

CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION No.426/2012

Dated: 20th November, 2019

Coram: R. Vijaykumar, Member (A).
R. N. Singh, Member (J).

Govind Swarup, IAS Age 66 years,
Principal Secretary (Retd.) Government of
Maharashtra, Residing at A-43, Ruia Park,
J.R.Mhatre Road, Juhu, Mumbai-400049.

...Applicant.

(By Advocate Shri S.V.Marne)

Versus

1. The Union of India Through the Secretary,
Ministry of Personnel, Public Grievances &
Pensions, Department of Personnel & Training,
North Block, New Delhi-110001.

2. The State of Maharashtra, Through the Chief
Secretary, Mantralaya, Mumbai-400032.

3. The Secretary, Union Public Service
Commission, Dholpur House, Shahjahan Road, New
Delhi-110069.

... Respondents

(By Advocates S/Shri V.S.Masurkar, D.A.Dube and
V.Narayanan)

Reserved on:- 07.11.2019.

Pronounced on:- 20.11.2019

ORDER

PER:- R. VIJAYKUMAR, MEMBER (A)

This application has been filed on
18.6.2012 under Section 19 of the Administrative
Tribunals Act, 1985 seeking the following

reliefs:-

"(a) This Hon'ble may graciously be pleased to call for the records of the case from the Respondents and after examining the order dated 22.10.2009 passed by Respondent No.1 (Annexure A-1) be quashed and set aside with all consequential benefits/

(b) This Hon'ble Tribunal may further be pleased to direct the Respondents to refund the amount of Pension which is cut in pursuance of the impugned orders dated 22.10.2009 along with interest @ 12% per annum.

(c) This Hon'ble Tribunal may further be pleased to direct the Respondents to pay interest @ 12% per annum on the withheld amounts of retiral benefits payable to the Applicant w.e.f. 01.09.2006 till the actual payment of the same.

(d) Costs of the application be provided for.

(e) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

2. The brief facts of the case are that the applicant was a senior officer of the IAS of the 1971 batch of the Maharashtra cadre who was appointed as Principal Secretary in the year 1998 and was posted as Managing Director of the Maharashtra Film, Stage and Cultural Development Corporation, a Public Sector Undertaking of the

Government of Maharashtra, and was acting in that capacity in the years 2000 and 2001. Disciplinary Proceedings were initiated against him in a charge memorandum issued on 9.2.2004 under Rule 8 of the All India Services (Discipline & Appeal) Rules, 1969 issued in the standard format with the following Articles of Charge as contained in Annexure-I of the Charge Memorandum issued to him reads as under:

"Article I :

Shri Govind Swarup, IAS while working as Managing Director of the Maharashtra Film Stage & Cultural Development Corporation (MFSCDC), Mumbai, he executed an agreement on 14.8.2000 with one Mr.Sahab Ahmed, Proprietor, M/s.Montage for producing a private programme called "Hum Ek Hai". This agreement clearly defined that the services to be rendered by MFSCDC would be purely of a technical and consultant nature without any financial involvement on the part of the Corporation. However, Shri Govind Swarup, as M.D., acted in violation of this agreement to the detriment of the Corporation causing serious financial loss to the Corporation and the government, thereby violating Rule 3(1) of the AIS (Conduct) Rules, 1968.

ArticleII :

Shri Govind Swarup, while working as MD of the MFSCDC, Mumbai, he misused money raised by the Corporation

by issuing bonds to the tune of Rs.20 crores and, diverted this fund for various purposes, without prior approval of the Board of Directors by operating fictitious account, viz. "Hum Ek Hai", which was opened without proper authority with the sole intention of siphoning off public money from various accounts of the Corporation into this account from where, the money was used to benefit Shri Shahab Ahmed, (proprietor of M/s.Montage and Director of House of Cine Arts). Thus, Shri Govind Swarup deliberately and with malafide intention showed disregard for his legitimate duties and failed to act with integrity, thereby acted in a manner of unbecoming of a member of the Indian Administrative Services. Thus contravened the provisions of Rule 3(1) of the AIS (Conduct) Rules, 1968.

Article III :

While working as MD, MFSCDC, Mumbai, Shri Govind Swarup, was duty bound to act as per the directions of the Board of Directors and its resolutions. However, Shri Govind Swarup acted without the permission of the Board of Directors, did not keep the Board of Directors informed about important developments having serious financial implications for the Corporation and even misled the Board of Directors by prevaricating the facts. Thus, Shri Govind Swarup failed to perform his duties as MD with absolute integrity, contravening Rule 3(1) of the AIS (Conduct) Rules 1968.

Article IV :

While working as MD, MFSCDC, Mumbai, Shri Govind Swarup, acted against the interest of the Corporation to benefit a

private individual, Mr. Shahab Ahmed, proprietor of M/s. Montage, at the cost of the Corporation. He deliberately and with malafide intention allowed a private individual to earn huge financial benefits and jeopardized the interest of the Corporation by collaborating in this manner with a private party. Shri Govind Swarup failed in his duties as M.D. and as the custodian of MFSCDC and Government funds in a number of instances, thus, committing a fraud in the Corporation and misusing its funds to the detriment of the Corporation. Thus violated the provisions of Rule 3(1) of the AIS (Conduct) Rules, 1968.

Article V :

While working as MD, MFSCDC, Mumbai, Shri Govind Swarup, even after causing the Corporation huge financial loss, failed to recover the amount. He also did not fix the interest recoverable on this amount, thus, showing disregard for the financial interest of the Corporation. He failed to assess the quantum of loss to the Corporation for recovery or the interest recoverable on the same.

Also, cheques issued on 31st March, 2002 were not credited to the Corporation until 17th May, 2002. The late credit as well as delay in recovery resulted in the Corporation suffering financial loss. This conduct of the former MD Shri Govind Swarup is violative of Rule 3(1) of the AIS (Conduct) Rules, 1968.

Article VI :

While working as MD, MFSCDC, Mumbai, Shri Govind Swarup, authorized

his subordinate Mr.A.G.Shukla, Financial Advisor & Chief Accounts Officer (FA&CAO) of the Corporation for carrying out the aforesaid transactions and Shri Shukla carried out such authority in blatant violation of all prudent financial norms. The MD, Shri Govind Swarup did not take any action against Mr.Shukla, thus, violating Rule 3(2) of the AIS (Conduct) Rules, 1968, under which he ought to have taken all necessary steps to ensure the integrity of the government servants under his control and authority at the said time".

The applicant replied to the charges and thereafter, inquiry was conducted after which the Inquiry Officer submitted his report on 10.11.2005. The Inquiry Officer held that none of the six Articles of Charge were proved. The Disciplinary Authority considered the report of the Inquiry Officer and having disagreed, communicated a copy of the disagreement note to the applicant on 17.2.2006 (Annexure A7) and to which the applicant furnished his reply on 21.2.2006, following which the Disciplinary Authority referred the matter to the UPSC for advice on 26.8.2008 and such advice was furnished by the UPSC in their letter at Annexure A9 in F.3/22/2008-SI dt. 7.7.2009 where they expressed their view, after examining the

facts and circumstances of the case, that Articles of Charge I, III and VI were proved, Articles II and V were partly proved and Article IV was not proved against the Charged Officer. Meanwhile, the officer superannuated on 31.8.2006 and the applicant was allowed to retire without prejudice to the continuation of disciplinary proceedings. The Competent Authority then passed impugned orders on 22.10.2009 after recording and discussing the facts and circumstances of the case and after referring to the views communicated by the UPSC. The Disciplinary Authority accordingly expressed his views in these orders as extracted below:

"33. AND WHEREAS pursuant to the receipt of the advice of the Union Public Service Commission, the case has again been considered in the Central Government (DoPT). Based on the evidence brought on record, submissions made by the charged officer, comments of the State Government and the advice of the UPSC in the matter, the Central Government, with the approval of the Competent Disciplinary Authority holds that the articles of charge Nos.I, III and VI contained in the State Government's charge memo dated 09-02-2004 stands established against Shri Govind Swarup and that articles of charge No.II & V stand partly proved against him with Article of Charge No.IV

not being proved against him for the following reasons:

(a) The Charged Officer's functioning has been regularly reflective of the fact that he had always taken the approval of the Board as granted and that he consistently ignored the set procedures so much so the executive/administrative actions were initiated even before the finalization of formal agreements/contract.

(b) The joint account with the private party was opened on 02-09-2000 whereas the agreement with M/s.Montage was finalized on 04-09-2000 to modify the original agreement of 14-08-2000 though the agreement with Zee Telefilms was finalized only in January, 2001. Thus this action of modifying the agreement with M/s.Montage was hurried and pre-mature in this context.

(c) The time lag between placing the matter for approval of the Board and opening of a joint account is just three days and it has been contended that within three days the potential of the programme changed from the one where Corporation could act only as a facilitator to where profit making was visualized.

(d) When the proposal did not involve any expenditure and there was no financial liability and the Corporation was only to gain (Rs.25.00 lakhs), the proposal was placed before the Board but it was not so in case of subsequent agreements which had financial implications.

(e) If "Hum Ek Hai" became a dead issue due to an "act of god" on 26-01-2001, the logic of pumping more funds into the project is not understandable. The said action was seemingly not a prudent act with Rs.6.30 crore loan being raised against FixedDeposits of

MFSCDC on 31-03-2001 and thereafter further Fixed Deposits @ Rs.4.00 crore being pledged for issuing bank guarantee to Prasar Bharati for and on behalf of Mr. Shahab Ahmed, which was eventually encashed to the extent of Rs.3.85 crore.

(f) The funds from SET India and Garnet Paper Mills became available in 2002, more than a year after the "Hum Ek Hai" fiasco for an entirely new programme but were placed in the joint account of "Hum Ek Hai".

(g) On the one hand it is being contended that the "Hum Ek Hai" lost its value due to the natural calamity having an impact on tapping its further potential but on the other hand notwithstanding the fact that fresh agreements were being entered into for new programmes, but the cheques received and credited were clearly in the name of "Hum Ek Hai".

(h) The justifications seem to indicate that Corporation was forced to become a secondary entity and "Hum Ek Hai" was of more paramount concern and sole objective of the Corporation had become to concern itself with wiping the account books of "Hum Ek Hai" clean of all debts. All new projects were being merged into "Hum Ek Hai"

(i) The said programme had failed and should have been accepted as a fait accompli due to a natural calamity, but the window dressing of its account books continued with other profits being used to offset its losses. Even if it was for accounting convenience, as is being contended then also such practice was contrary to all accounting norms of public bodies.

34. AND WHEREAS the Central Government thus finds merit in the observations of

the UPSC to conclude that such acts of omission/commission on the part of an officer of such senior level were in violation of the decision of the Board of Directors, without seeking of due approval of the Competent Authority, including the Board of Directors for entering into various agreements and making/authorising payments and not taking immediate appropriate action for recovery of dues thus causing loss to the Corporation as a result of such decisions. His functioning as head of the Corporation also lacked consistency with respect to the various actions taken by him. The lack of supervisory control over his subordinates was also apparent. The Central Government also considers that the recommendation of the UPSC with regard to the quantum of penalty are just and appropriate considering the gravity of the proven charges against the officer and would meet the ends of justice in this case.

35. NOW, THEREFORE the Central Government has decided that a penalty of withholding 20% (Twenty per cent) of pension otherwise admissible to Shri Govind Swarup, IAS (MH:1971) (retd.), for a period of 5 (five) years be imposed on Shri Govind Swarup with immediate effect in agreement with the advice of the UPSC and it orders accordingly. Further the gratuity admissible to him should be released if not required in any other case".

3. Prior to passing orders, the respondents did not communicate the views of the UPSC to the Charged Officer for furnishing his comments, if any.

4. The applicant's main grounds in this OA

are to question the basis of the analysis and the consequent findings of the UPSC and he has sought to bring out various aspects that have not been considered or have been wrongly construed by the UPSC.

5. Respondent No.1 have filed their reply and have reiterated the facts of the matter and the fact that the proceedings were conducted strictly in accordance with the extant prescribed procedures. The case records were examined along with the advice tendered by the UPSC (R3) and the Disciplinary Authority analysed the proof and evidence thereof and passed final orders under the approval of the Competent Authority.

6. Respondent No.2 has raised the preliminary objection on the delay of 868 days in filing this OA on 18.6.2012 after receipt of orders on 1.2.2010 and that this Tribunal would necessarily have to dismiss the OA on the preliminary aspect of delay. The reasons given by the applicant in Miscellaneous Application for condonation of delay were considered by this

Tribunal during the hearing held on 11.9.2012 and the OA was dismissed, but on appeal to the Hon'ble High Court of Bombay in Writ Petition No.858/2013, orders were passed on 9.1.2015 setting aside the orders of dismissal, condoning delay, and restoring the OA.

7. The respondent no.2 has, in his reply, asserted that prescribed procedures were properly followed and that the nature of delinquency and misconduct has been carefully considered and proved and it was on this basis that orders have been passed by the Competent Authority.

8. Respondent no.3, the UPSC, who have been impleaded through their Chairman in this OA, have filed a reply affidavit objecting to such impleadment as it was contrary to a variety of orders of this Tribunal. They have also stated that the UPSC acts in an advisory capacity and has no power to grant any relief to the applicant which lies within the province of the Disciplinary Authority which is the Ministry of Personnel and Training (R1). In response to

this, during the hearing, learned counsel for the applicant has accepted this ground and his request for permission to replace the name of Chairman by Secretary, UPSC was allowed. However, the reply of UPSC has been taken on board, considering the fact that the applicant has essentially raised questions on the facts of delegation of powers, Articles of Association etc. referred or overlooked by the UPSC while conveying its advice.

9. Applicant has filed his rejoinder and asserted that there was no loss caused to the Corporation as a result of his action and he has further reiterated various aspects of his defence.

10. Respondent no.2 has filed a reply to the rejoinder and referred to the scope of judicial review of this Tribunal in that, it was not the purpose of judicial review to re-appreciate the evidence nor take on the role of an Appellate Authority in the matter. Further, he refers to the rulings of the Hon'ble Apex Court in **Government of Tamil Nadu & Ors. v. S.Vel Raj**

(1997 (2) AISLJ 32) that standard of proof in DAR action is not of proof beyond doubt. Further, in **Government of Tamil Nadu v. N.Ramamurthy, AIR 1997 SC 3571**, the Hon'ble Apex Court held that "The Tribunal has no jurisdiction to go into the correctness or truth of the charges and the Tribunal cannot take over the functions of the Disciplinary Authority". They reiterated and urged certain facts in reply to the contentions made in the rejoinder and further argued that the applicant deliberately and with mala fide intentions, allowed a private individual to earn huge financial benefits and jeopardized the interests of the Corporation by collaborating with the private party. They maintained that strict procedures were followed including the basis for its disagreement and the communication of the disagreement note to the applicant.

11. During arguments, the learned counsel for applicant has reiterated various pleadings including by reference to the inquiry having been conducted by a reputed legal luminary who

had retired as Principal Secretary Law and Judiciary Department of the Maharashtra Government and who had held that none of the charges were proved. He has also argued that the applicant was not given a chance to represent against the UPSC's advice dt. 7.7.2009, in terms of the Judgment of the Hon'ble Apex Court in **Union of India and Ors. v. S.K.Kapoor, (2011) 4 SCC 589**, as incorporated in directions contained in OM F No.11012/8/2011-Estt(A) dt. 19.11.2014 issued by the DoP&T. However, learned counsel for the applicant also noted that the applicant had retired in 2006 and was now well past 70 years of age and he was not, therefore, pressing this aspect.

12. Learned counsel for Respondents, during arguments, has reiterated their views on the scope of judicial review by this Tribunal. They have asserted that all the facts relevant to the case have been properly considered by the Disciplinary Authority before passing orders in the matter. Further, all the procedures prescribed for such disciplinary action have

been followed before the Competent Authority passed final orders. In reply to the need to refer the UPSC advice to the applicant for obtaining his view, they have argued that prior to imposition of penalty, the AIS (D&A) Rules, 1969 under Rule 94, does not require it to be necessary to give the Member of Service any opportunity of making a representation on the penalty proposed to be imposed. Therefore, they state that prior to the rulings of the Hon'ble Apex Court in **S.K.Kapoor** (supra) on 16.3.2011, they were not communicating the advice of the UPSC prior to passing orders, but only supplying the UPSC advice along with the final orders to IAS Officers as a standard practice. Following **S.K.Kapoor** (supra), the amendment of Rule 9(3) and 9(4) of AIS (D&A) rules, 1969 requiring Disciplinary Authorities to communicate the advice of the Commission to the Member of Service in order to make a submission if so desired within 15 days has been incorporated and this is being followed. However, such practice was not in vogue at the time when orders were

passed in the case of the present applicant.

13. The matter has been carefully considered and the nature of charge, the report of the Inquiry Officer, the views of the UPSC and the final orders of the Disciplinary Authority have been carefully studied. The learned counsel for the parties were heard and views have been duly considered.

14. It is no doubt correct to hold that there was no requirement for the respondents to supply a copy of the UPSC advice to the applicant prior to passing final orders. Considering the long passage of time and the position of the rules in this matter, the learned counsel for the applicant has also not pressed this aspect of the need for referring the UPSC advice to the applicant to have his say. However, it is also indisputable that every aspect of the applicant's grounds in the present OA make reference to the UPSC advice and seek to point out omissions and wrong construal of the documents of the Corporation in relation to practices and procedures. When such is the

case, it is also considered that justice will be served best by permitting the applicant who has now received a copy of the UPSC advice to furnish his comments in detail to the Competent Authority for their consideration and to pass appropriate orders in the matter. We are also conscious of the fact that the rule requiring communication of such UPSC advice arose only after the rulings of the Hon'ble Apex Court in **S.K.Kapoor** (supra) and may not unsettle cases that have already been settled.

15. However, considering the peculiar facts and circumstances of the case we are of the considered view that this applicant needs to be given an opportunity to raise his arguments in response to the advice of the UPSC notwithstanding the previous practice of only communicating the advice along with the final orders of the Disciplinary Authority. This is particularly relevant in the context that there is no appeal against an order of the President who is the Competent Authority in the present case. In view of the above, we consider that it

would be appropriate in the facts of the present case in order to serve the interests of justice, that the applicant may file his response, if so advised, to the advice of the UPSC in not more than two weeks of receipt of a certified copy of these orders and upon receipt of such representation within the time period specified, the respondents shall consider the same and pass a reasoned and speaking order within three months and communicate these orders to the applicant within two weeks thereafter.

16. This O.A. is accordingly disposed of in the aforesaid terms. In the circumstances, there shall be no order as to costs.

(R.N. SINGH)
MEMBER (J)

(R. VIJAYKUMAR)
MEMBER (A)

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