CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO.1068/2001

New Delhi this the 27th day of June, 2003.

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN

HON'BLE SHRI GOVINDAN S.TAMPI, MEMBER (A)

Dr.Indu Kaushik
Specialist Grade II (GYANE & OBST)
R/o A-23, Sector 34
Noida. ... Applicant

(By Ms Raman Oberoi, Advocate)

vs.

1. Union of India
Through
Ministry of Labour
Holding Concurrent Charge of Secretary
and Chairman Standing Committee
ESI Corporation
Shram Shakti Bhavan
New Delhi.

2. The Director General
ESI Corporation
Panchdeep Bhavan
Kotla Road
New Delhi. .....Respondents

(By Ms.Jyoti Singh, Advocate)

O R D E R

Justice V.S.Aggarwal:-

The decision of the Apex Court in A.K.Kraipak v. Union of India and Ors.,[1970] 1 S.C.R. 457 is a landmark decision. It was held that rules of natural justice operate in areas not covered in any law. They do not supplant the law of the land but supplement it. Their aim is to prevent miscarriage of justice.

2. Similarly in **Chairman, Board of Mining Examination and Another** v. **Ramjee**, [1977] 2 S.C.R. 904, the Supreme Court observed that natural justice is not an unruly horse, no lurking land mine, nor a judicial cure- all. If fairness is shown by the decision maker to the man proceeded against, the form, features and fundamentals of such essential processual propriety being conditioned by the facts, no breach of natural justice can be complained of.

3. It is these principles which have been highlighted in the facts of the present case and, therefore, we mention some of the basic facts. Dr.Indu Kaushik (applicant) is working with the respondents since January 1979. She had been served with the following charges:-

> "1. She applied for leave from 16.10.95 to 25.11.95 for going to Australia. Though she was told by her superiors not to proceed on leave without a substitute, she defied the directions of her superiors and unauthorisedly absented from duty from 16.10.95 to 25.4.96 and without any permission had gone out of India to Australia via Mascot.
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> 2. In her communication dated 30.5.96, she alleged that the then Medical Commissioner and the then Director (Medical), Hqrs. asked suitable gift for sanctioning the leave and allowing her to go abroad, thereby levelling baseless allegations against the said officers.
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> 3. Unauthorisedly absented from duty from 4.5.1996 to 23.1.1998."

Considering the report of the inquiry officer, the disciplinary authority passed an order holding that the charges stood proved and imposed the following penalty:-

> "1. The pay of Dr. Indu Kaushik is hereby reduced with immediate effect by two stages (i.e. from Rs.13,875/- to Rs.13,125/-) for a period of two years. She will not earn and increments during this period of two years. After the penalty period of two years is over, her pay should be restored to the stage existing before reduction and increments thereafter will accrue in the normal course.
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> 2. The periods of absence from 16.10.95 to 25.4.96 and from 4.5.96 to 23.1.98 shall be treated as dies non."

The appeal of the applicant has since been dismissed by the Chairman, Standing Committee on 3.7.2000. By virtue of the present application, she assails both the orders, namely of the disciplinary as well as appellate authority.

4. The application has been contested. According to the respondents, the applicant applied for leave from 16.10.1995 to 25.11.1995. The leave was not sanctioned. The Director General had made remarks that No Objection Certificate/leave may be sanctioned after ensuring the substitute. There was no verbal assurance that was given. She was even told by the Director (Medical), Noida telephonically not to proceed on leave till a substitute is provided. She did not wait for a day and left the country. A charge-sheet was issued and the aforesaid penalty was imposed after

affording a reasonable opportunity. It was even pointed that the applicant had not submitted any proof to show that her sister-in-law was sick in Australia. That was the purpose for which the leave was claimed and the same has not been established on other procedural aspects to be looked into hereinafter. The assertions of the applicant have also been denied.

5. The learned counsel for the applicant at the outset had asserted that the inquiry officer was the immediate superior of the applicant and the immediate superior cannot be appointed as the inquiry officer. She strongly relied upon the Government of India, Ministry of Home Affairs Office Memorandum No.F.6/26/60-Ests. (A), dated 16.2.1961 in support of her contention. We reproduce the same as appeared in Swamy's CCS (CCA) Rules and reads:-

> "Immediate superior functioning as Inquiry Officer- The Pay Commission have recommended that a disciplinary enquiry should not be conducted by the immediate superior of the Government servant being proceeded against or by an officer at whose instance the inquiry was initiated.
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> The recommendation has been carefully examined by the Government. It is obviously desirable that only disinterested officers should be appointed as inquiry officers in departmental proceedings. There is no bar to the immediate superior officer holding an inquiry but, as a rule, the person who undertakes this task should not be suspected of any bias in such cases. The authorities concerned should bear this in mind before an Inquiry Officer is appointed in a disciplinary case."

Perusal of the same clearly shows that what is being relied upon does not support the version of the applicant. In accordance with the settled principles, only disinterested officers have to be appointed as inquiry officers. In fact, the instructions clearly show that there is no legal bar to the immediate superior officer holding the inquiry and when in the present case, it is not shown that the inquiry officer was not a disinterested officer, the very argument, therefore, that was pressed does not support the applicant's version. The same accordingly is rejected.

6. In that event, the learned counsel has pressed the plea that some of the documents had not been supplied to the applicant and, therefore, according to the learned counsel, prejudice has been caused to her. The respondents point out that all the documents claimed had been shown to the applicant. In her letter addressed to the inquiry officer at Annexure A-10, the applicant had requested for supply of a document i.e.the receipt of the letter dated 14.10.1999 issued by the Director Medical, Noida in which it was stated that she should not proceed on leave and the said document has not been made available to her. However, whenever such an argument is advanced, necessarily the same has to be examined on the touch-stone of prejudice, if any, that may be

caused. Perusal of the record reveals that during the course of enquiry, the applicant had claimed the two additional documents, namely the personal file on which the Director General's noting had been made on 10.10.1995 and the attendance register for May-June 1998 of Noida hospital for Doctors. On 19.2.1999 when it was listed for hearing, the noting portion of Director General of 11.10.1995 was shown to the applicant. The relevant photocopies of the attendance register asked for by her were also provided by the Presenting Officer. On 23.3.1999, all the 13 listed documents were taken on record. These facts clearly show that the applicant herself was fumbling and faultering. A request for supply of the documents has necessarily to be made before being complied with. Later on stating that the personal file has not been made available, appears to be irrelevant in the facts of the case and necessarily is not an argument which may make any impact. There is no prejudice that can be held to have been caused because only relevant documents can be called to be shown and copies supplied. In the facts of the present case, the said principle necessarily cannot be pressed into service because the proceedings of 19.2.1999 clearly show that the relevant documents had been supplied which read as under:-

"The presenting officer stated that in the preliminary hearing held on 3.3.1999

> the Charged Officer had asked for certain documents. The Inquiry Officer then handed over a copy of document No.1 namely a copy each of relevant portion of the attendance register where the Charged Officer had marked her attendance for the month of April & May. With regard to other documents the Inquiry Officer read out the contents of Hqrs. letter No.C-14/11/18/97-Vig. dated 21.7.96 which was also shown to Charged Officer in original."

The personal file as already referred to above was not found to be relevant and the request for supply of the same was, therefore, rightly rejected.

7. The main argument, however, in this regard was that the inquiry had been conducted in a manner unknown to law and, therefore, it has to be quashed. On behalf of the respondents, it was vehemently contended that this had been done with the consent of the applicant and, therefore, the plea of the applicant in this regard necessarily must be rejected.

8. Our attention had been drawn towards a decisions of the Supreme Court in the case of **M.C.Mehta** v. **Union of India & Others**, JT 1999 (5) SC 114. The Supreme Court had held that if on admitted facts or indisputable factual position, only one conclusion is possible and permissible, no writ is required to be issued and there would be no violation of the principles of natural justice. In the present case, it cannot be taken to be so as would be noticed hereinafter. Therefore, the

principle laid down in the case of M.C.Mehta (supra) will have no application in the facts of the present case.

9. Article 311 of the Constitution refers to giving of a reasonable opportunity to a delinquent before dismissing, removing or reducing him in rank. The Supreme Court in the famous decision of **Managing Director, ECIL, Hyderabad** v. **B.Karunakar**, 1993 (6) S.C.1 held that it is obligatory to hold an inquiry before an employee is dismissed or removed or reduced in rank, but it cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded, the report of the inquiry officer should be supplied to the delinquent. But it follows from the aforesaid that the inquiry necessarily should be conducted in accordance with the principles of natural justice or in accordance with the rules subject to an exception when the concerned person waives his right in this regard.

10. According to the respondents, the applicant had waived her right and she had agreed to make a departure from the inquiry in a normal manner. The proceedings of the inquiry officer in this regard which includes some of the questions and answers which wold be referred to hereinafter are:-

"The Inquiry Officer thus stated that if the Charged Officer was agreeable the enquiry could proceed further in the form of question answer session and Presiding Officer could also present his case through pertinent question to the Charged Officer which the Charged Officer had no objection.

1. Inquiry Officer	:	You are fully aware of the C.C.S. Conduct Rules
Charged Officer	:	Yes.
2. Inquiry Officer	:	You were never communicated any sanction/NOC or leave for the first charge.
Charged Officer	:	I met the Director General where he showed me that he has sanctioned NOC/ leave with the provision of substitute. As per file noting already shown to me but it was never communicated to me by then Medical Commissioner.
3. Inquiry Officer	:	During your absence you visited Mascat did you apply or informed the Competent Authority about your proposed visit.
Charged Officer	:	I did not consider it relevant to take

> such specific permission since I had sought permission to leave for abroad."

It shows that the inquiry officer had asked the applicant as to if she was agreeable to the enquiry proceeding further in the form of question and answer session and the applicant had no objection to the same. As per the respondents, in this process, the applicant had waived her right.

11. The word "waiver" is a vague term used in many senses. It is used sometimes in a sense of election as where a person decides between two rights. But waiver has to be an intentional relinquishement of a known right. There can be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and facts. It can be so done impliedly. The Supreme Court in the case of **Associated Hotels of India Limited** v. **S.B. Sardar Ranjit Singh**, AIR 1968 SC 933 had almost in similar terms expressed while illucidating the expression "waiver" and held:-

> "A waiver is an intentional relinquishement of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights. See Dhanukdhari Singh v. Nathima Sahu, (1907) 7 Cal WN 848 at p.852."

Indeed the aforesaid would show that a person who

has a right can waive the same in this regard, but the waiver has to be conscious abandonment of rights.

12. In the present case, the abandonment of rights, if any, had been that the inquiry could proceed further in the question answer form. As would be noticed hereinafter, it was a question answer session to which the applicant had agreed. Further cross-examination and a searching inquiry was beyond the scope of the departmental enquiry. To the searching questions, the applicant had not agreed. It, therefore, cannot be termed that in the facts of the present case, the applicant had conceded and waived his right and a total departure from the inquiry procedure under the Central Civil Services (Classification, Control & Appeal) Rules,1965 (for short, "the Rules") could be carried on.

13. Rule 14 of the Rules prescribes procedure for imposition of major penalties. It in unequivocal terms prescribes stage by stage as to what has to be done whenever proceedings for imposition of major penalties have to be started. Sub-rules (14) to Rule 15 clearly prescribes that on the date fixed for inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses have to be examined by on behalf of the Presenting Officer and may be cross-examined by the

alleged delinquent. There is a right to re-examination and the inquiry officer has also a right to put questions.

14. These rules clearly prescribe that it is based on the theory of reasonable opportunity and the principles of natural justice. The same have been enacted and evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. It has to be seen whether prejudice has been caused to the employee or not on account of the denial to him of the opportunity. But these principles cannot be stretched to ridiculous extent.

15. In the decision rendered by the Supreme Court in the case of **State Bank of Patiala & Ors. v. S.K.Sharma**, JT 1996 (3) S.C.722, the Supreme Court had gone into the details as to how the principles of natural justice could be termed to have been violated. A clear distinction has to be drawn as to whether the procedure prescribed was mandatory and in other case it was not mandatory. Ultimately, it was concluded that it has to be shown as to if any prejudice is caused to the person concerned or not. The relevant portion of the conclusions drawn in the case of S.K.Sharma

(supra) reads:-

> " (4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.
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> (b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution Bench in B.Karunakar. The ultimate test is always the same, viz.,test of prejudice or the test of fair hearing, as it may be called."

Therefore, necessarily one has to travel back to see if any prejudice is caused to the applicant by virtue of the departure from this rule or not.

16. What has happened in the present case is that the applicant who was a delinquent was straightaway put in the question answer form to which the applicant had agreed. That by itself, in our view cannot be taken to be a ground except when

it is shown that prejudice is caused. The Supreme Court in the case of **Employers of Firestone Tyre and Rubber Co. (Private) Ltd. v. The Workmen,** AIR 1968 SC 236 was concerned with somewhat similar controversy. The earlier decisions of the Supreme Court in this regard that the delinquent should not be subjected to questioning were referred to and discussed. The Supreme Court held that:-

(a) it will be permissible to draw the attention of the delinquent to the evidence on the record which goes against him; and

(b) if the delinquent is examined, first the procedure should be adopted in a clear case and not in all cases. The findings of the Supreme Court in this regard are:-

> "(9) This leaves over the contention that before examining the witnesses Subramaniam was subjected to a cross-examination. This was said to offend the principles of natural justice and reliance was placed on, Tata Oil Mills Co. Ltd. v. Its Workmen, 1963-2 Lab LJ 78 (SC); Sur Enamel and Stamping Works Ltd. v. Their Workmen, 1963-2 Lab LJ 367 :(AIR 1963 SC 1914); Meenglass Tea Estate v. Its Workman, 1963-2 Lab LJ 392 (AIR 1963 SC 1719) and Associated Cement Co. Ltd. v. Their Workmen, 1963-2 Lab LJ 396 (SC). These cases no doubt lay down that before a delinquent is asked anything, all the evidence against him must be led. This cannot be an invariable rule in all cases. The situation is different where the accusation is based on a matter of record or the facts are admitted. In such a case it may be permissible to draw the attention of the delinquent to the evidence on the

> record which goes against him and which if he cannot satisfactorily explain must lead to a conclusion of guilt. In certain cases it may even be fair to the delinquent to take his version first so that the enquiry may cover the point of difference and the witnesses may be questioned properly on the aspect of the case suggested by him. It is all a question of justice and fairplay. If the second procedure leads to a just decision of the disputed points and is fairer to delinquent then the ordinary procedure of examining evidence against him first, no exception can be taken to it. It is, however, wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over but the failure to question him in this way does not ipso facto vitiate the enquiry unless prejudice is caused. It is only when the person enquired against seems to have been held at a disadvantage or has objected to such a course that the enquiry may be said to be vitiated. It must, however, be emphasised that in all cases in which the facts in controversy are disputed the procedure ordinarily to be followed is the one laid down by this Court in the cited cases. The procedure of examining the delinquent first may be adopted in a clear case only. As illustration we may mention one such case which was recently before us."

Ultimately, the Supreme Court held that necessarily in the facts of each case it has to be mentioned whether the procedure could or could not be so adopted. In the same year, in the case of the **Central Bank of India Limited** v. **Karunamoy Banerjee**, AIR 1968 SC 266, the principle of rules of natural justice were again pressed into service. The Supreme Court held that if the allegations are denied, the burden of proving the truth of those allegations would be on the management. The concerned person should be given an opportunity to examine himself and adduce any other evidence that he may produce in support of his plea. But, if the

workman admits his guilt, to insist upon the management to let in evidence about the allegations will be an empty formality. In such cases, the management could examine the workman himself, even in the first instance. In paragraph 19, the said principles were eloquently stated in the following words:-

> "(19) We must, however, emphasize that the rules of natural justice, as laid down by this Court, will have to be observed, in the conduct of a domestic enquiry against a workman. If the allegations are denied by the workman, it is needless to state that the burden of proving the truth of those allegations will be on the management; and the witnesses called, by the management, must be allowed to be cross-examined, by the workman, and the latter must also be given an opportunity to examine himself and adduce any other evidence that he might choose, in support of his plea. But, if the workman admits his guilt, to insist upon the management to let in evidence about the allegations, will, in our opinion, only be an empty formality. In such a case, it will be open to the management to examine the workman himself, even in the first instance, so as to enable him to offer any explanation for his conduct, or to place before the management any circumstances which will go to mitigate the gravity of the offence. But, even then, the examination of the workman, under such circumstances, should not savour of an inquisition. If, after the examination of the workman, the management chooses to examine any witnesses, the workman must be given a reasonable opportunity to cross-examine those witnesses and also to adduce any other evidence that he may choose."

17. From the aforesaid, we can easily draw the basic rules that if the concerned officer has no objection, he can be examined in the first instance. If there is some evidence to which the delinquent's attention is drawn and no prejudice is

caused, he can certainly be asked certain questions.

18. In the facts of the present case, necessarily one has to again travel to see whether the procedure that the proceedings may start in the question answer form had been consented by the applicant or not.

19. We have already referred to above that the applicant had consented to the same. If only some questions had been asked which were answered, we would have found no difficulty in upholding the procedure that had been adopted. It could be stated that a reasonable opportunity had been granted and no prejudice was caused, but herein the applicant had not admitted the charges, but certain explanations were forthcoming. It was not simply a question answers session but cross-examination pertaining to certain questions. We are not delving into the same because suffice to say that some of the questions were not even part of the charges. It was a searching cross-examination regarding which there was no consent obtained. It was not a simply question answers that were being directed. For example certain questions were asked as to whether the applicant had taken employment during her stay abroad. We hasten to add that we are not delving into the said controversy because

it was not a part of the charges, but it clearly shows that the inquiry officer had not confined herself to the question answer form but had proceeded to cross-examining the applicant. No consent had been given by the applicant to that extent. She had thus not waived her right that far. She had made some explanations which the inquiry officer may or may not have believed. It is in this back-drop that we hold that prejudice must be held to have been caused in the facts of the present case.

20. Keeping in view the the above findings, the submission made pertaining to the future of the said inquiry report need not be opined.

21. For these reasons, we allow the present application and quash the impugned orders and it is directed that the disciplinary authority, if so advised, from the stage the inquiry proceeded before the inquiry officer may take necessary steps and re-start the enquiry. We make it clear that we are not expressing ourselves on the merits of the matter and the gravity of the charges. No costs.

(Govindan S. Tampi)
Member (A)

(V.S. Aggarwal)
Chairman

/sns/