Central Administrative Tribunal
Principal Bench, New Delhi

O.A.No.1886/2015

Reserved on 10th February 2016

Pronounced on 29th February 2016

Hon'ble Mr. A.K. Bhardwaj, Member (J)
Hon'ble Dr. B.K. Sinha, Member (A)

Mr. Prakash Mishra (IPS) (DG, CRPF)
Aged about 58 years
Son of late Mr. Somnath Mishra
r/o AB-80, Shahjahan Road,
New Delhi-1

..Applicant

(Mr. Vishvajit Singh, Mr. Apoorva Agarwal, Mr. Hemant Sharma, Mr. Pankaj Singh, Ms. Riddima Singh and Mr. Piyosh Vats, Advocates)

Versus

1. Union of India
   Through Secretary (Home)
   Department of Home Affairs
   Government of India, North Block
   Central Secretariat, New Delhi

2. State of Odisha
   Thrugh Principal Secretary
   Home Department, Government of Odisha
   Secretariat Building, Bhubaneswar

..Respondents

(Mr. D.S. Mahendru, Advocate for respondent No.1 –

Mr. Harin P. Raval, Senior Advocate (Mr. Shibashish Misra and Mr. Anando Mukherjee, Advocates with him) for respondent No.2)

O R D E R

Mr. A.K. Bhardwaj:

The applicant is 1977 batch IPS Officer of the Orissa cadre. Various positions held by him in his service career, as mentioned in paragraph 4 (ii) of the Original Application, read thus:-

Sl. No.	Central Government
1.	SP and DIG of CBI at Delhi Bhubaneswar and Hyderabad
2.	IG, Railway Protection Force, South Eastern Railway, Kolkata
3.	Joint Director, National Police Academy Hyderabad
4.	Special DG, National Investigation Agency, New Delhi
5.	DG, National Disaster Response Force, New Delhi
	State Government
1.	SP of Districts of Mayurbhanj and Rourkela
2.	AIG, State Police Headquarters, Cuttack
3.	DIG, Bhubaneswar Range and DIG, Security to the Chief Minister Orissa
4.	IG, Headquarters, Cuttack
5.	Chairman cum Managing Director, Orissa Police Housing and Welfare Corporation
6.	Addl. DG, Headquarters, Cuttack
7.	Additional DG and DG cum Director Intelligence, Anti Naxal Operations.
8.	DG, Home Guard and Fire Services
9.	DGP, Orissa

2. According to him, during his stint with the State Government of Odisha, he was given the charge of Chairman cum Managing Director, Odisha State Police Housing and Welfare Corporation (OSPH&WC) Ltd., Bhubaneswar and he served on the post till 03.07.2009. Vide memorandum dated 05.12.2014 he was charged with the misconduct mentioned in Annexure-I to the memorandum. The annexure reads thus:-

"Articles of charge

Shri Prakash Mishra while functioning as Chairman-cum-Managing Director, Odisha State Police Housing and Welfare Corporation (OSPH & WC) Ltd., Bhubaneswar for the period from 01.09.2006 to 03.07.2009 has committed gross irregularities and misconduct in the following manner:

That, without the corresponding power or authority, Sri Prakash Mishra passed orders for regularization of adhoc services of eight Peons and one Watchman of OS PH & WC Ltd. without approval of the Government or the Board of Directors, OS PH & WC Ltd., Bhubaneswar, in violation of stipulated rules and regulations, without following the recruitment procedures and provisions of the Odisha Reservation of Finance Department Resolution No.22764 dtd. 15.5.1997 and in contravention of the office memorandum relating to austerity measures issued by the Finance Department vide O.M. No.10954/F dtd. 14.3.2001. Subsequently, these irregular appointments were not approved by the Board of Directors of OSPH & WC Ltd. and the Government. As a result these employees went to the Court and started litigation and got stay order. Due to this act the State Government is unnecessarily facing litigation in Court.

That, his aforesaid acts in regularizing the services of eight adhoc Peons and one adhoc Watchman clearly shows willful violation of the prescribed rules and regulations and misconduct which is unbecoming of a member of an All India Service.

Thereby Shri Prakash Mishra has violated Rule – 3 (1) of All India Services (Conduct) Rules 1968."

3. Assailing the charge sheet, he filed O.A. No.314/2015, which came to be disposed of in terms of Order dated 09.02.2015 with liberty to the applicant to make a detailed representation to the disciplinary authority in response to the aforementioned memorandum espousing his grievance against the same within two weeks from the date of receipt of a copy of the Order and direction to the disciplinary authority to decide the same as expeditiously as possible preferably within eight weeks. As a ramification, in response to the memorandum dated 05.12.2014, the applicant made a representation dated 05.03.2015, which was decided in terms of the order

dated 28.04.2015, thus the applicant filed the present Original Application praying therein:

> "a) set aside the order No.HOME-IPS/CASE4-0004-2013- 13472 (M)/IPS, dated 28.04.2015 passed by the Respondent no.2;
>
> b) pass any further order(s) as this Hon'ble Tribunal may deem just and appropriate in the facts and circumstances of the present case."

4. In the impugned order, the State Government viewed thus:-

i) The decision of regularization of *ad hoc* employees had neither been approved by the Board of Directors of OSPH & WC Limited nor by the Government, which was mandatory.

ii) The stand taken by the applicant regarding allegation of violation of recruitment procedures and provisions of Odisha Reservation of Vacancies Act, 1975, as laid down by the Government of Odisha in Finance Department Resolution No.22764 dated 15.05.1997 was not tenable.

iii) The ORV Act provided for reservation in posts and services as mandated in the Constitution of India for SC and ST candidates.

iv) The regularization of *ad hoc* employees also contravened austerity measures stipulated by the Finance Department O.M. dated 14.03.2001.

In sum and substance, in the order passed in the aforementioned representation, the State Government reiterated the charges.

5. In the Original Application filed by him, the applicant espoused the following grounds:-

a) Once the issue regarding validity of regularization of *ad hoc* employees is *sub judice* before the Hon'ble High Court of Orissa in Writ Petition (C) No.7983/2010, the respondents could not have alleged any misconduct against the applicant and in doing so, they have disregarded the authority of the Hon'ble High Court.

b) Once the Hon'ble High Court had granted interim stay to the *ad hoc* employees, regularized by the applicant, no misconduct can be found to have been committed by him.

c) The incident of misconduct pertained to the year 2009 whereas the charge sheet was issued in the year 2014, i.e., after the delay of 5 years, hence the same is liable to be quashed on the ground of delay alone.

d) There is no misconduct committed by the applicant and the impugned charge sheet has been issued to him malafidely only because during the elections he had acted as per law and did not succumb to the pressures put on him.

e) Before issuance of charge sheet, the respondents did not seek his explanation as to why the disciplinary proceedings should have been initiated against him.

f) There was a practice prevalent in the Corporation of regularization of *ad hoc* employees by the Chairman-cum-Managing Director.

g) In regularizing the *ad hoc* employees, the applicant acted as per the recommendation of the Selection Committee.

h) The Chairman-cum-Managing Director of OSPH&WC Ltd. is competent to regularize the services of *ad hoc* employees (particularly

Peons and Watchmen) and needed no prior approval of Board of Directors.

i) There was no misconduct committed by the applicant when the Board had declined to confirm the appointment in the year 2010.

j) The Board of Directors of OSPH&WC Ltd. had in their third meeting dated 29.05.1981 delegated the powers of creation of posts, appointments thereto and disciplinary actions, including suspension, discharge and dismissal to posts carrying the pay of `500 and below in the pre-revised scale to the Managing Director. The Peon and Watchman fall in the said category.

k) In view of the Resolution dated 29.05.1981 passed by the Board, the order of regularization of *ad hoc* employees of the OSPH&WC Ltd. were not required to be approved by the Board of the Corporation.

l) The impugned order passed by the State Government rejecting the representation of the applicant does not contain any reason as to how the submission of applicant on the charges of violation of recruitment procedures and provisions of Odisha Reservation of Vacancies Act, 1975, as laid down by the Government of Odisha in Finance Department Resolution No.22764 dated 15.05.1997 is not in accordance with the provisions of said Act.

m) The Screening Committee in its meeting dated 11.06.2009 had shown due regard to the ORV Act, 1975.

6. Learned senior counsel for respondent No.2 – State of Odisha submitted that the issue involved in the Writ Petition (ibid) pending before the Hon'ble High Court has no bearing on the issue raised in the present Original Application, as the outcome of the Writ Petition would only

determine "whether the regularization of the services of *ad hoc* employee was in order or not". The further submission made by him was that the delay in issuance of charge sheet would not vitiate the disciplinary proceedings in all the circumstances. To buttress his plea, he relied upon the judgment of Hon'ble Supreme Court in **Anant R. Kulkarni** v. **Y.P. Education Society & others**, (2013) 6 SCC 515. Relevant excerpt of said judgment reads thus:-

> "8. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limitation of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court. The same principle is applicable in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question, must be carefully examined, taking into consideration the gravity/magnitude of charges involved therein. The Court has to consider the seriousness and magnitude of the charges and while doing so the Court must weigh all the facts, both for and against the delinquent officers and come to the conclusion, which is just and proper considering the circumstances involved. The essence of the matter is that the court must take into consideration all relevant facts, and balance and weigh the same, so as to determine, if it is infact in the interest of clean and honest administration, that the said proceedings are allowed to be terminated, only on the ground of a delay in their conclusion."

He also relied upon the judgment of Apex Court in **Secretary, Ministry of Defence & others** v. **Prabhash Chandra Mirdha**, (2012) 11 SCC 565 and submitted that the Tribunal should not interfere with the charge sheet at the initial stage. Relevant excerpt of the judgment reads thus:-

> "13. Thus, the law on the issue can be summarised to the effect that chargesheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not

> competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the chargesheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."

7. He further made reference to the Orissa Reservation of vacancies in post and services (for Scheduled Castes and Scheduled Tribes) Act, 1975 (Orissa Act 38 of 1975) and O.M. No.10954/F. Bt-1-9/2001 dated 14.03.2001 issued by the Government of Orissa, Finance Department to espouse that in regularizing the *ad hoc* employees, the applicant herein violated the provisions of said Act and O.M. With reference to letter dated 13.03.2008 issued by the Government of Orissa, Home Department, he submitted that without the approval of the Government even the Board of Directors could not have created any post.

8. Rejoining the submissions, learned counsel for applicant submitted that the applicant did not create any post and he only ordered regularization of such *ad hoc* employees, who were working on the post for years together and in doing so, he did not commit any irregularity, far less misconduct.

9. We heard the learned counsels for the parties and perused the record.

10. The main emphasis of the stand taken by the applicant in his Original Application is that he has not committed any misconduct and the charge sheet is liable to be quashed on this ground alone. To appreciate the plea, we may analyze the charges. As can be seen from the article of charges, the applicant is charged with the misconduct that while functioning as

Chairman-cum-Managing Director, Odisha State Police Housing and Welfare Corporation (OSPH & WC) Ltd., Bhubaneswar for the period from 01.09.2006 to 03.07.2009 he committed gross irregularities and misconduct of passing order for regularization of *ad hoc* service of eight Peons and one Watchman without the approval of the Government or the Board of Directors, OSPH & WC Ltd. in violation of rules and regulations, without following the recruitment procedures and provisions of the Odisha Reservation of Vacancies Act, 1975 (ORV Act, 1975). To articulate, the allegations against the applicant are; (i) he passed the order for regularization of *ad hoc* services of eight Peons and one Watchman without approval of the Government or the Board of Directors, OSPH & WC Ltd. in violation of the stipulated rules and regulations, (ii) in making such regularization, he violated Reservation of Vacancies (ORV) Act, 1975 as laid down by Government of Odisha in Finance Department Resolution No.22764 dated 15.05.1997, (iii) the austerity measures issued by the Finance Department vide O.M. dated 14.03.2001; and (iv) the regularization led to the litigation.

11. As far as the issue of regularization of services of *ad hoc* Peons and Watchman without approval of the Board of Directors and Government of Odisha is concerned, we find that in terms of the Resolution passed by the Board of Directors in its 3rd meeting held on 29.05.1981, M.D. is competent to create the posts with the maximum of the time scale of `500/- per month with the approval of the Chairman. The minutes, as placed on record by the applicant as Annexure P-10 of the Original Application, read thus:-

"Extract /Minutes of 3rd Board of Directors' meeting held on 29.5.81.

Item No.27 (Regarding Delegation of Administrative Power)

Administrative Powers:	M.D.	Chairman
1. Creation of posts appointment thereto and disciplinary action including suspension, discharge and dismissal	Can create posts with the maximum of Rs.500/- per month with the approval of the Chairman.	Not exceeding Rs.500/-

12. From the aforementioned Resolution, one can also see that the Managing Director is competent to make appointment to the post with the maximum of the time scale of `500/- per month with approval of the Chairman. The applicant was holding the post of Chairman-cum-Managing Director, thus it was within his competence to create the posts in question and make appointments thereto. Besides, we find from the additional documents placed on record by the State of Odisha with affidavit dated 02.02.2016 that on 08.12.2006 the applicant requested the Principal Secretary to the Government, Home Department, Government of Orissa, Bhubaneswar to consider regularization of *ad hoc* services of eight Peons /Orderly Peons against eight vacant posts. The letter reads thus:-

"Sub: Regularization of adhoc services of 8 Peons/Orderly Peons.

Sir,

Apart from regular Peons posted to Head office, we require Peons/Orderly Peons to work at Zonal/ Divisional office in the State. At present, we have 8 (eight) zonal offices at different places in the State. In addition, some more Zonal Divisional offices are likely to be opened in view of increased work load. At present, 8 (eight) Peons/ Orderly Peons are working in the Corporation for the purpose against 8 (eight) vacant posts. They have been allowed grade pay of the respective grade i.e. Rs.2550/- to Rs.3200/- with usual D.A., H.R.A., and Medical allowances etc. like regular employees of the Corporation except annual increment and pay for the break period. This was

discussed in the last Board of Directors Meeting held on 1.12.2006. The prescribed format duly filled in is enclosed for your kind perusal and ready reference.

In view of the above, the Govt. may kindly consider regulrisation of adhoc services of 8 (eight) Peons/Orderly Peons against 8 (eight) vacant posts lying in the Corporation as their services are badly required by the Corporation."

13. On 31.12.2008 he again wrote a letter to the Principal Secretary to Government of Orissa, Home Department, Bhubaneswar seeking permission for consideration of suitability of the Group 'D' employees against sanctioned posts available in the Corporation by forming a selection committee. The letter reads thus:-

"This is to draw your kind attention to the fact that, eight Peons/ Orderly Peon and one Watchman are working in this Corporation on Adhoc 44 days basis with usual break for a day or two in between sanctioned posts of nine in respect of Peon/ Orderly Peon and one in respect of Watchman. They have been continuing in the said posts for more than 20 years or so as need based employees. They have been allowed to draw grade pay of their respective posts except annual increment in view of break in service for a day or two, being Adhoc employees. Now they have been representing time and again to regularise their services in view of availability of sanctioned posts.

The C.M.D., as per delegation of financial power by the Board, can create and appoint a person belonging to this category i.e. Group-D/Class-IV employees.

In view of the above, the Govt. may kindly permit to consider the suitability of the Group-D employees against sanctioned posts available in the Corporation by forming a selection committee."

14. In terms of letter dated 13.03.2008 (ibid), the Undersecretary to Government of Orissa, Home Department sought certain clarification from the Chairman-cum-Managing Director, OSPH & WC Ltd. Bhubaneswar, i.e., the applicant herein. The letter reads thus:-

"I am directed to invite a reference to your letter on the subject cited above and to say that while considering the proposal for regularisation of Ad hoc services of different employees working in OSPH & WC Ltd. Finance Department have observed for compliance on the following points:

i) Operational result of the Corporation for the year 2006-07 along with audit report for the year 2003-04 and onwards may be furnished.

ii) The power of Board of Director has been restricted. Without approval of Government no post can be created. It may be indicated how so many persons are continuing against non-existent posts and salary is being drawn for them. Drawal of salary and other emoluments without a sanction post is highly irregular.

iii) Whether any recruitment rule/policy for the Corporation exists and if it exists why suitable/eligible persons were not recruited by following due process of law and whether there is any relaxation provision in the recruitment rule to engage persons on ad hoc basis.

I would, therefore, request you kindly to furnish the above clarification along with supporting document to this Department latest by 20th March, 2008.

This may be treated as most urgent."

15. After the aforementioned correspondence, the Selection Committee was constituted and as can be seen from the proceedings of the meeting of the Selection Committee held on 11.06.2009, the Committee had taken note of the provisions regarding reservation and had viewed that the reserved category candidates could be accommodated against future vacancies. We cannot also be oblivious of the fact that the *ad hoc* employees, who were considered for regularization, were working since 1987, 1988, 1994 and 1996, i.e., 13 to 22 years. The proceedings of the meeting of the Selection Committee (ibid) read thus:-

"As per orders of the CMD in File No.E-38/06 and File No.E-31/06 the selection committee was formed with the Chief Engineer (Civil) as Chairman and the C.S. and Jt. General Manager (F) and

Deputy General Manager (Admn.) as members to consider suitability of adhoc Watchmen and adhoc Peons/Orderly Peons for their coming over to the regular establishment.

The Selection Committee Meeting met on 11.06.2009 in the office Chamber of the Chief Engineer Civil and called for relevant files/records and their observation is made hereunder.

Watchman

There is only one sanctioned post of Watchman which has been created on 12.01.1981 for the Corporate Office. But there are 17 watchmen working under the corporation on adhoc basis since 1990/96/99. Prior to it, they were engaged as Daily wage earners since 1994. The CMD is competent to create and make appointment to the post carrying Rs.5500/- (pre-revised) per month. The adhoc Watchmen are at present getting only Rs.2550/- in the scale of Pay Rs.2550-3200 with DA, HRA, etc. without increment on 44 days basis. Since there is only one sanctioned post, the rule of reservation will not apply to this case. From the gradation list, it is found that Sri Bhim Bahadur Ale is the senior most among all adhoc watchmen and there is no adverse remark in performance of his duties. Therefore, the Committee considered Sri Bhim Bhadur Ale suitable to hold the post of Watchman on regular basis. The financial implication on this score will be very nominal.

Peons/Orderly Peons

There are 17 sanctioned posts of Peons against which 8 (eight) Peons have been regularly appointed. As against remaining 9 (nine) posts, 8 (eight) Peons have been working on adhoc basis since 1990/1994/1996. One post is kept in abeyance in view of WPC No.8595/05 filed by Smt. Annapurna Swain, Peon (adhoc). It is found from the gradation list of peons that the 8 (eight) Peons from S.I. No.9 to 16 were earlier engaged as Daily Wage Earners since 1987/1988/1994/1996. Subsequently they have been appointed on adhoc basis since 1990/1994/1996. The CMD is competent to create and make appointment to the posts carrying Rs.5500/- per month.

The rule of reservation is applicable to this case. According to 80 point Model Roster, 11 – UR, 3 – ST and 3 – SC Peons are required against 17 sanctioned posts. But within the gradation list 14-UR, 1-ST and 1-SC Peons (both regular and adhoc) are available leaving one post vacant. Out of which 6-UR, 1-ST and 1-SC Peons have been earlier regularly appointed and 8-UR Peons are now working on adhoc basis.

Since there is no adverse remark against any of the adhoc Peons, the Committee now considered all the 8 Peons suitable for regularization of their adhoc service subject to condition that the 4 (four) reserved posts (2-SC, 2-ST) can be accommodated against the vacancy that will occur in future by way of retirement/resignation/

creation or otherwise. The financial implication on this score will be very nominal."

16. In acceptance of the recommendations of the Selection Committee, the Chairman-cum-Managing Director, i.e., the applicant herein had passed the office order dated 19.06.2009, which reads thus:-

"The adhoc services of the following Peons/Orderly Peons are regularized against the available sanctioned posts in order of their seniority in the gradation list in the scale of pay Rs.2550-55-2660-60-3200 with D.A. and other allowances as admissible from time to time w.e.f. the date of issue of this order. They will be on probation for one year from the date of their regularization.

1.	Sri Trilochan Madhual	-	Orderly Peon
2.	Sri Pramod Kumar Jena	-	-do-
3.	Sri Rabindra Nath Barik	-	-do-
4.	Sri Mahabir Das	-	-do-
5.	Sri Krupasindhu Pihan	-	-do-
6.	Sri Maheswar Behera	-	-do-
7.	Sri Kartika Ch. Swain	-	-do-
8.	Sri Prasanta Kumar Behera	-	Peon

It is not so that the order was not referred to the Board of Directors for *post facto* approval. The fact that the Chairman-cum-Managing Director had ordered *post fact* approval of the Corporation/ Board of Directors to regularize the services of the *ad hoc* employees is established from the minutes of 102nd meeting of the Board of Directors held on 18.02.2010. Nevertheless, when the matter went to the Board, it raised certain issues, which read thus:-

"a) Whether Govt. approval has been taken in view of ban on recruitment to Base Level Posts?

b) Whether provisions of Orissa Reservation of Vacancy Act, 1975 has been followed. In this regard Government of Orissa, Home Department has also asked for a report vide letter No.-41259/M&D, dt 09.09.2009.

> 3. The appointments were made without obtaining Government approval as is required under Finance Department Order NO.-10954/F, dt 14.03.2001 which specifically prohibits recruitment into base level posts."

17. Though we have the material before us to comment upon the aforementioned issues, which are in fact also the charges against the applicant, but since it is settled position of law that in judicial review the Courts/Tribunals should not go into the correctness of charges, we are avoiding to do so. The scope of these proceedings is *inter alia* "whether the charges, as alleged, constituted any misconduct". The term 'misconduct' is defined in Rule 3 (3) (i) of All India Service (Conduct) Rules, 1968, in terms of which "No member of the service shall, in the performance of his official duties, or in exercise of powers conferred on him, act otherwise than in his own best judgment to be true and correct except when he is acting under the direction of his official superior". In the present case, as we see from the material before us, in view of the length of service of the casual workers, the power vested in him to regularize the services of the *ad hoc* employees and the minutes of the Selection Committee, the applicant exercised his power in his own best judgment and even when in taking such decision he could commit certain errors, no misconduct could be found to have been committed by him. At best, one can say that the judgment, though is best, was erroneous. Rule 3 (ibid) reads thus:-

> "(3) (i) No member of the service shall, in the performance of his official duties, or in exercise of powers conferred on him, act otherwise than in his own best judgment to be true and correct except when he is acting under the direction of his official superior."

Such is also the provision contained in Rule 3 of CCS (Conduct) Rules 1964, the extract of which has been mentioned in All India Services (Conduct) Rules, 1968, which reads thus:-

> "No Government Servant shall, in the performance of his official duties or in the exercise of powers conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior and shall, where he is acting under such direction, obtain the direction in writing, wherever practicable and where it is not practicable to obtain the direction in writing he shall obtain written confirmation of the direction as soon thereafter as possible."

18. In terms of the provisions of Central Secretariat Manual of Office Procedure, the officer should, in the performance of his official duties, or in the exercise of his powers, except when he is acting under instructions of an official superior to him, obtain directions in writing wherever practicable before carrying out the instructions and where it is not possible to do so he will seek conformation of his action as soon as possible thereafter. In the present case, the applicant had sought confirmation after the action. Relevant excerpt of the Manual on Office Procedure reads thus:-

> "An officer shall, in the performance of his official duties, or in the exercise of the powers conferred on him, act in his best judgment except when he is acting under instructions of an official superior to him. In the latter case, he shall obtain the directions in writing wherever practicable before carrying out the instructions, and where it is not possible to do so, he shall obtain written confirmation of the directions as soon thereafter as possible. If the Officer giving the instructions is not his immediate superior but one higher to the latter in the hierarchy, he shall bring such instructions to the notice of his immediate superior at the earliest."

19. To our satisfaction, we could refer to the O.M. dated 14.03.2001 relied upon by the learned senior counsel appearing for State of Orissa. We find

from paragraph 2.2 of the O.M. that there was complete ban on creation of new post and filling up the vacant posts. The paragraph 2.2 reads thus:-

> "2.2 Based on above analysis it has been decided to ensure progressive reduction of staff in the manner indicated below.
>
> i) There shall be a complete ban on creation of any new post, under any scheme, whether Non-Plan or State Plan, Central Plan and Centrally Sponsored Plan. In case there is any absolute necessity for creation of posts for modernization of administration or effective implementation of development and people-oriented projects, the same may be done only by abolition of equivalent posts in the Govt. or corporation with the approval of the Finance Department. Similarly in case of Police organisation, if there is absolute necessity for creation of posts in connection with enforcing law and order or establishment of new Fire Stations etc. the minimum requirement of posts may be created but such posts shall have to be filled up only by redeployment of available manpower in different wings of the Police Organisation including Home Guard or eligible surplus employees from other Departments, after due training wherever necessary.
>
> ii) There shall be a selective ban on filling up the base level vacant posts meant for recruitment. In case there is absolute necessity for filling up base level vacant posts __ connection with enforcing collection of Govt. revenue or enforcing law & ____meeting the basic needs of Govt. or other Govt. organisations like security__ like it can be filled up only with the prior concurrence of Finance Department.
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> iii) The vacant posts of Doctors and Nurses in Primary Health Centres, Hospitals Medical Colleges and Primary school teachers and drivers, in schools and Govt. organisations may be filled up without seeking prior concurrence of Finance Department and for filling up other vacant posts in those institutions ____ concurrence of Finance Department will be necessary.
>
> iv) 50% of the base level vacant posts as on 31st March of this financial year or 20% of the total base level posts in any grade which ever is less shall be abolished by the end of September, 2001. All Departments of Government shall ensure compliance to the above formula and then obtain clearance from Finance Department to fill up the vacant posts if any. Against the posts so abolished as well as against the posts already abolished under the ten percent rule in force, there shall be no recruitment even by rehabilitation assistance. Any candidate considered eligible under the rules in force under Rehabilitation Assistance has to wait for a regular vacancy in the un-abolished vacant posts with the clearance of Finance Department.
>
> v) If any order of a Tribunal or any Court of Law stipulates filling up the base level vacant posts or regularising temporary appointments etc. Finance Department shall have to be consulted and

> FD's concurrence has to be taken before implementing or contesting the said orders."

20. Again since the casual workers regularized by the applicant were working for 13 years to 22 years and were already drawing the wages, it would not be gainsaid to say that at best it was an error of judgment by the applicant in accepting the recommendations of the Selection Committee and issuing the order of regularization, but the same cannot be treated as misconduct. **Union of India** v. **J. Ahmed** (1979) 2 SCC 286, wherein it could be viewed that the negligence in performance of a duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute any 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. The relevant excerpt of the judgment reads thus:-

> "11....In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434: (AIR 1966 SC 1051), 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 punitive. In S. Govinda Menon v. Union of India, (1967) 2 SCR 566 : (AIR 1967 SC 1274), 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, (1964) 2 SCR 104: (AIR 1963 SC 1756), 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. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co.-op. Department Stores Ltd., (1978) 19 Guj LR 108 at p. 120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty."

In **Inspector Prem Chand** v. **Govt. of NCT of Delhi & others** (2007) 4 SCC 566, it could be viewed by Hon'ble Supreme Court that the misconduct means, the misconduct arising from ill motives and acts of negligence, error of judgment or innocent mistake do not constitute any misconduct. Nevertheless, in the said case, Hon'ble Supreme Court also viewed that in a given case, what should have been done, is a matter which would depend on the facts and circumstances of each case. No hard-and-fast rule can be laid down to define misconduct. Paragraphs 12 and 13 of the judgment read thus :-

> "12. It is not in dispute that a disciplinary proceeding was initiated against the appellant in terms of the provisions of the Delhi Police (Punishment and Appeal) Rules, 1980. It was, therefore, necessary for the disciplinary authority to arrive at a finding of fact that the appellant was guilty of an unlawful behaviour in relation to discharge of his duties in service, which was willful in character. No such finding was arrived at. An error of judgment, as noticed hereinbefore, per se is not a misconduct. A negligence simpliciter also would not be

a misconduct. In Union of India & Ors. vs. J. Ahmed (1979 (2) SCC 286), whereupon Mr. Sharan himself has placed reliance, this Court held so stating:

> "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, 17 Q.B. 536, 542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers, 1959 1 WLR 698)]. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur, (61 Bom LR 1596), and Satubha K. Vaghela v. Moosa Raza (10 Guj LR 23). 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." [Emphasis supplied]
>
> 13. The Tribunal opined that the acts of omission on the part of the appellant was not a mere error of judgment. On what premise the said opinion was arrived at is not clear. We have noticed hereinbefore that the appellate authority, namely, the Commissioner of Police, Delhi, while passing the order dated 29.8.2003 categorically held that the appellant being a raiding officer should have seized the tainted money as case property. In a given case, what should have been done, is a matter which would depend on the facts and circumstances of each case. No hard and fast rule can be laid down therefor."

In the present case, it is not so that the State of Orissa could allege any ill motive against the applicant. At best the regularization of 9 casual workers might be an error of judgment, which may not constitute misconduct.

21. The next vital argument espoused on behalf of the applicant is that there is delay in initiation of the disciplinary proceedings. There is sufficient force in such plea of the applicant, as the allegation contained in memorandum dated 05.12.2014 pertained to the period from 01.09.2006 to 03.07.2009, i.e., more than 5 to 9 years old as on the date of issuance of charge sheet. As has been ruled by the Apex Court in catena of judgments,

the delay can be one of the grounds to interfere with the charge sheet. Following the law declared by the Hon'ble Supreme Court, recently a Division Bench of this Tribunal in batch of Original Applications, including O. A. No.3871/2015, viewed thus:-

> "25... it is well established that if charges are not grave, the proceedings initiated after long delay or prolixed after initiation need to be interfered with. The two reasons sufficient to warrant interference with the charge sheet/disciplinary proceedings initiated belatedly, as articulated by Hon'ble Supreme Court are:-
>
> > "(1) That there is a presumption that the disciplinary authority condoned the charges; and
> >
> > (2) The delay has caused prejudice to the defense of the charged officer.
>
> 24. The second ground need to be raised before the disciplinary authority/Enquiry Officer. Besides, these two there can be several other reasons for which the charge sheets/disciplinary proceedings initiated belatedly or unduly prolonged need to be interfered with. One of the such ground may be that the disciplinary authority who is the sole Judge in the disciplinary matter is not fully convinced that the allegations made against an individual constitute misconduct or material placed before it is sufficient to take a decision for proceeding against him, but in the circumstances of the case could not show the confidence and valour to take a decision to drop the proceedings. It is not gainsaid that the executive and the quasi judicial authority, having semblance that the preponderance of material is not sufficient to persuade them to take a decision against the individual prefer to delay its decisions. This may also be a ground to interfere with the disciplinary proceedings when initiated after delay or not concluded for long. As is the position in the present case, the long pending proceeding has adverse affect on the promotional avenues of the employees and when the charges in the disciplinary proceedings are not grave, the agony he undergoes on account of prolonged disciplinary proceedings is more severe then the penalty, he may be subjected to even on conclusion of the proceedings. Likewise, the mental agony of having the disciplinary proceedings pending against him and the attitude of the fellow employees towards him on account of pendency of such proceedings against him become more cumbersome for an employee than the penalty he may be inflicted with early initiation and disposal of the proceedings. When the charges against the employees are grave enough warranting the imposition of the penalty of dismissal/removal or compulsory retirement, one may take a view that the employee who committed such misconduct deserved to undergo sufferance, he faced as above, but when the charges are not so grave, the charge sheet/disciplinary

proceeding should be struck down on account of delay in initiation or conclusion of the same.

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36. In M.V.Bijlani Vs. Union of India & Ors (2006) 5 SCC 88), the charge sheet was interfered being issued after 6 years on the ground that even the basic material on which departmental proceeding could be initiated was absent.

37. In Inderjit Singh & Others Vs. Food Corporation of India and Others (2002 (4) SLR vol.162 page 233), while quashing the charge sheet on the ground of delay, Hon'ble Punjab and Haryana High Court viewed thus:-

> "8.After considering the rival contentions of the parties, we are of the opinion that there is a merit in the contentions raised by the learned counsel for the petitioners. Every case has to be decided on its own facts. It is the admitted case that the respondent-Corporation is allegedly raising the shortage of paddy of the year 1979-80 and 1981-82. After a lapse of more than 20 years calling upon the so-called delinquent officials to explain the shortage when they are not posted at that station would be an extreme act of hardship which will tantamounts to denial of right of reasonable defence which is even recognised by our Constitution. It is the case of the petitioners that the charges levelled against them were well within the knowledge of the respondents. Had the charge sheets been issued at the relevant time, the petitioners would have in a position to rebut the allegations. There is no satisfactory explanation for the inordinate delay in the issuance of charge sheets forthcoming from the written statement of the respondents. In such a situation, there is no difficulty on our part to hold that the petitioners have been deprived of their right of reasonable defence and that they would be deprived of their right/chance to produce evidence after a lapse of more than 20 years to show that no shortage took place. The issuance of the charge sheet in the present case after a lapse of 20 years itself caused serious prejudice to the petitioners. Therefore, we are of the opinion that the department cannot be allowed to take the benefit of their own lapse by issuing charges sheets after a lapse of 20 years. Reliance can be placed upon the judgment of this Court dated 6.5.1994 passed in CWP No. 13008 of 1993 titled Dalip Singh v Food Corporation of India. Similar view was taken on the judicial side in CWP No. 10438 of 1992 Bhagwan Singh Dhillon v. Food Corporation of India."

38. In P.V.Mahadevan Vs. M.D. Tamil Nadu Housing Board (JT 2005) (7) SC417), Hon'ble Supreme Court ruled that allowing the respondents to proceed further with the departmental proceedings at the distance of time would be prejudicial to the appellant and keeping a higher Government official on the charge of corruption and disputed integrity would cause unbearable mental agony and distress

to the officer concerned. In the said case, Hon'ble Supreme Court could also view that the protracted disciplinary enquiry against a Government employee should be avoided not only in the interests of the Government employee but in public interest and also in the interests of inspiring confidence in the minds of the Government employees. Para 16 of the judgment read thus:-

> ''16. Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interests of the government employee but in public interest and also in the interests of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer.''

39. In Rajbir Singh Gill Vs. State of Punjab and another (1997 (7) SLR 423), Hon'ble Punjab and Haryana High Court viewed that the initiation of disciplinary proceedings after a lapse of period of 11 years is clearly arbitrary. Para 10 and 11 of the judgment read thus:-

> "10. In the peculiar circumstances detailed above, we have no hesitation, whatsoever, to hold that the initiation of the departmental proceedings in the instant case after the lapse of a period of 11 years was clearly arbitrary, specially in the light of the fact that the alleged incident came to the knowledge and notice of the authorities immediately on its occurrence. We are also of the opinion that holding a departmental enquiry at such a belated stage would deprive the petitioner of a reasonable opportunity to defend himself, as with the passage of time he would have certain forgotten various vital issues connected with the aforesaid incident.
>
> 11. In the facts and circumstances narrated above, the petitioner will be deemed to have retired from service with effect from 31.10.1997. He shall also be entitled to all consequential retrial benefits. The charge-sheets dated 11.5.1998 and 22.6.1998 are quashed as being contrary to the provisions of Rule 2.2 (b) of the Punjab Civil Service Rules, Volume II; the charge sheet dated 14.7.1995 is also quashed for the reasons mentioned above."

40. In State of A.P. Vs. N.Radhakishan (1998)(4) SCC 154), while discussing and analysed the scope of interference in the disciplinary proceedings on the ground of delay, the Hon'ble Supreme Court ruled thus:-

> ''19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the Court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the Court is to balance these two diverse considerations.
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> 20. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, and all in verbatim and without particularizing the role played by each of the officers charged. There were four charges against the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any inquiry officer even assuming that action was validly being initiated under 1991 Rules. There is no explanation whatsoever for delay in concluding the inquiry proceedings all these years. The case depended on records of the Department only and Director

> General, Anti- Corruption Bureau had pointed out that no witnesses had been examined before he gave his report.
>
> The Inquiry Officers, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. The Tribunal rightly did not quash these two later memos."

41. In State of Punjab and Others Vs. Chaman Lal Goyal (1995) 2 SCC 570), Hon'ble Supreme Court ruled that it is trite that the disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities and they cannot be initiated after a lapse of considerable time. In the said judgment, their Lordships viewed that the delay in initiation of proceeding is bound to give room for allegations of bias, mala fides and misuse of power and if the delay is too long and is unexplained, the Court may well interfere and quash the charge sheet. Regarding length of delay calling for interference, their Lordships ruled that it depends upon the facts of the given case. Para 9 of the judgement read thus:-

> ''9. Now remains the question of delay. There is undoubtedly a delay of five and a half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a

process of balancing. Now, let us see what are the factors in favour of the respondent. They are:

(A) That he was transferred from the post of Superintendent of Nabha Jail and had given (sic up) charge of the post about six days prior to the incident. While the incident took place on the night intervening 1/1/1987/2/1/1987 the respondent had relinquished the charge of the said office on 26/12/1986. He was not there at the time of incident.

(B) The explanation offered by the government for the delay in serving the charges is unacceptable. There was no reason for the government to wait for the Sub-Divisional Magistrate's report when it had with it the report of the Inspector General of Prisons which report was not only earlier in point of time but was made by the highest official of the prison administration. Head of the Department, itself. The Inspector General of Prisons was the superior of the respondent and was directly concerned with the prison administration whereas the Sub-Divisional Magistrate was not so connected. In the circumstances, the explanation that the government was waiting for the report of the Sub-Divisional Magistrate is unacceptable. Even otherwise they waited for two more years after obtaining a copy of the said report. Since no action was taken within a reasonable time after the incident, he was entitled to and he must have presumed that no action would be taken against him. After a lapse of five and a half years, he was being asked to face an enquiry.

(C) If not in 1992, his case for promotion was bound to come up for consideration in 1993 or at any rate in 1994. The pendency of a disciplinary enquiry was bound to cause him prejudice in that matter apart from subjecting him to the worry and inconvenience involved in facing such an enquiry."

42. In Meeran Rawther Vs. State of Kerala (2001 (5) SLR 518), Hon'ble Kerala High Court (DB) ruled that the delay in initiation of proceedings by itself constitute denial of reasonable opportunity to show cause and that would amount to violation of the principles of natural justice. Para 11 to 15 of the judgment read thus:-

"11. We notice with the above mentioned findings of the Secretary (Taxes I), Board of Revenue forwarded report to the Government. No action was taken by the Government for eight years even though letter of the Board of Revenue was received by the Government in the year 1992. Now on the basis of a letter of the Board of Revenue dated 1.1.1999 memo of charges dated 18.1.2000 has been issued. We are inclined to take the view that the present memo of charges dated 18.1. 2000 was an off shoot of the proceedings which led to the issuance of memo of charges dated 15.10.1998. We notice that for the last 14 years Government kept quiet and did not take any action with regard

to an incident that happened in 1986. Facts would reveal that in 1987 memo of charges was issued to the appellant and a preliminary enquiry was conducted and Secretary (Taxes I), Board of Revenue had made a note that it would be difficult to proceed with the case legally. Government did not find it necessary to proceed with the matter. We are satisfied in the facts and circumstances of this case that the present memo of charges dated 18.1. 2000 is ill-motivated and vitiated due to extraneous reasons.

12. We are unable to understand why the Government all on a sudden issued the memo of charges dated 18.1. 2000 with regard to certain incidents happened 14 years ago on which the Secretary (Taxes I), Board of Revenue, had opined that it would be difficult to prove the charges legally as early as in 1992. Matter rested there for years but resurrected all on a sudden. If the Government had any intention to take action with regard to an incident happened in 1986 it would have taken then and there. The precipitated action by the Government by issuing the memo of charges dated 18.1. 2000 was not called for or could be justified at this distance of time. In the facts and circumstances of this case we are satisfied that the motive induced by the Government to take action against the appellant was not to take disciplinary proceedings against him for misconduct which is bonafide believed he had committed, but to wreak vengeance on him for incurring the wrath of the member of the Legislative Assembly.

13. We may in this connection refer to some of the decisions of the apex court wherein the court had quashed disciplinary proceedings on the ground of delay, in State of Madhya Pradesh v. Bani Singh and another, AIR 1990 S.C.1308).

That was a case where departmental proceedings were initiated against an officer by issuing charge sheet dated 224.1987 in respect of certain instances that happened in 1975-76 and when the said officer was posted as Commandant, 14th Battalion. Memo of charges was quashed by the Tribunal on the ground of inordinate delay in initiating disciplinary proceedings. The matter was taken up before the apex court. The court held as follows:

‘’The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-1977. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April, 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are

also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage."

In A.R. Antulay and another v R.S. Nayak and another v. R.S.Nayak and another, 1992 (1) S.C.C. 225) the apex court was dealing with criminal prosecution. The court held that undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise. Later the apex court in State of Punjab v. Chaman Lal Goyal, 1995 (2) S.C.C. 570) held:

"The principles to be borne in mind in this behalf have been set out by a Constitution Bench of this court in A.R. Antulay v. R.A. Nayak. Though the said case pertained to criminal prosecution, the principles enunciated therein are broadly applicable to a plea of delay in taking the disciplinary proceedings as well. In paragraph 86 of the judgment, this court mentioned the propositions emerging from the several decisions considered therein and observed that ultimately the court has to balance and weigh the several relevant factors balancing test or balancing process and determine in each case whether the right to speedy trial has been denied in a given case. It has also been held that, ordinarily speaking, where the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges or the conviction, as the case may be, will be quashed."

The court also held that wherever delay is put forward as a ground for quashing the charges, the court has to weigh all the factors, both for and against the delinquent officer and come to a conclusion which is just and proper in the circumstances. In this connection we also refer to the decision of the Gujarat High Court in Mohanbhai Dungarbhai parmar v. Y.B. Zala and others (1980 (1) SLR 324) wherein the court held that delay in initiating proceedings must be held to constitute a denial of reasonable opportunity to defend himself for one cannot reasonably expect an employee to have a computer like memory or to maintain a day-to-day diary in which every small matter is meticulously recorded in anticipation of future eventualities of which he cannot have a pre-vision. Nor can he be expected to adduce evidence to establish his innocence for after inordinate delay he would not recall the identity of the witness who could support him. Delay by itself therefore, will constitute denial of reasonable opportunity to show cause and that would amount to violation of the principles of natural justice.

14. We may also refer to the decision of the Mysore High Court in Andrews v. Dist. Educational Officer, Bangalore (1968 Lab I.C. 756). In that case certain charges were framed against the government servant in the year 1961 to which we sent his explanation. Later in March 1964 charges were again framed against him. The charges were substantially the same as those

that were framed against him in 1961. The courts held as follows:

‘’If after the production of this explanation, the disciplinary proceeding was not continued, what should reasonably follow is that the disciplinary authority was satisfied with the explanation and dropped the charges. The strength of that inference receives reinforcement from the fact that it was only after a period of 3 1/2 years that the charges were once again revived. The great and inordinate delay in the revival of those charges and the antecedent discontinuance of the earlier disciplinary proceeding over a long tract of time can have no other meaning than that the disciplinary authority was satisfied with the explanation offered by the petitioner on October 1961, and that in consequence the proceedings against him were discontinued and abandoned. If that was how the earlier disciplinary proceeding terminated, it was not within the competence of the disciplinary authority to exhume those charges and to make them subject-matter of another disciplinary proceeding, as late as in the year 1964.”

The abovementioned principle was followed by the Madras High Court in E.S. Athithyaraman v. The Commissioner, Hindu Religious and Charitable Endowments (Administration) Department (AIR 1970 Mad 170). In that case the departmental officer, on framing charges against the delinquent called upon him to submit explanation and on receiving explanation again asked him whether he desired oral enquiry or only to be heard in person. That letter was acknowledged but not replied by the delinquent. Thereupon the enquiry officer went through the files and explanation and, without conducting actual enquiry, held that the charges were established and proposed punishment. That was a case where enquiry was ordered after seven years. The court held that the failure to hold actual enquiry, orders regarding delinquent's promotion and long lapse of period in passing final order, were circumstances from which him whether he desired oral enquiry or only to be heard in person. That letter was acknowledged but not replied by the delinquent, Thereupon the enquiry officer went through the files and explanation and, without conducting actual enquiry, held that the charges were established and proposed punishment. That was a case where enquiry was ordered after seven years. The court held that the failure to hold actual enquiry, orders regarding delinquent's promotion and long lapse of period in passing final order, were circumstances from which reasonable inference could be drawn that delinquent's explanation was accepted and proceedings were dropped.

15. We may in this case notice that the charges were levelled against the appellant with regard to an incident happened in 1986. We also notice in 1987 memo of charges was issued to him on the basis of which enquiry was conducted by the

Secretary who made a note on 3.9.1992 that it would be difficult to pursue the case legally. We must take it that the said opinion has been accepted by Government. Government have issued the present memo of charges with regard to an incident which happened 14 years ago. There is no acceptable explanation for the delay. In the facts and circumstances of the case, we hold that the present memo of charges has been issued since the charges levelled against him in the memo of charges dated 15.10.1998 could not be proved. We also hold that the present memo of charges were vitiated by malafide and is ill-motivated and issued for improper purpose. We therefore quash Ext. P1 memo of charges against the petitioner. Consequently the judgment of the learned single judge stands set aside."

43. In Union of India and Anr. Vs. Hari Singh (W.P (C) no.4245/2013, Hon'ble Delhi High Court ruled thus:-

"57. In the instant case, so far as delay is concerned, the petitioners do not remotely suggest that the respondent attributed to any delay. It is a hard fact that there is delay which is abnormal and extraordinary. The explanation of the petitioners is completely unacceptable for the reason that it is an after thought. In fact the petitioners had available with them the entire record which they claimed to have acquired belatedly.

58. It would be most inappropriate to accept the only justification tendered by the respondents of merely having written a few communications to the DRI for the documents. In any case, if the petitioner was serious about initiating disciplinary action in the above noted circumstances, it could have done so. We have noted above that the petitioner had available with them the necessary record and there was really no reason or occasion for delaying the proceedings for want of original documents. The final adjudication order as well as all inquiry reports was based on the records of the petitioners. Even after obtaining the inquiry report, the respondents delayed the matter not by one or two years but by several years as set out above.

59. We find that the courts have even held that delay in initiating disciplinary proceedings could tantamount to denial of a reasonable opportunity to the charged official to defend himself and therefore be violative of the principles of natural justice. In this regard, reference may usefully be made to the pronouncement of the Kerala High Court reported at 2001 (1) SLR 518 Meera Rawther Vs. State of Kerala wherein it has been held as follows:-

"3. The court also held that wherever delay is put forward as a ground for quashing the charges, the Court has to weigh all the factors, both for and against the delinquent officer and come to a conclusion which is just and proper

> in the circumstances. In this connection we also refer to the decision of Gujarat High Court in Mohanbhai Dungarbhai Parmar vs. Y.B. Zala and Others, 1980 (1) SLR 324 wherein the Court held that delay in initiating proceedings must be held to constitute a denial of reasonable opportunity to defend himself for one cannot reasonably expect an employee to have a computer like memory or to maintain a day-today diary in which every small matter is meticulously recorded in anticipation of future eventualities of which he cannot have a prevision. Nor can he be expected to adduce evidence to establish his innocence for after inordinate delay he would not recall the identity of the witness who could support him. Delay by itself therefore, will constitute denial of reasonable opportunity to show cause and that would amount to violation of the principles of natural justice."

60. So far as the prejudice is concerned, the long period which has lapsed between the alleged transaction and issuance of charge sheet would by itself have caused memory to have blurred and records to have been lost by the delinquent. Therefore, the respondent would be hard put to trace out his defence. The prejudice to the respondent is writ large on the face of the record. The principles laid down by the Supreme Court as well as by this court in the judgments cited by the respondent and noted above squarely apply to the instant case.

61. Certain intervening circumstances which are relevant and material for the purpose of the present consideration, deserve to be considered. We note such circumstances hereafter.

62. On the 23rd of September, 2012 the petitioner was promoted to the post of Superintendent, after evaluation in selection by the Departmental Promotion Committee and due vigilance clearance.

63. Learned counsel for the petitioner has also drawn our attention to the pronouncement of the Tribunal in OA No. 2727/2010 titled Joseph Kouk v. Union of India & Another. It is important to note that Joseph Kuok was implicated in the same incident as the present respondent. He also assailed the disciplinary proceedings similarly commenced against him by way of O.A.No.2777/2010. The Central Administrative Tribunal allowed Joseph Kouk's petition on the ground of inordinate and unexplained delay on the part of the respondent in issuing the charge memo. In the impugned order, the Central Administrative Tribunal has relied upon its adjudication in the Joseph Kouk matter.

64. We have been informed that eight officers out of the twenty three who were named in the report dated 6th August, 2003 have been permitted to retire. The petitioners permitted these

eight officers to retire voluntarily from service. No disciplinary proceedings were initiated against them before they retired. It is trite that an employee against whom disciplinary proceedings were being contemplated would not be permitted to leave the organization or to voluntarily retire from service. It is apparent therefore, that the respondents themselves did not consider the No.4245/2013 the matter as of any serious import affecting the discipline of the department.

65. In view of the above narration of facts, the delay in initiation of the proceedings certainly has lent room for allegations of bias, mala fide and misuse of powers against the respondent by the petitioners. In the judgment reported at 1995 (1) ILJ 679 (SC) State of Punjab v. Chaman Lal Goyal it has also been observed that when a plea of unexplained delay in initiation of disciplinary proceedings as well as prejudice to the delinquent officer is raised, the court has to weigh the facts appearing for and against the petitioners pleas and take a decision on the totality of circumstances. The court has to indulge in a process of balancing.

66. The alleged misconduct claimed to have been done by the respondent Hari Singh has also not been treated to be a major delinquency by the respondent in the light of the principles laid down in Meera Rawther (Supra). It, therefore, has to be held that the delay in initiating disciplinary proceedings would constitute denial of reasonable opportunity to defend the charges in the case and therefore, amounts to violation of principles of natural justice.

67. The plea of the petitioners that they did not have the original documents or certified copies thereof is baseless and rightly rejected by the Tribunal in the impugned order. As noted above, the petitioners were in possession of photocopy of original shipping bills which photocopy had been prepared by them and were available throughout. Even if the plea that the original documents or certified copy were necessary for initiating the disciplinary proceedings were to be accepted, the action of the respondents was grossly belated and certainly the long period which has lapsed was not necessary for procuring the same.

68. The respondents have failed to provide a sufficient and reasonable explanation for the delay in initiating the disciplinary proceedings against the petitioner.

69. We have noted the judicial pronouncements laying down the applicable consideration in some detail hereinabove only to point out that the law on the subject is well settled. The petitioners were fully aware of the position in law as well as of the necessary facts to adjudicate upon the issue. In our view,

> the present writ petition was wholly inappropriate and not called for.
>
> 70. For all these reasons, the judgment of the Tribunal cannot be faulted on any legally tenable grounds.
>
> The writ petition and application are devoid of legal merits and are hereby dismissed.
>
> The respondent shall be entitled to costs of litigation which is are quantified at Rs.20,000/-."

22. To rebut the plea of delay raised on behalf of the applicant, learned senior counsel for State of Orissa relied upon the judgment of Hon'ble Supreme Court in **Anant R. Kulkarni's** case (supra). In the said judgment, the Apex Court ruled that the Court/Tribunal should not generally set aside the departmental inquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings and when it exercises such power it exceeds its power of judicial review at the very threshold. The facts and circumstances of the case in question must be carefully examined, taking into consideration the gravity/magnitude of charges involved therein. In the present case, the only charge against the applicant is of disregarding the principle of reservation and ban on filling up the posts while regularizing certain *ad hoc* employees, who were working from 30 to 20 years. No ill motive is imputed against him. In the facts of the case, the regularization of certain *ad hoc* employees by Chairman-cum-Managing Director was within his competence but merely because he committed error of judgment in decision taking process, the applicant cannot be said to have committed any misconduct, far less the grave misconduct. In view of the nature of allegation, the plea of delay raised on behalf of applicant is acceptable. The plea is also supported by the

Union of India (respondent No.1) by filing a specific detailed affidavit dated 04.02.2016, which reads thus:-

"Reply on behalf of respondent -1

I, Mukesh Sawhney, S/o J.L. Sawhney, presently working as Under Secretary in the Ministry of Home Affairs, North Block, New Delhi, do hereby solemnly affirm and state as under:-

2. That I am well conversant with the facts of the case and I am competent to file this reply affidavit on behalf of Respondent No.1.

3. The Deponent respectfully submits that the Government of Orissa has served the chargesheet to the applicant in December 2014 for the alleged misconduct committed in the year 2009. In view of inordinate delay on the part of the Government of Orissa the chargesheet in question does not appear to be legally sustainable. The explanation of instituting disciplinary proceedings against the applicant after inordinate delay of almost 5 years on the ground that State government was burdened with litigation is not tenable as the matter was within the knowledge of the State Government and action was initiated for reversing the decision of regularization of employees in the year 2009 itself.

4. The deponent submits that in state of Madhya Pradesh vs Bani Singh and Anr., 1990 Cri LJ 1315, it has been inter-alia been observed that when there was no reason for initiation of departmental proceedings after inordinately long delay for over eight years which are not being explained, the same should be quashed.

Similarly, in Management of Delhi Transport Corporation vs Balbir Singh, (2013) III LLG 589 Del, the Hon'ble High Court of Delhi had held that "Charges made against workman shall not be sustained if there is an inordinate delay in framing of charges against workman." In this case, the Hon'ble Court has held as follows:-

"8. We do not find any merit in the contentions urged on behalf of the appellant. Indisputably, there has been an inordinate delay on the part of the appellant. Even if it is assumed that the delay was caused on account of the challenge t the validity of clause 9 (b) of DRTA (Conditions of Appointment and Services) Regulation, 1952 pending before the courts, the same would still not explain the delay completely. Admittedly, the said issue was put to rest by the decision of the Supreme Court in the case of DTC Mazdoor Congress (supra) which was delivered in 1990 and the first charge-sheet was issued to the respondent on 25.11.1992 more than two years after the date of said judgment. There is no explanation, whatsoever, in respect of this delay. Moreover, the appellant could have proceeded against the respondent for alleged misconduct in 1985 but

> chose not to do so. Further, the learned counsel for the appellant also could not draw attention to any document which would indicate that the appellant had been granted liberty by this Court to proceed against the respondent."

5. The deponent also intends to bring to the notice of this Hon'ble Tribunal that earlier an FIR was registered at Bhubaneswar Vigilance PS case No 35 dated 20 Sept 2014 u/s 13(2) read with Section 13 (d)(i) of the Prevention of Corruption Act 1988 and 120 (B) of the Indian Penal Code against the applicant Shri Prakash Mishra, IPS. The applicant filed Criminal Misc Petition under Article 226 and 227 of the Constitution of India and Section 482 of the Cr PC for Quashing the said FIR. The petitions filed by Shri Prakash Mishra were disposed of by the Hon'ble High Court of Orissa vide their Judgement dated 19.06.2015. The Hon'ble High Court quashed the aforesaid FIR and all consequential criminal proceedings vide their judgement dated 19.06.2015.

6. In Para 66 of their judgment dated 19.06.2015, the Hon'ble High Court have held as follows:-

> "It is not very uncommon in our country that honest and upright public servants with unimpeachable integrity and having impeccable track record are often hounded by the ruling political establishment for extraneous consideration. In the present case, what is more disturbing is that the Director, Vigilance, to whom the file was marked by the Chief Minister for conducting an enquiry, has abdicated his duty and responsibility by displaying studied indifference and allowing the Superintendent of Police, Vigilance Cell, Cuttack, to deal with the matter and entrust the enquiry to an officer of the rank of Deputy Superintendent of Police, inspite of the fact that the enquiry was being conducted against the writ petitioner, who was the former DGP of the State and is one of the seniormost IPS officers of repute in the country, presently posted as Director General, CRPF, New Delhi. The action or rather the willful inaction of the Director, Vigilance, in not ensuring free, fair and proper enquiry into the matter and allowing the report of a sham enquiry to be accepted and giving his consent for seeking approval of the State Government for registration of criminal case against the petitioners clearly shows that he was more concerned in exhibiting his loyalty to the ruling political establishment, akin to the old British adage of "more loyal than the Kind".

7. That the SLP filed by the Government of Orissa against judgement dated 19th June 2015 has been dismissed by the Hon'ble Supreme Court.

8. That the chargehseet in question has been issued by State Government for the alleged misconduct of regularizing the services of eight peons and one watchman in Police Housing and Welfare

Corporation who were working on adhoc basis for over 12-15 years. However the employees de-regularised by the State Government have subsequently been regularized as per interim direction of Hon'ble High Court. Thus Hon'ble High Court has upheld the action of the applicant in regularizing the services of the said employees who were working on adhoc basis for over 12-15 years.

9. That in view of the fact that the employees de-regularised by the State Government have subsequently being regularized as per the directions of the Hon'ble High Court and the fact that chargesheet has been issued to the applicant after a lapse of more than 5 years of the alleged misconduct, the charge sheet in question appears to be legally unsustainable.

10. In view of the submission made in the preceding paragraphs, the Hon'ble Tribunal may be pleased to pass an appropriate order in the interest of justice."

23. The stand taken by the Union of India in the aforementioned affidavit in itself is sufficient ground to quash the charge sheet. Nevertheless, we may take the opportunity to comment upon the role of Central and State Governments in certain matters, more so to emphasize that the authorities occupying any official position should discharge the function attached to it with due regard to the rules, regulations and the official hierarchy religiously. The 'administrative relations' of the Central and State Governments are contained in Chapter II (Articles 256 to 263 of the Constitution of India). In Article 257 (1) of the Constitution, it has been specifically provided that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. Chapter II reads thus:-

"257. Control of the Union over States in certain cases.-

(1) The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the

Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

(2) The executive power of the Union shall also extend to the giving of directions to a State as to the construction and maintenance of means of communication declared in the direction to be of national or military importance:

Provided that nothing in this clause shall be taken as restricting the power of Parliament to declare highways or waterways to be national highways or national waterways or the power of the Union with respect to the highways or waterways so declared or the power of the Union to construct and maintain means of communication as part of its functions with respect to naval, military and air force works.

(3) The executive power of the Union shall also extend to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State.

(4) Where in carrying out any direction given to a State under clause (2) as to the construction or maintenance of any means of communication or under clause (3) as to the measures to be taken for the protection of any railway, costs have been incurred in excess of those which would have been incurred in the discharge of the normal duties of the State if such direction had not been given, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of the extra costs so incurred by the State.

257A. [Assistance to States by deployment of armed forces or other forces of the Union.]

258. Power of the Union to confer powers, etc., on States in certain cases.-

(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorise the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this article powers and duties have been conferred or imposed upon a State or officers or authorities thereof,

there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

258A. Power of the States to entrust functions to the Union.-

Notwithstanding anything in this Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends.]

259. [Armed Forces in States in Part B of the First Schedule.]
Rep. by the Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

260. Jurisdiction of the Union in relation to territories outside India.-

The Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

261. Public acts, records and judicial proceedings.-

(1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.

(2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.

(3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

262. Adjudication of disputes relating to waters of inter-State rivers or river valleys.-

(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court

shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

263. Provisions with respect to an inter-State Council.-

If at any time it appears to the President that the public interests would be served by the establishment of a Council charged with the duty of-

(a) inquiring into and advising upon disputes which may have arisen between States;

(b) investigating and discussing subjects in which some or all of the States, or the Union and one or more of the States, have a common interest; or
(c) making recommendations upon any such subject and, in particular, recommendations for the better co-ordination of policy and action with respect to that subject,

it shall be lawful for the President by order to establish such a Council, and to define the nature of the duties to be performed by it and its organisation and procedure."

24. The Chapter is also analyzed by the Hon'ble Supreme Court in **Jayantilal Amratlal Shodhan** v. **F.N. Rana & others**, AIR 1964 SC 648 in the following words:-

"30. Chapter II is headed "administrative relations" and contains Articles from 256 to 263. It is divided into three parts, namely, general, disputes relating to water and co-ordination between States, and is mainly concerned with seeing that the executive power of the Union and of the States is smoothly exercised where it is to be exercised in the same territory. Article 256 lays down that "the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose". **Article 257 provides for control of the Union over States in certain cases and lays down that the executive power of a State shall be so exerciser as not to impede or prejudice the exercise of the executive power of the Union. It further lays down that the executive power of the Union shall extend to the giving of directions to a State for certain, purposes and also for payment of certain sums in certain circumstances by the Government at India to the Government of a State**. Then comes Art. 258, the first clause of which we have already set out. The second clause provides that a law made by Parliament which applies

in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties or authorise the conferring at' powers and the imposition of duties, upon the State or officers and authorities thereof. This clause may be contrasted with cl. (1). Under cl. (1) no entrustment of function can take place without the consent of the State Government but under cl. (2) Parliament may by law confer powers and impose duties in certain circumstances and the consent of the State Government is not necessary for this purpose. This clearly brings out the distinction between entrustment of functions which is exercise of executive power under Art. 258 (1) and the making of a law conferring powers and duties which in express terms is exercise of legislative power under Art. 258(2). Clause (3) provides for payment of certain sums. This clause in our opinion refers only to cl. (2), for there is no question of settlement of payment after the consent of the State Government has been obtained. If there is to be any payment for carrying out functions entrusted under Art. 258(1) it will be settled when consent is obtained. Article 258-A is the counterpart of Art. 258(1) and permits the Governor of a State with the consent of the Government of India, to entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the State extends. Article 260 gives power to the Government of India by agreement with the Government of any territory not being the territory of India to undertake any executive, legislative or judicial functions vested in the Government of such territory. This Article certainly refers to legislative, judicial and executive functions but they are referred to expressly and the Constitution- makers did not content themselves with using only the word "functions". Article 261 provides for full faith and credit to public acts, records and judicial proceedings. Clause (2) thereof lays down bow such full faith and credit as provided in cl. (1) shall be given and says that it shall be done as provided by law made by Parliament. Clause (3) provides that final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law. It will be seen that Art. 261 also where it departs from dealing with executive functions specifically mentions whether the functions are legislative or judicial. Article 262 deals with disputes relating to water and gives power to Parliament by law to provide for adjudication of such disputes. Here again this Article does not deal with executive functions and this is clear from the words used in the Article. Article 263 deals with co-ordination between States and provides for the setting up of inter-State Councils and is obviously of an executive nature."

25. Provisions pertaining to the 'services' under the Union and the State Governments are contained in Chapter I of the Constitution of India. The

provisions regarding the Indian Police Service are contained in Articles 311 to 313 of the Constitution. The Chapter reads thus:-

"308. Interpretation.

In this Part, unless the context otherwise requires, the expression "State" _252[does not include the State of Jammu and Kashmir].

309. Recruitment and conditions of service of persons serving the Union or a State.-

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor _253*** of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

310. Tenure of office of persons serving the Union or a State.-

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor _254*** of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor _255*** of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor_256***, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he

is, for reasons not connected with any misconduct on his part, required to vacate that post.

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.-

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

_257[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges _258***:

_259[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply-

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

312. All-India services.-

(1) Notwithstanding anything in _260[Chapter VI of Part VI or Part XI], if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all India services _261[(including an all-India judicial service)] common to the Union and the States, and, subject to the other provisions of this Chapter,

regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

_261[(3) The all-India judicial service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in article 236.

(4) The law providing for the creation of the all-India judicial service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.]

312A. Power of Parliament to vary or revoke conditions of service of officers of certain services.-

(1) Parliament may by law-

(a) vary or revoke, whether prospectively or retrospectively, the conditions of services as respects remuneration, leave and pension and the rights as respects disciplinary matters of persons who, having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India before the commencement of this Constitution, continue on and after the commencement of the Constitution (Twenty-eighth Amendment) Act, 1972, to serve under the Government of India or of a State in any service or post;

(b) vary or revoke, whether prospectively or retrospectively, the conditions of service as respects pension of persons who, having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India before the commencement of this Constitution, retired or otherwise ceased to be in service at any time before the commencement of the Constitution (Twenty-eighth Amendment) Act, 1972:

Provided that in the case of any such person who is holding or has held the office of the Chief Justice or other Judge of the Supreme Court or a High Court, the Comptroller and Auditor-General of India, the Chairman or other member of the Union or a State Public Service Commission or the Chief Election Commissioner, nothing in sub-clause (a) or sub-clause (b) shall be construed as empowering Parliament to vary or revoke, after his appointment to such post, the conditions of his service to his disadvantage except in so far as such conditions of service are applicable to him by reason of his being a person appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India.

(2) Except to the extent provided for by Parliament by law under this article, nothing in this article shall affect the power of any Legislature or other authority under any other provision of this Constitution to regulate the conditions of service of persons referred to in clause (1).

(3) Neither the Supreme Court nor any other court shall have jurisdiction in-

(a) any dispute arising out of any provision of, or any endorsement on, any covenant, agreement or other similar instrument which was entered into or executed by any person referred to in clause (1), or arising out of any letter issued to such person, in relation to his appointment to any civil service of the Crown in India or his continuance in service under the Government of the Dominion of India or a Province thereof;

(b) any dispute in respect of any right, liability or obligation under article 314 as originally enacted.

(4) The provisions of this article shall have effect notwithstanding anything in article 314 as originally enacted or in any other provision of this Constitution.

313. Transitional provisions.-

Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as an all-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

314. [Provision for protection of existing officers of certain services.] Rep. by the Constitution (Twenty-eighth Amendment) Act, 1972, s. 3 (w.e.f. 29-8-1972)."

26. As can be seen from Article 312 (1) of the Constitution, the Parliament may by law provide for the creation of one or more All India services (including an All India Judicial Service) common to the Union and the States, and, subject to the other provisions of the Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service. In terms of the provisions contained in Article 312 of the Constitution, the Parliament passed the All India Services Act 1951. Section

2 of the Act provided for Indian Police Service. In terms of provisions of Section 3 (1) of the Act 1951, the Central Government may, after consultation with the Government of the States concerned, including the State of Jammu and Kashmir, and by notification in the official Gazette makes rules for the regulation of recruitment, and the conditions of service of persons appointed, to an All India Services. In Section 3 (1), 6 and 7 (2) of All India Services (Discipline and Appeal) Rules, 1969, the vitality of the role of Central Government in suspension and initiation of disciplinary proceedings against a member of Indian Police Service has been emphasized. In G.I., M.H.A. letter No.73/80-AIS (II) dated 17.03.1960 again it is emphasized that in the matter of imposition of penalty if there is conflict between the UPSC and the State Government, the decision of the Central Government in the matter would be final. The instructions read thus:-

> "When a member is adjudged guilty of committing any act or omission which renders him liable to any of the penalties specified in Rule 3 other than dismissal, removal or compulsory retirement, the State Government under whom he was serving at the time of such act or omission, shall make a reference direct to the Union Public Service Commission for their advice as to the quantum of penalty to be imposed on him. The Commission would communicate their advice direct to the State Government concerned under intimation to the Department of Personnel and AR in the case of IAS and the Ministry of Affairs in the case of IPS and the Department of Agriculture in the case of IFS. The State Government should endorse copies of their final orders to the Commission and the Ministry of Home Affairs. If, however, the State Government do not accept the advice of the Commission in any case, they will have to make a reference to the Government of India in accordance with the proviso to Rule 6.
>
> Cases referred to the Commission and the Government of India should be complete in all respects. All the documents in connection with the case should invariably b e forwarded in original."

27. In Section 11 of the Discipline and Appeal Rules, 1969, it is specifically provided that when there is any difference of opinion between a State Government and the Commission on any matter covered by the rules matter shall be referred to the Central Government for its decision. The Section reads thus:-

> "11. Cases of difference of opinion to be referred to Central Government.- When there is any difference of opinion between a State Government and the Commission on any matter covered by these rules such matter shall be referred to the Central Government for its decision."

Rule 16 of the Act provides for orders against which appeal lie. The rule reads thus:-

> 16. Orders against which appeal lies.- Subject to the provisions of rule 15 and the explanations to rule 6, a member of the service may prefer an appeal to the Central Government against all or any of the following orders, namely:-
>
> (i) an order of suspension made or deemed to have been made under rule 3;
>
> (ii) an order passed by a State Government imposing any of the penalties specified in rule 6;
>
> (iii) an order of a State Government which-
>
> (a) denies or varies to his disadvantage his pay, allowance or other conditions of service as regulated by rules applicable to him; or
>
> (b) interprets to his disadvantage the provisions of any such rule; or
>
> (c) has the effect of superseding him in promotion to a selection post;
>
> (iv) an order of the State Government-
>
> (a) stopping him at the efficiency bar in the time scale of pay on the ground of his unfitness to cross the bar; or
>
> (b) reverting him while officiating in a higher grade or post to a lower grade or post, otherwise than as a penalty; or
>
> (c) deleted

(d) determining the subsistence and other allowances to be paid to him for the period of suspension or for the period during which he is deemed to be under suspension or for any portion thereof; or

(e) determining his pay and allowances-

(i) for the period of suspension, or

(ii) from the date of dismissal, removal or compulsory retirement from service, or from the date of reduction to a lower grade, post, time-scale of pay or stage in a time-scale of pay, to the date of reinstatement or restoration to be paid to him on his reinstatement or restoration; or

(f) determining whether or not the period from the date of suspension or from the date of dismissal, removal, compulsory retirement or reduction to a lower grade post, time scale of pay or stage in a time scale of pay, to the date of his reinstatement or restoration shall be treated as a period spent on duty for any purpose.

Explanation.- In this rule, the expression 'member of the Service' includes a person who has ceased to be a member of the Service.

Section 18 provides for form and content of appeal. Section 18 (2) of the Rules 1969 provides that every appeal preferred under the rules shall be addressed to the Secretary to the Government of India in the Department or the Ministry, as the case may be, dealing with the All India Service concerned. Rule 18 reads thus:-

"18. Form and content of appeal.- (1) Every member preferring an appeal shall do so separately and in his own name.

(2) Every appeal preferred under these rules shall be addressed to the Secretary to the Government of India in the Department or the Ministry, as the case may be, dealing with the All India Service concerned and shall-

(a) contain all material statements and arguments relied on by the appellant;

(b) contain no disrespectful or improper language; and

(c) be complete in itself.

(3) Every such appeal shall be submitted through the head of the office under whom the appellant is for the time being serving and through the Government from whose order the appeal is preferred.

(4) The authority which made the order appealed against shall, on receipt of a copy of every appeal, which is not withheld under rule 21, forward the same with its comments thereon together with the relevant records to the appellate authority without any avoidable delay and without waiting for any direction from the Central Government."

Rule 19 provides for consideration of appeal.

"19. Consideration of Appeal.- (1) In the case of an appeal against an order of the State Government imposing any penalty specified in rule 6, the Central Government 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 violation of any provision 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 record; and

(c) whether the 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 the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.

Provided that-

(i) the Commission shall be consulted before an order confirming, enhancing, reducing or setting aside a penalty is passed;

(ii) if the enhanced penalty which the Central Government proposes to impose is one of the penalties specified in clauses (v) to (ix) of rule 6 and an inquiry under rule 8 has not already been held in the case, the appellate authority shall, subject to the provisions of rule 14, itself hold such inquiry or direct that such inquiry be held in accordance with the provisions of rule 8 and thereafter, on a consideration of the proceedings of such inquiry make such orders as it may deem fit;

(iii) if the enhanced penalty which the Central Government proposed to impose is one of the penalties specified in clause (v) to (ix) of rule 6 and an inquiry under rule 8 has already been held in the case, the Central Government shall, make such orders as it may deem fit; and

(iv) no order imposing an enhanced penalty shall be made in any other case unless the appellant has been given a reasonable opportunity as far as may be in accordance with the provisions of rule 10, of making representation against such enhanced penalty.

(2) In an appeal against any other order specified in rule 16 the Central Government shall consider all the circumstances of the case and make such orders as it may deem just and equitable.

Rule 20 of the Rules, 1969 deals with the provisions pertaining to implementation of the orders on appeal. Once the final order of the disciplinary authority, which has issued the charge sheet, would be appealable before the Central Government and the Central Government has already taken a stand by way of an affidavit that the charge sheet in itself is vitiated, we are of the considered view that the same would not be sustainable.

28. As far as the plea of learned senior counsel for State of Orissa regarding non-interference with the charge sheet at the initial stage is concerned, we may refer to the judgment of Hon'ble High Court of Delhi in **Than Singh** v. **Union of India & others** (CWP No.3448/1998) wherein it was viewed that non-disclosure of misconduct in the charge sheet can be one of the grounds to interfere with the same. Paragraph 12 of the judgment reads thus:-

> "12. It is not in dispute that after the petitioner submitted his explanation in the years 1982 and 1983, no further action had been taken. The petitioner had been promoted twice unconditional. He obtained the vigilance clearance. There cannot be any doubt whatsoever that the writ petitioner was entitled to raise the question of delay as also the condonation of misconduct. The learned Tribunal, fortunately, did not address itself to the right question. It is now a well-settled principle of law that validity of a charge-sheet can be questioned on a limited ground. It is also well settled that normally the court or the Tribunal does not interfere at the stage of show cause. However, once the disciplinary proceedings are over, there does not exist any bar in the way of delinquent officer to raise all contentions including ones relating to invalidity of the charge sheet. The ground

upon which the correctness or otherwise of the charge-sheet can be questioned are:

i) If it does not disclose any misconduct.
ii) If it is discloses bias or pre-judgment of the guilt of the charged employee.
iii) There is non-application of mind in issuing the charge-sheet.
iv) If it does not disclose any misconduct.
v) If it is vague
vi) If it is based on stale allegations
vii) If it is issued mala fide."

29. In the present case, the charge sheet is not sustainable on the grounds: (i) the charges alleged against the applicant may be construed only of error of judgment or committing some irregularity but not misconduct; (ii) the Union of India has filed an affidavit that the charge sheet is vitiated and; (iii) there is delay in issuance of the charge sheet. Learned senior counsel for State of Orissa also argued that the impugned charge sheet is not assailed and it is only the order passed in the representation, which is impugnare in the present case. It is *stare decisis* that once there is an appeal or representation against an action or an order, the action under challenge in representation or appeal would stand merged in the order passed in appeal/representation. In the instant case, once the representation made against the charge sheet was rejected, the memorandum of charges stand merged in such decision and the absence of specific challenge to charge sheet would not vitiate the prayer clause.

Since the charge is not sustainable in view of the affidavit filed by the Union of India (ibid) on the ground of delay and there being no misconduct committed by the applicant, we do not consider it necessary to deal with

other grounds raised in the Original Application. *Ergo* the impugned order is quashed.

30. Original Application stands allowed. No costs.

(Dr. B.K. Sinha)
Member (A)

(A.K. Bhardwaj)
Member (J)

/sunil/