Central Administrative Tribunal
Principal Bench, New Delhi

OA No.2154 of 2013

Orders reserved on : 16.10.2015

Orders pronounced on : 28.10.2015

HON'BLE MR. JUSTICE L.N. MITTAL, MEMBER (J)
HON'BLE MR. SHEKHAR AGARWAL, MEMBER (A)

Shri S.C. Ahuja Son of Late Shri Devi Dass Ahuja,
Retired Deputy Education Officer (General),
New Delhi Municipal Council, New Delhi
R/o H.No.A-41, Kiran Garden, Uttam Nagar,
New Delhi.
Address of service of Notices C/o Shri Pradeep Kumar,
Advocate, Ch. No.665, Western Wing, Tis Hazari Courts,
Delhi-110054.

... Applicant

(By Advocate: Shri Pradeep Kumar)

Versus

1. The Lt. Governor of Delhi,
   Govt. of N.C.T. of Delhi
   Raj Niwas, Delhi-110054.

2. New Delhi Municipal Council,
   Through its Secretary,
   Palika Kendra,
   New Delhi-110001.

3. The Chairman,
   New Delhi Municipal Council,
   Palika Kendra,
   New Delhi-110001.

4. The Director (Vigilance)
   New Delhi Municipal Council,
   Palika Kendra,
   New Delhi-110001.

... Respondents

(By Advocate : Shri Vaibhav Agnihotri)

O R D E R

MR. SHEKHAR AGARWAL, MEMBER (A):

The applicant was working as Deputy Education Officer (DEO) with New Delhi Municipal Council (NDMC) when he

was placed under suspension on 16.7.2008. He submitted an appeal dated 6.8.2008 against the order of suspension and sent a reminder on 16.9.2008. On 10.9.2008, the disciplinary authority issued a chargesheet to the applicant under Rule 14 of the CCS (CCA) Rules containing the following charges:-

> **"STATEMENT OF ARTICLE OF CHARGES FRAMED AGAINST SH. S.C. AHUJA, D.E.O. (UNDER SUSPENSION), EDUCATION DEPARTMENT, NDMC, NEW DELHI.**
>
> While working as D.E.O. (G) in Education Deptt., NDMC New Delhi Shri S.C. Ahuja during 2008 has failed to maintain absolute devotion to duty in as much as that:-
>
> The office orders dated 05.06.08 & 06.06.08 in respect of Sh. Vivek Negi and Smt. Lalita Chakraborty, Asstt. Teachers respectively regarding their removal from Municipal Service, were found lying undelivered in the office of S.C. Ahuja, D.E.O. (G) till 16.07.08, when an inspection was carried out by the Vigilance Team on 16.07.08. These orders were found lying under the wooden writing platform kept in the table of Sh. Sanjay Kumar, T.V. Attendant working in the office of D.E.O. (G) who was looking after the job of Diary/Despatch.
>
> Thus, as D.E.O. (G), he has failed to get the office orders of removal from Municipal Service delivered to Sh. Vivek Negi and Smt. Lalita Chakraborty even after lapse of a period of about one month.
>
> The above act on the part of Sh. S.C. Ahuja amounts to mis-conduct unbecoming of a Council servant. He has, thus, violated the Rule-03 of the CCS (Conduct) Rules, 1964."

2. The applicant submitted his representation against the chargesheet on 18.9.2008 denying the allegations levelled against him. The disciplinary officer, however, decided to hold an inquiry and appointed an inquiry officer. The

suspension of the applicant was revoked on 23.10.2008. He superannuated from service on 31.10.2008. Inquiry officer submitted his report on 19.5.2009 holding the charge to be partly proved. The NDMC, however, vide letter dated 30.6.2009 supplied a copy of the inquiry report to him along with a disagreement note of the Chairman, NDMC. On 11.7.2009, the applicant submitted his representation against the disagreement note. On 29.10.2009/09.11.2009, the Chairman, NDMC, passed an order imposing penalty of 2% cut in pension for one year against the applicant. Further vide order dated 11.12.2009 of the Chairman, the period of suspension of the applicant w.e.f. 16.7.2008 to 23.10.2008 was ordered to be treated as "not spent on duty". Being aggrieved by the aforesaid order, the applicant submitted his petition to Lt. Governor on 15.2.2010. However, no decision on the same was forthcoming. The applicant then filed OA 2319/2011 before this Tribunal. During the pendency of the same, Lt. Governor passed the order dated 2.11.2011 setting aside the impugned order of Chairman, NDMC, on the ground that the Chairman was not competent to pass such an order. This order was communicated to the applicant on 21.3.2012. The Tribunal then disposed of the OA 2319/2011 vide Order dated 2.4.2012 holding that the same does not survive at that stage in view of the fact that the impugned order had been set aside by the appellate authority. The applicant, however, filed a Review Application on 10.5.2012 feeling that there were some errors of facts as well as of law apparent on the face of

record in the above said mentioned Order of the Tribunal. The RA No.126/2012 was, however, dismissed by the Tribunal on 30.5.2012. Thereafter on 25.5.2012/30.10.2012, New Delhi Municipal Council passed the impugned order imposing penalty of 5% cut in pension for a period of five years upon the applicant. The applicant submitted a petition against the same on 19.12.2012 to Lt. Governor and he has also filed this OA before us seeking the following reliefs:-

> "1. To quash and set aside the impugned order passed by the Respondent No. 2/New Delhi Municipal Council vide its resolution dated 25.5.2012 as communicated vide order dated 30.10.2012 issued by the Respondent No.4/Director (Vigilance), NDMC (Ann. A-1), impugned orders dated 5.3.2013 & 11.12.09 issued by the Respondent No.4/Director (Vigilance), NDMC (Ann. A-2 & A02 respectively);
>
> 2. To direct the respondents to refund the amount already recovered from the applicant in pursuance of the impugned orders of penalty of cut in pension imposed upon him by the respondents, along-with penal interest;
>
> 3. To grant all consequential benefits to treat the period of suspension from 16.7.08 to 23.10.08 as spent on duty for all purposes with full pay and allowances and to award interest on the amounts of retiral dues and other dues of the applicant which were with-held on account of pendency of the above case and paid highly belatedly as mentioned in para 5.18 above at the G.P.F. rates or at such other rate as may be deemed appropriate w.e.f. 1.11.2008 upto the date of their actual payments, as if the impugned orders had not been issued;
>
> 4. To pass such other or further orders as this Hon'ble Tribunal may deem fit in the interest of justice.
>
> 5. To award the Costs of this application."

3. In the reply filed on behalf of the NDMC, the averments of the applicant have been disputed by the respondents. The applicant has also filed a rejoinder in which he has more or less reiterated his stand.

4. Each of the grounds taken by the applicant to challenge the impugned order together with the response of the respondents and our finding thereon are discussed as hereunder.

4.1.1 The applicant has averred that New Delhi Municipal Council was neither competent nor had jurisdiction to pass the impugned order imposing cut in pension. This order has been stated to have been passed by the Council exercising authority conferred upon it by Rule 39 of the NDMC Act, 1994 and Rule 9 of the CCS (Pension) Rules, 1972. However, Rule 9 of the CCS (Pension) Rules does not empower the Council to impose punishment on retired employee of NDMC. Under this Rule, only the President of India is the competent authority to impose a cut in pension. Since the impugned order has not been issued by the President of India, it is *ab initio* void for want of competence and jurisdiction.

4.1.2 The respondents on their part have controverted this argument of the applicant. According to them, NDMC is an Autonomous Body and the employees of NDMC were different from the employees of Central Government. While it is true that when Rule 9 is applied to Central Government employees only the President of India is the competent authority to pass

an order imposing cut in pension or gratuity, the same does not hold good in the case of employees of autonomous bodies. In this regard, the respondents relied upon the judgment in the case of ***O.P. Gupta vs. Delhi Vidyut Board & another***, 2000 IV AD (DELHI) 909, of which the following para is relevant:-

> "7. Before appreciating rival contentions of the parties it may be appropriate to reproduce relevant portions of Rule 9 of the Pension Rules:-
>
> > "**9. Right of President to withhold or withdraw Pension:**
> >
> > [(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement :
> >
> > Provided that the Union Public Service Commission shall be consulted before any final orders are passed :
> >
> > Provided further that where a part of pension is withheld or withdrawn the amount of such pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem.]"
>
> There is a reference to President of India who has right to withhold or withdraw pension or part thereof. Proviso to this Rule further states that UPSC shall be consulted before any final order is passed. However, the question is as to whether President of India has to pass the order in the case of an employee of DVB also and UPSC has to be consulted. For this purpose one may peruse provisions of Rule 2 dealing with application of

> Pension Rules to find that these rules shall apply to Government servant including civilian Government servants in Defence services appointed to Civil Services etc. and exclude certain categories of employees. In the case of Government employees who are holders of civil posts, President of India as the executive Head is the final authority. The service conditions of such employees are governed by Articles 309 to 311 of the Constitution of India. It is for this reason that the President of India is the authority who has to pass the final order under Rule 9, as prescribed, in respect of Government employees and holders of civil posts. These Pension Rules are not automatically applicable to employees of DVB and they are adopted *mutandi mutandis.* The President of India is not the employer of the employees of DVB nor these employees are holder of civil posts. They are admittedly not governed by Articles 309 of the Constitution of India. DVB is a body constituted and being an autonomous body it has to act according to its own rules etc. As the Board is the supreme authority, it is the Board which can pass necessary orders under Rule 9 of Pension Rules in the case of employees of DVB. The reference 'President' is to be substituted by 'Board' and 'Government' is to be substituted by DVB to give proper meaning of such rules in so far as they become applicable for DVB employees. For same reason it is not necessary that there has to be any consultation with UPSC before final orders are passed by the Board. Therefore, I find no merit in the contentions of the petitioner that there was violation of Rule 9 in not forwarding the case to President of India or not consulting UPSC."

4.1.3 We have given careful consideration to the rival contentions. We find merit in the submission of the respondents that the CCS (Pension) Rules cannot be applied to NDMC employees *mutatis mutandis*. The President of India is not their employer. As such a reference to 'President' in Rule 9 of the CCS (Pension) Rules has to be substituted by word 'Council' as far as NDMC employees were concerned. Support for this is found in the order of Lt. Governor (page 62 of the paperbook) when he set aside the punishment order

passed by the Chairman, NDMC. The relevant part of the aforesaid order is reproduced below:-

> "As per the said clarification, the power to order any cut in pension in respect of a retired Government servant is vested in the President of India, under Rule 9 of CCS (Pension) Rules, 1965. In relation to NDMC employees, the same powers were delegated to the erstwhile New Delhi Municipal Committee (Committee) in respect of Class-I and Class-II officers under Resolution No.3 dated 10/10/1973 of the Committee, when the Pension Rules were adopted by NDMC for its employees and the administrative approval given by the LSG Department's order of 29.03.1975. After the enforcement of New Delhi Municipal Council Act, 1994, by virtue of residuary provision of Section 416 of NDMC Act, the power to order a cut in pension in respect of Class-I and Class-II superannuated officers of the Council was vested in the New Delhi Municipal Council."

4.1.4 From the above, it is clear when the Pension Rules were adopted by NDMC for its employees under Section 416 of the NDMC Act, the power to order cut in pension in respect of Class-I and Class-II superannuated officers of NDMC was vested in the Council. This argument of the applicant, thus, fails.

4.2.1 The next ground taken by the applicant is that a cut in pension can be ordered only when there is a finding that "grave misconduct" has been committed by a delinquent employee. The applicant relied in this regard on the judgment of the Hon'ble Supreme Court in the case of ***D.V. Kapoor vs. U.O.I. and others***, AIR 1990 SC 1923, wherein the following has been observed:

> "….It is seen that the President has reserved to himself the right to with-hold pension in whole or in part thereof whether permanently or for a specified

> period… The condition precedent is that in any departmental inquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service… as defined in Rule 9 (5) which is an exclusive definition (Explanation (b).”

4.2.2 Learned counsel for the applicant argued that Hon’ble Supreme Court had observed that the exercise of power by the President under this rule is hedged by the condition that the finding should be recorded either in departmental proceedings or in judicial proceedings that a grave misconduct or negligence in discharge of duty has been committed by the employee being punished. This has been reiterated in the judgment of Principal Bench of this Tribunal in the case of M***.P. Gupta vs. U.O.I.***, 2004 (3) 417 CAT ND. Learned counsel further argued that Hyderabad Bench of this Tribunal considered an identical matter in the case of ***P. Singh Rao vs. U.O.I. and others***, 1991 (2) ATJ 336, and observed as under:-

> “…. In the absence of any material to show that the applicant had acted with a corrupt motive, it cannot be held per se that any of the charges 1 to 6 constitute grave misconduct or negligence. It is not every misconduct or negligence for which pension as a whole or in part, can be with-held under Rule 9 of CCS (Pension) Rules, 1972.”

4.2.3. He also relied upon the judgment of this Tribunal in the case of ***K.M. Sharma vs. Union of India,*** 1987 (3) SLR 463 CAT Delhi.

4.2.4 Learned counsel argued that the applicant’s case was squarely covered by the aforesaid citations. Since in his case

there was no finding to the effect that grave misconduct has been committed by the applicant. Moreover, he argued that Rule 8 (5) of the CCS (Pension) Rules, defines 'grave misconduct' as follows:-

> (a) the expression 'serious crime' includes a crime involving an offence under the Official Secrets Act, 1923 (19 of 1923).
>
> (b) the expression 'grave misconduct' includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) (which was obtained while holding office under the Government so as to prejudicially affect the interest of general public or security of the state…"

4.2.5 Clearly the charge leveled against the applicant is not covered by the aforesaid definitions of 'grave misconduct'. Hence, the order under Rule 9 of CCS (Pension) Rules could not have been passed against the applicant.

4.2.6 The respondents, however, disputed this contention. They relied on the judgment of the Hon'ble Supreme Court in the case of ***Union of India and others vs. B. Dev***, (1998) 7 SCC 691, of which the following paras are relevant:-

> "8…… Under sub-rule (3) of Rule 8 if the authority considers that the pensioner is prima facie guilty of grave misconduct, it shall, before passing an order, serve upon the pensioner notice as specified therein, take into consideration the representation, if any, submitted by the pensioner; and under sub-clause (4), where the authority competent to pass an order is the President, the Union Public Service Commission shall be consulted before the order is passed. Sub-rule (5) referred to by the Tribunal does not appear to be relevant in the present case. It deals with appeals from orders passed by an authority other than the President. Under the explanation (b) to Rule 8, the expression 'grave misconduct' is defined to include

> "the communication of disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923...."

The explanation clearly extends grave misconduct to cover communication of any official secrets. It is not an exhaustive definition. The Tribunal is not right in concluding that the only kind of misconduct which should be held to be grave misconduct is communication etc. of an official secret. There can be many kinds of grave misconduct. The explanation does not confine grave misconduct to only the type of misconduct described there.

.....

12. The Tribunal has held that no charge of grave misconduct was framed or found proved against the respondent. This is clearly incorrect looking to the express language of the charge as framed and the enquiry report. The charge as framed expressly charged the respondent with having committed grave misconduct by remaining absent from duty without authorisation and by continuing to disobey Government orders issued to him for joining duty. He was charged with lack of devotion to duty and of conduct unbecoming a Government servant, and this was violative of the provisions of Rule 3(1) sub-clause *(ii)* and *(iii)* of CCS (Conduct) Rules. The finding also is that this charge of grave misconduct has been proved in the enquiry report. The conduct, therefore, of the respondent falls under Rule 9 and the order of the President dated 18-12-1984 cannot be faulted.

13. Our attention is drawn to a decision of this Court in *D.V. Kapoor V. Union of India and Ors.* (AIR 1990 SC 1923). In that case also, disciplinary proceedings were initiated against the Government servant under Rule 3*(ii)(iii)* of the CCS (Conduct) Rules and were later continued under Rule 9 of the CCS (Pension) Rules, 1972. The charge against the appellant there was that he absented himself from duty without any authorisation and despite his being asked to join duty, he remained absent. The Enquiry Officer, however, held that his absenting himself from duty could not be termed as entirely wilful because he could not move due to his wife's illness. The Enquiry Officer recommended that the case of the appellant should be considered

> sympathetically. The recommendation and finding of the Enquiry Officer were accepted by the President. However, it was decided to withhold full gratuity and payment of pension in consultation with the Union Public Service Commission. In these circumstances, this Court held that there was no finding that the appellant had committed grave misconduct as charged and that the exercise of power under Rule 9 was not warranted."

4.2.7 From the above, it is clear that the definitions of 'grave misconduct' mentioned in Rule 8 (5) of CCS (Pension) Rules and relied upon by the applicant has been held to be not exhaustive definition by the Hon'ble Supreme Court and that there can be many other kinds of 'grave misconduct'. The respondents had rightly argued that in the instant case even in the chargesheet issued to the applicant, it was mentioned in the statement of imputation that the action of the applicant constituted 'gross misconduct' unbecoming of a Council/Municipal servant (page 35).

4.2.8 We also do not find much merit in the argument of the applicant's counsel that the charge was only found to be partly proved by the inquiry officer and, therefore, did not constitute grave misconduct. From the facts of the case, it is clear that Chairman had disagreed with this finding of the inquiry officer and had issued a disagreement note to the applicant. The finding of the inquiry officer would, therefore, not be relevant for determining whether the charge proved against the applicant was grave or not. We also cannot overlook the fact that the respondents had regarded the misconduct committed by the applicant to be a grave one

since they had decided to proceed against him under Rule 14 of the CCS (CCA) Rules for major penalty.

4.3.1 Learned counsel for the applicant further argued that Rule 9 of CCS (Pension) Rules, clearly lays down that before passing the final order under the aforesaid provision consultation with Union Public Service Commission was a must. In the present case, however, UPSC has not been consulted rendering the aforesaid order to be unsustainable. In this regard, learned counsel for the applicant placed reliance on the judgment of Delhi High Court in the case of ***O.P. Gupta*** (supra) which has been extracted in earlier para of this Order wherein it is mentioned that wherever consultation with UPSC is necessary, it must be resorted to before passing an order under Rule 9. The respondents on the other hand relying on the same judgment submitted that as per NDMC Act, only Group 'A' employees fall within the jurisdiction of the UPSC. This position was not disputed by the applicant also, who, however, maintained that he had attained Group 'A' status as DEO after implementation of the VIth Pay Commission scales and was, therefore, within the purview of UPSC. The applicant, could, however, not substantiate his claim of becoming a Group 'A' officer in any manner.

4.3.2 The respondents on the other hand produced a copy of Bio-Data of the officer during the course of hearing which shows that the post of DEO held by the applicant was

classified as Group 'B'. The said document is extracted below:-

"BIO-DATA

1.	Name	:	Sh. Shiv Chander Ahuja
2.	Designation	:	D.E.O. (G)
3.	Date of appointment:		19/12/1974
4.	Date of holding the present post	:	05/09/2007
5.	Classification of the post held	:	Group "B"
6.	Appointing Authority	:	Chairman, NDMC
7.	Status Pmt./Temp.	:	pmt.
8.	Scale of Pay	:	Rs.7500-250-13000
9.	Basic pay and since when	:	Rs.11000/- 01/12/2007
10.	Date of next increment	:	- Not due -
11.	Date of Birth	:	28/10/1948
12.	Date of Retirement	:	31/10/2008

Sd/-
17/8/09
Section Officer,
NDMC, Pakika Kendra,
New Delhi-110001"

4.3.3 On the basis of the aforesaid document, we are of the opinion that the post held by the applicant was a Group 'B' and, therefore, did not fall within the purview of UPSC. Consequently, consultation with UPSC was not required before passing the impugned order.

4.4.1 Next counsel for the applicant submitted that the charge levelled against the applicant was vague. The chargesheet states that the applicant has violated Rule 3 of CCS (Conduct) Rules, 1964. The said Rule has many sub-rules with sub-clauses. The chargesheet was silent with regard to any specific clause or clauses of any of the sub-rule which were alleged to have been violated by the applicant. The learned counsel submitted that it was a settled principle of law that vagueness of the charge vitiates the entire proceedings as has been held by the Hon'ble Supreme Court in the case of ***Swai Jai Singh vs. State of Rajasthan***, (1986 (2) ATR 316 SC).

4.4.2 The respondents on the other hand disputed the aforesaid contention. According to them, the charge levelled against the applicant was very specific, namely, that he had failed to get certain office orders pertaining to removal from service of certain Assistant Teachers delivered promptly and the same were found lying in his office when an inspection was carried out by Vigilance Team on 16.7.2008. This act of the applicant was found to be misconduct unbecoming of NDMC servant in violation of Rule 3 of CCS (Conduct) Rules, 1964.

4.4.3 We have considered rival submissions. In our opinion there was nothing vague about the charge. Merely because a specific rule has not been quoted does not make the charge vague and vitiate the proceedings. The proceedings against the applicant could have been quashed, had the charge been

so vague as to deprive the applicant a fair opportunity to defend himself. This was not so in the instant case. In the judgment relied upon by the applicant in ***Swai Jai Singh*** (supra) the proceedings were quashed because it was observed by the Hon'ble Supreme Court that the charge was so vague that it was difficult for any accused to meet it fairly. We, therefore, do not find any merit in this contention of the applicant.

4.5.1 Learned counsel for the applicant argued that the disciplinary authority had failed to follow Rule 14(18) of the CCS (CCA) Rules in as much as the applicant has not been generally questioned by the inquiry officer on the circumstances appearing against him in the evidence for the purpose of enabling him to explain the same. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of ***Ministry of Finance vs. S.B. Ramesh***, 1998 (1) SC SLJ 417. Learned counsel argued that observance of this Rule was mandatory and failure to do so was violative of principles of natural justice. Learned counsel also relied on the judgment of the Madras Bench of this Tribunal in the case of ***R. Robert vs. U.O.I.***, (1991 (16 ATC 671), on the same issue.

4.5.2 The respondents on the other hand argued that since Rule 14 (18) is a facet of natural justice it has to be seen whether its violation has caused any prejudice to the applicant. In the instant case, the applicant has failed to demonstrate how prejudice has been caused to his defence by non-observance of Rule 14(18). The respondents' counsel

argued that in absence of any such assertion, the proceedings cannot be said to have been vitiated by non-observance of this Rule. In this regard, learned counsel relied on the judgment of the Hon'ble High Court of Delhi in the case of ***U.O.I. and others vs. Pradeep Kumar Modwilll and another*** in Writ Petition Nos.2850 and 2854 of 2011 decided on 19.8.2013. The following has been observed in the aforesaid case:-

> "54. In this regards, it is most apposite to note the decision of 3-Judge Bench of the decision of Supreme Court reported as MANU/SC/0456/1980 : (1980) 3 SCC 304 Sunil Kumar Banerjee vs. State of West Bengal & Ors dealing with Rule 8(19) of the All India Service Disciplinary Rules, 1969, which is pari materia with Rule 14(18) of the CCS (CCA) Rules, 1965. In said case, one of the contentions advanced by the appellant therein who was challenging a penalty inflicted upon him in a departmental action initiated against him was that the Enquiry Officer did not question him with reference to the circumstances appearing against him as provided by sub-rule (19) of Rule 8 of the All India Service Disciplinary Rules, 1969 and thus was denied an opportunity of explaining the circumstances which weighed in the mind of the Enquiry Officer. The Court repelled the aforesaid contention advanced by the appellant in the following terms:-
>
> > "...It is, however, true that the appellant was not questioned by the Enquiry Officer under Rule 8(19) which provided as follows:
> >
> > The inquiring authority may, after the member of the service closes his case, and shall, if the member has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the member of service to explain any circumstances appearing in the evidence against him.
> >
> > It may be noticed straightaway that this provision is akin to Section 342 of the Criminal Procedure Code of 1898 and Section 313 of the Criminal Procedure Code of 1974. It is now well established that mere non examination or defective

> examination under Section 342 of the 1898 Code is not a ground for interference unless prejudice is established, vide, K.C. Mathew v. State of Travancore - Cochin 1956 Cri. L. J. 444, Bibhuti Bhushan Das Gupta and Anr. v. State of West Bengal 1969 Cri. L.J. 654. We are similarly of the view that failure to comply with the requirements of Rule 8(19) of the 1969 rules does not vitiate the enquiry unless the delinquent officer is able to establish prejudice. In this case the learned Single Judge of the High Court as well as the learned Judges of the Division Bench found that the appellant was in no way prejudiced by the failure to observe the requirement of Rule 8(19). The appellant cross-examined the witnesses himself, submitted his defence in writing in great detail and argued the case himself at all stages. The appellant was fully alive to the allegations against him and dealt with all aspects of the allegation in his written defence. We do not think that he was least prejudiced by the failure of the Enquiry Officer to question him in accordance with Rule 8(19)."

55. From the afore-noted observations, the ratio of law which is discernible from the decision in Sunil Kumar's case (supra) is that non-adherence to Rule 8(19) of the All India Service Rules, 1969 by the Enquiry Officer is fatal only if it is shown that a delinquent was prejudiced on account of such non-adherence. A somewhat discordant note was struck by the 2-Judge Bench of the Supreme Court in the decisions reported as MANU/SC/7298/2008 : (2008) 3 SCC 484 Moni Shankar vs. Union of India and MANU/SC/0071/1998 : (1998) 3 SCC 227 Ministry of Finance vs. S.B. Ramesh which decisions have not noted the earlier 3-Judge Bench decision in Sunil Kumar Banerjee's case (supra) and thus we are bound by ratio of law laid down by the 3-Judge Bench in Sunil Kumar's case (supra).

56. In the instant case, Modwill has not shown as to how he has been prejudiced due to Enquiry Officer not examining him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965. A perusal of the statement of defense submitted by Modwill goes to show that he was fully alive to the allegations against him and dealt with all aspects of the allegations in his statement of defense. We do not think that he was least prejudiced by the failure of the Enquiry Officer to examine him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965. Such being the position, nothing turns upon the failure of the Enquiry Officer to examine him in terms of Rule 14(18) of the CCS (CCA) Rules, 1965."

He has also relied on the judgment of Ernakulam Bench of this Tribunal in OA No.20 of 2012 – M.C. John vs. Union of India and others decided on 5.8.2015. The following has been observed in the aforesaid case:-

> "18. The respondents would rely on the decision of a Division Bench of the Hon'ble High Court of Kerala in Babu Vs. Union of India reported in MANu/KE/0465/2006 : 2006 (4) KLT 793. Relying on the aforesaid decision it is submitted by the learned counsel for the respondents that if at all the violation would only be of a facet of the rules of natural justice and in such a case sustainability of the impugned order has to be tested on the touch stone of prejudice. It was held by the Division Bench:
>
> > "13: Viewed in that angel, it cannot be said that violation of a rule insisting for a facet of natural justice will result in declaring the order void. The approach and test adopted by the Constitution Bench of the Apex Court in B.Karunakar MANU/SC/0237/1994: (1993) 4 SCC 727) should govern such cases. Where the complaint is not that there was 'no opportunity 'no hearing', but one of 'not affording a proper hearing' or 'violation of a facet of natural justice', the person complaining must show causation of a prejudice as against him by reason of such violation. In such situation, the extent of prejudice suffered shall be the basis for the decision of the Court.""

4.5.3 We have given our careful consideration to the arguments advanced by both the sides. We find merit in the submission of the respondents that though there may have been non-observance of Rule 14(18) in the instant case, enough opportunity has been given to the applicant to defend himself. The applicant cannot claim denial of reasonable opportunity. At every stage of the inquiry, he has been afforded opportunity of submitting his representation and

adducing evidence in his defence. Moreover, he could not demonstrate how prejudice has been caused to his defence by this. We are, therefore, of the opinion that proceedings cannot be said to have been vitiated due to non-observance of Rule 14 (18).

4.6.1 Counsel for the applicant also urged that the applicant had not committed any misconduct as there was no allegation of corruption against him. Misconduct has been defined by Hon'ble Supreme Court in the case of Reference No.1 of 2003 (Reference under Article 317 (1) of Constitution of India) reported in 2009 (3) AISLJ 183 SC as under:-

> ".....In Article 124 (4) `misbehaviour' means wrong conduct or improper conduct. It has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or the Statute under consideration. Every act or conduct or error of judgment or negligence by a constitutional authority per se does not amount to misbehaviour. Misconduct implies a creation of some degree of mens rea by the doer. Willful abuse of constitutional office, willful misconduct in the office, corruption, lack of integrity or any other offence involving moral turpitude would be misbehaviour. Judicial finding of guilt of grave crime is misconduct. Persistent failure to perform duties or willful abuse of the office would be misbehaviour....."

4.6.2 Learned counsel argued that in view of the above definition given by Hon'ble Supreme Court, the case of the applicant does not fall under the category of misconduct as there was no *mens rea* of any degree. Hence, the impugned order is liable to be set aside on this ground as well. Learned counsel also relied on the judgment of Guwahati Bench of this Tribunal in OA No.237 of 2003 – ***Shri Dilip Kumar***

Rabidas vs. the Union of India and others decided on 18.6.2004, wherein it has been held that mere negligence does not constitute misconduct and no chargesheet can be issued in absence of misconduct.

4.6.3 We agree with the applicant that no charge of corruption has been levelled against him. His conduct could, therefore, be regarded only as negligence on his part. However, in our opinion negligence in every case cannot be condoned. Even Rule 9 of CCS (Pension) Rules under which punishment has been imposed on the applicant lays down that a cut in pension can be ordered for grave misconduct as well as for negligence. Moreover, absence of *mens rea* of any degree will not come in the way of imposing punishment for negligence as negligence by its very definition is not willful or deliberate but takes place only inadvertently. Thus, this argument of the applicant also fails.

4.7.1 Learned counsel for the applicant also submitted that this was a case of no evidence against the applicant and even the inquiry officer in his report has observed that the applicant had displayed positive attitude and devotion to official working by defining duties of the subordinate officers as well as receiving the two orders in dak in the absence of official who had been assigned this specific function. However, we find that the applicant had appeared before the Chairman of the NDMC when an opportunity of personal hearing was granted to him. He had voluntarily admitted before the Chairman that he had not apprised the concerned

clerk regarding the receipt of the said office orders. Nor had he ensured that the same be delivered to the concerned individuals as he was busy in other works. This is evident from the order of the Chairman, NDMC (Page 49 (Annexure A/11)). After such an admission on his part, the applicant cannot now claim that this was a case of no evidence. His argument that the order of punishment was non-speaking also loses force after aforesaid admission on his part.

4.8.1 Next learned counsel for the applicant argued that the inquiry conducted against the applicant was a common inquiry along with co-delinquent one Shri Sanjay Kumar, even though no order for common inquiry was passed as provided for under Rule 18 of CCS (CCA) Rules. He argued that the proceedings need to be set aside on this ground as well.

4.8.2 The respondents, however, disputed this contention and stated that even though inquiry officer was common for the applicant as well as Shri Sanjay Kumar, the inquiry proceedings were held separately. This is obvious from first para of the inquiry report (page 41 (Annexure A/8)) wherein it has been stated by the inquiry officer that the charges were required to be inquired against both officials simultaneously but separately. Even from the proceedings it is clear that in the case of the applicant both the examination of witnesses as well as cross-examination took place separately. After the aforesaid clarification given by the respondents, we do not find any merit in the submission of the applicant.

4.9.1 The applicant has also challenged his suspension order on the ground that no reasons for suspending him were disclosed in the same. The respondents, however, contended that suspension order was passed on 16.7.2008 and it was too late for the applicant to challenge the same through these proceedings filed in May 2013. In this regard, the respondents relied on the judgment of this Tribunal in OA No.3822/2010 – ***J.K. Sahu vs. Union of India and others*** decided on 21.11.2011. In para 6 of which the following has been held:-

> 6. The admitted fact is that the applicant was arrested on 28.01.2005 and deemed suspension order was passed by the Competent Authority on 03.10.2005. The cause of action in the matter had arisen in the year 2005. The subsequent orders cannot carry forward the illegality, if any, and the applicant was duty bound if he was prejudiced, to approach the Tribunal within the time mandated to the Tribunal to take a cognizance of such case. The present OA has been filed by the applicant on 15.11.2010 after a lapse of more than five years from the date on which the impugned order dated 03.10.2005 was passed. Thus, the OA has been filed after considerable unexplained delay and latches. Besides, under the Administrative Tribunals Act, 1985, the OA is barred by limitation. We have been mandated in the Administrative Tribunals Act to first decide the issue of limitation as this is a legal issue and thereafter to go into the merits. We cannot, therefore, take up issues raised here other than the limitation first. We are of the considered opinion that the applicant↕ s OA is hit by limitation. The Hon'ble Supreme Court in a recent judgment in the matter of D.C.S. Negi Versus Union of India & Ors. decided on 07.03.2011 in SLP (C) No.7956/2011(CC No.3709/2011) has very clearly delineated the powers of the Tribunal in respect of limitation. It is noted that Section 21 of the Administrative Tribunals Act unambiguously mandates the period within which Government employee has to agitate before the Tribunal for consideration and adjudication. Only if there is cause of action which needs to be taken up by relaxing and condoning the delay the same can be considered under Section 21. The present case is not a fit case for condonation of delay. Further, the Applicant has not moved for condonation of delay. Moreover, the Applicant has not shown sufficient

cause as to why and how the enormous delay should be condoned. In this regard, we may refer to the law laid by Hon'ble Apex Court in a recent decision in the matter of D. C. S. Negi (supra), where it has been held as follows:-

> "A reading of the plain language of the above reproduced section makes it clear that the Tribunal cannot admit an application unless the same is made within the time specified in clauses (a) and (b) of Section 21 (1) or Section 21 (2) or an order is passed in terms of sub-section (3) for entertaining the application after the prescribed period. Since Section 21 (1) is couched in negative form, it is the duty of the Tribunal to first consider whether the application is within limitation. An application can be admitted only if the same is found to have been made within the prescribed period or sufficient cause is shown for not doing so within the prescribed period and an order is passed under Section 21 (3)."

4.9.2 We find considerable merit in the aforesaid argument. The suspension order was passed on 16.7.2008. The applicant should have challenged the same immediately thereafter within a period of one year. He did not take any action and filed this OA only on 31.5.2013. Thus, challenge to the suspension order is barred by limitation and cannot be entertained at this belated stage.

4.10.1 The applicant has also questioned the order dated 11.12.2009 (Annexure A/3) by which the period of suspension w.e.f. 16.7.2008 to 23.10.2008 has been treated as period not spent on duty. While even this order would be barred by limitation, we find that this was passed after the order dated 29.10.2009 passed by the Chairman, NDMC imposing 2% cut in pension for one year on the applicant. This order of the Chairman was set aside by Lt. Governor on 2.11.2011 ((Annexure A/15) page 62). Thereafter a fresh order

of punishment was passed by the New Delhi Municipal Council on 30.10.2012 imposing 5% cut in pension for a period of five years. In all fairness, a fresh order regarding how the suspension period has to be treated should have been passed by the respondents themselves in view of a fresh punishment order. They did not do so. Moreover, we notice that the period of suspension mentioned therein, i.e., 16.7.2008 to 23.10.2008 was more than 90 days, despite the admitted position that a review of suspension had not been conducted within 90 days as mandated by Rule 10 (7) of CCS (CCA) Rules. The aforesaid Rule provides as follows:-

> "(7) An order of suspension made or deemed to have been made under sub-rule (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days."

4.10.2 Thus, the suspension period in the instant case could not have exceeded 90 days in the absence of review within the aforesaid period. Consequently, Annexure A/3 order dated 11.12.2009 gets vitiated on this ground as well.

4.11.1 Learned counsel for the applicant had also argued that the punishment imposed upon the applicant was excessive and deserves to be set aside. The respondents, however, opposed the same arguing that in judicial review the courts can interfere in the quantum of punishment only when it is found to be shockingly disproportionate to the misconduct committed by the delinquent. In this regard, they relied on the judgment of the Hon'ble Supreme Court in the

case of ***State Bank of India and another vs. Samarendra Kishore Endow and another***, (1994) 2 SCC 537. This legal submission was not disputed by counsel for the applicant as well. Considering the nature of the charge levelled against the applicant, we are of the opinion that the punishment imposed on the applicant is not excessive enough to shock the conscience of the Court. Therefore, no interference in the same is warranted.

5. No other ground was pressed before us.

6. On the basis of above analysis, we are of the opinion that there is no need to interfere in the punishment imposed on the applicant. The order dated 11.12.2009 regarding how period of suspension is to be treated is, however, set aside. The respondents are directed to pass a fresh order within a period of 90 days from the receipt of certified copy of this Order treating the period of suspension to be 90 days only w.e.f 16.7.2008 to 13.10.2008. For the period from 14.10.2008 to 23.10.2008, the applicant would be deemed to have been reinstated and shall be entitled to full pay and allowances.

7. The OA is accordingly disposed of. No costs.

(SHEKHAR AGARWAL)
MEMBER (A)

(JUSTICE L.N. MITTAL)
MEMBER (J)

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