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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.1310 of 2003
Cuttack, this the 19th day of March, 2007.

Babaji Charan Parida ... Applicant
Versus
Union of India & 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 CAT or not? Yes

(N.D.RAGHAVAN)
VICE-CHAIRMAN

(B.B.MISHRA)
MEMBER(A)

CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK.

Original Application No.1310 of 2003
Cuttack, this the 19th day of March, 2007.

C O R A M:

THE HON'BLE MR. N.D.RAGHAVAN, VICE-CHAIRMAN
AND
THE HON'BLE MR.B.B.MISHRA, MEMBER (A)

Babaji Charan Parida, Aged about 39 years, Son of Bairagi Charan Parida, At/Po. Akhua Dakhin, Via. Patkura, Dist. Kendrapara at present working as EDBPM/GDSBPM of Akhua Dakhin BO, Kendrapara.

..... Applicant.

By legal practitioner: Mr.D.K.Mohanty, Advocate.

-Versus-

1. Union of India represented through its Director General of Posts, Ministry of Communication, Department of Posts, Dak Tar Bhawan, New Delhi-110 001.

2. The Chief Postmaster General, Orissa Circle, Bhubaneswar, Dist.Khurda, Pin-751 001.

3. Director Postal Services (Hqrs.), Bhubaneswar Region, O/O. the Chief Postmaster General, Orissa Circle, Bhubaneswar, Dist. Khurda.

4. Superintendent of Post Offices, Cuttack North Division, Cuttack, Town/Dist. Cuttack.

...Respondents.

By legal practitioner: Mr.S.B.Jena, ASC.

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ORDER

MR.B.B.MISHRA,MEMBER(A):

Case of the applicant is that while he was continuing as EDBPM/GDSBPM of Akhua Dakhini Branch Post Office in account with Patakura Sub Post Office, on 26.07.1991 in contemplation of a disciplinary proceedings, he was placed under off duty. After eight years of the order of put off duty, on 05.07.1999 a set of charges was framed and served on the Applicant asking him to show cause. Thereafter the matter was enquired into and the IO in his report submitted on 25.10.2003 concluded that "all the three charges against Shri Babaji Charan Parida is proved to the extent that the deposits on the relevant dates have not been taken into Government Account but entrustment of money is not proved. The Disciplinary Authority did not agree with the later part of the report of the IO and accordingly, on 16.01.2003, served the report of the IO with his tentative disagreement note on the Applicant seeking his reply. On 30.01.2003, applicant submitted his reply to the communication of the Disciplinary Authority dated 16.01.2003. On consideration of the materials, the Disciplinary Authority in his order dated 24.02.2003 (Annexure-A/6) imposed the applicant punishment of debarring him from appearing in the recruitment examination for the post of Postman for a period of three years from the year 2003. On receipt of the order of punishment, on 11.03.2003, applicant submitted his appeal. On receipt of the Appeal, the Appellate Authority in exercise of the

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powers conferred under Rule 19 (iii) of the GDS (Conduct & Employment) Rules, 2001 issued notice to the Applicant asking him to show cause as to why the order of punishment shall not be modified to that of "removal" from service. On receipt of said order, on 26.09.2003, the Applicant submitted his reply. Expecting that the decision of the Appellate Authority may not go in his favour since he has already made up his mind to remove him from service, he has approached this Tribunal in the present Original Application filed under section 19 of the Administrative Tribunals Act, 1985 praying the following:

> "8. RELIEF SOUGHT FOR:
>
> ...to quash the order of punishment dated 24.02.2003 under Annexure-A/6;
>
> And further be pleased to quash the notice of enhancement of punishment dated 22.08.2003 under Annexure-A/8;
>
> And further be pleased to quash the order dated 13.01.2004 under Annexure-A/10;
>
> And further be pleased to direct the Respondents to pay the applicant all his service and financial benefits retrospectively."

2. By way of interim relief he has prayed for the following relief:

> "9. INTERIM RELIEF, IF ANY PRAYED FOR:-
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> .....to injunct the Opposite Parties not to take any action pursuant to the notice of enhancement of punishment dated

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> 22.08.2003 under Anexure-A/8 and allow the applicant to continue in his post in question."

3. This matter was listed on 30.12.2003 and this Tribunal while ordering issuance of notices to the Respondents, as an ad-interim measure directed as under:

> "Heard on the question of Interim relief. As an interim measure, it is hereby ordered that the Respondents should not take any coercive action pursuant to Annexure-A/8 dated 22.08.2003 without leave of this Tribunal."

4. Respondents in their replies have resisted the claim of the Applicant by stating that during the period from 10.12.1986 to 26.7.1991, the Applicant while continuing as GDSBPM of Akhuadakhini Branch Post Office had committed fraud to the tune of Rs.5,250/- permanently and Rs. 9,400/- temporarily as mentioned in letter dated 11/26-11-1993 of the Superintendent of Post Offices under Annexure-R/1. During preliminary enquiry, the applicant having admitted the fact of committing fraud credited the amount with interest in two installments. Thereafter, as continuance of applicant was not considered safe, he was placed under off duty w.e.f. 26.07.1991 (AN). Disciplinary proceedings under Rule 8 of EDAs(Conduct & Service) Rules, 1964 [now revised as Rule 10 of GDS (Conduct and Employment) Rules, 2001] was initiated against him by serving Charge Sheet under Annexure-A/1. The Applicant by filing OA No. 1 of 2000 challenged the put off duty order as also the proceedings initiated against him. The said matter was disposed of on

27.09.2000 directing the Respondents to re-instate the applicant in service and complete the proceedings early. In obedience of the said directions, the Tribunal was reinstated vide Memo dated 29.11.2000. After considering all formalities, the disciplinary authority vide Memo dated 24.2.2003 (Annexure-A/6) imposed the applicant punishment of debarring the applicant from appearing recruitment examination for the post of postman for a period of three y ears from 2003 and further ordered that the period of put off duty to be treated as non duty for all purposes. The punishment imposed by the Disciplinary Authority was reviewed by the Appellate Authority [i.e. DPS (HQ)] in exercise of the powers conferred under Rule 19(iii) of GDS (Conduct and Employment) Rules, 2001 and accordingly he issued show cause notice dated 22.08.2003 (Annexure-R/2), asking the applicant to show cause as to why the order of punishment shall not be enhanced to that of 'removal'. Applicant submitted his reply on 25.09.2003 (Annexure-R/3) and on consideration of the show cause reply of applicant dated 25.09.2003 and all other relevant records, the Appellate Authority decided to remove him from service vide Memo dated 13.01.2004. But in view of the order of stay dated 30.12.2003, the said order of punishment could not be given effect to and has been kept in abeyance.

5. Applicant has filed rejoinder countering the stand taken by the Respondents in their replies filed in this case.

6. His submission that both the orders of punishment imposed by the Disciplinary Authority as well as Appellate Authority are not sustainable for the reasons that (i) the Appellate Authority travelled beyond what has been made known to the applicant in Charge Memo under Annexure-A/1 inasmuch as that the Applicant committed fraud to the tune of Rs.14,650/-; (ii) Appellate Authority exercised the power under Rule 19(1)(ii) of GDS (Conduct & Employment) Rules, 2001; whereas proceedings was drawn up against the applicant under Rule-8 of EDAs (Conduct & Service) Rules, 1964; (iii) the observation of the Appellate Authority in paragraph 5 of the order of punishment that though there was delay in issuing the charge-sheet yet it has not caused any suffering to the charged official is contrary to law and the reply furnished by the Applicant that non-payment of *ex gratia* during the put off duty period has caused serious prejudices to him in defending his case has been answered by the Appellate Authority in a casual manner without keeping in mind the law enunciated by the Hon'ble Apex Court; (iv) The depositors of the alleged money being the vital/key witness, he being not called during enquiry has substantially deprived him of the opportunity of providing his innocence in the matter. But the Appellate Authority being prejudiced simply rejected the claim of the Applicant holding that it was not necessary to examine the depositors as the disciplinary proceedings is to be proved on preponderance of probability; (v) though the applicant had specifically taken the stand in page 3, sub paragraph 4 of his reply to the show cause submitted by

him before the Appellate Authority that there was no stamp in the Pass Book (PB), the entries made therein were not proved to be his signature, no proof of seizure of PB, no pay slip or counter foil of it, no witnesses to the entrustment of deposit and no credit certificate, without taking note of such point, the Appellate Authority issued the order of enhanced punishment. He has therefore, argued that since the basic requirements were not complied with, not only the orders of punishment but also the entire proceedings are vitiated.

7. As against this, the Learned Additional Standing Counsel 1 for the Respondents argued that the defence of delay in submitting the Charge Sheet is no more available to be urged by the applicant as considering the gravity of the offence this Tribunal did not interfere in the Charge in the earlier OA and directed the authorities to complete the proceedings by reinstating him IN service. Accordingly, the applicant was taken back to service vide order dated 20.12.2000 subject to the out come of the Disciplinary Proceedings initiated against him. As regards the sustainability of the order of the Disciplinary Authority, Mr. Jena, Learned ASC argued that principles of law are well settled that the Disciplinary Authority is not bound to accept the findings of the IO. He is free to come to his own findings after giving reasons and by a speaking order to be communicated to the charged official. Therefore, the disagreement notice analyzing the facts and evidences , along with the report of the IO was served on the applicant and on consideration of the reply submitted by the applicant

and all other records he imposed the order of punishment which needs no interference. The Respondents have also denied to have received any such appeal dated 24.02.2003 from the Applicant. As regards the order of the Appellate Authority, it has been argued that as per rules, an authority immediate superior to the authority passing the order, on review, may confirm, modify, set aside or pass such order as it deems just and proper. On review of the matter, when it was found by the Appellate Authority that the applicant committed fraud in 9 SB and 1 RD accounts to the tune of Rs.5,250/- permanently and Rs.9,400/- temporarily involving total amount of Rs. 14,650/- as detailed in Annexure-R/1, it was thought that continuance of such a fraudster is detrimental to the interest of the members of the public and their deposits in SB accounts are not in safe and, therefore, the Appellate Authority issued notice to the applicant asking him to file show cause as to why the order of punishment shall not be enhanced to that of 'removal'. It has been argued that though the depositors did not turn up to give their testimony before the IA, there was sufficient documentary evidence with required entries of the deposits in the Pass Books and receipt of deposits etc.. The Applicant had also admitted in writing of receipt of deposits during preliminary investigation before the SDI(P), Kendrapara. As regards the application of Rule, it has been argued that when the proceedings was started EDAs (Conduct & Service) Rules, 1964 were in existence but the said Rule was amended w.e.f. 2001. Accordingly, Rule 16 of ED (Conduct & Service) Rules, 1964 has been changed as Rule 19 of GDS (Conduct & Employment)

Rules, 2001. Since the previous rules are no more in existence, though the applicant was proceeded under Rule 8 of ED (C&S) Rules, 1964 he was called upon to submit defence as per provisions of Rule 19(iii) of GDS (Conduct & Employment) Rules, 2001. In regard to quantum of punishment, it has been argued that fraud of public money being serious in nature, it cannot be said that punishment does not commensurate with the gravity of offence. To say that the Tribunal cannot interfere with the punishment when the enquiry is conducted properly, the Respondents have also relied on the decision of the CAT, Bombay Bench made in the case of **Achut Laxman Bhawati v. Union of India and others** (130 Swamy's CL Digest 1994/2). With these reasons, the Learned ASC strongly, opposed the prayer of the Applicant.

8. To strengthen his arguments, Learned Counsel for the Applicant has relied on the following decisions:

(a) According to the Respondents, the alleged incident occurred between 10.12.1986 to 05.08.1991. For this incident, applicant was placed under off duty with effect from 26.07.1991 whereas charge was drawn and served him only on 05.07.1999 without any explanation for the delay in issuing the charge memo. He therefore, prays that in view of the decisions of **State of Madhya Pradesh v. Bani Singh and another** [AIR 1990 SC 1308], **State of**

Andhra Pradesh v. N. Radhakishan [AIR 1998 SC 1833], **Madan Mohan Mohanty v. State of Orissa and others** [OA No.171/2003 disposed of on 18/01/2005] and **K.L.Sharma v. Union of India and others** [OA No.304/1997, disposed of on 23.05.2003] the initiation of proceedings is void *ab initio*;

(b) Without analyzing the statements adduced/evidence produced, merely stating that in view of the 'oral and documentary evidence' the IO reached the conclusion that all the three charges against Shri Babaji Charan Parida is proved to the extent that the deposits on the relevant dates have not been taken into account is contrary to the law decided by the Hon'ble Apex Court in the case of **Sher Bahadur v. Union of India and others** [2002 SCC (L&S) 1028], **Kuldeep Singh v. The Commissioner of Police and others** [AIR 1999 SC 677] and by the Bangalore Bench in the case of **P.I.Chacko v. Union of India and others** [2003 (3) (CAT) 226];

(c) The report of IO is self-contradictory. When entrustment of money was not proved, question of taking the money automatically stands disproved.

This fact though urged by applicant, both the Disciplinary Authority as well as Appellate Authority failed to appreciate it;

(d) According to applicant reasons of disagreement notice given by the DA was on conjecture and surmises without discussing details. Appellate Authority also did not furnish any reason as to why he disagreed with the IO and the order of Disciplinary Authority and, therefore, the same is contrary to the decisions of the Hon'ble Apex Court made in the case of **Yoginath D. Bagde v. State of Maharashtra and another** [AIR 1999 SC 3734]; **S.B.I. and others v. Arvind K.Shukla** [AIR 2001 SC 2398] and in the case of **Bal Kishan v. Union of India and others** [1987 (3) SLR 863];

(e) By questioning the orders of DA as well as AA being bereft of any reason and liable to be quashed he has relied on the FULL BENCH decision of the CAT in the case of **Suresh B. Dave v. The Postmaster General and others** [(1992) 19 ATC 374(FB)]; of the Hon'ble Supreme Court in the case of **Chairman and Managing Director,**

United Commercial Bank and others v. P.C.Kakkar [2003 (4) SCC 364];

(f) Denial of opportunity of being heard in person by Disciplinary Authority as well as Appellate Authority before passing the order of punishment had prejudiced his interest and in defending his case, he has relied on the decisions of CAT, Ahmedabad Bench in the case of **Mahendra Doshi v. Union of India and others** (OA No. 219/01 disposed of on 23.04.2004- 2005 (1) (CAT) AISLJ 155); of the Hon'ble Supreme Court in the case of **Yoginath D. Bagade v. State of Maharashtra and another** [(1999) 7 SCC 739]; and in the case of **Smt. Khiralata Mohanta v. Collector, Keonjhar and three others** [2004 (I) OLR 327 at page 329];

(g) In the context of his averment that the Appellate Authority could not have awarded the enhanced punishment of dismissal while adjudicating his appeal, when there was no representation in this regard from the Disciplinary Authority, he has cited the ruling of the Hon'ble Supreme Court in **Makeshwar Nath Srivastava v. The State of Bihar & Ors.**, AIR 1971 SC 1106.

(h) Imposition of punishment by new rules makes the order void and for this contention, he has relied on the decision of the Hon'ble High Court made in the case of **Gayadhar Sahoo v. State of Orissa and others** [OJC No. 811/1990 disposed of on 26.04.1991].

9. Having given our anxious thoughts to the rival contentions of the respective parties, we have gone through the materials placed on record and the decisions relied on by the Learned Counsel for the Applicant.

10. Before proceeding to the merit of the matter, we may record that on interference in disciplinary proceedings, the power of Courts/Tribunals is no more res integra. The High Courts/Tribunals , while exercising the power of judicial review, cannot normally substitute their own conclusion on penalty and impose some other penalty. Court/Tribunal cannot interfere with the findings of fact based on evidence and substitute its own independent findings and that where the findings of the disciplinary authority or the Appellate Authority are based on some evidence the Court/Tribunal cannot re-appreciate the evidence and substitute its own findings. Observing further, the Hon'ble Apex Court in the case of **B.C. Chaturvedi v. Union of India,** 1996 SCC (L&S) 80 held that judicial review is not an appeal from a decision but a review of the manner in which the decision is made and that 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. It is trite law that Judicial review is not directed against the decision but is confined to the examination of the decision making process [1999 (l) SCSLJ 251=1999 (2) ATJ 227-**Apparel Export Promotion Council vrs. A.K.Chopra**. In the case of **Ranjit Thakur vrs. Union of India** (1987 (4) SCC 611) the Hon'ble Supreme Court of India interfered with the order of punishment after coming to the conclusion that the punishment was in outrageous defiance of logic and the punishment was shockingly disproportionate. Similar view was also taken in the case **of Indian Oil Corporation vrs. Ashok Kumar Arora** reported in 1997 (3) SCC 72. In the case of **Kailash Nath Gupta vrs. Enquiry Officer (R.K. Rai) Allahabad Bank and Others** reported in AIR 2003 SC l377 the Hon'ble Supreme Court upheld the decision of High court wherein it was held as under:-

> "the fact that a sum of Rs. 46,000/- has already been repaid and no loss was caused to the Bank .Though factual matrix was noticed to be different, yet it was held that the branch manager in a difficult situation had withdrawn the money and repaid with interest. There was no loss caused .Ultimately it was concluded that this was a fit case where the Board should be compassionate and gracious enough to reconsider employee's case to pass any other punishment other than dismissal, removal or termination".

11. It is settled law that the Court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and

to arrive at its own conclusion. **Judicial review is not an appeal from a decision but a review of the manner in which the decision is made**. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct (**State of Tamil Nadu and another vrs. S. Subramaniam** 1996 SCC (L&S) 627).

12. As regards the delay in issuing Charge Sheet the matter received due consideration of the Hon'ble Apex Court in the case of **State of A.P. vs. N.Radha Kisan** 1998(4) SCC 154 and while concluding the matter the Hon'ble Apex Court observed as under:-

> "...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". As the delay in framing of charge is over four years, there is no denying the fact that delay in initiation of disciplinary proceeding in this case is bound to give room for allegation of mala fide and misuse of powers."

13. In disciplinary proceedings, if the Charge Sheet has been framed based on no evidence or the findings are based on no evidence, in that case interference is permissible [**State of T.N. vs. S.Subramanianam** AIR 1996 SC 1232, **High Court of Bombay vs.**

Udai Singh 1997 SC 2786, **I O C vs Ashok Kr..Arora**, AIR 1997 SC 103].

14. Equally legal position is well settled that strict rules of evidences are not applicable to the departmental inquiries and every violation of procedure does not vitiate the inquiry [**R.S.Saini v. State of Punjab**, 1999 SCC (L&S) 424; **K.L.Shinde v. State of Mysore**, AIR 1976 SC 1080 = 1976 SLJ 468(SC): **Rae Bareli Kshetriya Gramin Bank v. Bhola Nath Singh and others,** AIR 1997 SC 1908 = 1997 (2) SLJ 126(SC); **Bank of India and Another v. Degala Suryanarayana**, 1999 SCC (L& S) 1036); **& Inspector General of Police v. Thavasiappan,** JT 1996(6) SC 540.

15. What principles of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the Courts will have to see is whether non observance of any of these principles in a given case is likely to have resulted in defeating the course of justice. Similarly, a broad distinction has, therefore, to be maintained between the decision, which are perverse, and those, which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse, but if there is some evidence on record which is acceptable and which would be relied upon, howsoever compendious it may be the conclusions would not be treated as perverse and the findings would not be interfered with.

16. We may remind ourselves of the principles, in point, crystallized by judicial decisions. The first of these principles is that disciplinary proceedings before a domestic Tribunal are of a quasi-judicial character; therefore, the minimum requirement of the rules of natural justice is that the tribunal should arrive at its conclusion on the basis of some evidence, i.e., evidential material which, with some degree of definiteness points to the guilt of the delinquent in respect of the charge against him. **Suspicion cannot be allowed to take the place of proof even in domestic inquiries**. It has been held by the Hon'ble Apex Court in the case of **Union of India vs. H.C.Goel**, AIR 1964 SC 364, that scrupulous care must be taken to see that the innocent are not punished applies to disciplinary enquiries held under the statutory rules. **Strict rules of evidence are not applicable to departmental enquiry proceedings**. The only requirement of law is that the allegation against the delinquent officer must be established by such evidence acting upon which a reasonable person acting reasonably and with objectivity may arrive at a finding upholding the gravamen of the charge against the delinquent officer. Mere conjecture or surmises cannot sustain the finding of guilt even in departmental enquiry proceedings ...[**Bank of India and another vs. Degala Suryanarayana**, AIR 1999 SC 2407]. It is equally well settled law that **in the matter of disciplinary proceedings the settled principle of law is not appreciation of evidence but what is permissible is to see that the case is of no evidence, finding based on suspicion and surmises, extraneous matter and whether the**

finding recorded passes the test of a common reasonable prudent man. Any evidence not admissible in law is to be discarded[**Kuldip Singh vrs. Commissioner of Police,** JT 1998 (8) SC 603.

17. In the case of **Rattan Lal Sharma vrs. Managing Committee Dr. Hari Ram (Co-education) Higher Secondary School and others** (1993) 4 SCC 10 it has been held that when the Inquiry Committee in conducting the departmental proceedings had left an indelible stamp of infirmity, then such proceedings cannot be upheld merely because higher authority later had approved its decision/findings. In other words, when the Inquiry Officer commits an illegality and irregularity, which left an indelible stamp of infirmity, then the Disciplinary Authority as well as the Appellate Authority cannot cure the same as it affects the basic foundation of such proceedings. In the case of **Indian Oil Corporation v. Ashok Kumar Arora** (AIR 1997 SC 1030) it has been held by the Apex Court that Court, in cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/authority. The jurisdiction of the Court in such cases is very limited, for instance where it is found that the domestic enquiry is vitiated because of the nonobservance of principles of natural justice, denial of reasonable opportunity, findings are based on no evidence and/or the punishment is totally disproportionate to the proved misconduct of an employee. This decisions have been reiterated in the case of **Union of India vrs. G. Krishna,** 2005 (3) ATJ 359).

18. Another fact of the matter is that when an employee is visited with the harsh/enhanced punishment of removal from service, it was incumbent upon the authorities to allow the opportunity of personal hearing which is also a part of the principles of natural justice. This view is fortified by the decision reported in **AIR 1971 SC 1409- 1998 SCC (L&S) 1601-** Opportunity of hearing was not given before punishment was bad. In the case of **Baradakanta Mishra Vrs. State of Orissa** AIR 1976 SC 1899 it has been held that if the order of the initial authority is void an order of the Appellate Authority can not make it valid.

19. Finally the Hon'ble Apex Court in the case of **Union of India and another vrs. G.Ganayutham** (Dead) by LRs reported in AIR 1997 SC 3387 have summarized the proposition of proportionality in administrative law in England and India and held under what circumstances the Court can interfere in the matter in the following manner:

> (1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various

alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.

(2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is not ruled out. These are the CCSU principles.

(3) (a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he has done;

(b) If the Convention is incorporation in English making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon;

(4) (a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority;

(5) (b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of

> 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Article 14".

20. From the above, it is crystal clear that the Tribunal is normally precluded from interfering with the findings of fact recorded at the domestic enquiry but if the findings of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny. Keeping the above parameter in mind, now we are to examine as to whether the punishment imposed on the applicant is based on evidence, after due compliance of natural justice and according to Rules/law.

21. Undisputedly, in this case, the applicant was placed under off duty w.e.f. 26.7.1991 and charges were framed and served on the Applicant on 05.07.1999. There was no satisfactory explanation given for such long delay, either in the charges or in the counter except general averments that the delay was caused due to completion of past verification work of applicant. The charges pertain to the period of 10.12.1986 to 26.07.1991. Therefore, it is inconceivable to accept the logic that it took near about 8 years to frame the Charge-Sheet. Thus, in our opinion the authority has been unfair with applicant and oblivious of principles of natural justice.

22. Secondly, the IO held that the charge is proved to the extent that of not taking the deposits on the relevant dates to the

Government Account but entrustment of money is not proved. A firm view could have been taken on the later part, had the depositor been summoned, examined and cross-examined. From the above, it is clear that the depositor was the vital witness in this case and non-examination of the vital/material witnesses certainly vitiates the enquiry (Ref: **Hardwari Lal v. State of U.P. and others**, 2000 SCC (L&S) 85; **Sri Mangal Singh v. Commissioner of Himachal Pradesh Govt.** 1975 (L) SLR 500 (HPHC); **Shri Hari Giri vs. Union of India through Secretary Ministry of Labor and others**, 1991 (2) ATJ 580).

23. In the case **of Lav Nigam v. Chairman & MD, ITI Ltd and another,** 2006 SCC (L&S) 1835 it has been held by the Hon'ble Apex Court (at paragraph 10 page 1836)as under:

> "10. The conclusion of the High Court was contrary to the consistent view taken by this Court that in case the disciplinary authority differs with the view taken by the inquiry officer, he is bound to give a notice setting out his tentative conclusions to the appellant. It is only after hearing the appellant that the disciplinary authority would at all arrive at a final finding of guilt. Thereafter, the employee would again have to be served with a notice relating to the punishment proposed".

24. But it is seen that this procedure has not been followed by the Disciplinary Authority while issuing the order of punishment to the Applicant.

25. Law is well settled that principles of natural justice are implicit in the Rules and even if any Rule relating to Disciplinary Proceedings and punishment does not incorporate these principles, the

same would be read as part of Rule by necessary implication. The aforesaid dicta has been settled by the Hon'ble Apex Court in the case of **State Govt. Houseless Harijan Employees' Association v. State of Karnataka and others**, 2001 (l) SCC 610.

26. Therefore, for the ends of justice, principles of natural justice demand that before taking any action, such as removal, dismissal, the Appellate Authority should have followed the same procedure as has been observed by the Hon'ble Apex Court in the case of Lav Nigam (supra).

27. We notice that the Appellate Authority did not afford any opportunity of hearing before imposing the harsh punishment of removal in exercise of power of Review. Denial of opportunity of being heard in person by the Disciplinary Authority/Appellate Authority before passing the order had certainly prejudiced the interest of the delinquent. Co-ordinate Bench of this Tribunal (Ahmedabad Bench) in the case of **Mahendra Doshi vs. Union of India & Ors.** (O.A.NO.219/01 disposed of on 23.4.2004)-2005 (1) (CAT) AISLJ 155 while discussing the rights of the delinquent official to be heard, taking support of the decision of the Hon'ble Apex Court in **Yoginath D. Bagade vs. State of Maharastra and another** (1999) 7 SCC 739 & the case of **Punjab National Bank v. Kunj Bihari Mishra** have held that the right to be heard would be available to the delinquent up to the final stage and this being a constitutional right of an employee, the same cannot be

taken away by any instructions including rules made under Article 309 of the Constitution.

28. Therefore, in compliance with the principles of natural justice, the Appellate Authority is required to follow the same procedure what has been held by the Hon'ble Apex Court in the case of Lav Nigam (Supra) to be followed by the Disciplinary Authority.

29. In paragraph 14 of the Counter the Respondents have stated as under:

> "...the Applicant committed fraud in 9 SB and one RD accounts to the tune of Rs.5,250/- permanently and Rs.9,400/- temporarily involving total amount of Rs.14,650/- as detailed in Annexure-R/1 to the counter. Continuance of such fraudulent GDS BPM is detrimental to the interest of the members of the public and their deposits in SB accounts are not safe with the applicant. As such, action by the Respondents are justified".

30. According to Respondents the Applicant has been put back to service vide order dated 20.12.2000 and he is continuing in service. It has not been brought to the notice of this Tribunal that he has committed any fraud during this period. Therefore, the presumption of the Appellate Authority that continuance of such fraudster is unfounded. But the Applicant has not been able to establish the contention that he has preferred any appeal.

31. However, an over all view of the case convinces us that there has been no illegality in the initiation of disciplinary proceeding. Besides the quantum of punishment ordered by the Disciplinary Authority does not appear disproportionate since lack of trust of an

employee by the employer if proved deserves stringent action. But the Appellate Authority before whom no appeal has been preferred has *suo motto* reviewed the case, come to a conclusion other than what has been reached by D.A. and has imposed higher punishment of 'removal' without giving adequate opportunity to the applicant to the extent discussed above.

32. Since the applicant has not preferred any appeal against the order of Disciplinary Authority, is implied that he has accepted the punishment imposed by the Disciplinary Authority and we do not wish to interfere with it. But the act of the Appellate Authority in exercising of power of review and enhancing the order of punishment to that of 'removal', without following due procedure of law as discussed above, has rendered his decision unsustainable. Thus, while retaining the order of punishment imposed by the Disciplinary Authority we quash the order of the Appellate Authority dated 13.01.2004 (Annexure-A/10).

33. In the result, this OA is allowed to the extent stated above. There shall be no order as to costs.

(N.D.RAGHAVAN)
VICE-CHAIRMAN

19/3/07
(B.B.MISHRA)
MEMBER(A)

KNM, PS.