) candidate in the Ministry of Agriculture on 18.08.2003 and worked there till 12.06.2006. He met with an accident and claimed for PH status which was not accepted by his employer. He applied to the Staff Selection Commission (SSC) for Section Officer (Audit) examination, 2005 vide his application dated 02.03.2005 as an Other Backward Classes (OBC)/PH candidate. According to Disability Certificate No. 2265 dated 07.08.2004 of Civil Surgeon-cum-Chief Medical Officer (CS-cum-CMO), Chapra submitted by him to the SSC at the time of interview, nature of his handicap was, "*Post Traumatic Stiffness (post operation) of LT elbow with weakness in LT forearm. Disability 50% (fifty percent)*". As per another certificate No. 3400 dated 05.11.2005 of the CS-cum-CMO, Chapra with full body covering photograph submitted by him on direction of the SSC, he was a case of, "*Post traumatic (Post operative) Stiffness LT Elbow*". He was physically disabled and had 50 (Fifty) per cent permanent physically impairment in relation to his "*Functional impairment of left forearm*". On being finally selected, he was appointed in the erstwhile office of the Principal Accountant General (Audit), West Bengal as Section Officer (Audit) (now AAO) on 27.06.2006 (FN) against a vacancy reserved for OBC (PH) category on the basis of these two disability certificates of CS-cum-CMO, Chapra in support of his PH status.

3. As per offer of appointment as Section Officer (Audit) issued to him on 22.05.2006 and declaration made by him in compliance thereof, he was not to apply for any other post/examination during the period of probation. He applied for the Combined Graduate Level Examination (CGLE), 2006 as a PH category candidate directly. He applied for Earned Leave (EL) from 26.10.2009 to 30.09.2009 (prefixing and suffixing Saturdays and Sundays) vide application dated 20.10.2009 for availing Leave Travel Concession (LTC) to Mumbai. He did not join on expiry of this EL and submitted revised application dated 09.11.2009 for sanction of EL from 26.10.2009 to 06.11.2009 on account of private affairs.

4. He had appeared in the CGLE, 2006 under Roll No. 1258847 as an OBC/PH category candidate and ranked 09 in General (UR) category and recommended by the SSC for appointment as Inspector (Examiner) after physical and medical test. The Commissioner of Customs (General), Mumbai called him for physical and medical test vide letter dated 15.10.2009. He reported for these tests on 26.10.2009. His medical examination was done on 27.10.2009 in St. George Hospital, Mumbai, a Government Hospital. The hospital certified, "cannot discover that he has any disease, constitutional weakness or bodily infirmity except nil". He completed the physical/field tests (i.e. 1600 meters walking in 15 minutes and 8 Kms cycling in 30 minutes) satisfactorily like a physically and medically fit candidate on 28.10.2009. On submission of required documents and the



Attestation Form, an offer of appointment was issued to him vide letter dated 01.12.2009 of the office of the Commissioner of Customs (General), Mumbai.

5. In the meanwhile, a complaint was received by the Commissioner of Customs (General), Mumbai against him on 23.11.2009 from one Shri Amit Kumar Prince. Shri Prince alleged that he had managed to get PH category certificate by hook or crook. He was not eligible for that category because he was only 10-15% disabled. Shri Prince also added that he had been appointed as LDC in the Ministry of Agriculture on the basis of Combined Matric Level Examination, 2000. He was also selected as Tax Assistant on the basis of Tax Assistants Examination, 2004. In those two examinations, he was not PH but OBC. He was selected as Section Officer (Audit) on the basis of Section Officer (Audit) Examination, 2005 as OBC (PH) category candidate. He had also appeared in the CGLE, 2006 without informing his office. The Appellant stated in his application dated 07.12.2009 to the Assistant Commissioner, P&E Department, Custom House, Mumbai that he had inadvertently given false information about his status of employment, place of residence and details of applications submitted for other examinations without routing the same through proper channel. He sought guidance whether he could change the content of his Attestation Form or not.

6. The Commissioner of Customs (General) reported the matter of fraudulent claim of PH category by the Appellant to the Central Board of Excise and Customs (CBEC) and the SSC on 23.12.2009 and held the offer of appointment for the post of Inspector (Examiner) dated 01.12.2009 in abeyance. On being advised by the CBEC and the SSC to take suitable necessary action as per DoPT guidelines and statutes, the Commissioner of Customs (General), Mumbai called for explanation of the Appellant vide letter dated 29.07.2010. In his response dated 07.08.2010, he denied that he had submitted any false claim about his PH status. He requested for verification of authenticity of his PH certificate. The Commissioner of Customs (General) wrote four letters to the CS-cum-CMO, Chapra on 10.11.2010, 28.12.2010, 07.02.2011 and 21.03.2011 for verification of genuineness of disability Certificate No.3400 dated 05.11.2005 issued to him. However, no reply was received.

7. The office of the Commissioner of Customs (General), Mumbai issued notice dated 13.01.2011 to him to show cause why the offer of appointment dated 01.12.2010 (kept in abeyance) should not be cancelled due to suppression of information and giving of false information by him. After hearing him in person, the Commissioner of Customs (General) cancelled the offer of appointment dated 01.12.2010 vide speaking order passed on 05.07.2011, OA No. 1096 of 2012 filed by him before the Hon'ble Central Administrative Tribunal, Kolkata Bench, Kolkata (Tribunal) against that order was still pending.

8. In the meanwhile, one Shri B. Kumar of Patna made a complaint dated 14.09.2010 to the Commissioner of Customs (General), Mumbai against him with copy to the PAG (Audit), West Bengal. The office of the PAG (Audit), West Bengal forwarded copy of that complaint and PH category certificate dated 05.11.2005 to the CS-cum-CMO, Chapra vide letter dated 09.03.2012 followed by reminder dated 03.05.2012 for confirmation of authenticity of PH certificate issued to him.

9. Since no reply was received from the CS-cum-CMO, Chapra, the AG and the DA referred his PH category case to the Zonal Medical Board, N.R.S. Medical College and Hospital, Kolkata. The Zonal Medical Board requested him to be present on 30.01.2013 at 10.30 AM vide Memo dated 08.01.2013. However, he did not appear before the Zonal Medical Board. He was again requested vide letter dated 08.06.2013 of the Zonal Medical Board to appear before it on 26.06.2013 at 10:30 AM. It was forwarded to him vide letter dated 24.06.2013 of the office of the AG and the DA. However, his family members refused to receive the same.



10. A charge sheet containing four Articles of charge was issued to him by the AG and the DA on 24.04.2014 under Rule 14 of CCS (CCA) Rules, 1965. Charge in Article-I, in brief, was that prior to joining as Section Officer (Audit) on probation on 27.06.2006 under OBC and PH category, he joined the Ministry of Agriculture as LDC on 18.08.2003, got confirmed on 07.06.2005, met with an accident and claimed for PH status which was not accepted by his employer, applied for the post of Deputy Director (DD) on 18.05.2009 in Employees State Insurance Corporation (ESIC) without indicating PH category, appeared for medical and physical test got conducted by the Commissioner of Customs, Mumbai on 27.10.2009 and 28.10.2009 for his appointment as Inspector (Examiner) under OBC (PH) category and the offer of appointment for that post was cancelled by the Commissioner of Customs (General), Mumbai due to suppression of some information and furnishing of some false information. Thus, he was alleged to have taken contradictory stand in a deliberate attempt to take undue advantage by suppressing facts.

(i) Charge in Article-II was that in view of contradictory stands taken by him, he was directed to appear before the Zonal Medical Board of NRS Medical College and Hospital, Kolkata on 30.01.2013 for confirmation of his PH status followed by another date of 26.06.2013 (fixed for this purpose) but he deliberately and willfully ignored the official directions to appear before the Zonal Medical Board on both the dates and thereby disobeyed the orders of the authorities.

12. Charge in Article-III was that before joining on 27.06.2006 as Section Officer (Audit) on probation, he had submitted a declaration on 26.06.2006 to the effect that he shall neither apply for appointment elsewhere nor sit for any examination to qualify for other appointments during the period of his probation. However, he reported to the office of the Commissioner of Customs (General), Mumbai on 26.10.2009, for appointment to the post of Inspector (Examiner) under PH category without information to the office in violation of the terms and conditions of offer of appointment for the post of Section Officer (Audit).

13. According to Article-IV, he reported to the office of the Commissioner of Customs (General), Mumbai on 26.10.2009 for appointment to the post of Inspector (Examiner) by availing sanctioned EL for five days from 26.10.2009 to 30.10.2009 for visiting Mumbai for LTC. On joining on 09.11.2009, he submitted revised application for sanction of EL from 26.10.2009 to 06.11.2009 on ground of private affairs which was sanctioned on 13.11.2009. Charge against him was that he had suppressed the fact of his attendance in the office of the Commissioner of Customs (General), Mumbai.

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18. After going through the entire material on record, the grounds given by the Appellant were found untenable due to the following reasons:

(a) *Allegation of the Appellant that none of the documents listed in Annexure III to the charge sheet was supplied to him is factually incorrect. The office of the AG and the DA has confirmed that copies of all the listed documents were supplied to him alongwith the charge sheet. In fact, he stated in his letter dated 06.05.2014 that he had received charge sheet on 01.05.2014. However, he stated that he had taken station leave permission on 02.05.2014 to visit his native place for urgent private affairs and fell ill there. He requested for further time of ten days from the date of rejoicing duty after recovery. The RAO/HRBC informed on 07.05.2014 that no permission for leaving the station had been given to him. On being directed vide letter dated 22.05.2014 to submit reply within three days, he submitted a detailed representation dated 26.05.2014 against the charge sheet. Therefore,*



contention of the Appellant that he had to submit reply to the charge sheet on the basis of assumption and the facts as he could recollect, is afterthought and baseless."

8. The applicant appeared in person and was heard extensively. He prayed for reinstatement. Ld. Counsel for the respondents vehemently opposed his prayer and placed the following documents in response to the queries as raised by this Bench.

- i. Admission Certificate issued by the Staff Selection Commission, Northern Region (SSC, NR) New Delhi, Govt. of India.
- ii. Attendance Sheet of SSC, NR wherein it is recorded that the Handicapped Certificate duly checked by the Office, i.e. SSC.
- iii. Scrutiny Sheet prepared by SSC, NR.
- iv. List of dossiers of the candidates nominated by SSC, NR.

9. Parties were heard at length. Records were perused. The discernible facts are thus:

(i) The total number of vacancies and vacancies filled up were as under:

“Category	SC	ST	OBC	PH	HH	UR	Total
Vacancies Available	68	33	156	(8)	(7)	243	500
Vacancies filled up	68	33	156 [*]	(8)	(0) [@]	243 [#]	500 ^{\$}

- Includes 2 OBC+PH candidates # includes 6 UR+PH candidates

^{\$} includes 27 OBCs and 1 PH at UR standard

@ there are no HH candidates available in the list

considered for selection."

(ii) A clause in his appointment order reads as under:

"12. Medical Examination: His/her appointment will be subject to his/her being found physically fit, in accordance with the rules on the subject. On his/her accepting this offer of appointment necessary arrangement for his/her medical examination by a Civil Surgeon will be made by the office and on receipt of the certificate of fitness from the civil Surgeon, he/she will be required to report himself/herself to the office.

The departmental candidates who had undergone medical examination and whose character and antecedents were got verified at their initial appointment in the Government service need not undergo such formalities again for their appointment as Section Officer (Audit) on probation."



The above clause makes it imperative for a candidate to appear in medical examination and for the office to ascertain his medical fitness for appointment against the post in question, and then to allow him to join.

The Appellate order clearly indicates that the applicant was duly appointed against "OBC PH" category (His category is mentioned as 4, 6) upon verification of his Disability Certificate and probably after medical examination, as the order speaks of.

(iii) His Disability Certificate (of 2004-2005), on the basis of which he was appointed, has never been certified as fake, by any authority whatsoever, at any point of time. Therefore, in absence of any certificate to the contrary, it cannot be presumed that he was not a handicapped person when he was appointed as such.

(iv) There is no specific suppression of facts or misrepresentation as PH, to seek appointment, against the applicant. The first Article of Charge is "he himself claimed as a non PH candidate by mentioning "NA" regarding his PH status in his application dated 18.05.2009 while applying for the post of Dy. Director, in Employees State Insurance Corporation but also passed medical and physical tests

while applying for the post of Inspector (Examiner) under PH category in the Office of the Commissioner of Customs (General), Mumbai. On the other hand he submitted PH certificate in this office and getting the benefits which is contradictory. Such act of Shri Kumar clearly proves his deliberate attempt to taking undue advantage by suppressing aforesaid crucial fact of his physical handicapped status and this tantamount to gross misconduct in his part and attracts Rule 3(1)(i) and (iii) of CCS (Conduct) Rule, 1964."

In our considered opinion, unless it is proved, at least on the basis of preponderance of probability, that applicant had suppressed fact about his medical condition or used a fake Disability Certificate to secure employment, it would be quite unfair to dismiss him from service. In absence of any conclusive proof of the fact that the Disability Certificates of 2004-05, on the basis of which he was appointed, are fake, the conclusions of the authorities in regard to Article-I seems not based on records, but on presumptions.

(v) Given the fact that his Disability Certificate is not a fake one, whether the allegation under Article-II that the applicant "intentionally avoided the Zonal Medical Board and deliberately and willfully ignored to appear before the Medical Board and thus disobeyed the orders of authorities, that is unbecoming of a Government servant" "thereby he violated Rule 3(1)(i) and (iii) of CCS (Conduct) Rules, 1964", if proved would still attract such gravest form of penalty as that of dismissal, is to be considered.

(vi) We note that, the offer of appointment dated 22.05.2006 (Annexure-A/1) also mentions a clause as under:

"11. At the time of appointment, he/she will be required to give an undertaking in writing in Annexure 'A' to the effect that during the period of his/her probation he/she will neither apply for any appointment elsewhere nor sit for any examination to qualify for other appointment.

12. Medical Examination: His/her appointment will be subject to his/her being found physically fit, in accordance with the rules on the subject. On his/her accepting this offer of appointment necessary arrangement for his/her medical examination by a Civil Surgeon will be made by the office and on receipt of the certificate of fitness from the civil Surgeon, he/she will be required to report himself/herself to the office.

The departmental candidates who had undergone medical examination and whose character and antecedents were got verified at their initial appointment in the Government service need not undergo such formalities again for their appointment as Section Officer (Audit) on probation."

"6. POSTING: The Section Officer (on probation) appointed in a particular office will be liable to be transferred to the office of the Comptroller & Auditor General of India or to such other offices within the IA&AD and on such terms and conditions as the Comptroller & Auditor General of India may decide

All persons at the time of appointment will be required to give an undertakings in writing to the effect that during the period of their probation they will neither apply for any appointment elsewhere nor sit for any examination to qualify for other appointment."

However, no undertaking to that effect has been produced by respondents in support of their claim that 'Shri Kumar gave an undertaking on 26.06.2006 in Annexure-A and stated that "I do hereby declare that during the period of my probation I shall neither apply for any appointment elsewhere nor sit for any examination to qualify for other appointments". Shri Kumar was appointed in the post of Section Officer (Audit) on probation only after accepting the offer and submission of various undertakings/certificates including the undertaking in Annexure-A also', hence, "the act of Shri Kumar is nothing but unfaithfulness and untrustworthiness tantamount gross misconduct and attract Rule 3(1)(i) and (iii)

of CCS(Conduct) Rules 1964", does not stand get substantiated in absence of such undertaking.

Given the fact that no undertaking could be produced, the respondents have not clarified, whether the applicant was still on probation when he reported to the office of Commr. of Customs, Mumbai. Whether, not disclosing his application for a job elsewhere was in violation of his appointment order and contrary to the undertaking and would attract the gravest form of penalty of dismissal from service. Such being the position, whether Article III of the charge was adequately proved, is also a question that requires to be answered.

(vii) The complainants whose identity finds mention in the Appellate Authority's order as "Amit Kumar Prince" and "Shri B.Kumar of Patna", who had alleged that the applicant was never a physically handicapped, do not seem to be summoned as witness during the enquiry, to prove their complaints.

The Disability Certificate submitted by applicant, as referred to supra, have not been proved as fake as yet.

10. The legal proposition in regard to scope of interference in disciplinary proceeding matter is discussed hereunder:

In Union of India vs. H.C. Goel, (1964) 4 SCR 718, it was held:

"22....The two infirmities are separate and distinct though, conceivably, in some cases, both may be present. There may be cases of no evidence even where the Government is acting bona fide; the said infirmity may also exist where the Government is acting mala fide and in that case, the conclusion of the Government not supported by any evidence may be the result of mala fides, but that does not mean that if it is proved that there is no evidence to support the conclusion of the Government, a writ of certiorari will not issue without further proof of mala

fides. That is why we are not prepared to accept the learned Attorney-General's argument that since no mala fides are alleged against the appellant in the present case, no writ of certiorari can be issued in favour of the respondent."

In Moni Shankar v. Union of India and Anr., (2008) 3 SCC 484, the Hon'ble



Supreme Court held:

"17. The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely - preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality."

In Narinder Mohan Arya vs. United India Insurance Co. Ltd., (2006) 4 SCC 713 it was held that:-

"26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. [State of Assam and Anr. v. Mahendra Kumar Das and Ors. [(1970) 1 SCC 709] (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice [Khem Chand v. Union of India and Ors. (1958 SCR 1080) and State of Uttar Pradesh v. Om Prakash Gupta (1969) 3 SCC 775]. (3) Exercise of

discretionary power involve two elements (i) Objective and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. [K.L. Tripathi v. State of Bank of India and Ors. (1984) 1 SCC 43]. (4) It is not possible to lay down any rigid rules of the principles of natural justice which depend on the facts and circumstances of each case but the concept of fair play in action is the basis. [Sawai Singh v. State of Rajasthan (1986) 3 SCC 454] (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject matter of the charges is wholly illegal. [Export Inspection Council of India v. Kalyan Kumar Mitra [1987 (2) Cal. LJ 344.] (6)] Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances. [Central Bank of India Ltd. v. Prakash Chand Jain (1969) 1 SCR 735 and Kuldeep Singh v. Commissioner of Police (1999) 2 SCC 10]."

Yet again in **M.V. Bijlani vs. Union of India & Ors., (2006) 5 SCC 88**, Hon'ble Apex Court held:

"25.....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

In **Jasbir Singh Vs. Punjab & Sind Bank & Ors. [(2007) 1 SCC 566]**, Hon'ble Apex Court followed **Narinder Mohan Arya Vs. United India Insurance Co. Ltd. & Ors (supra)** stating that "In a case of this nature, therefore, the High Court should have applied its mind to the fact of the matter with reference to the materials brought on records. It failed so to do."

In **Roop Singh Negi vs. Punjab National Bank and Others** reported in **(2009) 2 Supreme Court Cases-570** the Hon'ble Supreme Court observed as under:

"14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, *inter alia*, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence."

In **Roop Singh Negi vs. Punjab National Bank and Others** it was held that "suspicion, as is well known, however high may be, can under no circumstances be held to be a substitute for legal proof".

In **B.C. Chaturvedi v. Union of India & Others, (1995) 6 SCC 749**, the Hon'ble Apex Court on the scope of judicial review has held as under:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/ Tribunal is concerned to determine whether the inquiry was held by a Competent Officer or whether the inquiry was held by a Competent Officer or whether Rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical Rules of Evidence Act nor of proof of fact or evidence as defined



therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the Disciplinary Authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal it its power of judicial review does not act as Appellate Authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the Rules of natural justice or in violation of statutory Rules prescribing the mode of inquiry or where the conclusion or finding reached by the Disciplinary Authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

Laying down the scope of judicial review, the Hon'ble Apex Court in **Union of India v. P. Gunasekaran, (2015) 2 SCC 610**, has further observed as under:

"Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an Appellate Authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No. 1 was accepted by the Disciplinary Authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second Court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:

- (a) the enquiry is held by a Competent Authority;*
- (b) the enquiry is held according to the procedure prescribed in that behalf;*
- (c) there is violation of the principles of natural justice in conducting the proceedings;*
- (d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case."*

11. In the aforesaid backdrop, we feel that the authorities have misdirected themselves in penalizing the applicant long after his entry into service on the basis of doubtful PH status when there is no clinching evidence that the Disability

Certificate, that was used to secure employment under PH quota, is a "fake" one.

The authorities have therefore, appeared to have penalized the applicant on the basis of suspicion. Further, whether the charges, to the extent proved, would attract a major penalty or the gravest penalty of dismissal from service, needs to be clarified appropriately. Accordingly, both the Penalty Order and the Appellate Orders are quashed, with liberty to the authorities to (i) verify the genuineness of the Disability Certificate that was used to seek employment. (ii) To consider whether the applicant had undertaken as alleged, in the format as in Annexure-A of his appointment letter and in violation of the clause and undertaking appeared at the selection in another department while still on probation. (iii) The examination of the complainants, as mentioned in the Appellate order, namely Amit Kumar Prince and Shri B.Kumar of Patna, to prove their complaint. (iv) On the basis of their revelation to issue appropriate order at the earliest. Till such time, to issue order in accordance with law.

12. The present O.A. is thus allowed to the extent as indicated above along with MA 855/2018. No costs.

(Dr. Nandita Chatterjee)
Member (A)

(Bidisha Banerjee)
Member (J)