Central Administrative Tribunal
Principal Bench
New Delhi

OA No.3638/2013
with
OA No.4166/2013
OA No.4162/2013
OA No. 4163/2013
OA No. 4169/2013
OA No. 2301/2015
OA No. 2280/2015

Reserved on : 06.09.2016
Pronounced on : 23.03.2017

Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K. N. Shrivastava, Member (A)

OA No. 3638 of 2013

Sh. Navendra Kumar S/o Dr. Ram Mohan Lal,
R/o 108, Vidya Vihar Apartment,
Plot No.48, Sector-9, Rohini, Delhi-110085
Retired as DE (Commercial), GO No.5346
Sanchar Haat, Sector-6, Rohini, Delhi. ... Applicant

Versus

Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003 ... Respondent

OA No.4166/2013

Sh. Navendra Kumar S/o Dr. Ram Mohan Lal,
R/o 108, Vidya Vihar Apartment,
Plot No.48, Sector-9, Rohini, Delhi-110085
Retired as DE (Commercial), GO No.5346
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Chairman & Managing Director,
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OA No.4162/2013

Sh. Navendra Kumar S/o Dr. Ram Mohan Lal,
R/o 108, Vidya Vihar Apartment,
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Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003 ... Respondent

OA No. 4163/2013

Sh. Ram Prashad S/o Late Sh. Umrao,
R/o 12-D, Sanchar Lok Apartment,
Plot No.108, IP Extension,
Delhi-110092.
Retired as D.E. (G.O. No. 4649),
MTNL, New Delhi. ... Applicant

Versus

Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003 ... Respondent

OA No. 4169/2013

Sh. Ram Prashad S/o Late Sh. Umrao,
R/o 12-D, Sanchar Lok Apartment,
Plot No.108, IP Extension,
Delhi-110092

Retired as D.E. (G.O. No. 4649),
MTNL, New Delhi. ... Applicant

Versus

Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003 ... Respondent

OA No. 2301/2015

Sh. Ram Prashad S/o Late Sh. Umrao,
Aged about 69 years,
R/o 12-D, Sanchar Lok Apartment,
Plot No.108, IP Extension,
Delhi-110092
Retired as D.E. (G.O. No. 4649),
MTNL, New Delhi. ... Applicant

Versus

Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003. ... Respondent

OA No. 2280/2015

Sh. Ram Prashad S/o Late Sh. Umrao
R/o 12-D, Sanchar Lok Apartment,
Plot No.108, I.P. Extension,
Delhi-110092.
Retired as D.E. (G.O. No. 4649),
MTNL, New Delhi. ... Applicant

Versus

Chairman & Managing Director,
Mahanagar Telephone Nigam Limited,
5th Floor, Doorsanchar Sadan,
9, CGO Complex, Lodhi Road,
New Delhi-110003. ... Respondent

By Advocates: Mr. D. S. Chaudhary for Applicants

Mr. Saket Sikri with Ms. Neha Bhatnagar and
Mr. Junaid Jasbir for Respondents

O R D E R

Justice Permod Kohli, Chairman :

These OAs have been filed by two applicants, namely, Navendra Kumar and Ram Prashad. While OA Nos.3638/2013, 4162/2013 and 4166/2013 have been filed by applicant Navendra Kumar, OA Nos.4163/2013, 4169/2013, 2280/2015 and 2301/2015 have been filed by applicant Ram Prashad. The factual background and the legal issues being common, these OAs were heard and are being disposed of by this common judgment. Brief facts are noticed from each OA.

OA No.3638/2013

2. Applicant Navendra Kumar was serving as Divisional Engineer and posted, OFC project, Guwahati during the period 1996-97. The project was in the State of Manipur on Imphal-Moreh route. He was issued a memorandum dated 08.02.2006 under rule 25 of MTNL (CDA) Rules, 1998 alleging that on the basis of investigation, random technical checking of the trenching and laying works of OFC (optical fiber cable) in sub-section 1 of Imphal-Moreh route was conducted by CBI team. The random checking revealed that about 1000 metres length shown, claimed and paid as hard soil in the first

running account bill and MB dated 14.06.1996 was not hard soil but soft soil only as per the classification of soil mentioned in the tender documents. The total length of about 1000 metres falsely shown as hard soil and paid at the rate of Rs.270/- at a depth ranging from 150-160 cms, and a sum of Rs.2,13,577.00 was paid to the contractor on proportionate basis, whereas the rate of soft soil was Rs.50.00 at a depth of 165 cms and the amount should have been paid at the rate of soft soil for 1000 metres, which worked out to be Rs.50,000.00, and as such, an excess payment of Rs.1,63,577.00 (approximately) was made to the applicant. It was further alleged that random checking conducted at location -90 metres from 324 km post towards Imphal further revealed that even though RCC pipe protection was shown in the bills, but no RCC pipe protection was found in the above said place at the time of checking in about 100 metres, which showed that the Site Engineer Shri P. K. Bagchi and Shri S. R. Das, JTO (since expired) had falsely and fraudulently preferred the bills showing providing of RCC pipe protection in MB at the rate of Rs.175.00 per metre. Hence, the department suffered a loss of Rs.17,500.00 (approx.) for the approximate length of 100 metres. It is also alleged that providing of re-inforced cement concrete pipe protection to the HDPE pipe was allowed by Shri P. K. Bagchi and Shri M. L. Sharma, DE at a depth of 1.55 mtrs to 1.60 mtrs for the length of 100 mtrs, which was approved by Shri A. C. De, then Director for which the

extra payment comes to Rs.1,75,000/- @ Rs.175/- per mtr. Applicant, Navendra Kumar, DE, also allowed 901 mtrs for which extra payment comes to Rs.1,57,675.00 @ Rs.175.00. It was found that payment was made to the contractor against the provisions of tender/contract agreement by the accused public servants. It was accordingly alleged that the applicant had acted in collusion with others in cheating the Department of Telecom (now BSNL) by showing/claiming false/different nature of soil than actual soil, depth and RCC protections by submitting false bills/MBs, thereby causing wrongful gain to the contractor/himself and corresponding loss to the department to the tune of Rs.5,13,752.00 (approx.). The applicant is thus said to have failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of a Company employee in violation of rules 5(43), 4(1)(i), (ii) & (iii) of the MTNL (CDA) Rules, 1998.

3. On the basis of the aforementioned memorandum, an inquiry was conducted against the applicant. The inquiry officer submitted his report dated 28.01.2011 holding the charges against the applicant not proved. The disciplinary authority did not agree with the findings of the inquiry officer and formed a view that minor penalty be imposed upon the applicant. Second stage advice of CVC was also sought. Copy of the inquiry report along with the note of

disagreement was served upon the applicant for his representation, and after consideration of his representation the disciplinary authority imposed the penalty of recovery of Rs.52,558/- upon the applicant vide impugned order dated 24.01.2013. Appeal preferred against the said order also resulted in dismissal vide order dated 25.07.2013.

OA No.4162/2013

4. In this OA, the same applicant, Navendra Kumar, DE, has been accused of the same set of allegations and was issued a charge memorandum dated 03.02.2005 under rule 25 of the MTNL (CDA) Rules, 1998 in respect of the allegations pertaining to the period 1996-97 when he was posted as DE (OFC) and alleged to have executed the OFC trenching and laying work on Imphal-Moreh route. On the basis of the aforesaid charge memorandum, an inquiry was conducted. The inquiry officer submitted his report on 20.01.2011 and held the charges partly proved to the extent that the applicant failed to maintained devotion to duty and acted in a manner unbecoming of a Company employee. Other charges were held not proved. After consideration of the representation of the applicant the disciplinary authority ordered recovery/forfeiture of Rs.95,566/- from the withheld gratuity of the applicant.

OA No.4166/2013

5. In this OA, the same applicant was issued charge memorandum dated 13.02.2006 under rule 25 of the MTNL (CDA) Rules, 1998 alleging that while working as DE (OFC) in the year 1996-97, the applicant executed the OFC trenching and laying work on Imphal-Moreh route. He did not carry out the test check as per para 192 of the tender document and furnished a false certificate that the work was done satisfactorily. It is stated that the inquiry constituted on the basis of the aforesaid charge memorandum was completed and the inquiry officer submitted his report on 27.01.2011 holding the charges against the applicant as not proved.

6. It is noticed that when the inquiry was constituted, the charged officer (applicant) approached the Hon'ble High Court of Delhi. The matter was ultimately taken to the Hon'ble Supreme Court, and finally culminated in dismissal of the claim of the applicant. Thereafter the inquiry was completed. The disciplinary authority imposed the penalty of recovery/forfeiture of Rs.98,339/- from the withheld gratuity of the applicant, vide order dated 29.01.2013. Appeal preferred against the order of the disciplinary authority also resulted in its dismissal vide order dated16.09.2013.

7. The applicant retired from service provisionally on superannuation on 28.02.2006 before submission of his representation to the charge-memorandum.

8. The applicant has accordingly sought quashing of the orders of imposition of penalty as also the appellate orders in all these Applications. In OA No.4162/2013 and 4166/2013 he has challenged the memorandum of charge as well.

9. The other set of OAs, bearing Nos.4163/2013, 4169/2013, 2280/2015 and 2301/2015, have been filed by the other applicant, namely, Ram Prashad. This applicant was also serving as Divisional Engineer and posted in OFC (Survey) at Guwahati, and was associated with the laying of optical fiber cable in the State of Manipur on Imphal-Moreh route in the year 1996. In OA No.4163/2013 and 4169/2013, he was served with separate charge memoranda dated 27.07.2006 on the allegation that he failed to recommend and deduct the proportionate amount as per the deficiencies found by him during the sample test check of OFC laid on the Imphal-Moreh route. It is also alleged that this applicant mentioned in his report that rocky soil was not encountered all along the route, and even then did not recommend recovery for the trenching cost at the rate of hard soil, which resulted in huge pecuniary benefit to the contractor. On the basis of the charge

memorandum inquiry was conducted. The inquiry officer submitted separate reports in respect of both the charge memoranda on 30.08.2012 (OA-4613/2013) and on 29.08.2012 (OA-4169/2013) holding the charges against the applicant fully proved. Copy of the inquiry report along with CVC advice was served upon the applicant. He submitted representations dated 12.03.2013 on the inquiry reports. The disciplinary authority vide separate orders dated 02.07.2013 imposed the penalty of forfeiture of proportionate loss of Rs.1,41,800/- (OA-4163/2013) and Rs.1,00,000/- (OA-4169/2013) from the withheld gratuity of the applicant. Appeals preferred by the applicant against the aforesaid orders were also dismissed vide orders dated 05.10.2013.

10. In OA Nos.2280/2015 and 2301/2015, the applicant Ram Prashad, was served with two charge memoranda dated 27.01.2006 in respect to the same period and work. In the memorandum subject matter of challenge in OA No.2280/2013, it was alleged that while working as Divisional Engineer, OFC, Guwahati during the period 1996-97 the applicant failed to maintain absolute integrity and devotion to duty and committed gross misconduct inasmuch as he had failed to detect the non-availability of RCC works/protections and rocky soil during the test checking of the trenching work on Imphal-Moreh route. It was further alleged that even though he had

stated that no rock was observed all along the route, but recommended a deduction of only 5% and passed the bill, resulting in undue pecuniary benefit to the contractor. In the other charge memorandum in respect of OA No.2301/2015, it is alleged that while working as Divisional Engineer, OFC, Guwahati during the same period, the applicant had conducted test checking of the work done in sub-section 16 of Imphal-Moreh route before making final payment to the contractor but remained silent about the non-availability of RCC protections, and failed to recommend and deduct the proportionate amount as per the deficiencies detected during the test check, resulting in substantial pecuniary loss to the department. The inquiry officers submitted their respective reports on 31.05.2013 (OA No.2280/2015) and 24.06.2013 (OA No.2301/2015) holding the charges as proved. The disciplinary authority imposed the penalty of forfeiture of proportionate loss of Rs.1,40,000/- (OA No.2280/2015) and Rs.79,283/- (OA No.2301/2015) from the withheld gratuity of the applicant vide orders dated 17.05.2014 and 18.03.2014 respectively. Appeals preferred by the applicant against the aforesaid penalty orders also came to be rejected vide orders dated 24.11.2014.

11. In all these Applications, the applicants have challenged the charge-sheets, penalty orders and the appellate orders. The

grounds of challenge to the impugned orders are common in all the OAs. Challenge is made on the following grounds:

(i) In OA Nos.3638/2013 and 4166/2013 the validity of disagreement note is challenged on the ground that the disciplinary authority has not recorded its reasons for disagreement with the findings of the inquiry officer and its own findings on the basis of the material/evidence before the inquiry officer, vitiating the penalty order, as also the appellate order.

(ii) The applicants were employees of Department of Telecommunication in the year 1996-97, the period for which the allegations of misconduct have been made against them. The applicants came to be absorbed in MTNL w.e.f. 01.10.2000 and thus, MTNL is not competent to initiate disciplinary proceedings against the applicants in respect to the alleged misconduct when they were not its employees.

(iii) The applicants are deemed to have resigned from Department of Telecommunication and the charge-sheets having been issued beyond four years of the alleged incident, is illegal and in violation of rule 9 of the CCS (Pension) Rules, 1972.

(iv) Even if it is presumed that MTNL was competent, under rule 5(43) of the MTNL (CDA) Rules, 1998, disciplinary action could only be initiated on the recommendations of Department of Telecommunication, and in absence of any such recommendation, the entire disciplinary proceedings stood vitiated.

(v) No loss has been caused to the State Exchequer. In any case, the alleged loss was not a part of the charge against the applicants. Hence, the impugned orders imposing penalty of recovery are not sustainable in law.

(vi) The random test check was conducted by CBI after seven years of the execution of the work and at that stage it was not possible to ascertain the deficiencies, if any.

(vii) It is a case of no evidence and the findings of the inquiry officer and consequential orders of the disciplinary authority are perverse in nature.

(viii) The charge-sheet has been issued after a period of almost ten years of the date of the alleged incident and thus, the entire disciplinary proceedings are vitiated on account of long delay.

(ix) In OA Nos.4163/2013 and 4169/2013 there is an additional ground that the disciplinary authority and the appellate

authority are the same. It is stated that the penalty order has been passed by Shri A. K. Garg, Director (Technical) and the same person has decided the appeal and passed the impugned appellate orders in his capacity as Chairman-cum-Managing Director.

12. The respondent MTNL has filed detailed counter affidavits. It is stated that the applicants were absorbed with MTNL w.e.f. 01.10.2000 and on becoming its employees, MTNL had full right to proceed against applicants for misconduct committed by them in the previous employment, i.e., Department of Telecommunication, as per rules. Reliance is placed upon rule 5(43) of the MTNL (CDA) Rules, 1998. It is also pleaded that in case of the applicant Ram Prashad, clear sanction was granted by DoT vide letter dated 10.12.2004 to proceed against him, and permission was also granted to MTNL to take departmental action as required in the matter, and further the penalty imposed was ratified by DoT vide letter dated 28.05.2013.

13. It is also pleaded by the respondents in their counter affidavits that the sanction was granted by DoT, the erstwhile employer, for launching prosecution as also departmental proceedings, and later on penalty being imposed, the same was also ratified by DoT. CVC was also consulted, and CVC suggested

imposition of the penalty. The respondents further submit that the entire procedure as prescribed under law has been followed. In case of applicant Navendra Kumar (OA-3638/2013) in para 5 of the preliminary objections, it is mentioned that the sanction was granted by the DoT vide letter No.9-150/2001-Vig.I dated 14.12.2004 for launching of prosecution and regular departmental action for major penalty against the applicant by MTNL. Further, the penalty imposed on the applicant was also ratified by DoT vide letter dated 13.12.2012. The action against the applicant was taken under rule 25 of the MTNL (CDA) Rules, which prescribe major penalty procedure. The respondents have also stated that the case was registered with CBI vide letter dated 13.05.2004. The DoT informed the respondent-MTNL vide letter dated 14.12.2004 for initiating action for major penalty against the applicant pursuant to advice of CVC. According to the respondents, the applicant having been absorbed in MTNL w.e.f. 01.10.2000, MTNL was competent to initiate the disciplinary proceedings. Since in OA No.3638/2013, the inquiring authority held the charges not proved, the inquiry report was sent to CVC through DoT, and CVC advised imposition of suitable major penalty, vide its letter dated 24.11.2011. The disciplinary authority accordingly issued a disagreement note dated 30.03.2012 asking the applicant to make his representation in respect to the disagreement note. On consideration of the representation dated 23.04.2012 in response to

the disagreement note, the disciplinary authority proposed to impose the penalty of recovery of Rs.52,558/-.

14. In OA No.4162/2013, the DoT vide letter dated 16.12.2004 granted sanction to MTNL to proceed against the applicant for departmental action, and later the penalty imposed on the applicant was also ratified by DoT vide letter dated 30.12.2012. In OA No.4166/2013, permission to proceed against the applicant was granted by DoT vide letter dated 16.12.2004 pursuant to the letter of CVC dated 18.05.2004. In the additional affidavit filed, the respondents have further stated that the issue of applicability of rule 5(43) of the MTNL (CDA) Rules has already been settled by the Hon'ble High Court of Delhi vide its judgment dated 18.04.2006 passed in WP(C) No.3790/2006 filed by the applicant Navendra Kumar. Relevant observations of the Hon'ble High Court are reproduced hereunder:

> "10. The admitted facts of these cases are that the petitioner's services stood absorbed with MTNL with effect from 1.10.2000. The allegations of misconduct pertain to a period when he worked at Guwahati. However as on date as also on the date when the charge-sheet was issued, the jural relationship of employee and employer between the petitioner and the DOT had ended. The petitioner has not disputed that the absorption was validly made with effect from 1.10.2000; equally he has not challenged the provisions of Rule 5(43). In the absence of such a challenge, in my opinion, the submission by the petitioner that MTNL does not have any jurisdiction to issue show cause

notice or initiate departmental proceedings is devoid of merit.

11. On the submissions of the petitioner that MTNL could not have dealt with the acts of omission and commission which took place prior to its incorporation in relation to employment rendered, while the petitioner was in the services of DOT, there can be no dispute about the fact that the entire contract of service in relation to the petitioner were taken over by the respondent MTNL as on the date of his absorption. In the absence of any Rule empowering the Central Government to exercise control over the services of the petitioner in relation to matters of employment for the period he served with it, the only authority which would continue to have jurisdiction to initiate departmental proceedings would be MTNL. Any other interpretation would lead to incongruity, because inevitably it would result in dual disciplinary control a situation deleterious to public interest and at the same time leading to avoidable conflict."

"12. ..Equally, the contentions raised that no reference was received by MTNL from the DOT, too have to be seen from the stand point of prejudice. The provisions of Rule 5(43) have to be seen as indicative of a power. In that sense the provision has to be given widest amplitude and the question of reference or lack of it would be only procedural, that cannot be equated to a legal requirement. The fact that an alleged misconduct was noticed subsequently by MTNL itself is indicative of some inter se correspondence or communication between MTNL and the DOT."

15. In OA No.4163/2013 filed by applicant Ram Prashad, sanction was granted by DoT vide letter dated 10.12.2004 to proceed against him for disciplinary action, and later the penalty imposed on the applicant was also ratified by DoT vide letter dated 28.05.2013. In OA No.4169/2013 filed by the same applicant, sanction was granted by DoT vide letter dated 16.12.2014 to proceed for disciplinary action,

and latter the penalty imposed on the applicant was ratified vide letter dated 28.05.2013. In OA No.2301/2015, the respondents have mentioned that sanction for disciplinary action was granted by DoT vide letter dated 10.12.2004 pursuant to the advice of CVC, and the penalty imposed on the applicant also came to be ratified vide letter dated 24.02.2014. It is also the case of the respondents that in the criminal case instituted against the applicant he was convicted and sentenced to undergo rigorous imprisonment of two years and a fine of Rs.20,000/- vide judgment dated 30.08.2013 passed by the Special Judge, CBI, Guwahati. The respondents have also referred to the judgment of the Hon'ble High Court of Delhi in the case of ***Navendra Kumar & another*** *v* ***MTNL*** [LPA No.1771/2006] decided on 01.10.2007, whereby the judgment of the learned single Judge dated 18.04.2006 passed in WP(C) No.3790/2006 has been upheld.

16. In OA No.2280/2015, sanction was granted by DoT vide letter dated 06.12.2004 and the penalty imposed was ratified vide letter dated 30.04.2014. The respondents have also referred to the conviction of the applicant in criminal case and sentence of RI of two years and fine of Rs.10,000/- vide judgment dated 30.12.2014 by the Special Judge, CBI, Guwahati.

17. We have heard the learned counsel for parties at length. Vide order dated 02.08.2016, the respondents were directed to

produce the record pertaining to the inquiring authority as well as the disciplinary authority, particularly the note of disagreement. In compliance to the aforesaid direction, the record has been produced.

18. We proceed to deal with the grounds of challenge.

Ground (i):

In OA No.3638/2013, the inquiring authority held the charges as not proved. In such an eventuality rule 26(2) of the MTNL (CDA) Rules, 1998, which is similar to rule 15(2) of the CCS (CCA) Rules, 1965, prescribes that in the event the disciplinary authority disagrees with the findings of the inquiring authority on any article of charge, it is incumbent upon the disciplinary authority to record its reasons for disagreement with the findings of the inquiring authority and record its own findings on the basis of the evidence/material produced during the inquiry. From the perusal of the record produced, we find that the disciplinary authority has recorded the following note of disagreement on 04.04.2011:

> "I have gone through the I.O. report submitted vide letter No.DGM(A)/HQ/INQ/NR/D(Retd.)/08-09 dated 28.1.2011 who came to a conclusion that the charges against Sh. Navendra Kumar DE (now retired), could not be established due to lack of evidence induced during course of inquiry. I do not agree with the findings of I.O. as the Jt. Inspection report as (Exts-30) proves that Sh. Navendra Kumar, has failed to conduct necessary checks resulting in substandard work."

From the careful scrutiny of the aforesaid disagreement note, we are of the considered view that the said disagreement note does not satisfy the mandate of rule 26(2) of the MTNL (CDA) Rules. Rule 26(2) is reproduced hereunder:

> "(2) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose."

Even though the disciplinary authority has disagreed with the findings of the inquiring authority, however, it has not recorded reasons for disagreement with the findings of the inquiring authority nor its own findings on the charge on the basis of evidence/material brought before the inquiring authority. Merely recording its own opinion does not constitute a reason for disagreement. The disciplinary authority is bound to record as to on what grounds he disagrees with the findings of the inquiring authority and also record its own findings on the charge. Though the disciplinary authority may not write a detailed judgment, at least the thought process which is sufficient to demonstrate the reasons for disagreement to the findings must be put on record. The disciplinary authority has merely mentioned, "I do not agree with the findings of I.O. as the Jt. Inspection report as (Exts-30) proves that Sh. Navendra Kumar, has failed to conduct necessary checks resulting in substandard work".

The disciplinary authority has not dealt with the reasons recorded by the inquiring authority and thereafter disagreed by recording reasons, though on the basis of the joint inspection report the inquiring authority has recorded its definite findings holding the charge as not proved. The inquiring authority while dealing with this aspect of the issue returned its finding in the following manner:

> "Genesis of the case lies in the findings revealed by inspection reports placed at Ext-S-29 to Ext-S-32, of the sub-section-01 of Imphal-Moreh route conducted by CBI in presence of independent witnesses.
>
> As per these exhibits, the depths of the trench and nature of soil as shown in bills, MB and diagram are different from those found during random technical checking of trenching and laying works conducted by CBI team in presence of independent witnesses.
>
> Neither any independent witness nor any signatory of these exhibits could be made appear before the inquiry to authenticate the contents of these inspection reports produced as Ext-S-29 to Ext-S-32 before the inquiry. Therefore SPS did not get any chance to cross-examine the witnesses regarding the contents. As such these documents cannot be given cognizance as evidence.
>
> All the charges against the SPS are based on the facts that the depth of the cable trenches and the nature of the soil as per bill/MB/diagram differ from those found during random technical checks conducted by CBI team in presence of independent witnesses on the sub-section-01 of Imphal-Moreh route. On the basis of this the charge have been framed that the SPS while passing the IIIrd RA Bill and IVth RA Bill did not carry out but the 10% check as required by tendered documents and CPWD manual which resulted in loss to the organization and corresponding gain to the contractor.
>
> As the material evidence viz. inspection reports available on the record on the inquiry as Ext-S-29 to

> Ext-S-32 are not authenticated and cannot be given cognizance as evidence, hence the charges that follow from these documents, cannot be sustained."

and, finally the following conclusion:

> "On the basis of assessment of the evidence made above in Para-8, following conclusions are drawn:
>
> The Ext-S-29 to Exts-S-32 which constituted material evidence could not be authenticated by the concerned witnesses, the SPS did not get any chance to cross examine the witnesses regarding the contents of the documents, hence these exhibits cannot be given cognizance. All the charges that follow from these documents cannot be established and as such charges listed in Annexure-1 and elaborated Annexure-2 of the charge Memo against the SPS cannot be sustained for lack of evidence on the record of the inquiry.
>
> ...(illegible)
>
> On the basis of evidence produced before the inquiry by prosecution as well as defence side, including prosecution and defence brief as... (illegible) in para-8 and the conclusions drawn in Para-9 above, following... (illegible) in this case.
>
> The charges against the SPS that he failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of a company employee in accordance with MTNL (CDA) Rules-1998 Rule-5(43) thereby violating Rule-4(1)(i), (ii) & (iii) of MTNL (CDA) Rules-1998 cannot be substantiated on the basis of available evidence on the record of the inquiry and hence are not proved."

There is not even a whisper in the disagreement note as to how and in what manner the findings of the inquiring authority are wrong or incorrect. Thus, the disagreement note is not in consonance with the

mandatory requirement of rule 26 (2) of the MTNL (CDA) Rules. Without going into other aspects, this OA needs to be allowed.

19. In OA No.4166/2013, the inquiring authority vide its report dated 27.01.2011 recorded following conclusions:

> "(i) The exhibits, which contained material evidence could not be authenticated by the concerned witnesses, the SPS did not get any chance to cross examine the witnesses regarding the contents of the documents, hence these exhibits cannot be given cognizance. Therefore charge against the SPS cannot be sustained for lack of evidence on the record of the inquiry.
>
> (ii) Above all, the data regarding tender, quantity, approved rates etc. has been taken for sub-section-10 of the Imphal-Moreh route for calculation of loss to the organization and corresponding gain to the contractor. Therefore charge regarding sub-section-11 of the said section against the SPS cannot be sustained."

and held the charge not proved. The disciplinary authority disagreed with the inquiry report stating that deficiency in MB and joint inspection report of CBI in the presence of independent witnesses was not given weightage in the inquiry report, and after receiving the representation dated 23.04.2012 from the charged officer passed the impugned order dated 29.01.2013 imposing penalty of recovery/ forfeiture of Rs.98,339/- from the withheld gratuity of the applicant. The contention of Mr. Chaudhary is that the aforesaid disagreement note does not disclose the reasons for disagreement nor the disciplinary authority has recorded its own findings on the charge as

per the mandate of rule 26(2), and thus the impugned order is not sustainable in law. We have already discussed the purport and scope of rule 26(2) hereinabove in OA No.3638/2013 and set aside the impugned order. The same principle is squarely applicable in this OA in view of the nature of the disagreement note recorded. This OA is also required to be allowed on this ground without going into other aspects.

20. In OA No.4162/2013, the charge against the applicant was as under:

> "That Shri Navendra Kumar, while working as Divisional Engineer, OFC, Guwahati during the period 1996 to 1997 failed to maintain absolute integrity and devotion to duty and committed gross misconduct in as much as he had passed the second Running Account bill in sub-section 14 of Imphal-Moreh route of the Contractor Shri H. B. Brojendro Singh, Imphal without conducting test check as required under Para 192 of tender documents and CPWD Manual, Vol.II at para No.7:33:1 & 7:33:2, wherein the nature of soil was shown as RCC protection and payment received by the Contractor, whereas the nature of soil and RCC protection shown were different.
>
> By the aforesaid act, the said Shri Navendra Kumar, DE failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of a company employee in violation of Rule 4 (1) (i), (ii) & (iii) of MTNL (Conduct) Discipline and Appeal Rules, 1998."

The inquiry officer in the findings recorded in its report dated 20.01.2011 held as under:

> "On the basis of evidence produced before the inquiry by prosecution as well as defence side, including prosecution and defence brief as analysed in para-8 and conclusions drawn in para-9 above, following findings are adduced in this case.
>
> The charges against the SPS are partly proved upto the extent that he failed to maintain devotion to duty and acted in a manner un-becoming of a company employee and thereby violated provisions contained in rule 4 (I) (ii & iii) of MTNL CDA Rules, 1998.
>
> However, due to lack of evidence on the record of the inquiry the charge that he failed to maintain absolute integrity and thereby violated provisions contained in rule 4 (I) (i) of MYNL CDA Rules, 1998 is not established and hence not proved."

This charge was a consolidated one for alleged contravention of rule 4 (1) (i), (ii) and (iii) of rule 4 of the MTNL CDA Rules, 1998. The charge against the applicant in respect to the alleged misconduct under rule 4 (1) (ii) and (iii) is said to have been proved, whereas the charge in respect to the alleged misconduct under rule 4 (1) (i) has been held as not proved. Admittedly, the disciplinary authority did not record any note of disagreement in respect to the part of the charge held not proved and forwarded the inquiry report to the applicant for his response/representation. The disciplinary authority, however, awarded the penalty of recovery/forfeiture of Rs.95,566/- from withheld gratuity vide the impugned order dated 24.01.2013. From a perusal of the impugned order we find that the disciplinary authority has not taken into consideration the fact that the major part of the charge against the applicant, i.e., he had failed to

maintain absolute integrity, has not been proved. The only part of the charge proved against him is lack of devotion to duty. In the second part of the charge which is said to be proved, the applicant has not been held liable for causing wrongful gain to the contractor and wrongful loss to the Government. The applicant has been held liable for misbehaviour or misconduct under rule 4 (1) (ii) and (iii), which reads as under:

> "RULE 4 GENERAL
>
> (1) Every employee of the company shall at all times:
>
> xxx xxx xxx
>
> (ii) Maintain devotion to duty;
>
> (iii) do nothing which is unbecoming of a company employee."

In respect to the part of the charge proved, the inquiry officer has evaluated the evidence in the following manner:

> "The material documentary evidence produced by the PO include FIR dated 23/08/2002 as Ext-S-1, Survey Report of Imphal-Moreh route as Ext-S-2, Joint Inspection Report dated 25/09/2003 as Ext-S-11 and Ext-S-12 showing calculation of excess payment made to the contractor, due to the defective work for laying of OFC.
>
> The Ext-S-11 viz. joint inspection report carried out on 25/09/2003 indicate that the soil shown, claimed and paid as rocky soil was found hard soil and the RCC works protection claimed to have been provided were also not found correct. Accordingly, Ext-S-12 shows that the approximate loss caused due to the defective works for laying of OFC by the contractor in sub-

section 14 of Imphal-Moreh route comes out to be Rs.8,52,537/-.

Let us now consider the authenticity of these Ext-S-11 and Ext-S-12, which are material evidence for sustaining the charges against the SPS.

Ext-S-12 was authenticated by Sh. Shubhabrata Gupta while appearing as witness SW-3 on 15/03/2010 before the inquiry. He deposed that contents of the said documents are true. Further stated that calculation available in Ext-S-12 was done by him alongwith Sh. S. C. Paul, Sr. A.O. On cross-examination by the Charged Officer, he told that excess payment calculated vide Ext-S-12 was done as per the spot verification report. The IInd RA bill available at Ext-S-5 was authenticated by Sh. Kaushal Kumar Mishra while appearing as SW-2 on 15/03/2010 before the inquiry.

Authenticity of joint inspection report viz. Ext-S-11 was done by Sh. Misri Lal Roy while appearing as SW-1 on 15/03/2010 before the inquiry, during his examination in chief. However, during his cross-examination, he deposed that report was prepared in CBI office. During examination by IO, he stated that regarding contents of Ext-S-11 whatever findings and comments were given by his senior viz. Sh. Ranjeet Kumar Nath SDE (AT) he agreed with it.

Although, as per SW-1, the report was prepared in the CBI office and not on the site, also he simply agreed with his senior regarding the facts mentioned in Ext-S-11, so above documents cannot be termed as absolute proof, however, considering the fact that the standard of proof in departmental inquiry is preponderance of probability, the above documents viz. Ext-S-5 (IInd RA Bill), Ext-S-11 (Joint Inspection Report) and Ext-S-12 (The calculation Sheet for extra payment made to the contractor) can be given cognizance as evidence.

From the above discussion, it can be concluded that the soil shown, claimed and paid as rocky soil was found hard soil and the RCC works protections claim to have been provided were also not found correct. Had test check would have been done, this could have been avoided. As such Sh. Navendra Kumar, DE,

> Retired failed to maintain devotion to duty and acted in a manner un-becoming of a company employee."

Although the inquiry officer has held that the charge against the charged officer as regards integrity has not been proved, even this finding is sufficient to conclude that the charged officer was at least negligent in performance of his duties which caused loss of Rs.8,52,337/- to the State. The punishment imposed is only recovery/forfeiture of Rs.95,566/- from the withheld gratuity. The impugned order of punishment cannot be faulted on the ground of non-recording the note of disagreement, as even the part of the charge proved against the applicant was/is sufficient to impose the penalty awarded.

21. In all the OAs other issues raised are common and these are being dealt with hereinafter.

Ground (ii), (iii) & (iv)

22. Grounds of challenge to the impugned orders enumerated at (ii), (iii) and (iv) hereinabove are being taken up together, being inter-linked. The contention on behalf of the applicants is that the incident relates to the years 1996-1997 when the applicants were employees of DoT. They came to be absorbed in MTNL w.e.f. 01.10.2000 and thus MTNL is not competent to initiate the disciplinary proceedings. It is further the case of the applicants

that on their absorption in MTNL they are deemed to have resigned from DoT and thus the charge-sheets having been issued beyond four years of the alleged incident is in violation of rule 9 of the CCS (Pension) Rules, 1972.

23. The respondents have relied upon rule 5(43) of the MTNL (CDA) Rules, 1998. Relevant provision of the rule reads as under:

> "(43) Any misconduct committed by an employee in previous organization and if the organization refers the case to MTNL, it will be taken cognizance of and disciplinary action will be taken in spite of the clearance given by that organization at the time of his/her resignation or relieving. It may also be ensured that the previous organization where an employee has committed the misconduct, lends all cooperation to MTNL in this regard."

From a perusal of the aforesaid rule, it is evident that any misconduct committed by an employee of MTNL in previous organization could be taken cognizance of for disciplinary action, provided the erstwhile employer refers the case to MTNL, even if any clearance was given by the erstwhile employer at the time of his/her resignation or relieving, and the previous organization with whom the employee is alleged to have committed the misconduct lends all cooperation to MTNL.

24. While dealing with the factual aspects of each one of the OA hereinabove, we have noticed that in each and every case, DoT,

the erstwhile employer of the applicants in these OAs, had granted sanction for initiating disciplinary proceedings by specific letters. This fact has not been disputed by the applicants. Not only that sanction was accorded for disciplinary action, even the penalty imposed was ratified in all the cases. Thus in view of the mandate of rule 5(43) the disciplinary actions initiated by the respondent-MTNL had has the sanction of law. The applicants had attempted to challenge the disciplinary proceedings on the same ground in WP(C) No.3790/2006 – ***Navendra Kumar*** *v* ***MTNL*** (*supra*). This writ petition was dismissed by the Hon'ble High Court of Delhi in view of the specific provision of rule 5(43), and the LPA against the said order has also been dismissed. Relevant observations of the Hon'ble High Court have already been extracted hereinabove. Mr. Chaudhary, learned counsel for the applicants, has relied upon a judgment of this Tribunal dated 08.10.2013 passed in OA No.2596/2012 and connected OA No.3465/2012 – ***M. L. Sharma*** *v* ***BSNL & others***. In this case, the Tribunal held that the allegations of lapses during the service of DoT cannot be examined under the rules of MTNL. We have carefully perused this judgment. Firstly, the provisions of rule 5(43) was not brought to the notice of the Tribunal, and secondly in view of the judgment of the Hon'ble High Court in ***Navendra Kumar***'s case (*supra*), this judgment is *per incurium*.

25. The second leg of the argument advanced by Mr. Chaudhary is that with the absorption of the applicants in MTNL w.e.f. 01.10.2000 they are deemed to have resigned from services of DoT and thus, the issuance of charge memoranda beyond a period of four years is barred by the principle enshrined under rule 9 of the CCS (Pension) Rules, 1972. The respondents have, however, rebutted this contention. It is stated that the absorption of the applicants with MTNL was a condition of service to which the applicants had consented as they were absorbed on their opting for absorption. It is in fact, a mere shifting from services of one employer to another. There is no element of 'resignation'. The applicants have drawn the service benefits by taking into consideration their services rendered in DoT as well as a continuing service. The submission of the applicants is thus contrary to the facts on record and law. Resignation is a voluntary act where the contract of service is terminated for all practical purposes, which is not the position in the present case. In fact, the applicants are carrying the services rendered with DoT to MTNL for earning various service benefits. Their absorption was at their instance. They cannot be permitted to take the stand of deemed resignation for purposes of disciplinary action alone. Apart from that, the respondents have further contended that rule 9 of CCS (Pension) Rules, 1972 has no application to the case of the applicants as they are governed by the MTNL

(CDA) Rules, 1998. According to the respondents, rule 37 of these Rules takes care of disciplinary proceedings after retirement. The said rule reads as under:

> "37: **Disciplinary Proceedings after Retirement**
>
> (1) After the retirement of an employee, the disciplinary proceedings initiated before his retirement, shall continue and the same should be completed within 6 (six) months after the date of retirement.
>
> (2) Despite the pendency of the disciplinary proceedings as stated in Rule 37(1) above, the Disciplinary Authority may withhold payment of Gratuity, for ordering recovery from Gratuity of the whole or part of any pecuniary loss caused to the Company if the employee is found in a disciplinary proceeding or judicial proceedings to have been guilty of offences/misconduct as mentioned in sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the Company by misconduct or negligence during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of section 7(3) and 7(3A) of the Payment of Gratuity Act 1972, should be kept in view in the event of delayed payment, in case the employee is fully exonerated. In all the above cases, payments other than gratuity will be released at the time of retirement as per rules.
>
> (3) The official against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as he was in service until the proceedings are concluded and final order is passed in respect thereto. The concerned official on superannuation shall not be entitled for the payment of gratuity till the proceedings are completed and final order is passed thereon (which should be completed

> within 6 months after the date of retirement). Continuance of cases for more than six months after retirement must be justified with valid reasons and such cases must be put up to the Board for its appraisal."

Sub-rule (1) of rule 37 permits the employer to continue disciplinary proceedings initiated before retirement of an employee even after his retirement, with the rider to complete the same within six months after the date of retirement. Sub-rule (2) permits the disciplinary authority to withhold payment of gratuity or ordering recovery from gratuity during the pendency of disciplinary proceedings, of course, subject to the outcome of the disciplinary proceedings in accordance with the conditions stipulated therein. Sub-rule (3) further permits continuation of the disciplinary proceedings even after superannuation of the delinquent employee as if he was in service till the proceedings are concluded and final order is passed. In such an eventuality the rule further empowers the disciplinary authority to withhold the payment of gratuity till the proceedings are completed or final order is passed. The rule also contains a condition that where the disciplinary proceedings continue beyond six months as prescribed under sub-rule (1), it must be justified with valid reasons and must be put up to the Board for its appraisal.

26. The respondents have produced copies of the record, which contains a note placed before the Board of Directors in its 282nd

meeting. The Board has approved continuation of the disciplinary proceedings in the case of applicant Navendra Kumar in its meeting held on 03.06.2012.

Ground (v)

27. Insofar as this ground of challenge is concerned, it is contended by Mr. Chaudhary, learned counsel appearing for the applicant that under rule 37, recovery from gratuity is permissible only if pecuniary loss has been caused to the Government/Company. His further contention is that there was no charge for the alleged loss against the applicants, and in any case, the loss has not been assessed. We have seen the charge memorandum and examined this contention. Even though in the statement of articles of charge, the loss has not been referred to or mentioned, however, in the statement of imputation of misconduct or misbehaviour in support of the articles of charge framed against the applicants, the loss has been worked out on the basis of definite measurements and calculations, and even the approximate loss caused to the Government/Company has been indicated. In case of applicant Navendra Kumar, the loss assessed in OA No.3638/2013 is Rs.5,13,752/-. In OA No.4166/2013 the excess payments made on account of soft nature of soil is assessed as Rs.1,65,782/- and on account of false and fabricated claim of re-inforced cement concreting works has been mentioned as Rs.1,32,900.

Similarly in OA No.4162/2013, the loss caused to the department is assessed at Rs.8,52,537/-. In case of applicant Ram Prashad, in OA No.4163/2013, the loss is assessed at Rs.7,56,077/-. In OA No.4169/2013, the approximate loss is worked out as Rs.8,52,537/-. In OA No.2301/2015, the loss is assessed at Rs.11,84,935/-. In OA No.2280/2015 the excess payment made has been mentioned as Rs.1,65,782/-. In view of the above factual position, the plea of Mr. Chaudhary is not sustainable on facts.

Grounds (vi) & (vii)

28. Both the issues mentioned hereinabove are inter-linked. The contention that the random check was conducted by CBI after seven years of the execution of the work and at that stage it was not possible to ascertain the deficiencies, is a question which could only be considered by the technical experts. The inquiry officer has recorded specific findings based upon the evidence and material before it, which *inter alia* includes the opinion of the experts. The findings clearly reveal that deficiencies were found during random checks. In exercise of the power of judicial review, this Tribunal cannot re-appraise the evidence and material produced before the inquiry officer unless the findings are found to be perverse in nature, i.e. without any evidence. After going through the inquiry reports, we find that the random checks were conducted by CBI in the

presence of technical personnel who was signatory to the test check report. We have no reason to ignore the factual findings of the inquiry officer. The same were based upon evidence. The contentions of the applicants are thus rejected.

Ground (viii)

29. The next contention of the applicants that the charge-sheets have been issued after a period of almost a decade of the date of alleged incident and thus the entire disciplinary proceedings are vitiated on account of long delay, also deserves to be rejected for the simple reason that the charges are based upon investigation conducted by CBI and on evidence which is technical in nature. Mere delay is not sufficient to declare the whole inquiry as vitiated particularly when the complete process of holding the inquiry has been adhered to.

Ground (ix)

30. In OA No.4163/2013 and OA No.4169/2013, it is an additional ground that the disciplinary authority and the appellate authority are the same person. The penalty order dated 02.07.2013 in OA No.4163/2013 has been issued by Mr. A. K. Garg in his capacity as Director (Technical), and the appellate order dated 05.10.2013 has also been issued by Mr. A. K. Garg in his capacity as Chairman-cum-Managing Director. Same is the position in OA No.4169/2013. It is

accordingly pleaded that the penalty orders as also the appellate orders in both these OAs are required to be quashed as the same person has issued the penalty orders and later became judge of his own cause while sitting as the appellate authority. There is substance in this contention. The question arises whether the entire proceedings are vitiated on this count. In the famous case of ***A. K. Kraipak v Union of India*** [(1969) 2 SCC 262], the Hon'ble Supreme Court held that a person cannot be a judge of his own cause. Relevant observations of the Apex Court are reproduced hereunder:

> "15. It is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All-India Service is entitled to great weight. But then under the circumstances it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. <u>It is against all canons of justice to make a man judge in his own cause.</u> It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and duty. Under those circumstances it is difficult to believe that

> he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates."

After going through record of the case and the fact that the penalty orders as also the appellate orders are passed by the same person, we are of the considered view that the entire disciplinary proceedings would not be vitiated on this count. However, the appellate orders are not sustainable in law.

31. On consideration of the issues raised and examining the material on record in depth, we dispose of these OAs in the following manner:

(1) In view of our findings in OA No.3638/2013 and OA No.4166/2013 filed by applicant Navendra Kumar that the disagreement notes do not comply with the provisions of rule 26(2) of the MTNL (CDA) Rules, the penalty orders dated 24.01.2013 and 29.01.2013 and appellate orders dated 25.07.2013 and 16.09.2013

respectively are liable to be quashed. In normal circumstances, we would have remanded the case allowing the disciplinary authority to record fresh notes of disagreement and proceed further in the matter. However, we do not intend to do so for the simple reason that the incident relates back to 1996-1997. The applicant retired from service on 28.02.2006. It is eleven year that the applicant has since retired. The penalty is of recovery only. The charges are not so grave. We, therefore, deem it appropriate to close the disciplinary proceedings against the applicant in these two cases. These OAs are accordingly allowed.

(2) The charge in OA No.4162/2013 filed by applicant Navendra Kumar is fully established. In view of our findings hereinabove, this OA is dismissed.

(3) On account of our findings in OA No.4163/2013 and OA No.4169/2013 filed by applicant Ram Prashad, the orders passed by the appellate authority are hereby set aside. The matters are remitted back to the appellate authority to re-examine the appeals and pass fresh orders within a period of two months from the date of receipt of copy of this order.

(4) In view of our findings in OA Nos.2280/2015 and 2301/2015 (applicant Ram Prashad) same are hereby dismissed.

There shall be no order as to costs.

(K. N. Shrivastava)
Member (A)

(Justice Permod Kohli)
Chairman

/as/