

CENTRAL ADMINISTRATIVE TRIBUNAL, CUTTACK BENCH

O.A.NO.171 OF 2003

Cuttack, this the 18th day of ~~January~~, 2005
February.

Madan Mohan Mohanty Applicant

Vrs.

Union of India and others Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the Reporters or not? *yes*
2. Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? *yes*

(M.R.MOHANTY)
JUDICIAL MEMBER

(B.N.SOM)
VICE-CHAIRMAN

**CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH**

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Cuttack, this the 18th day of ~~January~~, 2005
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CORAM:

**HON'BLE SHRI B.N.SOM, VICE-CHAIRMAN
AND
HON'BLE SHRI M.R.MOHANTY, JUDICIAL MEMBER**

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Madan Mohan Mohanty, aged about 55 years, son of late Ramanath Mohanty, presently working as Principal Secretary to Government, Textiles & Handlooms, Sports and Y.S. Department, Government of Orissa, Bhubaneswar, district Khurda.

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Applicant

Advocates for the applicant - M/s J. Pattnaik, H.M.Dhal,
A.A.Das, B.Mohanty,
T.K.Patnaik, P.K.Nayak &
S.Patnaik.

Versus

Union of India, represented through its Secretary to Government of India, Ministry of Personnel (PG & Pensions), Department of Personnel & Training, North Block, New Delhi.

State of Orissa, represented through its Secretary to Government, G.A.Department, Bhubaneswar, District Khurda.

Special Secretary to Government, G.A.Department, Bhubaneswar, District Khurda

..... Respondents

Advocates for the Respondents - Mr.U.B.Mohapatra,
Sr.CGSC

Mr.T.Dash, Govt.Advocate



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ORDER

SHRI B.N.SOM, VICE-CHAIRMAN

Shri Madan Mohan Mohanty, presently working as Principal Secretary to Government of Orissa, has filed this Original Application challenging the charge memo dated 20.5.2002 issued to him on the ground that the same is illegal and arbitrary. It has also been alleged that the impugned memo of charges has been issued at the behest of some vested interest with mala fide intention. It has also been alleged that the said memo of charges is based on no materials on record and that the allegations taken in their entirety do not constitute any misconduct. He has, therefore, prayed for judicial intervention in the interest of justice, equity and fair-play.

2. The applicant's case is that on receipt of the memo of charges, he had submitted written statement of defence (Annexure 2) denying all the charges framed against him. However, the disciplinary authority, without application of mind on the points raised by him, appointed an Inquiring Officer to enquire into the charges and also appointed a Presenting Officer

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to present the case on behalf of the Government in support of the charges. The grievance of the applicant is that the alleged delinquency relates to the period from May 1990 to December 1994, during which period the applicant had functioned as Commissioner-cum-Secretary in the Irrigation & Power Department. It has been alleged that the applicant by abusing his position as a public servant had obtained pecuniary advantages for one of the contractors entrusted with the execution of the Upper Indravati canal excavation work. The allegations, as set out in the memorandum of charges, *prima facie* not only do not constitute any misconduct, but are absolutely vague, being not clear and specific. It has also been submitted that the charges have been framed against him after ten years of the occurrence of the alleged act of misconduct. The delay in initiating the proceeding is abnormal and there is no explanation for such delay. This delay has caused serious prejudice to the applicant inasmuch as by initiating the instant disciplinary proceedings, the promotion prospect of the applicant to the rank of Chief Secretary



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has been seriously affected. Therefore, initiation of the proceeding at such belated stage is bad in law.

3. Referring to the vagueness of the charges, he has submitted that the second article of charges framed against him is with regard to offloading the balance of work in the project for excavation of Right Main Canal from RD 42 KM to 45 KM of Upper Indravati Right Canal of Division-I, Upper Indravati Irrigation Project, Mukhiguda, from M/s OCC Ltd. to one M/s D.Agarwalla. Both the contractors were entrusted with construction work in the said reach in separate agreements. It is stated in the statement of imputations that the proposal of the Chief Engineer of the Project to offload some portion of the work to M/s D.Agarwalla was discussed in the Tender Committee meeting held on 31.10.1992.

4. The applicant has contended that the disciplinary authority has heaped the blame on him although the decision alleged to have been taken wrongly was taken by the Tender Committee comprising functionaries from different Departments,

like, Secretary of the Administrative Department, Secretary of the Finance Department, Secretary of the Law Department and the concerned Chief Engineer. The Tender Committee having decided to offload the work, the applicant could not have any individual responsibility inasmuch as the work in question being not a new work is not required to be put to tender, more particularly in view of the procedure contained in F-2 Agreement. The applicant has, therefore, submitted that there were no latches on his part to face the instant proceeding.

5. Regarding the other charge relating to deviation proposal, the applicant has pointed out that the provision for putting the matter before the Tender Committee before offloading the contract was made mandatory by the Government by its circular issued in the year 2000 and no such order existed in the year 1993 when the alleged decision was taken. Notwithstanding that, the fact remains that the matter regarding offloading of the job to M/s D.Agarwal was also placed before the Tender Committee on 21.7.1994 and was approved.

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6. He has refuted the allegation that the Financial Advisor-cum-Deputy Secretary, I & P Department, had ever suggested that the deviation proposal should be placed before the Tender Committee and that the advice was overlooked by the applicant. The applicant had never disagreed with his advice. The fact of the matter is that he had endorsed the same which would necessarily mean that the applicant had endorsed the noting of the Financial Advisor-cum-Deputy Secretary. The fact of the matter is that it was the Financial Advisor who had agreed to the proposal of the Chief Engineer to offload the work to M/s D.Agarwalla and put up the proposal for obtaining approval of the Government. In the circumstances, the applicant could not in no way have been held responsible for excess payment alleged to have been made to the contractor.

7. The Respondents by filing a detailed counter have contested the Original Application in all respects. They have submitted that the applicant was given full opportunity to submit his written statement of defence after examining the documents listed in the memorandum of charges except the copy of FIR in



Bhubaneswar Vigilance P.S. Case No.44 of 2000 as the same was not listed in the memorandum of charges. With regard to the Codal provisions in Rule 6.3.15 Note I, Vol.I, they have admitted that the same was a typographical error which occurred in the article of charges and therefore, a correction was proposed by the General Administration Department in their letter No. 5919/Vig. Cell dated 18.10.2002, wherein reference to 'O.P.W.D.Code Rule 6.3.19' was substituted by 'O.P.W.D.Code Rule 3.2.4, 6.3.15 and 6.3.17'. They have also submitted that the notification contained amendment to the charge sheet to the effect that wherever the words 'F.A.-cum-Dy.Secretary' appeared were to be substituted with the words 'AFA-cum-Under Secretary'. They have submitted that the work was offloaded and entrusted to another agency without any reasonable ground as per the report of the Vigilance Technical Wing and that while taking the decision for offloading work, no disclosure was made regarding change in alignment of canal (change in scope of work and change in classification of strata) which was well known to the project authorities during 1989. They have stated that while processing the first deviation



statement, A.F.A., Irrigation & Power Department in his note dated 30.4.1993 (Annexure IV) had suggested placing of the entire facts before the Tender Committee to arrive at a complete recommendation in view of it being practically new work than what was awarded to M/s O.C.C.Ltd. and that the views of A.F.A. were endorsed by the Financial Advisor in his noting dated 3.5.1993 enquiring as to how the Chief Engineer, who was aware of this fact of change of alignment in 1989, failed to bring this material fact to the notice of the Tender Committee. However, this query of the Financial Advisor was answered by the Chief Engineer vide his letter No.102 dated 11.5.3 which though not convincing was accepted by the Financial Advisor. They have contended that as Head of Government department, the Secretary (in this case the applicant) has responsibility to go through all these previous material notes of A.F.A., F.A. and reply of Chief Engineer available in the file, which having not been done by the applicant was an act of serious omission. They have also denied that the charges are either vague or unspecific. They have also submitted that the applicant has misinterpreted the

provisions of Codal Rules, which led to incurring of financial loss to the Government. It has also been argued that the applicant as Secretary of the said Department was expected to place the technical matters, like the rate of Medium Hard Rock (MHR) not appearing in S.R. before the Tender Committee for threadbare discussion and to reach a rational and unanimous decision to approve the deviation by the Committee. The applicant before endorsing the file to the Minister in charge of the Department was expected to refer the matter to the Tender Committee and consult again with the Chief Engineer and Engineer-in-Chief who are technical persons in this regard. Justifying the initiation of disciplinary action, for the reasons as discussed above, the Respondent-State Government have prayed for vacation of the order dated 1.4.2003 and allow them to carry out necessary amendment in the article of charges and memo of evidence, etc., to facilitate an impartial enquiry into the matter.

8. The applicant had filed rejoinder dated 13.9.2004 to the counter filed by Respondent Nos. 2 and 3. The applicant's main grievance is that the memo of charges had been issued by

the Respondents at the behest of persons who had axe to grind against the applicant in as much as the disciplinary proceeding has been initiated with mala fide intention to deprive the applicant of further promotion to which he is otherwise eligible and entitled. He has submitted that the Codal Rules, referred to by the Respondents either in the charge memo or in their proposed amendment notification, i.e., Rule 6.3.19 read with Rules 3.2.4, 6.3.12 and 6.3.15, have no bearing on the case of deviation and the role of the Tender Committee. The fact of the matter is that no Codal provision has been violated by the applicant. He has further reiterated that by issuing an office memorandum NO. IIM 105/2000 / 4586/WR, dated 27.11.2000 under Rule 6.3.17 of OPWD Code Vol.I, it was decided that in case of works having contract value of Rs.50 lakhs or more, if the deviations are more than 20% and involve net deviation amount of Rs.50 lakhs or more, the proposal of Chief Engineer along with the recommendation of the above Committee shall be referred to the Tender Committee of the Water Resources Department for examination and recording its recommendation for Government

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orders. The procedure introduced by Government by their order dated 27.11.2000 could not reasonably be applied on any action/decision taken or procedure followed by the Government functionaries earlier to the promulgation of that order. In other words, the applicant could not have been charged for violation of Government order dated 27.11.2000 for the decision that he had taken in file during May 1993 or earlier. Pointing out these lacunae in the memo of charges as well as the flaw in the counter filed by the Respondents, the applicant has prayed for quashing the memo of charges under Annexure 1.

9. We have heard the learned counsel for the rival parties and perused the records placed before us.

10. The issue to be answered is, whether it is a fit case for judicial intervention at the interlocutory stage. The Hon'ble Apex Court in ***Transport Commissioner, Madras v. A.Radha Krishna Moorthy, (1995) 1 SCC 332*** has already held and the same has been repeated subsequently that it is not a matter for the Tribunal to go into the truth and correctness of the charges more particularly at a stage prior to conclusion of the disciplinary

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proceeding. However, in that case also it was held by their Lordships that if the charges are vague, it would attract judicial intervention.

11. In ***B.C.Chaturvedi v. Union of India and others,*** **AIR 1996 SC 484**, the scope of judicial review has been clearly spelt out as follows:

“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 is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of a 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 reappreciate the evidence and to arrive at the 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. "

The same view was taken by the Hon'ble Apex Court in ***Union of India and others v. Upendra Singh, 1994 (1) SLR 831.*** The sum total of the judgments in both the cases is that the purpose of judicial review is to ensure that the individual receives fair treatment. In this, the Court/Tribunal would examine whether the decision making process was fair and transparent and for the purpose of fairness and transparency the charges should not suffer from the vices of vagueness and the charges should be based on rules and the findings/conclusions should be based on some evidence.

12. In the instant case, the applicant has brought out two main allegations against the Respondents. Firstly that the

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Respondents framed charges against the applicant for certain action/decision taken by him during the year 1992, i.e., about ten years prior to the issue of the memorandum of charges and such a delay has caused serious prejudice to him in as much as by initiating the instant disciplinary proceeding, the prospect of the applicant for promotion to the rank of Chief Secretary has been seriously affected. He has also alleged that the delay in initiating the proceeding is not only abnormal, but there is no explanation for such delay. The absence of explanation fully explains the ulterior motive of the Respondents to deny him further progress in his service career. The other standpoint of the applicant against the charge memo issued against him is that the allegation that he had contravened the provisions of the O.P.W.D.Code and established official procedure and precedents is imaginary and that the charges are framed more on suspicion than on facts. Whatever decision to which he was a party was taken by him either as a Member of the Tender Committee, which is an inter-departmental committee consisting of Secretaries to Government of Orissa in other Departments and the Chief Engineer, or was on



the advice of the Financial Advisor to the Department concerned. It was irrational as well as bad in law to have singled out one of the members of the Committee or the group for such disciplinary action. Such selectivity smacks of mala fide and bias.

13. We have given our anxious thoughts to the allegations of delay in framing the charges against the applicant. We have dealt with an identical issue in O.A. No. 304 of 1997, *Sri K.L.Sharma v. Union of India and others*, decided on 23.5.2003. In that case also the disciplinary action initiated ten years after the applicant had left the charge of the post. In that case, as in the instant case, the Respondents did not explain the cause of such long delay in initiating the disciplinary action. In the counter filed by the Respondents in this case not a whisper has been made to explain the delay in initiating the disciplinary action against the applicant. They have also not rebutted the claim of the applicant that all the decisions regarding offloading of some portion of excavation work were taken after due deliberation in the Tender Committee meeting held on 31.10.1992. As the Respondents have failed to give any reasonable explanation for



delay in initiating disciplinary action, we see lot of force in the submission made by the applicant that the delay in initiating disciplinary action against him had prejudiced him substantially, as his further progress in service was throttled. In this connection, we would recall the judgment of the Apex Court rendered in the case of *State of Andhra Pradesh v. N.Radhakishan*, (1998) 4 SCC 154, where it has been held as follows:

“.....If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. xx xx Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.”

14. As the delay is too long and as it is a fact that the applicant is in the zone of consideration for promotion to the next echelon of civil service, there is no denying the fact that the delay in initiation of the disciplinary proceeding in this case is bound to give room for allegations of bias, mala fides and misuse of power.



We are also distressed to find that the Respondents have done nothing precious to give us the impression that the delay was purely on administrative reasons and there was no antipathy/bias against the applicant. That being the ground reality, we have no doubt that serious prejudice has been caused to the applicant by the delayed action on the part of the Respondents.

15. On the second issue regarding fixing responsibility on the Secretary of the Department for procedure that was followed in approving the cost of deviation in offloading the work from 42 KM to 45 KM of right canal of Indravati Project, two points have been advanced by the Respondents to show how the applicant was blameworthy. Firstly that the decision to offload the deviation work to M/s D.Agarwala was taken without intervention of the Tender Committee, and, secondly, that he, as the Secretary of the Government Department, should have seen the infirmities in the noting of the Financial Advisor and Joint Secretary and should have returned the file back for reconsideration by the technical members and then endorsing it to the Minister in charge of the Department for financial approval.



With regard to the first allegation that the applicant had not placed the matter before the Tender Committee, we are surprised to find that in the statement of imputation of articles of charges it has been stated that the proposal was discussed in the Tender Committee held on 31.10.1992 when it was decided to offload the balance work of excavation from M/s OCC Ltd. to M/s D.Agarwala and the said decision has been termed as "highly illegal and beyond the scope of the Codal provision without taking recourse to open and competitive tender required for work of such nature and cost". This is clearly a contradictory position taken by the Respondents. We wish they were more rational and steadfast in their statements/submissions. That apart, nowhere in the charge-sheet the disciplinary authority has referred to the Codal Rule under which the duty was cast upon the Tender Committee to put the matter to open tender. On the other hand, the learned Senior Counsel for the applicant, during oral argument, has brought to our notice the Codal provisions as contained in Rule 6.3.19, 6.3.17 and Note II below Rule 6.3.15 to prove the Respondents' wrong. However, the Respondents could not



produce any Codal provision before us either to rebut the argument of the applicant or to show us that open tender system has been prescribed under the Codal provision for execution of balance work for an ongoing project. The learned Senior Counsel for the applicant submitted before us that the Codal provision has been made to the effect that after a work is executed, any extra work to be generated while executing the project work and if the deviation is likely to exceed the prescribed limit of 15%, the same could be approved for execution of work by the authority competent to accept tender after the revised administrative approval is obtained (Authority: Note II below Rule 6.3.15 O.P.W.D.Code, Vol.I). In this case, as submitted by the Senior Counsel for the applicant, it was the Tender Committee which in its meeting on 31.10.1992 had approved the proposal for offloading the balance work of excavation and thereafter the Chief Engineer had initiated a case for obtaining administrative approval of the competent authority. In this connection, by producing a copy of the relevant note in the file (Annexure 5) he has drawn our attention to the detailed note put up by the



Financial Advisor-cum-Joint Secretary seeking Government approval for allowing the cost of work of deviation. Repeatedly a point has been made both in the counter of the Respondents as well as during oral argument by the Government counsel that the A.F.A.-cum-Under Secretary of the Department had proposed in his note that the deviation proposal should be placed before the Tender Committee. However, his view point was not accepted by the Financial Advisor-cum-Joint Secretary who, in his note, had stated clearly that the proposal was approved by the Tender Committee in its meeting held on 31.10.1992 wherein it was decided to award the job at a value of Rs.84,81,616/-. From a perusal of the note dated 13.5.2003 of the F.A.-cum-Joint Secretary, we find little scope on the part of the Secretary of the Department (the applicant) to raise any query as it was a full-fledged proposal giving all the reasons why the proposal should be accepted in toto and it clearly stated that the proposal merits sanction by Government.

16. From a perusal of the counter as well as the statement of imputation of articles of charges, it is apparent that the

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charges were framed on suspicion and speculation and instead of being able to show clearly how the Secretary had exceeded his given power either as a member of the Tender Committee or while functioning as Commissioner-cum-Secretary to the State Government. The Respondents have given their valued judgment as to how he should have conducted himself. It is also surprising that when the thrust of their allegation against the applicant is that he took such decision without consulting the Tender Committee, the Respondents in the statement of imputations of charges have clearly stated that it was the Tender Committee which had taken decision to offload portion of the work to M/s D.Agarwala and also that as per the Codal provisions, for any deviation work sanction is to be obtained from the authority competent to accord administrative sanction and therefore, this charge brought against the applicant is vague and without merit. It also appears from the counter reply filed by the Respondents that they were questioning the quality of the decision taken by the applicant in his capacity as Commissioner-cum-Secretary to the Department. Even if for argument sake it is granted that the

decision that the applicant had taken as Commissioner-cum-Secretary was wrong, that decision would not make out a case for misconduct on which ground he could be proceeded against. In this connection, we would profitably refer to the decision of the Hon'ble Supreme Court in the case of **Union of India and others v. J.Ahmad**, 1979 SLJ 308, wherein it was held as follows;

“.....It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard or administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.”

In paragraph 12 of the judgment, Their Lordships held as follows:

“.....There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be

irreparable or the resultant damage would be so heavy that the degree of culpability would be very high."

17. The ratio of the judgment in **J.Ahmad's case (supra)** has telling effect on this case also. For reasons best known to the Respondent-Administration, a decision was taken after a decade to initiate disciplinary action against the applicant on the ground that he could not manage the affairs of the Irrigation Department effectively. But the moot question is, whether lack of leadership qualities or lack of high state of efficiency justifies taking action under Rule 3 of All India Services (Conduct) Rules. This has been answered by their Lordships in **J.Ahmad's case (supra)** where they held that allegations concerning personal ability would not constitute misconduct for the purpose of disciplinary proceedings. In this view of the matter, we have no hesitation to hold that the allegations brought against the applicant do not constitute misconduct punishable under Rule 3 of All India Services (Conduct) Rules.

18. Having regard to the facts of the case and the Codal provisions concerning the procedure laid down for granting approval for offloading of work, it is clear that the disciplinary

action as in Annexure-1 was initiated with long delay which has caused serious prejudice to the interest of the applicant leading to reasonable suspicion of bias. The charge memo issued to the applicant is found to be vague, indefinite, subjective and not based on the Codal provisions as contained in O.P.W.D. Code, Vol.I, nor any prima facie case of misconduct made out.

19. In the circumstances, the Original Application succeeds.

No costs.

Mohanty
18/02/05
(M.R.MOHANTY)
JUDICIAL MEMBER

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(B.N.SOM)
VICE-CHAIRMAN