

IN THE HIGH COURT OF JHARKHAND AT RANCHI

W.P.(S) No.2646 of 2012

Binda Paswan son of late Nakat Paswan, residing at Mohalla-Edalhatu, PO Morabadi, PS Bariyatu, Town and District Ranchi.

..... **Petitioner**

Versus

1. The State of Jharkhand through the Secretary/Principal Secretary, Road construction Department having office at Project Building, PO and PS Dhurwa, Town and District Ranchi.
2. The Special Secretary, Road Construction Department having office at Project Building, PO and PS Dhurwa, Town and District Ranchi.
3. The Deputy Secretary, Road Construction Department having office at Project Building, PO and PS Dhurwa, Town and District Ranchi.
4. The Engineer-in-Chief, Road Construction Department having office at Project Building, PO and PS Dhurwa, Town and District Ranchi.
5. The Chief Engineer cum Enquiry Officer, National Highway Wing, Jharkhand having office at Dhurwa, PO and PS Dhurwa, Town and District Ranchi.

.....**Respondents**

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD

For the Petitioner(s) :Mr. Manoj Tandon, Advocate;
 Ms. Shivani Bhardwaj, Advocate;
 Mr. Shubham Kumar, Advocate;
 Mr. Karamjit Singh Chhabra, Advocate
 For the Respondent :Mr. Om Prakash Tiwari, GP-III

Dated:08/04/2026

1. The present writ petition under Article 226 of the Constitution of India has been filed against the order dated 18.1.2012 passed by the Engineer-in-Chief, Road Construction Department - Respondent No.4, whereby and whereunder, the recovery of Rs. 3,63,333/- has been sought from the petitioner with a further punishment of stoppage of three increments with cumulative effect. It has also been mentioned in the order impugned that the petitioner would not be entitled for anything than what he has been paid under Rule 97 of the Jharkhand Service Code during the period of suspension.

Factual Matrix:

2. The brief facts of the case which require to be enumerated herein read as under:

- (i) It is stated that the petitioner was appointed as a Junior Engineer in the month of December, 1987. The State of Bihar was bifurcated on 15.11.2000 and the services of the petitioner was finally allocated to the State of Jharkhand in view of the provisions enshrined in Bihar Re-organization Act, 2000. Right from the date of appointment the petitioner was discharging his duties to the satisfaction of all concerned without any complaint of any kind whatsoever against the petitioner.
- (ii) The petitioner was posted as Junior Engineer, Road Construction Department, Road Section, Raidih under the jurisdiction of Road Division, Gumla during the Financial Year 2008-2009, he was put under suspension vide order no. 255 dated 4.9.2009 under the provisions enshrined in Bihar and Orissa Sub-Ordinate Services (Discipline and Appeal) Rules, 1935.
- (iii) Memo of charge was framed against the petitioner on 9.2.2010 and the said charge was communicated to the petitioner by office order dated 10.2.2010. The petitioner submitted a detailed reply on 24.3.2020 to the enquiry officer, the In-charge Chief

Engineer, National Highway Wing, Road Construction Department, Jharkhand, Ranchi. The petitioner denied each and every charges. The petitioner explained the entire facts to show that he was not at all responsible and guilty for any kind of omission or commission.

- (iv) A thorough enquiry was conducted by the enquiry officer, the Chief Engineer, National Highway Wing and this enquiry report was prepared on 01.08.2011. On perusal of the enquiry report it would be evident that none of the four charges against the petitioner were proved. The said enquiry report was forwarded by the enquiry officer to the Government by letter dated 2.8.2011.
- (v) The Deputy Secretary of the Road Construction Department without giving any opportunity of being heard to the petitioner differed with the finding recorded by the enquiry officer and communicated the same to the petitioner by letter dated 15.10.2011.
- (vi) The petitioner having no option has submitted his reply on 11.11.2011 to the said letter dated 15.10.2011 wherein the petitioner reiterated that none of the charges were proved against the petitioner and there was no point in differing with

the finding recorded by the enquiry officer and the petitioner was fit to be exonerated of the charges.

(vii) However, none of the grounds taken by the petitioner was considered and the disciplinary authority by order contained in memo no. 372(S) dated 18.1.2012 passed the order of punishment against the petitioner whereby a recovery of Rs. 3,60,333/- only has been sought from the petitioner; stoppage of three increments with cumulative effect has been passed with a further direction that the petitioner shall not be entitled for anything than what he has been paid under Rule 97 of the Jharkhand Service Code during the period of suspension.

(viii) The petitioner preferred an appeal on 25.4.2012 to the appellate authority, the Secretary, road construction Department, Government of Jharkhand, Ranchi but the said representation has not been disposed of as yet.

Arguments advanced on behalf of the petitioner:

3. The learned counsel appearing for the petitioner has questioned the order of punishment on the ground that the procedure as laid down by the judicial pronouncement in the judgment rendered by the Hon'ble Apex Court in the case of **Punjab National Bank & Others Vs. Kunj Behari Misra**, reported in **1998 (7) SCC 84** has

not been followed. It has been submitted that the further irregularity in the process is that the inquiry report in which the charge has not been found to be proved has been differed but not by the disciplinary authority rather by the Deputy Secretary and based upon that difference of opinion a second show-cause notice although was issued which has been scrutinized by the Engineer-in-Chief, i.e., disciplinary authority and thereafter the punishment has been imposed. It has been contended that there was no application of mind before inflicting the punishment that too major in nature.

Arguments advanced on behalf of the State:

4. Mr. O.P.Tiwari, the learned counsel appearing for the State has defended the order of punishment on the ground that the procedure as laid down by the Hon'ble Apex Court in the case of **Punjab National Bank & Others Vs. Kunj Behari Misra**(*Supra*) has been followed, since, the inquiry report in which the charge has not been found to be proved has been differed by the Deputy Secretary and thereafter the second show cause notice has been issued. The learned counsel has further submitted that even considering the fact that the procedure has not been followed it can be a best case to remit the matter before the authority.

Analysis: -

5. This Court has heard the learned counsel for the parties.

6. The admitted fact is that the order of punishment which has been passed in a situation of charge having not been found to be proved by the inquiry officer although the same was placed before the Deputy

Secretary, not before the disciplinary authority, who has differed with the opinion of the inquiry report assigning the reason but thereafter the same was forwarded to the Engineer-in-Chief i.e. the disciplinary authority who based upon that difference of opinion has inflicted the order of punishment.

7. As such, the issues which require consideration are:

- (i) As to whether the procedure as laid down in the case of ***Punjab National Bank & Others Vs. Kunj Behari Misra***(supra) has been followed in the present case or not?”
- (ii) As to whether in such circumstances of wrong having been committed by the disciplinary authority will it be proper to remit the matter before the disciplinary authority again in order to give aid to a wrong doer?

Issue No.1:

8. This Court considering the aforesaid issue is of the view that the facts pertaining to the case of ***Punjab National Bank & Others Vs. Kunj Behari Misra (supra)*** needs to be referred herein which is as under:

The respondents in these two appeals, namely, Shri Kunj Behari Misra and Shri Shanti Prasad Goel were working in the appellant-Bank in the Hazratganj Branch, Lucknow, as Assistant Managers. On 10-11-1981, on physical verification of the currency chest, a shortage of Rs 1 lakh currency notes was found. Thereafter first information report was lodged and disciplinary proceedings were initiated by the appellant-Bank

against both the respondents, who were also placed under suspension. Six charges were framed against Misra while the charge-sheet served on Goel contained seven charges. The disciplinary authority did not conduct the enquiry itself and an enquiry officer was appointed to hold the enquiry.

The enquiry officer gave the respondents opportunity of being heard. In his report submitted in connection with the enquiry against Misra, he found him guilty only of one charge, namely, that he did not sign the relevant register from 20-10-1981 to 9-11-1981 but exonerated him of charges two to six. As far as Goel is concerned, the enquiry officer in his report found him not guilty of any of the charges and exonerated him.

On the receipt of the reports from the enquiry officer, the disciplinary authority, the Regional Manager of the appellant-Bank to whom the reports were submitted did not agree in the case of Misra with the findings of the enquiry officer in respect of charges two to six and by a short order dated 12-12-1983, passed an order holding that it was an undisputed position that Misra being Assistant Manager was in the joint custody of the keys of the currency chest and he had personal responsibility towards the safe custody of the cash and that no material had been placed during the enquiry proceedings to establish that he had discharged his duties in the manner expected of him. The disciplinary authority accordingly held Misra to be responsible for the shortage in question and held that a minor penalty of

proportionate recovery ought to be imposed on the respondent for the loss of Rs 1 lakh caused to the Bank due to negligence on his part in the discharge of his duties. Similarly in the case of Goel, the disciplinary authority did not agree with the enquiry report and passed an order dated 15-12-1983 directing proportionate recovery of the loss of Rs 1 lakh caused to the Bank by him. During the pendency of these disciplinary proceedings, both Misra and Goel superannuated on 31-12-1983. The disciplinary authority accordingly directed the recovery of the money from the Bank's contribution to the provident fund of the respondent-officers.

The respondents then filed appeals to the appellate authority but they were unsuccessful. Thereupon Misra filed Civil Writ Petition No. 3197 of 1984 before the Lucknow Bench of the Allahabad High Court while Goel filed Civil Writ Petition No. 1192 of 1984 in the High Court at Allahabad. The main contention of the respondents in the said writ petitions was that the disciplinary authority, who had chosen to disagree with the conclusions arrived at by the enquiry officer, could not have come to adverse conclusions without giving them an opportunity of being heard and the orders passed against them were liable to be quashed. This contention found favour with the High Court who, while allowing Misra's writ petition vide its judgment dated 20-2-1990, quashed the order imposing penalty and directed the appellants to release the retirement

benefits including provident fund and gratuity. Following the aforesaid decision, the writ petition filed by Goel was allowed by the High Court on 10-1-1995 and a similar direction was issued for the release of the retirement benefits like provident fund and gratuity etc. to the said respondent.

Thereafter, appeals by special leave came up for hearing before a Bench of two Judges of the Hon'ble Apex Court. While the appellants placed reliance on the decision in *State Bank of India v. S.S. Koshal* [1994 Supp (2) SCC 468 : 1994 SCC (L&S) 1019 : (1994) 27 ATC 834] the counsel for the respondents placed reliance on two other two-Judge Bench decisions in *Institute of Chartered Accountants of India v. L.K. Ratna* [(1986) 4 SCC 537 : (1986) 1 ATC 714] and *Ram Kishan v. Union of India* [(1995) 6 SCC 157 : 1995 SCC (L&S) 1357 : (1995) 31 ATC 475] . Both the sides also referred to the Constitution Bench decision of this Court in *Managing Director, ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] and each of them sought to place reliance on them. In view of the apparent conflict in the decisions in the first three cases by order dated 30-10-1996 [From the Judgment and Order dated 20-2-1990 of the Allahabad, High Court in W.P. No. 3197 of 1984] , the case was referred to be heard by a larger Bench. Thereafter, matter was placed before the full bench of the Hon'ble Apex Court to resolve the apparent conflict.

9. The Hon'ble Apex Court based upon the aforesaid background has laid down the proposition in a situation where if the charge has not been found to be proved by the inquiry officer, then the disciplinary authority has not been said to be remediless rather the disciplinary authority has been conferred with a power which is to be exercised by him. In a situation of charge having not found to be proved the disciplinary authority by showing difference of opinion by assigning the reason may communicate the same to the delinquent employee for the purpose of providing opportunity to put his defence. The relevant paragraph is paragraph no. 19 of the said judgment which is being quoted and referred herein:

"19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result, thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

10. The purpose is that in such situation when the inquiry officer has found none of the charges proved against the delinquent employee then the delinquent employee ought to have been given an opportunity to defend himself on the issue of showing the difference of opinion.

11. Adverting to the facts of the present case wherein also the admitted fact is that the writ petitioner while holding the post of Junior Engineer has been proceeded by imputing the following charges:

“आरोपसंख्या-1-श्री बिन्दापासवान, कनीय अभियंता द्वारा श्री गौरी शंकर प्रसाद सिंह, तत्कालीन सा र्यपालक अभियंता, पथ प्रमंडल, गुगलावो कार्यकाल में विवेकाधीन मद में कार्य हेतु कार्यपालक अभियंता की सक्षमता (25.000=00सं०) में लाने के उद्देश्य से गुमला रायडीह-चैनपुर पथ के लिए कुल 11.89.149=00 रु०केलिए 50 अदद प्राक्कलन तैयार किए गए तथा संबंधित सहायक अभियंता श्री सदानन्द प्रसाद के माध्यम से कार्यपालक अभियंता से इन प्राक्कलनों पर स्वीकृति प्राप्त कर ली गयी। इस मामले में आरोपित कनीय अभियंता द्वारा न सिर्फ एक ही पथ के लिए किलोमीटर वाइज अलग-अलग प्राक्कलन तैयार किए गए अपितु एक ही पथ के विभिन्न किलोमीटर की लम्बाई में अलग-अलग प्राक्कलन तैयार किए गए ताकि इन प्राक्कलनों को 25.000-00 रु० के अन्तर्गत लाया जा सके तथा बिना उच्चस्तरीय स्वीकृति उक्त राशि का फर्जी विपत्र तैयार कर एवं गलत व्यय दिखाकर दुःविनियोग के सहारे राशि का गबन किया जा सके। उक्त पथ में आरोपित कनीय अभियंता द्वारा संबंधित सहायक अभियंता तथा कार्यपालक अभियंता के साथ षड्यंत्र कर लगभग 10.90.000=00 रु० का व्यय दिखा दिया गया।

इस प्रकार एक ही पथ का खंड-खंड में प्राक्कलन तैयार कर तथा एक ही पथ में कुल प्राक्कलित राशि का जान बुझकर कार्यपालक अभियंता की सक्षमता की अधिसीमा से अधिक राशि का कार्य बिना सक्षम पदाधिकारी का स्वीकृति प्राप्त किए ही संपादित दिखाकर इनके द्वारा मुख्य सचिव, बिहार का परिपत्र आदेश संख्या-462 त०प०को० दिनांक 30.03.1982 में विहित अनुदेश का उल्लंघन किया गया जिसके लिए ये दोषी है।

आरोप संख्या-2- वर्ष 2008-09 के अंतर्गत विवेकाधीन मद के तह त्संपादित दिखाए गए कार्यों की जाँच के दौरान पाया गया कि गुमला रायडीह-चैनपुर पथ के लिए स्वीकृत प्राक्कलनों में अन्य मदों के साथ ही WBM Grade III का कार्य की स्वीकृत किए गए थे तथा इन मदों को संपादित दिखाकर राशि का व्यय भी दिखलाया गया है। परन्तु जाँच के दौरान पाया गया कि भौतिक रूप से WBM Grade III का कार्य पथ में कराया ही नहीं गया।

इस प्रकार, आरोपित कनीय अभियंता द्वारा संबंधित सहायक अभियंता एवं कार्यपालक अभियंता के साथ मिलकर WBM Grade III के कार्य को बिना संपादित किए ही Criminal Breach of Trust एवं आपराधिक षड्यंत्र के तह त्कूट अभिलेख तैयार कर इस अभिलेखों में संपादित दिखा दिया गया तथा व्यय गत दर्शाए गए राशि का गबन कर लिया गया।

इस प्रकार आरोपित कनीय अभियंता न सिर्फ सरकारी सेवक आचार नियमावली 1976 के नियम 3(1) (II) (III) तथा 3(3) के प्रतिकूल आचरण के लिए दोषी है, अपितु विहार वित्त नियमावली के नियम -9 के तह त्प्रावधानित वित्तीय औचित्य के सिद्धान्तों के प्रतिकूल वित्तीय अनियमितता करने तथा बिहार वित्त नियमावली के नियम-34 के तह त्सरकार को वित्तीय क्षति पहुँचाने के लिए दोषी है।

आरोप संख्या-3- वर्ष 2008-09 के अंतर्गत विवेकाधीन मद के तह त्स्वीकृत प्राक्कलन में पथों के पलैंक में मिट्टी करने तथा पथों में मूरम बिछाए जाने के प्रावधान स्वीकृत कराए गए थे तथा इन्हें संपादित दिखाकर व्यय किया गया

भी दर्शाया गया। परन्तु जाँच के दौरान पाया गया कि आरोपित कनीय अभियंता के प्रभार में पड़ने वाले गुमला रायडीह-चैनपुर पथ में ये कार्य नहीं कराए गए। जिन पथांशों में मूरम की गुणवत्ता निम्नस्तरीय पाया गया तथा मिट्टी कार्य में भी संपीड़न का आभाव पाता गया।

इस प्रकार, आरोपित कनीय अभियंता द्वारा न सिर्फ सरकारी सेवक आचार नियमावत 1976 के नियम 3(1) (II) (III) तथा 3(3) में अपेक्षित आचरण के प्रतिकूल कार्य किया गया अपितु बिहार वित्त नियमावली के नियम -9 एवं नियम-34 के तहत सरकार को वित्तीय क्षति भी पहुँचाया गया जिसके लिए वे दोषी है।

आरोप संख्या-4- वर्ष 2008-09 के अंतर्गत विवेकाधीन मद के तहत यगत्राशि के सभी कार्य विभागीय रूप से कराए गए दर्शाए गए हैं। परन्तु तो सामग्रियों की अलग से आपूर्ति ली गयी और न मजदूरों द्वारा श्रम पुस्त पर श्रम कार्य कराया गया। इसके विपरीत संवेदकों को किए जाने वाले भुगतान की तरह Finished कार्यों का भुगतान किया गया है, जो लेखा प्रक्रिया का गंभीर उल्लंघन है, जिसके लिए आरोपित कनीय अभियंता दोषी हैं।”

12. The writ petitioner was asked to participate in the enquiry proceeding who participated in the same and defended the charges leveled against him. The inquiry officer had concluded the inquiry and found none of the charge having been proved against the petitioner.

The opinion of the inquiry officer is as under:

“आरोप संख्या-1-

निष्कर्ष - विवेकाधीन प्रायोजन हेतु आवंटन साधारण मरम्मत शीर्ष के अंतर्गत आता है और इस शीर्ष के अंतर्गत साधारण मरम्मत मद के किसी भी राशि के प्राक्कलन की स्वीकृति आवंटन की सीमा तक करने के लिए कार्यपालक अभियंता सक्षम है। पुनः यदि किसी पथ के लिए विवेकाधीन प्रयोजनार्थ एक ही प्राक्कलन का सृजन किया जाता तो विवेकाधीन प्रायोजन हेतु प्राप्त आवंटन में से एक पथ में मात्र 25000/- रुपये का व्यय संभव था और प्राप्त आवंटन का उपयोग सार्थक नहीं रह जाता। अतः उक्त तथ्यों के आलोक में कार्यपालक अभियंता के निदेशानुसार खण्ड-खण्ड में कनीय अभियंता द्वारा प्राक्कलन सृजन करने को गलत नहीं कहा जा सकता है। पुनः रु० 10.90.000/- रुपये के फर्जी विपत्र तैयार करने की पुष्टि भी संलग्न साक्ष्यों से नहीं हो पाती है। अतएव यह आरोप प्रमाणित नहीं होता है।

आरोप संख्या-2-

निष्कर्ष कार्यपालक अभियंता, पथ प्रमण्डल, गुमला को दिये गये आवंटन आदेश की प्रति उपायुक्त, गुमला को दिये जाने के कारण आवंटित राशि की जानकारी उपायुक्त, गुमला को थी और शायद इसी वजह से पथों के निरीक्षणोपरांत उनके द्वारा कार्यपालक अभियंता को WBM Gr. III के कार्य में सुधार कर Premix Carpet या Pot Patch के लिए लिखा गया। कार्यपालक अभियंता के अनुपालन प्रतिवेदन के बाद उपायुक्त द्वारा पुनः कोई पत्राचार नहीं किये जाने से यह प्रतीत होता है कि आरोपित पदाधिकारी द्वारा कार्य में सुधार कर Premix Carpet/Pot Patch का कार्य करवा दिया गया होगा। बाद की तिथि में जाँच दल द्वारा WBM Gr. III का कार्य नहीं

पाये जाने के सम्बन्ध में यह तर्क संगत प्रतीत होता है कि WBM Gr. III के कार्य को Premix Carpet या Pot Patch में Cover कर दिया गया होगा।

यह आरोप प्रमाणित नहीं होता है।

आरोप संख्या-3-

निष्कर्ष आरोप के साथ संलग्न साक्ष्य के रूप में अधीक्षण अभियंता, पथ अंचल, राँची एवं अधीक्षण अभियंता, राष्ट्रीय उच्च पथ अंचल का जाँच प्रतिवेदन संलग्न है जिसमें प्रथम जाँच प्रतिवेदन में मिट्टी मूरम का कार्य नहीं किये जाने एवं दूसरे में कुछ पथांश में मिट्टी मूरम का कार्य किये जाने का सेमिटी किया गया है परन्तु इनकी गुणवत्ता एवं संपीड़न पर प्रश्नचिह्न खड़ा किया गया है। दोनों जाँच प्रतिवेदन में किसी पथांश विशेष में प्राक्कलन के अनुरूप किये जाने वाले मिट्टी मूरम की मात्रा, मापी पुस्ति में दर्ज मिट्टी की मात्रा का उल्लेख है और न ही स्थल पर किये गये कार्यों का ही मापी पुस्ति में दर्ज मात्रा से मिलान किया गया है। किसी भी प्रतिवेदन में गुणवत्ता या संपीड़न के लिए कोई जाँच किये जाने का उल्लेख नहीं किया गया है। वर्णित परिस्थितियों में आरोपित पदाधिकारी का सदेह का लाभ देते हुए इस आरोप से मुक्त किया जा सकता है।

आरोप संख्या-4-

निष्कर्ष लेखा के समंजन संबंधी कागजात से स्पष्ट होता है कि कार्यपालक अभियंता एवं सहायक अभियंता के निर्देश पर ही श्री पासवान, कनीय अभियंता द्वारा Finished rate पर भुगतान हेतु प्रमाणक तैयार किये गये। कार्य से संबंधी पथांश उग्रवादग्रस्त क्षेत्र में है इसलिए कार्य कराना दुष्कर एवं जोखिम भरा है। अतः श्री पासवान को इस आरोप में बरी किया जा सकता है। इसके अतिरिक्त ध्यानयोग्य है कि जाँच से पूर्व परिवाद पत्र की संपुष्टि कराई गई है, ऐसा कोई पत्र या प्रमाण सुनवाई के दौरान उपलब्ध नहीं कराया गया जबकि सरकार का निर्देश है कि परिवाद पत्र चाहे वे कितने भी विशिष्ट प्रकृति के क्यों नहीं हो। पर तब तक कोई कार्रवाई न परिवाद दाता से प्राप्त न कर ली जाय। की जाय, जब तक कि इसकी संपुष्टि परिवाद दाता से प्राप्त न कर ली जाय।

13. The aforesaid inquiry report was forwarded to the Deputy Secretary of the concerned department who differed with the opinion raised by the inquiry officer as per Annexure -7 to the writ petition. The disciplinary authority admittedly was not the disciplinary authority but even then, the inquiry report was forwarded to him. The Deputy Secretary, thereafter, has forwarded the second show cause notice along with its reply to the disciplinary authority, the Engineer-in-Chief who in turn thereof inflicted the recovery of Rs./- 3,63, 333/- along with major punishment of withholding three annual increments with cumulative effects and other punishments.

14. The question of issuance of second show cause notice which contains difference of opinion is not a concept in a situation where the charge has not been found to be proved and the same has been differed by the disciplinary authority. The reason being that the second show cause notice must be issued by the disciplinary authority on acceptance of the inquiry report so as to provide an opportunity to the delinquent employee before inflicting punishment. The disciplinary authority thereafter is to pass an order on consideration of the reply given by the delinquent employee which would be evident from paragraph 19 of the judgment referred herein above.

15. The learned State counsel has also admitted that disciplinary authority of the post of Junior Engineer is the Engineer-in-Chief. As such, the power conferred to take any disciplinary action lies upon the Engineer-in-Chief not upon any other officer of the department. Herein the difference of opinion ought to have been shown by the disciplinary authority who is the Engineer-in-Chief but actually it has been shown by the Deputy Secretary of the concerned department. The said difference of opinion has been forwarded to the authority who on its acceptance has inflicted punishment and, not only that, it has referred in the impugned order that the punishment has been inflicted after scrutinizing the entire materials. The entire materials mean the difference of opinion shown by the Deputy Secretary and the response furnished by the delinquent employee. Therefore, consideration /application of mind which was to be made by the disciplinary authority i.e. the Engineer-in-Chief has not been made. Consideration

always means application of mind which is to be made by the disciplinary authority not by the other officer.

16. Consideration does not mean a mere formality, rather, if any document or stand has been taken in defence, it is the bounden duty of the authority concerned to discuss and while accepting or refusing, the same must be based upon the well assigned reason, otherwise, it cannot be said to be a consideration in the eyes of law since consideration means active application of mind which can only be said to be there if the document/defence will be well considered by the authority concerned, reference in this regard be made to the judgment rendered by Hon'ble Apex Court in the case of *Chairman, Life Insurance Corporation of India and Others v. A. Masilamani* reported in (2013) 6 SCC 530 wherein at paragraph 19 it has been held that the term “consider” postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The relevant paragraph of the aforesaid judgment is being quoted and referred herein as under:

19. The word “consider” is of great significance. The dictionary meaning of the same is, “to think over”, “to regard as”, or “deem to be”. Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term “consider” postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order.”

17. It is not in dispute that if in any provision of law, there is no reference of observance of principle of natural justice before passing any stigmatic order or an order which is going to adversely affect the party, even then, the principle of natural justice is required to be followed, being a cardinal principle to be observed before taking any adverse decision against the party.

18. Before the Hon'ble Supreme Court in **Mrs. Maneka Gandhi Vrs. Union of India and Anr., [(1978) 1 SCC 248]**, similar issue fell for consideration with respect to vires of the provision of Section 10(3) of the Indian Passport Act on the ground that before impounding the passport, the principle of natural justice has not been followed. The plea was taken that under the provision of Section 10(3) of the Indian Passport Act, there is no provision to issue show cause notice and as such, there cannot be said to be any illegality committed by the authority in impounding the passport without observing the principle of natural justice.

19. The provision of Section 10(3) was questioned on the ground that when any adverse decision is to be taken, the cardinal principle of natural justice is to be observed but the aforesaid provision having not been referred in the provision of Section 10 of the Indian Passport Act, therefore, it may be declared as ultra vires.

20. The Constitution Bench of the Hon'ble Supreme Court, however, refused to hold the provision of Section 10 of the Indian Passport Act ultra vires, but, it has been laid down that even if there is no provision to issue show cause notice contained in the punitive

provision, then also principle of natural justice, being cardinal in nature, has to be observed. For ready reference, the relevant paragraph of the said judgment is being referred herein below:

"9. We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club:

"We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet re-remain to be solved. But I affirm that the area of administrative action is but one area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a „majestic“ conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair-play in action -- who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration.

And then again, in his speech in the House of Lords in Wiseman v. Borneman¹⁴, the learned Law Lord said in words of inspired felicity:

"... that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or

precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only „fair play in action“. Nor do we wait for directions from Parliament. The common law has abundant riches : there may we find what Byles, J., called „the justice of the common law“ "

Thus, the soul of natural justice is "fair-play in action" and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that "fair-play in action" demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The rule was stated by Lord Denning, MR in these terms in Schmidt v. Secretary of State or Home Affairs -- "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand. It has even gained access to the United Nations (vide American Journal of International Law, Vol. 67, p. 9 479). Magarry, J., describes natural justice "as a distillate of due process of law" (vide Fontaine v. Chastarton¹⁶). It is the quintessence of the process of justice inspired and guided by "fair-play in action". If we look at the speeches of the various Law Lords in Wiseman case¹⁴ it will be seen that each one of them asked the question "whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal "in all the circumstances unfair?" The test adopted by every Law Lord was whether the procedure followed was fair in all the circumstances and "fair-play in action" required that an opportunity should be given to the taxpayer "to see and reply to the counter- statement of the Commissioners" before reaching the conclusion that "there is a prima facie case against him". The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected?"

21. This Court based upon the aforesaid proposition of law coupled with the judgment rendered by the Constitution Bench of the Hon'ble Apex Court and also the applicability of the said judgment in the facts of the present case wherein the Engineer-in-Chief being the disciplinary authority has not applied his mind rather he has acted upon on the basis of the difference of opinion shown by the Deputy Secretary who even was not having any jurisdiction to look into, the same cannot be said to be just and proper.

22. Accordingly, the order of punishment is hereby quashed and set-aside.

Issue No.2

23. The second issue pertains to remand of the matter to the concerned authority. This Court conscious about the fact that on technicality no advantage will be given to the delinquent employee or anybody but the aforesaid principle is to be considered based upon the factual aspect. This Court therefore is proceeding to assess as to whether in the facts of the present case the matter needs to be remitted. The admitted position herein that the memorandum of charge is dated 9.02.2010 and the order of punishment was passed in the year 2012 and since then the considerable period i.e. more than a decade has lapsed and in the meanwhile writ petitioner has also retired from service.

24. The issue of remand has also been taken into consideration by the Hon'ble Apex Court in the said judgment i.e. ***Punjab National Bank & Others Vs. Kunj Behari Misra*** as would be evident from paragraph no. 21 thereof which is being referred herein under:-

“21. Both the respondents superannuated on 31-12-1983. During the pendency of these appeals, Misra died on 6-1-1995 and his legal representatives were brought on record. More than 14 years have elapsed since the delinquent officers had superannuated. It will, therefore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings. We, therefore, do not issue any such directions and while dismissing these appeals, we affirm the decisions of the High Court which had set aside the orders imposing penalty and had directed the appellants to release the retirement benefits to the respondents. There will, however, be no order as to costs.”

25. It appears from the aforesaid paragraph that the matter was not remanded since in the meanwhile the concerned litigant of the said case has retired and in the meanwhile 14 years have already been lapsed. Applying the same principle herein also that the disciplinary proceeding was initiated in the month of February, 2010, concluded in the year 2012 and since then 14 years have already been lapsed and in the meanwhile the writ petitioner has already retired. Then the question is that why the matter is to be remitted by relegating the petitioner to take the rigour of the departmental proceeding at the stage when he has already superannuated from service.

26. The learned State counsel has failed to answer the proceeding after retirement under which provision, although he has submitted that Rule 43 of the Pension Rule can be taken care of. This Court is of the view that there is no applicability of Rule 43 of the Pension Rule, since, the rider is there that the punishment withholding the pension is to be inflicted based upon the offence/charge which is not beyond the period of four years from the date of initiation of the proceeding.

27. This Court is further of the view that if the law is already settled and it is the bounden duty of the disciplinary authority to conclude the proceedings strictly in pursuance of the law and if there is any deviation on the part of the disciplinary authority then certainly the disciplinary authority being a wrong doer and the said wrong doer cannot be allowed to take advantage of its own wrong on the basis of the settled principle of law as has been laid down in the case of ***Kusheshwar Prasad Singh vs. State of Bihar and Ors., (2007) 11 SCC 447***, wherein at paragraphs-14, 15 and 16, the Hon'ble Apex Court has observed as under:

"14. In this connection, our attention has been invited by the learned counsel for the appellant to a decision of this Court in Mrutunjay Pani v. Narmada Bala Sasmal [AIR 1961 SC 1353] wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet (no party can take undue advantage of his own wrong).

15. ... This Court (at SCC p. 142, para 28) referred to Broom's Legal Maxims (10th Edn.), p. 191 wherein it was stated: "It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".

28. This Court considering the aforesaid facts is of the view that it is not a case where the matter is to be remanded.

29. The writ petition accordingly stands allowed and disposed of.

30. Consequently, the order impugned is hereby quashed and set aside.

31. Pending interlocutory application (s), if any, also stands disposed of.

(Sujit Narayan Prasad, J.)

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KNR/AFR

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