CENTRAL ADMINISTRATIVE TRIBUNAL

ERNAKULAM BENCH

.....

DATE OF DECISION : 6-7-1990

PRESENT

Hon'ble Shri N.V.Krishnan, Administrative Member

And

Hon'ble Shri A.V.Haridasan, Judicial Member

O.A.200/89 & OAK.629/88

1. ORIGINAL APPLICATION No.200/89

D. Jayachandra Hermon ... Applicant

Versus

1. Divisional Engineer (IM)
Calicut.

2. Telecommunication District
Manager,
Calicut.

3. General Manager,
Telecommunications,
Trivandrum.

4. Union of India, represented
by Secretary, Ministry of
Telecommunications,
New Delhi.

5. James Paul,
Assistant Engineer(Phones)
Inquiry Authority,
Circle Telecom Store
Department,
Ernakulam,
Cochin-16. ... Respondents

Mr. O.V.Radhakrishnan .. Counsel for applicant

Mr. K.P.T. Thangal, ACGSC .. Counsel for respondents

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2. ORIGINAL APPLICATION NO.K.629/88

P. Raghavan ... Applicant

Versus

1. Union of India,
represented by Secretary,
Ministry of Communicatiog,
New Delhi.

2. The Director of Postal
Services,
Calicut Region,
Calicut.

3. Superintendent of
Post Offices,
Cannanore Division,
Cannanore. --- Respondents

Mr.M.K.Damodaran .. Counsel for the applicant

Mr. P.S.Biju, ACGSC .. Counsel for the respondents.

JUDGEMENT

(Shri N.V.Krishnan, Administrative Member)

The applicant in the first case, i.e. O.A.200/89, a Technical Supervisor in the C.T.O. Calicut, was compulsorily retired from service in disciplinary proceedings by the order dated 4.3.88 (Exhibit A-10) of the Telcom District Manager, Calicut (Respondent-2), the Disciplinary Authority-- D.A. for short. His appeal was rejected on 27th July, 1988 (Exbt. A-12) by the General Manager, Telephones, Kerala Circle, Respondent-3. Hence the applicant

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has challenged the aforesaid two orders.

2. The applicant in the second case, i.e. OAK 629/88, a Postmaster at Cannanore, was dismissed from service by the Superintendent of Post Offices, Cannanore, the 3rd Respondent, by his order dated 31.12.87 (Annexure-II). His appeal was dismissed by the Director of Postal Services, Calicut, the 2nd Respondent on 30th March, 1988 (Annexure-III). These orders are challenged.

3. In both the applications a number of grounds have been adduced in support of the challenge. One common ground is that though an enquiry was held by an Enquiry Officer--EO for short-- yet, before the D.A. finalized his decision about the guilt of the applicants, he did not furnish the applicants with a copy of the enquiry report. It is alleged that the applicants were thus denied an opportunity to make a representation against the findings in the enquiry. As the learned counsel appearing for the applicants contended that this was a sufficient and important ground to invalidate the further proceedings, in the light of the judgement of the Larger Bench of the Tribunal in Prem Nath K.Sharma Vs. Union of India (Bombay) 1988 (6) ATC 904, and as this issue went to the root of the matter, it was desired that this issue be first considered. Hence, both the applications were finally heard together on this issue.

4. Before proceeding further, it needs mention that Article 311(2) of the Constitution was amended by the 42nd Amendment Act. Before such amendment, a delinquent was given a reasonable opportunity of making representation on the penalty proposed by the D.A., but only on the basis of the evidence adduced during the enquiry. For this purpose, under the relevant ~~orders~~, rules he was given a copy of the EO's Report and he thus got an opportunity to also represent against the findings of the E.O. The amended Article 311 provided that the penalty may be imposed on the basis of the evidence adduced during such enquiry and it shall not be necessary to give the delinquent any opportunity of making any representation on the penalty proposed. Rules relating to departmental enquiry were also amended correspondingly.

5. In Prem Nath K.Sharma's case, the E.O. exonerated the applicant of all the charges. The D.A. declined to accept those findings and on 31.4.84 he passed an order removing the applicant from service without either giving to the applicant a copy of the report of the E.O. or hearing him in this regard. The appeal filed against this order was dismissed. The question raised before the Larger Bench was whether the order of the D.A. was bad in law because the applicant was not given a copy of the report of the E.O. and was not heard before the D.A. reached his

conclusions. The Larger Bench sitting at Bombay answered this question in the affirmative on 6.11.87. Its judgment was reported in April, 1988.

6. Following this judgement, a Division Bench of the Tribunal sitting at Bombay rendered a similar judgement in E.Bhashyam Vs. Union of India and others (1988 (6) ATC 863.) In this case, the E.O. had found the applicant guilty and this was accepted by the D.A. who imposed the punishment of dismissal, again without furnishing to the applicant a copy of the E.O's Report or giving him a hearing. In appeal, the findings of the D.A. were upheld but the punishment of dismissal from service was reduced to removal from service. Relying on the judgement in Prem Nath Sharma's case, the Bench set aside the impugned order of penalty imposed by the D.A.

7. It is relevant to add that the Bench also felt that the appellate order was defective as it was not passed after affording a personal hearing to the applicant. In this connection the Division Bench cited the following observations of the Supreme Court in the case of Ramchander Vs. Union of India 1986 (3) SCC 103:

> "It is not necessary for our purposes to go into the vexed question whether a post-decisional hearing is a substitute of the denial of a right of hearing at the initial stage or the observance of the rules of natural justice since the majority in Tulsiram Patel case unequivocally

lays down that the only stage at which a government servant gets "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him" i.e., an opportunity to exonerate himself from the charge by showing that the evidence adduced at the inquiry is not worthy of credence or consideration or that the charges proved against him are not of such a character as to merit the extreme penalty of dismissal or removal or reduction in rank and that any of the lesser punishments ought to have been sufficient in his case, is at the stage of hearing of a departmental appeal. Such being the legal position, it is of utmost importance after the Forty-Second Amendment as interpreted by the majority in Tulsiram Patel case that the Appellate Authority mustnot only give a hearing to the government servant concerned but also pass a reasoned order dealing with the contentions raised by him in the appeal. We wish to emphasize that reasoned decisions by Tribunals, such as the Railway Board in the present case, will promote public confidence in the administrative process. An objective consideration is possible only if the delinquent servant is heard and given a chance to satisfy the authority regarding the final orders that may be passed on his appeal. Considerations of fair play and justice also require that such a personal hearing should be given."

I will have occasion to refer to this observation later on.

8. Against the judgement of the Tribunal in Bhashyam's case, a Special Leave Petition was filed before the Supreme Court . By an order dated 11.3.1988 in that SLP, Union of India Vs. E. Bashyan(AIR 1988 SC 1000)

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the Bench was pleased to refer the S.L.P. to a Larger Bench. The decision of the Larger Bench is awaited.

9. It is also necessary to add that it is admitted that the decision in Prem Nath Sharma's case has been stayed by the Supreme Court by an interim order passed while admitting a petition seeking Special Leave to appeal against that judgement.

10. When these two applications came up for hearing, one of us (N.V.Krishnan, Administrative Member) had a doubt whether the impugned orders can be ~~(mechanically)~~ quashed on the basis of the judgement in Prem Nath Sharma's case on the ground - raised for the first time before the Tribunal - that the applicants were not given a copy of E.O's report before the D.A. took any final decision in the disciplinary proceedings-- non supply of EO's report, for short. The brief reasons for entertaining that doubt are as follows:

(i) If this was a real grievance it should have been agitated at the earliest opportunity and that can be only before the Appellate Authority.

(ii) When an applicant files an appeal he makes an issue out of every conceivable grievance he has against the EO's report as well as the manner in which and the grounds on which the DA has found him guilty. If that be so and if the applicant was really

aggrieved by the non supply of the EO's report this grievance should have been the most important one raised in the appeal.

(iii) Reasonable opportunity to the delinquent in a disciplinary proceeding consists of a number of ingredients or steps such as, an opportunity to cross-examine the departmental witnesses, an opportunity to adduce evidence in support of his defence, etc. If any of these opportunities are denied, the matter is specifically mentioned in the appeal memo. In fact, the memorandum of appeal in the first case is a brief document (Exhbt. A-11) mentioning four grounds. In the third ground, it is stated that the decision of the D.A. is, among other things, against the principles of natural justice, but no ground whatsoever has been given. A perusal of the appellate order at Annexure-A3 in the second case (OAK 629/88) shows that the applicant had raised six grounds ~~only~~ one of which was that the orders of the D.A. were not based on natural justice. However, the applicant did not indicate specifically in what respect natural justice was denied to him. Thus the non supply of the EO's report was not a grievance when the applicants filed their appeals.

(iv) Section 20 of the Administrative Tribunals Act 1985 stipulates that the Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant has availed himself of all the remedies available to him under the relevat service rules. Statutory appeal under the rules governing disciplinary proceedings is one such remedy. It naturally follows that in that proceeding, the applicant should put forward all the grounds on which he relies so that the competent authority can consider all aspects of the case before an order is passed and that applies to the non-supply of the EO's report as a ground.

11. It is also necessary to state that the Respondents have, however, not taken any objection that the applicants cannot be permitted to raise this ground before the Tribunal when they had not raised it before the appellate authority.

12. Further, in OAK 200/89 the applicant's attack based on this ground was not seriously contested. In the second case Shri P.S.Biju, the learned counsel for the Respondents opposed the application on merits in so far as this ground is concerned.

13. Elaborate submissions were made by Shri O.V.Radhakrishnan, the learned counsel for the

applicant in OAK 200/89 and by Shri M.K.Damodaran, the learned counsel for the applicant in OAK 629/88 that this ground can, in the circumstances of these cases, be raised for the first time before this Tribunal. Their submissions in brief are as follows:-

(i) The non supply of EO's report is a violation of the provisions of Article 311 of the Constitution and the principles of natural justice. This being a question of law, it can be raised at any stage.

(ii) Article 311(2) is a constitutional mandate which has to be observed by the employer, i.e. the D.A. The DA was bound to supply the EO's report. The non supply thereof renders the subsequent proceedings void. They cannot become valid merely because the plea is raised before the Tribunal only and not earlier.

(iii) Merely because the plea was not raised before the Appellate Authority it cannot be held that the applicant had waived his right to receive a copy of the EO's report.

(iv) The same principles regarding natural justice which govern the enforcement of Article 14 of the Constitution govern administrative proceedings involving civil consequences.

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14. Before proceeding further, an objection raised by the respondents' counsel in the second case has to be disposed of. He pointed out that in Kailash Chander Vs. State of UP (AIR 1988 SC 1338) the Supreme Court delivered judgement on 5th May, 1988 (i.e. after the judgement in Prem Nath Sharma's case) holding that the non-service of a copy of the Inquiry Officer's Report was immaterial. Therefore, he claimed, the present applicants can not contend that on this ground alone the impugned orders have to be quashed.

15. We have carefully perused that judgement. What was canvassed by Shri R.K.Garg, learned counsel for the petitioner in that case, was that non supply of the report of the Administrative Tribunal, i.e. the authority under the UP Disciplinary Proceedings (Administrative Tribunals Rules, 1947) which held the inquiry, has vitiated the subsequent proceedings, including the order of punishment. Para 5 of the judgement contains a reference to the Explanation under Rule 9(3) requiring "that a copy of the recommendation of the Tribunal as to the penalty should be furnished to the charged government servant."

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The Respondents pointed out, it is stated, that this Explanation was dropped after the 42nd amendment. The Supreme Court observed that after the amendment of Article 311 of the Constitution by the 42nd Amendment, it was not necessary for this report to be supplied. What is really meant and obviously is that there was no need to give a second opportunity to the applicant in respect of the penalty and supply him with a copy of the EO's report for that purpose. In our view this judgement does not lay down that, after the 42d amendment of the Constitution, the supply of the EO's report to enable the delinquent to make a representation against that report and establish his innocence--as distinct from a representation in regard to the quantum of penalty--is either not required or is immaterial. In fact this issue has not been considered therein.

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16. For the purpose of these two cases, we are accepting the position that, though the facts in Prem Nath Sharma's case are different (i.e. there was a disagreement on guilt between the EO and the DA) and though the judgement in that case has been stayed by the Supreme Court, nevertheless, the principles enunciated in them are binding on us. Therefore we are only concerned, at present, with the question whether the objection regarding non supply of the EO's report should have been raised before the appellate authority.

17. No doubt, it is a question of law and ordinarily it can be raised in any forum without even a pleading and hence the applicants contend that they have a right to raise the issue for the first time before us. That stand ignores the fact that the question would arise only if there is first an averment that the EO's report was not supplied, which is a question of fact. There should be a further averment that the applicants are seriously aggrieved by this non supply. Both being facts should have been raised at the earliest stage (appellate authority) to enable the legal question to be raised. In fact, if the government servant was, for example, not given an opportunity to present his defence, he would have raised it as a specific fact and grievance before

the appellate authority. Likewise, the grievance regarding non supply of EO's report should also have been raised.

18. The applicants, it would appear, did not have such a grievance when they filed their appeals. It cannot be that the judgement in Prem Nath Sharma's case creates in them, so to say, a grievance with retrospective effect, which they themselves did not feel then. While a judgement can expound the law, it cannot, in the circumstances of these cases, create a grievance, where none existed or was felt. Therefore, the law enunciated in Prem Nath Sharma's case supra will have only prospective effect unless the foundation therefor had been laid as a specific grievance at the earliest available opportunity, i.e. before the appellate authority.

19. I now proceed to consider the arguments of the applicants. The learned counsel for the applicants had cited a number of decisions. Many of them are only to the effect that the supply of the EO's report is an integral part of the reasonable opportunity given to the delinquent under Article 311 of the Constitution. I have taken note of only those decisions that have a bearing on the limited issue under consideration viz. whether the grievance before us should not have been raised before the

appellate authority.

20. The first ground concerns the directions given in Article 311(2) that before a person is dismissed or removed or reduced in rank there should be an enquiry in which he has been informed of the charges against him and given a reasonable opportunity for being heard in respect of those charges. Keeping this provision in view one can consider what would be the position if, for example, in an enquiry the delinquent was not given an opportunity to cross examine witnesses and he had not raised this as a specific ground in the departmental appeal/review? Would he be permitted to raise the issue before the Tribunal for the first time? I have no doubt in my mind that he would be expected to raise this issue before the appellate authority and if he failed to do so he forfeits his right to rely on this ground to assail the order passed in his case on that ground, despite the protection available under Article 311(2).

21. Further under section 20 of the Administrative Tribunals Act, 1985 an application can ordinarily be made before the Tribunal after exhausting all other departmental remedies which include the statutory appeals in disciplinary cases. If a delinquent government servant does not avail himself of that forum or does not place before the appellate authority all the grounds on which he seeks redressal of his grievances (such as,

for example, charges not having been framed or opportunity not given to adduce defence evidence etc.), it cannot be that he can file an application before the Tribunal on ground not raised before the appellate authority. The only exception to this is the case where the vires of any law, rule, direction, etc. is challenged. That ground alone can be raised before the Tribunal directly, as it cannot be decided by the appellate authority for want of competence. It is not as if that, even in these two applications, the statutory rules governing the conduct of disciplinary proceedings have been challenged on the ground that, to the extent that they do not provide for an opportunity to the delinquent to make a representation against the EO's report, before a decision on the charges is taken by the D.A. they are ultra vires Article 311(2). For that purpose also, they have to lay the foundation properly by stating that this opportunity was denied to them. That averment should have been made before the appellate authority as it was a grievance.

22. The next question is whether Article 311(2) can be compared with fundamental rights as far as waiver of right is concerned. What was argued was that the State and its authorities have, under the unilateral mandate entrusted to them under the said Article a duty to rigidly follow the provisions of Article 311(2) and confer

the protection envisaged thereunder to the delinquent, without its being asked for. Secondly, this being the case, the protection given to the goverment servant cannot be waived by him. The learned counsel, Shri O.V.Radhakrishnan, has cited the decision of the Supreme Court in Basheshar Nath vs. Income-tax Commissioner, AIR 1959 SC 149, which has a bearing on this issue. Article 14 reads as follows:

> "The State shall not deny to any person equality before law or equal protection of the law within the territory of India"

Noting its peremptory language, the Court observed that this Article is in the form of an admonition addressed to the State and does not directly purport to confer any right on any person, as some of other Articles eg. Article 19. After explaining the other features of this Article, the Court went on to observe as follows:

> "It seems to us absolutely clear, on the language of Art. 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every Welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct,

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> relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State."

23. Shri P.S.Biju, the learned counsel for the Respondents in O.A.629/88 has rightly pointed out that this conclusion of the Supreme Court was based on the specific terms of Article 14. There is no doubt that the tenor of Art. 14 is totally different from that of Article 311(2). Further, the latter is not an admonition addressed to the State, unlike Article 14. On the contrary, it is a provision which confers some rights on government servants such as the right to be informed of the charges against him and the right to be given a reasonable opportunity of being heard in respect of the charges before he is punished. Such a right can certainly be waived. For example, the delinquent can waive his right to adduce any evidence in his defence.

24. Therefore, there is no resemblance between Article 14 and Article 311(2) in this respect, i.e. competence of a citizen to waive his rights.

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25. Shri M.K.Damodaran, the learned counsel in the second case relied on the decision of Supreme Court in Maneka Gandhi Vs. Union of India (AIR 1978 SC 597) for the proposition that even in administrative proceedings which involves civil consequences, the doctrine of natural justice must be held to be applicable. He has drawn our attention to the observations made by the Hon'ble Hegde J. in A.K.Kraipak's case (AIR 1970 SC 150) which were reproduced in the judgement in Maneka's case. That extract is reproduced below to help examining the argument advanced in this connection.

> "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it.....Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Oftentimes it

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> is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. The University of Kerala (1969) 1 SCR 317: (AIR 1969 SC 198) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case."

26. It is not my view that natural justice should not permeate enquiries. What is at issue is (i) whether after the 42nd amendment of the Constitution, the natural right to receive a copy of the EO's report hasbeen withdrawn and (ii) whether the grievance that the EO's report was not furnished can be raised before the Tribunal for the first time without raising it before the appellate authority. I concede that as at present, the first part of this question has been concluded by the answer in Prem Nath Sharma's

case. As regards the second question, it is made clear in the above extract that this question has to be looked into only when a complaint is made before a court that some principle of natural justice had been contravened. That issue has been raised before us. The issue then is whether such a complaint should not have been made to the appellate authority which could have given the relief because the Rules do not prohibit the supply of the EO's report. That question is not answered by this argument of the learned counsel.

27. Connected with the issue of waiver is the submission by Shri O.V.Radhakrishnan counsel for applicant in the first case, that a right can be waived only if the party is first aware of the existence of such a right. He cites a decision of the High Court of Himachal Pradesh in Sansar Chand V. Union of India (1980 (3) SLR 124) in support of this contention. He submitted that the legal position about this right was quite nebulous after the 42nd amendment of the Constitution. Before such amendment the government servants got a copy of the EO's report because the D.A. had necessarily to give him that report to enable him to be heard on the penalty proposed

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to be imposed, which is the nature of the constitutional provision and protection. But that also gave an opportunity to the government servant to represent against the merits of the enquiry report itself--other than on the issue of penalty. By reason of this practice, the right to get a copy of the EO's report was always thought to be part of the second opportunity given by Article 311(2) to government servants. As the second opportunity was withdrawn by the 42nd amendment of the Constitution, the applicants genuinely believed that the right to represent against the Enquiry Report - as distinct from the penalty--had also been taken away by the 42nd amendment. It is for this reason that the applicants did not raise this ground before the appellate authority. That cannot be construed to be a waiver of a right because the applicant had no knowledge of this right until it was clarified in Prem Nath Sharma's case.and hence could not have waived any objection on this ground before the appellate authority. It was also contended that even the respondents were ignorant of the nicities involved in this regard till the position was clarified in Prem Nath Sharma's case.

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28. I have considered this plea carefully. This does not appeal to me for more than one reason:.

(i) In the first place, the right to be treated in accordance with the principles of natural justice is not specifically mentioned in any provision of the Constitution. It is enshrined in the concept of "reasonable opportunity" which is required to be given to a government servant under Article 311(2) of the Constitution for being heard in respect of the charges against him. Even after the 42nd amendment of the Constitution this provision of giving a reasonable opportunity remains. Therefore, all principles of natural justice associated with the reasonable opportunity to be heard in respect of the charges which existed before the amendment ~~continued~~ do exist even after the amendment of Article 311 in 1976. In any case, the applicant should not have desisted from raising the ground in appeal on his own presumption that the right to get a copy of the EO's report has also been withdrawn by that amendment. If there was even the slightest doubt in this regard, the applicant should have erred on the safe side by presuming that the 42nd amendment had in actual terms withdrawn only the

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reasonable opportunity of making representation on the penalty proposed.

(ii) Secondly, it is not correct to submit that even the respondents were not aware of the exact implication of the 42nd amendment in so far as it concerns the right to get a copy of the EO's report for making a representation against that Report, as distinct from the penalty. It would appear that the Union of India was fully aware of the position resulting from the 42nd amendment. This would become clear from a reading of the Supreme Court's judgement in Ramchander's case (AIR 1986 (3) SC 103). That judgement can leave no doubt that the intention of the 42nd amendment was to deny an opportunity to make a representation, both against the Enquiry Report and against the penalty. It is on that basis that the observations reproduced in para 7 supra were made that after the amendment, the earliest forum before which a government servant canrepresent about his innocence, after the enquiry is completed, is before the appellate authority. The mere fact that the respondents held this view is no extenuating ground. On the contrary, it is because of that view of the

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respondents, that the applicants should have canvassed the opposite view before the appellate authority, by adducing the non supply of the EO's report as a major grievance.

(iii) Thirdly the Supreme Court itself has clarified the scope of Article 311(2) of the Constitution on more than one occasion as follows:

— In AIR 1958 SC 300, Khem Chand Vs. Union of India, Article 311(2) as it then stood, (i.e. before the 15th amendment of the Constitution) was interpreted. It merely provided that the punishment of dismissal, removal or reduction in rank cannot be imposed "until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him." The content of the protection was explained as follows in the judgement dated 13.12.57.

> "(19) To summarise: the reasonable opportunity envisaged by the provision under consideration includes:
>
> (a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;
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> (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

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(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant."

— The judgement in AIR 1964 SC 364, Union of India Vs. H.C.Goel interprets the provision of Article 311(2) of the Constitution after the 15th amendment when the second opportunity was separately provided for. The following observations were made in this connection.

"It would thus be seen that the object of the second notice is to enable the public servant to satisfy the Govemment on both the counts, one that he is innocent of the charges framed against him and the other that even if the charges are held proved against him, the punishment proposed to be inflicted upon him is unduly severe. This position under Art. 311 of the Constitution is substantially similar to the position which governed the public servants under S. 240 of the Government of India Act, 1935. The scope and effect of the provisions of S. 240 of the Government of India Act, 1935, as well as the scope and effect of Art. 311 of the Constitution have been considered by judicial decisions on several occasions and it is unnecessary to deal with this point in detail, vide, Secy. of State v. I.K.Lal, 1945 FCR 103: (AIR 1945 FC 47) High Commr. for India v. I.M.Lal, 75 Ind. App. 225: (AIR 1948 PC 121) and Khem Chand v. Union of India, 1958 SCR 1080: (AIR 1958 SC 300)."

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--- Lastly, in State of Maharashtra Vs. B.A.Joshi (AIR 1969 SC 1302) the Supreme Court has observed as under:

> "It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases, indeed, in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer."

In fact, this judgement has been relied upon by the learned counsel of the applicant in the first case to show that the non-supply of the EO's report will cause great prejudice to the applicant. Indeed it should be so without an exception. If that be so, that is all the more reason to have ventilated this grievance in appeal. By not doing so, either it can be presumed that there was no grievance or that the grievance was waived.

These decisions show, without any doubt, that the supply of the EO's Report--no doubt, as part of the second opportunity to represent against the penalty--gives the government servant an opportunity to establish his innocence and represent against the adverse conclusions, if any, drawn in the Report. That takes me to the important point which I would like to stress which is that, as pointed out in Premnath K Sharma's case, out of the two matters on which representations could be made in the past before the 42nd Amendment - though,

no doubt, as part of the second opportunity - the said Amendment had really withdrawn only the opportunity to make a representation against the penalty. The other opportunity to establish one's innocence still remains. Further, even if there was a doubt, any prudent person would have erred on the safe side and asserted that the right to represent against the EO's report before the D.A. took a final decision had not been withdrawn by the 42nd Amendment to the Constitution and that it did not amount to making a representation against the punishment as such.

29. That was the case in OP 5181/85 - V.Sivarama Pillai Vs. Union of India and others filed in the High Court of Kerala - which was received on transfer by this Tribunal and registered as TAK 156/87. That application involved a similar issue. A copy of the enquiry officer's report had not been given to the delinquent before the disciplinary authority found him guilty and this ground was specifically raised before the appellate authority while challenging the Disciplinary Authority's order, as early as on 21st August, 1984, ie, long before the judgment in Premnath Sharma's case. As the appellate authority dismissed this plea and also rejected the appeal on other grounds too, the O.P. was filed. That TA was allowed on the single ground based on the judgment in Premnath Sharma's case that the DA's order finding the applicant guilty, without giving him a copy of EO's Report to him was ~~involved~~ invalid. Nothing prevented the applicant in those two cases also from raising this issue before the appellate authority. I am, therefore, unable to accept the argument that there were good and valid reasons for not raising the matter before the appellate authority. I am of the view that the applicants did not have a grievance on this score at that point of time. I am also of the view that the judgment in Premnath Sharma's case does not have the effect of creating a grievance in them restrospectively.

30. Then comes the plea that the D.A. having passed his final order without giving an opportunity to the applicants to represent against the E.O.'s report. and establish their innocence, the original order imposing penalty is ab initio null and void. I have carefully considered this submission. In the first place, this is not a contravention of any mandatory rule governing the conduct of disciplinary proceedings. Secondly, it is not as if that, after the ~~contemplation~~ completion of the enquiry the applicants specially requested the D.A. to supply them with a copy of the EO's report before he took a decision thereon and that such a request was turned down. In that event alone this plea would have had any force. The applicants did not even feel aggrieved by the non supply of the EO's report and did not raise this before the appellate authority. In these circumstances, the applicants can be considered to have waived their rights in this behalf and the non supply of the EO's report does not vitiate the proceedings to render them ab initio void.

31. Shri M.K.Damodaran, the learned counsel for the applicant in the second case has cited a decision of the Allahabad Bench of the Tribunal in Sain Singh Rawat Vs. Union of India /T988 (7) ATC 806/ to support the view that the plea raised for the first time before the Tribunal can be considered. The observations of that Bench are as follows:

> "We have carefully considered the submissions made by the learned Addl. Standing Counsel on behalf of the respondents and agreeing with the principles of law laid down in the rulings relied upon by him, we are, however, of the view that there cannot be a general law to the effect that no question of any kind whatsoever, which is not raised in the disciplinary proceedings, can be allowed to be raised subsequently before any court or Tribunal. The admissibility of such questions or objections has to be judged in the light of their nature in individual cases. For example, if due to ignorance or by oversight some jurisdictional point is not raised before the disciplinary authority or the appellate authority and it is later on found that in fact the disciplinary authority had no jurisdiction to act in the matter, the whole proceedings will be rendered invalid and such questions should be allowed to be raised in court/Tribunal when the validity of the disciplinary proceedings is challenged before it. On the other hand, if the question sought to be raised are questions of fact and do not raise any jurisdictional question, the same cannot be allowed to be raised for the first time in courts or Tribunals. In Kiran Singh v. Chaman Paswan/ (AIR 1954 SC 340) the Hon. Supreme Court had held that a decree passed by a court without

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jurisdiction is a nullity and its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon. The same principle should apply to the jurisdiction of an administrative officer who exercises quasi-judicial powers against the delinquent in disciplinary proceedings. In State of M.P. Vs. Syed Quamar Ali (1967 SLR 228), it was held by the Hon'ble Supreme Court that if an order of dismissal of a government servant is made in breach of a mandatory provision of the rules subject to which the power of punishment can be exercised, it is totally invalid and has no legal existence. It was further observed that it was not even necessary for the government servant to have such order set aside by the court. It will, therefore, be necessary to examine the substance of the objections raised on behalf of the petitioner against the authority of the General Manager and ADGOF and if it it is found that they had no jurisdiction to act in the matter, such question has to be allowed in this writ petition."

The decisions of the Supreme Court referred to are distinguishable. In one case, it was held that if the authority lacked jurisdiction, the lack of such authority is a matter which could be questioned at any stage. In the second case, it is held that an order in a disciplinary proceeding in breach of a mandatory provision of the rules in invalid. As neither lack of jurisdiction nor violation of mandatory rules is in issue in the present cases this principle has no application.

32. Shri M.K. Damodaran relies for the same proposition on a Supreme Court decision in Ram Kristo Vs. Dhan Kristo (AIR 1969 SC 204). That was a case where

the High Court of Patna had observed that the contention based on Section 27(1) of Regulation 3 of 1872 was raised for the first time in the course of arguments and hence this was disallowed. The Supreme Court pointed out that the said Section 27 provided that no transfer by a ryot shall be valid unless it has been registered in the record of rights and also that no transfer in contravention of this provision shall be recognised as valid by any civil court. As the language of Section 27 was peremptory, it was held by the Supreme Court that the High Court had to take notice of a contention based on that section, whenever it was made and was bound to examine the contention in the light of Section 27. That decision is based on the peculiar circumstances of that case, particularly the mandatory nature of the provisions of section 27. This does not advance the case of the applicant.

33. As pointed out earlier, the Respondents had not pleaded any objection on this ground in their reply affidavit. The learned counsel for the Respondents in the first case could not rebut, in the course of his arguments, the proposition made by the applicants' counsel that he was entitled to raise the issue of the non supply of the EO's report for the first time before this Tribunal.

34. Shri P.S.Biju, the learned counsel for the Respondents in the second case cited the decision of the Supreme Court in M.P.Srivastava Vs. Veena (AIR 1967 SC 1193) to contend that questions never raised in courts below cannot be allowed to be raised for the first time in appeal before the Supreme Court. That was a case relating to restoration of conjugal rights. It was observed by the Supreme Court that the appellant never argued in the court of first instance and the High Court that attempts proved to have been made by the Respondent to resume conjugal relations could not, in law, amount to satisfaction of the decree and hence he was not permitted to raise the plea for the first time before the Apex Court. The rationale of that decision is, no doubt, applicable, however, as the matter concerns the Apex Court it need be relied upon only as a last resort in other situations.

35. His reliance on the Supreme Court's judgement in Union of India vs. Parmanand [1989 (10) ATC 30] is misplaced because that judgement lays down the circumstances when the Administrative Tribunal can interfere with the punishment awarded by the competent authority in departmental proceedings. We are not at that stage in these cases.

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36. He has also cited the decision of the Supreme Court in S. Venkappa Vs. Rangu (AIR 1977 SC 890) that the decision of a case cannot be based on grounds outside the pleas of the parties. This was rendered in that case because the High Court, in appeal, took an entirely different view of the facts of the case and came to a conclusion that there was a benami transaction, which was neither pleaded nor was it the subject matter of the trial. This citation by the Respondents is inappropriate in the present case for, what is sought to be decided is only a question of law that is germane to the issue. It is also not the case that it is being decided behind back of the parties. Notice and elaborate arguments have been heard. has been given to both the parties/ That judgement is, therefore, not applicable for our present purposes.

37. Having disposed of the arguments advanced in this case by the parties, it is only appropriate to conclude this judgement by pointing out finally that in similar situations it has been held that objections of a similar nature should be raised at the earliest opportunity. The leading authority for this proposition is the Supreme Court's judgement in State of UP Vs. Om Prakash (1969 SLR 890). That

was a case in which the respondent, who was a Member of the UP Civil Service, was dismissed from service by an order dated 30th August, 1949 issued by the Chief Secretary of the Governmeb of the United Provinces, as it then was. Naturally, that was an order passed prior to the commencement of the Republic's Constitution. Against his dismissal, the respondent filed a suit which was dismissed. In appeal, the decree of the lower court was reversed by the High Court on various grounds, of which one was that the government servant was appointed by the Governor and therefore, he could not have been dismissed by the Chief Secretary, an authority subordinate to the Governor. It was against this decision of the High Court that the State of Uttar Pradesh, as it had then become, filed this appeal before the Supreme Court. Reversing the High Court's judgement, the following observations were made by the Supreme Court:

> "8. Reasonable Opportunity contemplated by s. 240 of the Government of India Act, 1935 as under Art. 311 (2) of the Constitution primarily consist of (i) opportunity to the concerned officer to deny his guilt and establish his innocence which means he must be told what the charges against him are and the allegations on which such charges are based; (ii) he must be given reasonable opportunity

to cross-examine the witnesses produced against him and examine himself or other witnesses on his behalf and (iii) he must be given opportunity to show cause that the proposed punishment would not be proper punishment to inflict which means that the tentative determination of the competent authority to inflict one of the three punishments must be communicated to him.

"9. All these requirements have been substantially complied within the present case. It is true that an enquiry under s. 240 of the Government of India Act must be conducted in accordance with the principles of natural justice. But those principles are not embodied principles. What principle of natural justice should be applied in a particular case depends on the facts and circumstances of that case. All that the court have to see is whether the nonobservance of any of those principles in a given case is likely to have resulted in deflecting the course of justice. In the present case so far as the first charge is concerned, the fact that the respondent was not given full opportunity to cross-examine Hafiz Habib Beg could not have in the least affected the finding of the enquiry officer as it was primarily based on the admissions made by the respondent. The High Court was not right in its conclusion that the report of the enquiry officer had not been made available to the respondent before he was called upon to show cause against the proposed punishment. A summary of that report had been given to him when he asked for it for the purpose of submitting a memorial to the Government against the order made in ~~1946~~ 1946 (sic) dismissing him from service. It is not shown that that summary did not contain all the relevant facts

and circumstances taken into consideration as well as the conclusions reached by the enquiry officer and the recommedations made by him. The entire records of the enquiry were before the courts in proceedings commenced by the respondent in 1948 and quite clearly it would have included the report of the enquiry officer. Further it was open to the respondent to ask for a copy of that report when he was asked in 1949 to show cause against the proposal to dismiss him. He did not do so nor did he object to the notice calling upon him to show cause why he should not be dismissed on the ground that he had not been supplied with a copy of the report made by the enquiry officer. The learned judges of the High Court were wholly wrong in holding that there was no proof to show that Mr. Bishop had been appointed to enquire into the allegations. No such plea had been taken in the plaint. There is a presumption that official acts had been done according to law."

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"14. The conclusion of the High Court that the respondent was appointed by the Governor and therefore he could not have been dismissed by the Chief Secretary, an authority lower in rank than the Governor is based on no pleadings. No such allegation was made in the plaint nor any issue raised in that regard. The plaintiff did not lead any evidence to show that he had been appointed by the Governor. The contention that he was dismissed by an authority lower in rank than that appointed him was not urged before the trial court. That contention appears to have been taken for the first time in the High Court. The High Court should not have entertained that contention. Under s. 241 of the Government of India Act, 1935, appointments to the Civil Service ad Civil Posts in connection with the affairs

> of a Province could have been made by the Governor or such person as he might have directed. The material on record does not afford any basis for the conclusion that the respondent was appointed by the Governor. Therefore the High Court, in our opinion, was wholly wrong in holding that the respondent was dismissed by an authority lower in rank than that appointed him."

38. What has been stated therein with reference to section 240 of the Government of India Act, 1935, which applied to that case, is also true of the Article 311(2) of the Constitution. This judgement should set at rest the doubts raised in this regard which have been considered in the preceding paragraphs. For, the following important conclusions can be drawn from this judgement.

(i) Even in a circumstance where the delinquent has to be given an opportunity to show cause against the proposed punishment, he can not challenge the disciplinary proceedings on the ground that only a summary of the EO's report was given to him without first complaining that either the summary did not contain all details or that though he asked for a full copy of the report it was not given to him. The proceedings cannot be treated as void on this ground without any grievance being made by the applicant.

(ii) It is clear that if there was no objection at the appropriate level, that plea cannot be raised

before any higher Tribunal.

(iii) Para 14 of the judgement shows that even an alleged violation of Article 311(1) (i.e. dismissal by an authority subordinate to the appointing authority) can not ipso facto render the proceedings void, unless that contention is raised before the trial court at the earliest instance.

(iv) Therefore, Article 311(2) is a far far cry from Article 14 and the observations made by the Supreme Court in relation to Article 14 cannot be made applicable to Article 311(2) without considering the individual merits of the case.

39. Another similar case is Amritlal Vs. Collector, CEC, Revenue (AIR 1975 SC 538) where the petitioner had alleged that he was not given promotion to the senior grade although he satisfied all the required conditions of service and that by giving promotion to others, unjustifiable preference was given to them, thus violating Article 16 of the Constitution. In that case it was held by the Supreme Court that before a Writ Petition under Article 32 was filed it was necessary to make a representation to government against the violation of the petitioner's right. It was observed as follows:

> "In the petition of KN Kapur and others, we do not even find an assertion that any

representation was made against any violation of a petitioner's right. Hence, the rule recognised by this Court in Kaminy Kumar Das V. State of West Bengal (AIR 1972 SC 2060) at p.2065 that a demand for justice and its refusal must precede the filing of a petition asking for direction or Writ of Mandamus, would also operate against the petitioners."

40. Kaminy Kumar Das referred to in the above judgement was a Sub Inspector of Police in West Bengal who was dismissed by the Deputy Commissioner of Police, Calcutta for dereliction of duties. His appeal and memorial having been dismissed he filed a petition before a learned Judge of the Calcutta High Court which was dismissed on two preliminary grounds, viz., inordinate delay and that the objection to the jurisdiction of the D.A. was not taken in the course of departmental proceedings and, therefore, could not be allowed to be raised before the High Court for the first time. In appeal, though a Division Bench was disposed to hold that the principles of natural justice have been violated, yet the appeal was dismissed principally on the ground of delay. It is against the D.B's judgement that an appeal was filed before the Supreme Court.

41. In para 11 of their judgement (AIR 1972 SC 2060) dismissing this appeal the Supreme Court observed as follows:

"We may mention that the Division Bench of Calcutta High Court had, treating the case as one for a mandamus to reinstate the appellant,

relied upon the statements in Halsbury's Laws of England, Third Edition, Vol.11, page 73 article 133 that "except in a case where the delay is accounted for, Mandamus will not be granted unless applied for within a reasonable time after the demand and refusal" The Division Bench had also referred to Ferris on "Extraordinary Legal Remedies (page 228), to hold that not only, on an analogy from the Statute of Limitation in civil cases, a reasonable period may be indicated for applications for Writs of Mandamus, but relief may be refused on the ground of acquiescence and presumed abandonment of the right to complain inferred from inordinate delay. It rightly observed that laches is a well established ground for refusal to exercise the discretion to issue a Writ."

42. It is this rule that has been referred to in Amritlal's case (AIR 1975 SC 538) vide the extract of judgement reproduced in para 39 .

43. The decision of the Supreme Court in Om Prakash Gupta's case was followed by the Delhi High Court in Union of India Vs. Ravi Dutt [1973 (1) SLR 122]. Para 23 of the judgement which is self explanatory is reproduced below:

> "23. <u>The next ground which found favour with the lower appellate court was that a copy of the finding of the enquiry officer was not given to the respondent. It is a common case that a copy of the findings of the enquiry officer was not sent along with the show cause</u>. The show cause was sent to the plaintiff through A.S.I. Narinder Singh but the same was refused by the plaintiff

who was in then in jail as he maintained that he was outside the police jurisdiction. The second attempt was also made by the disciplinary authority to serve him with the show cause notice but again the same was refused. Ultimately the show cause was sent and received by the plaintiff who was in the Central Jail. It is admitted by the counsel for the respondent that the show cause ultimately did reach him. It is also not disputed that he never asked for a copy of the findings of the enquiry officer the mention of which was made in the copy of the show cause notice. It is also not disputed that no reply was given by the respondent to the show cause. Mr. Sehgal, however, sought to contend that even if he never asked for the enquiry report it was the duty of the disciplinary authority to send a copy of the findings of the Enquiry Officer because in the absence of the copy of the findings he was prejudiced in his defence. In our view the argument is misconceived. The right of the government servant extends to being given a reasonable opportunity to meet the charge against him. If the respondent had on the receipt of the show cause asked for a copy of the findings of the enquiry officer and the same had been refused we have no doubt that the same would amount to denial of reasonable opportunity. But when in the present case the respondent never chose to ask for a copy of the findings of the enquiry officer and there is no requirement of the rules that the authorities should on their own send a copy. We cannot see how any grievance can be made that the same was not supplied. In this connection a reference may be made to State of U.P. v. Om Prakash Gupta (1969 SLR 890) where a similar argument was repelled by the lordships of the Supreme Court that where rules did not require

> the Government servant to ask for a copy of the report when he was asked to show cause against the proposed punishment of dismissal and since he did not do so nor did he object to the notice calling upon him to show cause why he should not be dismissed on the ground that he had not been supplied with a copy of the report made by the enquiry officer, the grievance had no substance."

That is a stronger case because not even a summary was supplied and that too before the 42nd amendment of the Constitution had come into force. Hence, the grievance is all the more strong and yet the Court held that this is a right, which if not given, does not ipso facto vitiate the proceedings. It should be raised as a grievance without which the disciplinary proceedings cannot be assailed.

44. I am, therefore, of the view that though the law has been expounded in Prem Nath Sharma's case it does not necessarily mean that in cases where a copy of the EO's report had not been supplied to the delinquent before the D.A. came to take any decisions about the charges, the proceedings should, necessarily be treated as invalid. The delinquent should really have experienced a grievance on this account and he should have raised this issue in his appeal to the Appellate Authority, before whom alone he could have raised this matter for the first time

after the 42nd amendment. If he had not done so, it would normally be presumed that he did not have any grievance on this score or even if he had any, he had waived it. He cannot be permitted to raise that plea before either the High Court, in the case of State Government employees, or before the Central Administrative Tribunal, in the case of Central Government employees.

45. It is only necessary to point out for the purpose of record that while Prem Nath Sharma's case was decided on 6.11.87 the penalty order in the first case was passed on 4.3.88 and in the second case on 31.12.87. Therefore, in both these cases the issue regarding non supply of the EO's report could theoretically have been raised before the appellate authority even on the basis of the judgement in Prem Nath Sharma's case. However, that judgement was reported only in April 1988, but as the appellate order in the first case was passed only on 27th July 1988 the issue could still have been raised. In the second case, the appellate order was passed on 30.3.88 sometime before the publication of the judgment in Prem Nath Sharma's case and therefore the applicant therein could not have raised this issue. However this is immaterial. The applicants could still contend that this matter may be raised before this Tribunal as a pure question of law. I also feel that irrespective of whether the impugned

appellate order had been passed before or after the judgement in Prem Nath Sharma's case, the disciplinary proceedings cannot be questioned on the ground of non supply of the EO's report unless the applicants had raised this as a grievance before the appellate authority.

46. For the reasons mentioned above, I am of the view that the two applications cannot be allowed on the aforesaid ground which, otherwise, would have gone to the root of the matter and rendered unnecessary decision on merits on other grounds. The applications have to be rejected in so far as this ground is concerned. I would accordingly direct that the cases be heard on merits in respect of other grounds adduced by the applicants.

6/7/90

(N.V.Krishnan)
Administrative Member

(Shri AV Haridasan, Judicial Member)

47. Having gone through the instructive and rather exhaustive discussion by my Learned Brother on the preliminary issue in these cases namely, whether the impugned penalty orders in these 2 cases should be struck down and the proceedings be remitted to the disciplinary authority to the stage of furnishing copies of the enquiry reports to the applicants who are the delinquent Government servants in these cases, on the basis of the decision of the Larger Bench of the Tribunal in Premnath K Sharma's case I find it impossible to persuade myself to agree with the conclusion arrived at. That has necessitated this brief note.

48. The undisputed facts obtaining in these 2 cases are that copies of the enquiry reports were not supplied to the applicants before the disciplinary authorities took final decisions on the basis of the reports and evidence adduced before the inquiry authority and that the applicants had not in the appeal memoranda raised the plea that the non-supply of the inquiry report has resulted in prejudice to them though they had raised the plea that the decisions of the disciplinary authorities were bad for non-observance of principles of natural justice. My Learned Brother has rightly observed that though the Supreme Court has in the SLP stayed the operation of the order in Premnath K Sharma's case, the principles enunciated in that decision are still binding on us, rightly distinguishing the decision of the

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Supreme Court in Kailash Chander V. State of U.P.(AIR 1988 SC, 1338) on facts. However, on the ground that the applicants did not raise the grievance that the non-supply of the EO's reports before the disciplinary authorities took final decisions regarding their guilt has resulted in prejudice to them as grounds in appeals my Learned Brother is of the view that they cannot be permitted to urge that ground before this Tribunal for the first time, and that their not raising this ground before the appellate authority would lead to a presumption that they did not have any such grievance or that even if they had any such grievance, the same had been waived.

49. It is a well established principle that a question of law can be raised at any stage and argued even without a pleading. My Learned Brother has adverted to this principle in paragraph 17 of his discussion. But it has been observed by my Learned Brother that the question of law arises only out of assertion of the facts of non-supply of the EO's report and the further assertion that the applicants were seriously prejudiced by the non-supply. It has been observed that if these two facts are not averred before the appellate authorities, it is not permissible to raise it for the first time before this Tribunal. But as observed at the outset, it is an undisputed fact that copies of the EO's reports were not furnished to the applicants before the disciplinary authorities took decisions on the question of guilt of the applicants. So that ceases to be a disputed question of fact.

50. Then the further question is whether the non-supply of the copies of the reports has resulted in prejudice is a fact to be pleaded and if not pleaded will it preclude the affected party from raising it as a question of law before the Tribunal. The necessity of giving a copy of the EO's report to the delinquent Government servant before the disciplinary authority decides whether the delinquent is guilty or not basing on the report is to give the delinquent Government servant an opportunity to bring to the notice of the disciplinary authority the infirmities, if any, in the proceedings and also to point out the paucity or insufficiency of evidence to come to a finding that he is guilty. This opportunity definitely is a part of the reasonable opportunity to defend. That is why it has been held that the non-supply of the copy of the EO's report before deciding about the guilt of the delinquent vitiates the proceedings from that stage. So if the furnishing of the copy of the EO's report is essential to meet the principles of natural justice in a disciplinary proceedings, then non-supply of the same will naturally amount to denial of reasonable opportunity thereby violating the principles of natural justice.

51. There may be exceptional cases where even non-supply of the EO's report might not have caused prejudice. But such cases will be very very rare. In State of Maharashtra V. B.A.Joshi(AIR 1969 SC, 1302) referred to by my Learned Brother in paragraph 28 (page 27) of the discussion

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it has been observed as follows:

> "It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases, indeed, in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer".

Referring to the above observation of the Supreme Court, my Learned Brother said that non-supply of the EO's report would cause prejudice to the delinquent and that it should be so without an exception in all cases. But my Learned Brother has further added that, if prejudice would be caused by non-supply of the EO's report, it is all the more a strong reason why the aggrieved parties should raise that grievance in appeal and that if such a grievance is not raised in appeal, it should be presumed that there was no such grievance or that the right was waived. The fact that the applicants in these cases did not state in the memoranda of appeal that prejudice was caused to them on account of the non-supply of the EO's report cannot, in my view, be used as an obstruction for them to raise the plea that the principles of natural justice have been violated on account of the non-supply of the EO's report. It is not disputed that both the applicants had raised a ground in their appeal memoranda that the disciplinary authorities concerned had not observed the principles of natural justice. If the applicants were given a personal hearing before the appellate authorities probably they would have explained in what way the principles of natural justice were violated. The mere omission to state

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the facts which constituted the violation of principles of natural justice cannot in my view preclude the applicants from raising that plea before us.

52. The observation of my Learned Brother is that since the applicants did not raise the grievance that non-supply of the EO's report has caused prejudice to them, it has to be presumed that there was no grievance. I am of the view that no such presumption can be drawn. As observed by their Lordships in State of Maharashtra V. B.A.Joshi's case

> "... it would be in a very rare cases, indeed, in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer".

A presumption has to be drawn in favour of the larger or the stronger probability than the lesser or rarer probability. Since it would be only in very rare cases that prejudice would not be caused no presumption that no prejudice has been caused can be legitimately drawn by the mere fact that the applicants had omitted to mention in the memoranda of appeal that prejudice has been caused to them while the fact that EO's reports have not been furnished to them remain a fact undisputed.

53. Further, the question of waiver also does not arise. We are considering the question whether the non-supply of the EO's report has vitiated the proceedings and not only whether the appellate order is right or not. If the non-supply of the EO's report vitiate the proceedings then a subsequent omission by the applicants to raise this as a ground in the appeal could not and would not validate

the vitiated proceedings. The position will be different if an extract of the report of the E.O. alone was given or if without giving a copy of the EO's report the applicants were asked to say whether they have got anything to say about the EO's report and if the applicants either furnished a reply or failed to furnish a reply and did not raise an objection that no decision can be taken without furnishing the full text of the EO's report then it could be said that the applicants have waived their right to get a copy of the EO's report and that therefore no prejudice has been caused to them.

54. In State of U.P. v. Omprakash(1969 SLR 89) quoted by my Learned Brother in paragraph 38 of his discussion and relied on by him to reach a conclusion that the non-supply of the report to the delinquent Government servant would not invalidate the proceedings, the facts were different from the case on hand. In that case a summary of the report was given to the Government servant. It was not shown that the summary did not contain all the relevant facts and circumstances taken into consideration as well as the conclusions reached by the enquiry officer. It was also open for the Government servant to ask for a copy of the report when he was asked to show cause against the proposal to dismiss him. He did not do so and he did not object to the notice calling upon him to show cause why he should not be dismissed, on the ground that what was supplied to him was not a copy of the report of the E.O. It was in such circumstances that the Supreme Court held that no prejudice

was caused to the delinquent concerned in that case. But in these cases the extracts of the EO's report also were not given. They were not even asked whether they had anything to say about the EO's report or about the evidence recorded at the enquiry. Therefore, as the facts of the case in Omprakash's case are different from the facts of these cases the reliance placed to reach the conclusion that no prejudice has been caused to the applicants by the non-supply of the EO's report cannot said to be well founded.

55. Another conclusion drawn by my Learned Brother seeking support from the decision of the Supreme Court in Omprakash's case is that:

> "... even in alleged violation of Article 311(1) (i.e. dismissal by an authority subordinate to the appointing authority) cannot ipso facto render the proceedings void, unless that contention is raised before the trial court at the earliest instance."

The finding of the Supreme Court was based on the fact that the delinquent in that case had not pleaded that he was appointed by the Governor, and that the authority who passed the order of removal from service was lower in rank, so that the authority who passed the order of removal was subordinate to the appointing authority was a question of fact which was not pleaded. Such a dispute on fact is not there in these cases. So the reliance placed on the ruling also is not very sound.

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56. To say that from the conduct of the applicants in not raising the case that non-supply of EO's report caused prejudice to them, it has to be taken that they had no such grievance or that the grievance has been waived to my mind appears to be being hypertechnical. It is true that in Premnath K Sharma's case the law was only explained and that the decision by itself did not create any right and that if the rulings of the Supreme Court on the question of what is reasonable opportunity if properly understood there would have been no doubt as to the fact that the right to get a copy of the EO's report and an opportunity to make representation against it is still intact even after the 42nd Amendment of the Constitution. But inspite of that, it is strange to see that in majority of the disciplinary proceedings, prior to the judgement in Premnath K Sharma's case, copies of the EO's reports were not supplied to the delinquents prior to the decision regarding their guilt by the disciplinary authorities. Even in these cases which arose after the decision in Premnath K Sharma's case, the contention taken by the respondents before us is that as per rules 15-IV, it is not necessary to give a copy of the report before imposing penalty and that therefore there is no merit in the contention that the non-supply of a copy of report has vitiated the proceedings. So, even now responsible officers of the Government hold the view that the delinquents have no right to obtain a copy of the report before a decision is made by the disciplinary authority

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on the question of their guilt. Such contentions are raised by them even before the High Court and the Tribunals where they are represented by Standing Counsel. That being the case with the Government it is harsh to hold that not raising such a grievance in the appeal preclude the delinquent to raise it as a question of law before the Tribunal for the first time.

57. It is well settled that principles of natural justice have to be observed even in administrative orders involving civil consequences. In State of Orissa V. Dr(Miss) Binapani Dei (AIR 1967 SC, 1269) Supreme Court has observed that non-compliance of natural justice may vitiate administrative orders even if prejudiced caused to the aggrieved persons is not specifically established because non-observance of natural justice is by itself proof of prejudice. Lord Denning M.R has in Annamunthodo V. Oilfied Workers & Trade Union (1961) 3 All ER 621, 625 observed

> "Counsel for respondent Union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it. Their Lordships cannot accept this suggestion. If a domestic Tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the Courts. It is a prejudice to any man to deny justice".

Quoting this the Supreme Court in SL Kapoor V. Jagmohan (1980 4 SCC 379 observed

> "In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independent by of proof of denial of natural justice is unnecessary".

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58. Hence in my view, as the undisputed fact is that copies of the enquiry reports were not furnished to the applicants before the disciplinary authorities decided that the applicants were guilty there is proof of denial of natural justice, and without prooving separately that prejudice was caused, this question of law can be agitated by the applicants for the first time before the Tribunal. Hence, I disagree with the view expressed by my Learned Brother that the disciplinary orders cannot be held to be vitiated on the grounds of non-supply of the EO's report to the applicants before the disciplinary authority decided the question of their guilt, and that the application as far as that ground has to be rejected. On the other hand, I am of the view that as the disciplinary proceedings are vitiated for non-observance of natural justice the impugned punishment orders have to be quashed and set aside and that the respondents may be given liberty to recommence the proceedings from the stage of receipt of the EO's report by the disciplinary authority and to complete the same after furnishing copies of the reports to the applicants and affording them opportunities to make their representation, in accordance with law.

(A.V.HARIDASAN)
JUDICIAL MEMBER
6.7.1990

6/7/90

...56/-

Order of the Bench

59. There has been some delay in the pronouncement of judgement in this case due to the fact that one of us (Shri NV Krishnan) was on long leave on medical grounds.

60. In view of the fact that it has not been possible for us to render a unanimous judgement it has become necessary to take action under Section 26 of the Administrative Tribunals Act of 1985.

61. The point of difference between us relates to the circumstance in which a government employee found guilty by the Disciplinary Authority can impugn that finding on the basis of the judgement of the Larger Bench of the Tribunal in 1988(3)SLJ(CAT)-449 Premnath K Sharma Vs. Union of India and others wherein it was held as follows:

> "For the aforesaid reasons, we hold that the findings of the Disciplinary Authority are bad in law because the applicant was not given a copy of the report of the Enquiry Officer and was not heard (given an opportunity of making his representation) before arriving at the finding."

The issue before us is whether, if the plea that a copy of the report of the Enquiry Officer was not given to the delinquent government servant had not been taken before the Appellate Authority, that plea can be taken for the first time before this Tribunal for seeking a direction

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to quash the findings of the Disciplinary Authority. On this issue we have rendered different judgements. Hence the Registry is directed to refer the case to the Hon'ble Chairman, Central Administrative Tribunal for necessary action under Section 26 of the Administrative Tribunals Act of 1985.

62. Copies of our judgements along with a copy of the Order of the Bench may be served on the parties before action as directed above is taken.

6/7/90

(A.V.HARIDASAN)
JUDICIAL MEMBER

6/7/90

(N.V.KRISHNAN)
ADMINISTRATIVE MEMBER

6.7.1990

CAT/3/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

~~ERNAKULAM~~
Ernakulam

O.A. No. K 629/88 & ~~198~~
~~T.A.~~ No. 200/89

DATE OF DECISION 19.10.90

1. P. Raghavan Petitioner (in OA K 629/88)
1. D. Jayachandra Hermon (in OA 200/89)

Mr. M. K. Damodaran Advocate for the Petitioner(s)
Mr. O.V. Radhakrishnan

Versus

1. UOI (M/Communications) & others Respondent
1. Divl. Engineer (I.M), Telecom. & others.

N. N. Sugunapalan, SCGSC Advocate for the Respondent(s)
TPM Ibrahim Khan

CORAM :

The Hon'ble Mr. G. Sreedharan Nair, Vice Chairman (J)

The Hon'ble Mr.

1. Whether Reporters of local papers may be allowed to see the Judgement? X
2. To be referred to the Reporter or not? yes
3. Whether their Lordships wish to see the fair copy of the Judgement? X
4. Whether it needs to be circulated to other Benches of the Tribunal? yes

MGIPRRND—12 CAT/86—3-12-86—15,000

19/X

HON'BLE SHRI G. SREEDHARAN NAIR, VICE CHAIRMAN (J)

This matter comes up before me on a reference made by the Hon'ble Chairman under section 26 of the Administrative Tribunals' Act.

2. The two applications O.A.K. 629/88 and O.A. 200/89 were heard together by a Division Bench of this Tribunal. In both of them the attack is against the order of the disciplinary authority imposing a penalty in accordance with the C.C.S. (C.C.&A) Rules, for short the Rules. In O.A. 200/89, the penalty is one of compulsory retirement while in the other O.A. it is dismissal from service. Both these are penalties which fall within the scope of clause (2) of Article 311 of the Constitution of India, so that it cannot be imposed except after an enquiry and giving the Government servant a reasonable opportunity of being heard in respect of the charges. In a case where the enquiry is not held by the disciplinary authority itself but by an enquiry officer appointed by him, before the disciplinary authority arrives at ~~the~~ a conclusion of the ~~proceedings to the imposition~~ truth of the implications against the Government servant, ~~should~~ and imposes one of the penalties contemplated under clause (2) of Article 311 of the Constitution of India, the furnishing of a copy of the report of the Enquiry Officer forms part of the affording of reasonable opportunity contemplated under the clause. This proposition has been laid down in a number of decisions of this Tribunal and has gained

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recognition in the decision of the Full Bench of the Tribunal in P. K. Sharma's case. Indeed, the Division Bench that heard these cases has followed that proposition.

3. The issue on which the difference has arisen between the Hon'ble Members who constituted the Bench is whether it is open to the Government servant to raise the plea of non supply of copy of the report of the Enquiry Officer and resultant violation of the principles of natural justice in a case where he has not taken up that plea before the appellate authority constituted under the Rules, when an appeal as prescribed under the Rules has been filed by him. On this question, while one of the Hon'ble Members has held that the Government servant cannot be permitted to raise this plea in such a case, the other Hon'ble Member has held that being a pure question of law, there is no bar to the same being agitated for the first time before the Tribunal.

4. It is settled that even in a second appeal from the decision in an original suit, ~~the~~ a pure question of law can be raised for the first time, and even in a case where the decision on the question has to depend on facts, if such facts are clearly established ~~without controversy~~ from the records before the court. It is to be noted that while a second appeal from the decision in a suit is always treated as continuation of the proceedings in the suit, a Writ

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Petition under Article 226 of the Constitution of India or an Original Application under section 19 of the Administrative Tribunals Act, wherein the challenge is against the order passed by the authorities in the disciplinary proceedings, it is an independent proceeding and not a continuation of the proceedings before the departmental authorities. As such, in such proceedings it will not be proper and legal to preclude the Government servant ~~in such proceedings~~ to raise a question of law, though not agitated before the departmental authorities.

5. In these cases, admittedly the plea of violation of natural justice was raised by the applicants before the appellate authority, though it does not appear that the applicants specifically put forward the averments that the copy of the report of the Enquiry Officer was not furnished by the disciplinary authority before the penalty was imposed and thereby the violation has occurred. In this context reference may be made to Sub Rule (2) of Rule 27 of the Rules. It is extracted hereunder:

> "(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the appellate authority shall consider-
>
> (a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;
>
> (b) whether the findings of the disciplinary authority are warranted by the evidence on the record; and

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(c) whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;

and pass orders-

(i) confirming, enhancing, reducing, or setting aside the penalty; or

(ii) remitting the case to the authority which imposed or enhanced the penalty or to any other authority with such direction as it may deem fit in the circumstances of these cases; "

From the sub-rule it is manifest that the objection if any with respect to the procedure followed by the disciplinary authority can be ~~relied~~ related only to compliance of the procedure laid down in the rules. Rule 14 which lays down the procedure for imposing the major penalties does not prescribe that the disciplinary authority shall serve copy of the report of the Enquiry Officer to the Government servant before imposing the order of penalty. As stated earlier, the necessity to furnish a copy of the report of the Enquiry Officer is not by way of compliance of the rules, but is to conform to the constitutional mandate of affording of reasonable opportunity enshrined in clause (2) of Article 311 of the Constitution of India. As such, it cannot be said that if the Government servant has not raised this matter before the appellate authority, he is precluded from urging the same while he files the Original Application before the Tribunal assailing the order in the disciplinary proceedings.

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6. It was argued on behalf of the respondents that it is open to a Government servant to waive prescriptions relating to natural justices. It was pointed out by him that since the applicant in O.A. 200/89 did not participate in the enquiry, he cannot urge this plea before this Tribunal. I am afraid the scope of the reference does not cover this aspect. Suffice to state that it is evident from the records that it is a case where pursuant to the receipt of memorandum of charges the applicant did submit his written statements denying the charges, though he did not physically appear before the Enquiry Officer to cross examine the witnesses. As such it cannot be said that when the Enquiry Officer after the conclusion of the enquiry furnishes its report to the disciplinary authority incorporating the findings, the Government servant is not entitled to know about its contents. If only he is informed about the same, does he get the opportunity to appear before the disciplinary authority and impress upon him that the report is not acceptable.

7. In the result, I hold that it is open to the applicants in these applications to raise before this Tribunal the plea of violation of natural justice in so far as reasonable opportunity of defence guaranteed under the clause (2) of Article 311 of the Constitution of

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India has not been afforded, since before the disciplinary authority arrived at the finding of the guilt and imposed the penalty, copy of the report of the Enquiry Officer was not furnished, though this point was not specifically urged while the applicants filed the appeal before the appellate authority in the course of the disciplinary proceedings.

8. These applications may now be placed before the Division Bench.

19-X-1990.

(G. Sreedharan Nair)
Vice Chairman (J)
19.10.1990

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CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

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Date of decision ... 9.11.1990

P R E S E NT

Hon'ble Shri N.V.Krishnan, Administrative Member

And

Hon'ble Shri A.V.Haridasan, Judicial Member

Original Application No.200/89

D.Jayachandra Hermon ... Applicant

Vs.

Divisional Engineer(IM)
Calicut & 4 others. ... Respondents

M/s O.V.Radhakrishnan &
K.Radhamani Amma ... Counsel for applicant

Mr.N.N.Sugunapalan,SCGSC ... Counsel for respondents

O R D E R

(Shri N.V.Krishnan, Admve. Member)

In this case and in OAK 629/89, which were heard together, we had difference of opinion, as a result of which the issue was referred under section 26 of the Administrative Tribunals Act (Act, for short) to the Hon'ble Chairman of the Central Administrative Tribunal for necessary action. Our difference of opinion related to the question whether the ground, that the disciplinary order and the appellate order deserve to be set aside as being in violation of the principles of natural justice, because the disciplinary authority came to the conclusion about the guilt of the applicant before giving him a copy of the Enquiry Officer's report and without giving an opportunity to make a representation

against that report, can be taken for the first time before this Tribunal or it was incumbent upon the applicant to have taken this ground before the appellate authority. On a reference under section 26 of the Act, this question has been answered by Hon'ble Shri G.Sreedharan Nair, Vice Chairman, by agreeing with the views expressed by one of us (A.V.Haridasan) by holding as follows:

> "In the result, I hold that it is open to the applicants in these applications to raise before this Tribunal the plea of violation of natural justice so far as reasonable opportunity of defence guaranteed under the clause (2) of Article 311 of the Constitution of India has not been afforded, since before the disciplinary authority arrived at the finding of the guilt and imposed the penalty, copy of the report of the Enquiry Officer was not furnished, though this point was not specifically urged while the applicants filed the appeal before the appellate authority in the course of the disciplinary proceedings."

2. When the case came before us earlier, we were of the view that if this ground was found to be valid, it would only be proper to quash the impugned orders and remit the matter to the disciplinary authority for further necessary action in accordance with law, taking it up from the stage when the Enquiry Officer's report was received by him. In this view of the matter and decision rendered on the disputed issue, we quash the Annexure-A9 order dated 4th March 1988 of the second

respondent, the Telecom District Manager, Calicut, the disciplinary authority, and the Annexure-A12 order dated 27th July 1988 of the third respondent, the General Manager, Telecommunications, Trivandrum who is the appellate authority.

3. The applicant has impugned the Annexure-A10 Report of the Enquiry Officer. In the view that we are taking in this case, we have not considered this issue. It is open to the applicant to make submissions in this behalf before the appropriate forum.

4. As we have quashed the impugned orders on a technical ground only, we remand the case to the second respondent and direct him to proceed from the stage reached after he had received a copy of the Enquiry Officer's report. Now that the applicant has already received a copy of the Enquiry Officer's report, we direct him to submit to the second respondent, within two weeks from the date of receipt of this order, his representation in regard to the Enquiry Officer's report. On receipt of such a representation, the 2nd respondent is directed to complete the proceedings and pass a final order in accordance with law within a period of six weeks therefrom.

5. The applicant has also prayed that the respondents be directed to treat him as continuing in service despite the impugned Ann.A9 order retiring him compulsorily and grant him all consequential benefits. We notice that the applicant was not

suspended pending the departmental enquiry.

6. In the circumstances, this case would normally have been governed by Rule 10(4) of the C.C.S.(CCA) Rules, 1965 (Rules, for short) excepting the fact that a decision to continue the enquiry has already been taken by us in para 4 supra. Therefore, the provisions of Rule 10(4) of the Rules would now squarely apply to this case as if the Disciplinary Authority, on a consideration of the circumstances of the case, has already decided to hold further enquiry. Accordingly the applicant will be deemed to have been placed under suspension from the date of Annexure-A9 order of compulsory retirement (i.e. 4.3.88) and will remain so until further orders of the appointing authority. Accordingly, the 2nd respondent is directed to take consequential action in the light of the above direction.

7. The application is disposed of with the aforesaid directions. There is no order as to costs.

(A.V.Haridasan)
Judicial Member

(N.V.Krishnan)
Administrative Member

9.11.1990