

(2019) 10 DEL CK 0197

In the Delhi High Court

Case No : Civil Writ Petition No. 8622 Of 2019

Ex. Nursing Orderly A.K. Bhagat

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 21-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 309, 311(2)
Central Civil Services (Classification, Control And Appeal) Rules, 1965 — Rule 14, 15(2), 15(4)
Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 — Rule 5, 9(2)

Citation : (2019) 10 DEL CK 0197

Hon'ble Judges : Vipin Sanghi, J;Rajnish Bhatnagar, J

Bench : Division Bench

Advocate : Ankur Chhibber, Amrita Prakash, Hari Shankar Sharma

Final Decision : Dismissed

Judgement

Vipin Sanghi, J

1. The present writ petition has been preferred by the petitioner to assail the orders of the Central Administrative Tribunal (hereinafter referred to as the "Tribunal") dated 23.01.2019 passed in O.A. No.696/2014 dismissing the petitioner's Original Application, and dated 11.03.2019 whereby his Review Application (R.A.) 72/2019 was dismissed. The petitioner had assailed his removal from service by way of punishment.

2. Three issues arise for our consideration, including an important question of law, namely: Whether the "Disagreement Note" issued by the Disciplinary Authority upon receipt of the inquiry report - with which he proposes to disagree, is liable to be considered as containing his "final" opinion, merely because the Disagreement Note does not use the expression "tentative", or other similar expression, and merely because he may have used words and language which convey that the opinion expressed in the Disagreement Note is "final" even though, his conduct betrays the fact that he granted an opportunity to the

delinquent to make a representation against the Disagreement Note, and only upon consideration of the same, passed the final order. This question begets another one viz. whether one should look at merely the form, or the substance of the "Disagreement Note" and the manner in which the Disciplinary Authority conducts himself while dealing with, and in relation to the Disagreement Note. The other two issues that arise are: (i) What is the effect of the Petitioner/Delinquent Employee not raising the issue of the Disagreement Note being worded to appear as "final", and not "tentative", at the earliest stage when it is issued by the Disciplinary Authority, and; (ii) Assuming that the Disagreement Note is worded as containing a "final" opinion, and there is breach of the Principles of Natural Justice in the conduct of the Disciplinary Proceedings to that extent, are the proceedings rendered null and void, and are liable to be quashed to the extent they are in breach of the said Principles on that ground alone, or would it be necessary for the delinquent employee to also plead and establish the prejudice actually suffered by him due to the said breach of the Principles of Natural Justice.

3. Disciplinary proceedings were initiated against the petitioner under Rule 14 of CCS (CCA) Rules, 1965 for imposition of major penalty. The memorandum of charge dated 01/02.09.2006 served on the petitioner contained two charges, pertaining to acceptance of illegal monetary gratification by the petitioner from another member of the force, Constable A.K. Jha. The petitioner was allegedly caught red-handed accepting bribe of Rs. 10,000/- for official favor, and Rs. 35,000/- for promising recruitment to the persons for the post of Constable, by passing them in medical examinations through illegal means.

4. The Inquiry officer held that the first charge "is not proved in totality", however, "it seems to be an attempt of cheating of Rs. 10,000/-". With respect to the second charge, the Inquiry Officer held it could not be proved that the petitioner accepted a bribe for Rs. 35,000/- for promising recruitment through illegal means. But at the same time, the remaining part of the charge stood proved as an attempt to cheat.

5. The Disciplinary Authority, upon receipt of the enquiry report, observed that the charges against the petitioner stood proved. The Disagreement Note also gave the petitioner 15 days time to file a representation and stated that, thereafter, the final order would be passed. The extract of the Disagreement Note reads as under:

"The Enquiry of the Charge-Memo No.V-15014/5th R.Bn./ANU/2006-2590 Dated 01/02.09.2006 of the charges has been completed by Shri Satya Prakash, Assistant Commandant/Enquiry Officer. In the aforesaid Departmental Enquiry the Enquiry Officer has neither found the charges against the Force Member as proved nor dis-proved. A copy of the Departmental Enquiry has been annexed with this letter.

2. The undersigned has examined the Findings submitted by the Enquiry Officer

Shri Satya Prakash, Assistant Commandant of the Departmental Enquiry and found that the Enquiry Officer regarding Charge No.01, in which the Nursing Orderly A.K. Bhagat was charged of accepting Rs.10,000/- as bribe was caught red handed, the Enquiry Officer has observed while concluding that the act of bribe to be an attempt of cheating/fraud. Though on the basis of the statements of witnesses and documentary evidences produced by them in the Departmental Enquiry they have nowhere assumed the case as cheating or fraud.

3. The Nursing Orderly A.K. Bhagat was caught red handed accepting bribe of Rs.10,000/- from constable A.K.Jha in the CMO Chamber of the Dispensary of the Battalion, which has been corroborated by the deposition of Ex. Niri/WORK D.K.Singh (A.P.G.-2) in Departmental Enquiry, in which he has stated that during the search and seizure of the Nursing Orderly A.K. Bhagat total Rs.10,000/- of Rs.50-50 of two bundles of 100-100 notes were recovered. Which has been corroborated by the statements of A.P.G.-01,03,04,05, AND 06. Besides this when the Assistant Commandant Sri Surender Singh asked from the charged official whose this money belong to then on the first time he replied that this money belongs to him only, there after again said that the same belongs to constable A.K.Jha and he has given it for counting. However the Nursing Orderly A.K.Bhagat has denied of knowing the constable A.K.Jha or ever had any talk with him. (As has been deposed by him in the cross-examination by the Enquiry Officer during the Departmental Enquiry) If the charged force member was not knowing the constable A.K.Jha then why he allowed him in the Chamber of the CMO such an important officer and in his absence and allowed him to keep the Envelope at his table and why he was counting the money of an unknown person in his chamber of such an important office. Beside this it is also important to note that constable A.K.Jha is an educated force member, who did not require to get counted an amount of only Rs.10,000/- from an unknown person in such an important office. Besides this the seizure memo of the seized rupees was prepared on which there is the signature of the charged official. These all facts prove the charge of bribe. The Charge Number-2, in which there is the charge upon the Nursing Orderly A.K.Bhagat that he had demanded from Constable A.K.Jha calling him at his Govt. accommodation finalized all talks regarding getting his candidates passed out illegally in medical test and finalized place and time for transactions of money. Regarding the aforesaid on the basis of the statements of witnesses and the documentary evidences produced by them in the Departmental Enquiry and on the basis of the circumstantial evidences the constable A.K.Jha was known to the Nursing Orderly A.K.Bhagat and in that respect he had called constable A.K.Jha at his residence for getting his candidates passed in the medical test and fixed the time and place for the transaction of money and the time was fixed when the CMO would not be in his chamber. In this regard as per the statement of A.P.G.05, the Nursing Orderly A.K.Bhagat had asked from the constable A.K.Jha Rs.35,000 each for getting his candidates passed in the Medical Test and for two candidates to pass Rs.70,000 was asked and for getting his work accomplished he had called constable A.K.Jha

at his govt. accommodation and for payment of the money the CMO chamber was selected. And on the other side Constable A.K.Jha while discharging his duties and exposing the bribery secretly informed the Senior Commandant 5th Reserve Battalion and on his instruction constituting the board the aforesaid proceeding was undertaken. Thus, the charge No.-02 framed against the Nursing Orderly A.K.Bhagat got proved. In this regard it is also clarified that on getting the Charge No.-01 proved the Charge No.-02 automatically got proved.

Thus as per the aforesaid it has been clarified that both the charges against the Nursing Orderly A.K.Bhagat have got proved. The undersigned being in disagreement with the conclusion of the Enquiry Officer, a copy of the findings of the Enquiry Officer is being supplied to you and you are directed if you have to file any petition to the Disagreement Note or to the Departmental Enquiry then within 15 days of the receipt of this letter you may file your response. If you choose not to file any response within 15 days then it will be presumed that you have nothing to say regarding this Disagreement Note and the Departmental Enquiry and according to that final order shall be passed." (emphasis supplied)

6. Thus, it would be seen that the Disagreement Note did not state that the opinion/ view of the Disciplinary Authority was "tentative". It does, facially, convey the meaning that his disagreement is "final", though the Disciplinary Authority does not, in terms, say that he has finally decided that the petitioner is found guilty of the charges.

7. The petitioner represented to the Disciplinary Authority in response to the opportunity granted to him by the above Disagreement Note vide representation dated 11.09.2012. Pertinently, in the representation made by the petitioner, he did not claim that the Disagreement Note was not "tentative", or that it contained the "final" opinion of the Disciplinary Authority with regard to his guilt, or that the opportunity granted to him to represent against the Disagreement Note was an exercise in futility.

8. The Disciplinary Authority after considering the representation made by the petitioner to the Disagreement Note passed the final order dated 25.09.2012 holding the petitioner guilty of both the charges framed against him. In the final order passed by the Disciplinary Authority dated 25.09.2012, he, inter alia, observed "Before taking the Final Decision being the Disciplinary Authority and on deeply analyzing the final response dated 11.09.2012 of the charged official to the Disagreement Note No.6039 dated 23.08.12 and the reply dated 07.08.12 of the charged official it has revealed that the charged official has save and except three points more or less has reiterated the arguments which the charged official has submitted in its reply to the P.O. Brief Note dated 07.08.12", and eventually, removed the petitioner from service with immediate effect.

9. The petitioner preferred the Departmental Appeal before the Appellate Authority on 25.10.2012 against his removal from service. In his said appeal, the

petitioner, inter alia, stated as follows:

" That I was dealt departmentally for the allegation of demanding and accepting a bribe of Rs.10,000/- (Rupees ten thousand) from Const. A.K. Jha in the year 2006.

That in the departmental enquiry non of the allegations was proved as per the findings given by the enquiry officer Asstt. Commandant, Satya Prakash.

That the disciplinary authority had issued a Disagreement Note holding the charges level against me as established.

That the reply to the Disagreement Note was furnished by me to the disciplinary authority giving all the grounds for which the charges level against me are not proved.

The disciplinary authority has passed the final order totally in contravention of the principle of natural justice showing completely a biased attitude.

The disciplinary authority has failed to analyze the facts on records and has passed the order with pre-determined purpose to punish the applicant.

The disciplinary has not given any judicious heed to the submission made in the reply to the Disagreement Note but has passed the final order without giving any weightage even to the findings of the I.O. that the allegations of demanding and accepting the bribe for illegal passing out of medical test was not established."

10. The above would show that no ground of appeal was raised by the petitioner to claim that the Disagreement Note itself was bad in law, since it did not contain only a "tentative" view of the Disciplinary Authority, and that it contained his "final" opinion. The petitioner did not claim that the right of representation granted to him by the Disciplinary Authority vide his Disagreement Note dated 23.08.2012 was an empty formality.

11. The Departmental Appeal of the petitioner was rejected by the Appellate Authority on 07.01.2013. While dismissing the Departmental Appeal, the Appellate Authority, inter alia, observed:

"Since the E.O. did not conduct the DE in proper manner and left material evidence for not proving the Article of Charge -II, disciplinary authority did not agree with the findings of enquiry report and accordingly, issued Disagreement Note against the enquiry report mentioning therein the lacuna/ material evidence left for not proving of the article of charge-II and thereby proved the article of charge No.-II. Thereafter on receipt of the reply of the Disagreement Note from the appellant, disciplinary authority find no such documentary evidence/ material facts which could be establish him as innocent for further exempting him from the charge. The Disciplinary Authority after taking into consideration of all the material evidences available on record as well as the Enquiry report, Disagreement Note, considered that the charges leveled against the appellant is serious in nature and hence, awarded the penalty of "Removal from service" vide

Final Order No. final order No.V-15014/5th RB/Disc/Rule-36/AKB/12-6653 dated 25-09-2012." (emphasis supplied)

12. Thus, the Appellate Authority found that the Disciplinary Authority had considered the representation of the petitioner before passing the final order holding him guilty of the charges and punishing him.

13. Still not satisfied, the petitioner then preferred a Revision against the Appellate Order dated 07.01.2013 on 12.02.2013. Only in the revision preferred by the petitioner, for the first time, he faintly raised the issue of the Disagreement Note being illegal. He stated in his revision, inter alia, as follows:

"That in the Departmental Enquiry two charges were framed against me but none of the charges were held proved against me by the Enquiry Officer, Shri Satya Prakash, Asstt. Commandant. But in order to make me a escape goat the Disciplinary Authority had issued a Disagreement Note holding the charges leveled against me as proved, making mockery of the Departmental Enquiry."

14. The Revision preferred by the petitioner was also rejected by the Competent Authority on 18.06.2013. Even the Revisional Authority, inter alia, found that"... ... After duly considering all the averments of the petitioner in reply to the Disagreement Note and materials available in the case files he held both the charges so leveled against the petitioner as proved. The Disciplinary Authority has given detailed justification while holding both the charges as proved. The Disciplinary Enquiry was conducted duly following the laid down procedure. The petitioner was given all reasonable opportunity to defend his case but he could not build any base to outweigh the prosecution case."

15. Thus, even the Revisional Authority returned a finding against the petitioner that the Disciplinary Authority had taken into consideration all the material evidences available on record as well as the inquiry report and the reply to the Disagreement Note of the petitioner.

16. After failing to get relief from the Departmental Authorities at all rungs, the petitioner preferred the aforesaid Original Application before the Tribunal. A perusal of the Original Application shows that no specific plea or ground was raised by the petitioner to say that the Disagreement Note was not "tentative", or that it was "final" and that the Disciplinary Authority had already made up his mind with regard to the guilt of the petitioner. The petitioner did not claim that the opportunity granted to him to make his representation on the Disagreement Note was illusory, or an empty formality. Thus, there was no question of the respondent having the opportunity to deal with this aspect of the matter. The Tribunal dismissed the Original Application of the petitioner on 23.01.2019. A perusal of the said order dated 23.01.2019 shows that even at the hearing of the Original Application, the petitioner did not specifically raise the aforesaid plea of the Disagreement Note not being "tentative", or it being "final", or that the opportunity to represent against the same was farcical. The submissions of the learned counsel for the petitioner/ applicant are recorded in paragraph 5 of the

said order, which reads as follows:

"5. The counsel for the applicant submitted that the findings of the Inquiry Officer were correct. The Inquiry Officer instead of holding that he had taken bribe, had come to the conclusion that he has taken money and thereby he cheated the victims. The counsel for the applicant strenuously contended that finding of the disciplinary authority in the Disagreement Note in holding the said amounts are part of the bribe is perverse. We have gone through the material, including the opinion of the disciplinary authority expressed in the Disagreement Note as well as in the impugned order of dismissal passed by the disciplinary authority and the appellate authority. The orders are speaking and well reasoned orders and are not perverse"

17. The petitioner then preferred a Review Application before the tribunal being R.A. No.72/2019. In the Review Application, the petitioner, for the first time, clearly raised the issue that the Disagreement Note was not "tentative". In Ground-3 contained in the Review Application, the petitioner stated as follows:

"3. Because, "Error apparent on the face" is clearly visible in para 5 of this Hon"ble Tribunal's judgment where it has recorded " We have gone through the material, including the opinion of the disciplinary authority expressed in in the Disagreement Note as well as in the impugned order of dismissal passed by the disciplinary authority and the appellate authority. The orders are speaking and well reasoned orders are not perverse." That the Hon"ble Supreme Court, in the matter of Ranjit Singh vs. Union of India and Ors, has inter-alia held that "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 favorable 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 charges of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer." A bare perusal of the Disagreement Note dtd. 23.8.2012 clearly suggests that it lacks the tentative reasons of disagreement and hence fails the test of reasonableness and law laid down by the Hon"ble Apex Court."

18. The Tribunal rejected the Review Application by the impugned order dated 11.03.2019.

19. In the light of the aforesaid, the first issue that arises for consideration is, whether, the petitioner can at all be permitted to raise the plea that the

Disagreement Note was not "tentative", or that it was "final", or that there was failure of compliance of the Principles of Natural Justice on the part of the Disciplinary Authority, before us. The petitioner sought to raise the said issue for the first time, faintly in the Departmental Revision, and thereafter, in the Review Application moved before the Tribunal.

20. In our view, it was imperative for the petitioner to raise this plea fairly and squarely at the very first opportunity i.e. when the Disagreement Note was issued to him by the Disciplinary Authority. The fact that the petitioner did not raise this plea at the initial stage itself shows that the petitioner did not consider the language used in the Disagreement Note as conveying a "final" decision/opinion of the Disciplinary Authority, and he understood the Disagreement Note to be "tentative". Raising of this plea pointedly, for the first time, in the Review Application before the Tribunal shows that the said plea was raised as an afterthought, and as a result of the counsel's ingenuity. Had that said plea been raised before the Disciplinary Authority himself, the Disciplinary Authority could have clarified the matter. Maybe, he would have withdrawn the Disagreement Note and issued a fresh one to cure the so-called defect - assuming that there was one. The petitioner could not have waited to raise the said pointed plea, for the first time, in the Review Application before the Tribunal, after having gone through several rungs to seek relief, namely, before the Disciplinary Authority; Appellate Authority; Revisional Authority, and; before the Tribunal when it heard and decided the Original Application. The respondent department could not be taken by surprise, and be presented a fait accompli. Had the said aspect been raised earlier before the Departmental Authorities, they would have had the opportunity of undertaking course correction. In our view, on this short ground, the petitioner is estopped from raising the said plea belatedly and he cannot be permitted to raise this plea before us.

21. In any event, since the said plea has been raised by the petitioner by placing reliance on the Disagreement Note itself, which forms part of the record before the Tribunal, we have considered the same.

22. When the writ petition came up before us for preliminary hearing on 08.08.2019, we passed the following order after hearing learned counsel for the petitioner at some length.

"We have heard the submissions of Mr. Chhibber at some length. He submits that while issuing the Disagreement Note, the Disciplinary Authority recorded, not his tentative view in relation to the findings returned by the Inquiry Officer, but a definite finding of guilt - as is evident from the language used in the Disagreement Note. He submits that the grant of opportunity to the petitioner to represent against the Disagreement Note was rendered an empty formality, since the Disciplinary Authority had already made up his mind that the petitioner was guilty of the charges. He submits that since the view expressed by the Disciplinary Authority in the Disagreement Note was not tentative, the inquiry stood vitiated from the stage of issuance of the Disagreement Note. In support of

his submission Mr. Chhibber has placed reliance on *Yoginath D. Bagde Vs. State of Maharashtra & Another*, (1997) 7 SCC 739, followed in *Rishipal Singh Vs. Union of India & Others*, W.P. (C.) No.745/2009 decided on 26.03.2010 by a Division Bench of this Court; and *Rajpal Singh Vs. Union of India & Others*, W.P. (C.) No. 19690/2005 decided on 09.03.2016 by a Division Bench of this Court.

We have put it to Mr. Chhibber that while there can be no dispute about the proposition that the grant of opportunity to the delinquent to represent against the Disagreement Note cannot be an empty formality, and the formation of the opinion by the Disciplinary Authority with regard to his disagreement to the findings returned by the Inquiry Officer should be tentative and not final, the Disagreement Note may not be considered to contain the "final" opinion, merely because the Disciplinary Authority may have used words and language which conveys that the opinion expressed is a final opinion. This is for the reason that Disciplinary Authorities, more often than not, are not legally qualified and well-versed with the intricacies of the law. If in the understanding of the Disciplinary Authority his opinion is "final", he would not even grant an opportunity to the delinquent to make a representation against the Disagreement Note, or, even when granted, he would not consider the representation. Thus, it appears to us that only a facial or peripheral look at the Disagreement Note may not be sufficient to decide whether the opinion of the disciplinary authority is "tentative" or "final", and a closer scrutiny of the conduct of the disciplinary authority - which includes his conduct post the issuance of the Disagreement Note would have a bearing on determination of this issue. It is the content and conduct, and not the form which is relevant. There is no magic in use/ abstinence from use of certain words by the disciplinary authority which would be determinative of the issue. There may be cases, where- though the Disagreement Note uses words and language which may convey only a "tentative" opinion, but there may be other independent evidence to show that the opinion of the disciplinary authority was actually final and that he disposed of the representation with a closed mind.

We have, thus, put it to Mr. Chhibber that a deeper scrutiny would be required, on case to case basis, to find out whether the opportunity to make a representation against the Disagreement Note is an empty formality, or not. For that purpose, the final order that the Disciplinary Authority passes would need examination. If the pleas raised in the representation of the delinquent are considered and dealt with in the final order, a safe conclusion could be drawn that the view expressed in the Disagreement Note was tentative, and not final, despite the use of the language in the Disagreement Note which is suggestive of the opinion of the Disciplinary Authority being final. However, if the Disciplinary Authority summarily rejects the representation without discussing the pleas raised by the delinquent in his representation, it may be concluded that, indeed, the view expressed by the Disciplinary Authority in the Disagreement Note was final, and not tentative. In the decisions relied upon by Mr. Chhibber, taken note of hereinabove, the aforesaid distinction has not been drawn. Mr. Chhibber seeks a short adjournment to examine the aforesaid aspect.

At his request, list on 14.08.2019."

23. Mr. Chhibber advanced further submissions on the adjourned date i.e. 14.08.2019 and relied upon several decisions, which shall be referred to later in this decision.

24. The contention of Mr. Chhibber - learned counsel for the petitioner, is that the Disagreement Note issued by the Disciplinary Authority was not "tentative" in nature, which violated the Principles of Natural Justice, insofar as it rendered the opportunity of hearing and representation against his being found guilty of the charges, an empty formality. The petitioner relies on decision of the Supreme Court in *Yoginath D. Bagde (supra)*, wherein the Disciplinary Authority had issued a show cause notice to the delinquent officer as to why the "penalty" - which was tentatively proposed, should not be imposed. The Supreme Court held that the Disciplinary Authority came to his final conclusion with regard to the "guilt" of the delinquent without providing an opportunity of hearing. The Supreme Court further held that the Disciplinary Authority should provide his "tentative" view for disagreement with the finding of innocence returned by the Inquiry Officer, along with his reasons as to why he "proposes" to disagree with the report of the Inquiry Officer.

25. Mr. Chhibber relied on several other decisions where the Disagreement Note had been quashed since the Disciplinary Authority recorded the "final" decision/opinion in the Disagreement Note, instead of a "tentative" opinion. He has relied on *Union of India v. Anokhey Lal, W. P.(C)742/2007*, decided by a Division Bench of this court. This court relied on the language used by the Disciplinary Authority in the Disagreement Note to hold that the reasons recorded are "final" and not "tentative". The court held that the Disagreement Note starts with the observation that Disciplinary Authority has not agreed with the findings of the Inquiry Officer, and in conclusion the note mentions that the charges are proved. These observations show that Disciplinary Authority had a pre-determined mind, as a result of which, the opportunity of hearing provided to officer was rendered as an empty formality. This court held that the Disciplinary Authority should have an open mind while dealing with the representation.

26. In *BSNL v. Central Administrative Tribunal Moti Mahal Lko. & Anr, Service Bench: 985/15* decided on 26th February 2016, the Allahabad High Court upheld the decision of the Administrative Tribunal which had relied on *Yoginath D. Bagde (supra)*, and concluded that the phrase "Hence the charge is proved to this extent" means that instead of recording "tentative" reasons, the Disciplinary Authority recorded "final" conclusions that the charge is proved, and thereby the opportunity given to officer is rendered futile.

27. In *Union of India v. K.K. Dhawan, 2012 SCC OnLine Del 2193*, this court observed that if punishment is already prescribed in the Disagreement Note, then it is indicative of the fact that Disciplinary Authority had a closed mind while addressing the officer's representation. The Disciplinary Authority has to

maintain objectivity, impartiality and openness of mind to ensure observance of Principles of Natural Justice. Reasons for disagreeing have to be tentative and be given to the delinquent officer, so that he is not blind sighted. They should not be vaguely or loosely worded, but should be precise to effectively assist the officer in understanding the reasons. Moreover, there is no need to mention the word "tentative" explicitly in the note, but it should be reflective in the language and content of the note. Here, the onus was put on the authorities to prove that the Disagreement Note is "tentative" and not "final", but nothing was produced to prove the same.

28. In *Birbal Mahey v. Union of India*, 2010 SCC OnLine Del 1067, the respondents sought to draw a distinction with *Yoginath D. Bagde* (supra) on the ground that in *Yoginath D. Bagde* (supra), the Show Cause Notice was in respect of the penalty proposed - which means that the aspect of "guilt" stood concluded by the Disciplinary Authority against the delinquent without notice to; right of representation, or; hearing to him, whereas, in that case the Show Cause Notice issued was to determine the "guilt" of the delinquent. This court rejected the distinction sought to be made and held that this difference is not material, since the Disciplinary Authority had made up its mind about the guilt of the officer. This court further held that the usage of the phrase "I hold you guilty" in the note conveys that the note was "final". Relying on the case of *Yoginath D. Bagde* (supra), and the words expressly used in Disagreement Note, this court quashed the disciplinary proceedings. The relevant extract from this decision reads as follows:

"13. The decisions relied upon by the petitioner lay down the legal position that in case the Disciplinary Authority disagrees with the findings of the enquiry officer, it must communicate its tentative opinion for such disagreement to the delinquent employee and grant him a right to represent and to meet the reasons that the Disciplinary Authority has conveyed for his tentative opinion. It is only after considering the representation, if any, and the personal hearing, if any, granted to the delinquent, that the Disciplinary Authority is expected to arrive at his conclusive finding one way or another. However, a perusal of the Disagreement Note shows that the Disciplinary Authority had, in fact, held the petitioner guilty of Charge No. 1 even before the said note was issued to the petitioner. It is, therefore, clear to us that the procedure adopted by the Disciplinary Authority of requiring the petitioner to submit his representation and to grant him a hearing was an empty formality.

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16. We are conscious that in *Yoginath D. Bagde v. State of Maharashtra* (supra), the notice had been issued to grant an opportunity to the petitioner to show cause against the penalty proposed to be imposed by the respondent, whereas, in the present case the order dated 14.07.2005 was issued to convey the reasons for disagreement with the findings of the enquiry officer in respect of the first Article of Charge, i.e. before the passing of the impugned order dated

25.10.2005 by the Disciplinary Authority. However, in our view, this difference is not material since in the present case as well, the Disciplinary Authority has made up his mind with regard to the guilt of the petitioner even before passing the said order dated 14.07.2005. The Disciplinary Authority while issuing the order dated 14.07.2005 consciously used the words to the effect "In view of the above, I hold you guilty of Article of Charge-I". In our view, the aforesaid observation is clear and categorical, and there is no ambiguity about what the Disciplinary Authority desired to convey when he used the aforesaid language. George Bernard Shaw has said "Words are only postage stamps delivering the object for you to unwrap." Plutarch stated that "In words are seen the state of mind and character and disposition of the speaker."

(emphasis supplied)

29. Mr. Chhibber has also placed reliance on the judgments of a Division Bench of this Court in *Rajpal (supra)*, *Rishipal Singh (supra)* and *Union of India v. Baljit Singh Sondhi*, W.P.(C.) No. 11273/ 2009, decided on 19.07.2010, which are in the same vein as *Birbal Mahey (supra)* and the other decisions taken note of hereinabove.

30. Mr. Chhibber submits that in the facts of the present case, grant of opportunity to represent against the Disagreement Note tantamounts to a post-decisional hearing, since the Disciplinary Authority had formed his "final" opinion with regard to the petitioner's guilt without hearing him in the matter. He submits that such post-decisional hearing would not meet the requirements of the law, and would not cure the defect which inheres the Show Cause Notice/ Disagreement Note. In this regard, he places reliance on *K.I. Shephard v. Union of India*, (1987) 4 SCC 431, and *Shekhar Ghosh v. Union of India*, (2007) 1 SCC 331, where the Supreme Court observed:

14. A post-decisional hearing was not called for as the disciplinary authority had already made up its mind before giving an opportunity of hearing. Such a post-decisional hearing in a case of this nature is not contemplated in law. The result of such hearing was a foregone conclusion.

31. Mr. Chhibber lastly submits that if this Court is inclined to take a view different from the view taken by several Benches of this Court in the above cited decisions, the correct course to be adopted by this Court would be to refer the issue to a larger Bench. In this regard, he places reliance on *Union of India v. Colonel G.S. Grewal*, (2014) 7 SCC 303.

32. We have given our thoughtful consideration to the matter in the light of the submissions advanced by Mr. Chhibber and the decisions cited before us. In our considered view, a distinction needs to be drawn between cases where the Disciplinary Authority has actually formed his "final" opinion with regard to the "guilt" of the delinquent employee even before issuing the Disagreement Note, and cases where, though the Disciplinary Authority may not actually have formed his definite and "final" opinion about the "guilt" of the delinquent employee while

issuing the Disagreement Note, he employs language in the Disagreement Note, which is suggestive of and conveys the meaning that he has formed a definite and "final" opinion with regard to the "guilt" of the delinquent employee.

33. To illustrate the point, we may take the example of a situation where the Disciplinary Authority issues a perfectly worded Disagreement Note by resorting to usage of expressions such as "tentative", "proposed" and so on. On the face of it, such a Disagreement Note would not be open to challenge on the ground that the opinion expressed therein by the Disciplinary Authority is not "tentative", or that it is "final". But, if in another document, which comes into existence prior to the issuance of the Disagreement Note; simultaneously with it, or; before receipt or consideration of the reply to the Disagreement Note given by the delinquent employee, the Disciplinary Authority actually records his definite opinion that the delinquent employee is guilty of the charge, and that he would punish him, would it be possible for the Disciplinary Authority to defend his position by mere reference to the language used in the Disagreement Note? Would it not be open to the delinquent employee to contend that the Disagreement Note - though apparently "tentative", in fact, the Disciplinary Authority has already made up his mind to find the delinquent employee "guilty", and to punish him even before consideration of his representation to the Disagreement Note? The point that we are trying to drive home is that it is the substance, and not the form of the Disagreement Note which is relevant.

34. We cannot lose sight of the fact that, more often than not, Disciplinary Authorities are not legally trained and skilled minds, and are not well versed with the intricacies of the law. While meaning to comply with the spirit of the law relating to consideration of representations against Disagreement Notes, they may fail to follow the letter of the law and employ language which may not accurately describe their state of mind and may, in fact, convey a contrary meaning. On the other side of the spectrum would be cases, where the authorities may comply with the letter of the law; employ skillful language in the Disagreement Note while, in fact, they may not be complying with the spirit and intent of the law. The compliance with the spirit of the law is imperative, and even if there is non-compliance with the letter of the procedural law - strictly speaking, the same may not render the action violative of the Principles of Natural Justice.

35. One frequently comes across situations where, even the best of legally trained and skilled minds make mistakes in drafting pleadings of a case. In *Teva Pharmaceutical Industries Ltd.v. Natco Pharma Limited*, (2014) 210 DLT 591 (DB), a Division Bench of this Court was dealing with an appeal from the order of the learned Single Judge returning the plaint. This Court considered the issue whether a party should be penalized for the weak, not precise, and ambiguous pleadings of their advocates. The Division Bench, inter alia, observed:

"18. The pleadings in the plaint, to say the least, are not very lucid and clear. However the senior counsel for the respondent/defendant also has not argued on

the basis of the pleadings in the plaint. He has in this regard rather relied on the replication which indeed shows that the focus of the appellants/plaintiffs was/is on prohibiting/preventing export. We have perused the replication carefully. We tend to agree with the senior counsel for the appellants/plaintiffs that what has been filed as a replication is indeed a cut and paste job perhaps from the rejoinder which may have been prepared or filed to the reply to the application for interim relief. However what arises for consideration is, whether the appellants/plaintiffs are to be penalized for the weak, not precise and ambiguous pleadings of their Advocates. We are in this context reminded of what the Courts have held about Moffusil pleadings. It has been held that they are to be construed liberally and that only because the parties did not use the terminology which they should have, ipso facto, would not mean that the ingredients for satisfying the requirements of statute are absent. The Supreme Court in *Kedar Lal Seal v. Hari Lal Seal* AIR 1952 SC 47 held that the Courts would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however, clumsily or inartistically the plaint may be worded. The same sentiment was echoed in *Ganesh Trading Co. v. Moji Ram* (1978) 2 SCC 91. Though the genesis of the said view was, the Moffusil lawyers being not skilled in language and pleadings but we find the principle to have travelled till *Des Raj v. Bhagat Ram* (2007) 9 SCC 641 and *Narain Prasad Aggarwal v. State of M.P.* (2007) 11 SCC 736, though the Supreme Court in *Devasahayam v. P. Savithramma* (2005) 7 SCC 653 also observed that different considerations on construction of pleadings may arise between pleadings in the Moffusil Court and pleadings on the Original Side of the High Court. Alas, we find that the said difference appears to have ceased to exist- pleadings on the Original Side of this Court are being drafted, as in the Moffusil Court.

19. However we are still of the opinion that the principle, of not allowing a litigant to suffer for such defects in pleadings should still be upheld. From a reading of the plaint, it can undoubtedly be not said that the suit is confined to prohibiting exports. The suit is for using the patented process of the appellants/plaintiffs for manufacturing the product for sale in US and "elsewhere" and from the averments of the respondent/defendant of sale network of the respondent/defendant in Delhi, it has to be held that the averments pertain to Delhi also. We are also of the view that no prejudice is caused to the respondent/defendant from so giving benefit of doubt to the appellants/plaintiffs inspite of defect in their pleadings, as the respondent/defendant is already contesting the first suit in this Court. We are further of the view that the second suit for the same relief i.e. of restraining the respondent/defendant from marketing the goods produced from infringing process in Delhi would be maintainable as the same is based on a subsequent cause of action i.e. threat by the respondent/defendant to commence marketing goods produced from infringing process, in Delhi, as pleaded, i.e. after having made a statement in the first suit of not using the infringing process." (emphasis supplied)

36. Thus, the Division Bench not only held that defective pleadings should not be a cause for the concerned party suffering prejudice, it also invoked the doctrine of prejudice. When, even well trained and skilled legal minds are known to make mistakes while framing pleadings and documents, and the law is that such mistakes should not result in prejudice to the concerned party, in our view, it would be unfair and rather harsh to lay down higher standards for scrutinizing documents - such as Disagreement Notes, that the Disciplinary Authority - who may not even be legally trained or skilled, may author. Applying the same principle, as recognized in *Teva Pharmaceutical Industries Ltd.* (supra) by reference to earlier Supreme Court decisions, we see no reason as to why the Disciplinary Authority should suffer adverse consequences of an imperfect or defective use of language while framing the Disagreement Note, and why the Court should not, in such like cases, undertake a deeper scrutiny of the real intent and meaning of the Disciplinary Authority when it issues the Disagreement Note. It is for this reason that, in our considered view, not merely the language employed in the Disagreement Note, but the other relevant surrounding circumstances, that deserve to be considered to ascertain the true purport of the Disagreement Note i.e. whether it is "tentative", or it is "final".

37. There can be no quarrel with the legal proposition as laid down by the Supreme Court initially in *Punjab National Bank v. Kunj Behari Misra*, (1998) 7 SCC 84, which was followed by the Supreme Court in *Yoginath D. Bagde* (supra). *Kunj Behari Misra* (supra) was a case where the question considered by the Supreme Court was "when the enquiry officer, during the course of disciplinary proceedings, comes to a conclusion that all or some of the charges alleging misconduct against an official are not proved then can the disciplinary authority differ from that and give a contrary finding without affording any opportunity to the delinquent officer.". The respondent Kunj Behari Misra was found guilty of one charge out of six framed charges against him. He was exonerated on the other five charges. The other respondent, namely Shanti Prasad Goel, was exonerated of the charges framed against him. The Disciplinary Authority did not agree with the findings of the Enquiry Officer in the case of Kunj Behari Misra insofar, as, he was exonerated of charges two to six. By his summary order, he held the respondent guilty of all the charges and subjected him to a minor penalty of proportionate recovery of the amount found missing. The other respondent Shanti Prasad Goel was, similarly, found guilty by the Disciplinary Authority by a summary order and was similarly subjected to penalty. Their departmental appeals were unsuccessful. They assailed the penalty imposed upon them before the Allahabad High Court. The main contention of the respondents 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. This contention was accepted by the High Court, which quashed both the orders imposing penalty. The appellant Punjab National Bank then preferred appeals to the Supreme Court.

38. On account of an apparent conflict in law emerging from several decisions relied upon before the Division Bench, the matter was referred to a larger Bench. The contention of the appellant Punjab National Bank before the Supreme Court was that the Service Regulations governing the respondents did not require an opportunity of being heard being given to the delinquent employee when the Disciplinary Authority disagrees with the findings of the Enquiry Officer, once the Enquiry Officer had given a hearing to them. It was also argued that the requirements of such a hearing could not be read into the Service Regulations and no prejudice could be said to have been caused to the respondent employees" inasmuch, as, enquiry officer had given full opportunity to them to defend themselves. The Supreme Court took note of the Service Regulations applicable to the respondent. Regulation 7(2) provided that "The disciplinary authority shall, if it disagrees with the findings of the enquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose"

39. After referring to the earlier decisions, the Supreme Court concluded that the Principles of Natural Justice would have to 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."

40. In *Yoginath D. Bagde (supra)*, the factual position was that the enquiry officer held the charges against the appellant Judicial Officer, as not proved. The enquiry officer, consequently, recommended reinstatement of the appellant. The Disciplinary Committee of the High Court considered the report of the Enquiry Officer and disagreed with the findings of the enquiry officer. It held that the charges against the appellant were proved. The Disciplinary Committee, therefore, tentatively decided to impose penalty of dismissal from service on the appellant. Accordingly, the appellant was called upon by a Notice to Show Cause as to why the proposed penalty be not imposed upon him. The delinquent officer was served with a copy of the enquiry report and the reasons recorded by the Disciplinary Committee for not agreeing with the findings submitted by the enquiry officer. The High Court considered the reply and decided to impose major penalty of dismissal from service upon the appellant. Consequently, the appellant was dismissed from service. The challenge by the appellant before the High Court in a writ proceeding failed.

41. Before the Supreme Court, the appellant, inter alia, contended that before recording its reasons for disagreeing with the findings of the enquiry officer, and issuing a show cause notice relating to the proposed punishment, the appellant should have been given an opportunity of hearing on the aspect of "guilt" and since that was not done, the Principles of Natural Justice were violated. The consequent decision taken by the High Court to recommend dismissal of the appellant and his dismissal by the State Government were vitiated. The Supreme Court held that it was open to the Disciplinary Authority, either to agree with the findings recorded by the enquiring authority, or disagree with those findings. If it does not agree with the findings of the enquiring authority, it may record its own findings. The Supreme Court observed :

"28.....Difficulties have arisen in all those cases in which the enquiring authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the disciplinary authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the rules made under Article 309 of the Constitution or the disciplinary authority may, of its own, provide such an opportunity. Where the rules are in this regard silent and the disciplinary authority also does not give an opportunity of hearing to the delinquent officer and records findings different from those of the enquiring authority that the charges were established, "an opportunity of hearing" may have to be read into the rule by which the procedure for dealing with the enquiring authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be "not guilty" by the enquiring authority, is found "guilty" without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

29. We have already extracted Rule 9(2) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 which enables the disciplinary authority to disagree with the findings of the enquiring authority on any article of charge. The only requirement is that it shall record its reasoning for such disagreement. The rule does not specifically provide that before recording its own findings, the disciplinary authority will give an opportunity of hearing to a delinquent officer. But the requirement of "hearing" in consonance with the principles of natural justice even at that stage has to be read into Rule 9(2) and it has to be held that before the disciplinary authority finally disagrees with the findings of the enquiring authority, it would give an opportunity of hearing to the delinquent officer so that he may have the opportunity to indicate that the findings recorded by the enquiring authority do not suffer from any error and that there was no occasion to take a different view.

The disciplinary authority, at the same time, has to communicate to the delinquent officer the "TENTATIVE" reasons for disagreeing with the findings of the enquiring authority so that the delinquent officer may further indicate that the reasons on the basis of which the disciplinary authority proposes to disagree with the findings recorded by the enquiring authority are not germane and the finding of "not guilty" already recorded by the enquiring authority was not liable to be interfered with." (emphasis supplied)

42. It also found support from the three-judge bench decision in Kunj Behari Misra (supra). The Supreme Court further observed in Yoginath D. Bagde (supra):

"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.

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34. Along with the show-cause notice, a copy of the findings recorded by the enquiry officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that

he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

35. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to the findings on the two charges framed against him, the principles of natural justice, as laid down by a three-Judge Bench of this Court in *Punjab National Bank v. Kunj Behari Misra* [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] referred to above, were violated.

36. Mr Harish N. Salve, learned Senior Counsel appearing on behalf of the respondent has contended that the disciplinary proceedings come to an end either when the delinquent is exonerated of the charges or when punishment is inflicted upon him on the charges being proved. Since in the instant case, the Disciplinary Committee had given an opportunity of hearing to the appellant before finally recommending to the State Government to dismiss him from service, the principles of natural justice were fully complied with and that too at a stage earlier than the stage when the curtain was finally brought down on the proceedings. He contended that not only the findings recorded by the enquiry officer but the reasons for which the Disciplinary Committee had not agreed with those findings, were communicated to the appellant to whom a notice was also issued to show cause why he be not dismissed from service. He further contended that the appellant submitted a reply in which he attacked the reasons for which the Disciplinary Committee had decided to disagree with the findings of the enquiry officer and, therefore, in the given circumstances of this case, it cannot be said that there was a failure or denial of opportunity at any stage.

37. The contention apparently appears to be sound but a little attention would reveal that it sounds like the reverberations from an empty vessel. What is ignored by the learned counsel is that a final decision with regard to the charges levelled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of *Punjab National Bank v. Kunj Behari Misra* [(1998) 7 SCC 84 : 1998 SCC (L&S) 1783 : AIR 1998 SC 2713] in which it had been categorically provided, following earlier decisions, that if the disciplinary authority does not agree with the findings of the enquiry officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the disciplinary authority that the findings already recorded by the enquiry officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case." (emphasis supplied)

43. As a result of the decisions of the Supreme Court in *Kunj Behari Misra*

(supra) and Yoginath D. Bagde (supra), Rule 15(2) of the CCS (CCA) Rules, 1965 was amended to specifically provide that the Disciplinary Authority shall forward a copy of the inquiry report, and where the Disciplinary Authority is not the Inquiring Authority and the Disciplinary Authority seeks to disagree with the report of the Inquiry Officer, he should also forward along with the inquiry report "its tentative reasons for disagreement" to the Government servant and require him to submit, if he so desires, his written representation within fifteen days. Sub-Rule (4) of Rule 15, as it now stands, provides that the Disciplinary Authority shall consider the representation, if any, submitted by the Government servant and record its finding before proceeding further in the matter.

44. Pertinently, both in Kunj Behari Misra (supra) and Yoginath D. Bagde (supra), the factual position was that the Disciplinary Authority fixed the "guilt" of the delinquent employee without affording any opportunity to him to deal with the reasons that the Disciplinary Authority may have had for disagreeing with the findings of innocence returned by the Enquiry Officer. As noticed above, in Kunj Behari Misra (supra), the Disciplinary Authority did not issue any show cause notice whatsoever to the delinquent employee before subjecting them to penalty despite the fact that the Enquiry Officer had exonerated the delinquent employees either wholly, or partially. The Disciplinary Authority straight away proceeded to arrive at his finding with regard to their "guilt" on the charges leveled against them, and also proceeded to punish them without any opportunity of hearing or representation. In Yoginath D. Bagde (supra), the Disciplinary Authority issued the show cause notice, only confined to the aspect of the proposed punishment, but not to the aspect of "guilt". It was in this background that the Supreme Court held (in paragraph 34 and paragraph 35) that the Disciplinary Authority had already taken a final decision that the charges against the appellant/ delinquent employee were proved. That is not the factual position in the case in hand. The Show Cause Notice/ Disagreement Note is in respect of the "guilt", and not the punishment. This raises the question whether it can be inferred that the Disciplinary Authority has already finally decided on the "guilt" of the delinquent employee, on a facial reading of the Disciplinary Note?

45. We again say that there can be no quarrel with the aforesaid proposition of law laid down by the Supreme Court in Kunj Behari Misra (supra) and Yoginath D. Bagde (supra). A delinquent employee has to be given a meaningful opportunity to represent against the Disagreement Note, whenever the Disciplinary Authority proposes to disagree with the findings returned by the enquiry officer in favour of the delinquent employee. That opportunity to represent against the Disagreement Note cannot be an empty formality and it has to be a meaningful one.

46. The opinion that the Disciplinary Authority forms, and reflects in the Disagreement Note, thus, has to be "tentative" and cannot be "final". He has to, in the Disagreement Note, give reasons as to why he proposes to disagree with

the findings returned by the enquiry officer which are in favour of the delinquent employee. The purpose of issuance of the Disagreement Note is to provide a meaningful opportunity to the delinquent employee to meet and counter the reasons on account of which the Disciplinary Authority proposes to differ with the findings of the enquiry officer. This is necessary, so that the representation that the delinquent employee makes in response to the Disagreement Note, is duly considered, and such consideration should be apparent from the final order that the Disciplinary Authority may pass.

47. But the point is, whether the determination of the issue whether to the disagreement expressed in the Disagreement Note is "tentative" or "final", can be trivialized, and be determined only upon the facial examination of the Disagreement Note? Or, would the other relevant and attending circumstances be also looked at to determine this issue?

48. We have, in the earlier part of our discussion given an example in paragraph 33. We do not wish to re-state the same. However, that example helps us in arriving at our conclusion that the examination of the aforesaid aspect i.e. whether the opinion contained in the Disagreement Note of the Disciplinary Authority is "tentative" or "final", cannot be determined merely on facial reading of the Disagreement Note itself, but would have to be determined by looking at the Disagreement Note as a whole; the conduct of the Disciplinary Authority in considering and dealing with the representation that the delinquent may make, and; his conduct while giving his reasons for arriving at his final decision with regard to the guilt, or otherwise, of the delinquent employee.

49. It is well settled that in the field of administrative law, it is the "substance" which is looked at and is preferred, over the "form". We may refer to the decision of the Supreme Court in *Gujarat Steel Tubes Ltd. And Others v. Gujarat Steel Tubes Mazdoor Sabha and Others*, (1980) 2 SCC 593.

50. One of the issues considered by the Supreme Court in *Gujarat Steel Tubes Ltd.* (supra) was whether the order of termination was one of simple discharge or whether the same was punitive in the nature of dismissal or removal. While examining the said issue, the Supreme Court, inter alia, observed:

"50. The anatomy of a dismissal order is not a mystery, once we agree that substance, not semblance, governs the decision.

Legal criteria are not so slippery that verbal manipulations may outwit the court. Broadly stated, the face is the index to the mind and an order fair on its face may be taken at its face value. But there is more to it than that, because sometimes words are designed to conceal deeds by linguistic engineering. So it is beyond dispute that the form of the order of the language in which it is couched is not conclusive. The court will lift the veil to see the true nature of the order.

51. Many situations arise where courts have been puzzled because the manifest language of the termination order is equivocal or misleading and dismissals have

been dressed up as simple termination. And so, Judges have dived into distinctions between the motive and the foundation of the order and a variety of other variations to discover the true effect of an order of termination....." (emphasis supplied)

51. The Supreme Court also referred to its decision in *Chartered Bank v. Employees' Union*, (1960) 3 SCR 441, and *Murugan Mills v. Industrial Tribunal*, (1965) 2 SCR 148, where it had held that the form of the order in the case of termination of service is not conclusive, and that the tribunal can go behind the order to find the reasons which led to the order. 52. A Division Bench of this Court in *Union of India v. Vinod Babu*, 2014 SCC OnLine Del 2049, held that the language of the Disagreement Note cannot be decisive of whether the note is intended to be "tentative" or "final". The court held that the substance of the note has to be seen, instead of the form of the note. The relevant extract from this judgment read as follows:

10. "So far as the second aspect, i.e., the notice of disagreement and the manner in which it was done is concerned, Yoginath D. Begde (supra) no doubt, suggests that disciplinary authority ought to have prefaced or prefixed the discussion with something to suggest that conclusions are tentative. In this case, the Disagreement Note of 10.04.2008 does not contain any such terms. However, we are of the opinion that mere absence of such term, or any to the like effect would not ipso facto invalidate the show cause notice which conveys the substance of the disagreement, i.e., that the disciplinary authority was of the opinion that the Inquiry Officer's recommendations stating that there was no material to implicate the respondent, was incorrect. The disciplinary authority went on to suggest that such material existed in the form of the joint inquiry report. The substance of the Disagreement Note, therefore, was that the Inquiry Officer felt that there was material to support the charge rather than exonerate the respondent - which is what was exactly put to the respondent/applicant who dealt with it appropriately. In these circumstances, the findings of the CAT to the contrary are disapproved and are accordingly set aside. (emphasis supplied)

53. In *Union of India v. P. N. Bhatt*, 2005 SCC OnLine Del 1453, a Division Bench of this court examined the Disagreement Note, which started with the phrase that council has "proposed" to differ with the findings of the Inquiry Officer. Furthermore, the Note ended with the observation that a suitable decision will be taken after considering both the Inquiry Officer's Report and officer's representation. This court held that the Disagreement Note was "tentative" in nature, and not "final". The court also differentiated *Yoginath D. Bagde* (supra) on facts, where the Show Cause Notice was against the penalty proposed. The extract from this judgment reads as follows:

"6. We have carefully perused the said Disagreement Note and on scrutinizing thereof, we are of the considered opinion that Disagreement Note that has been prepared and finalized by the disciplinary authority was of tentative nature which is apparent from the expression used in the language of the aforesaid office

memorandum. It is clearly stated that after examination of the inquiry report the Council has "proposed" to differ with the findings of the Inquiry Officer. The said expression clearly makes it clear that the aforesaid difference and disagreement is only tentative in nature and not a final decision. The same is also corroborated by the last paragraph of the said communication wherein it is clearly stated that the disciplinary authority would take a suitable decision after considering the inquiry report and submission of the charged officer. Therefore, whatever was recorded in the said Disagreement Note was apparently tentative in nature and not a final decision taken. The disciplinary authority proposed to take a final decision after scrutiny of the inquiry report and the reply, if any, received from the respondent.

7. In that view of the matter, the submission of the counsel for the respondent that the said Disagreement Note was a final decision and not a tentative opinion cannot be accepted. The Tribunal also fell into an error in considering the said opinion as a final opinion and not as a tentative opinion. The decision, which is referred to by the learned Tribunal in its decision, namely, *Yoginath D. Bagade v. State of Maharashtra* reported in 1999 VIII AC (SC) 201 : [1999 (5) SLR 248 (SC)], in our considered opinion is distinguishable on facts. A reading of the said decision would make it clear that in the said case not only the disciplinary authority, in the dis-agreement note, took a final decision in respect of disciplinary proceeding but also decided about the penalty which was to be imposed on the charged employee and decided to impose upon him the penalty of dismissal. In that context the aforesaid observations were recorded by the Supreme Court, which in our opinion have no application to the facts and circumstances of this case. In that view of the matter we are of the considered opinion that the decision which is rendered by the Tribunal cannot be sustained and is against the settled principles of law and, therefore, the same is set aside and quashed." (emphasis supplied)

54. When we examine the Disagreement Note issued by the Disciplinary Authority in the present case, in the light of the manner in which the Disciplinary Authority proceeded to deal with the same, the only conclusion that we can reach is that the view expressed by the Disciplinary Authority in the Disagreement Note was "tentative" and not "final", even though the language conveys otherwise. Firstly, we may observe that the Disagreement Note clearly sets out the reasons for disagreeing with the findings returned by the Inquiry Officer. Secondly, the Disciplinary Authority put the petitioner/ delinquent employee to notice that he being in disagreement with the conclusion of the Inquiry Officer, the delinquent was being supplied with the findings of the Inquiry Officer and he was directed that "If you have to file any petition to the Disagreement Note or the departmental inquiry you may file your response". He also stated that if the petitioner chose not to file a response within fifteen days, it would be presumed that he had nothing to say regarding "this Disagreement Note and the departmental inquiry and according to that final order shall be passed". Thus, though the Disciplinary Authority did not use words such as "tentative";

"propose", or the like, he clearly gave an opportunity to the petitioner to represent, inter alia, against the Disagreement Note within fifteen days and also informed him that a final order would be passed only after his representation is received and, if the same is not so received, in absence thereof.

55. Then we come to the order passed by the Disciplinary Authority finding the petitioner "guilty" and subjecting him to penalty. That order was passed on 25.09.2012. The same is a detailed order which discusses the history of the case; the charges framed against the petitioner; and the substance of the statements made by several witnesses who appeared in the inquiry, including the cross-examination of the petitioner. The Disciplinary Authority records that he has examined the response dated 11.09.2012 to the Disagreement Note No.6039 dated 23.08.2012, and it revealed that the petitioner/ charged official had more or less reiterated the arguments which he had submitted in reply to the Presenting Officer's brief note dated 07.08.2012, except raising three points. The Disciplinary Authority then proceeds to discuss the said points raised by the petitioner in detail and concludes that both the charges against the petitioner stood proved.

56. If the Disciplinary Authority would have already arrived at his "final" opinion with regard to the "guilt" of the petitioner while issuing the Disagreement Note, he would not have examined the matter in such depth and would have summarily rejected the representation made by the petitioner. However, that is not the case. The Disciplinary Authority specifically takes note of each & every aspect raised by the petitioner in his Disagreement Note, and squarely deals with them in his final order dated 25.09.2012. His reasoning is extremely detailed and is founded upon the evidence recorded in the inquiry proceedings. By no stretch of imagination, it can be said that the consideration of the petitioner's representation to the Disagreement Note has been undertaken with a close mind, or in a pre-meditated manner. There is no basis to infer that merely because the Disciplinary Authority had not used the appropriate words, such as, "tentative", and his opinion appeared to convey the meaning of his opinion being "final", he felt bound to stick to his opinion contained in the Disagreement Note. Not only this, the petitioner has had two departmental reviews of the final order thereafter - firstly, in appeal, and thereafter, in revision. Both these orders are exhaustive, and consider the merits of the case independently. Thus, we reject the petitioner's plea that the Disagreement Note contained the "final" opinion or finding of the Disciplinary Authority regarding his "guilt", and that it did not contain the "tentative" opinion on the "guilt" of the petitioner for the reasons recorded in the Disagreement Note.

57. We now proceed to consider the last issue that arises for consideration. Even if, for the sake of arguments, the plea of the petitioner were to be accepted that the Disagreement Note recorded the "final" opinion of the Disciplinary Authority with regard to his "guilt", that would not be the end of the matter. Even if that were the case, at the highest, it would lead to the conclusion that there was

breach of the Principles of Natural Justice. Mere breach of the Principles of Natural Justice in complying with the procedural requirements in the conduct of the Departmental Proceedings, it is well-settled, is not sufficient to nullify the departmental proceedings. The petitioner would still need to establish that such breach of Principles of Natural Justice has caused him prejudice, and unless he is able to establish a serious prejudice, the Court would not interfere with the departmental proceedings.

58. The Doctrine of de facto prejudice is often employed by courts when a challenge is raised before it to disciplinary proceedings on one or the other ground. We may refer to the decision of the Supreme Court in *Haryana Financial Corporation and Another v. Kailash Chandra Ahuja*, (2008) 9 SCC 31. In this case, the appellant corporation initiated disciplinary proceedings against the respondent delinquent. The Enquiry Officer exonerated him of all the charges. The Managing Director of the Corporation sought clarifications from the Enquiry Officer. The matter was remanded to the Enquiry Officer for such clarification. Delinquent was called upon to appear before the Enquiry Officer. He appeared and participated in the proceedings without any protest. The Enquiry Officer then submitted his finding holding the delinquent guilty. After issuing a Show Cause Notice as to why he should not be punished, the delinquent was dismissed from service. The delinquent preferred a writ petition before the High Court, which set aside his dismissal on the ground that he had not been furnished a copy of the Enquiry Report before recording the finding of guilt by the Disciplinary Authority. It was argued on behalf of the respondent that supply of the Enquiry Report - by which he had been found guilty by the Enquiry Officer, was mandatory, in view of the fact that he had been exonerated by the Enquiry Officer vide his earlier report. On behalf of the Corporation, it had been urged that the delinquent had not whispered that he suffered any prejudice due to non supply of copy of the Enquiry Report.

59. In this background, the Supreme Court proceeded to examine the case. The Supreme Court referred to its earlier Constitution Bench decision in *ECIL v. B. Karunakar*, (1993) 4 SCC 727, wherein it was held that non-supply of the Enquiry Report, when the Enquiry Officer is not the Disciplinary Authority, tantamounts to denial of reasonable opportunity to the employee to prove his innocence, and is a breach of Principles of Natural Justice. The Constitution Bench in *B. Karunakar* (supra) examined the effect of non supply of the officer's report to the delinquent, and observed:

"30.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report

may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice." (emphasis supplied)

60. The Supreme Court in *Haryana Financial Corporation and Anr.* (supra) proceeded to observe:

"20. Holding that it was incumbent on the delinquent employee to show prejudice, the majority held that non-supply of report of the inquiry officer to the delinquent employee would not by itself make the order of punishment null and void or non est. The majority concluded: (*B. Karunakar case* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] , SCC p. 758, para 31)

"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/Tribunal and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

21. From the ratio laid down in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] it is explicitly clear that the doctrine of natural

justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside." (emphasis supplied)

61. The Supreme Court noticed the position in law as it earlier existed, namely, that mere violation of the Principles of Natural Justice was sufficient to vitiate the proceedings and further enquiry was necessary. After noticing the decisions in *Ridge v. Baldwin*, 1964 AC 40, *Board of High School and Intermediate Education v. Chitra Srivastava*, (1970) 1 SCC 121, *S.L. Kapoor v. Jagmohan*, (1980) 4 SCC 379, and *Wade and Forsyth* in their classic work *Administrative Law*, (9th Edn.) pp. 506-09, the Supreme Court observed as follows:

36. The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

37. In *Malloch v. Aberdeen Corporation*, (1971) 2 All ER 1278, Lord Reid said;

"It was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. If that could be clearly demonstrated it might be a good answer". (emphasis supplied)

Lord Guest agreed with the above statement, went further and stated: (All ER p. 1291b-c)

"... A great many arguments might have been put forward but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way." (emphasis supplied)

38. In *Jankinath Sarangi v. State of Orissa* [(1969) 3 SCC 392] it was contended that natural justice was violated inasmuch as the petitioner was not allowed to lead evidence and the material gathered behind his back was used in determining his guilt. Dealing with the contention, the Court stated: (SCC p. 394, para 5)

"5. ... We have to look to what actual prejudice has been caused to a person by the supposed denial to him of a particular right." (emphasis supplied)

39. In *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC

704] this Court considered several cases and held that it was only if the court/tribunal finds that the furnishing of the report "would have made a difference" to the result in the case that it should set aside the order of punishment. The law laid down in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] was reiterated and followed in subsequent cases also (vide *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , *M.C. Mehta v. Union of India* [(1999) 6 SCC 237]).

40. In *Aligarh Muslim University v. Mansoor Ali Khan* [(2000) 7 SCC 529 : 2000 SCC (L&S) 965] the relevant rule provided automatic termination of service of an employee on unauthorised absence for certain period. M remained absent for more than five years and, hence, the post was deemed to have been vacated by him. M challenged the order being violative of natural justice as no opportunity of hearing was afforded before taking the action. Though the Court held that the rules of natural justice were violated, it refused to set aside the order on the ground that no prejudice was caused to M.

Referring to several cases, considering the theory of "useless" or "empty" formality and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that had M been given a notice, it "would not have made any difference" and, hence, no prejudice had been caused to M.

41. In *Ajit Kumar Nag v. Indian Oil Corpn. Ltd.* [(2005) 7 SCC 764 : 2005 SCC (L&S) 1020] , speaking for a three-Judge Bench, one of us (C.K. Thakker, J.) stated: (SCC pp. 785-86, para 44)

"44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of *audi alteram partem*. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit. (See *R. v. University of Cambridge* [(1723) 1 Str 557 : 93 ER 698] .) But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " "To do a great right" after all, it is permissible sometimes "to do a little wrong"." [Per Mukharji, C.J. in *Charan Lal Sahu v. Union of India* [(1990) 1 SCC 613] (*Bhopal Gas Disaster*), SCC p. 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than "precedential"." (emphasis supplied)

42. Recently, in P.D. Agrawal v. SBI [(2006) 8 SCC 776 : (2007) 1 SCC (L&S) 43] this Court restated the principles of natural justice and indicated that they are flexible and in the recent times, they had undergone a "sea change". If there is no prejudice to the employee, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority." (emphasis supplied)

62. The conclusion drawn by the Supreme Court after analyzing several decisions, reads as follows:

"44. From the aforesaid decisions, it is clear that though supply of report of the inquiry officer is part and parcel of natural justice and must be furnished to the delinquent employee, failure to do so would not automatically result in quashing or setting aside of the order or the order being declared null and void. For that, the delinquent employee has to show "prejudice". Unless he is able to show that non-supply of report of the inquiry officer has resulted in prejudice or miscarriage of justice, an order of punishment cannot be held to be vitiated. And whether prejudice had been caused to the delinquent employee depends upon the facts and circumstances of each case and no rule of universal application can be laid down.

45. In the instant case, no finding has been recorded by the High Court that prejudice had been caused to the delinquent-employee- writ-petitioner. According to the High Court, such prejudice is 'writ large'. In our view, the above observation and conclusion is not in consonance with the decisions referred to above, including a decision of the Constitution Bench in B. Karunakar. The view of the High Court, hence, cannot be upheld. The impugned order, therefore, deserves to be set aside and is accordingly set aside." (emphasis supplied)

63. We may also refer to the decision of the Supreme Court in Union of India v. Alok Kumar, (2010) 5 SCC 349. In this elaborate decision, the Supreme Court dealt with the doctrine of de facto prejudice in the following words:

"83. Earlier, in some of the cases, this Court had taken the view that breach of principles of natural justice was in itself a prejudice and no other "de facto" prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where the rule is merely directory the element of de facto prejudice needs to be pleaded and shown. With the development of law, rigidity in these rules is somewhat relaxed. The instance of de facto prejudice has been accepted as an essential feature where there is violation of the non-mandatory rules or violation of natural justice as it is understood in its common parlance. Taking an instance, in a departmental enquiry where the department relies upon a large number of documents majority of which are furnished and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal

documents have resulted in de facto prejudice and he has been put to a disadvantage as a result thereof.

84. Even in the present cases, Rule 9(2) empowers the disciplinary authority to conduct the inquiry itself or appoint other authority to do so. We have already held that the language of Rule 9(2) does not debar specifically or even by necessary implication appointment of a former employee of the Railways as enquiry officer. Even if, for the sake of argument, it is assumed otherwise, all the respondents have participated in the departmental enquiries without protest and it is only after the orders of the competent authority have been passed that they have raised this objection before the courts. In the light of the peculiar facts and circumstances of the present case, it is obligatory upon the respondents to show that they have suffered some serious prejudice because of appointment of retired railway officers as enquiry officers. We have no hesitation in stating that the respondents have in no way satisfied this test of law. Thus, if their argument was to be accepted on the interpretation of Rule 9(2), which we have specifically objected, even then the inquiries conducted and the order passed thereupon would not be vitiated for this reason.

85. The doctrine of de facto prejudice has been applied both in English as well as in Indian law. To frustrate departmental enquiries on a hypertechnical approach has not found favour with the courts in the recent times. In *S.L. Kapoor v. Jagmohan* [*S.L. Kapoor v. Jagmohan*, (1980) 4 SCC 379] a three-Judge Bench of this Court while following the principle in *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)] stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in itself prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings.

86. Expanding this principle further, this Court in *K.L. Tripathi v. SBI* [(1984) 1 SCC 43 : 1984 SCC (L&S) 62] held as under: (SCC p. 58, para 31)

"31. ... it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. ... There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."

87. In *ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] this Court noticed the existing law and said that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact, prejudice has been caused to the employee

or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.

88. It will be useful to refer to the judgment of this Court in *Haryana Financial Corpn. v. Kailash Chandra Ahuja* [(2008) 9 SCC 31 : (2008) 2 SCC (L&S) 789] at pp. 38-39 where the Court held as under: (SCC para 21)

"21. From the ratio laid down in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] it is explicitly clear that the doctrine of natural justice requires supply of a copy of the enquiry officer's report to the delinquent if such enquiry officer is other than the disciplinary authority. It is also clear that non-supply of report of the enquiry officer is in breach of natural justice. But it is equally clear that failure to supply a report of the enquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non est and ineffective. It is for the delinquent employee to plead and prove that non-supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside." (emphasis in original)

89. The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default which relates to statutory violations. It will not be permissible to set aside the departmental enquiries in any of these classes merely on the basis of apprehended prejudice." (emphasis supplied)

64. Pertinently, before us, the petitioner has not even ventured to state as to what prejudice he has suffered on account of the Disciplinary Authority issuing the Disagreement Note which does not explicitly state that it is "tentative", and conveys the impression that it is "final". Neither in the Review Application preferred before the Tribunal, nor in the writ petition, the petitioner has articulated as to what prejudice he has suffered, and how the said prejudice has been caused to him. He does not state as to how the position would have been materially different - and in his favour, had the Disagreement Note used words like "tentative" or "proposed". He does not point out that any plea raised by him in his representation to the Disagreement Note has not been considered and dealt with. In fact, as already taken note of hereinabove, the Disciplinary Authority very exhaustively considered the representation to the Disagreement Note and dealt with each & every aspect of the representation made by the petitioner. Thus, mere violation of the Principles of Natural Justice - assuming that there was one, is not sufficient to vitiate the order passed by the

Disciplinary Authority. The fact that the petitioner did not raise any plea regarding the Disagreement Note being "defective" - either before the Disciplinary Authority, or before the Appellate Authority, and the fact that he faintly raised this plea before the Revisional Authority, but not in the Original Application, itself shows that even the petitioner did not believe that the Disagreement Note was "final" and he had suffered any prejudice on that account. All his pleas have been considered by the Appellate Authority and the Revisional Authority and these aspects also take away from any plea of prejudice that the petitioner may raise.

65. We may now proceed to deal with the decisions of this Court and other High Courts relied upon by Mr.Chhibber.

66. In Anokhey Lal (supra), the Disciplinary Authority - while disagreeing with the findings returned by the Inquiry Officer, did not give any opportunity to the delinquent employee to make his representation and straightaway proceeded to pass the order of removal from service, even though the Inquiry Officer had held that the charges were not proved. The departmental Appellate Authority set aside the order of removal from service and directed the Disciplinary Authority to furnish his Note of Disagreement and to pass appropriate orders after giving the delinquent employee an opportunity to make his representation thereagainst. The representation of the delinquent employee was rejected, and the Disciplinary Authority held the charges as proved and imposed penalty of removal from service upon the employee. His departmental appeal also failed. Then, he approached the Tribunal. The Tribunal, inter alia, held that in the Note of Disagreement, final conclusion was recorded, which showed that the Disciplinary Authority had already made up its mind and the entire action was pre-determined. The Division Bench agreed with the conclusion drawn by the Tribunal that the Disciplinary Authority had already made up its mind, and with a pre-determined mind an opportunity was given to the respondent employee to submit his explanation, which was an empty formality. Pertinently, the issues that we have considered hereinabove, namely, whether the Disagreement Note has to be read facially and strictly, or in the light of the manner in which the representation was dealt with, was neither raised, nor considered in this decision. The Court also did not examine the aspect: whether the Disagreement Note not being "tentative" was raised at the earliest opportunity, and the consequence of it not being so raised. It also did not consider the doctrine of de facto prejudice. The Division Bench did not grant an opportunity to the petitioner employer to re-start the inquiry proceedings from the stage of issuing a fresh Disagreement Note to the delinquent employee by observing that the Disciplinary Authority had committed a "double fault". The facts of that case are materially different from the facts of the present case.

67. BSNL (supra) was a case where the representation made by the respondent employee against the Disagreement Note was not disposed of. The proceedings came up before the High Court and the High Court gave liberty to the delinquent

employee to make an additional representation, if he so intended. The High Court directed the Disciplinary Authority to consider all such representations and to render its decision by a speaking order in a time-bound manner. The delinquent then filed his additional representation. The Disciplinary Authority passed an order imposing penalty of reduction of pension by 5% for a period of one year with immediate effect, and restored full pension after completion of the period of one year. The employee's departmental appeal failed. The Disagreement Note stated "Hence the charge is proved to this extent". The Tribunal held that the Disagreement Note was not "tentative" and placed reliance on Yoginath D. Bagde (supra). On further challenge before the High Court by the petitioner/ employer, the High Court found that the additional representation made by the respondent employee "was considered with total non-application of mind". On a reading of the said decision, what emerges is that it was the Tribunal, which invoked Yoginath D. Bagde (supra) and relied upon it. So far as the High Court is concerned, the aforesaid issue was not really raised, or considered by it. In any event, even this decision does not show that the aspects that we have considered in the present petition, namely, whether the Disagreement Note has to be read facially and strictly, or in the light of the manner in which the representation of the delinquent employee has been dealt with, was neither argued nor considered by the Allahabad High Court in this decision. The other two aspects taken note of hereinabove, have also not been considered. Thus, not only on facts, but even otherwise, this decision is of no avail to the petitioner.

68. Mr. Chhibber then placed reliance on K.K. Dhawan (supra). This case had a checkered history. The delinquent was not supplied relevant documents and the proceedings were not concluded in a timely manner. The Inquiry Officer exonerated the delinquent of the charges. He was issued a Disagreement Note along with a copy of the inquiry report and the second stage advice of the CVC. The contention of the respondent delinquent was that a perusal of the second stage advice and the Disagreement Note showed that the Disciplinary Authority had already held him "guilty" without giving him a reasonable opportunity to defend himself, and thereby, violated the Principles of Natural Justice. It was also the case of the respondent delinquent that the penalty order was merely a verbatim reproduction of the Note of Disagreement, without taking into consideration the reply and the submissions made by him against the same. This Court dismissed the writ petition preferred by the Union of India against the order of the Tribunal. On the aspect of the Disagreement Note being "tentative", and not "final", the Division Bench, inter alia, observed as follows:

"55. The learned counsel for the petitioners has not been able to demonstrate that the dissenting note was tentative. When the punishment is already prescribed as against the charged officer in the disagreement note, then it is clearly indicative of the fact that the Disciplinary Authority has already closed its mind to the representation of the charged officer. It also discourages the charged officer, as after a report by the enquiry officer in his favour, he is intimated that

the Disciplinary Authority not only disagrees but deems a certain punishment to be imposed would be clearly a denial of an opportunity of being heard making the entire process reminiscent of a kangaroo court, wherein the proceedings are merely formalities and wholly irrelevant. Reliance for this can be placed on *Yoginath. D. Bagde v. State of Maharashtra* AIR 1999 SC 3734. In another matter of *Jiban Kumar Sarkar v. Union of India (UOI)* (2011) 1 LLJ 845 Cal, the Division Bench of the High Court of Calcutta had held as under:

"20. The Disciplinary Authority has given its conclusive observations and findings in the guise of the disagreement note resulting in grave prejudice to the interests of the appellant apart from violating the enshrined principles of natural justice. There is no dispute that in the disagreement note Disciplinary Authority cannot express conclusive observations and/or findings as the same would prejudice the valuable right of the charged employee to make an effective representation in order to persuade the Disciplinary Authority not to hold the employee concerned guilty and also on the point of imposition of the punishment. In the present case, by expressing conclusive opinion, the entire exercise of issuing show cause notice became idle ceremony and empty formality. The Disciplinary Authority by expressing its final opinion instead of tentative findings in the disagreement note has prejudged the issue in violation of the principles of natural justice."

56. The Disciplinary Authority is required, under the law, to maintain objectivity, impartiality and openness of mind to ensure the observance of the principles of natural justice and fairness in administrative action. Therefore, while disagreeing with the findings of the Enquiry Officer care should be taken that the disagreement note must contain only tentative reasons for disagreement. The sole purpose of providing this in the departmental proceedings is to ensure that the charged officer does not feel blind sighted and is made aware of the reasons for which the Disciplinary Authority disagrees with the Enquiry Authority, which had initially found a report in favour of the charged officer. The main intention is to allow a proper and reasonable opportunity of hearing to the charged officer in consonance with the principles of natural justice and most importantly to render a last opportunity to the charged officer to persuade the Disciplinary Authority on the basis of the findings of the Enquiry Report. The reasons for disagreement should be tentative in nature. Whether or not a disagreement note is tentative might not necessarily be established by explicitly featuring the word "tentative" while drafting the same. The same should be reflective in the language and the content of the disagreement note. The reasons for the disagreement should not be vaguely and loosely worded but instead they should be precise and effectively assist the charged officer in comprehending the apprehension of the Disciplinary Authority, which in turn enables the charged officer to defend himself properly.

57. If a conclusion is already arrived at prior to giving the opportunity to represent against the disagreement note, then the entire preceding thereafter, would be rendered futile and would be a mere formality. A conclusion specifying the guilt of the charged officer would in itself discourage the whole purpose

behind the proceedings and render the entire process nugatory and pointless. The enquiry report would virtually be rendered non-est.

58. When the punishment is already prescribed as against the charged officer in the disagreement note, then it is clearly indicative of the fact that the Disciplinary Authority has already closed its mind to the representation of the charged officer. It also discourages the charged officer, as after a report by the enquiry officer in his favour.

59. On perusing the record it is apparent that the report of the Enquiry Officer is a detailed one containing the brief history of the case, the articles of charges, the statements of imputation of misconduct, the case as set up by the petitioners and the analyses of the evidence. On the seven articles of charges framed against Respondent No. 1, the Enquiry Officer came to the conclusion that Articles I, II, IV, and VII not proved while Articles III, V and VI partly proved. However, the Disciplinary Authority did not agree with the findings of the Enquiry Officer and therefore, issued a dissenting note dated 5th March, 2007 which contained the allegations imputed against the charged officer, the findings of the Enquiry Officer and ultimately its own views. It is pertinent that while discussing each and every article seriatim, the Disciplinary Authority ultimately concluded that the "IO's finding has not been found acceptable and the charge has been viewed as "proved" or "fully proved" except for Article VI which was held to be substantially proved while only part (a) of the charge was held to be "not proved". The 5th para of the dissenting note titled as "Conclusions" contains the summary of the view of the Disciplinary Authority pertaining to each charge and further detailed that the said note was sent to the CVC for their second stage advice for recommending levy of a suitable major penalty on the Charged Officer, which was replied to by OM dated 8th February, 2007 advising the imposition of a suitable major penalty on Respondent No. 1. It is only after the advice of the CVC was received that the comments of Respondent No. 1, representing against the said dissenting note were called for.

60. The dissenting note is clearly indicative of the mindset of the Disciplinary Authority, who had already decided that the Respondent No. 1 was guilty of the charges framed against him. It is also evident that the opportunity of being heard given to Respondent No. 1 was merely a procedural formality. The consultation with the CVC for the imposition of the punishment prior to hearing of the representation of Respondent No. 1 is also a substantial clue about the mind of the Disciplinary Authority who had undoubtedly already formed its conclusion on the guilt of Respondent No. 1 with regard to the charges framed against him. The learned counsel for the petitioners is unable to point out any single factor or reason which would show that the dissenting note was tentative nor has been able to show why the representation of the Respondent No. 1 was not considered by the Disciplinary Authority before imposing the disproportionate punishment of compulsory retirement in the facts and circumstances."

(emphasis supplied)

69. The above extract would show that the facts in K.K. Dhawan (supra) were materially different. In fact, these facts fit the example of the situation we have discussed in paragraph 33 above. The Disciplinary Authority not only arrived at his "findings" of guilt, he even proceeded to call for the advice of the CVC on the quantum of punishment. This clearly brought out the intent of the Disciplinary Authority. Otherwise, even before receiving and considering the representation of the delinquent employee to the Disagreement Note, there was no question of his proceeding to obtain the second stage advice from the CVC. In fact, a reading of paragraph 60 of K.K. Dhawan (supra) shows that the Court went on to examine the "mind" of the Disciplinary Authority and, in the light of the facts taken note of in paragraph 60 quoted hereinabove, concluded that the Disagreement Note was not "tentative". It was in this background that the case was found to be covered by Yoginath D. Bagde (supra). We may also observe that in K.K. Dhawan (supra), the issue that we are considering was neither raised, nor considered.

70. With due respect, the conclusion drawn by the Division Bench that the inquiry report would virtually be rendered "non-est", if the conclusion is already arrived at before representing against the Disagreement Note, appears to be contrary to the decision of the Supreme Court in B. Karunakar (supra), and the several other decisions taken note of by us hereinabove. Mere breach of Principles of Natural Justice would not render the proceedings "non-est", or "null & void" since the delinquent employee would still have to establish the prejudice that he has suffered on account of breach of the Principles of Natural Justice. This decision, therefore, is clearly distinguishable and does not advance the case of the petitioner.

71. We have already extracted hereinabove the relevant paragraphs from Birbal Mahey (supra). Firstly, Birbal Mahey (supra) does not consider the three issues that we are concerned with, as already taken note of hereinabove. Secondly, Birbal Mahey (supra) is a case where the writ petition had been preferred before this Court against the order of the Disciplinary Authority and there were no Departmental Appeals, or other judicial remedies available to, and availed of by the petitioner. In the present case, as noticed hereinabove, the petitioner has gone through several rungs without raising the plea that the Disagreement Note was not "tentative", or that it was "final". The petitioner raised the said plea only faintly in his Revision, and clearly only when he preferred Review Application before the Tribunal, and not before that. Thus, in our view, the decision in Birbal Mahey (supra) is of no avail to the petitioner.

72. So far as Rajpal (supra), Rishipal Singh (supra) and Baljit Singh Sondhi (supra) are concerned, we do not consider it necessary to deal with each one of them separately in view of our aforesaid discussion. Neither of these decisions considers the three aspects with which we are concerned in the present case, as taken note of hereinabove.

73. Reliance placed by Mr. Chhibber on K.I. Shephard (supra) and Shekhar Ghosh (supra) is not apposite, considering the fact that we are of the view that

the present is not a case of post-decisional hearing, since we are convinced that the Disciplinary Authority had not formed a "final" opinion with regard to the petitioner's "guilt" while issuing the Disagreement Note. The "final" opinion was formed after considering the representation of the petitioner, and after squarely dealing with all his submissions in detail.

74. The submission of Mr. Chhibber that this Court should refer the issue to a Larger Bench in view of the decision in G.S. Grewal (supra) also does not appeal to us, since the issues considered by us have not been squarely raised, or considered in the earlier decisions cited before us.

75. For all the aforesaid reasons, we are of the view that there is no merit in the present petition and the same deserves to be dismissed. Accordingly, we dismiss the same leaving the parties to bear their own costs.