(22)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.136/2003

New Delhi this the 21st day of July, 2004.

HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)
HON'BLE MR. S.A. SINGH, MEMBER (ADMNV)

G.C. Jatav,
S/o late Ghasi Ram,
R/o S-10, Venus Apartment,
Sector-9, Rohini,
Delhi-85. -Applicant

(By Advocate Shri K.C. Mittal)

-Versus-

1. Secretary cum Chairman,
   Standing Committee,
   ESIC, Ministry of Labour,
   Shram Shakti Bhawan,
   New Delhi.

2. Director-General,
   Employees State Insurance Corporation,
   Kotla Road,
   Near Bal Bhawan,
   New Delhi-110 002. -Respondents

(By Advocate Shri Yakesh Anand)

ORDER

By Mr. Shanker Raju, Member (J):

Applicant impugns respondents' orders dated 26.7.2001, imposing upon him a penalty of removal from service as well as order dated 29.10.2001, issued by the appellate authority, upholding the punishment.

2. On disclosure by one Sh. G.R. Baru, Assistant Regional Director, Employees State Insurance Corporation (ESIC) was caught in a trap by the CBI, accepting illegal gratification, on which the applicant was proceeded against in a major penalty proceedings under CCS (CCA) Rules, 1965 on the following articles of charge:

"ARTICLE OF CHARGE NO.I :

That Shri G.C. Jatav, while posted and functioning as Regional Director in Employment

State Insurance Corporation (ESIC), then in Regional Office, Chandigarh during 199-96 failed to discharge his duties honestly and exhibited lark of integrity and devotion to duty inasmuch as he directed Shri G.R. Baru, Asstt. Regional Director, ESIC, Regional Office, Chandigarh to demand a bribe of Rs.5,000/- from Shri Jasbir Singh, Consultant of M/s Mander Forging Pvt. Ltd., Mohali for showing favour of not prosecuting the Managing Director of the said company in pursuance of the Show Cause Notice dated 8.1.96 for having contravened the provisions of ESIC Act. Consequent to this direction of Shri G.C. Jatav, a bribe amount of Rs.3,000/- was later on demanded and accepted by Shri G.R. Baru from Shri Jasbir Singh on 4.4.96 stating that the bribe money is to be shared by him with Sh. G.C. Jatav, Regional Director and, thereby, Sh.G.C. Jatav, committed gross misconduct unbecoming of an employee of the Corporation. Thus, he contravened rule 3(1) (i) (ii) (iii) of the Central Civil Service (Conduct) Rules, 1964 which are applicable to the employees of ESIC by virtue of Regulation 23 of the ESIC (Staff and Conditions of Service) Regulations, 1959.

ARTICLE OF CHARGE NO.II :

That the said Shri G.C. Jatav also received an amount of Rs.5,000/- from Sh. G.R. Baru, Asstt. Regional Director on 4.4.96, which Sh. G.R. Baru had demanded and accepted as bribe from Sh. Darshan Kumar, then Manager, ESIC, Patiala at the instance of Sh. G.C. Jatav for arranging the transfer of said Shri Darshan Kumar from Patiala to Chandigarh. Recovery of the said bribe amount was effected from the residence of Sh. G.C. Jatav by Shri G.R. Baru in presence of independent witnesses, and thereby, Shri G.C. Jatav committed gross misconduct, unbecoming of a public servant. Thus, he contravened rule 3(1) (i) (ii) (iii) of the Central Civil Service (Conduct) Rules, 1964 which are applicable to the employees of ESIC by virtue of Regulation 23 of the ESIC (Staff and Conditions of Service) Regulations, 1959.

ARTICLE OF CHARGE NO.III :

That the said Sh. G.C. Jatav had also directed Shri G.R. Baru, Asstt. Regional Director, ESIC, then in Regional Office, Chandigarh to demand and accept bribe from the representative M/s Atul Fastners, Mohali for showing the favour of not prosecuting the Managing Director of the said company for having contravened the provisions of ESI Act. Consequent upon this direction a bribe of Rs.5,000/- was demanded and accepted by Shri G.R. Baru on behalf of Shri G.C. Jatav from Shri Pankaj Sharma of M/s Atul Fastners and

unbecoming of a public servant. Thus, he contravened rule 3(1) (i) (ii) (iii) of the Central Civil Service (Conduct) Rules, 1964 which are applicable to the employees of ESIC by virtue of Regulation 23 of the ESIC (Staff and Conditions of Service) Regulations, 1959."

3. Shri G.R. Baru was also proceeded against in a criminal case registered under Prevention of Corruption Act and also in a disciplinary proceeding, where 100% pension cut has been imposed upon him. In the list of documents the disclosure statement of Baru does not form part of the list of documents and the envelope containing Rs.5,000/- recovered from the residence of applicant allegedly formed part. Shri Baru was cited as a witness to support the charge.

4. During the course of inquiry, Sh. Baru was not examined. Disclosure statement was proved through Sh. S.L. Gupta but was never exhibited in the inquiry.

5. On the basis of the evidence recorded applicant has been held guilty of the articles of charge. After he has tendered his defence where one Jasbir Singh who was the alleged bribe giver denied to have given any bribe to Sh. Baru.

6. In the defence statement applicant has objected to non-examination of Baru and taking into consideration his disclosure statement and also not proving the envelope containing Rs.5,000/- allegedly recovered from applicant's residence.

7. Applicant preferred a representation in response to the inquiry report which on consultation with Central Vigilance Commission at second stage was also tendered.

8. The disciplinary authority by an order dated 29.10.2001 imposed upon applicant punishment of removal from service, holding that Baru was cited as one of the prosecution witnesses but his statement was not relied upon by the Inquiry Officer (IO).

9. In appeal, applicant has raised several legal contentions. The appellate authority vide impugned order upheld the punishment, giving rise to the present OA.

10. Learned counsel for applicant Sh. K.C. Mittal, amongst several grounds to challenge the impugned orders, contended that non-examination of prime witness Baru is denial of reasonable opportunity to cross examine. Accordingly the disclosure statement made by such a witness which form basis of the guilt and punishment cannot be sustained in law. It is stated that one R. Upasak, DSP, CBI was not even mentioned as a witness in the chargesheet but was later on examined as a witness. Accordingly, assuming the recovery has been effected from applicant's residence of Rs.5,000/- yet for want of any evidence as Baru was not examined it has not been established that the amount so recovered is the bribe money. Accordingly, not only inquiry but the consequent orders are also vitiated.

11. On the other hand, respondents' counsel Sh. Yakesh Anand appeared and has been allowed two days' time on 14.7.2004 to place before us record of the disciplinary proceedings along with short submissions. Having failed to comply with the same, we proceed to record our observations. The opportunity accorded having not been availed of respondents have lost their right.

12. In the reply filed respondents have vehemently opposed the contentions and stated that non-examination of Baru is not attributed to them, as despite several opportunities he has not come present in the inquiry. The other evidence in the form of recovery memo and tripartite statement clearly established recovery of amount which tallies with the description in the disclosure statement of Baru. Accordingly, as there is some evidence this Tribunal shall not interfere. Learned counsel further states that there is overwhelming evidence against applicant. The inquiry report is reasoned and the orders have been passed by the authorities dealing with the contentions and are speaking.

13. Learned counsel further states that for establishing mala fides burden is on applicant, which he has failed to discharge. In this regard decision in **E.P. Royappa v. State of Tamil Nadu**, AIR 1974 SC 555 is relied upon.

14. We have carefully considered the rival contentions of the parties and perused the material on record.

15. At the outset, a fair hearing and reasonable opportunity is essence of principles of natural justice. These inbuilt rules which are to be read as part of any procedure for holding proceedings are flexible. The principles of natural justice are to be judged in the facts and circumstances of each case.

16. Apart from levelling violation of principles of natural justice and denial of reasonable opportunity the sine qua non is to establish that this infirmity has vitiated the proceedings and has caused prejudice to the concerned. This law is crystalised by the Apex Court in a Constitution Bench decision in **Managing Director, ECIL v. B. Karunakar**, JT 1993 (6) SC 1.

17. The test of prejudice has been laid down by the Apex Court in **State Bank of Patiala v. S.K. Sharma**, 1996 (3) SCC 364, wherein the following observations have been made:

> "33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):
>
> (1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.
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> (2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this : procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under - "no notice", "no opportunity" an "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting acid the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evidence. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a precedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his

conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar, 1993 4 SCC 727. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgement. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it 'void' a nullity if one chooses to)/ In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the stand point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to

balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

18. Though there are substantive rules of procedure violation of which does not attract the test of prejudice. One such rule is examination of a relevant witness and also production of documents and proving it in accordance with law. This is in consonance with Rule 14 of the CCS (CCA) Rules, 1965, laying down procedure for imposing major punishment upon a government servant.

19. A Constitution Bench of the Apex Court in **Union of India Vs. T.R. Verma,** AIR 1957 SC 882 held as follows:

"(10) Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by tribunals, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a Court of Law.

Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them.

If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in New Prakash Transport Co. v. New Suwarna Transport Co., 1957 S C R 98; (S) AIR 1957 S C 232) where this question in discussed."

21. In **Phulbari Tea Estate v. Its Workmen**, AIR 1959 SC 1111, the following relevant observations were made:

> "(4) The Tribunal gave two reasons for holding that the dismissal was unjustified; namely - (1) that proper procedure had not been followed, and (2) that legal evidence was wanting. So far as the second reason is concerned, there is force in the criticism on behalf of the company that the Tribunal had proceeded as if it was setting in appeal on the enquiry held by the company. But considering that the Tribunal was also of opinion that proper procedure had not been followed we have still to see whether that finding of the Tribunal justifies the conclusion at which it arrived. We may in this connection set out in detail what happened at the enquiry on March 12, as appears from the testimony of the manager and the documents produced by him before the Tribunal. They show that when the enquiry was held on March 12, certain persons, whose statements had been recorded by the manager in the absence of Das during the course of what may be called investigation by the company were present. The first question that DAs was asked on that day was whether he had anything to say in connection with the disappearance of two lorry wheels and tyres from the garage. He replied that he had nothing to say, adding that he knew nothing about the theft. He was then told that the people who had given evidence against him were present and he should ask them what they had to say. He replied that he would put no questions to them. Then the witnesses present were asked whether the evidence they had given before the manager was correct or not; and if that was not correct, they were at liberty to amend it. They all replied that the evidence they had given before the manager was correct. This was all that had happened at the enquiry on March 12 and thereafter the order of dismissal was passed by the manager. The manager's testimony shows that the witnesses who were present at the enquiry were not examined in the presence of Das. It also does not show that copies of the statements made by the witnesses were supplied to Das before he was asked to question them. Further his evidence does not show that the statements which had been recorded were read over to Das at the enquiry before be was asked to question the witnesses. It is true that the statements which were recorded were produced on behalf of the company before the Tribunal; but the witnesses were not produced so that they might be cross-examined even at that stage on behalf of Das. The question is whether in these circumstances it ca be said that an enquiry as required by principles of natural justice was made in this case.

(5) We may in this connection refer to Union of India v. T.R. Verma, 1958 SCR 499: 9 (S) AIR 1957 SC 882). That was a case relating to the dismissal of a public servant and the question was whether the enquiry held under Art.311 of the Constitution of India was in accordance with the principles of natural justice. This Court, speaking through Venkatarama Ayyar J., observed as follows in that connection at p.507 (of SCR): (at p.885 of AIR):

"Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

(6) It will be immediately clear that these principles were not followed in the enquiry which took place on March 12, inasmuch as the witnesses on which the company relied were not examined in the presence of Das. It is true that the principles laid down in that case are not meant to be exhaustive. In another case New Prakash Transport Co. Ltd. v. New Suwarna Transport Co. Ltd., 1957 SCR 98: ((S) AIR 1957 SC 232), this Court held that

"rules of natural justice vary with the varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have bee contravened must be judged not by any preconceived notion of what they may be but in the light of the provisions of the relevant Act."

In that case, it was held that

"the reading out of the contents of the police report by the Chairman at the hearing of the appeal was enough compliance with the rules of natural justice as there was nothing in the rules requiring a copy of it to be furnished to any of the parties"

That was, however, a case in which the police officer making the report was not required to be cross-examined; on the other hand, the party concerned was informed about the material sought to be used against him and was given an opportunity to explain it. The narration of facts as to what happened on March 12, which we have given above, shows that even this was not done in this case, or there is no evidence that copies of the statements of witnesses who had given evidence

against Das were supplied to him or even that the statements made by the witnesses to the manager were read out in extenso to Das before he was asked to question them. In these circumstances one of the basic principles of natural justice in an enquiry of this nature was not observed, and, therefore, the finding of the Tribunal that proper procedure had not been followed is justified and is not open to challenge."

21. In **State of Mysore and others v. Shivabasappa Shivappa Makapur,** AIR 1963 Supreme Court 375, a decision of the Constitution Bench consisting of six Judges the following observations have been made:

"(6) We may next refer to the decision of this Court in 1958 SCR 499: ((S) AIR 1957 SC 882). That arose out of a Writ Petition filed by a Government servant in the High Court of Punjab, calling in question an order of dismissal passed against him, on the ground that the enquiry which resulted in the order had not been conducted in accordance with the rules of natural justice. The facts were that when the petitioner, and his witnesses appeared for giving evidence, the enquiring officer took their examination on hand himself, put them questions, and after he had finished, asked them to make their statements. The complaint of the petitioner was that he and his witnesses should have been allowed to give their own evidence, and then cross-examined, and that the departure from the normal procedure in taking evidence, was a violation of the rules of natural justice. In rejecting this contention this Court observed as follows:-

"Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed. Vide the recent decision of this Court in 1957 SCR 98: ((S) AIR 1957 SC 232) where this question is discussed."

It is on the observation that "the evidence of the opponent should be taken in his presence" that the decision of the learned Judges that the evidence of witnesses should be recorded in the presence of the person against whom it is to be used is based. Read literally the passage quoted above is susceptible of the constuction which the learned Judges have put on it, but when read in the context of the facts stated above, it will be clear that that is not its true import. No question arose there as to the propriety of admitting in evidence the statement of a witness recorded behind the back of a party. The entire oral evidence in that case was recorded before the enquiring officer, and in the presence of the petitioner. So there was no question of a contrast between evidence recorded behind a party and admitted in evidence against him, and evidence recorded in his presence. What was actually under consideration was the procedure to be followed by quasi-judicial bodies in holding enquiries and the decision was that they were not bound to adopt the procedure followed in Courts, and that it was only necessary that rules of natural justice should be observed. Discussing next what those rules required, it was observed that the person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind the back of the party is put to him and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word, & sentence by sentence, is to insist on bare technicalities, & rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them."

22. In **Ministry of Finance and another v. S.B. Ramesh,** 1998 SCC (L&S) 865 the following observations have been made:

"14. Then, again after extracting the relevant portions from the Disciplinary Authority's

order, the Tribunal observed as follows:-

"We have extracted the foregoing portions from the order of the Disciplinary Authority for the purpose of demonstrating that the Disciplinary Authority has placed reliance on a statement of Smt K.R. Aruna, without examining Smt Aruna as a witness in the inquiry and also on several documents collected from somewhere without establishing the authenticity thereof to come to a finding that the applicant has conducted himself in a manner unbecoming of a government servant. The nomination form alleged to have ben filed by Shri Ramesh for the purpose of Central Government Employees' Insurance Scheme, was not a document which was attached to the memorandum of charges as one on which the Disciplinary Authority wanted to rely on for establishing the charge. This probably was one of the documents which the applicant called for, for the purpose of cross-examining the witness or for making proper defence. However, unless the government servant wanted this document to be exhibited in evidence, it was not proper for the Enquiry Authority to exhibit it and to rely on it for reaching the conclusion against the applicant. Further, an inference is drawn that S.B.R. Babu mentioned in the school records (admission registers) and Shri Ramesh mentioned in the Municipal records was the applicant, on the basis of a comparison of the handwriting or signature or telephone numbers are only guesswork, which do not amount to proof even in a disciplinary proceedings, need not be of the same standard as the degree of proof required for establishing the guilty of an accused in a criminal case. However, the law is settled now that suspicion, however strong, cannot be substituted for proof even in a departmental disciplinary proceeding. Viewed in this perspective we find there is a total dearth of evidence to bring home the charge that the applicant has been living in a manner unbecoming of a government servant or that, he has exhibited adulterous conduct by living with Smt K.R. Aruna and begetting children."

15. On a careful perusal of the above findings of the Tribunal in the light of the materials placed before it, we do not think that there is any case for interference, particularly in the absence of full materials made available before us in spite of opportunity given to the appellants. On the facts of this case, we are of the view that the departmental enquiry conducted in this case is totally unsatisfactory and without observing the minimum required procedure for proving the charge. The Tribunal was, therefore, justified in rendering the findings as above and setting aside the order impugned before it."

23. As regards recovery allegedly made from

applicant, though we are conscious that a disciplinary proceeding is not a criminal trial and the strict rules of evidence and Criminal Procedure Code have no application. Rule is preponderance of probabilities, which, inter alia, allow admissibility of circumstantial evidence but mere suspicion cannot be allowed to take place of proof. A guilt of a person should be established after following the due process of law and this evidence should conclusively point towards guilt of a delinquent. Denial of examination of witness Baru and non-inclusion of the disclosure statement made by Baru and relying upon it for want of its proof would amount to holding applicant guilty on the basis of a material which has not been put to applicant and against which reasonable opportunity has not been afforded.

24. In **Surajmal v. State (Delhi Admn.)**, 1979 (4) SCC 725 while dealing with a case of bribery under the Prevention of Corruption Act observed that "mere recovery by itself cannot prove the charge of prosecution against applicant, in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money". The evidence cited does not show that applicant had ever accepted the bribe as Sh. Jasbir Singh from whom alleged money was received by applicant as illegal gratification and the alleged recovery is bellied by his statement that he has never given any bribe nor the same was demanded. Accordingly, the recovered amount has not been proved to be the amount demanded and accepted by applicant through Baru. Moreover, we find from the testimony of DW-1 and the documents on record that the aforesaid money has been claimed by applicant as his own. The envelope containing

the aforesaid recovered amount though figured in the list of documents, has not been brought on record of the inquiry. The same is the case with the disclosure statement, which does not form part of the record of the departmental proceedings. As such, placing reliance on these two documents even by the standards of preponderance of probabilities cannot be legally sustained. The Tribunal in **S.K. Jain v. Union of India**, 1989 (4) SLJ 953 held that in a trap case mere recovery of money is not a sufficient evidence and following observations have been made:

> "21. Another lacuna in the proceedings is the non-examination of material witness. In this context, reference may be made to the decision of the Himachal Pradesh High Court in Mangal Singh v. Commissioner of Himachal Pradesh, 1975(1) SLR 500. In that case, the Deputy Superintendent of Police was an important witness in a disciplinary inquiry held against the petitioner under the CCS (CCA) Rules, 1965. It was the Deputy Superintendent of Police who submitted a report that he had found that the petitioner had allowed the passengers to board the vehicle and travel in it without tickets being issued to there. The High Court of Himachal Pradesh held that the non-examination of the Deputy Superintendent of Police vitiated the disciplinary proceedings. Shri R.S. Pathak, C.J. as he then was, observed as follows:
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> "When the Deputy Superintendent of Police was not produced in evidence and was not available for cross-examination by the petitioner, it is apparent that the report submitted by him cannot be relied on as material against the petitioner. In my opinion, the General Manager was wholly wrong in holding that the two charges stood proved notwithstanding the absence of the Deputy Superintendent of Police as a witness. Consequently, the very basis on which the show-cause notice against removal was issued stands vitiated."
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> (See also Dr. D.P.S. Luthra v. Union of India & ors, 1988 (8) A.T.C. 815).
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> 22. In the instant case, Shri K.K. Chopra and Shri R.S. Chahal were the trap witnesses who had also signed the recovery memo. They were to depose about the incident and the alleged

trap. Shri Chopra though cited as a prosecution witness, was not produced at the inquiry. Shri Chahal was, however, produced as one of the prosecution witnesses. As regards the non-production of Shri Chopra as a witness, the respondents have contended that he could not appear before the Inquiry Officer due to "indisposition". The Inquiry Officer has heavily relied on the testimony of Shri Chahal."

25. In **Hardwari Lal v. State of U.P. and others,** (1999) 8 SCC 582 the following observations have been made:

"3. Before us the sole ground urged is as to the non-observance of the principles of natural justice in not examining the complainant, Shri Virender Singh, and the witness, Jagdish Ram. The Tribunal as well as the High Court have brushed aside the grievance made by the appellant that the non-examination of those two persons has prejudiced has case. Examination of these two witnesses would have revealed as to whether the complaint made by Virender Singh was correct or not and to establish that he was the best person to speak to its veracity So also, Jagdish Ram, who had accompanied the appellant to the hospital for medical examination, would have been an important witness to prove the state or the condition of the appellant. We do not think the Tribunal and the high Court were justified in thinking that non-examination of these two persons could not be material. In these circumstances, we are of the view that the High Court and t he Tribunal erred in not attaching importance to this contention of the appellant."

The aforesaid is the legal proposition referred to us by the learned counsel for applicant.

26. On the other hand, it is also relevant to highlight the manner in which this contention of applicant has been dealt with by respondents. In the order of removal the contention of non-examination of witness was raised by applicant and dealt with by the disciplinary authority by observing as under:

"The next contention of the Charged Officer is that the inquiry has suffered from the following material defects allegedly going to the very root of the case:

a) The presence of Shri Baru was not ensured by the inquiry officer who, however, has relied on Shri Baru's statement given to the police during custody, a number of times, in the Inquiry Report.

b) The envelop containing the amount of Rs.5,000/-; said to have been recovered from the Charged Officer's house, though mentioned in the list of documents to the charge sheet, was not produced during the inquiry.

c) The Inquiry Officer was appointed not by the Disciplinary Authority, but by the Director (Vigilance).

d) Shri S.L.Gupta, D.S.P., CBI, was not connected with the case and was not there in raid at Shri Baru's residence but he appeared unauthorisedly at the time of search at his (Charged Officer's) house. the S.P. had not directed him nor could the Investigating Officer direct an officer of equal rank. As his involvement was unauthorised, his statement should be ignored from consideration.

e) The Inquiry Officer allowed the Presenting Officer to produce a witness i.e. Shri R.Upasak, DSP, CBI, though hiss name does not appear in the charge sheet.

The factual position in this regard is given below:

a) Shri Baru was cited as one of the prosecution witnesses and in the normal routine he was summoned but he did not appear before the Inquiry Officer. There is no evidence that his statement was relied upon by the Inquiry Officer. There is no evidence that his statement was relied upon by the Inquiry Officer. the fact is that there were others who witnessed the tap as well as the subsequent proceedings including the search of the house of the Charged Officer. Such witnesses appeared before the Inquiry Officer and their statements and depositions were relied upon by the Inquiry Officer.

b) It is a fact that the envelop containing Rs.5000/- recovered from the residence of the Charged Officer was one of the prosecution documents cited in the charge sheet ibid. The same could not be produced before the Inquiry Officer as it is with the CBI Court in the criminal case against Shri Baru. However, the recovery of Rs.5000/- from the residence of the Charged Officer is evident from the following witnesses and documents:-

(1) Recovery memo dated 5.4.96 (Ex.S.9)

2. Statement dated 15.4.96 from Shri Vinod Goel (SW.4), Dy Manager, State Bank of India, Chandigarh (Ex,S.17) (pp 9 & 10).

(3) Statement dated 18.4.96 from Shri Harjeet Singh (SW.5), Administrative Officer, National Insurance Company Ltd., Sector 34, Chandigarh (Ex.S.18) (pp.10 &11).

(4) Deposition of Shri Vinod Goel, SW4 before the Inquiry Officer on 13.9.99.

(5) Deposition of Shri Harjeet Singh SW5 before the Inquiry Officer on 13.9.99.

(6) Deposition of Shri S.L.Gupta, SW9 before the Inquiry Officer on 04.9.99.

(7) Deposition of Shri R.Upasak, SW11 before the Inquiry Officer on 12.11.99.

27. It is also stressed by the disciplinary authority that the disclosure statement of Baru was not at all relied upon, which is misconceived and, on the face of it, is wrong. The IO while holding applicant guilty of Article II of the Charge, recorded the following conclusions:

> "727. From the depositions of the various witnesses and the recovery of Rs.5,000/- from the house of the CO at exactly the same place and in manner as disclosed by Shri Baru, it was reasonable to infer that as stated by Shri Baru, he had collected the bribe amount from Shri Darshan Kumar for his transfer from Patiala to Chandigarh and passed it on to CO. Thus he had done on the directions of the CO. The recovery also suggests that what Shri Baru had stated about collection of bribe from other parties on behalf of CO was also correct. there was collusion between CO and Shri Baru, and Shri Baru demanding and accepting the bribe amounts was acting on the directions of the CO.
>
> 7.28. On the basis of evidence on record, the Articles of Charge-II is held as proved."

28. Regarding Article of Charge-I it is recorded as under:

"7.34. As already established in Article of Charge-II, Shri Baru and CO were hand in glove with each other and Shri Baru was demanding and collecting illegal gratification on behalf/directions of the CO."

29. Regarding Article of Charge-III it is recorded as under:

"7.37 CO has again mentioned in his brief that the charge is based on the statement of Shri Baru and Shri Baru had not been produced during the enquiry. However, as established in the Article of Charge-II, Shri Baru was demanding and collecting illegal gratification on behalf of the CO. It was the CO who could give the benefit to the parties and Shri Baru along could not have provided the desired relief to the parties. Shri Pankaj Sharma (SW-10) in his deposition stated that Shri Baru had demanded Rs.10,000/- and had told him that the amount was to be shared with the CO. However, the amount was later settled for Rs.5000/- Once the amount had been settled, Shri Baru had taken Shri Pankaj Sharma and Shri Luther to the CO's chamber. Shri Pankaj Sharma deposed that it was embarrassing to meet the Regional Director when the matter had already been settled with Shri Baru and they could not understand why Shri Baru had taken them to the CO. When they had gone to CO's chamber, he had told them about the consequence of default. The amount of Rs.5,000/- was given to Shri Baru at his residence."

30. If one has regard to the above, what is transparent and established beyond doubt is that the disclosure statement of Baru was relied upon heavily to establish all the articles of charge by the IO against applicant. This shows non-application of mind by the disciplinary authority to the record of inquiry.

31. We have not come across any evidence apart from supporting evidence of other witnesses to establish the disclosure statement of Baru and to establish that the amount recovered is the same amount which had been demanded

by applicant from Jasbir Singh. The aforesaid witness Jasbir Singh denied the allegations against applicant and categorically deposed that neither any amount was demanded nor same was recovered.

32. As regards disclosure statement, if a document is not forming part of inquiry and the only mode even in accordance with rules of preponderance of probabilities the same should have been established and proved by the maker of this document, i.e., Baru. By not exhibiting this document in the inquiry and not affording a reasonable opportunity to applicant to cross-examine Baru who is a material witness has certainly prejudiced applicant. Had this witness been examined, applicant would have established his defence of not demanding any money and also in the view that there is overwhelming evidence that the amount has been claimed by applicant as his own, there is no rebuttal to this in the inquiry report.

33. Any material which is recorded behind the back of the delinquent cannot be relied upon against him, if at all the aforesaid document is to be accepted or relied upon reasonable opportunity to rebut is mandated. This includes proving the document through examination of Baru and calling him as a witness with an opportunity to cross examination to applicant. For want of such a procedure this disclosure statement is not admissible and in the light of the decision of the Constitution Bench decision in Shivappa and T.R. Verma (supra) such a procedure contravenes principles of natural justice. Keeping in view the particular circumstances non-examination of this witness,

which is very material, and the statements having been relied upon to establish all the charges against applicant certainly goes to the root of the matter and vitiates the inquiry.

34. In the light of the decision of the Apex Court in **Kuldeep Singh v. Commissioner of Police and Others**, JT 1998 (8) SC 603 even in a departmental proceeding the test applied is of a common reasonable prudent man. We find that even applying the aforesaid test the inquiry is vitiated.

35. When this contention has been raised before the appellate authority the following observations have been made:

> "It was also clarified in the penalty order (page 3) that there was no evidence that the statement of Shri Baru was relied upon by the Inquiry Officer. There were others including those who witnessed the trap as well as the subsequent post trap proceedings and their statements and depositions were relied upon by the Inquiry Officer."

36. If one has regard to the above, it is clear non-application of mind to the contentions raised by applicant. This suffices quashing of the appellate order as well.

37. It is a trite law that in disciplinary proceedings on judicial review this Court cannot re-apprise the evidence or appreciate it. We cannot sit as an appellate authority over the findings arrived at by the departmental authorities, yet this does not preclude to examine the prejudice caused on account of violation of

principles of natural justice and substantive rules of procedure. To examine the cited witness and to tender the evidence the documents which are relied upon are two principles which precedes the holding of disciplinary proceedings and condition precedent for involving a penal action against the government servant. By not following the rules on this ground alone the inquiry as well as consequent orders cannot be upheld.

38. The other evidence cited like recovery memo and statements of other witnesses in the wake of non-examination of Baru and not forming part of the disciplinary proceeding record makes the entire evidence in-admissible.

39. The other legal grounds raised are not adjudicated, as the OA is liable to succeed on this ground alone.

40. In the result, for the foregoing reasons and in the circumstances we partly allow this OA and set aside the impugned orders. Respondents are directed to forthwith reinstate applicant with all consequential benefits. Applicant shall be deemed to be in service. However, applicant shall not be entitled to back wages. No costs.

(S.A. Singh)
Member (A)

(Shanker Raju)
Member(J)

'San.'