

RESERVED

CENTRAL ADMINISTRATIVE TRIBUNAL

ALLAHABAD BENCH ALLAHABAD

Original Application No. 330/00614 of 2016

Dated: This the 06th day of April 2019.

HON'BLE MR. RAKESH SAGAR JAIN, MEMBER (J)

J.S. Arya, IDAS, S/o Shri Dharam Pal Arya, R/o D/8/8156 Vasant Kunj, New Delhi 110 070.

... Applicant

By Adv: Shri Rakesh Verma

V E R S U S

1. Union of India through its Secretary, Ministry of Defence, (Defence Accounts Department/Finance), Govt. of India, South Block, New Delhi 110 011.
2. The Controller General of Defence Accounts, Office of Controller General of Defence Accounts, Ulan Batar Road, Palam, Delhi Cantt. 110 010.
3. Controller, office of CDA (Funds), Near Head Post Office, Meerut, 250001.

... Respondents

By Adv: Shri R.K. Srivastava.

O R D E R

1. The present O.A. has been filed by applicant J.S.Arya under Section 19 of the Administrative Tribunal act seeking the following reliefs:

- "(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned punishment order dated 14.07.2015 as well as order in review dated 05.01.2016 rejecting the review petition, both passed by the order and in the name of the Hon'ble President of India, under the signature of the respondent No.2 (Annexure A-1 and A-2) respectively to Compilation No. 1 of this petition).
- (ii) To issue a writ, order or direction in the nature of mandamus directing the respondent Nos. 1 and 2 to

release annual increments, illegally stopped under the strength of the aforesaid punishment order and to carry out re-fixation of pay with resultant benefits thereof with payment of arrears together with interest thereon @ 12% per annum, within a period as may be fixed by this Hon'ble Tribunal.

- (iii) to issue any other suitable writ, order or direction in the facts and circumstances of the case which this Hon'ble Tribunal may deem fit and proper.
- (iv) to award cost of the petition in favour of the petitioner".

2. Case of applicant is that while posted as Additional Controller of Finance & Accounts in the office of Controller of Finance & Accounts (Factories), Bolangir was charged sheeted under Rule 14 of CCS (CC&A) Rules, 1965 on three counts out of which Charge No. 1 was proved and Charge No. 2 and 3 were disproved.

Charge/Article No. 1 reads as:-

"Ordnance Factory Bolangir floated Limited Tender No. 09100465/MM dated 28.01.10, the bidders are required to submit EMD of Rs.2,84,419/- along with their bid. As per technical CST, SBIR & MIR claimed exemption from submission of EMD. As per Ordnance Factory Board Material Management and Procurement Manual clause No. 5.1..2, EMD is exempted only for KVIC, DGS&D, NSIC or sister factory registered firms. EMD once specified to be submitted in the tender enquiry cannot be waived off even by GM.

Since SBIR & MIR did not submit EMD as required, thus, the bids submitted by SBIR & MIR are liable to be rejected summarily for non submission of EMD due to non compliance of tender clause.

In CST prepared on 23.3.2010 in this case, "Exemption claimed" was mentioned against EMD TEC dated 15.4.2010, in which Shri J.S. Arya, IDAS, Addl. Controller of Finance and Accounts at Controller of Finance and Accounts (Factories) Bolangir was a member, did not discuss the above deficiency, thus overlooked the deficiency and declared both SBIR & MIR technically qualified and advised for opening of their price bids, which is irregular".

3. So, as per the allegation against the applicant, in the charge sheet, by his act or omission, the applicant failed to maintain integrity, devotion to duty and did acts unbecoming of a public servant and which were prejudicial to the interest of Ordnance Factory, Bolangir and/or indicative of his negligence and favouritism to the Tenderers/vendors and therefore, applicant committed gross misconduct as provided in Rule 3 (1)/ 3 (2) of CC (Conduct) Rule.
4. Along with the summary of allegation, as per the procedural rules, list of witnesses and list of documents were served on the applicant. An Inquiry Officer was appointed. Complying with the principle of natural justice and the procedural rules, enquiry was conducted by the Inquiry Officer. The Inquiry Officer submitted his report holding that the charge leveled against the applicant is proved. The above said entire material along with the representation of the applicant was considered by the disciplinary authority and vide order dated 14.07.2015, the disciplinary authority imposed the penalty of withholding increments of pay for a period of one year. Review filed by the applicant was also dismissed maintaining the penalty imposed upon him.

5. I have heard the learned counsels for the parties in support of their respective case and gone through the pleadings.
6. The Inquiry Officer held the charge No.1 to be proved on the ground that

"7. On this Article of Charge 1, sufficient opportunity was given to Shri JS Arya to explain his position. However, Shri JS Arya's defence to this charge 1 vide his final defence brief dated 5.3.2014 are not tenable due to following reasons.

- (a) The Charged Officer's contention, that 'the documents listed as P6 & P7 relied upon by the prosecution predates the tender & has no relevance to this tender in question which was opened at a later date' is not correct, as in the reference of these letters the TE No. & date was clearly mentioned and the procurement process had already started with the issue of TE on 28.1.2010 based on earlier TPC-1 decision dated 10.1.2010. Hence, defence of Charged Officer on P.O. findings is not accepted.
- (b) The Charged Officer's contention that his noting on the said documents P4 & P5 contain nothing but a 'general/opinion on EMD & spirit of EMD: is not correct, as Jt. GM/OFBL, requested Addl. CFA (Fys) for specific clarification on EMD Exemption issue in view of the position brought out by these two firms.
- (c) The Charged Officer's contention, that 'if was not known if these two companies will participate in this tender or they will qualify due scrutiny at a later date; is also not relevant to this charge, as the Article of Charges-1 basically pertains to unauthorized EMD exemption without any

supporting rule position by the Charged Officer on the subject Tender and thereby adopting inequitable/non transparent method to favour these two firms such as SBIR & MIR.

(d) The contention of Charged Officer's that 'GM/OFBL is the competent authority for considering such request for waiver and what the Jt. GM did or did not do was not known to him' cannot be considered as excuse for him, as the Addl. CFA (Fys)/OFBL was the Financial Advisor in this tendering process and he is duty bound to give correct & appropriate financial advice in terms of laid down procedure in the OFB manual. Further the Charged Officer was the finance member of TPC-1, which was supposed to decide this case and he could have taken assistance from his own Accounts Officer/Procurement Section of his office for in-depth examination of the case rather than disposing the same in a hurried manner, without even marking the said notings to GM/OFBL, who was the competent authority in this TPC case.

(e) His contention that 'Acceptance of EMD does not require financial concurrence' cannot be accepted for his defence, since this Tender Enquiry was already issued and clarification was sought on EMD issue citing the TE number and date as the reference as he being the TPC-I finance member. The Charged Officer did not apply his mind correctly to examine if EMD waiver as requested by the firm is as per the terms & condition of TE or as per the laid down provisions in rule in OFB manual as part of his official duty & responsibility and therefore he is responsible for giving incorrect advice to the factory authority on the subject.

(f) From the above carefully considered by me in sequential/events, it is seen that the preponderance of probability of the events having occurred and offence having been committed are clear. Further, as per the Inquiry Officer, I am arriving at the conclusion that the Article of the Charge-1 as stated in the Memorandum No. AN/1/1382/6/JSA dated 19.3.2013 against Charged Officer i.e. Shri JS Ary, IDAS, Controller, the then Addl. CFA in the office of CFA (Fys.), OFBL, are clearly established as correct and the charge stands proved and the statement of imputation of misconduct or misbehaviour therein has been sustainable.

7. It be noted that as per, the charge sheet, applicant by his act or omission failed to maintain integrity, devotion to duty and did acts unbecoming of a public servant and which were prejudicial to the interest of Ordnance Factory, Bolangir and/or indicative of his negligence and favouritism to the Tenderers/vendors and therefore, applicant committed gross misconduct as provided in Rule 3 (1)/ 3 (2) of CC (Conduct) Rule.

8. Learned counsel for applicant submitted that the alleged action of the applicant cannot be termed as a misconduct but at the most an act of negligence or act of innocent mistake may be attributed to applicant but the same does not constitute misconduct and in any case, failure to maintain high standard of efficiency in performance of duty amounting to negligence and does not constitute misconduct or failure to maintain devotion to duty constituting acts unbecoming of a public servant being prejudicial to the interest of Ordnance Factory, Bolangir and favouritism to the Tenderers/vendors

and placed reliance upon Union of India v/s J.Ahmed, AIR 1979 SC 1022 in support of his arguments.

9. However, in the case J.Ahmed (supra), the charge was framed against the respondent J.Ahmed that while holding the post of District Magistrate, Nowgong District, there were large scale disturbances in Nowgong and considerable damage to property regarding which an enquiry was held against the said officer and was removed from service on ground of misconduct being proved against him. It is in the context of the nature of the allegations and charge against the said official, the Hon'ble Apex Court held that :

"The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:

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

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in [Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik](#)(3), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In [S. Govinda Menon v. Union of India](#)(4), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious

consequences the same may amount to misconduct as was held by this Court in *P. H. Kalyani v. Air France, Calcutta*(5), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would *ipso facto* constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil [see *Navinchandra Shakerchand shah v. Manager, Ahmedabad Co- op. Department Stores Ltd.*(1)]. But in

any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea. We find it difficult to subscribe to this view because gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings."

10. Again in case of J. Ahmed (supra), the Hon'ble Apex Court while holding as to what would constitute misconduct for the purpose of disciplinary proceeding, observed that "the charges framed against the respondent would affirmatively show that the charge inter alia alleged failure to take any effective preventive measures meaning thereby error in judgment in evaluating developing situation. Similarly, failure to visit the scenes of disturbance is another failure to perform the duty in a certain manner. Charges Nos. 2 and 5 clearly indicate the shortcomings in the personal capacity or degree of efficiency of the respondent. It is alleged that respondent showed complete lack of leadership when disturbances broke out and he disclosed complete inaptitude, lack of foresight, lack of firmness and capacity to take firm decision. These are personal qualities which a man holding a post of Deputy Commissioner would be expected to possess. They may be relevant considerations on the question of retaining him in the post or for promotion, but such lack of personal quality cannot constitute misconduct for the purpose of disciplinary proceedings." And further "It would thus transpire that the allegations made against the respondent may indicate that

he is not fit to hold the post of Deputy Commissioner and that if it was possible he may be reverted or he may be compulsorily retired, not by way of punishment. But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct, viz., such acts and omissions which would render him liable for any of the punishments set out in rule 3 of the Discipline & Appeal Rules, 1955. No such case has been made out."

11. So, the question in the present case would be whether the acts of applicant constitute 'misconduct' or 'negligence in performance of his duty'. The Inquiry officer has clearly held the acts of the applicant to be misconduct proving Articles – I. It is also settled law that a Tribunal would not sit as a Appellate court to substitute its opinion even if a different view is possible unless the conclusion or finding reached by the disciplinary authority is based on no evidence and/or perverse, and the conclusion or finding be such as no reasonable person would have ever reached. Refer to B.C. Chaturvedi v. Union of India, AIR 1996 SC 484, reiterating the principles of judicial review in disciplinary proceedings, the Hon'ble Apex Court has held as under: "12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in eye of the Court. When an inquiry is conducted on charges of a misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice be complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a

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

12. And recently in the case of Union of India and Others Vs. P.Gunasekaran (2015(2) SCC 610), the Hon'ble Supreme Court has observed as under:-

"Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge no. I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into re- appreciation of the evidence. The High Court can only see whether:

- a. The enquiry is held by a competent authority;
- b. The enquiry is held according to the procedure prescribed in that behalf;
- c. There is violation of the principles of natural justice in conducting the proceedings;
- d. The authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
- e. The authorities have allowed themselves to be influenced by irrelevant or extraneous consideration;
- f. The conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
- g. The disciplinary authority had erroneously failed to admit the admissible and material evidence;
- h. The disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
- i. The finding of fact is based on no evidence."

13. In the instant case, no ground has been made out by the applicant to show that the conclusion or finding reached by the disciplinary authority is based on no evidence and/or perverse, and the conclusion or finding be such as no reasonable person would have ever reached. Even, otherwise, it is nobody's case that furnishing of the EMD was not an essential requirement of the Notice Inviting Tender. Rather, the fact that the tendering firm requested that payments due to them from the respondents be considered to be their EMD would make it an essential requirement of tendering process. The applicant was the Financial Member of TPC-I and being intimately connected with the tendering process is not accepted to be ignorant of the terms and conditions of the NIT and therefore it cannot be said that his act/s were acts of negligence, error of judgment, or innocent mistakes and did not constitute misconduct.

14. In view of the facts of this case and in view of the law laid down by the Hon'ble Supreme Court, referred to above, and in view of the fact that the applicant has not brought to our notice violation of any procedural rules or violation of principles of natural justice, no case is made out for interference with the impugned order. Accordingly, the OA is dismissed. No costs.

(Rakesh Sagar Jain)
Member -(J)

Manish/-