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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.341/2004

New Delhi, this the 3rd day of **November**, 2004

Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. S.A. Singh, Member (A)

Subhash Chand
1156/DAP Now 1161/DAP
C-19, Type II
New Police Lines
Kingsway Camp
Delhi – 110 009. ... Applicant

(By Advocate: Sh. Shyam Babu)

Versus

1. Govt. of NCT of Delhi
Through its Chief Secretary
Players Building
I.P.Estate
New Delhi.

2. Jt. Commissioner of Police
[Armed Police]
Police Headquarters
I.P.Estate
New Delhi.

3. Dy. Commissioner of Police, Delhi
2nd Battallion
Delhi Armed Police
New Police Lines
Kingsway Camp
Delhi. ... Respondents

(By Advocate: Smt. Sumedha Sharma)

O R D E R

By Mr. Justice V.S.Aggarwal:

Applicant (**Subhash Chand**) faced departmental action on the allegations that on the intervening night of 4th and 5th June, 1993, he was posted in C.P. reserve duty. During the checking of MT Park by Sub Inspector Sher Singh, it was revealed by Constable Jagpal Singh that the applicant had taken Truck No.DIG 830 unauthorizedly and without any permission. The applicant was

marked absent vide Daily Diary No.110 dated 4.6.1993. It was also alleged that the applicant along with one Mukesh Kumar, property dealer with some persons had entered the house of Shri Puran Singh and quarreled with him. He had beaten him and assaulted him. This resulted in registration of a case FIR No.169/1993 in the Police Station, Timarpur with respect to offences punishable under Sections 451/323/34 of Indian Penal Code. The Inquiry Officer had examined the witnesses and framed the charge against the applicant. He had given an inquiry report with the following conclusions:

> "In my opinion in the view of statements of the PWs and DWs as discussed above and the documents on the D.E. file, the charge of absent from duty, taking away the Govt. vehicle unauthorisedly and involvement in a criminal case FIR No.169/93 u/s 451/323/34 IPC P.S. Timarpur, Delhi leveled against H.C. (Driver) Subhash Chand No.1156/DAP II BN DAP Delhi are proved beyond any shadow of doubt in it and the root behind it was the alcohol which he had consumed"."

2. The applicant took up the grievance that proper opportunity to produce Defence Witnesses had not been granted. He made a representation to the competent authority. The competent authority had accepted the request of the applicant and ordered a supplementary inquiry. The applicant submitted his list of defence witnesses including Incharge of Police Control Room Van (night duty) base Burari. The Inquiry Officer submitted a supplementary inquiry report to the disciplinary authority. He again concluded that the charge against the applicant has been proved. The applicant contended that even in the supplementary inquiry, the Inquiry Officer has not examined the relevant defence witnesses particularly Incharge of the PCR Van (night duty), Burari. Since the applicant

was not given an opportunity to produce the defence witnesses, the DCP 2nd Bn. DAP passed an order that supplementary departmental proceedings may be drawn from the stage of defence against the applicant. The matter was remitted back to the inquiry officer.

3. On 24.2.1995, the applicant again gave list of six defence witnesses. The Inquiry Officer again submitted a supplementary report coming to the conclusion that applicant did not want to produce his defence witnesses. The disciplinary authority dismissed the applicant from service. He preferred an appeal, which was rejected on 30.10.1995.

4. The applicant preferred an Original Application No.98/1996. On 23.7.1996, noticing the contention of the applicant that he had not been given a reasonable opportunity to produe his defence witnesses, the OA was allowed holding:

> ""We are not able to agree with this argument of the ld. Counsel for the respondents. Smt. Chibber has submitted that the petitioner could not trace out the identity of the incharge of the PCR van and in any case the incharge of PCR van being an official was working under the control of the respondent and they should have directed him to appear before the disciplinary authority."
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> The learned Tribunal further observed as under:
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> > "The file contains a letter however from the petitioner purported to be dated 18.03.1995 which was received by somebody on 14.03.1995 and forwarded on 15.03.1995. In this letter, the petitioner had stated his difficulty in locating the incharge of PCR van and asked that he may be summoned. There is no explanation."
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> The learned Tribunal also reached to the following conclusion in its order dated 23.07.1996:

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> "We can only come to the conclusion that no proper proceedings during this period were conducted nor the petitioner was given a proper opportunity to appear and produces witnesses. The opportunities which the disciplinary authority had directed the inquiry officer to give to the petitioner had, infact, not been given, with the result the petitioner has been denied reasonable opportunities to defend himself.""

5. In this backdrop, the order passed was set aside. The applicant contends that he had again submitted the list of defence witnesses including the Incharge of the PCR Van (night duty). On 23.9.1996, the Inquiry Officer submitted another report. He submitted that Department had lost the record of the PCR pertaining to the period of June, 1993 and, therefore, it was not possible to produce the Incharge of PCR Van (night duty). Acting on the supplementary report that was again submitted, the applicant was dismissed on 29.10.1996 and his appeal was also rejected on 13.2.1997.

6. The applicant filed OA 375/2002. On 19.2.2003, this Tribunal had set aside the impugned orders holding:

> "11. Unfortunately, in this case at every stage when supplementary enquiries had been held, there had been persistent omission in examining the incharge of PCR van who, in our considered opinion, was the material witness as also some other DWs and even in the final round of inquiry, the same omission had again occurred. Obviously, applicant did not have fair opportunity to defend his case. In the circumstances, we have no alternative but to set aside the impugned orders. We, therefore, allow this OA. The impugned orders dated 29.10.96 and 13.2.97 are quashed and set aside. The applicant is directed to be reinstated in service forthwith.
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> 12. However, respondents are free to proceed in the matter by appointing a fresh EO

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> and permit the applicant to examine the DWs, in terms of the earlier order passed by this Tribunal. If the records of PCR van at the relevant time are not available, EO shall proceed with the enquiry based on circumstantial evidence. The DA can thereafter pass appropriate orders in accordance with law, rules and instructions on the subject. This exercise shall be completed as expeditiously as possible but in any event within a period of four months from the date of receipt of a copy of this order. No costs."

7. The departmental inquiry was again started on 5.4.2003. The Inquiry Officer had observed that three defence witnesses could not be examined as their record from PCR was not traceable. Three other defence witnesses have already been examined and he submitted a supplementary report. The disciplinary authority thereupon imposed the penalty of withholding of future increments for a period of five years with cumulative effect. The intervening period of dismissal from 29.10.1996 to 6.4.2003 as well as the suspension period from 5.6.1993 to 5.9.1993 and 26.6.1995 to 28.10.1996 was decided as period not spent on duty for all intents and purposes. His appeal was dismissed. By virtue of the present application, he seeks to assail the orders that have now been passed on various grounds.

8. Needless to state that in the reply filed, the application has been contested.

9. We have heard the parties counsel and have seen the relevant record.

10. The learned counsel for the applicant, in the first instance, had urged that the applicant had been acquitted pertaining to the offence purported to have been committed by him and, therefore, the second part of the charge framed cannot be sustained keeping in view the findings of the learned judicial magistrate (Metropolitan

Magistrate). He strongly relied upon Rule 12 of the Delhi Police (Punishment & Appeal) Rules, 1980.

11. Rule 12 of the above said Rules reads as under:

> **"12. Action following judicial acquittal.-** When a police officer has been tried and acquitted by a criminal court, he shall not be punished departmentally on the same charge or on a different charge upon the evidence cited in the criminal case, whether actually led or not unless:-
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> (a) the criminal charge has failed on technical grounds, or
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> (b) in the opinion of the court, or on the Deputy Commissioner of Police the prosecution witnesses have been won over; or
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> (c) the court has held in its judgment that an offence was actually committed and that suspicion rests upon the police officer concerned; or
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> (d) the evidence cited in the criminal case discloses facts unconnected with the charge before the court which justify departmental proceedings on a different charge; or
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> (e) additional evidence for departmental proceedings is available."

12. The intention to frame the said Rule was that if a person has been acquitted by a criminal court, he should not be dealt with departmentally but there are five exceptions to it. Exception (e) referred above clearly mentions that where the additional evidence in the departmental proceedings is available, in that event the departmental action can be taken.

13. Perusal of the Judgment of the learned Metropolitan Magistrate dated 9.11.2000 clearly indicates that no evidence had been produced in the Court. But in the matter before us, an additional evidence was available because one Puran Singh, PW-7 had categorically deposed that he was working as Security Guard in

K.D.R. Jahangir Puri. One Mukesh and Subhash Chand on the intervening night of 4/5.6.1993 at about 10.30 to 10.45 PM had entered his house. Mukesh took him out of his house and they wanted to take him away by force. He had raised his voice. In the meantime, Subhash Chand had arrived at the spot and he was apprehended by the police. In other words, there was material in the departmental action which had been supported earlier and evidence in fact had been recorded. Therefore, in the peculiar facts of the present case, Rule 12 of the above said Rules will not come to the rescue of the applicant.

14. Once again on behalf of the applicant, great stress was laid on the fact that proper opportunity had not been granted to the applicant to produce his evidence and defence witnesses.

15. We have already given brief resume of the facts in the earlier order passed by this Tribunal in OA 375/2002 dated 19.2.2002 between the parties. It was noticed that if the records of PCR at the relevant time are not available, inquiry officer could proceed on the basis of circumstantial evidence. It is thereafter that supplementary findings of the inquiry officer had been given. It indicates that the Log Book of the PCR Van of the relevant time was reported to have been destroyed and, therefore, identity of the staff on duty could not be ascertained. This fact clearly shows that once the Log Book was not available, it could not be produced.

16. Pertaining to the allegation that proper opportunity to examine witnesses was not given, the inquiry officer had recorded:

> "As regard to examine the D.W.'s, DW-1 was allowed, DW-2, 3 & 4 could not be examined as their record from PCR could not be traced. DW-5 to 9 were already examined. The Log-book of vehicle No.DIG-830 was examined from the M.T. section of IInd Bn. DAP. The DW's from

> 12 to 16 are not allowed as they are already crossed by HC Subhash Chand No.1156/DAP in D.E. proceedings. It is clarified that the defaulter is entitled to avail the opportunity to cross examine the witness only once. A defaulter can not ask for this right again. (T.L.Tandan v/s state AIR 1960 Punjab 646). The copies of documents not supplied earlier have been supplied to him. HC Subhash Chand No.1156/DAP, as per list produced only 4 D.W.'s out of 16, who were examined and their statements were recorded.

17. The reasons given by the inquiry officer does not appear to be illogical and we need not reproduce the same. The procedural aspect cannot be allowed to be misused because certain witnesses who have already been cross-examined cannot be allowed to be further cross-examined unless cogent reasons are given. They were not shown to us. Certain witnesses were disallowed pertaining to which the record was not available. But sum and substance of the above quoted portion would show that proper and fair opportunity had been given to the applicant.

18. As regards that there was no circumstantial evidence or other evidence against the applicant, we take liberty in referring to the well settled principle that ordinarily this Tribunal in judicial review will not sit as a Court of appeal. It could only interfere if findings arrived by the disciplinary authority are based on no evidence or totally perverse or legally not tenable. The Supreme Court in the case of **B.C.CHATURVEDI** v. **UNION OF INDIA AND ORS.**, JT 1995(8) SC 65 had gone into this controversy and held that the disciplinary authority is the sole judge of facts. The Tribunal would only interfere where conclusions or findings arrived at are totally based on no evidence. The findings of the Supreme Court in this regard are:

> "12. 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 necessarily correct in the eyes 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 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 in 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."

Similar was the finding recorded by the Supreme Court in the case of **KUMAON MANDAL VIKAS NIGAM LTD.** v. **GIRJA SHANKAR PANT AND OTHERS**, (2001) 1 SCC 182.

19. As already referred to above, however it has been urged that there was no circumstantial evidence or direct evidence pertaining to the allegations made against the applicant. On closer scrutiny, we find that the said contention of the learned counsel

must be repelled. Though as already referred to above, we are not judicially sitting as a Court of appeal but reference can well be made about the evidence on the record. **Constable Anil Kumar** had appeared as **PW-3** in the inquiry. He stated that he had asked Head Constable (Driver) Subhash Chand where the vehicle was taken and it was responded by HC Subhash Chand that it was taken to workshop. Thereafter, the witness went to the Duty Officer room to check the departure and found that no such departure of the vehicle and the driver had been made. When he came back to M.T. Park, he found that the vehicle and the driver was not there. **Sub Inspector Pardeep Kumar, PW-4** also deposed that on the relevant date, the Duty Officer had informed him that he had received message about a quarrel from Police Control Room and the applicant as well as the Government vehicle DIG/830 were found on the spot. **Sub-Inspector Om Parkash Pandey, PW-6** was posted at Police Station, Timarpur. He also stated that on receipt of Daily Diary entry No.20, he along with Constable Satbir Singh reached at the spot and found that the PCR Van was also on the spot. The above said vehicle and the applicant were there and they were taken to the Police Station. We have already referred to above that **Shri Puran Singh, PW-7** has already made such a statement. It is obvious, therefore, that it cannot be taken that this is a matter in which it can be held that there was no evidence on the record. Keeping in view the totality of facts and the circumstances, therefore, we find that there is no ground to interfere in the penalty that has been awarded.

20. Confronted with that position, the learned counsel assailed the second part of the order whereby the intervening period of dismissal from 29.10.1996 to 6.4.2003 and suspension period

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from 5.6.1993 to 5.9.1993, besides from 26.6.1995 to 28.10.1996 was decided as not spent on duty for all intents and purposes. Learned counsel had urged that the suspension order had merged with the dismissal order. Once the dismissal order is set-aside, the applicant must be taken to be on duty.

21. Learned counsel for the applicant relied upon Rule 27(c) of Delhi Police (Punishment & Appeal) Rules, 1980. But perusal of the same clearly shows that it would only come into play when a punishment of dismissal or removal from service is set aside, in appeal under Delhi Police (Punishment & Appeal) Rules and case is remanded for further inquiry and action. The order had not been set aside in appeal and, therefore, in strict sense, the said Rule has little application.

22. However, reliance further was being placed on Fundamental Rule 54-A(2) to contend that a notice to show cause is required before passing such an order. FR-54-A(2)(i) reads as under:

> "(2)(i) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by the Court solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits, the Government servant shall, subject to the provisions of sub-rule (7) of Rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired, or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him, in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice:"

23. In sum and substance, it clearly indicates that it is based on principles of natural justice while a person is not fully exonerated on merits but dismissal is set aside. The said person must be given a show cause notice irrespective of the same. Keeping in view the long litigation that applicant had faced particularly when on different times the matter has been remitted, the order of dismissal has been set aside and presently a penalty of withholding of future increments for a period of five years with cumulative effect has been imposed. It is in the fitness of things and fairness that applicant should be given a show cause notice while deciding as to if the period from 29.10.1996 to 6.4.2003 when he was dismissed and suspension period from 5.6.1993 to 5.9.1993 and from 26.6.1995 to 28.10.1996 should be treated as period spent on duty or not.

24. With these findings recorded above, we pass the following order:

a) The Original Application is dismissed qua the penalty that has been imposed upon the applicant with respect to withholding of future increments for a period of five years with cumulative effect.

b) It is directed that a notice should be given to the applicant to show cause proposing as to if the period referred to above has to be treated as spent on duty or not. After considering the reply, a proper order should be passed.

(S.A.Singh)
Member (A)

(V.S.Aggarwal)
Chairman

/NSN/