CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.NO.283 OF 2013

New Delhi, this the 22nd day of February, 2017

CORAM:

HON'BLE SHRI SHEKHAR AGARWAL, ADMINISTRATIVE MEMBER

AND

HON'BLE SHRI RAJ VIR SHARMA, JUDICIAL MEMBER

é é é .

Mr.Banarasi Prasad,
Assistant Engineer (E),
S/o late Akaloo,
Presently posted Border Flood Light Division,
CPWD, 46 Btn. BSF, Mudra Road, Bhuj,
Gujarat 370001

Also at Quarter No.1053, Block-22,
Lodi Colony, New Delhi 110003 é é . Applicant

(By Advocate: Mr.S.K.Das)

Vs.

1. Union of India through
   Chief Engineer (E), New Delhi Region,
   C.P.W.D., Vidyut Bhawan,
   New Delhi.
2. Superintending Engineer (E),
   DCEC-VI, Vidyut Bhawan,
   C.P.W.D., New Delhi é é Respondents

(By Advocate: Mr.A.K.Singh)

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ORDER

***Per* Raj Vir Sharma, Member(J):**

Through the instant Original Application filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for quashing the order dated 15.3.2010 (Annexure A/1) passed by the disciplinary authority imposing on him the penalty of ócensureô and

stipulating that the period of absence of the applicant from 19.12.2001 to 24.06.2002 shall be treated as *dies non* without forfeiting his past services, as well as the order dated 20.4.2012 (Annexure A/2) passed by the appellate authority rejecting the applicantôs appeal and upholding the disciplinary authorityôs order dated 15.3.2010, *ibid.* The applicant has also prayed for consequential service benefits.

2. Resisting the O.A., the respondents have filed a counter reply. The applicant has also filed a rejoinder reply thereto.

3. We have perused the records and have heard Shri S.K.Das, the learned counsel appearing for the applicant, and Shri A.K.Singh, the learned counsel appearing for the respondents.

4. The applicant was issued Memo dated 08.10.2002 (Annexure A/3) by respondent no.2 proposing to hold an enquiry against him under Rule 14 of the CCS (CCA) Rules, 1965. Statements of article of charges and of imputations of misconduct, the list of documents by which, and the list of witnesses by whom the article of charges framed were proposed to be sustained, were annexed to the said O.M. dated 08.10.2002. There were two articles of charges which read thus:

ARTICLE-1

> That the said Sh.Banarasi Prasad, Junior Engineer (E) while attached to Elect. Sub Division-IV, under Faridabad Central Electrical Division, was directed by the Executive Engineer (E), Faridabad, Central Electrical Division, as well as by the Assistant Engineer (E), Electrical Sub Division-IV to take over charge from other Junior Engineer (E) but Sh. Banarasi Prasad did not comply with the orders issued by the office.

By the above acts of omission & commission, the said Sh.Banarasi Prasad, Junior Engineer (E) failed to exhibit lack of devotion to duty, thereby contravening Rule 3(1)(ii) of CCS(Conduct) Rules, 1964.

ARTICLE II

That the said Sh.Banarasi Prasad, Junior Engineer (E), while attached to Elect. Sub Division-IV, under Faridabad Central Electrical Division, applied for six days earned leave w.e.f. 22/10/2001 to 27/10/2001 and R/H & CL w.e.f. 12/11/2001 to 21/11/2001.

After expiry of leave, the said Sh.Banarasi Prasad, Junior Engineer (E) remained absent w.e.f. 22/11/2001 and did not join his duties. He was directed by the Assistant Engineer (E) Electrical Sub Division-IV and the Executive Engineer (E) Faridabad Central Elect. Division through various letters and notice through local newspaper, but he did not join his duties.

By the above acts of omission & commission, the said Sh.Banarasi Prasad, Junior Engineer (E) failed to exhibit lack of devotion to duty, thereby contravening Rule 3(1)(ii) OF ccs (Conduct) Rules, 1964.ò

The applicant, vide his representation dated 22.11.2002 (Annexure A/4), denied the charges levelled against him. Thereafter, enquiry was conducted by the inquiry officer. The inquiry officer, vide his report dated 1.10.2009(Annexure A/5), found that both the articles of charges were not proved. While agreeing with the finding of the inquiry officer on Article I of the charges as not proved, the disciplinary authority disagreed with the finding of the inquiry officer on Article II of the charges and issued a disagreement note/O.M. dated 20.11.2009(Annexure A/6) asking the applicant to submit his written representation, if any, to the enquiry report and the disagreement note. On 22.01.2010, the applicant submitted his representation (Annexure A/7) wherein he took various grounds in support of the findings of the inquiry officer and questioning the disagreement note.

After considering the representation dated 22.1.2010 filed by the applicant, and the materials available on record, the disciplinary authority, vide order dated 15.3.2010(Annexure A/1), held Article I of the charges as not proved, and Article II of the charges as partially proved. Accordingly, the disciplinary authority imposed on applicant the penalty of ócensureô and directed that the period of absence of the applicant from 19.12.2001 to 24.6.2002 shall be treated as *dies non* without forfeiting his past services. The appeal made by the applicant against the disciplinary authorityôs order of punishment of ócensureô was turned down by the appellate authority, vide order dated 8.10.2010. O.A.No.1318 of 2011 was filed by the applicant challenging both the order of punishment of ócensureô dated 15.3.2010 passed by the disciplinary authority, and the order dated 8.10.2010 passed by the appellate authority rejecting his appeal. The Tribunal, vide its order dated 17.1.2012 (Annexure A/10), disposed of OA No.1318 of 2011 and remanded the matter to the appellate authority to pass fresh order keeping in view the mandate of Rule 27(2) of the CCS (CCA) Rules, 1965 and the contentions raised by the applicant in his appeal. Thereafter, the appellate authority again considered the applicantôs appeal. After examining the points/grounds urged by the applicant in his appeal, the appellate authority, vide order dated 19.4.2012/20.4.2012 (Annexure A/2), again turned down the applicantôs appeal. Hence, the present O.A.

5. It was submitted by Shri S.K.Das, the learned counsel appearing for the applicant that there are contradictions in the evidence led

by the prosecution/Department on Article II of the charges, and the disciplinary and appellate authorities have failed to take into consideration those contradictions in the evidence while returning their finding that Article II of the charges was partially proved against the applicant. Therefore, the impugned orders are unsustainable and liable to be quashed.

5.1 Shri S.K.Das, the learned counsel appearing for the applicant also submitted that while agreeing with the finding of the inquiry officer on charge article no.1 as not proved, the disciplinary authority disagreed with the finding of the inquiry officer on charge article no.2. In the disagreement note/O.M. dated 20.11.2009, the disciplinary authority arrived at a conclusion that the charge article no.2 was ófound to be correct and provedô and then issued a disagreement note/notice. It was, thus, submitted by the learned counsel that when the disciplinary authority disagreed with the finding of the inquiry officer with regard to charge article no.2, it could only make a tentative finding and not a conclusive one, and the disagreement note/notice was to be as to whether or not the findings of the inquiry officer with regard to charge article no.2 should be set aside. The disagreement note issued by the disciplinary authority in the present case is, therefore, argued as being illegal, and, consequently, the orders passed by the disciplinary and appellate authorities are unsustainable and liable to be quashed. In support of his submission, the learned counsel for the applicant placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Yoginath D.Badge** v. **State of Maharashtra & another,** (1999) 7 SCC 739.

6. *Per contra,* it was submitted by Shri A.K.Singh, the learned counsel appearing for the respondents that the applicant was afforded sufficient opportunity to defend himself at all stages of the disciplinary proceeding, and the enquiry was held as per the procedure prescribed in the Rules. While forwarding to applicant a copy of the enquiry report together with its own tentative reasons for disagreement with the finding of the inquiry officer on Article II of the charges, the disciplinary authority required the applicant to submit his written representation to the I.O's report and disagreement note/O.M. dated 20.11.2009. After considering the applicant's representation and the materials available on record, the disciplinary authority came to the final conclusion that Article II of the charges was partially proved and accordingly passed the order at Annexure A/1. In compliance with the direction issued by the Tribunal in OA No.1318 of 2011, the appellate authority considered the grounds urged by the applicant in his appeal and passed fresh order dated 20.4.2012 (Annexure A/2) rejecting the appeal and upholding the order of the disciplinary authority. Therefore, there is no infirmity in the impugned orders, and the Tribunal, while exercising power of judicial review, should not interfere with the same.

7. It is no more *res integra* that the power of judicial review does not authorize the Tribunal to sit as a court of appeal either to reappraise the evidence/materials and the basis for imposition of penalty, nor is the

Tribunal entitled to substitute its own opinion even if a different view is possible. Judicial intervention in conduct of disciplinary proceedings and the consequential orders is permissible only (i) where the disciplinary proceedings are initiated and held by an incompetent authority; (ii) such proceedings are in violation of the statutory rule or law; (iii) there has been gross violation of the principles of natural justice; and (iv) on account of proven bias and mala fide.

7.1 In **Rajinder Kumar Kindra v. Delhi Administration through Secretary (Labour) and Others,** AIR 1984 SC 1805, it has been laid down that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be rejected as perverse. It has also been laid down that where a quasi judicial tribunal records findings based on no legal evidence and the findings are its mere *ipse dixit* or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated.

7.2 In **B.C. Chaturvedi v. Union of India**, AIR 1996 SC 484, reiterating the principles of judicial review in disciplinary proceedings, the Hon'ble Apex Court has held as under:

> ñJudicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine

whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.ò

7.3 In **R.S. Saini v. State of Punjab and ors**, (1999) 8 SCC 90, the Hon'ble Apex Court has observed as follows:

"We will have to bear in mind the rule that the court while exercising writ jurisdiction will not reverse a finding of the inquiring authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the inquiring authority, it is not the function of the court to review the evidence and to arrive at its own independent finding. The inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the court in writ proceedings."

7.4 The above view has been followed by the Hon'ble Apex Court in **High Court of Judicature at Bombay through its Registrar v. Shashikant S. Patil,** (2000) 1 SCC 416, wherein it has been held as under:

> ñ...Interference with the decision of departmental authorities can be permitted, while exercising jurisdiction under Article 226 of the Constitution if such authority had held proceedings in violation of the principles of natural justice or in violation of statutory regulations prescribing the mode of such inquiry or if the decision of the authority is vitiated by considerations extraneous to the evidence and merits of the case, or if the conclusion made by the authority, on the very face of it, is wholly arbitrary or capricious that no reasonable person could have arrived at such a conclusion, or grounds very similar to the above. But we cannot overlook that the departmental authority, (in this case the Disciplinary Committee of the High Court) is the sole judge of the facts, if the inquiry has been properly conducted. The settled legal position is that if there is some legal evidence on which the findings can be based, then adequacy or even reliability of that evidence is not a matter for canvassing before the High Court in a writ petition filed before Article 226 of the Constitution.

7.5 In **Syed Rahimuddin v. Director General, CSIR and others**, (2001) 9 SCC 575, the Hon'ble Apex Court has observed as under:

> ñé It is well settled that a conclusion or a finding of fact arrived at in a disciplinary enquiry can be interfered with by the court only when there are no materials for the said conclusion, or that on the materials, the conclusion cannot be that of a reasonable mané .ò

7.6 In **Sher Bahadur v. Union of India,** (2002) 7 SCC 142, the order of punishment was challenged on the ground of lack of sufficiency of the evidence. The Hon'ble Apex Court observed that the expression

"sufficiency of evidence" postulates "existence of some evidence" which links the charged officer with the misconduct alleged against him and it is not the "adequacy of the evidence".

7.7 In **Government of Andhra Pradesh v. Mohd. Nasrullah Khan,** (2006) 2 SCC 373, the Hon'ble Apex Court has reiterated the scope of judicial review as confined to correct the errors of law or procedural error if it results in manifest miscarriage of justice or violation of principles of natural justice. In para 7, the Hon'ble Court has held:

> ñBy now it is a well established principle of law that the High Court exercising power of judicial review under Article 226 of the Constitution does not act as an Appellate Authority. Its jurisdiction is circumscribed and confined to correct errors of law or procedural error if any resulting in manifest miscarriage of justice or violation of principles of natural justice. Judicial review is not akin to adjudication on merit by appreciating the evidence as an Appellate Authorityé ..ò

8. From the order dated 15.3.2010 (Annexure A/1) passed by the disciplinary authority, it transpires that the plea of contradiction in the evidence on Article II of the charges raised by the applicant in his representation on the enquiry report as well as the disagreement note was duly considered by the disciplinary authority in paragraphs 8 to 21 of the order dated 15.3.2010, ibid, which are reproduced below:

> ñ8. C.O. vide his letter dt.22.01.10 received under EE(E)/ECD-Iôs letter 15(PF)/ECD-I/E-I/141 dt.22.01.10, pleaded mainly following points:
>
> a) Contradiction in dates from which absent period commenced i.e. w.e.f. 22.11.01 or 01.12.01.
>
> b) Non-receipt of any letters from the office regarding his absence from duty.

9. The undersigned has studied the reply of the C.O. and found that there is contradiction in dates from which the C.O. remained absent. In the letter dt.07.12.01 (i.e. Exhibit-P6) from EE (E), FCED to C.O. it is mentioned that C.O. was absenting from duty from 22.11.01, whereas the press notice published in newspaper (Exhibit P-9 & 10) shows that the C.O. was absenting from 01.12.01.

10. In his representation C.O. has mainly relied upon his E.L. sanction for 6 days for which he had applied. However, he has not provided any evidence of being present for the balance period.

11. However, to be fair, the C.O. was given another opportunity to present his case before the undersigned in person vide this office O.M.No.7(1)/DCEC-VI/E-I/331 dt.15.02.10. C.O. appeared in person before the undersigned at 12 Noon on 22.02.10.He has reiterated his stands that he was not absenting from duty. His attention was brought to various communications sent to him by the office and press notice published in newspaper regarding his absence from duty. He has defended that he did not receive any of these communications. He was also asked whether he has submitted a joining report on 25.6.02, as mentioned in E.E.(E), FCEDôs letter dt.09.07.02 addressed to SE, ODEC. He denied the same. He has presented documents of correspondence done by him during the period 23.11.01 to 31.10.02 and deposited photo copies of the same (10 copies) to present his case that he was not absent during the period, as mentioned in Charge Article of Charge Sheet.

12. The photocopies of the documents submitted by the C.O. on 22.02.10 during the personal hearing are the letters between office & him at his sub-divisional address which are dt.23.11.01, 01.12.01, 09.07.02, 20/24.07.02, 23.07.02, 29.07.02, 01.08.02, 06.08.02, 20/21.08.02, 31.10.02. Out of these ten documents document no.2, i.e., letter dated 01.12.01 from AE to CO is already including in the defence documents (Exhibit D4). All these 10 documents submitted by C.O. do not contain anything regarding his absence from duty. The contents of these documents are mainly regarding the non-taking over the charge by the C.O. Based on these documents C.O. has pleaded during the personal hearing on 22.02.10 that he was present in the office. However C.O. could not explain for the period 02.12.01 to 06.07.02.

13. The Charge Article No.2 is for the absence from duty by the C.O. w.e.f. 22.11.01 to date of charge sheet, i.e., 08.10.02. There are ten prosecution documents, out of which 4 documents i.e. Exhibit P-2, P-6, P-7 & P-8 are the letters from the office to C.O. regarding his absenting from duty. Exhibit P-9 & P-10 are the press notices published in newspaper in Aaj Vanarasi and Indian Express on 14.05.02 regarding his absence from duty.

14. While C.O. has claimed his ignorance regarding the above letters from office addressed to him for absenting from duty, the press notice published in news paper on the subject matter remained unexplained by the C.O.

15. However, an examination of prosecution documents shows the following circumstantial evidence:

Exhibit-P 1 is an office order dt.25.09.01 from EE (E), FCED. This letter does not fall in the absent period.

Exhibit-P 3 is a letter dt.01.12.01 from AE to C.O. sent to his office address. This implies that C.O. was in office.

Exhibit-P 2 is a letter dt.18.12.01 from AE to C.O. regarding C.O.ôs absenting from duty w.e.f. 01.12.01.This letter is addressed to C.O. (JE(E) at sub-division office address. This implies and leads to circumstantial evidence that the C.O. was in office.

Exhibit P 4 is a letter dt.03.07.02 from EE (E) to AE(E) and copy to C.O. among others. This also carries office address of C.O. and lead to similar circumstantial evidence that C.O. was in office.

Exhibit-P 5 is a leave application from C.O. submitted on 23.11.01. This also leads to a circumstantial evidence that the C.O. was in office on 23.11.01.

Exhibit P 6 is a letter dt.07.12.01 from EE, FCED to C.O. sent to his office address. This also carries the address of C.O.ôs office address. Hence leads to similar circumstantial evidence that he was in the office on 07.12.01.

Exhibit P-7 is a letter dt.06.03.02 from EE, FCED to C.O.ôs residential permanent address (Varanasi) in which C.O. is reported to be absent from 01.12.01.

Exhibit P 8 is a letter dt.22.03.02 from EE, FCED to C.Oôs residential address (Vanarasi) which is a reminder to the previous letter of EE.

Exhibit P 9 & P 10 are the press notices published in Indian Express and Aaj Varnasi on 14.5.02 wherein it is reported that the C.O. is absent from 01.12.01.

16. EEôs letter no.7(9) Estt. FCED/280 dt.09.07.02 addressed to SE, ODEC shows that C.O. was absenting from duty w.e.f. 01.12.01 & submitted joining report on 25.06.02. During the personal hearing on 22.02.10 C.O.ôs attention was brought to this letter and specifically asked whether he had submitted any joining report on 25.06.02, but he denied. Record also shows that there is no joining report and the letter given by the C.O. is only an intimation that he has handed over the charge in ED-XIII and is submitting original LPC. This letter was diarized on 25.06.02 and sent to EE(E), FCED, by the sub-division.
17. The Charge Article No.2 is regarding absent period by the C.O. w.e.f. 21.11.01 to the date of Charge Sheet i.e. 08.10.02.
18. The undersigned has considered the article of charge, I.Oôs report, representation of the C.O., record/facts & circumstances etc. of the case carefully. It is established that during the period from 22.11.01 to the date of Charge Sheet (08.10.02), no work has actually been done by the C.O. But keeping in view the circumstances of charge not being handed over as per SE (Coord)ôs order, the C.O. has a reasonable defence against not having done any productive work. Further his claim to be present in the office, on the basis of correspondence, has some merit, except for the period from 19.12.01 to 08.07.02. However, the contents of the EE, FCEDôs letter dt.09.07.02 addressed to SE, ODEC shows that C.O. has submitted a joining report on 25.06.02 (although this statement was denied by the C.O. during the personal hearing on 22.02.10).
19. It is hence established beyond doubt that the C.O. was absent w.e.f. 19.12.01 to 24.06.02. Therefore the Charge Article No.2 is partially proved, i.e. for the period from 19.12.01 to 24.06.02, the C.O. was absent from duty.
20. In view of the above I hold that charge against Sh.Banarsi Prasad as under:
    (a) Charge Article No.I (i.e. non-compliance of orders issued by the office to take over the charge from another JE(E) is not proved.
    (b) Charge Article No.2 (i.e. absenting from duty) is partially proved.

NOW, THEREFORE, considering the circumstances, undersigned has taken a lenient view and in view of the powers conferred to me under Rule 11 of CCS (CCA) Rules 1965, consider that the ends of justice would be met in the case if a

> penalty of censure is imposed on Sh.Banarsi Prasad, JE (E). I order accordingly.
> 21. Further it is also ordered that the absent period from 19.12.01 to 24.06.02 shall be treated as dies non without forfeiting his past services.ò

From the above, it is clear that the contradiction in the evidence on Article II of the charges, as pleaded by the applicant before us, was duly considered by the disciplinary authority. It was found by the disciplinary authority that the applicant unauthorizedly remained absent from 19.12.2001 to 24.06.2002 instead of 22.01.2001 to 25.06.2002. Accordingly, the disciplinary authority held that Article II of the charges was partially proved.

9. On a perusal of the order dated 20.4.2012 (Annexure A/2) passed by the appellate authority rejecting the applicantôs appeal, we have found that the points urged by the applicant with regard to Article II of the charges and/or contradictions in the evidence led by the prosecution/Department on Article II of the charges were also duly considered by the appellate authority. After analyzing the materials available on record, the appellate authority did not accept any of the contentions raised by the applicant. Accordingly, the appellate authority rejected the applicantôs appeal and upheld the order dated 15.3.2010 (Annexure A/1). The findings recorded by the appellate authority are as follows:

> ña) Before imposing penalty specified under rule 11, the procedure laid down in the rule has been complied with by the Disciplinary Authority.
> b) The findings of the Disciplinary Authority are supported by the evidences on the record/facts of the case.

c) The penalty awarded by the Disciplinary Authority is in order.

AND WHEREAS as the contention of the appellant that disciplinary authority has relied upon the Executive Engineerôs letters, which was not a part of the charge sheet, have already been examined by the Appellate Authority. It has been observed that in the report Inquiry Officer has relied upon exhibit D-5, and Ex. P-4 besides service book to reach a conclusion regarding sanction of leave period in service book and full payment of salary etc. and concluded that charge article no.2 as not proved. Exhibit D-5 and P-4 based on which I.O. has come to such conclusion were not in conformity with the record/facts of the case. Besides Service Book was not even a part of documents in the Inquiry proceedings. These aspects were enough for the Disciplinary Authority to disagree with the said finding of the enquiry officer. However, to be fair, Disciplinary Authority vide his letter No.2282 dated 28.10.2009 has asked EE/ECD-I to confirm whether the period of absence w.e.f. 19.12.2001 onwards for which article of charge was framed, was regularized and payment of salary thereto released at any stage.

AND WHEREAS Executive Engineer vide his letter dated 30.10.2009 has confirmed that neither the period of unauthorized absent of Appellant w.e.f. 19.12.2001 was regularized nor the leave of the period of absence was sanctioned, salary for the period from 01.09.2001 to 30.06.2002 has also not been drawn. The three references quoted by the Appellant which were stated as not a part of documents brought in the enquiry, are the correspondence made for the above confirmation.

AND WHEREAS Disciplinary Authority has seen these documents only in order to satisfy himself whether at any stage the leave were sanctioned and payment thereto released in order to be fair on this particular point. Neither these documents were treated as exhibit documents to decide this case nor considered in the final orders passed by the Disciplinary Authority. Therefore, Appellantôs contention that Disciplinary Authority has relied upon on these letters are not sustainable.

AND WHEREAS case record substantiated that all the documents including those documents which were submitted by the Appellant during his personal appearance before the Disciplinary Authority. Even after the I.O. report were examined in detail by the

> Disciplinary Authority. Benefit of doubt was given to the C.O. wherever slightest ambiguity or doubt found and thereafter came to the conclusion that charge article No.I was found not proved and charge article No.2 was partially proved. C.O. was awarded penalty of censure which is the softest penalty prescribed under minor penalties although charge sheet was framed and inquiry was got conducted under major penalty. Undersigned has found that C.O. have never challenged the letters written to him by EE(E) and AE(E) about his unauthorized absence from his duty. He never took cognizance of the fact that EE(E) had published a notice in newspaper that the C.O. had been absenting from his duty on his own. Above facts prove that he had not been in the office and the contention of the C.O. that he had been in the office is untenable and not acceptable.ò

10. The observations/findings recorded by the disciplinary and appellate authorities on the applicantôs plea of contradictions in the evidence led by the prosecution/Department on Article II of the charges are based upon evidence/materials available on record. It is found that after taking into consideration the contradictions in the evidence led by the prosecution/Department on Article II of the charges, the disciplinary authority has held Article II of the charges as partially proved and accordingly imposed on applicant the penalty of ócensureô, and the appellate authority has also upheld the disciplinary authorityôs order. While exercising the power of judicial review, this Tribunal does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence/materials available on record. Therefore, we do not find any substance in the contention of the applicant that the disciplinary and appellate authorities have failed to take into consideration the contradictions in the evidence on Article II of the charges,

while returning their finding that Article II of the charges was partially proved against the applicant.

11. The other submission of Shri S.K.Das, the learned counsel appearing for the applicant, is that though the inquiry officer held that both Articles I and II of the charges were not proved against the applicant, yet the disciplinary authority, vide disagreement note/O.M. dated 20.11.2009, arrived at a conclusion that Article II of the charges was proved against the applicant without affording him an opportunity of hearing and, therefore, the impugned orders are unsustainable and liable to be quashed. In support of his submission, as already noted, the learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in **Yoginath D.Badge v. State of Maharashtra & another** (supra). We do not find any substance in the said submission of the learned counsel appearing for the applicant.

12. The applicant did not raise the said plea either in his representation dated 22.1.2010 to the enquiry report and the disagreement note dated 20.11.2009 or in his appeal dated 22.7.2010 against the disciplinary authority's order dated 15.3.2010, ibid. The order dated 17.1.2012 passed by the Tribunal in O.A.No.1318 of 2011 does not also disclose the applicant to have raised the said plea before the Tribunal. The Tribunal remanded the matter to the appellate authority to pass fresh order keeping in view the mandate of Rule 27(2) of CCS (CCA) Rules, 1965 and the contentions raised by the applicant in his appeal and pass a reasoned and

speaking order. Therefore, the applicant cannot be allowed to raise the said plea in the present proceeding.

13. The disagreement note/O.M. dated 20.11.2009 reads as under:

ñOFFICE MEMORANDUM

WHEREAS, a charge sheet was served on Sh.Banarsi Prasad, JE(E) by SE(E), ODEC vide his OM no.7(8)BP/Estt./ODEC/819 dt.08.10.02. The said charge sheet contained 2 articles of charges.

1. AND WHEREAS, SE (E), ODEC, CPWD, New Delhi vide his order no.7(8)BP/Estt./ODEC/958 dt.04-12-02 appointed Sh.A.K.Suri, SE (TLQA), Nr.CPWD as I.O. to enquire into the charges framed against Sh.Banarsi Prasad, JE(E). On retirement of Sh.A.K.Suri, the SE (E), DCEC-VI, CPWD, New Delhi vide order no.7(1)DCEC-VI/E-I/2004/276 dt.08.10.04 appointed Sh.V.K.Mallik, SE (TLQA), NR, CPWD, New Delhi as I.O. to enquire into the charges. Due to transfer of Sh.Mallik the S.E.(E), DCEC-VI, CPWD, New Delhi, vide order no.7(1)DCEC-VI/E-I/2008/88 dt.30.05.08 appointed Sh.H.P.Meena, SE(Inq.) as I.O. to enquire into the charges framed against the C.O.

   The SE/ODEC vide his letter no.7(8)/ BP/Estt./ODEC/959 dt.04.12.2002 appointed Sh.Jajeet Singh, OS, ODEC as P.O. to present the case.

2. The I.O. has submitted his findings under his letter No.SE(Inq.)/12/2008/dt.01.10.09. An attested copy of the same is enclosed herewith.

3. The findings of I.O. have been examined and it is found that ï

(i) In para 6.1.5 of his report I.O. has concluded that charge article no.1 is not proved in view of the documentary & circumstantial evidences and failure of the prosecution to prove the charge with documents and evidences placed on record. The undersigned accepts this finding.

(ii) Regarding charge article 2, the I.O. in his report has concluded that Charge Article No.2 (i.e. absenting from duty w.e.f. 22.11.01 onwards) as not proved. He has come to this conclusion citing exhibit D-5 and P-4 brought during the course of inquiry. Undersigned has disagreement on this point as briefed below:

(a) Para 6.2.2 of the I.O. report shows that leave had been sanctioned by EE (E), FCED letter no.7(2)Estt. FCED

1583 dt.23.08.02, as exhibit D-5 and therefore the I.O. has concluded that charge Article 2 automatically subsides.

(b) Exhibit D-5 is a letter from EE(E), FCED to SE, ODEC stating that charge official was on casual leave on 12-11-01, 13-11-01 and 17-11-01 and R/H on 16-11-01, and besides he was on EL on 22-10-01 to 27-10-01, which were sanctioned. Whereas charge Article no.2 was for absenting from duty w.e.f. 22.11.01 onwards. The I.O. report is silent on the absent period w.e.f. 22.11.01, for which letters and memos were issued to him by the office and also published a notice in the news paper Aaj Varanasi and Indian Express o 14.5.02. Therefore, the contents of para 6.2.2 in the I.O. report is not in conformity with the facts/records of the case.

(c) Further Para 6.2.3 of I.O. report says that EE (E), FCED had informed the SE, ODEC about the joining of duty by the C.O. vide letter 8(14) Estt./FCED/1181 dt.03.07.02 as at exhibit P 4, and regularizing the period by sanctioning the leave in service book and full payment of salaries etc. had also been made to the C.O.

(d) A perusal of the said exhibit P-4 shows that it is a letter no.8(14) Estt./FCED/1181 dt.03.07.02 from EE, FCED addressed to AE, SD-IV to issue instructions to Sh.S.S.Dhall, JE (E) to hand over the charge of Old Press Colony, Faridabad, to Sh.Banarsi Prasad, JE(E). The said letter was also endorsed to SE, ODEC to intimate him that Sh.Banarsi Prasad, JE(E) has submitted his joining report on 25.6.02. The said letter does not contain anything regarding the sanctioning of the leave and its entry in service book and payment of full salary etc. Therefore, the contents of Para 6.2.3 is also not in conformity with the records/facts of the case.

4. In view of the above position this office has asked EE(E), ECD-I, vide this office letter no.7(12) DCEC-VI/E-I 2282 dt.28.10.09 to examine the record & confirm whether the absent period of the incumbent w.e.f. 22.11.01 onwards for which the charge sheet was framed was regularized and payment of salaries etc. released thereto at any stage. EE (E), ECD-1 vide his letter no.8(1)ECD-I/E-I/09 2447 dt.30.10.09 has informed that neither the period of unauthorized absence of Sh.Banarsi Prasad, JE(E) w.e.f. 22.11.01 onwards is regularized for leave of the absence period is sanctioned. The period for which pay has not been drawn is:

01.09.01 to 30.06.02 - 10 months

01.08.02 to 30.09.02 - 02 months

5. The service book of Sh.Banarsi Prasad, JE(E) was also examined, which confirms the above position. On perusal of personal file of C.O. it is seen that EE (E), ECD-I had issued a pay fixation order vide 15(PF)ECD-I/EC-I/2368 dt.1.10.07, revising the pay of the incumbent from 09.08.99 onwards, consequent upon an audit report. The said fixation was for the period of 09.08.99 to 01.08.07, which covered the absent period from 22.11.01 onwards also. The entry for this fixation order was made in the service book on 17.10.07. Subsequently, EE (E)/FCD-I has realized this error and hence issued another office order superseding the above pay fixation vide 15(PF)EC-I/ED-II/07/862 dt.25.04.08, wherein the pay was fixed from 09.08.99 to 01.08.01, with specific remarks that ñthe decision regarding subsequent increment shall be taken only after regularization of absent periodò. The entry to the above fixation order has not been made in service book. On perusal of personal file it is seen that Sh.Banarsi Prasad, JE(E) has not applied for leave for above period of absence for which decision is pending by the leave sanctioning authority.

6. In view of the above facts it is clear that the absent period i.e. 22.11.01 onwards, for which the C.O. was charge sheeted, has not yet been regularized by the division. Only 5 days i.e. 16.07.02 to 20.07.02 was sanctioned as EL by EE(E)/FCED and he was paid salary for the full month of 7/02. Therefore, the IOôs findings on charge Article 2 is not on conformity with the record/facts of the case. The records & facts of the case establishes the fact that C.O. was absenting from duty w.e.f. 22.11.01 o till the date of serving the charge sheet i.e. 08.10.02 except for 5 days w.e.f. 16.07.02 to 20.07.02 for which period leave was sanctioned.

7. Hence it is found by the undersigned that the charge article 2 is not correctly concluded by the I.O. as being not proved. The charge is found to be correct and proved in the light of the above facts brought out.

8. Sh. Banarsi Prasad, JE (E), is requested to furnish his written representation if any to the undersigned on I.O.ôs report and disagreement by the undersigned, as brought out above within 15 days of the issue of this letter.ò

Though in paragraph 7 of the disagreement note/O.M. dated 20.11.2009, it was observed that the ócharge article 2 is not correctly concluded by the I.O.

as being not provedô and the ócharge is found to be correct and provedô, yet the disciplinary authority, vide paragraph 8 of the disagreement note/O.M. dated 20.11.2009, requested the applicant óto furnish his written representation if any to the undersigned on I.Oôs report and disagreement by the undersignedô. In view of the fact that the disciplinary authority gave an opportunity to the applicant to submit his written representation ón the I.Oôs report and disagreementô, it cannot be said that the observation made by the disciplinary authority in paragraph 7 of the disagreement note/O.M. dated 20.11.2009 that the ócharge is found to be correct and provedô was the final conclusion arrived at by the disciplinary authority that Article II of the charges against the applicant was proved.

14. After considering the applicantôs representation dated 22.1.2010 to the I.Oôs report and disagreement note/O.M. dated 20.11.2009, the disciplinary authority passed the order dated 15.3.2010 holding, inter alia, that óCharge Article No.2 (i.e. absenting from duty) is partially proved.ô It is, thus, clear that the finding arrived at by the disciplinary authority in paragraph 7 of the disagreement note/O.M. dated 20.11.2009 that óthe charge article 2 is not correctly concluded by the I.O. as being not proved, and the ócharge is found to be correct and provedô was tentative and not final.

15. Rule 15 of the CCS (CCA) Rules, 1965, deals with action on the inquiry report. Sub-rule (2) of Rule 15 is relevant for the purpose of considering the second contention of the applicant. It reads as under:

> ñ(2) The Disciplinary Authority shall forward or cause to be forwarded a copy of the report of the inquiry, if any, held by the Disciplinary Authority or where the Disciplinary Authority is not the Inquiring Authority, a copy of the report of the Inquiring Authority together with its own tentative reasons for disagreement, if any, with the findings of Inquiring Authority on any article of charge to the Government servant who shall be required to submit, if he so desires, his written representation or submission to the Disciplinary Authority within fifteen days, irrespective of whether the report is favourable or not to the Government servant.ò

Sub-rule (2) of Rule 15 imposes an obligation on the disciplinary authority to forward or cause to be forwarded a copy of the inquiry report, where the disciplinary authority is not the inquiring authority, to the Government servant. The disciplinary authority is also required to record its own tentative reasons for disagreement, if any, with the inquiring authority. In view of this rule position, we do not find any infirmity in the disagreement note/O.M. dated 20.11.2009.

16. In **Yoginath D.Bagde Vs. State of Maharashtra & another** (supra), the challenge was to the judgment and order passed by the Honôble Bombay High Court which had dismissed the writ petition by which the appellant had challenged the order dismissing him from service after the disciplinary proceedings in which it was found that the appellant was guilty of the charges framed against him. The appellant was a Judicial Officer who was dismissed from service on the charges of indulging in correct practices. Complaint was made against him by a person who was an accused in a sessions trial being conducted by the appellant. Anti-corruption Bureau laid a trap against the appellant, but the trap was unsuccessful and failed.

Inquiring Authority described the trap as false and it was laid without the Chief Justiceôs prior permission. The Inquiring Authority held the charges as not proved against the appellant, but the Disciplinary Committee of the Honôble High Court disagreed with the findings of the Inquiring Authority and held the charges as proved. The Minutes of the Disciplinary Committee were as follows:

> ñDiscussed. For the reasons recorded in Annexure Áô hereto, the Committee disagrees with the findings of the Enquiry Officer and finds that the charges levelled against the delinquent Judicial Officer have been proved. It was, therefore, tentatively decided to impose upon the Judicial Officer calling upon him to show cause why penalty of dismissal from service as prescribed in Rule 5(1)(ix) of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979 should not be imposed upon him. Showcause notice will be accompanied by a copy of the Report of the Inquiring Authority and the reasons recorded by this Committee.ò

Allowing the appeal, the Honôble Supreme Court held, inter alia, that the show-cause notice issued to the appellant was regarding penalty proposed to be imposed on him. This show-cause notice does not meet requirement of law because decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing. After taking this decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show cause against major punishment of dismissal proposed to be imposed on him. Post-decisional opportunity of hearing, though available in certain case, would be of no avail, at least, in the circumstances of the case. The Disciplinary Committee took a final decision that the charges

against the appellant were established and recorded that decision in writing and then issued a notice requiring him to show cause against the proposed punishment of dismissal. The findings were final; what was tentative was the proposal to inflict upon appellant the punishment.

17. In the instant case, we have already found that the view expressed by the disciplinary authority in paragraph 7 of the disagreement note/O.M. dated 20.11.2009 that ótheô charge article 2 is not correctly concluded by the I.O. as being not provedô and the ócharge is found to be correct and provedô was tentative, and that the disciplinary, vide paragraph 8 of the disagreement note/O.M. dated 20.11.2009, had given opportunity to the applicant to ófurnish his written representation if anyé .on I.O.ôs report and disagreementô. Thus, it cannot be said that the disciplinary authority, before giving an opportunity to the applicant to make representation against the reasoning given in the disagreement note, arrived at the final conclusion that Article II of the charges was proved against the applicant and thereby violated the principles of natural justice. Furthermore, the disciplinary authority, after considering the applicantôs representation dated 22.1.2010, held that óCharge Article No.2 (i.e. absenting from duty) is partially provedô, although the disciplinary authority in the disagreement note/O.M. dated 20.11.2009 took a tentative view that Article II of the charges was found to be correct and proved. The disagreement note/O.M. dated 20.11.2009 also did not contain any tentative decision of the disciplinary authority to impose any punishment on the applicant. Therefore, the decision in **Yoginath**

D.Bagde Vs. State of Maharashtra & another (supra), being distinguishable on facts, is of no help to the case of the applicant.

18. In the light of our above discussions, we have no hesitation in holding that the Original Application is devoid of any merit. Accordingly, the O.A. is dismissed. No costs.

(RAJ VIR SHARMA)
JUDICIAL MEMBER

(SHEKHAR AGARWAL)
ADMINISTRATIVE MEMBER

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