

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 301 of 2007

Tuesday, this the 25th day of March, 2008

C O R A M :

**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE MRS. O.P. SOSAMMA, ADMINISTRATIVE MEMBER**

Rajesh Kachhap,
Joint Controller, Communication Accounts,
Office of the Controller, Communication
Accounts, Department of Telecommunications,
B.S.N.L., Thiruvananthapuram. ... Applicant.

(By Advocate Mr. S. Gopakumaran Nair)

v e r s u s

1. Union of India, represented by Secretary,
Department of Telecommunications,
New Delhi .
2. Chief General Manager, Chennai, Telephones
B.S.N.L., Chennai – 78
3. General Manager (TS) & Enquiry Officer,
Office of the Chief General Manager,
Southern Telecom Region, Chennai. ... Respondents.

(By Advocate Mr. Sunil Jose)

The Original Application having been heard on 16.01.08, this Tribunal on
25.3.08, delivered the following :

O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The issue involved in this case is whether, even after the closure by the
Criminal Court of the Criminal case registered by the C.B.I. against the applicant,
on the ground that there was only infraction of proceedings and that the
irregularities committed by the applicant were due to negligence while

performing the duties but without any malafide intention and there is no loss to the Government, whether the authorities are justified legally in proceeding against the applicant under Rule 14 of the C.C.S (CC&A) Rules, 1965.

2. Brief facts of the case, necessary for the purpose of disposal of this OA are as under:-

(a) The applicant is presently working as Joint Controller of, Communication Accounts, Bharat Sanchar Nigam Limited, Thiruvananthapuram. Earlier, when he was functioning as DGM (F & N), on 19-08-2002, a surprise inspection in the office of the Senior Accounts Officer (Cash) North East Zone, Chennai was conducted in which certain irregularities in the case of payment of bills passed by the applicant during December, 2001 was noticed. The Vigilance submitted a report to the department alleging that the applicant had committed fraud by violating the financial norms by way of altering cash figures in the bills, utilizing estimates/proforma invoice as cash bills without actual purchase, booking items of personal use in office accounts etc., Further, some entries were missing in the stock register and that discounts available in the bills were not accounted or adjusted. Due to the above irregularities, the B.S.N.L sustained an approximate loss of Rs 4,27,966/-

(b) On the basis of the above vigilance report, a complaint was lodged with the C.B.I. Chennai for criminal investigation. The CBI, registered a case R.C. No. MA 1 2003 A 0024 dated 27-05-2003 against the applicant and two more officials of BSNL under Sec. 120 B read with Sec. 42, 467, 468 and 471 IPC and also under Sec. 13(i) (d) of the Prevention of Corruption Act, 1988.

(c) After registering the case, the CBI conducted investigation and filed a petition under Sec. 173 of the Cr. P.C. to the Principal Special Judge for CBI cases in Criminal M.P. No. 22/05 on 07-01-2005, vide Annexure A-1. The said report contained the allegations as stated in



including

(a) above inclusion the alleged loss to the Government to the tune of Rs 4,27,966/- and also the following:-

"3. That the investigation revealed that there was violations of procedures laid down by BSNL Chennai Telephones and passing and payment of the bills given by Shri Rajesh Kachhap (A-1) which related to the purchase of personal items etc., The procedures laid down were not being implemented by the witnesses and other officials of BSNL, Chennai Telephones. But these irregularities were done without any malafide intention and because of that there is no loss to Govt. of India.

4. Though it has come to light that A-1 made various purchases; passed himself as Dy. Financial Advisor/Dy. General Manager and received the payments the material on record of the case would show that he has overstepped and negligent while performing official acts. Hence, this case has been referred to the Department for initiation Regular Departmental Action for major penalty against the 3 accused persons for failure to maintain absolute integrity and for having acted in a manner unbecoming of a Government servant under rules 3 (1)(i) and 3(1)(iii) of Central Civil Services (Conduct) Rules, 1965."

(d) The Criminal Court has, on considering the above application closed the criminal case, vide Annexure A-2 order dated 20-01-2005, rendering inter alia the following:-

2. Therefore, according to the final report, the acts of the accused can only invite regular departmental action and not criminal action against them. Hence, the final report has been filed recommending the closure of the FIR. The opinion of the Senior Public Prosecutor, CBI has also been enclosed and he has also concurred with the final report submitted by the Investigating Officer. On the perusal of the petition, the FIR, the Final Report, the Opinion of the Senior Public Prosecutor, and other connected records, the plea of the Investigation Officer, for the closure of the FIR has to be accepted.

(e) After the closure of the Criminal case, the applicant was served with a charge sheet No. 8/70/2005 Vig II dated 31-05-2005 under Rule 14 of the CCS (CC&A) Rules 1965 for major penalty, vide

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Charge Memo at Annexure A-3. The charge sheet contains the very same allegations as filed before the Criminal Court.

(f) As the applicant was incapacitated to give an effective reply in the absence of copies of relied upon documents, he had vide Annexure A-4, A-5 and A-6 communications brought to the notice of the Disciplinary authority about the closure by the criminal case by the Criminal Court and also that if the allegation is one of mere negligence, the same cannot constitute misconduct and no charge memo can be issued in the absence of misconduct. The applicant relied upon the decision by the Apex Court in the case of **Union of India and others vs J. Ahmed (AIR 1979 SC 1022 = (1979) 2 SCC 286)** wherein it has been held that there may be negligence in performance of duty but the same would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. On the above ruling, the applicant had sought for dropping of the penalty proceedings.

(g) The department has not dropped the proceedings but directed the applicant to cooperate in the conduct of the proceedings.

3. In view of the above situation, the applicant had moved this O.A. inter alia praying for the following reliefs:-

- (a) Quash the Annexure A3 charge sheet issued to the applicant;
- (b) Award cost of and incidental to this application; and
- (c) Pass such other orders or directions which this Hon'ble Tribunal deem fit, proper and necessary in the interest of justice.

4. The applicant had also sought for the following interim relief:-

“ For the reasons stated in the application, this Hon'ble Tribunal may be pleased to pass an interim order staying all proceedings

pursuant to Annexure A3 charge sheet.

5. At the time of initial admission hearing, the respondents were directed to file reply before considering the interim relief; but since there was no reply forthcoming and as according to the applicant certain vital documents were not made available, by way of interim relief, the respondents were directed not to proceed with the inquiry till the next date of hearing. The interim relief was continued till the disposal of the case.

6. Respondents have contested the O.A. They have averred that in the course of the investigation, the Vigilance team found that figures in the bills were altered, estimate/proforma invoice were utilized as cash bills, booking items of personal use in office accounts etc., The items for personal use were purchased by the applicant by using his own credit card and the amount was got reimbursed from office. The proforma invoice/estimate was passed by the officer as cash bill, which is beyond reasonableness. Most of the items purported to have been purchased are not entered in stock register, which is mandatory as per rule. Instead of giving only advice/financial concurrence as Financial Advisor, the applicant himself has purchased many items for his office and for his personal use without financial powers and forced his subordinate officers to pay the amount. The items for office use should have been purchased through E.O. To GM(North) as per the existing practice. The applicant with malafide intention of illegal financial gains made purchases of personal items and made good the amount so spent, from the public money. It has also been alleged that the action of the applicant is a calculated misappropriation (Para 10 of the reply) and that purchases made by the applicant cannot be termed as infraction of procedure, his deliberate negligence

had resulted in a loss to the department to the tune of Rs 4,27,966; purchases were made only with the malafide intention to defraud and misappropriate Government funds and the applicant is trying to put the blame on his subordinates (para 11).

7. The applicant had filed a Misc. Application, MA No. 405/2007 two additional documents, Annexure A-7 and A-8. The former is a guideline dated 25-11-2003 which states that in respect of local purchases made, if there is no malafide intention behind the purchase, the disciplinary action should not be started. However, concerned officer should be warned to follow the prescribed methods of purchase. Annexure A-8 is a communication from the Inquiry authority, fixing the date of hearing of the case.

8. By yet another M.A. No. 495/2007, the applicant had filed some more documents, Annexure A-9 to A-19, which mainly contain the correspondence with the Enquiry Authority and his orders and one letter dated 28-05-2004 from the Dy. General Manager (vigilance) wherein, referring to the charges made against the applicant by the CBI before the Criminal Court under Sec. 120 (b) read with 420, 467, 468 and 471 IPC, the DGM Vigilance had suggested "*The officer may be listed under 'Officers of Doubtful Integrity' and all transactions by the officer may be closely monitored.*"

9. Objections were filed by the respondents to the above M.As and in addition, they had filed detailed reply justifying their action in initiation of proceedings and also annexing inter alia the following:-

(a) Annexure R-1(A) -Copy of Advice of the CVC dated 03-03-05.
As per this advice, accepting the recommendations of the CBI, the

C.V.C. had advised the department to initiate major penalty proceedings against the applicant.

(b) Annexure R-1(B) - Reply dated 17-10-2005 to representation dated 22.09.2005 (Annexure A-4) asking the applicant to cooperate with the inquiry.

(c) Annexure R-1(C): Order dated 27-04-2006 whereby application against the I.O. on the ground of bias had been rejected.

(d) Annexure R-1(D) – Order dated 28th June, 2006 in response to the appeal filed by the applicant against the order dated 27-04-2006 (referred to above) holding that there is no provision for appeal and direction was given to the applicant to cooperate with the proceedings.

(e) Annexure R-1(E) – Orders dated 29th November, 2006 from the Disciplinary Authority.

10. The applicant has filed his rejoinder to the reply filed by the respondents, reiterating his contentions as contained in the O.A.

11. Counsel for the applicant argued that the initiation of charge sheet under major penalty proceedings is illegal on more than one ground. First, the criminal case was closed, wherein it was clearly stated that there had been no malafide intention and that no loss had been caused to the exchequer. As such, there is no question of initiation of charge for alleged violation of the provisions of Rule 3 (1)(i) of the Conduct Rules. The Vigilance guidelines itself provides for such a bar, vide Annexure A-7. Again, act of negligence cannot amount to misconduct as held by the Apex Court in the case of Union of India vs J. Ahmed (*supra*). Again, it was argued that the applicant has suffered throughout for the past years when the rules provide for conclusion of proceedings, if initiated on valid grounds, within six months.

12. Counsel for the respondents attempted to justify the initiation and

conducting of the proceedings, stating that the same had been initiated at the advice of the Vigilance commission, vide Annexure R-1(A).

13. After conclusion of arguments on both the sides, original records were called for and the same have been made available by the respondents.

14. Arguments were heard and documents, including the original records perused. The records are in two parts. One is numbered 9-11-2005 Vig. I, containing the CBI investigation report, the advice tendered by the Central vigilance Commission and the approval of the Minister of State for initiation of proceedings. The other is numbered 8/70/2005 Vig II, dealing with the departmental Disciplinary proceedings instituted against the applicant.

15. The first note in the file No. 9-11/2005 Vig. I is dated 09-02-2005, referring to the FIR and the CBI Report dated 08-01-2005. Though this note is posterior to the date of decision dated 20-01-2005, by the Criminal Court of the criminal case, there has been no reference of the decision of the Criminal Court. The case was referred to the CVC with the report of the CBI. The CBI report is dated 07-01-2005, and the communication from CBI to the Director (Vigilance), Chennai Telephones contains, apart from the said report dated 07-01-2005 also, draft statement of imputation and statements of witnesses and documents for initiating Regular Departmental Action for major penalty against the applicant and two others. (The draft imputation of charge and the final statement of imputation are ad-verbem the same, save certain cosmetic changes.) The C.V.C. had considered the above report and suggested vide its letter dated 3rd March, 2005, departmental action as recommended in the CBI report. There is no inkling therein that it is aware of the submission made by the CBI before the

Criminal Court and the order passed by the Criminal Court to close the case.

16. The report dated 7th January, 2005 of the CBI in para 4.2 states that Direct purchase by the officer per-se cannot be treated as malafide, but the accompanying circumstances as enumerated at points 3, 4 and 5 make them malafide. Para 3 of the Draft Statement of imputation of charge against the applicant reads, "*Shri Rajesh Kachhap exhibited misconduct in the following purchases made by him during the period December, 2000 to August, 2002 in gross violation of the above prescribed procedure and detrimental to the financial interest of BSNL, Chennai Telephones.*" Thus, both malafide and financial loss have been alleged in the report and draft statement of imputation. In contrast to the same, in their petition before the Criminal Court vide Annexure A-1, there has been a specific mention, "*these irregularities were done without any malafide intention and because of that there is no loss to Govt. of India.*" This petition is also dated 07-01-2005 as the date of report of the CBI. The averment made in this petition before the Criminal Court had been maintained throughout, as is evident from the order of the Principal Special Judge for CBI cases, vide Annexure A-2. Thus, the earlier report alleging malafide and loss to the Respondents' organization, furnished to the Department by the CBI loses its sting by the submission made before the Criminal Court. True, it has been indicated in the petition filed by the CBI for closure of the case that departmental action would be initiated against the applicant for violation of the provisions of Rule 3(1)(i) of the Conduct Rules. However, the said submission made before the Court cannot be construed that if a specific provision is available for dealing with such cases (where there is no malafide intention) the said provision should be ignored. For, vide Annexure A-7 it has been clearly stipulated that where there is no malafide intention behind local purchases, the disciplinary action

should not be started. However the concerned officers should be warned to follow the prescribed methods of purchase. Thus, initiation of the proceedings is against such a bar as provided for in the guidelines vide Annexure A-7.

17. While decision to initiate the proceedings was taken without considering the closure order of the criminal cases, as spelt above, it appears that the respondents are still of the view that there has been a stupendous loss of Rs. 4, 27,966/- vide para 11 of reply by Respondent No. 2, the said reply also contains at more than 1 place that action of the applicant is a calculated misappropriation, i.e. there has been malafide. Thus, the approach of the respondents in dealing with the proceedings is diagonally opposite to the fact that even as per CBI, there has been no malafide intention and that there is no financial loss and that all that happened was only certain procedural irregularities.

18. The respondents in their reply have justified initiation of departmental proceedings though the criminal case was closed, in the following words:-

"7. It is submitted that as soon as the Vigilance Wing unearthed the irregularity, the matter was got thoroughly investigated by the Central Bureau of Investigation, which interrogated about 60 to 70 witnesses and collected various documents. In view of the fact that the evidences available was not sufficient to establish commission of criminal offences, institution of regular departmental action against the applicant under Rule 14 of the CCS (CCA) Rules, 1965 was recommended. It is submitted that this recommendation of the CBI was in view of the fact that the degree of proof required in judicial proceedings is "proof beyond doubt", while in the departmental disciplinary proceedings "preponderance of probability" is sufficient to hold the charge as proved. In view of the findings of the CBI, the complainant

before the Principal Special Judge (CBI) Chennai, a petition was filed as his brought out by the applicant in A1. The Principal Special Judge (CBI) Chennai, considered A1 petition and by order dated 20.01.2005 accepted the final report holding that the acts of the accused (applicant) can only invite regular departmental action and not criminal action. As regards the averment of the applicant that A2 was accepted without any protest or challenge, it is submitted that the Deputy General Manager (Vigilance) is not the complainant in the case under FIR No. RC-MA1-2003A-0024 dated 27.05.2003. The complainant in the above case is the SPE:CBI:ACB, Chennai. The DGM (Vigilance) was not a party to the petition under Section 173 Cr. P.C. In the Hon'ble Principal Special Judges Court in Crl. M.P. No. 22/05. It is therefore, submitted that the question of protesting or challenging the Court's decision by the DGM (Vigilance) does not arise. It is further submitted that during the course of investigation by the CBI whatever transpires is an internal matter and is not communicated to the department. Likewise, the closure of FIR is an internal matter between CBI and the CBI Court, in which the complainant is the CBI and the accused are the applicant and 2 others. The closure of FIR is only an administrative action resorted to by the CBI in cases where it recommends only departmental action and not prosecution. Hence, the question of contesting or challenging the Court's decision by the department is outside the purview of the case."

19. It must be kept in mind that though the standard of proof in a criminal proceedings and that in departmental proceedings may be entirely different, the facts cannot change. What fact has been spelt out before the Criminal Court cannot be varied when it comes to departmental proceedings. Here, in the instant case, while before the criminal court it has been clearly stated that there is no malafide intention and that there is no loss to the ex-chequer, in the departmental proceedings a diagonally opposite stand has been taken. This is

due to the fact that the respondents acted on the report which is anterior to the order dated 20-01-2005 of the Criminal Court, wherein the fact that according to the CBI, there has been no malafide intention and there has been no financial loss, as specified by the CBI in its petition as also as concurred in by the senior Public Prosecutor had been authenticated. And, from the records it is clear that the fact of the above submission by the CBI before the criminal Court has not been brought to the notice of the authorities competent to approve initiation of disciplinary proceedings against the applicant. In fact, even if it could be justified that since the report of the CBI made available to the respondents and the averments made in the petition before the Criminal Court were of the same date consequent to which it was not possible to inter-link the same while submitting the case to the Hon'ble Minister of State for the Minister's approval to initiate action against the applicant, the file was once again submitted in March, 2005, when the stand taken by the CBI before the Criminal Court (which is in drastic deviation from the one mentioned in the report made available to the ^{could have been spelt out;} respondents),^{the file was submitted again to the Hon'ble Minister of State in} May 2005, when the crux of the final report of the CBI furnished to the Criminal Court could have been made known to the Hon'ble Minister. This was not done. Again, when the respondents had proposed an innocuous amendment to the Charge Sheet, by adding one more prosecution witness, that opportunity could have been utilized to right the wrong committed by the respondents. This was also not done.

20. Thus, issue of charge sheet against the applicant suffers from serious and grave legal infirmity inasmuch as the facts therein do not match with the facts specified in the final report furnished to the Criminal Court by the CBI and that in the absence of malafide intention, the guidelines of the CVC are clear that there

shall be no disciplinary proceedings that could be taken against the erring officers.

21. The applicant had brought out in his representation dated 22-09-2005 that in the case of Union of India vs J. Ahmed, the Apex Court has held as under:-

"The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.

10. It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see *Pierce v. Foster*). A disregard of an essential condition of the contract of service may constitute misconduct [see *Laws v. London Chronicle (Indicator Newspapers)*]. This view was adopted in *Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur*, and *Satubha K. Vaghela v. Moosa Raza* . The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

*In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik* in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as*

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punitive. In S. Govinda Menon v. Union of India the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H. Kalyani v. Air France, Calcutta wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high."

22. Thus, according to the applicant, if the case has to be enquired into, the same would be with reference to alleged negligence on his part as stated by the CBI in its final report before the Criminal Court and in that event, action could be initiated under Rule 16 of the CCS (CC&A) Rules, 1965.

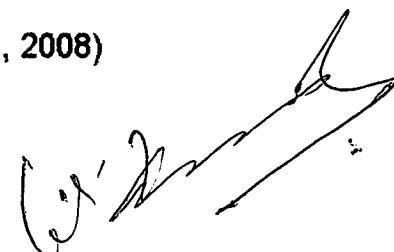
23. On the basis of the above discussions, it is clear that the impugned Annexure A-3 charge sheet dated 31.5.2005 suffers from serious and grave illegality and consequently the same cannot stand the test of judicial scrutiny. Accordingly, the said charge memo is quashed and set aside. It is, however, open to the respondents to proceed against the applicant for minor penalty proceedings as submitted by the applicant vide A/4 communication dated 29.09.2005. In case if such an action is taken, the same should also be concluded within a reasonable period of time.



24. The Original Application is allowed in the above terms. In the circumstances, there shall be no order as to costs.

(Dated, the 25th March, 2008)


(O.P. SOSAMMA)
ADMINISTRATIVE MEMBER


(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVR.