* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 16.02.2024
Judgment pronounced on: 06.03.2024

\+ W.P.(C) 3940/2017 & CM APPL.14022/2021

PARVEEN KUMAR ..... Petitioners

versus

EXPORT INSPECTION COUNCIL & ORS .... Respondents

Advocates who appeared in this case:

For the Petitioner : Petitioner in person

For the Respondent : Mr. L.R. Khatana, Advocate

CORAM:
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G M E N T

TUSHAR RAO GEDELA, J.

[The proceeding has been conducted through Hybrid mode]

1. This a writ petition under Article 226 of the Constitution of India, *inter alia*, seeking the following reliefs:-

> *"(I) Quash the illegal, malacios, arbitrary, fraudulent, without jurisdiction & injurious punishment order dt. 17.02.2016 Annexure P-1].*

(II) Quash the illegal, malacios, arbitrary, fraudulent, without jurisdiction & injurious punishment order dt. 20.02.2016 [Annexure P-2].

(III) Issue order for all consequential benefits with 12% interest.

(1V) Any other relief deemed fit and proper in the facts & circumstances of the case may kindly be granted in favour of the petitioner in the interest of justice."

2. It is the case of the petitioner that he was appointed as a Junior Scientific Assistant with the respondent/Export Inspection Council on a direct recruitment basis, on 08.11.1989. At the relevant time, he was working as a Technical Officer in Export Inspection Agency under the respondent office.

3. Petitioner states that while working in the respondent department, the petitioner filed a petition bearing W.P.(C) 5374/2004 exposing recruitment scam in his department in which sixteen Assistant Director (including Rajvinder Singh/Respondent no. 4) was recruited fraudulently, without establishing merit and members of Selection Committee forged their signatures in the selection process.

4. It is also the case of the petitioner that *vide* the office order dated 10.09.2013, the petitioner was directed to proceed to sub-office, Kanpur to hold charge w.e.f. 11.09.2013 since the officer in charge of SO Kanpur was hospitalized. In this regard, the petitioner submitted a representation dated 11.09.2013 requesting to not depute him on tour

to SO, Kanpur. Thereafter, *vide* the office order dated 12.09.2023, the respondent rejected the request made by the petitioner and stated that the petitioner would stand relieved on 13.09.2013 (A/N) from EIA Delhi Head Office to report for duty to SO, Kanpur w.e.f. 16.09.2013, till further orders. The respondent No.4 & Competent Authority advised the petitioner to submit the tour programme from 16.09.2013 to 20.09.2013. Accordingly, the petitioner filed the tour programme which was approved by the respondent.

5. On 20.09.2013, the respondent in breach of the sanctioned tour, instead of sending other officer on tour, ordered the petitioner to stay on tour till further orders, without money for food and shelter.

6. On 01.02.2014, the petitioner filed three criminal complaints against respondent no. 3 for grabbing the post of Director (I &Q.C), Export Inspection Council of India by misrepresenting his educational qualification.

7. Thereafter, *vide* office order dated 04.02.2014, the respondent yet again directed the petitioner to be deputed on tour to the sub-office, Kanpur from 06.02.2014 onwards, till further orders. It is the case of the petitioner that the petitioner immediately filed a tour programme. The same was rejected by the Account Section of the respondent for not having a termination date of tour.

8. On 06.02.2014, the respondent issued a letter to the petitioner

directing him to submit a proper tour programme. To this, the petitioner sent a request letter dated 11.02.2014 withdrawing the *bonafide* request for tickets and requested the respondents to settle his tour programme as per the rules or issue a sample of '*properly filled tour programme'* as desired by the respondents.

9. It is the case of the petitioner that respondents yet again issued a letter dated 26.02.2014 to the petitioner to submit a proper tour programme against the order dated 04.02.2014, declaring that the tour programme dated 05.02.2014 was improper. Hence, the petitioner repeatedly requested the respondents to co-operate and help him in submitting a proper tour programme.

10. On 27.03.2014, the respondent no.3 issued a charge-memorandum under the authority of Export Inspection Council of India alleging disobedience of the order dated 04.02.2014 by the petitioner.

11. Thereafter, the petitioner sought copies of relevant documents from the respondents, which were not provided to the petitioner, constraining him to file W.P.(C) 2458/2014. The said petition was disposed of by this Court *vide* order dated 22.04.2014 permitting the petitioner to submit a representation with a direction to the respondent to decide the same within a specified period, and also extending the time for the petitioner to file a reply to the charge memo.

12. On 12.05.2014, the petitioner filed his reply. Thereafter, the petitioner submitted a request on 16.05.2014, for Voluntary Retirement under Rule 48-A of CCS Pension Rules, which was rejected by the respondent *vide* order dated 27.05.2014.

13. The disciplinary enquiry was initiated against the petitioner and an Inquiry Officer was appointed on 02.12.2014. The petitioner made a representation against the illegal appointment of an ineligible person, being a retired public servant, as Inquiry Officer in contravention of Rule 11 of the statutory Export Inspection Employees (Classification, Control & Appeal) Rules, 1978, which was rejected by the respondent, *vide* order dated 19.12.2014.

14. Upon another representation made by the petitioner, the respondents *vide* office order dated 19.01.2015, upheld the appointment of Mr. Inder Singh as the Inquiry Officer, citing Section 21 of the Indian Penal Code, 1860.

15. On 08.07.2015, the Petitioner submitted a protest letter on irregular & illegal/fraudulent conduct of enquiry as well as illegal appointment of Mr. Inder Singh as Inquiry Officer.

16. *Vide* the order dated 17.02.2016, the Disciplinary Authority passed an order of penalty of reduction in rank from Technical Officer to Lower Post of Junior Scientific Assistant against the petitioner. Thereafter, the petitioner preferred a statutory appeal which was

dismissed by the Appellate Authority *vide* order dated 20.02.2017.

17. The petitioner has approached this Court assailing the aforesaid orders dated 17.02.2016 and 20.02.2017.

CONTENTIONS OF THE PETITIONER:

18. The petitioner, who appears in person, submits that the penalty order has arisen out of the disciplinary proceedings initiated against him on the charge of not having obeyed the orders passed by the Competent Authority directing him to go on a tour to Kanpur Sub-Office till further orders. He submits that even though the petitioner had been repeatedly requesting that he may be provided with tickets as also the hotel and food charges for stay in Kanpur, no action was taken on his request on the wholly baseless premise that his tour programme was not proper.

19. Mr. Parveen Kumar, the petitioner in person submitted that he had been employed with the respondent and in that capacity, been deputed to various places on official duty under the Tour Orders. He submits that *vide* the order dated 04.02.2014, the petitioner was deputed on tour to the sub-Office at Kanpur, till further orders, w.e.f. 06.02.2014. Pursuant thereto, the petitioner claims to have given a requisition of his tour programme to the Accounts Department of the respondent for the purposes of providing the 'to and fro' ticket, hotel charges, and food charges till further orders, in compliance of order

dated 05.02.2014. He submits that though this was sanctioned by the Deputy Director (Mr. Nitin Y. Meshram), yet *vide* the order dated 06.02.2014, the respondent had rejected the requisition on the ground that there was no provision under the Rules where the tickets are booked by the office for a Touring Officer. A serious advisory was also simultaneously issued directing the petitioner to submit a proper tour programme and proceed to join duty at the sub-office at Kanpur, failing which the non-compliance would be viewed seriously.

20. It is the case of the petitioner that by the letter dated 11.02.2014 addressed to the Deputy Director (Incharge), the petitioner had requested for settlement of his tour programme submitted on 05.02.2014. In particular, he had requested that the closure to the tour programme be given, apart from the 'to and fro' fare with arrival and departure date; hotel charges; food charges in terms of order dated 04.02.2014. He further requested for a sample tour programme. Without referring to the said letter, the Deputy Director, *vide* the letter dated 26.02.2014 informed the petitioner that he was relieved from the respondent-office to join duty at the sub-office at Kanpur on 06.02.2014. It was also informed that the tour programme dated 05.02.2014 was neither a proper programme nor did the petitioner join the sub-office at Kanpur. He was directed to join Kanpur sub-office immediately, failing which the same would be taken as disobedience.

21. Mr. Kumar submits that since his tour programme was not

closed properly, he had no choice but to rejoin the services of the respondent at the original place of employment.

22. On disciplinary proceedings having been initiated against the petitioner, the petitioner participated in the same and conducted cross-examination of various witnesses produced on behalf of the respondent. By referring to the statement of one Mr. Rohit Malik dated 09.07.2015, he submits that the cross-examination vindicates the stand taken by the petitioner. He submits that no consent of the employee for closure of the tour is required and that the said information has to be provided by the office itself. In fact, to the question as to whether the starting date and the termination date of a particular tour are necessary ingredients for finalizing a tour in advance in regard to hotel and food charges, the witness affirmed that the same is required to work out the amount of Travel Allowance advance. The relevant documents were also confronted to the witness to affirm that no such closure date for the tour programme was mentioned therein.

23. Mr. Kumar referred to the earlier tour programme dated 12.09.2013 whereby similar tour order was passed by the respondent however, the closure of the tour programme was intimated to the petitioner which was filled in by the petitioner while submitting the requisition for travel allowance and other advance for the intended tour between 16.09.2013 to 20.09.2013. According to the petitioner, the tour programme from 16.09.2013 to 20.09.2013 was modified by the

Competent Authority (Deputy Director) and informed to the petitioner which was thereafter added in the said requisition. He asserted that every time, the petitioner has been given a closure date of the tour programme by the respondent.

24. He submits that it is not the petitioner who can decide the closure date of the tour programme, and the same is within the competence of the Competent Authority of the respondent. He vehemently submitted that it is not the whims and fancies of an employee to return back to the original office as and when the employee pleases since the end of the tour is determinable by the superior officer. On that basis, Mr. Kumar submits that the allegation of the respondent that the petitioner had not given the closure date is contrary to the facts or even the logic.

25. A charge sheet was issued on 27.03.2014 under Rule 8 of the Export Inspection Council Employees (CCA) Rules, 1978 and Export Inspection Agency Employees Rules (CCA) Rules, 1978. Mr. Kumar had meticulously referred to the Articles of Charge, the Statement of Imputations and the impugned order dated 17.02.2016 to submit that the Disciplinary Authority did not consider any of the defences raised by him and had already predetermined the punishment.

26. The petitioner challenged the order of Disciplinary Authority (hereinafter referred to as 'DA') primarily on two grounds which

according to him are clear violations of Principles of Natural Justice as also Rules and Regulations of the respondent. The first contention of the petitioner is that the order dated 12.02.2014 whereby the Inquiry Officer was appointed is vitiated inasmuch it is contrary and violative of Rule 11 (2) of the Export Inspection Agency Employees (Classification, Control and Appeal) Rules, 1978 (hereinafter referred to as 'EIA Rules') of the respondent.

27. Mr. Kumar submits that Rule 11 (2) prescribes the Inquiry Officer to be a "*Public Servant*". He submits that admittedly, the Inquiry Officer who was appointed was a retired employee of the respondent and not in active duty. According to Mr. Kumar, retired employees cannot be called Public Servants. He relies upon the judgment of the Supreme Court in ***Union of India & Ors. vs. P.C. Ramakrishnayya*** reported in **(2010) 8 SCC 644**, particularly para 12 to 16 to submit that a retired employee by no stretch of imagination can be called a Public Servant, as he ceases to be in service. On that basis, he submits that due to the appointment of Mr. Inder Singh as Inquiry Officer, being an incompetent officer, the enquiry proceedings as also the subsequent disciplinary proceedings are vitiated and the impugned punishment orders be quashed and set aside.

28. The other leg of argument of the petitioner proceeded on the basis that the petitioner was not granted any opportunity of hearing by the Disciplinary Authority before passing the impugned order. He

relies on the EIA Rules, 1978 particularly Parts V and VI regarding "*Penalties, Disciplinary Proceedings and Disciplinary Authorities"*. In particular, he referred to Rule 11 (4) to submit that after the written Statement of Defence is submitted, if the Charged Officer sought hearing, the Disciplinary Authority ought to grant such hearing before passing the final order. Mr. Kumar, by referring to the Statement of Defence submitted that the petitioner had sought personal hearing, which was never granted. He asserts that this cannot be disputed by the respondent. On that basis, he submits that not only the statutory rules were violated but the well settled Principles of Natural Justice in accordance with the administrative law were also brazenly violated rendering the impugned order of the Disciplinary Authority liable to be quashed. He prays that the petition be allowed and the impugned orders dated 17.02.2016 and 20.02.2017 be quashed and the penalty of "*reduction in Rank from the post of Technical Officer to the lower post of Junior Scientific Assistant, until he is found fit by the competent authority to be restored to the post of Technical Officer"*, be set aside.

29. Mr. Kumar had also referred to all the correspondences and letters exchanged between the parties to submit that the petitioner was constrained to send communications to the respondent since its officers were not cooperating in closing the date of the tour. On merits, the petitioner also took this Court through portions of the cross examination of certain witnesses and read through the order of

Disciplinary Authority as well as of Appellate authority to submit that not only the principles of natural justice were violated, but also on merits, guilt could not have been held to be proved. On this basis, Mr. Kumar prays that the present petition be allowed.

CONTENTIONS OF THE RESPONDENT:-

30. Mr. L.R. Khatana, learned counsel for the respondent, at the very outset submits that the petitioner was imposed the penalty *vide* the impugned order dated 17.02.2016 after following the due procedure of law and abiding with the principles of natural justice. The order of penalty passed by the Disciplinary Authority was also tested and confirmed by the Appellate Authority *vide* the order dated 20.02.2017. It is submitted that as such, the impugned orders need not be interfered with by this Court under Article 226 of the Constitution of India.

31. Even otherwise, Mr. Khatana submits it is trite that the High Court under Article 226 of the Constitution of India is not to act as an Appellate Court and is only to judicially review whether the procedure prescribed has been followed and that the principles of natural justice have broadly been complied with.

32. Learned counsel submits that in any case, the adjudication of the issue raised in the present petition would be an academic exercise only inasmuch as the petitioner was subsequently dismissed from service as

a result of another disciplinary proceedings.

33. Learned counsel meticulously took this Court through all the documents placed on record to submit that the petitioner has been unable to show any Rule, Regulation or Circular in support of his contention that the closure of the tour programme is to be given by the respondent and not the employee himself. In order to support the aforesaid contention, he referred to the previous tour *vide* order dated 12.09.2013. According to learned counsel, even in the said office order, the petitioner was deputed for a tour to Kanpur sub-office *w.e.f.* 16.09.2013, till further orders. Yet, when the petitioner submitted his requisition for travel allowance on separate heads, he had filled in the closure date himself. He submits that such requisition being in tune with the practice, the Accounts Department released the amounts required during that tour. On this basis, Mr. Khatana submits that the petitioner was well aware of the practices of the respondent and this submission on behalf of the petitioner is nothing but a bogey raised by the petitioner in order to escape the imposition of penalty. In fact, learned counsel submits that in the previous requisition, the petitioner himself had purchased tickets and merely sought reimbursement which was admittedly granted to him. Whereas, in regard to the present tour, by the letter dated 11.02.2014, he made submissions which were contrary to the previous documents. Learned counsel submits that the absurdity of the submissions of the petitioner is apparent from para 3

of the letter dated 11.02.2014 wherein he sought a sample of a properly filled tour programme.

34. Learned counsel for the respondent vehemently opposed the submissions of the petitioner and submitted that the tenor of the letters on record submitted by the petitioner undoubtedly indicates that the petitioner was only delaying the tour and disobeying the lawful orders of his superiors. On the aforesaid basis, learned counsel submits that the writ petition is completely bereft of merits and should be dismissed with exemplary cost.

35. On the question of violation of Rule 11(2) and 11(4) of the EIA Rules, learned counsel submits that even the retired officers would remain public servants and as such, the Inquiry Officer appointed *vide* the letter dated 02.12.2014 is in accordance with the extant Rules. In support of his submissions, he relies upon the judgment of the Supreme Court in the case of ***Union of India and Ors vs. Alok Kumar*** and batch reported in **(2010) 5 SCC 349,** in particular to paras 45 and 46 wherein the Supreme Court while relying Section 21 of the Penal Code, 1860, had held that any person who is in service of the Government or remunerated by fees or Commission for the purpose of any public duty of a Government is also a "*Public Servant*".

36. Mr. Khatana submits that in the present case, the Inquiry Officer who was appointed, was a retired Deputy Director of the respondent.

He submits that the Inquiry Officer was paid remuneration for the purposes of conducting inquiry against the petitioner who is a public servant and the disciplinary proceedings itself would fall within the public duty of the respondent. On that basis, learned counsel submits that the argument of the petitioner that a retired person cannot be a public servant is untenable.

37. So far as the issue of violation of Rule 11(4) of Rules is concerned, Mr. Khatana refers to the Statement of Defence submitted by the petitioner. After taking the Court through the contents of the defence statement, learned counsel submits that there is no defence raised by the petitioner except to make allegations against the officers and the authorities, and the petitioner has only mentioned that he desired to be heard in person. According to learned counsel, when there was no defence statement on merits against the Articles of Charge, the Disciplinary Authority concluded that the petitioner in all probability would continue the undesirable tirade of baseless allegations against all and sundry including the Disciplinary Authority and as such, it was found appropriate not to grant him personal hearing. Resultantly, learned counsel submits that it could not be said to be violation of Rule 11 (4) of the said Rules.

38. As a last submission, Mr. Khatana submitted that even in case it is assumed, though not admitted, that the Principles of Natural Justice are violated, unless the petitioner is able to establish, by cogent facts,

evidence and other documentary evidence, extreme *de facto* prejudice having been caused, the same cannot be interfered with by this Court under the power of judicial review in accordance with Article 226 of the Constitution of India. He relied upon the judgment of ***Union of India and Ors vs. Alok Kumar*** *(supra)* to submit that unless the delinquent is able to show and demonstrate extreme prejudice, minor violation which would not otherwise infract or impinge upon the substantive rights of the delinquent or materially affect the outcome of the disciplinary proceedings, the Courts cannot interfere with such proceedings. In the present case, according to the learned counsel, the petitioner has miserably failed to show, demonstrate or establish that any violation has caused *de facto* prejudice entitling him to seek interference by this Court. Thus, he submits that the present writ petition be dismissed with exemplary cost.

ANALYSIS AND CONCLUSION:-

39. This Court has heard the arguments of the learned counsel for the parties as well as perused the documents placed on record.

40. The controversy which arises in the present petition revolves around the interpretation of the provisions of Rule 11(2) and Rule 11 (4) of the EIA Rules, 1978 and its effect on the facts arising in this case.

41. In order to appreciate the aforesaid controversy, it would be

apposite to extract Rule 11(2) of the EIA Rules which is as under:-

> *"**11. (2)** Whenever the disciplinary authority is of opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against Agency employee, it may itself inquire or appoint under this rule [**a public servant****] to inquire into the truth thereof."*
>
> (emphasis supplied)

That a perusal of the aforesaid sub rule brings to fore two aspects. One, that the Disciplinary Authority may itself inquire into the truth of any imputation of misconduct or misbehavior against agency employee; and two, that it may appoint under that sub rule '*a public servant'* to inquire into such truth thereof. The explanation attached thereto is in reference only to a situation where the DA itself proceeds to hold the inquiry, and as such is not relevant to the present case.

42. If this Court were to go by the plain and simple language as employed in sub rule (2) of Rule 11 of the EIA Rules, it would mean that such person / Inquiry Officer must be a servant of the public and not a person who '*was'* a servant of the public. Therefore, the contention of the learned counsel for the respondent that a retired officer can also be construed to be a public servant does not appear to be correct. This is clear not only from the language as employed but also fortified by the ratio laid by the Supreme Court in the case of ***Ravi Malik Vs. National Film Development Corporation Ltd. & Ors.*** reported in (**2004) 13 SCC 427**. To make the issue crystal clear, relevant paragraph of the aforesaid judgment is extracted hereunder:-

> ***"7.*** *In this case the Central Vigilance Commission had issued instructions permitting retired officers to be appointed as inquiry officers. The words "public servant" used in Rule 23(b) mean exactly what they say, namely, that the person appointed as an inquiry officer must be a servant of the public and not a person who was a servant of the public. Therefore, a retired officer would not come within the definition of "public servant" for the purpose of Rule 23(b). Rule 7 cannot be interpreted to mean that the direction issued by the Central Vigilance Commission would override any interpretation which a court may put, as a matter of law, on it."*

It would be relevant to consider that in ***Ravi Malik*** *(supra),* the Supreme Court had an occasion to consider Rule 23(b) of the Service Rules and Regulations, 1982 of the National Film Development Corporation Ltd., (hereinafter referred to as 'NFDCL') wherein the same words *'public servant'* was called for interpretation. In that context, the Supreme Court had rendered the ratio aforesaid. In the present case too, the words employed are *'public servant'* which is identical to the words used in Regulations 23(b) of the NFDCL. In fact, the entire Rule 11(2) is *pari materia* to Regulation 23(b) of Rules of NFDCL. Just so that there is clarity to the issue, both Regulation 23(b) of Rules of NFDCL and Rule 11(2) of the present Rules are extracted hereunder:

Regulation 23 (b) of the Service Rules and Regulations, 1982 of NFDCL:-

> *"**23. (b)** Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of*

misconduct or misbehaviour against an employee, it may itself enquire into, or appoint any public servant, hereinafter called the inquiring authority to inquire the truth thereof."

Rule 11 (2) of EIA Rules, 1978:-

*"**11. (2)** Whenever the disciplinary authority is of opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against Agency employee, it may itself inquire or appoint under this rule [a public servant**] to inquire into the truth thereof."*

In that view of the matter, the issue as to whether a '*public servant'* can or cannot be a retired person, is no more *res integra* and as such, is not open for the interpretation as sought to be given by the learned counsel for the respondent.

43. The reliance of Mr. Khatana on the judgment of ***Alok Kumar*** *(supra)* is inconsequential since Rule 9(2) of the Railway Servant (Discipline & Appeal) Rules, 1968 is distinct from the Rule 11 (2) of the EIA Rules. It is trite that an authority holds the ratio for the facts arising in that particular case and cannot be read as Euclid's Theorem to be applied to every case irrespective of the facts which arise therein. While researching further on this subject, this Court has also considered the judgment rendered by the Supreme Court in ***Union of India & Ors. Vs. Jagdish Chandra Sethy*** bearing C.A. No. 6061/2011 rendered on 18.07.2023 wherein too, the ratio laid down in ***Ravi Malik*** *(supra)* was considered. Since in the case before the Supreme Court was one predicated on interpretation of Rule 14 of the CCS (CCA)

Rules, 1965, the Supreme Court relied upon the judgment of ***Alok Kumar*** *(supra)* to allow the appeal of the Union of India while agreeing with the ratio laid down in ***Alok Kumar's*** case. The two rules being distinct, this Court is of the opinion that even ***Jadgish Chandra Sethy*** *(supra)* would not be applicable to the present case.

44. In view of the above, this Court has come to the irresistible conclusion that the Inquiry Officer who was appointed, admittedly being a retired officer of the respondent, did not fulfill the criteria of a *'public servant'* and as such, the said appointment is violative of Rule 11 (2) of the EIA Rules.

45. The second issue is in respect of violation of Rule 11(4) of the EIA Rules whereby after submission of the written Statement of Defence, the Charged Officer is permitted to seek personal hearing before the DA. It would be apposite to extract the Rule 11 (4) of the EIA Rules which is as under:-

> *"**11. (4)** The disciplinary authority shall deliver or cause to be delivered to the Agency employee a copy of the articles of charge, the statement of the imputations of misconduct or misbehavior and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the Agency employee to submit, within such time as may be specified, a written statement of his defence **and to state whether he desires to be heard in person**."*
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> (*emphasis* supplied)

The language of Rule 11(4) prescribes the procedure as to how

the DA would proceed, post receipt of the proceedings concluding with the Inquiry Officer's report. According to the said Rule, the DA is mandated to afford the Charged Officer (hereinafter referred to as 'CO') an opportunity to tender a written Statement of Defence against the Articles of Charge and the proposed penalty. That apart, as is usual, in compliance of the principles of natural justice in administrative law, the DA is also to afford an opportunity of personal hearing to the CO, if such person desires.

46. In the present case, admittedly, the petitioner had submitted his written Statement of Defence *vide* the letter dated 12.05.2014 and had also specifically sought an opportunity for personal hearing. Para 3 of the said letter is extracted hereunder for clarity:-

> *"3. While reserving my right to take recourse to such action as may be feasible under law, I state that the allegations leveled against me in the aforesaid charge memorandum are preposterous, misconceived and without any substance. I deny them unequivocally. I desire to be heard in person."*

There is no doubt that the petitioner in the aforesaid paragraph had categorically sought personal hearing. It is also not disputed by the respondent that no such opportunity, despite a prayer, was ever afforded to the petitioner by the respondent.

47. Learned counsel for the respondent had vehemently argued that such opportunity was not given to the petitioner because of his alleged

misbehavior with the senior officials of the respondent. He had submitted that, times without number, the petitioner had abused and misbehaved with the senior officials and as such, purely to insulate the DA from such tirade, the respondent did not give such opportunity. In the considered opinion of this Court, surely this cannot be a justifiable, much less, any reason at all to deny any person an opportunity of personal hearing, particularly when such Charged Officer demands it. The opportunity of personal hearing is not a mere formality and as such, cannot be short shrifted in any manner whatsoever. The opportunity of personal hearing is intrinsic and intertwined not only with the disciplinary proceedings but also with the principles of natural justice in such a bond that it would form the second side of the same coin. There is no gainsaying that since the outcome of any disciplinary proceedings may entail a harsh and drastic civil consequence upon a Charged Officer, the opportunity of personal hearing has been held to be a very precious and indelible right conferred upon any employee, zealously protected under the principles of natural justice as applicable to the administrative law.

48. It is apparent from the aforesaid submission of the learned counsel for the respondent that no opportunity of personal hearing was ever granted to the petitioner, thereby undoubtedly violating Rule 11 (4) of the EIA Rules, 1978. This Court is fortified in its view by the ratio laid by the Supreme Court in ***Yoginath D. Bagde Vs. State of***

Maharastra & Anr., reported in (**1999) 7 SCC 739**. In the said case, the Supreme Court was considering an issue where the DA had disagreed with the findings of the Inquiry Officer and the DA had not afforded an opportunity of personal hearing to the appellant. In that context, Supreme Court held as under:-

> *"**30.** Recently, a three-Judge Bench of this Court in Punjab National Bank v. Kunj Behari Misra, (1998) 7 SCC 84 relying upon the earlier decisions of this Court in State of Assam v. Bimal Kumar Pandit, AIR 1963 SC 1612, Institute of Chartered Accountants of India v. L.K. Ratna, (1986) 4 SCC 537 as also the Constitution Bench decision in Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727 and the decision in Ram Kishan v. Union of India, (1995) 6 SCC 157 has held that:*
>
> > *"It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted. The first stage of the enquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity*

> *of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority."*

The Court further observed as under:

> *"When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed."*

The Court further held that the contrary view expressed by this Court in State Bank of India v. S.S. Koshal, 1994 Supp (2) SCC 468 and State of Rajasthan v. M.C. Saxena, (1998) 3 SCC 385 was not correct.

***31.** In view of the above, a delinquent employee has the right*

of hearing not only during the enquiry proceedings conducted by the enquiry officer into the charges levelled against him but also at the stage at which those findings are considered by the disciplinary authority and the latter, namely, the disciplinary authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry officer. If the findings recorded by the enquiry officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the disciplinary authority has proposed to disagree with the findings of the enquiry officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution."

It is clear from the aforesaid observations in ***Yoginath D. Bagde*** *(Supra)* which also relied upon the case of ***Punjab National Bank Vs.***

Kunj Behari Mishra reported in **(1998) 7 SCC 84**, that the right of personal hearing is an indelible right and ought to be afforded to the Charged Officer. In fact, it has been held to be a Constitutional right of the employee which cannot be taken away by any legislative enactment or service rule including rules made under Article 309 of the Constitution of India, 1950.

49. In view of the above, this Court is of the considered opinion that undoubtedly, Rule 11 (4) of the EIA Rules, 1978 has been violated by the respondent.

50. Yet another argument urged by learned counsel for the respondent was on the principle that unless *de facto* prejudice caused to the petitioner is established by way of appropriate evidence, the appointment of the Inquiry Officer as also the subsequent inquiry proceedings cannot be set aside by this Court under writ jurisdiction. Learned counsel had relied upon the judgment of ***Alok Kumar*** *(Supra)* for this proposition too.

51. Insofar as the aforesaid submission of learned counsel for the respondent is concerned, there appears to be some substance in it. This Court has considered the ratio laid down by the Supreme Court in ***Alok Kumar*** *(supra)* wherein the Supreme Court after considering the previous judgments rendered by it, had concluded that the employee under charge had to establish *de facto* prejudice caused on account of a

retired officer having been appointed as the Inquiry Officer. In the present case, the petitioner had *vide* letter dated 07.07.2015 protested against the appointment of the said retired officer as an Inquiry Officer on the basis of contravention of Rule 11(2) of the EIA Rules, 1978. The petitioner had alleged bias and prejudice on the part of Inquiry Officer against himself in respect of non-supply of documents despite orders passed by this Court besides other allegations. Even on 08.07.2015, after the Inquiry Officer had conducted the evidence of two witnesses, the petitioner had yet again given his objections in respect of the appointment of the Inquiry Officer in terms of Rule 11 (2), lack of supply of defence documents and also in respect of recording of evidence of the said witnesses.

52. This Court has considered the aforesaid submission of learned counsel for the respondent as also the petitioner in the context of *de facto* prejudice caused to the petitioner. On an overall consideration of the letter and perusal of the inquiry proceedings placed before this Court, it would be difficult to conclusively render a finding as to whether any real prejudice indicting the inquiry proceedings itself has been established before this Court. No doubt that the petitioner did protest against the appointment of the Inquiry Officer; the bias of the Inquiry Officer; as also some issues regarding the recording of statement of the witnesses, however the bias or the *de facto* prejudice as such is not clear from the records.

53. In view of the above, this Court holds that there has been a clear violation of Rule 11 (2) as also 11(4) of EIA Rules, 1978. This opinion is also fortified by the judgment of the Supreme Court as referred to above. While holding that there has been a violation of Rule 11 (2) in terms of appointment of retired officer as an Inquiry Officer, however since *de facto* prejudice has not been established clearly in terms of the aforesaid observations and also in line with the judgment of the Supreme Court in ***Alok Kumar*** *(Supra),* this Court is of the considered opinion that the inquiry proceedings till the stage of Inquiry Report are not vitiated.

54. The upshot of the above conclusion is that the impugned orders of the Disciplinary Authority dated 17.02.2016 and the Appellate Authority 20.02.2017 are quashed and set aside. The respondent is directed to afford a proper and justifiable opportunity to the petitioner of personal hearing before the Disciplinary Authority at the stage of consideration of the Statement of Defence. Consequently, the petitioner would be entitled to the subsistence allowance as admissible in accordance with the EIA Rules, 1978 at the post that the petitioner was holding at the time of initiation of the disciplinary proceedings, from the date when the petitioner had sought personal hearing till the date when he was reverted back to the post of Technical Officer or was finally dismissed from service, whichever was earlier.

55. Considering the fact that it has been held above that there has

been a direct violation of Rule 11 (2) and Rule 11 (4) of the EIA Rules, 1978 and the matter is remitted back to the Disciplinary Authority, the facts as referred to by the learned counsel for the parties need not be examined or appreciated at this stage lest the same cause any prejudice to either of the parties. As such, the issues on facts are left open for the consideration of the Disciplinary Authority.

56. In view of the above, the petition is allowed in part and is disposed of along with the pending applications.

TUSHAR RAO GEDELA, J.

MARCH 06, 2024
Aj/ms