
(1997) 01 AHC CK 0053

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 3277 of 1986

Deepak Ganguly

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 29-01-1997

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 36, 37, 38

Citation : (1998) 2 UPLBEC 933

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : A.P. Shahi, Ganguly, S.N. Singh and R.N. Singh, for the Appellant;
L.P. Naithani, for the Respondent

Judgement

D.K. Seth, J.—The order dated 29.1.1986 (Annexure-7 to the writ petition) dismissing the petitioner from service and imposing a disqualification for future employment anywhere either in Government or autonomous body on undertaking inflicted by the Director, Wadia Institute of Himalayan Geology is the subject matter of challenge in the present writ petition. Assailing the impugned order Mr. A.P. Shahi, learned Counsel for the petitioner raises three grounds: (i) inspection of documents demanded by the petitioner was not accorded to him, the petitioner was disallowed from examining the witnesses list of which was furnished, accepting 14 out of them and that before inflicting punishment, the copy of the enquiry report was not supplied, by reason whereof there has been violation of principles of natural justice vitiating the disciplinary proceedings and the punishment imposed (ii) assuming not admitting that the charges were proved and the petitioner was guilty, even that event, the punishment is too harsh and disproportionate considering the graveness of the charges alleged to have been proved, (iii) the initiation of the disciplinary proceeding having not been made in compliance with" Clause 16(b) of the Memorandum of Association, the disciplinary proceedings is void abinitio.

2. Mr. L.P. Naithani, learned Counsel for the respondents raised a preliminary

point to the maintainability of writ against the respondents, a society registered under the Society Registration Act, not being State within the meaning of Article 12 of the Constitution of India as has already been held in an earlier case against the present society/institute itself by this court.

3. On the question of merits, Mr. Naithani contends that the first point raised by Mr. Shahi relating to violation of natural justice is only procedural and, therefore, the question is to be reviewed on the principle of prejudice which according to him in the facts and circumstances of the case is non-existent with regard to the second point, his contention is that out of 8 charges, though apparently six having been proved may not seem to be grave but the cumulative effect of the same to be a grave one warranting the punishment inflicted and that part in exercising of revisional jurisdiction, which the High Court exercises under Article 226 of the Constitution, the quantum of punishment cannot be altered or interfered with. With regard to the 3rd contention of Mr. Shahi, Mr. Naithani contends that the petitioner having participated in all through the proceedings and having not raised the question at any stage and even not making out such a case in the writ petition, is not entitled to raise the question simply on the basis of a plea raised in the rejoinder affidavit in respect whereof the petitioner did not have any opportunity to reply or meet the case. The writ petition, according to him, should, therefore, be dismissed.

4. The preliminary point taken by the respondent's Counsel about the maintainability of the writ petition requires the first attention. Admittedly, the respondent is a society registered under the Societies Registration Act. Such a society is not a State within the meaning of Article 12. With the development of the concept of State coming within the description of other authority the question of instrumentality and agency of the Government has been recognised to be the governing factor for determining characteristic of body for the purpose of fitting in the description of other authority. The said question has been attended to in a series of decision by the Apex Court, right from the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, ; upto the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ; Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee, ; Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, and Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

5. The meaning of the word "State" depends upon the context in which it is used since the same carries different meanings. It is a body of people occupying a defined territory and organised under a sovereign Government; a body politic or a society of men, which may be a body politic of nations or an individual Governmental unit. In international practice, the State is dependent on the recognition by the existing group of other States and has a relatively permanent

legal organisation, determining its structure and the relative powers of its major governing bodies or organs. Ours is a federal system of Government operating in certain respects and in certain matters in all its parts and also separate Governments operating in other respects in distinct parts of the whole. Such units or sub-divisions are also Governments. The definition of State in Article 36 has adopted its definition as given in Article 12 which is an extensive definition including in its fold "Local or other authorities". Because of such extensive definition, it comprehends some thing more which otherwise would not have been contemplated in its ordinary sense. Now the State is an abstract entity which acts through its different organs. The said activities as contemplated in our Constitution embraces within itself various welfare activities for the development of human resources and prevents various kinds of exploitation and inculcate human instincts as a measure of welfare to the people at large for which different measures have been incorporated in the Constitution itself for the protection of the rights of the people advanced and development of its as a resource. The State has been defined to mean as in the constitution a welfare State, the aims and objects of which is to be furthered on the basis of the preamble being the basic feature of the Constitution which defines India as a sovereign socialist secular democratic Republic and to secure to all its citizens justice, social, economic and political, equality of status and of opportunity. In order to achieve this goal, the Government has to depend on its welfare activities, even on various societies and other organisations which are not otherwise conceived to be included or apprehended as organ of the State. The real test is as to whether a Particular body or organ is an agency or instrumentality of the State. Then again while projecting fundamental and other rights in Part III, directive principles have been incorporated in Part IV. Though not enforceable by law but still the principles specified in Part IV recognises the same to be the duty of the Government, nevertheless the same should be regarded as fundamental in the governance of the country and be applied in the making of laws as indicated in Article 37. While indicating in Article 38 that a State has to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in "which justice, social, economic and political is ensured. Even the power of the Government in the field of trade or business has also been held to be a Government activity for the development of economics subject to Constitutional limitations and relating to fundamental rights in Part 111 exercisable in furtherance of the directive principle of the State policy. But such adventure of the Government in the field of trade or business does not render the organ or organisation not to be an instrumentality or agency of the State. The trade and business activities of the State constitute public enterprise. In order to determine the nature and character of the organ for the purpose of Article 12, the Court has to see through the corporate veil to ascertain the face behind it as an instrumentality or agency. Applying these tests, it is to be seen as to whether the present organisation is a State within the meaning of Article 12 or not.

6. In the case of International Airport Authority (supra), these tests were

summaries in the following expression:

"1. One thing is clear that if the entire share capital of the Corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government."

2. "Whether the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation it would afford some indication of the character."

3. "It may also be relevant factor...whether the Corporation enjoys monopoly status which is the State conferred or State protected."

4. "Existence of" deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."

5. "If the functions of the Corporation of public importance and closely related to governmental functions it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government. "

6. "Specifically, if a Department of Government is transferred to a Corporation. It would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

If on a consideration of these relevant factors it is found that the Corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case, be an "authority" and therefore, "State" within, the meaning of the expression in Article 12."

7. In order to determine the nature and character of the organisation one or the other of the tests laid down In the case of International Airport Authority (*supra*), as quoted in case of *C1WTC* (*supra*), has to be satisfied. It is only some or few of the tests which are to be satisfied. Admittedly, the financial assistance may not be a factor so much so as to satisfy this factor. But, however, if there appears to exist a. deep and pervasive State Control indicating it to be an agency of instrumentality and the functions are of public Importance and are closely related to Government functions, then the test appears to be satisfied.

8. In the present case the memorandum of Association of Wadia Institute of Himalayan Geology has been produced by the learned Counsel for the petitioner which the learned Counsel for the respondents admits to be a copy thereof. The Institute has been described as an autonomous organisation In the Ministry of Science and Technology Government of India. The object of the Society as mentioned therein are to prepare a Geological map of the entire Himalayas based on studies and researches on tectonics, geomorphology, glaciology, hydrogeology etc, to carry out research work on different aspects of the Himalayan Geology and physiography; promote Intensive training and organise research on Himalayan Geology; organise-work Parties of post-graduate students under the supervision of University Professors and Senior Officers of Geological Survey of

India and such other ancillary objects.

9. The very description of the Institute as an organisation in the Ministry of Science and Technology Government of India indicates the same to be a Part of the Government though secluded out as a society for the purposes of administrative efficiency. The objects enumerated are also very much necessary for the development of the country itself. Each individual object appears to be governmental. The various provisions contained in the Memorandum of Association will clearly show that almost in each aspects of its working in furtherance of Its object the Geological Survey of India has been involved, Therefore, the test, that it closely related to governmental functions, appears to be satisfied. The question of preparation of map and research on the Himalayan Geology is definitely of great public importance. Thus it fulfills the Clause (5) of the criteria laid down in the case of International Airport Authority (*supra*).

10. Clause (4) of the said Memorandum provides that the Central Government may appoint one or more persons to review the work and progress of the society and the institute and to hold enquiries in the affairs thereof and to report thereon in such manner as the Central Government may stipulate. Upon receipt of such reports the Central Government may take such action and issue such directions as it may consider necessary and the society and institute shall be bound to comply with such directions. While by virtue of Clause (5) the Central Government may issue such directions to the society or the Institute as it may consider necessary for the furtherance of the objects of the society or the Institute and for ensuring their proper and effective functioning. By reason of Clause (6) the society has to deal with the income and property of the society for promoting its object subject to the conditions or limitations as the Central Government may impose. No Part of the income and property can be paid or transferred even by way of dividends, bonus or otherwise directly or indirectly expecting payment in good faith for remuneration to any member or other person in return for any services rendered or for travelling allowances, etc. As provided in Clause 18 the Society is entitled to accept grants from Government and subscriptions, donations, gifts, etc. as provided in Clause (ii) which is to be "maintained in a fund comprising of the money provided by the Central Government and grants etc. received, to be deposited in such fund in the State Bank of India or to invest in such manner as the institute may with the approval of the Central Government would decide. No property acquired wholly or substantially out of the Government grants, without prior sanction of Government, can be disposed of, encumbered or utilised for purpose other than those for which grants are sanctioned. By reason of Clause 47 financial aspects of the society ought to be referred to the Finance Committee for advise. If the advice tendered by the Finance Committee on any matter referred to is not accepted, the issue will be referred to the Central Government. The alteration and extension for the purposes of the society can be made only with the previous concurrence of the Central Government by reason of Clause 50. In view of Clause 51 the, rules and regulations can only be altered with the sanction of the Central

Government.

11. The object and pervasive control as referred to above is carried through by the governing body. The first Governing Body referred to in Clause 7 comprised of the Director General, Geological Survey of India; Surveyor-General Survey of India; Chairman, University Grants Commission; Head of the Bureau of Technical Education of Science, Ministry of Education as Ex-officio member. While, Director, Geological Survey of India and Director, International Geological Research Institute were members. Clause 19 dealing with the governing body specified; the powers of the governing body imposing a restriction to the power to acquire and sell property only with prior sanction of the Government of India. The President of the governing body is to be appointed by the Government of India. Eight Professors of Geology from the Universities to be nominated by the President, Director-General, Survey of India (Ex-officio), Survey General Chairman, University Grant Commission, Two persons, nominated by the Central Government from academic organisation interested in Himalayan Geology, a representative of the Ministry of Education, a representative of the Ministry of Finance.

12. Thus, it appears that the Government exercises a deep and persuasive control over the functioning of the society or the institute and bears the major finance through grants. The very manner of control n>ad with the objects and the purposes as indicated above clearly indicates that a Department of a Government has been transferred to the society or the Institute. The above conditions satisfied at least 3 of the criteria mentioned in the case of International Airport Authority of India (supra). Therefore, the society on the institute appears to be an agency or instrumentality of the Government. The attention of the Court while deciding the" earlier case holding the society/ institute not to be a State was not drawn to the present aspects. Mr. Naithani fairly concedes that these materials were not placed before the Court when the earlier decision was rendered. In all fairness he has conceded that the said decision cannot stand in the way of taking a fresh look in the matter on the basis of the materials now produced before the Court. In that view of the matter the earlier decision does not bind this Court in distinguishing the same on the above features attended to herein above.

13. Learned Counsel for the petitioner on the other hand relied on the decision of Purnima Banerji v. Indian School Certificate 1995 (1) UPLBEC 265 and Arvind Kumar Sharma v. Central Board of Secondary Education (1996) 2 UPLBEC 1331, which also supports the proportion enunciated though on a different perspective.

14. So far as the denial of opportunity to inspect documents is concerned as contended in Paragraph 15 of the writ petition dealt with in Para 27 of the counter affidavit and reiterated in Para 21 of the rejoinder affidavit is concerned, both, learned Counsel of either Parties had referred to in Annexure-CA-2 to the counter affidavit being an order-sheet dated 26.6.1980. In the said order it is recorded that with regard to the inspection of additional documents, necessary

orders have already been issued vide proceedings held on 25.6.1980 and whatsoever -documents were considered necessary to be shown to the defendant for his defence had been ordered to be shown to the delinquent official.

15. The contention of Shri Ganguli that his right to inspection of documents is to be decided by the disciplinary authority and not by the Inquiry Officer is not tenable. According to the guiding principles laid down for such enquiries, the charged officer has submitted written request to the Inquiry authority indicating relevance of each documents whose inspection is desired. Shri Ganguli submitted a list of additional documents to the Enquiry Officer without indicating there relevance but still the Enquiry Officer went into each and every document and whatever additional documents were considered essential to be shown to the delinquent official for his proper defence have been ordered to be shown to him even by over-ruling the objections raised by the Presenting Officer, in most of the cases.

16. Shri Ganguli had submitted a list of 33 defence witnesses yesterday whom he would like to produce. As the list appeared to be unduly lengthy, he was requested to consider the possibility of cutting down number of witnesses, and was also requested to clearly indicate the relevance of each witness whom he would like to produce for his defence.

17. Instead of cutting down the number of defence witnesses, I find from today's list that he had added one more name i.e. he has submitted a list of 34 witnesses whom he would like to call in his defence. He has also not clearly indicated what issues these witnesses will help in clarifying.

18. After going through the list it has been observed that the objective of summoning such a large number of witnesses clearly appears to impede the speedy adjudication of the case. After going through the list and the nature of relevance given by the charged officer, I feel that the summoning of the witnesses as indicated in Annexure- "C will be relevant from the defence point of view.

19. Since 15 days time has already been allowed to Defence Assistant for Inspection of the additional documents, the hearing of the proceedings is adjourned for 15th July, 1985 when both the prosecution as well as defence witnesses will be examined.

20. So far as the contention that the witnesses were not allowed to be examined is concerned, reference has been made by both the counsels to the above order.

21. Admittedly, the documents have been inspected. It is not a case that no opportunity to inspect those documents were given. Admittedly, 14 witnesses of the defence were examined. It is not a case that the petitioner was disallowed from cross-examining the prosecution witnesses. Therefore, it cannot be said that the opportunity was denied to the petitioner. Inasmuch as the sorting out of the list of witnesses were carried through negotiation. Admittedly, the matter is

one of procedure. The question of inspection of documents is dependent on its relevance. Therefore, documents which were relevant, were allowed to be Inspected. Learned Counsel for the petitioner has not been able to draw my attention to any such documents which though relevant was not given Inspection of. He has not specified anywhere nor he has pointed out even in this Court any document having relevance has not been allowed to be inspected. Similarly nothing has been shown to this Court that any material witness having relevance have been disallowed to be examined. The learned Counsel for the petitioner has not drawn my attention to any such fact by which it can be said that any such material witness has been disallowed to be examined. Nothing has been shown to this Court as to which of the material witness has not been allowed to be examined. Whether any prejudice has been caused or not has not -been shown to this Court. The learned Counsel for the petitioner has not been able to make out a case by reason thereof.

22. Learned Counsel for the petitioner further contends that before inflicting the punishment the copy of the enquiry report was not given as contained in para 16 of the writ petition dealt with in Para 18 of the counter affidavit and reiterated In Para 22 of the rejoinder affidavit. The reply in the counter affidavit to the said fact appears to be vague. The non-supply of the enquiry report before inflicting punishment has also not been seriously contested by the learned Counsel for the respondents. The learned Counsel for the petitioner, however, fairly conceded that the order of punishment was passed before the decision in the case of Union of India and others Vs. Mohd. Ramzan Khan, , was delivered and that the ratio decided therein being prospective cannot be applied and attracted in the present case.

23. The ratio in the case of Mohammad Ramzan Khan (supra), applies prospectively is no more res-integra. In the case of State of U.P. and Another Vs. Abhai Kishore Masta, , in Paragraph-6 it was observed as follows:

"We shall first take up the quashing of the order of punishment made in the disciplinary enquiry. The decision in Mohd. Ramzan Khan has been explained by a Constitution Bench of this Court in Managing Director ECIL v. B. Karunakar, it has been held that where the order of punishment is made earlier to the date of the decision in Ramzan Khan, non-supply of enquiry report does not vitiate the enquiry.

Following the said decision, the order of the High Court quashing the punishment on the said ground is set aside."

24. Similar view was expressed in the case of B.C. Chaturvedi Vs. Union of India and others, , in the following manner:

A question thereafter-had arisen whether the ratio would be applicable to the order passed earlier to the judgment. On reference to the Constitution Bench, to which two of us K. Ramaswamy and B.P. Jeevan Reddy, JJ were members, it was held in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., , that the

relief granted in Ramzan Khan's case erroneous and that the ratio in Ramzan Khan's case would apply to the punishment imposed by the disciplinary authority after the date of the judgment. Since the controversy is no longer res-integra the appellant is not entitled to the benefit of Ramzan Khan's ratio as admittedly he was dismissed from service on October 29, 1986 and the order of dismissal from service is valid."

25. The said proposition, however, has not been disputed by the learned Counsel for the petitioner. He, on the other hand, relies on the decision in the case of Committee of Managment, Vaidik High Secondary School v. District Inspector of Schools Meerut and Ors. 1993 (2) UPLBEC 934. He relied on Paragraph 19 of the said judgment in support of his contention that any denial of opportunity would hit the principles of natural justice. According to him since the decision to inflict the punishment was based on the enquiry report and the punishment has adversely effected the petitioner and the enquiry report is a material utilised against him, the non-supply thereof is a denial of opportunity to adduce additional evidence or material of probative value which could differ the punishment, therefore, the same amounts to violative of procedural safeguard and control to fair and just enquiry.

26. Now as we have seen that the allegation of disallowing the inspection and examining witness has not been shown to be prejudicial by the learned Counsel for the petitioner. The non-supply of-enquiry report before inflicting punishment cannot be brought within the ambit of the submission of the learned Counsel for the petitioner, since the same would again fall back on the ratio in the case of Mohd. Ramzan Khan (supra), which, as already observed, cannot be applied, in the present case, admittedly on the ground that the order of punishment was inflicted on 29.1.86 long before the ratio was laid down, Relying on the decision in the case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., . Learned Counsel for the respondents contends that Article 311(2) does not apply in the case of the petitioner. Neither he is governed by any rules framed under Article 309. Mohd. Ramzan Khan's case (supra), is attracted only when a person is covered by Article 311(2) and covered by Rules framed under Article 309. Admittedly the petitioner has not claimed to be so. it is not necessary to go into the said question in view of the observation made hereinbefore.

27. On the other hand in the case of State Bank of Patiala and others Vs. S.K. Sharma, , the question- of procedural violation was considered. In the said case a distinction was made with regard to such violation as (a) violation of substantive nature (b) violation is procedural in character. When the violation is of substantive nature cannot be answered by applying the test of substantial compliance or prejudice but the violation procedural in character does not mean to automatically vitiated the enquiry or order passed except cases falling under, "no notice", no opportunity and "no hearing" on the other hand such violation has to be examined from the point of view of prejudice, namely, whether such violation has prejudiced the delinquent in defending himself properly and

effectively.

28. It has not been shown to the Court that the violation of the procedure alleged flows from a provision mandatory in character. As has been held in the case of State Bank of Patiala (supra), if the violation of procedure is not of a provision mandatory in character, the same can be answered by examination from the stand point of substantial compliance. In the present case, the order contained in Annexure CA-2 clearly indicates substantial compliance and an examination of the entire procedure satisfies this test of no prejudice. Nowhere it has been alleged by the petitioner that no hearing was given. But the violation alleged cannot be characterised to be a failure of justice in the facts and circumstances of the case. The test laid down in the case of State Bank of Patiala (supra), is the principles of audi alteram partem in the following manner:

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

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

There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

29. The present case satisfies the test laid down balancing the whole of the proceedings in the facts and circumstances of the case. It does not appear to be

contrary to the principles laid down therein calling for any interference on the said question.

30. The second point urged by the learned Counsel for the petitioner, namely that the punishment is too harsh and it is disproportionate seems to be of some substance. It appears from the charge-sheet which is Annexure-3 the following charges were leveled-

(i) He had made malicious, defamatory and unsubstantiated allegations against his superior.

(ii) He has alleged fishy deal against his super or without any substance to lower the prestige of his superior.

(iii) He has alleged a false allegation of incurring of huge telephone bill at his residence by his superior.

(iv) He did not show interest and promptness in clearance of suppliers bills and adjustment of the Scientists Field advances, resulting into a delay ranging from 3 months to over 3 years and thereby shown lacks of devotion to duty amounting to dereliction of duty.

(v) He has failed to cooperate and produce the records for physical verification of stores for the year 1983-84.

(vi) He made, a false report above his superiors in forwarding his application to O.N.G.C. allegedly with adverse remark.

(vii) He alleged that the Registrar was favoured by recurring monetary benefits by the Director and therefore, he had been protecting the Director against whom he has levelled allegations of corruption, misuse, of Government Funds which are false amounting to in subordination.

(viii) He had taken unauthorised Photostat copies of official documents tantamounting to unauthorised communications of information.

31. Out of the aforesaid charges the (iv) and (v) the charges were not proved while the rest appears to have been proved. In fact, the (iv) And (v) the charge were the grave charges while the rest are not so grave though the said charges also deserves some amount of punishment may not be severe in proportion to the gravity of the said charges. Apparently the charges appeared to be of insubordination by making allegations against his superiors which were proved to be abortive. In my view, it appears that the situation is to be weighed by the disciplinary authority so as to determine the proportion of the punishment warranted on the basis of the charges proved. Admittedly, this court while exercising revisional power cannot determine the quantum of punishment. Neither can it sit on appeal in the same manner a Tribunal can do. Such matters ought to be considered by the "disciplinary authority. Even if the High Court is of opinion that the punishment is too harsh, it cannot deal with the same but has to refer the same to the disciplinary authority or the appellate authority for fresh

consideration. In the case of State Bank of India and Others Vs. Samarendra Kishore Endow and Another, . It has been held by the Apex Court in the following manner:

"Now coming to the facts of this case it would appear that the main charge against the respondent is putting forward a false claim for reimbursement of expenditure incurred for transporting his belongings from Phek to Amarpur. So far as charge No. 5 is concerned there is no finding that the account become irregular or that any loss was incurred by the bank on account of the irregularity committed by the respondent. In the circumstance it may be that the punishment of removal imposed upon the respondent is harsh but this is a matter which the disciplinary authority or the Appellate authority should consider and not the High Court or the Administrative Tribunal. In our opinion, the proper course to be adopted in such situations would be to send the matter either to the Disciplinary authority or the Appellate authority to impose appropriate punishment."

32. The said decision was rendered after considering various decision which will be reflected from the observations made in the said case as reproduced below:

"It is not an appeal from a decision, but a review of the manner in which the decision was made." Per Lord Brighten in Chief Constable of the North Wales Police v. Evans 1982 (3) All E.R. 141 at p. 155 and A.B. Gandhi v. M/s. Gopinath & Sons, 1992 Supp (2) S C.R. 312. In other words the power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court. " Per Lord Marylebone in Chief Constable v. Evans. In fact in service matters, it was held by this Court as far back as 1963."

33. Now, coming to the power of the Court exercising Judicial Review to interfere on the question of penalty, it was held by a Constitution Bench in State of Orissa Vs. Bidyabhushan Mohapatra, thus:

"But the Court in a case in which an order of dismissal of a public servant is impugned, is not concerned to decide whether, the sentence imposed provided it is justified by the rules, is appropriate having regard to the gravity of the misdemeanour established. The reasons which induce the punishing authority, if there has been an enquiry consistent with the prescribed rules, are not justifiable nor is the penalty open to review by the Court, If the High Court is satisfied that if some but not all of the findings of the Tribunal were, "unassailable", the order of the Governor on whose powers by the rules no restrictions in determining the appropriate punishment are placed, was final, and the High Court had no jurisdiction to direct the Governor to review the penalty for as we have already observed the order of dismissal passed by a competent authority on a public servant, if the conditions of the constitutional protection have been complied with, is not justiciable. Therefore, if the order may be supported on any finding

as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant. The Court has no jurisdiction if the findings of the enquiry officer or the Tribunal prima-facie make out a case of misdemeanour, to direct the authority to reconsider that order because in respect of some of the findings but not all it appears that there had been violation of the rules of natural justice."

This principle was reiterated in *Railway Board Representing The Union of India (UOI) Vs. Niranjan Singh*, . The same view was reiterated by this Court in *Union of India v. Parma Nanda* AIR 1989 SC 1135.

34. It is significant to mention that the learned Judge also referred to the decision of this Court in *Bhagat Ram Vs. State of Himachal Pradesh and Others*, and held, on a consideration of the facts and principle thereof, that "this decision is, therefore, no authority for the proposition that the High Court or the Tribunal has jurisdiction to impose any punishment to meet the end of justice." And then added significantly "if may be noted that this Court exercise the equitable jurisdiction under Article 136 (in *Bhagat Ram*) and the High Court and Tribunal has no such power or jurisdiction." The learned Judge also quoted with approval the observations of Mathew, J. in *Union of India (UOI) Vs. Sardar Bahadur*, , to the following effect:

"Now it is settled by the decision of this Court in *State of Orissa Vs. Bidyabhushan Mohapatra*, , that if the order of a punishing authority can be supported on any finding as to substantial misdemeanour for which the punishment can be Imposed, it is not for the Court to consider whether the charge proved alone would have weighed with the authority in imposing the punishment. The Court is not concerned to decide whether the punishment imposed, provided it is justified by the rules, is appropriate having regard to the misdemeanour established."

35. Following the said ratio in my view it would not be wise to hold that She petitioner is entitled to a lesser punishment though prima-facie it appear to be so in my view. Because of the ratio reflected above, it would be the domain of the disciplinary authority to decide the question and to consider on the charges proved whether any lesser punishment could or could not be inflicted. The same is a question to be decided by the disciplinary authority having regard to the facts and circumstances of the case and the charges so proved and pass appropriate order accordingly with regard to punishment and all consequential matters as may deem fit by the disciplinary authority. It would be open for the respondents to take a fresh look in the matter and in case it is decided to inflict any lesser punishment than dismissal or removal from service with such deprivation of financial benefits as may deem fit and proper, in case the petitioner is put back into service.

36. Though, however, the order shows to be a little harsh and I have not

expressed my opinions with the same, so far as the order of dismissal is concerned, but however, the later part of the order by which it was observed that the petitioner is precluded from obtaining any appointment in future in any Government or similar organisation is definitely excessive and too harsh in proportion with the charges framed and, therefore, that, part should be considered by the disciplinary authority for being deleted. Because of such observation the petitioner might not have been able to obtain any other employment. In the mean time, long 10 years have lapsed. It seems that he had suffered sufficient punishment for the same and by reason of passage of time the petitioner might have lost his eligibility to get appointment elsewhere. The disciplinary authority, may however take the above situation into consideration while considering of the question imposing penalty afresh and may think of suitable penalty proportionate to the charges proved and the agony already suffered by the petitioner due to passage of long time in between for which certain pecuniary benefits may be considered to be withdrawn in the from of non-payment of arrears or part thereof otherwise as may deem fit and proper by the authority concerned.

37. So far as the question of maintainability of the proceeding as contended by the learned Counsel for the petitioner relying on Clause 16(b) of the Memorandum cannot now be agitated for the simple reason that the petitioner had Participated in the proceedings all through without raising the said question and did not take the said point in the writ petition and had come out with such a plea only in the rejoinder affidavit, disabling the respondents to deal with the same. A point not raised all through cannot be allowed to be agitated when attempted to be raised through the rejoinder affidavit, without any opportunity to the respondents to contest the same.

38. In the result, the writ petition is allowed in Part to the extent indicated above. The respondents shall reconsider the question - of imposing penalty afresh as Indicated above in the- light of the observations made hereinbefore. Such considerations is to be effected within a period of 4 months from this date and the decision thereon shall be Communicated to the petitioner within a period of 3 weeks from the date of such decision.

39. The writ petition stands, thus, disposed of. There will, however, no order as to costs.