

CENTRAL ADMINISTRATIVE TRIBUNAL  
CALCUTTA BENCH  
KOLKATA

**LIBRARY**

OA. 946 of 2012

Present

:Hon'ble Ms. Bidisha Banerjee, Judicial Member  
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Sri Manik Lal Kar, Son of Late Bhuban  
Mohan Kar, Sub-Divisional Engineer  
(now retired), Under control of Divisional  
Engineer, Entally, BSNL, Calcutta.

..... Applicant.

-versus-

1. Union of India, through the  
Secretary, Department of  
Telecommunication, 20, Ashok  
Road, New Delhi – 110001.
2. The Director (HR), BSNL, Bharat  
Sanchar Bhawan, Janpath New Delhi  
– 110001.
3. The Chief General Manager (CTD),  
Bharat Sanchar Nigam Limited,  
34, B.B.D. Bag, Telephone Bhawan,  
Kolkata – 700001.
4. Divisional Engineer, BSNL, Calcutta  
Telephone, Entally Extension  
88B, Rafi Ahmed Kidwai Road  
Kolkata.
5. Sujit Mitra, Inquiring Authority,  
Calcutta Telephones,  
34, B.B.D. Bag, Telephone Bhawan,  
Kolkata – 700001.

..... Respondents.

For the Applicant

: Mr. B.R. Das, Counsel  
Mr. B. P. Manna, Counsel

For the Respondents

: Mr. L.K. Chatterjee, Counsel (DOT)  
Mr. S. K. Ghosh, Counsel (DOT)  
Mr. A. K. Gupta, Counsel (BSNL)

Heard on: 13.03.2019

Date of order: 11.04.2019

ORDER

Per Ms. Bidisha Banerjee, JM:

This application has been filed in order to seek the following relief:

*"12.(a) Abstain from proceeding with the charge sheet and / or acting in furtherance thereof in any manner whatsoever.*

AND/ OR

*(b) Direct the Respondents to withdraw the charge sheet dated 04.04.2012 framed by the Respondent No. 3 (not being the Appointing Authority) in violation of Rule 36 sub rules (3), (4), (6) and (9) as stated herein before*

AND

*(c) Direct Respondent authorities to release the pensionary benefits which are lying withheld.*

AND

*(d) Pass any order/ orders including an order directing the Respondents to come out with a fresh charge sheet, if permitted under the Rule."*

2. From the pleadings and written notes exchanged between the parties, following position emerged:

The applicant was chargesheeted in the year 2007, vide charge memo dated 05.11.2007 indictments inter alia being as under:

"That the said Shri Manik Lal Kar (Staff No. 102346) while posted and functioning as SDE/Technical (Central), Calcutta Telephones during 2000 committed gross misconduct inasmuch as he forwarded several bills of M/s/ A. Enterprise, 32A/23D, South Sinthee Road, Calcutta- 700050 for drawing of 20 pair PIPS/PIJF cables overhead by the firm, violating General Financial Rules and Rules contained in P&T Manual which resulted in huge loss to Calcutta Telephones.

In the estimate No. XP/3852/D(b)/Ent/Ext1/97-98, although there was no provision for drawing 20 pair PIPS/PIJF cable against the places mentioned in the relevant work orders, the expenditure incurred for such

drawing of cable overhead was booked against the said estimate. This is in contravention of Rules 131, 132 of General financial Rules and the rule contained in para 162 of P&T Manual, Vol. X.

Further, Shri Manik Lal Kar as SDE, Technical (Central), Calcutta Telephones forwarded bills of M/s. A. Enterprise amounting to Rs. 1,232,360.00 booked against the estimate No. XP-3852//D(b)/Ent/Ext1/97-98 to the AO/Cash (Central), Calcutta Telephones. He had also certified that the JTO, Technical (Central) Calcutta Telephones and AAO, Estimate (Central), Calcutta Telephones have certified the fund availability under the said estimate.

That by doing so, Shri Manik Lal Kar had violated the rule 163 and 164 of P&T Manual Vol. X regarding detailed estimate mentioning therein that all works either within the power of sanction of Divisional Engineer or beyond the power of sanction of Divisional Engineer are to be executed against the sanctioned estimate and the estimate is to be submitted before the competent authority to have accordance.

Thus, by his above acts, the said Shri Manik Lal Kar (Staff No. 102346) failed to maintain absolute integrity, devotion to duty and also acted in a manner which is unbecoming of a Public servant, thereby violated Rule 4(1)(a), 4(1)(b) and 4(1)(c) of BSNL, CDA Rules, 2006."

The Enquiry authority found the charges as not proved. The Disciplinary Authority, Chief General Manager, Calcutta Telephones agreed with the findings and exonerated him of the charges, vide his order dated 28.4.2012.

While the proceedings were underway, the CBI (ACB) chargesheeted him and his wife Juthika Kar on 23.03.2007 under Section 120B, 109 of IPC and Section 13(1) 9e) read with 13(2) of Prevention of Corruption Act, 1988, having found them in possession of assets to the tune of Rs. 69,41,729.78.

He approached this Tribunal in OA. 1660 of 2010 seeking revocation of suspension order dated 6.10.2005 and quashing of charge memo dated 5.11.2007. Having noted his exoneration vide enquiry report dated 16.12.2011 this Tribunal allowed

the revocation. Respondents took the order to Hon'ble High Court but failed in their efforts to get it reversed.

Hon'ble High Court held that suspension being made on 6.10.2005 under CCS (CCA) Rules, review under the CCS (CCA) Rules was mandatory, BSNL CDA having come into force much later, on 10.10.2006.

The applicant was once again charge sheeted on 04.04.2012 by the BSNL authorities for allegedly acquiring assets disproportionate to his legal and known sources of income which he could not explain/satisfactorily account for and for violation of some specified departmental conduct rules. The period in question was 28.02.1995 to 06.04.2005 which included the period 28.02.1995 to 30.09.2000 when he was admittedly employed under the Department of Telecommunication (DOT), Govt. of India. As allegations pertained to the period while he was employed not under BSNL, but under DOT, the applicant has alleged invoking of power by BSNL in term of BSNL CDA Rules as without jurisdiction and has challenged the authority of the BSNL to issue charge sheet in terms of rule 36 of BSNL CDA Rules 2006 when his misdemeanour was determinable by DOT, under CCS (CCA) Rules.

3. It is an admitted fact the applicant had served DOT until he voluntarily opted for absorption under BSNL on permanent basis and was absorbed on 01.10.2000. Therefore, the questionable period can be broken up into two distinct period, (i) from 28.02.1995 until his absorption in BSNL on 30.09.2000, when CCS (CCA) Rules were applicable as he served under DOT, and (ii) from the date of absorption in BSNL till 06.04.2005 when he served under the BSNL, when CCS (CCA) rules were still applicable, BSNL having not framed its rules until then.

4. The BSNL Conduct Discipline and Appeal Rules, 2006 was framed and came into force on 10.10.2006, and therefore the applicant has pleaded that the period of occurrence from 28.02.1995 to 06.04.2005 should entirely be governed under the existing CCS (CCA) Rules, 1965, and not under BSNL CDA Rules.

5. The respondents have refuted the claim stating that the charge sheet was drawn up in 2012 when the BSNL CDA Rules was already in force and held the field. They have averred that the charges were rightly drawn up under the BSNL CDA Rules since,

according to them, post 10.10.2006 the absorbed employees of BSNL came to be governed by BSNL CDA Rules, 2006.

Thus, according to the respondents, the Disciplinary Authority issued the charge sheet, with full jurisdiction and power under BSNL CDA Rules.

6. Further, the respondents would contend that an investigation was conducted by the CBI, Anti-Corruption Branch, Kolkata and on completion of the investigation the department accorded prosecution sanction on 12.03.2007 whereafter CBI filed charge sheet on 23.03.2007 under Section 13(1)(e) read with Section 13(2) of Prevention of Corruption Act, 1988 as also some Sections of IPC, and the trial is on, and therefore the proceedings were perfectly in order.

7. Thus legality and propriety of a departmental charge sheet, issued in 2012, under BSNL CDA rules, by the BSNL, has been called to question in the present OA.

8. As already referred to with supra, the applicant has challenged initiation of the proceedings under BSNL CDA Rules on the ground that the alleged misconduct was relatable to the period when he served DOT and even while service in BSNL, the CCS (CCA) Rules applied to him and therefore the present employer had no jurisdiction to proceed against him under BSNL (CDA) Rules. While the respondents in a bid to pulverise and torpedo the arguments of the applicant would dispel the claim on the ground that, such a course was permissible since an employee who committed misconduct under a previous employer could not be allowed to go scot free as it would not sub serve the ends of justice.

9. To defend their stand the respondents have heavily relied upon the following legal provisions :

(i) Rule 58 of BSNL CDA Rules, 2006 which envisages the following "REPEAL AND SAVINGS" clauses :

"(i) Any Rule corresponding to these rules in force immediately before the commencement of these rules and applicable to the employees to whom these rules apply, are hereby repealed, provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules, provided further that such repeal shall not affect the previous operation of the rules so repealed and

contravention of any of the said rules shall be punishable as if it were a contravention of these rules.

Sub-rule (iii) therein stipulates that -

*"The proceedings pending at the commencement of the Rules shall be continued and disposed, as far as may be, in accordance with the provisions of these Rules, as if such proceedings were proceedings under these Rules."*

Sub-rule (iv) of rule 58 which stipulates that -

*"Any misconduct, committed prior to the issue of these Rules, which was misconduct under the superseded Rules, shall be deemed to be misconduct under these rules."*

(ii) Rule 59 of BSNL CDA Rules, 2006 which provides :

*"In case of any doubt in application of BSNL CDA Rules 2006, the relevant G.O.I. Decisions/ Instructions in Model CDA Guidelines issued by the DPE, Fundamental Rules/ Supplementary Rules, Central Civil Services (Conduct) Rules, 1964, and Central Civil Services (Classification, Control and Appeal) Rules, 1965 as amended/ modified time to time shall be referred to, so long as these are not in contradiction with BSNL CDA Rules 2006 as amended time to time.*

(iii) G.I., M.H.A., O.M. No. R. 4/3/57-Ests. (A) dated 13<sup>th</sup> Sept., 1957 i.e., Govt. of India's Decision No. (2) as available below Rule 3, of Central Civil Services (Classification, Control and Appeal) Rules, 1965 and in the DIRECTOR-GENERAL P&T ORDERS wherein the following has been clarified-

*"When these rules may be applied – "that the time at which an act was committed or the capacity in which it was committed is not material for deciding whether or not the Central Civil Services (Classification, Control and Appeal) Rules, 1965, are applicable to an employee. It would, therefore, be quite in order to initiate disciplinary proceedings against a Government servant for some misconduct which is alleged to have been committed at a time when he was not a Government servant, e.g., when he was an Extra-Departmental Agent.[See also Decision (12) below Rule 11.]"*

(iv) Further, Govt. of India's Decision No. (1) as available below Rule 11. Of Central Civil Services (Classification, Control and Appeal) Rules, 1965 which states,

*"(1) Departmental action in respect of misconduct committed in earlier employment. – It is clarified that the provision of Rule 11 of the CCS (CCA) Rules, 1965, which envisages the imposition of*

penalties of Government servant for 'good and sufficient reason' is adequate authority for taking action against a Government servant in respect of misconduct committed before his employment if the misconduct committed before his employment was of such a nature as has rational connection with his present employment and renders him unfit and unsuitable for continuing in service. When such action is taken, the charge should specifically state that the misconduct alleged is such that it renders him unfit and unsuitable for continuance in service. [G.I., M.H.A., O.M. No. 39/1/67-Ests. (A) dated 21<sup>st</sup> February, 1967] The copies of the relevant pages containing the said Memos/ Decisions available in CCS(CCA) Rules, are enclosed here marking as Annexure-'F' & Annexure-'G' respectively:

10. In addition to the above, the respondents have also relied upon the following decisions of the Hon'ble Apex Court :

- (i) **State of Rajasthan vs. B.K. Meena & Ors.** reported in AIR 1997 SC 13 wherein it was inter alia held that Departmental enquiry need not be stayed till conclusion of criminal trial.
- (ii) **Depot Manager, A.P. State-Road Transport Corporation vs. Mohd. Yousuf Miya & Ors.** reported in (1997) 2 SCC 699, wherein Hon'ble Apex Court observed that "the High Court erred in staying the disciplinary proceedings as the same had nothing to do with culpability of the offences under Sec. 304-A and 338, IPC. Under these circumstances the High Court was not right in staying the proceedings since the purpose of departmental enquiry and of prosecution are two different and distinct aspects".
- (iii) **Commr. Of Police, Delhi vs. Narender Singh** reported in AIR 2006 SC 1800, where Hon'ble Apex Court held, that "it is now well-settled by reason of a catena of decisions of this Court that if an employee has been acquitted of a criminal charge, the same by itself would not be a ground not to initiate a departmental proceeding against him or to drop the same in the event an order of acquittal is passed".
- (iv) **Keshava Madhava Menon Vs. State of Bombay**, where Hon'ble Supreme Court examined the "GENERAL RULES OF CONSTRUCTION" of GENERAL CLAUSES ACT, 1897 to contend that "no question of invalidity of BSNL CDA Rules and in particular Rule 58 thereof as raised by the applicant, does perhaps arise at all for the very fact that the said Rule 58 is not only repeal but Repeal and Saving. As all the relevant causes of action in connection with the disciplinary proceeding against the applicant continues prospectively for the limited purpose as stand indicated vide sub-rules (i) & (ii) under Rule 58, the same are binding on the applicant for being an employee of BSNL during the period in question".

11. The applicant, as already referred to earlier, has not only challenged initiation of proceedings on the ground that charges relate to the period of 28.02.1995 to 06.04.2005 i.e. before promulgation of BSNL CDA Rules, 2006, but also challenged the continuation of proceedings on the following grounds inter alia:

- (i) No permission was taken as per the original authority i.e. DOT.
- (ii) The criminal case has ended with his honourable acquittal and the department had not sustained any loss on account of petitioner either directly or indirectly.
- (iii) Suspension period of 06.10.2005 to 30.04.2010 was treated as spent on duty for all intents and purpose as per orders of the Tribunal, Calcutta Bench in O.A. No. 1660 of 2010 dated 27.04.2010 and upheld by the Hon'ble High Court in WPCT No. 408 of 2012 dated 13.05.2013.
- (iv) The 2<sup>nd</sup> charge sheet immediately before retirement was a replica of the charge sheet filed before the Criminal Court dated 23.03.2007. In the 2<sup>nd</sup> charge sheet the applicant as well as his wife Smt. Juthika Kar who was a Central Govt. Employee (Section Supervisor in the office of the PMG/South Bengal Region) and his daughter Smt. Sumana Mitra (Kar) who was software Engineer of Accenture Services Pvt. Ltd. were implicated, and as such 2<sup>nd</sup> charge sheet was not maintainable. The charges are vague and do not relate to violation of any BSNL CDA Rules.
- (v) The charge sheet expressed malicious and malafide intention and was intended to harass and humiliate the petitioner at the behest of the Investigating Agency.
- (vi) The applicant having retired on superannuation from the strength of BSNL on 30.04.2012 by a positive order without attaching any precondition of continuation of disciplinary proceedings after retirement, continuation of the second disciplinary proceedings was bad in law.
- (vii) No authority other than President is vested with the power of affecting pension after superannuation; hence any order issued by the G. M, affecting the pension is bad in law.

(ix) The proceedings should be quashed on the ground of delay of 17 years in terms of following decisions and orders:

(a) Ananta Kumar Kulkarni vs. Y.P. Education Society (2013) (2) SCC (L&S) 593

(b) The State of Madhya Pradesh vs. Bani Singh and another, AIR 1990 SC 1308 (A-22/P-142-145).

(c) P.V. Mahadevan vs. M.D.T.N. Housing Board (2005) 6 SCC 636 (A-22/P-146-150)

(d) Pravat Kumar Paul vs. State of West Bengal & Ors decided on 27<sup>th</sup> August, 2010 in W.P.S.T. 264 of 2010 before Calcutta High Court

(e) CVC's instruction No. 8 (1) (g)/99(3) dated 3<sup>rd</sup> March 1999 (A-19/P-63-64)

(x) The proceedings were not maintainable due to violation of principle of natural justice, having failed to supply the prosecution documents and statements of prosecution witnesses. In support the following decisions have cited:

(a) Kashinath Dikshita vs. Union of India, 1986 II LLJ 468 (SC): 1986 Lab IC 1939:

(b) State of U.P. vs. Shatrughan Lal, 1998 II LLJ 799: 1998 Lab IC 3489 : AIR 1998 SC 3038: 1998(80) FLR 389: (1998) 6 SCC 651.

(xi) The BSNL authorities have acted without jurisdiction in terms of commission of alleged misconduct during the period applicant was governed by CCS (CCA) Rules. In support the following decision of Central Administrative Tribunal, Principal Bench, New Delhi, rendered on 8<sup>th</sup> Oct. 2013 in the case of Shri M.L. Sharma vs. Bharat Sanchar Nigam Ltd. in O.A. No. 3465 of 2012 has been relied upon.

12. Ld. Counsels were heard and materials on record were perused.

In Keshava Madhava Menon the decision cited by the respondents, while interpreting the operation of Article 13(1) of the Constitution of India, a Constitution Bench of Hon'ble Apex Court held as under :

*"Per KANIA C.J., PATANJALI SASTRI, MEHRCHAND MAHAJAN, DAS and CHANDRASEKHARA AIYAR JJ.--FAZL ALI and MUKHERJEE JJ.- Before the Constitution came into force, there was no such thing as fundamental right. As the fundamental rights became operative only and from the date of the constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights come into being. Therefore, Art. 13(1) can have no retrospective operation but is wholly prospective. If an act was done before the commencement of the Constitution in contravention of the provision of any respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned. Hence proceedings under S. 18(1) Press (Emergency Powers) Act 1931, pending at the date of the Constitution are not affected".*

*"Per Fazl Ali & Mukherjee JJ.- Article 13(1) will have no retrospective operation & transactions which are and closed and rights which have already vested will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force and as regard proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, a law which has been declared by the Constitution to be completely ineffectual can no longer be applied".*

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Article 13(1) with which we are concerned for the purposes of this application is in these terms: -

*"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."*

*It will be noticed that all that this clause declares is that all existing laws, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of article 13 (1) which may be read as indicating an intention to give it retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called fundamental rights. Indeed, the heading of Part III is "Fundamental Rights". These rights are given, for the first time, by and under our Constitution. Before the Constitution came into force there was no such thing as fundamental right. What article 13(1) provides is that all existing laws which clash with the exercise of the fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the*

question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that article 13(1) can have no retrospective effect but is wholly prospective in its operation. After this first point is noted, it should further be seen that article 13 (1) does not in terms make the existing laws which are inconsistent with the fundamental rights void ab initio or for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect which, we have said, they do not possess.

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If therefore, an offence had been committed under a temporary statute and the proceedings were initiated but the offender had not been prosecuted and punished before the expiry of the statute, then, in the absence of any saving clause, the pending prosecution could not be proceeded with after the expiry of the statute by efflux of time.

Article 13(1) is entirely prospective in its operation and as it was not intended to have any retrospective effect there was no necessity at all for inserting in that article any such saving clause. The effect of article 13 (1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute. As already explained, article 13 (1) only has the effect of nullifying or rendering all inconsistent existing laws ineffectual or nugatory and devoid of any legal force or binding effect only with respect to the exercise of fundamental rights on and after the date of the commencement of the Constitution. It has no retrospective effect and if, therefore, an act was done before the commencement of the Constitution in contravention of the provisions of any law which, after the Constitution, becomes void with respect to the exercise of any of the fundamental rights, the inconsistent law is not wiped out so far as the past act is concerned; for, to say that it is, will be to give the law retrospective effect. There is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists, notwithstanding that it does not exist with respect to the future exercise of fundamental rights. We, therefore, agree with the conclusion arrived at by the High Court.

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The sole point to decide in the appeal is whether proceedings instituted under section 18 (1) of the Indian Press (Emergency Powers) Act, XXIII of 1931, before the commencement of the Constitution of India are affected by its provisions. The High Court has answered this question in the negative and, in my opinion, rightly.

I am in respectful agreement with the observations of the learned Chief Justice of Bombay that it is difficult to believe that the Constituent Assembly contemplated that with regard to the laws which it was declaring to be void under article 13 all vested rights and all proceedings taken should be disturbed and affected by particular laws ceasing to be in force as a result of inconsistencies with the fundamental rights guaranteed to the citizens. It is not arguable and was not argued that Part III of the Constitution has any retrospective operation. The appellant was not possessed of any fundamental rights in September, 1949, when he published the pamphlet in question and his act clearly came within the mischief of the provisions of section 18 of Act XXIII of 1931 and he thus became liable to the penalties prescribed therein.

It was, however, contended by Mr. Chari, the learned counsel for the appellant, that the effect of the language employed in article 13 (1) of the Constitution was that the proceedings commenced before the coming into force of the Constitution could not be continued after its commencement under the laws that became inconsistent with its provisions. For this proposition he placed reliance on the rule of construction stated in Maxwell on "Interpretation of Statutes", p. 404, which is to the following effect :--

"Where an Act expired or was repealed, it was formerly regarded, in the absence of provision to the contrary, as having never existed, except as to matters and transactions passed and closed. Where, therefore, a penal law was broken, the offender could not be punished under it if it expired before he was convicted, although the prosecution was begun while the Act was still in force." This rule seems to be based on a statement of Tindal C.J. in *Kay v. Goodwin* (1). The learned Chief Justice made the following observations :--

"I take the effect of repealing a statute to be, to obliterate it as completely from the records of Parliament as if it had never been passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."

This was the rule of the English common law which was applied in cases of statutes which were repealed and under this rule all pending actions and prosecutions could not be proceeded with after the repeal of the law under which they were started. This rule was however changed by the Interpretation Act of 1889, section 38. Therein it was enacted that unless the contrary intention appears, no repeal is to affect any investigation, legal proceeding, including the initiation of criminal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. A similar provision exists in India in section 6 of the General Clauses Act of 1868 and 1897. The High Court held that the provisions of article 13(1) were analogous to the repeal of a statute and therefore section 6 of the General Clauses Act had application to the construction of these provisions and that being so, the coming into force of the Constitution did not in any way affect the continuance of the proceedings that had been commenced against the appellant under the law that was in force at the time of the publication of the pamphlet.

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Article 13(1) of the Constitution is in these terms :--

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. The freedom guaranteed to the citizen which has application to the case of the appellant is in article 19 (1) (a) and this article is in these terms :--

"All citizens shall have the right to freedom of speech and expression."

It is admitted that after the 26th January, 1950, there has been no infringement of the appellant's right of freedom of speech or expression. In September, 1949, he did not enjoy either complete freedom of speech or full freedom of expression. It is in relation to the freedom guaranteed in article 19(1) of the Constitution to the citizen that the provisions of article 13 (1) come into play. This article does not declare any law void independently of the existence of the freedoms guaranteed by Part III. A citizen must be

possessed of a fundamental right before he can ask the court to declare a law which is inconsistent with it void; but if a citizen is not possessed of the right, he cannot claim this relief. The appellant in the present case was not possessed of any fundamental right on the day that he published the pamphlet and in these circumstances the question is whether he can claim protection under the rights guaranteed to him on 26th January, 1950, for escaping the consequence of his act on any principles of construction of statutes.

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Both on considerations of convenience and also on grounds of justice and reason I am inclined to think that penalties incurred under a law in force at the time when the act was committed would survive its extinction so that persons who violate its provisions might afterwards be punished.

While explaining implication of a "repeal" Hon'ble Court ruled:

The expression "repeal" according to common law rule obliterates a statute completely as if it had never been passed and thus operates retrospectively on past transactions in the absence of a saving clause or in the absence of provisions such as are contained in the Interpretation Act, 1889, or in the General Clauses Act, 1897, while a provision in a statute that with effect from a particular date an existing law would be void to the extent of the repugnancy has no such retrospective operation and cannot affect pending prosecutions or actions taken under such laws.

The said judgement was rendered by majority view where even in absence of a "saving" clause in the words of Constitution under Article 13(1), reading prosecution or actions under repealed laws were allowed to culminate reasonably. Whereas in the present case, as evident from the language used in Rule 58, already enumerated supra, BSNL CDA although "repeals" earlier CCS (CCA) but also saves past actions determinable under CCS (CCA) Rules. In view of such saving clause although BSNL CDA Rules would have no retrospective operation to transactions past and closed in terms of CCS (CCA) Rules, but with regard to inchoate matters, which were still not determined had not come into force, had not begun or were pending when BSNL CDA came into force or were not yet prosecuted to a final decision under CCS (CCA) rules would still be determinable under BSNL (CDA) rules. But such saving clause, in no manner can, be construed to take within its sweep such past acts and actions or conduct of an employee in DOT that were determinable by DOT under CCS (CCA). Such acts

that were punishable only by DOT under CCS (CCA) Rules cannot now become determinable under BSNL (CDA) Rules. The BSNL would have no authority to exercise power to determine transactions determinable by DOT under CCS (CCA) Rules. The sole authority to be exercised by BSNL would only be in terms of Rule 58 of BSNL CDA and not otherwise.

By framing Rule 58, BSNL cannot attempt to usurp the power of Central Govt. to prosecute its employee while in its strength, under CCS (CCA) rules which applied to them or take away the power of DOT to deal with its pensioners to prosecute them in terms of CCS (Pension) Rules.

Therefore, actions or transactions supposed to be past and closed prior to formation of BSNL that were determinable by DOT in terms of CCS (CCA) cannot be determined under BSNL CDA rules. They have to be determined in terms of CCS (CCA) rules by Central Govt. as BSNL CDA cannot be applied by BSNL to actions/transactions determinable by DOT in terms of CCS (CCA) rules.

13. However, we would note that the applicant has not challenged the constitutionality or vires of Rule 58 of BSNL CDA Rules.

14. Nevertheless, in **Mamata Mohanty vs. State of Orissa & ORs.**, the Hon'ble Apex Court held as under:

*"57. Once the court comes to the conclusion that a wrong order has been passed, it becomes the solemn duty of the court to rectify the mistake rather than perpetuate the same. While dealing with a similar issue, this Court in *Hotel Balaji & Ors. v. State of A.P. & Ors.*, AIR 1993 SC 1048 observed as under:*

*"12.....2.....To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* at page 18:*

*"a Judge ought to be wise enough to know that he is fallible and, therefore, ever ready to learn: great and honest enough to discard all mere pride of opinion and follow truth wherever it may lead: and courageous enough to acknowledge his errors".*

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"62. It is a matter of common experience that a large number of orders/letters/circulars, issued by the State/statutory authorities, are filed in court for placing reliance and acting upon it. However, some of them are definitely found to be not in conformity with law. There may be certain such orders/circulars which are violated of the mandatory provisions of the Constitution of India. While dealing with such a situation, this Court in *Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors.*, AIR 1997 SC 1446 came across with an illegal order passed by the statutory authority violating the provisions of Articles 14 and 16 of the Constitution. This Court simply brushed aside the same without placing any reliance on it observing as under:

*"The said order was not challenged in the writ petition as it had not come to the notice of the appellants. It has been filed in this Court along with the counter affidavit.... This order is also deserved to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents....."*

*(emphasis added)*

15. In the aforesaid context we note that while BSNL CDA repeals earlier CCS (CCA) it also saves exercise of jurisdiction under CCS (CCA) particularly in view of Rule 58(iv) which saving clause should be construed as already discussed earlier, as one that would allow BSNL to determine acts and actions or transactions of its employee while in BSNL, prior to promulgation of BSNL CDA Rules, when CCS (CCA) rules applied to them. It should however not apply to transactions undertaken while in DOT service. Therefore, inarguably and indubitably Rule 58 empowers the BSNL to proceed and determine against conduct/demeanor of its employee to whom, prior to promulgation of BSNL (CDA) Rules, CCS (CCA) rules were applicable. This view would be further strengthened by the decision discussed infra.

16. The Central Administrative Tribunal, Principal Bench, New Delhi, in the case of **Shri M.L. Sharma vs. Bharat Sanchar Nigam Ltd.** in O.A. No. 3465 of 2012, noted the following :

".....the Respondents have initiated action against the Applicant in some cases under the BSNL Conduct, Discipline and Appeal Rules, 2006, and in some cases under the CCS (CCA) Rules, 1965. While the disciplinary proceedings against the

applicant in respect of the lapse in supervising work of trenching and laying of O.F. Cables while he was functioning as DE (OFC), Guwahati during the period 1995-96 was initiated under Rule 35 of BSNL, CDA Rules, 2006. Again, for some other six related alleged misconduct committed by the applicant during the said period in the same place, the Respondents have proposed to take action against him under Rule 14 of the CCS (CCA) Rules, 1965. The Respondents are totally confused. They are not sure as to which Rule is applicable in the cases against the applicant."

While determining whether the past action/conduct of an employee in DOT when he was not in the strength of BSNL could be questioned by BSNL, the Bench held as under:

".....in any case, for the same offence relating to the period 1995-96/1996-97 alleged to have been committed by the Applicant while he was working in Guwahati under the Government of India, he cannot be tried under the different set of rules. The respondents aforesaid action is against their own submission that till finalization of BSNL CDA Rules, 2006, the applicant was subject to the CCS (Conduct) Rules 1964 and CCS (CCA) Rules, 1965 and from 10.10.2006 BSNL CDA Rules, 2006 superseded these rules."

13. As rightly argued by the learned counsel for the applicant, the applicant became an employee of the Respondent-Corporation only with effect from 01.10.2000 and the BSNL, CDA Rules, were admittedly promulgated in the year 2006. Till such time, as submitted by the applicant, he was to be governed under the CCS (CCA) Rules, 1965. Therefore, the disciplinary proceedings initiated against the applicant by the BSNL for the alleged misconduct committed when he was not on the strength of the respondent-corporation in terms of the aforesaid rule is without jurisdiction. As far as CCS (CCA) Rules, 1965 are concerned, the applicant has already retired from service on 1.10.2000 and no disciplinary proceedings could have been initiated against him under the said Rules. If at all any proceedings had to be initiated, it is possible only under the provisions of Rule 9 of CCS (Pension) Rules, 1972. Even the Central Government could not have issued any charge sheet to him in the year 2005/2006 for the misconduct alleged to have been committed in the year 1995-96/1996-97 in terms of Sub-Rule 2(b) (ii) of the said Rules.

14. In the above facts and circumstances of the case, we agree with the counsel for the applicant that the disciplinary proceedings initiated against the applicant is not only badly delayed but they were also without jurisdiction. We, therefore, allow both these OAs. Consequently, we quash and set aside the Memorandum dated 28.6.2007, the order of the Disciplinary Authority dated 18.11.2008 imposing the penalty of Censure upon him, Appellate Authority's order dated 22.5.2009 and the Reviewing Authority's order dated

28.7.2011 in OA. 2596/2012. Similarly, we quash and set aside the impugned charge sheets dated 7.10.2005, 15.12.2005, 18.09.2006, 18.11.2006 and 23.12.2006 in OA. No. 3456/2012 with all consequential benefits. The respondents shall also pass appropriate orders withdrawing the aforesaid Memorandum/Order in compliance with the aforesaid directions within a period of 2 months from the date of receipt of copy of this order."

No decision of higher fora has been placed to show that this decision of Principal Bench has been overruled or reversed on appeal. Therefor having attained finality it binds BSNL. The BSNL, being a party to the order cannot feign ignorance to the said order. The decision prevents BSNL to usurp jurisdiction and power of DOT to determine action of its employees while in DOT, prior to their absorption in BSNL.

17. Further, Hon'ble Calcutta High Court, in WPCT No. 408 of 2012 while dealing with the present applicant noted the following facts:

".....respondent was employed with the Calcutta, Telephones which was taken over by the Bharat Sanchar Nigam Limited (BSNL). An FIR was lodged against the respondent on 5<sup>th</sup> April, 2005 under section 13(1)(a) and section 13(2) of the Prevention of Corruption Act, 1988. The respondent was suspended on 6<sup>th</sup> October, 2005. The allegation against him was acquisition of assets, disproportionate to his known source of income. While the respondent was under suspension, he was absorbed in service with the BSNL.

The application was submitted by the respondent to his erstwhile employer, i.e. the Calcutta Telephones on 10<sup>th</sup> November, 2005 for revocation of the order of suspension. However, that was not done and a charge sheet was issued to him on 23<sup>rd</sup> March, 2007.

On 14<sup>th</sup> July, 2010 the respondent preferred O.A. No. 1660 of 2010 for quashing the continued suspension against him. He contended therein that the order of suspension cannot be continued endlessly against an employee."

On 16<sup>th</sup> October, 2011 the departmental enquiry concerned against the respondent, was concluded and the Enquiry Officer held that the charge was not proved against the respondent”

The learned counsel for BSNL has also "submitted that once the BSNL took over the employment of the respondent, he having opted for employment with the BSNL, it is the BSNL (Conduct, Discipline & Appeal) Rules, 2006 which would prevail over the Central Civil Services (Classification, Control and Appeal) Rules.

Hon'ble High Court in the said matter held as under:

"we are not convinced by the submission made by the learned advocate for the petitioners. There is no dispute that the BSNL took over the Calcutta Telephone in the year 2006 and the rules came into effect on 10<sup>th</sup> October, 2006. Therefore, although the BSNL had taken over the establishment of the Calcutta Telephones and the service of the respondent, the old rules of the Central Civil Service (Classification, Control & Appeal) Rules prevailed and covered the service conditions of the employees working in the erstwhile department, prior to the take over. The new rules became applicable only in October, 2006."

We would note that the Rule 58 of BSNL CDA, particularly Rule 58(iv) was neither challenged, nor was in issue or discussed in the aforesaid judgments. We however noted that although ruled in favour of the employee, Hon'ble High Court in its judgment has not altogether debarred BSNL from invoking CCS (CCA) Rules to deal with its employees for their conduct prior to promulgation of BSNL CDA Rules.

18. In **P. Selvaraj vs. BSNL, in W. P. (M.D.) 13341 of 2010, M.D. (M.D.) 1 of 2010**, Hon'ble Madras High Court has upheld the decision of CAT, Chennai Bench, of permitting BSNL to continue proceedings against a BSNL employee initiated vide charge memo dated 22.3.2006 under CCS (CCA) Rules, for his acts while serving as TTA at Sholavandar Telephone Exchange prior to promulgation of CDA rules. Hon'ble Court brushed aside the claim of the employee that the proceeding was badly delayed and both Departmental and criminal proceedings were one and same and therefore upon acquittal in criminal case Departmental case should not continue in view of U.O.I represented by its **Commissioner of IT & Anr. Vs. CAT represented by its Registrar & Anr. (2005) II LLJ 307 Madras**, rendered referring to Supreme Court decision in **Corporation of the City of Nagpur vs. Ram Chandra & Ors. [AIR 1984 SC 626 =(1981) 2 SCC 714]** " that if authority feels there is sufficient evidence and good grounds to proceed with the enquiry it can certainly do so" and **UOI vs. Naman Singh Shekhawant (2008) 4 SCC 1** that initiation of departmental proceedings must be viewed on the

background of total exoneration by criminal court and cannot be initiated on account of delay. Therefore, proceedings initiated under CCS (CCA) Rules that were pending when BSNL CDA came into effect, can be safely concluded by BSNL in view of the saving clause.

19. In the aforesaid backdrop, so long the applicant served in DOT until his absorption in BSNL i.e. while he was in the strength of DOT, the Central Govt. that had the right to proceed against him and punish him either under CCS (CCA) as a serving employee, or in terms of Rule 9 of CCS (Pension) Rules, after he retired from DOT, subject to the limitation and restrictions imposed by Rule 9 (iv) of Pension Rules. Misconduct during such period can never be determinable by BSNL as BSNL would not have the power to initiate proceedings or withhold pension and other retiral dues that were payable by Central Govt. in terms of CCS (Pension) Rules or became payable in terms of Rule 37A of CCS (Pension) Rules, 1972, amended in 2000.

20. Accordingly, having understood the true import and implication of the judgments and orders, extracted supra, we conclude as under that:

- (i) when the questionable conduct of an employee is while the employee was the strength of DOT i.e. prior to formation of BSNL, such conduct that was determinable by DOT under CCS (CCA) Rules, would remain determinable under the CCS (CCA) Rules, or the CCS (Pension) Rules, as the case may be, but only by the Central Govt., (ii) when the questionable conduct is post absorption in BSNL i.e. post Oct, 2000, while in disposition of BSNL but prior to promulgation of BSNL CDA Rules such, as was determinable under CCS (CCA) Rules in view of Rule 58(iv) of BSNL CDA Rules would be determinable by BSNL under CCS (CCA) Rules if CCS (CCA) stood already invoked or else if not instituted then under BSNL CDA Rules;

(iii) while such questionable conduct of an employee of BSNL, past promulgation of BSNL (CDA) would irrefutably and inarguably be determinable under BSNL (CDA) Rules.

21. Having so concluded, we noticed the misconduct is allegedly committed between 28.02.1995 to 30.09.2000 when it was determinable by DOT in terms of CCS (CCA) Rules. Given the saving clause in Rule 58 of BSNL CDA it would still be determinable by DOT and not by BSNL under its CDA Rules. Therefore, the chargesheet issued in the present case by the BSNL under the guise of exercise of power under Rule 58 *ibid*, was issued absolutely without authority and jurisdiction and was therefore unsustainable and liable to be quashed.

22. In the present case having so concluded, we discern that the applicant, who was erroneously prosecuted under BSNL CDA rules for the period of service rendered in DOT rendering the chargesheet a nullity is not yet acquitted of all criminal charges. But he has been allowed to superannuate.

23. In the aforesaid backdrop, having already concluded that disciplinary action under BSNL (CDA) for alleged misconduct while serving under DOT as illegal, while we have no hesitation to quash the charge memo and hold that the applicant would be entitled to receive all held up retiral dues within a period of one month from the date of receipt of a copy of this order, we also grant liberty to the respondents to act in accordance with law in regard to the questionable conduct while in BSNL and the outcome of criminal proceedings.

(Dr. Nandita Chatterjee)  
Member (A)

" *yes*  
(Bidisha Banerjee)  
Member (J)

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