

(2010) 07 GAU CK 0027

In the Gauhati High Court

Case No : Writ Petition (C) No's. 126 and 127 of 2009

State of Tripura and Another

APPELLANT

Vs

Sanatan Talukdar and Others

RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 14
Constitution of India, 1950 — Article 16, 310, 311

Citation : (2011) 1 GLR 232

Hon'ble Judges : I.A. Ansari, J;C.R. Sharma, J

Bench : Division Bench

Advocate : S. Deb and D.C. Nath, for the Appellant; C.S. Sinha and D.C. Saha, for the Respondent

Final Decision : Allowed

Judgement

I.A. Ansari, J.—The Respondent herein, namely, Sanatan Talukdar, is a member of Indian Forest Service ("TFS") belonging to the 1981 Batch of Manipur and Tripura Joint Cadre. By a memorandum, dated 28.4.1995, a disciplinary proceeding was drawn against the Respondent, under Rule 14 of the Central Civil Services. (Classification, Control and Appeal) Rules, 1965, on a charge of misconduct. The Respondent, as an applicant, put to challenge the drawing of the said disciplinary proceeding, by making Original Application No. 142 of 1997, before the Central Administrative Tribunal. During the course of hearing of the said Original Application ("OA"), the learned Tribunal was informed by the authority concerned that charges, under the Indian Civil Services (Discipline and Appeal) Rules, 1969, were made ready and would be served upon the applicant/ Respondent herein in due course. The learned Tribunal, therefore, disposed of the OA No. 142/1997, with direction to the present writ Petitioners to complete the inquiry, on the fresh charges, within the prescribed period.

2. A fresh memorandum of charges were accordingly served upon the applicant-Respondent herein by memorandum, dated 1.8.1997, mentioning therein the

alleged misconduct for contravention of Rule 3 of the Indian Services (Conduct) Rules. The applicant-Respondent submitted his written statement. On completion of the inquiry, the Inquiry Officer submitted his report holding the applicant-Respondent guilty of both the charges. A copy of the inquiry report was, vide Memorandum, dated 12.2.1998, served upon the applicant-Respondent advising him to submit his representation, if any, against the finding of the Inquiry Officer. Though the applicant-Respondent sought for further time to enable him to examine the inquiry report and submit his representation against the same, this was declined by communication, dated 20.2.1998. The applicant-Respondent, however, submitted, on 26.2.1998, his representation assailing the report of the Inquiry Officer.

3. By order, dated 30.7.1998, the disciplinary authority passed an order imposing penalty of reduction by one stage, in the time scale of pay, for a period of two years, with cumulative effect, with the stipulation that during the period of reduction to the earlier stage, the applicant-Respondent would not be entitled to any increment. The applicant preferred, on 18.8.1998, an appeal. In course of time, the applicant, Respondent made a request for early disposal of his appeal. As no appropriate order was passed on his appeal, the applicant-Respondent, moved, in the Central Administrative Tribunal, an original application, being OA No. 48/2000, assailing the legality and validity of the departmental proceeding, drawn against him, and also the consequential order of penalty imposed on him. This original application was resisted by the present Petitioners.

4. In the original application, which gave rise to OA No. 48/2000, the applicant-Respondent had impugned the order of penalty, primarily, on the grounds that (i) the Inquiry Officer had himself informed the disciplinary authority that some other person should be appointed as Inquiry Officer inasmuch as he is acquainted with the facts of the case, but the authority concerned did not appoint a new Inquiry Officer, and the inquiry, which was, thus, held, cannot be termed as just and fair inquiry and that (ii) the representation, which had been made by the applicant-Respondent against the findings of the inquiry report, had not been considered and the penalty was imposed without considering the applicant-Respondent's representation made against the correctness and legality of the findings of guilt, reached against him, by the Inquiry Officer, and acted thereupon by the disciplinary authority.

5. In short, according to the applicant-Respondent, the penalty, imposed on him, was, in violation of the principles of natural justice. On the ground that the penalty, imposed on the applicant-Respondent, was in violation of the principles of natural justice, the learned Central Administrative Tribunal, Gauhati Bench, set aside and quashed the order, dated 30.7.1998, whereby the impugned penalty had been imposed. The relevant observations, made by the learned Tribunal, for the purpose of setting aside and quashing the penalty, read as under:

5. In the instant case the act imputed in the Jampui hills range. The Enquiry Officer acted as a CCF in the office of the PCCF in 1992. His full acquaintance

with the matter was reflected in the discussion. Some of the observation of the Enquiry Officer is reproduced, below:

Let me not pretend that... Charged Officer.

The Inquiry Officer himself mentioned the matter to the authority to enable the authority to conduct the enquiry through other person other than the Inquiry Officer. The disciplinant authority, however, failed to act as per law and caused the enquiry through the said Inquiry Officer. In the circumstances the enquiry cannot be termed as just and fair enquiry. In our view the enquiry conducted ought not to have been conducted by the said Inquiry Officer in the facts and circumstances of the case. The other glaring infirmity in the enquiry proceeding pertains to the non-consideration of the representation of the applicant. The Inquiry Officer submitted his report holding the applicant guilty. The affected officer is entitled to make comment to state his case against the finding and conclusion reached by the Inquiry Officer. Fairness in action demanded for consideration of the representation. Consideration of the representation is apart of rendering justice to the parties. The requirement of principles of natural justice would have been satisfied by providing opportunities to the parties to file representation and to decide the same by the authority fairly and pass an order. It is not the case of not submitting written statement. It was a case that the applicant did submit his representation but not within the time prescribed. The applicant made an application for extension of period. There is no good reason for not extending the time for submission of the representation on the fact situation. At any rate, the applicant submitted his representation for, before the disciplinary authority passed the order. The applicant submitted his representation refuting case and every finding of the Inquiry Officer. The representation was submitted by the applicant on 26.2.2008 and the impugned order was passed after elapse of 5 months. When the Respondents authority took the decision for imposing the penalty, the written statement of the applicant was very much available before them. There was no justification for not considering the representation of the applicant. The applicant was, thus, denied with a fair opportunity to defend his case within the meaning of clause two of Article 311 of the Constitution of India read with the Disciplinant rules. The Respondent authority also faulted in its decision making process on his failure to consult the Joint Cadre Authority. The consultation here envisage prior consultation and post facto consultation cannot cure the contravention of the rules. Admittedly, the Respondent authority failed to consult the Joint Cadre Authority namely, Manipur Tripura as required, under Rule 7(3).

6. For all the reasons stated above, the impugned order dated 30.7.1998 imposing the penalty cannot be sustained and according the same is set aside and quashed. The application is allowed.

(emphasis is added)

6. Following the order, dated 19.12.2001, whereby the OA No. 48/2000 was, as

mentioned above, disposed of, an order was made, on 22.5.2002, by the Government setting aside the penalty, which had been imposed on the applicant-Respondent herein by order, dated 30.7.1998 aforementioned. The order, dated 22.5.2002, reads as under:

ORDER

WHEREAS, a disciplinary proceeding was drawn up vide Memo. No. F.11(9)-ARD/91, dated 1.8.1997 against Shri Sonatan Talukdar, IFS, for certain acts of omission and commission during his tenure as Divisional Forest Officer, Kanchanpur Division, under Rule 8 of the AIS (D&A) Rules, 1969.

AND WHEREAS, after observation of all codal formalities and consulting the UPSC the Governor was pleased to impose a penalty of reduction by one stage in time scale of pay for a period, of 2(two) years only without cumulative effect upon Shri Sonatan Talukdar, IFS, vide order No. F11(9)-ARD/91/2605-08 dated 30.7.1998 with further stipulation that during the period of proposed reduction to the lower stage, Shri Sonatan Talukdar will not earn any increment.

AND WHEREAS, Shri Sonatan Talukdar, IFS, filed a petition before the CAT, Gauhati Bench, challenging the punishment order.

AND WHEREAS, the hon''ble CAT, Gauhati, considered the petition submitted by Shri Talukdar and in their order dated 19.12.2001 set aside and quashed the punishment order which was imposed on Shri Sonatan Talukdar, IFS, vide order No. F.11(9)-ARD/91/2605-08 dated 30.7.1998.

NOW, THEREFORE, in pursuance of the order passed by the Central Administrative Tribunal, the Governor is pleased to set aside the penalty imposed vide order No. F11.(9)ARD/91/2605-08 dated 30.7.1998 upon Shri Sonatan Talukdar, IFS.

7. Thereafter, memorandum, dated 31.7.2004, was issued stating to the effect, inter alia, that the Government had decided to revive the proceeding, against the applicant-Respondent herein, from the stage of appointment of a new Inquiry Officer to enquire into the charges, which had led to the imposition of penalty by order, dated 30.7.1998, and the penalty, having come to be challenged by the applicant-Respondent, got set aside by the order, dated 19.12.2001, passed, in OA No. 48/ 2000, by the learned Central Administrative Tribunal. The memorandum, dated 31.7.2004, read as under:

MEMORANDUM

WHEREAS, a disciplinary proceeding was drawn up against shri Sonatan Talukdar, IFS, under Rule 8 of the AIS (D&A) Rules, 1969, vide this Department Memo. No. F11(9) ARD/91 dated 1.8.1997;

AND WHEREAS, Sri Dutta Roy, IFS, Ex-PCCF, was appointed as Inquiry Officer to enquire into the charges framed against Shri Talukdar;

AND WHEREAS, the I.O. Shri Dutta Roy had submitted his findings holding that the accused officer was substantially guilty of Charge-I and guilty of Charge-II;

AND WHEREAS, after consultation with the UPSC a penalty of reduction by one stage in the time scale of pay for a period of 2(two) years only without cumulative effect was imposed upon Shri Sonatan Talukdar, IFS vide order No. F.1(9)-AKD/91/2605-08 dated 30.7.1998 with a further stipulation that during the period of proposed reduction to the lower stage, Shri Talukdar would not earn any increment;

AND WHEREAS, shri Sonatan Talukdar, IFS, filed a petition before the CAT, Guwahati Bench, challenging the punishment order;

AND WHEREAS, the hon"ble CAT, Guwahati, considered the petition submitted by Shri Talukdar and quashed the punishment order, which was imposed upon him on the following ground:

(i) The Inquiry Officer (the then PCCF, Shri Dutta Roy) was biased; because he was in the position of a witness in the case. Thus, the principle of natural justice was violated.

(ii) As per AIS disciplinary rules, the views of the Joint Cadre Authority (MT Cadre.) was not obtained by the State Government before imposition of penalty.

AND WHEREAS, in pursuance of the order, passed by the CAT, the punishment order which was issued by the Department was set aside.

AND WHEREAS, it has been decided, by the Government to revive the proceeding.

NOW, THEREFORE, after considering all facts and circumstances, the Governor is pleased to revive the proceeding from the stage of appointment of a new Inquiry Officer who will enquire into the charges against Shri Sonatan Talukdar. The charges shall remain the same.

(emphasis is added)

8. By yet another order, dated 31.7.2004, the Governor appointed Shri S.K. Saha, Special Commissioner of Departmental Inquiries, as new Inquiry Officer, with direction that the inquiry shall be completed within a period of six months. This order read as under:

ORDER

WHEREAS, the enquiry under Rule 8 of the AIS (D&A) Rules, 1969, is being held against Shri Sonatan Talukdar, IFS, CCF (P&D), o/o the PCCF, Government of Tripura, Agartala.

AND WHEREAS, the Governor considers that an Inquiry Officer should be appointed to enquire into the charge framed against him;

NOW, THEREFORE, the Governor in pursuance of Sub-rule (2) of the said Rule

hereby appoints shri S.K. Saha, Special Commissioner of Departmental Enquiries, Melarmath, Agartala, as Inquiry Officer to enquire into the charge framed against the aforesaid Sri Sonatan Talukdar, IFS. The enquiry shall have to be completed within 6 (six) months positively.

9. We may take a pause here to point out that the Memorandum, dated 31.7.2004, notifying the Government's decision to revive the proceeding was, in reality, a resumption of the disciplinary proceeding, which had been drawn against the Respondent herein by order, dated 30.7.1998, and had been set aside by the order, dated 19.12.2001, aforementioned, by the Central Administrative Tribunal inasmuch as the learned Tribunal had not terminated or quashed the disciplinary proceeding as not maintainable. What the learned Tribunal had done was to set aside the proceedings of the enquiry including the findings reached therein and the penalty imposed on the Respondent.

10. The resumption of the disciplinary proceeding by appointment of a new Inquiry Officer was put to challenge by the applicant-Respondent herein by making OA No. 187/2004. By order, dated 28.8.2004, the learned Tribunal stayed the operation of the memorandum, dated 31.7.2004, whereby the disciplinary proceeding had been ordered to be resumed by the new Inquiry Officer.

11. We may also point out here that during the pendency of the OA No. 48/2000, which came to be, eventually, disposed of by the learned Tribunal on 19.12.2001, the penalty period of two years, which had been imposed on the applicant-Respondent herein by the order, dated 30.7.1998, and was put to challenge by the applicant-Respondent herein, elapsed by efflux of time, and he was promoted to the post of Conservator of Forest with effect from 31.7.2000, by Notification, dated 22.9.2000. During the pendency of the said OA No. 48/2000, the applicant-Respondent was also promoted to the post of Chief Conservator of Forest, which he holds even today. Thus, the said two promotions, namely, the promotion to the post of Conservator of Forest, and to the post of Chief Conservator of Forest, given effect by Notification, dated 22.9.2000 and 19.11.2001 respectively, were granted, when the OA No. 48/2000 was still pending, the effective date of promotion of the present applicant-Respondent being 31.7.2000, i.e., with effect from the date, on which the period of penalty, imposed by the order, dated 30.7.1998, had elapsed by efflux of time.

12. Having pointed out that during pendency of OA No. 48/2000, the applicant-Respondent had been granted two promotions, as mentioned above, it, now, deserves to be pointed out that while OA No. 187/2004 was pending, wherein the applicant-Respondent herein had put to challenge the revival of the disciplinary proceeding by the Memorandum, dated 31.7.2004, aforementioned, the applicant-Respondent herein filed another original application, which gave rise to OA No. 29/2007, seeking from the learned Tribunal direction to the Respondents to consider the applicant-Respondents further promotion to the post of Additional Principal Conservator of Forest as per recommendation of the DPC,

dated 16.5.2000, and for such other direction(s) as the learned Tribunal deemed fit, the case of the applicant-Respondent herein being, in brief, thus:

(i) By order, dated 26.8.2004, passed in OA No. 187/2004, the learned Tribunal has stayed the revival of the inquiry by memorandum, dated 31.7.2004, as well as the order, dated 31.7.2004, whereby a new Inquiry Officer was appointed and, in the meanwhile, the Government had provided the applicant Respondent with the benefit of promotion to the post of Conservator of Forest from the date on which his junior, Shri A.K. Singh, IFS, was appointed, on promotion, as Conservator of Forest. On 16.5.2007, a DPC was held for the post of Principal Chief Conservator of Forest, Additional Principal Chief Conservator of Forest, etc., and on recommendation of the DPC, promotion to the post of Principal Chief Conservator of Forest had already been effected, but promotion to the post of Additional PCCF, for which the Principal Chief Conservator of Forest stands recommended by the DPC, has not been given effect to despite the fact that the applicant had made a representation, on 16.8.2007, to the effect, inter alia, that in the disciplinary proceeding, which had been revived, an order of stay already stood passed by the learned Tribunal, on 26.6.2004, in OA No. 187/2004, and the applicant-Respondent could not have, therefore, been deprived of his promotion to the post of Additional PCCF.

(ii) In his application, which gave rise to OA No. 249/2007, the applicant-Respondent expressed his apprehension that the delay, in approaching the learned Tribunal for remedy of his grievances, may cause delay in receiving promotion to the post of Additional Principal Chief Conservator of Forest inasmuch as the applicant-Respondent apprehends that he might be superceded by his juniors and would be subjected to discharge duties under his juniors.

(iii) By a common order, dated 19.12.2008, both the original applications, namely, OA No. 187/2004 and 249/2007, have been disposed of by the learned Tribunal by setting aside and quashing the revival of the enquiry and appointment of the new Inquiry Officer by the order, dated 31.7.2004, which stood impugned by the present Respondent in OA No. 187/2004. By its common order, dated 19.12.2008, aforementioned, the learned Tribunal further directed the Government, (i.e., Petitioners herein) to consider the applicant-Respondent's case for next higher promotion by opening, if need be, the sealed cover, which contains the Departmental Promotion Committee's recommendations.

(iv) While so setting aside and quashing the revival of the disciplinary proceeding as indicated above, the learned Tribunal has, principally, assigned two reasons, namely, (i) that the penalty, imposed on the Respondent herein, had been set aside by the learned Tribunal and, while doing so, no liberty had been granted by the Tribunal to proceed de novo/afresh/from any stage and that the matter was not remitted back by it (the learned Tribunal) to the disciplinary authority nor had the present Petitioners, at any point of time, applied to the Tribunal seeking to be permitted to proceed with the disciplinary proceeding from any particular stage or to revive the proceeding, and (ii) that the Government had not retained

its liberty to proceed de novo/afresh/from any particular stage, while passing the order, dated 22.5.2002, reinstating the Petitioner. Yet another reason, assigned by the learned Tribunal, is that denial of further promotion to the Respondent herein was mala fide and aimed at stalling his further promotion.

(v) Aggrieved by the fact that the revival of the enquiry as stated hereinbefore has been set aside and quashed and the present Petitioners have been directed to act upon the recommendations of the DPC governing the promotion of the applicant Respondent herein to the post of Additional Principal Chief Conservator of Forest, the present Petitioners have filed two writ petitions seeking issuance of writ of certiorari setting aside and quashing the common order, dated 19.12.2008, aforementioned. As against the learned Tribunal's order, passed, in OA No. 187/2004; setting aside the order, dated 31.7.2004, whereby the Disciplinary Proceeding was revived against the applicant-Respondent herein, and also the separate order, dated 31.7.2004, passed, appointing a new Inquiry Officer, the present Petitioners have filed a writ petition, which have given rise to WP(C) No. 126/2009, and to the extent that the present Petitioners have been directed by the learned Tribunal, in OA No. 249/2004, to consider the promotion of the applicant-Respondent herein to the post of Additional Principal Chief Conservator of Forest, the writ petition, filed by the present Petitioners, has given rise to WP(C) No. 127/ 2009.

13. Both the writ petitions having arisen out of a common order and as any direction, in any of the two writ petitions, would have a bearing on the outcome of the other writ petition, both the writ petitions, on the request made by the learned Counsel for the parties, have been heard together and are being disposed of by this common judgment and order.

14. We have heard Mr. S. Deb, learned senior counsel, for the Petitioners, and Mr. C.S. Sinha, learned Counsel, appearing on behalf of the Respondents.

15. Appearing on behalf of the present Petitioners, Mr. S. Deb, learned senior counsel, has submitted that the order, dated 19.12.2001, whereby the penalty, imposed on Petitioner-Respondent herein, had been set aside by the learned Tribunal, clearly shows that this order was passed by the learned Tribunal not on the ground that there was no material available on record warranting imposition of penalty on the applicant-Respondent, (i.e., the present Respondent), but on the ground that while conducting the enquiry, from the stage of appointment of the Inquiry Officer, the Disciplinary Authority had not observed the principles of natural justice and, thus, it is, primarily, on the ground of failure to observe the principles of natural justice that the findings, reached by the Disciplinary Authority, and the consequential penalty, imposed on the applicant Respondent, came to be set aside.

16. In order to buttress his submissions, Mr. Deb also points out that the learned Tribunal had clearly held, in its order, dated 19.12.2001, aforementioned that the Inquiry Officer had himself informed the Disciplinary Authority that he was

acquainted with the facts of the case and he was, therefore, not an entirely disinterested person and, hence, in such circumstances, the Disciplinary Authority, according to the learned Tribunal, ought not to have allowed the said Inquiry Officer to hold the enquiry. This apart, further points out Mr. Deb, the learned Tribunal had also noted, in its order, dated 19.12.2001, aforementioned that the applicant-Respondent herein had made a representation against the findings of the Inquiry Officer, but the same was not considered by the Disciplinary Authority, while upholding the findings of guilt, on the ground that the applicant-Respondent had not submitted his representation against the findings of the Inquiry Officer, though, while imposing the penalty, the Disciplinary Authority ought to have taken into account the applicant-Respondent's said representation even if the same had been belatedly made.

17. Thus, reiterates Mr. Deb, it was on account of violation of the principles of natural justice that the order, imposing penalty on the applicant-Respondent, had come to be set aside by the learned Tribunal and the learned Tribunal had not determined the merit of the charges and/or the materials, which had surfaced against the applicant Respondent, in the disciplinary proceedings, drawn against the applicant-Respondent herein. Mr. Deb submits that when the findings of an enquiry, reached in a disciplinary proceeding, and the penalty, imposed on the person proceeded against, are set aside by a Tribunal on the ground of violation of the principles of natural justice, there is no impediment, on the part of the Disciplinary Authority, to revive or resume the enquiry from the stage, where the omission to observe the principles of natural justice had occurred.

18. In the case at hand, too, submits Mr. Deb, the disciplinary proceeding having been set aside on the ground of violation of the principles of natural justice, there was no impediment, on the part of the disciplinary authority, to revive the proceeding from the stage, where the disciplinary authority had failed, according to the learned Tribunal, to observe the principles of natural justice. Support for this submission is sought to be derived by Mr. Deb from the case of Nagarjuna Construction Ltd. v. Government of Andhra Pradesh AIR 2009 SCW 105 . Mr. Deb also refers, in this regard, to the case of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,

19. As regards the order, dated 22.5.2002 (whereby the State Government had set aside the order, dated 30.7.1998, which had imposed penalty on the applicant-Respondent, herein), Mr. Deb points out that this order has not changed the situation inasmuch as the passing of the order, dated 22.5.2002, was of no consequence at all, because, the order, dated 30.7.1998, already stood set aside by the learned Tribunal and the mere fact, that the learned Tribunal had not granted leave to the Disciplinary Authority to resume the enquiry and/or the fact that the Disciplinary Authority had not gone to, or had not obtained from, the learned Tribunal leave before resumption of the enquiry, could not have been made a ground for interference with the order, dated 30.7.2004, whereby the enquiry was, in law, revived, as has been stated in the order, dated 30.7.2004.

20. Resisting the writ petitions, Mr. C.S. Sinha, learned Counsel, appearing on behalf of the applicant-Respondent herein, submits that the learned Tribunal is wholly justified in taking the view that when it had not granted leave and/or its leave had not been obtained by the Disciplinary Authority, the Disciplinary Authority could not have revived the proceeding and that even while passing the order, dated 22.5.2002, the Disciplinary Proceeding had not reserved the liberty to start de novo a proceeding against the applicant-Respondent. This apart, points out Mr. Sinha, the authority concerned had already granted two promotions to the applicant-Respondent, namely, promotion to the post of Conservator of Forest and also to the post of Chief Conservator of Forest and, in the face of these two promotions, it becomes transparent that the applicant-Respondent's acts of omissions or commissions, which had formed the basis of the charges of misconduct against the applicant Respondent, stood condoned, and the learned Tribunal has rightly referred to, and relied upon, in this regard, the decisions in *Lal Audhraj Singh Vs. State of Madhya Pradesh*, and *The Collector of Customs v. Rebati Mohan Chatterjee* (1975) 2 SLR 897.

21. Repelling the submissions, made on behalf of the applicant-Respondent herein, Mr. Deb submits that the question of condoning misconduct, which had become the basis of the charges framed against the applicant-Respondent herein, does not arise inasmuch as the "misconduct", which gave rise to the charges against the Petitioner, were in public domain and in public domain, the ordinary relationship of employer and employee would not apply and that the Constitutional scheme of governance does not permit a government to condone any such charge, which may injure public interest or the interest of the State, for, both these interests cannot be different from, or irreconcilable with, each other.

22. Moreover, the promotions, in the present case, had, according to Mr. Deb, no bearing on the charges levelled against the Respondent inasmuch as the promotions, though granted, have not condoned, and cannot, in law, be taken to have condoned the misconduct and the result of the enquiry, which has been resumed, would really determine if the applicant-Respondent can, or cannot, be allowed to enjoy the promotions, already granted to him, namely, promotions to the posts of Conservator of Forests and Addl. Chief Conservator of Forest. Mr. Deb, therefore, on behalf of the Petitioners, contends that the applicant-Respondent's two promotions to the post of Conservator of Forest and Addl, Chief Conservator of Forests, would be subject to the outcome of the disciplinary proceeding inasmuch as the misconduct, if proved, may warrant interference with the Respondent's promotions.

23. Let us, first, consider the learned Tribunal's conclusion that since the learned Tribunal, while passing the order, dated 19.12.2001, in OA No. 48/2000, setting aside and quashing the penalty, imposed on the present Respondent, had not given any liberty to the present Petitioners to proceed with the disciplinary proceeding de, novo/afresh/from any particular stage, the revival or resumption

of the proceeding was illegal, particularly, when the State Government had, at no point of time, applied to the Tribunal seeking its leave to revive or resume the proceeding nor had the State Government, while issuing the order, dated 22.5.2002, and setting aside there under the penalty (imposed on the Respondent herein by the Government's earlier order, dated 30.7.1998, aforementioned) kept its rights reserved to go ahead with disciplinary proceeding, de novo/afresh/from any particular stage.

24. It needs to be, now, noted that a careful perusal of the order, dated 19.12.2001, aforementioned, leaves no doubt that the imposition of penalty on the present Respondent had come to be set aside by the learned Tribunal, by its order, dated 19.12.2001, aforementioned on the ground of failure, on the part of the Disciplinary Authority, to observe principles of natural justice, while conducting the enquiry in the disciplinary proceeding and also in imposing the penalty, and not on the ground that in the facts and circumstances of the case, the disciplinary proceeding was, otherwise also, not warranted or maintainable. It is, as a matter of fact, not disputed, even on behalf of the Respondent, that the learned Tribunal had set aside the finding's of the enquiry and the penalty imposed on the Respondent for omission to observe the principles of natural justice and not on the ground that there was no material on record to sustain the findings of guilt reached against the Respondent or that the disciplinary proceeding was, otherwise also, not warranted or necessitated.

25. The question, therefore, which we are, now, required to consider is this: What is the effect of an order, passed by a Tribunal or a court, setting aside the findings of a disciplinary proceeding and the penalty imposed on the ground of non-observance of the principles of natural justice, while conducting the enquiry and/or while accepting findings of an enquiry and imposing penalty?

26. In the case at hand, when the penalty, imposed on the Respondent, was set aside by the learned Tribunal on the ground of failure to observe principles of natural justice, the effect was that the disciplinary authority was free to resume, the enquiry from the stage, where the failure to observe principles of natural justice had taken place. For such a revival or resumption of the disciplinary proceeding, no leave was required to be either taken by the State Government from the learned Tribunal, or was required to be reserved by the State Government, while making the order, dated 22.5.2002.

27. There can be no doubt, and it is not, in fact, in dispute, as already pointed out above, that the learned Tribunal had not interfered with the penalty imposed on the present Respondent on the ground that there was no material to sustain the findings, reached against the present Respondent, but on the ground of omission to observe the principles of natural justice. When the principles of natural justice are not observed and, in consequence thereof, an order is interfered with, there is no final decision in the case and fresh proceedings are left open. What happens, in such a case, is that the order, which is found to be not sustainable due to lack of inherent defect of having not observed the

principles of natural justice, is set aside, but the proceedings remain without being terminated. In plain words, the Supreme Court has observed, in *Nagarjuna Construction Ltd. v. Government of Andhra Pradesh* AIR 2009 SCW 105, which Mr. Deb relies upon, thus, "Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left upon. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated,

(emphasis is added)

28. What follows, as a corollary, from the above statement of law, laid down in *M/s. Nagarjuna Construction Co.* (supra), and the discussions held above is that with the setting aside of the penalty imposed by the learned Tribunal by order, dated 19.12.2001, the Disciplinary Proceeding, drawn against the Petitioner, had not come to be terminated. Consequently, the proceeding remained pending for its resumption from the stage of appointment of a new Inquiry Officer, who ought, not to have been a witness to the facts of the case and who ought not to have been suffering from such disqualification as the Inquiry Officer, who had earlier conducted the enquiry, had been (according to what the learned Tribunal had held in its order, dated 19.12.2001,) suffering from. This is precisely what has been done by the Government by orders, dated 31.7.2004, which became the subject-matter of challenge in OA No. 187/2004 and have come to be set aside by the common order, dated 19.12.2008, which stands impugned in the present writ petitions.

29. The question, therefore, is this: Following the order, dated 19.12.2001, passed in OA No. 48/2000, whereby the penalty, imposed on the Respondent, had been set aside by the learned Tribunal, when the Government, (acting upon the learned Tribunal's said order dated. 19.12.2001,) passed the order, dated 22.5.2002, aforementioned, setting aside, once again, the penalty imposed on the Respondent by the Government's earlier order, dated 30.7.1998, what was the legal effect of the order, dated 22.5.2002?

30. It needs to be noted, as already indicated above, that with the order, dated 19.12.2001, passed, in OA No. 48/2000, by the learned Tribunal, when the penalty, imposed by the Government on the Respondent, by order, dated 30.7.1998, had already been set aside, the order of penalty, in the light of the decision, in *M/s. Nagarjuna Construction Co.* (supra), had come to stand vacated, because of its inherent defect of having not observed the principles of natural justice and no fresh order, as has been done by the Government by order, dated 22.5.2002, was at all required to be passed by the Government setting aside, once again, the order, dated 30.7.1998, which had already stood set aside by the learned Tribunal as mentioned hereinbefore. The order, dated 22.5.2002, setting aside the penalty was, therefore, superfluous and redundant. What the order, dated 22.5.2002, did, in fact and in law, was that it vacated the penalty imposed on the Respondent, but did not terminate the disciplinary proceeding. The penalty having come to be so vacated, it remained open to the Government

to resume the enquiry from the stage of appointment of a new Inquiry Officer and, then, bring the disciplinary proceeding to its logical end in accordance with law.

31. The conclusion, which we have reached above, would follow even when we consider, in the light of the decision in *Union of India v. Md. Ramzan Khan* (1991) 1 SCC 188, the effect of the learned Tribunal's order dated 19.12.2001 from yet another angle as contended by Mr. Deb. In *Md. Ramzan Khan* (supra), the court held that whenever the Inquiry Officer is other than the disciplinary authority and the report of the Inquiry Officer holds the employee guilty of all or any of the charges with proposal for any punishment or not, the delinquent employee is entitled to a copy of the report to enable him to make a representation to the disciplinary authority against such findings recorded in the enquiry report inasmuch as the employee must have his say with regard to the correctness or otherwise of the findings reached by the Inquiry Officer and/or with regard to the legality or otherwise of the manner in which the enquiry was conducted by the Inquiry Officer so that the disciplinary authority considers the employee's contentions along with the enquiry report and other relevant materials for the purpose of taking its decision on the question of guilt or otherwise of the employee and, hence, the non-furnishing of the report amounts to a violation of the rules of natural justice, because it would deny to the employee a reasonable opportunity of hearing.

32. Following the decision, in *Md. Ramzan Khan* (supra), since the need to answer several questions had arisen, the court, in *B. Karunakar* (supra), formulated several questions for determination, one of the questions being [as noted by the court in *B. Karunakar* (supra)], "What is the effect of the non-furnishing of the report on the order of punishment and what relief should be granted is the employee in such cases?"

(emphasis is added)

33. Responding to the above question, the court held, in *B. Karunakar* (supra), that while the right to represent against the findings, recorded in the report by the Inquiry Officer, is part of the reasonable opportunity to be made available to the employee during the first stage of the inquiry, namely, before the disciplinary authority takes its decision with respect to the correctness or otherwise of the findings of the enquiry report, the right to show-cause, against the penalty proposed, belongs to the second, stage, when the disciplinary authority, having considered the findings recorded in the report and having come to the conclusion of the guilt of the employee, proposes to award penalty on the basis of its own conclusions. The Supreme Court has also pointed out, in *B. Karunakar* (supra), that the first right is the right to prove innocence, whereas the second right is to plead for either no penalty or a lesser penalty after the conclusion, as regards the guilt, has already been reached and it is the second right, exercisable at the second stage, which has been taken away by the Forty-second Amendment and not the first right, i.e., the employee's right to have his say on every such

material including the enquiry report, which would be considered by the disciplinary authority for the purpose of taking a decision on the question as to whether the employee is or is not guilty.

34. As to why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the first stage and also a requirement of the principles of natural justice, the Supreme Court has observed, in *B. Karunakar (supra)*, that the findings, recorded by the Inquiry Officer, form an important material, which the disciplinary authority has to take into consideration for arriving at its conclusion as to whether the findings are or are not correct, but before the disciplinary authority reaches its conclusion with regard to the guilt or otherwise of the employee, who is proceeded against, and before the delinquent employee is condemned, the principles of natural justice would require, observed the Supreme Court, in *B. Karunakar (supra)*, that the employee be given a fair opportunity to meet, explain and controvert the Inquiry Officer's findings inasmuch as it would be, according to the Supreme Court, a negation of the tenets of justice and a denial of fair opportunity if the disciplinary authority considers the findings, recorded by a third party like the Inquiry Officer, without, giving the employee an opportunity to reply to it.

35. Although it is true, points out the Supreme Court, in *B. Karunakar (supra)*, that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority does take into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In such circumstances, the findings of the Inquiry Officer do constitute an important material, which is likely to influence the disciplinary authority's ultimate conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or may be contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee, but are taken into consideration by the disciplinary authority, while arriving at its conclusions. Both, the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require, held the court in *B. Karunakar (supra)*, that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is, then, required to consider the evidence, the report of the Inquiry Officer and the representation of the employee as against the enquiry report. The observations, appearing, in this regard, in *B. Karunakar (supra)*, read as under:

25. While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry, viz., before the disciplinary authority takes into consideration the findings in the report, the

right to show-cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment.

35A. The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported, by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it.

36. Thus, the court held, in B. Karunakar (supra), that the right to receive report

of the enquiry is an integral part of reasonable opportunity inasmuch as the findings, recorded by an Inquiry Officer, form an important material before the disciplinary authority for the purpose of taking action along with other materials so as to reach a just conclusion.

37. The next question, therefore, in *B. Karunakar (supra)*, was: what is the effect of the order of punishment, when the same is passed without furnishing to the employee a copy of the enquiry report? The answer to this question was given by the Supreme Court in para 30(v), which reads, thus:

The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry 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 is added)

38. From the observations made above, in *B. Karunakar (supra)*, what clearly emerges is that when an employee puts to challenge his dismissal or removal from service on the ground that the enquiry report had not been furnished to him before the disciplinary authority considered the enquiry report along with other materials and held the employee guilty, the court cannot, as a routine affair, set aside the findings reached by the Inquiry Officer or the Disciplinary Authority and/or the penalty imposed on the delinquent employee, for, the court can interfere with the findings of guilt reached in such a case and/or the penalty imposed on the delinquent employee only when the court is satisfied that the omission to furnish enquiry report has caused prejudice to the employee. Obviously, it would depend on the facts of a given case as to whether non-furnishing of the enquiry report has or has not caused prejudice to the employee.

39. Logically, therefore, when the court, in a given case, finds that even after furnishing the enquiry report, no consequence, different from what had already been done, would follow, it would be perversion of justice to permit the employee to resume duty and get all the consequential benefits. In fact, according to the Supreme Court, in *B. Karunakar (supra)*, such reinstatement would amount to rewarding the dishonest and the guilty and thereby stretching the concept of justice to illogical and exasperating limits. It would amount to, as observed by the Supreme Court, in *B. Karunakar (supra)*, an unnatural expansion of natural justice, which, in itself, is antithetical to justice.

40. The court, therefore, concluded, in *B. Karunakar (supra)*, that no Court or Tribunal should mechanically set aside the order of punishment on the ground that enquiry report was not furnished. Setting aside of the punishment is possible and legally warranted if the Court or the Tribunal finds that non-furnishing of the enquiry report has caused prejudice to the employee and/or furnishing of the report would have made a difference to the result. If after hearing the parties, the Court or the Tribunal comes to the conclusion that non-furnishing of the report would have made no difference to the ultimate findings and the punishment given, the Court or the Tribunal should not interfere with the order of punishment.

41. What further follows from the discussions held above is that furnishing of enquiry report is not a ritual, but it has a definite object, the object being to enable the employee to have his say on the findings reached by the Inquiry Officer, when the Disciplinary Authority takes the enquiry report for determination whether the findings of the enquiry shall, or shall not, be sustained. Hence, unless there is prejudice caused to the employee as a result of the breach of the principles of natural justice, because of non-furnishing of an enquiry report, the findings reached, and the punishment imposed, cannot be set aside. The court has also explained, in its observations, made at para 31, in *B. Karunakar (supra)*, that when a Court or a Tribunal sets aside the punishment for breach of the principles of natural justice, the proper relief that should be granted is to direct, reinstatement of the employee with liberty to the authority/management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement, if ultimately ordered, should invariably be left to be decided by the authority concerned, according to law, on the culmination of the proceedings and depending upon the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide, according to law, how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any, and the extent of the benefits, he will be entitled to. The reinstatement made, as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report

and no more, where such fresh inquiry is held. That will also be the correct position in law. The conclusions, so reached, by the court read as under:

31. Hence, in all cases where the Inquiry 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. Where after following the above procedure, the Court/Tribunal sets aside the order of punishment, the proper relief that should be granted is to direct reinstatement of the employee with liberty to the authority/ management to proceed with the inquiry, by placing the employee under suspension and continuing the inquiry from the stage of furnishing him with the report. The question whether the employee would be entitled to the back-wages and other benefits from the date of his dismissal to the date of his reinstatement if ultimately ordered, should invariably be left to be decided by the authority concerned according to law, after the culmination of the proceedings and depending on the final outcome. If the employee succeeds in the fresh inquiry and is directed to be reinstated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the inquiry for failure to furnish the report, should be treated as a reinstatement for the purpose of holding the fresh inquiry from the stage of furnishing the report and no more, where such fresh inquiry is held. That will also be the correct position in law.

42. In the light of the decision in B. Karunakar (supra), what becomes clear is that when the learned Tribunal had found, in the present case, that the principles of natural justice had not been observed in the enquiry conducted against the Respondent and, as a result thereof, the findings cannot be sustained, it could have set aside the penalty imposed on the Respondent and this is precisely what the learned Tribunal had, in fact, done by its order, dated 19.12.2001. On the penalty being so set aside, the Government ought to have, in the light of the

decision, in B. Karunakar (supra), and also in the light of the decision, in M/s. Nagarjuna Construction Co. (supra), resumed the disciplinary proceeding by appointing a new Inquiry Officer. What the Government did was that it did not, immediately, resume the enquiry. In the meanwhile, as the period of penalty had expired by efflux of time and the Respondent had already stood recommended by the DPC for promotion to the post of Conservator of Forests, he was granted promotion to the post of Conservator of Forests and, subsequently, he was further promoted to the post of Additional Chief Conservator of Forests. What the Government ought to have done following the order, dated 19.12.2001, is what the Government has, now, done by orders, dated 31.7.2004, whereby the Government has resumed the enquiry by appointing a new Inquiry Officer. The order, dated 31.7.2004, however, stand set aside by the learned Tribunal by its common order on the ground that the learned Tribunal had not granted leave to the Government to proceed with the enquiry de novo/afresh/from any particular stage and the Government had not obtained such leave from the learned Tribunal nor had the Government reserved its right to resume the enquiry, when, following the learned Tribunal's order, dated 19.12.2001, the Government had earlier passed the order, dated 22.5.2002, setting aside the penalty.

43. In the light of the discussions held above, it becomes clear that the learned Tribunal's conclusion that it (the learned Tribunal), having not granted leave to the Government to hold the enquiry de novo/afresh from any particular stage, no such enquiry could have been held by the Government after the penalty imposed on the Respondent stood set aside by the Tribunal by order, dated 19.12.2001, is wholly erroneous. Extended logically, it would mean that the learned Tribunal's further conclusion that the Government, having not obtained, in this regard, leave from the Tribunal, could not have resumed the enquiry, too, is incorrect and cannot be sustained.

44. Above all, the Government's action of passing the order dated 22.5.2002, setting aside the penalty imposed on the Respondent, was wholly superfluous and redundant inasmuch as the order of penalty had ceased to exist, when the learned Tribunal had already set aside the penalty by its order, dated 19.12.2001, and, in the light of the decision, in B. Karunakar (supra), and also the decision, in M/s. Nagarjuna Construction Co. (supra), there was, contrary to what the learned Tribunal has held, no need for the Government to specifically reserve its right to resume the enquiry inasmuch as the Government was legally bound to resume the enquiry. As a matter of fact, the Government had failed to do what it ought to have done. What the Government seeks, now, to do is correction of the error, which it had committed and not something, which is illegal. To put it a little differently, what the Government has, now, done by its orders, dated 31.7.2004, (which stand set aside by the learned Tribunal), is that the Government has carried out the procedure, which it was, under the law and in the light, of the decisions, in B. Karunakar (supra) and M/s. Nagarjuna Construction Co. (supra), bound to carry out. The learned Tribunal, therefore, could not have, and ought not to have, interfered with the orders, dated

31.7.2004, when the learned Tribunal's earlier order, dated 19.12.2001, had been passed setting aside the findings, reached against the Respondent and the penalty imposed on him, due to non-disciplinary observance of the principles of natural justice and not on merit. The disciplinary proceeding, drawn against the Respondent, had not, by virtue of the learned Tribunal's order, dated 19.12.2001, come to stand terminated and ought to have been resumed and must, now, be allowed to be resumed unless the law, on this aspect, requires otherwise.

45. What emerges from the above discussion is that when the learned Tribunal, by its order, dated 19.12.2001, set aside the penalty imposed on the Respondent, the disciplinary proceeding had not come to be terminated and it ought to have been, ordinarily, proceeded with. No leave was, therefore, contrary to what the learned Tribunal has, now, observed, required to be obtained by the Government from the learned Tribunal for the purpose of resuming the disciplinary proceeding from the stage, where it had been left. In short, no leave was required to be obtained by the Government for passing an order, such as, the orders, dated 31.7.2004, aforementioned, whereby the disciplinary proceeding had been revived and the Inquiry Officer had been appointed, nor was the Government required to specifically reserve its right to resume the disciplinary proceeding, when it had passed its earlier order, dated 22.5.2002, aforementioned.

46. Let us, now, turn to the question, raised by Mr. Sinha, that in the facts of the present case, the Government must be taken to have "condoned" the lapses, if any, on the part of the Respondent, because the Respondent has been granted two promotions after the order, dated 22.5.2002, was passed.

47. With regard to the above submission, it may be noted that during the pendency of the OA No. 48/2000, which was disposed of by order, dated 19.12.2001, the penalty, imposed on the Respondent, by the Government's order, dated 30.7.1998, was of reduction by one stage, in the time scale of pay, for a period of two years, with cumulative effect, with the stipulation that during the period of reduction to the earlier stage, the Respondent would not be entitled to any increment. As indicated hereinbefore, the period of two years of the penalty expired, by efflux of time, on 29.7.1998; whereas the learned Tribunal passed its order, setting aside the penalty, on 19.12.2001. Since the said period of two years had already expired, the Respondent's right to be considered for promotion got matured. The State Government allowed the Respondent to be promoted to the post of Conservator of Forests, because the Respondent had already been recommended by the Departmental Promotion Committee for promotion to the post of Conservator of Forests during the pendency of OA No. 48/2000. Before, however, the order, dated 31.7.2004, was passed resuming the enquiry by the Government, the Respondent, on having fallen within the zone of consideration for promotion to the post of Additional Chief Conservator of Forests, was considered and promoted accordingly. None of these two

promotions evaporated the disciplinary proceeding, which had remained pending against the Respondent.

48. Ordinarily, pendency of a disciplinary proceeding cannot be made a ground for not considering an employee for promotion, when his case for promotion falls within the zone of consideration, because it is no longer *res integra* that the right to be considered for promotion is a fundamental right [See *Ajit Singh and Others Vs. The State of Punjab and Others*,

49. Because of the fact that an employee, even when a proceeding is pending against him, has a right to be considered for promotion, when his turn comes, the system of sealed-cover procedure has been evolved, where under the conclusion reached, independent of the pending proceeding, as to whether the employee, deserves or does not deserve to be promoted, is kept in sealed cover pending culmination of the disciplinary proceeding. Depending upon the result of the disciplinary action, the "sealed cover" is opened and the action is taken accordingly.

50. There may be a case, where the result of the disciplinary proceeding leads to termination of service of the employee concerned. In such circumstances, the question of promoting him, even if he was, otherwise found fit for promotion, does not arise. Broadly speaking, therefore, there are two courses open to a competent authority, when the case of an employee, who is facing a disciplinary proceeding, arises for consideration for promotion. The appropriate authority can either adopt the "sealed-cover" procedure, which is usually followed, or grant promotion to the employee subject, of course, to the result of the pending disciplinary proceeding.

51. It is not in dispute that a Government employee cannot take away, the right, of the competent authority to take a pending disciplinary proceeding to its logical conclusion and impose penalty if the pending disciplinary proceeding proves a misconduct. The position of law, in this regard, has been clearly laid down by the Supreme Court, in *B.C. Chaturvedi Vs. Union of India and others*, in the following words:

8. It is true that pending disciplinary proceeding, the Appellant was promoted as Assistant Commissioner of income tax. Two courses in this behalf are open to the competent, authority, viz., sealed cover procedure which is usually followed, or promotion, subject to the result of pending disciplinary action. Obviously, the appropriate authority adopted the latter course and gave the benefit of promotion to the Appellant. Such an action would not stand as an impediment to take pending disciplinary action to its logical conclusion. The advantage of promotion gained by the delinquent officer would be no impediment to take appropriate decision and to pass an order consistent with the finding of proved misconduct.

52. Under ordinary law of master and servant, once an employee's misconduct, which could have, otherwise, justified his dismissal or some other penalty is

condoned, the employer cannot, after condoning such misconduct, turn back and assert his right to punish the servant. The question is: Whether the doctrine of condonation of misconduct, as obtainable under the ordinary law of master and servant, can be pressed into service, when an employee is governed by statutory rules?

53. While considering the question posed above, it may be noted that in the beginning, when there is an offer by the Government for making an appointment and acceptance of such an offer by a person, the relationship between the person, who is given the offer, and the Government, may be contractual, but, once an employee is appointed, he acquires a status and his status is governed by the condition of service, which may be regulated by the statutory rules or legislative provisions as the case may be. (See *Union of India and Another Vs. Tulsiram Patel and Others*, Under the law, the Government is not justified in excluding an employee from being considered for promotion, if he, otherwise, fails within the zone of consideration, merely on the ground that certain disciplinary proceeding is either contemplated or pending against him. A reference, in this regard, may be made to the case of *New Bank of India v. N.P. Sehgal* AIR 1991 SCW 565, wherein the Supreme Court has observed:

6... the mere fact that disciplinary proceedings are contemplated or are under consideration against an employee does not constitute a good ground for not considering the employee concerned for promotion if he is in the zone of consideration nor would it constitute a good ground for denying the promotion if the employee is considered otherwise fit for promotion.

54. The position of law, as discussed above, is clearly reflected from the Supreme Court's decision, in *State of Madhya Pradesh and others Vs. R.N. Mishra and others*, too, wherein, having considered the difference between the ordinary law of master and servant, on the one hand, and the law, which governs, on the other hand, a Government employee's right to be considered for promotion during pendency of a disciplinary proceeding against him, the court laid down as under:

The substance of the decisions cited above is that under ordinary law of master and servant, once an employer has condoned any misconduct attributed to a employee, which would have, otherwise, justified his dismissal or punishment, the employer cannot after such condonation go back upon his election to condone and assert a right to punish the servant. But, the question that arises for consideration in the instant case is, whether the doctrine of condonation of misconduct under ordinary law of master and servant can be pressed into service, where an employee is governed by statutory rules, and under law the employer is required to consider the case of an employee for promotion against whom a preliminary enquiry is pending. To begin with when there is an offer and acceptance of an appointment, the relationship between the employee and Government may be contractual, but once an employee is appointed, he acquires a status, as his conditions of service are regulated by statutory rules or

provisions of an Act. Under law, Government is not justified in excluding an employee from the field of consideration for promotion merely on the ground that certain disciplinary proceedings are contemplated or some preliminary inquiry to inquire into the misconduct attributed to that employee are pending. In *New Bank of India v. N.P. Sehgal* JT(1991) 1 499 : AIR 1991 SCW 565 it was held by this Court, thus:

...the mere fact that disciplinary proceedings are contemplated or under consideration against an employee does not constitute a good ground for not considering the employee concerned for promotion if he is in the zone of consideration nor would it constitute a good ground for denying the promotion if the employee is considered otherwise fit for promotion.

In *B.C. Chaturvedi* (supra) at p. 757 of SCC this Court held as follows:

it is true that pending disciplinary proceeding, the Appellant was promoted as Assistant Commissioner of income tax. Two courses in this behalf are open to the competent authority, viz., sealed cover procedure which is usually followed, or promotion, subject to the result of pending disciplinary action. Obviously, the appropriate authority adopted the latter course and gave the benefit of promotion to the Appellant. Such an action would not stand as an impediment to take pending disciplinary action to its logical conclusion. The advantage or promotion gained by the delinquent officer would be no impediment to take appropriate decision and to pass an order consistent with the finding of proved misconduct.

7. In the present case, misconduct attributed to the Respondent came to light in the year 1976 when a preliminary inquiry was ordered and while the inquiry was continuing, the State Government was required to consider the case of the Respondent for promotion to the post of Assistant Conservator of Forests. Under law, the State Government had no option but to consider the case of the Respondent for promotion. The State Government could not have excluded the Respondent from the zone of consideration merely on the ground that a preliminary inquiry to enquire into the allegations of misconduct attributed to him was pending. In such a situation, the doctrine of condonation of misconduct cannot be applied as to wash off the acts of misconduct which was the subject-matter of preliminary enquiry. We are, therefore, of the opinion that the promotion of the Respondent to the post of Assistant Conservator of Forests would not amount to condonation of misconduct alleged against him which was the subject-matter of preliminary inquiry. Consequently, the punishment imposed on the Respondent by the State Government was valid and legal. The decision relied upon by the Tribunal as well as by the learned Counsel for the Respondent in *Lal Audhraj Singh v. State of M.P.* is not applicable to the facts of the present case, as in that case, the employer had a choice to inflict punishment on the employee but the employer did not choose to punish the employee and in that context, it was held by the High Court, that the misconduct attributable to the employee was condoned.

(emphasis is added)

55. Relying upon the above decision of R.N. Mishra (supra), the Supreme Court, in its later decision, in P.D. Agarwal v. State Bank of India (2006) 8 SCC 776 observed:

25. However, for the purpose of holding that misconduct was condoned by the employer the court must come to a definite finding as regards the conduct of the employer. It must be held that either expressly or by necessary implication that the employer had knowledge of the misconduct of the employee. It is one thing that despite such knowledge, the delinquent officer is promoted to which he would not have been otherwise entitled to or if the disciplinary proceeding had been initiated as if the misconduct was not committed for and it is another thing to say that such a misconduct was not required, to be taken into consideration as by reason of the service rule, promotion was to be granted, on the basis of seniority alone, and, thus, the question of condonation of misconduct on the part of the employer would not arise.

56. What emerges from the above discussion is that an employee cannot be denied his right of being considered for promotion merely on the ground that a disciplinary proceeding is either pending against him or is contemplated. The authorities concerned may either choose the sealed cover procedure as discussed above and act upon the recommendations, if any, for promotion and depending upon what the result of the disciplinary proceeding is. The Government may also choose to promote an employee during the pendency of a disciplinary proceeding if he is, otherwise, found fit for promotion. Such promotion would be governed by the result of the disciplinary proceeding. In the present case, therefore, the mere fact that the Respondent was promoted twice cannot, in the facts and attending circumstances of the present case, be extended to mean that the misconduct, which the Respondent has allegedly committed, stands condoned.

57. We, now, turn to the decisions, which Mr. Sinha relies upon in order to sustain the impugned orders of the learned Tribunal.

58. In the case of Lal Audhraj Singh Vs. State of Madhya Pradesh, the writ Petitioner, Lal Audhraj Singh, was served with a charge sheet, on 27.1.1954, when he was holding the post of Range Officer alleging negligence in discharge of his duties. The writ Petitioner gave his reply thereto, on 4.3.1954, denying the allegations of negligence. Nothing happened thereafter till 15.4.1963, when a notice was issued to him by the Government asking him to show-cause as to why his two increments, in his scale of pay, as Assistant Conservator of Forests, should not be withheld for the negligence, which had formed the subject-matter of the notice issued to him on 27.1.1954. The writ Petitioner gave his explanation and, thereafter, an order was passed, on 27.12.1965, withholding, with cumulative effect, one increment, in the scale of pay of the writ Petitioner, as Assistant Conservator of Forests. In the intervening period of nine years, commencing from 27.1.1954, when the charge sheet was served on the writ

Petitioner, and the imposition of penalty by order, dated 27.12.1965, the writ Petitioner was promoted, in the year 1965, to the post of Assistant Conservator of Forests and, upon his promotion, he continued to receive his increments and was also allowed to cross the efficiency bar. Dealing with the case, a Division Bench of the Madhya Pradesh High Court, in Lal Audhraj Singh (supra), held as under:

4. In our judgment, the contentions advanced on behalf of the, Petitioner must be given effect to. It is well settled that a master cannot impose any punishment on a servant for a misconduct which he has condoned. The subject of condonation has been discussed at length in a number of English cases [see Horton v. Mcmurtry (1860) 2 LT 297 Phillips v. Fosall 1872 QB 666; Boston Deep Sea Fishing and Ice Co. v. Ansell (1888) Chd 339 Battle T. Parmmenter (1889) 5 TLB. 396; Federal Supply, etc. v. Angehrn and Piel (1910) 80 LJPC 1 London General Omnibus Co. Ltd. v. Holloway (1912) 2 KB 72; Hanley v. Pease and Partners Ltd. 1915 1 KB 698 . The principle that merges from these cases has long been adopted in India, see L.W. Middleton Vs. Harry Playfair, and District Council, Amraoti v. Vithal Vinayak Bapat, AIR 1941 Nag. 125. In the Nagpur case, Base J said "once a master has condoned any misconduct which would have justified dismissal, or a fine, he cannot, after such condonation, go back upon his election and claim a right to dismiss or to impose a fine or any other punishment in respect of the offence which has been condoned." Here, the negligence, which formed the basis of the notice issued to the Petitioner on 27th January, 1954 asking him to show-cause why he should not be dismissed or given one of the lesser punishments detailed in Rule (1) para 3 of Part I Serial No. 13 of the Book Circular of the Madhya Pradesh Government, was clearly condoned by the Government when no action of any kind was, for over a period of nine years, taken against the Petitioner on the charge of negligence and when, on the other hand, he was promoted in 1956 to the post of Assistant Conservator of Forests and also received after promotion annual increments and was allowed to cross the Efficiency Bar. The promotion given to the applicant, the annual increments allowed to him as well as the crossing of the Efficiency Bar can only be explained on the basis that the negligence, for which the Petitioner was charged in 1954 and which the Government thought serious enough to entail his dismissal, was condoned by the Government. It is not as if the Government was not aware of the fact that the applicant had been charged with negligence, and that a notice had been issued to him to show-cause why he should not be dismissed from service. The notice dated the 27th January, 1964 was issued to the applicant by a responsible officer, namely, the Divisional Forest Officer, Mandla Division. It is not also the case of the opponent that the Petitioner was promoted to the post of Assistant Conservator of forests in ignorance of the notice issued to him by the Divisional Forest Officer on 27th January, 1954. We are far from saying that once a person is promoted, then there is a condonation of the lapses or misconduct on his part prior to his promotion. But if the lapse or misconduct is one which is known to the authority before the person is promoted

and not one which comes to light subsequent to the promotion, and if the authority concerned knowing of this lapse or misconduct promotes the civil servant without any reservation, then it must be taken that the lapse or misconduct has been condoned. In our opinion, having regard to the circumstances in which the Petitioner was promoted to the post of Assistant Conservator of Forests and given annual increments and allowed to cross the Efficiency Bar, it must be held that the negligence, which formed the basis of the notice issued to the Petitioner on 27th January, 1954, was condoned by the Government. The negligence having been condoned could not clearly be used subsequently for awarding any punishment to the Petitioner.

(emphasis is added)

59. While considering the observations made above, it needs to be noted that the decisions, which have been referred to, and relied upon, in Lal Audhraj Singh (supra), relate to largely cases arising out of ordinary law of master and servant and not the relationship between Government and its employee, which is, though, ordinarily, contractual, in nature, in the beginning, becomes more of a question of status than contract and is governed by the relevant rules and not by the ordinary law, which, otherwise, governs the relationship between the master and servant. Even in Vithal Vinayak Bapat (supra), which the Division Bench has referred to in Lal Audhraj Singh (supra), is a case, when we were governed by the Government of India Act, 1935, and not by the present Constitution. The Constitution Bench, in Roshan Lai Tandonkunj Behari (supra), has succinctly described the distinction between the ordinary law, governing the relationship of master and servant, and the law, which governs the relationship between the Government and its employee, which we have already discussed above.

60. Thus, none of the English cases, which have been referred to, and relied upon, in Lal Audhraj Singh (supra), arose out of the relationship between the Government and its employee, which fall in public domain. This apart, even while allowing the writ petition, the court made it clear, in Lal Audhraj Singh (supra), that it was not laying down a law of universal application, when it observed

... We are far from saying that once a person is promoted, then, there is a condonation of the lapses or misconduct on his part prior to his promotion.

61. Thus, the court gave its decision, in Lal Audhraj Singh (supra), on the basis of the facts of the given case and did not, as a proposition of law, lay down that promotion, in itself, would, always and without exception, amount to condoning a Government servant's misconduct. Even on merit, the court found, in Lal Audhraj Singh (supra), that punishment of withholding of the increment had been imposed without any opportunity having been given to the writ Petitioner to have his say in the matter. Thus, the decision, in Lal Audhraj Singh (supra), does not lay down a law of general proposition and cannot be made a basis for holding, in the light of the decisions, in B.C. Chaturvedi (supra) and R.N. Mishra (supra), that granting of promotion would necessarily amount, in all cases and

invariably, as an act of condonation of the misconduct.

62. Turning to the case of *Collector of Customs v. Rebati Mohan Chatterjee* 1976 (2) SLR 897 which has also been relied upon by Mr. Sinha, it needs to be noted that the Respondent was served with a notice to show-cause, in the year 1964, by the Collector of Customs. On the reply being given by the Respondent, the Collector was satisfied that no case against the Respondent could be made out and accordingly dropped the proceeding. Subsequently, however, a notice on more or less the same grounds, which were contained in the notice served on the Respondent in the year 1964, was issued to the Respondent on 14.8.1970 and the latter notice came to be challenged by the Respondent. As the impugned notice, dated 14.8.1970, was quashed, the matter was carried, in appeal, by the Collector. The court found that when the Collector, having considered the explanation given by the Respondent, had already concluded that there was no case against the Respondent and, as such, dropped the proceeding, the Respondent could not have been proceeded, again, on identical grounds by a second show-cause notice. However, after the writ petition was filed, the Respondent was promoted on the recommendation of the DPC. The Division Bench of the Calcutta High Court held that no application was made by the Appellant, in the appeal, for any order that the promotion of the Respondent be stayed pending disposal of the appeal or that the promotion should be abided by the result of the appeal. With greatest respect, the conclusion, so reached, in *Rebati Mohan Chatterjee* (supra), does not appear to be, in the light of the decision, in *B.C. Chaturvedi* (supra), correct inasmuch as granting of promotion cannot, by itself, do away with a misconduct and, hence, the mere fact that during pendency of the writ petition, the Respondent had been promoted, could not have been a ground for quashing the impugned notice. This does not, however, mean, we must hasten to add, that the impugned notice could not have been quashed; more so, when the decision, in *Rebati Mohan Chatterjee*, shows that the notice, in the year 1964, had been issued on a report given by the Central Bureau of Investigation and the Collector of Customs, having given an elaborate analysis on the various allegations made against the Respondent and the report of the CBI Officer, had already concluded that "in the circumstances, the report of the CBI has no legs to stand". Thereafter, nothing happened till 16.4.1970, when the second show-cause notice was given at the instance of the Central Vigilance Commission. In such factual scenario, the decision, in *Rebati Mohan Chatterjee* (supra), was rendered. This decision too, therefore, cannot be said to have laid down a law of general proposition that during the pendency of a disciplinary proceeding, when an employee is promoted, his misconduct must be taken to have condoned, particularly, when the decisions, in *B.C. Chaturvedi* (supra) and *R.N. Misra* (supra), which we have already dealt with above, lay down otherwise.

63. While examining the decision, in *The State of Punjab Vs. Dewan Chuni Lal*, which Mr. Sinha relies upon, we deem it appropriate to extract from the decision itself the material facts, which were taken into account by the Supreme Court in

deciding the appeal. The relevant facts are, therefore, reproduced below:

1. By this appeal, the State of Punjab challenges the judgment and order of the Punjab High Court upholding the decree of the Subordinate Judge, Gurgaon, declaring that the dismissal of the Respondent from service was illegal and inoperative. The Respondent, a Sub-Inspector of Police, was called upon to answer a charge framed on 12th October, 1949, setting forth extracts from his confidential character roll showing inefficiency and lack of probity while in service from 1941 to 1948 and to submit his answer to the prima facie charge of inefficiency as envisaged, in para 16.25(2) of the Punjab Police Rules.

2. The Respondent had joined the police service and had, served as a Sub-Inspector in various places, which are now in Pakistan, before he was posted to Gurgaon in the year 1949. It appears that the view taken of his conduct and reputation by his superior officers over the years was not consistent. In some years, he got what is known as a "B" certificate and in others an "A" certificate. According to Rule 13.17 of the Punjab Police Rules, Superintendents of Police had to prepare personally and submit annually to the Deputy Inspector General of Police confidential reports in the form prescribed on the working of all Assistant Sub-Inspectors and Sub-Inspectors serving under them. The reports were to be of two kinds "A" and "B" and to be marked as such. An "A" report was for recommending that incremental promotions should not be withheld, while a "B" report was to contain a recommendation, for reasons to be fully stated, that incremental promotions should be withheld. The Rule further shows that the purport of all "B" reports was to be formally communicated to the officer concerned and his written acknowledgement to be taken. It also prescribed that the submission of two successive "B" reports regarding an officer would, result, automatically, in the institution of departmental proceedings against him with a view to stoppage of increment.

3. *** ** 4. *** ** 5. The confidential reports, extracts whereof, were contained in the charge sheet make it clear that the Respondent was being accused of laziness and ineffectiveness and as having a doubtful reputation as to his honesty. Excepting for the year 1948, wherein a specific instance of corruption was charged against him the other reports only contained generally adverse remarks. For instance the remarks against him for the year 1941 were to the effect that he was "lazy and ineffective and that he had been warned for dishonesty, laziness and lack of control". In the year 1942, when he was posted, at Dera Gazi Khan, his annual confidential report showed that although there were no definite complaints, he had not shown any outstanding ability or energy. The Superintendent of Police was not certain about his honesty but had no special complaints against him. The Respondent was not allowed to cross the efficiency bar in that year in view of his past reports.

6. It is the common case of the parties that the Respondent was allowed to cross the efficiency bar in 1944. In 1945, he was transferred to Montgomery and got a "B" report and his honesty was characterised as doubtful. He got another

warning in that year. In 1946, the Superintendent of Police remarked that he was a failure as a Station House Officer and was slow to carry out orders and had no grip on his staff. The Deputy Inspector General of Police Multan Range summed up his 16 years' service with the note:

From all accounts, he is one of the worst Sub-Inspectors in the Range and the department will be well rid of him if action under Rule 16.25(2) can be successfully taken against him. Action under Rule 16-25 cannot succeed at present, but his past record is such that any further complaint should warrant his dismissal.

In the confidential reports of the year 1946, the Superintendent of Police, Muzaffargarh, stated that he was not honest and was very poor on parade. The Deputy-Inspector-General Multan Range gave him a third warning. The Superintendent of Police, Muzaffargarh, however, remarked that although his previous record was unsatisfactory he appeared to be trying to mend himself. In the year 1948 he got a "C" report and the Superintendent of Police described him as "thoroughly corrupt". The S.P. further remarked that:

This officer fell to unheard of depths of moral degradation in corrupt practices while posted to City Rewari inasmuch as he changed, the opium, recovered by him earlier with Resaunt for Rs. 1,000 bribe and then made over the opium for sale in the black market. He was known to have mixed up with bad characters, gamblers and Rishawatdalals.

According to the charge sheet, the attested copies of these reports were to be used as evidence against him.

7. *** ** 8. The Respondent pleaded not guilty to the charge and filed a list of 68 witnesses whom he sought to examine in his defence. He also gave a summary of the facts about which each of the witnesses was to depose. The Inquiry Officer allowed him to examine 21 witnesses in defence. No witness was examined on behalf of the department. On 25th May, 1950, Bishambar Das, Superintendent of Police, made a report that the charge had been fully brought home to the Respondent and it was suggested that he should be dismissed. The Deputy Inspector or General asked him to show-cause why he should not be dismissed from service. After receipt of a written representation made by the Respondent and recording his statement the Deputy Inspector General passed an order dismissing the Respondent from service.

(emphasis is added)

64. Aggrieved by his dismissal, the Respondent, in Dewan Chuni Lal (supra), instituted a suit. In the setting of the facts, as extracted above, it was urged, before the Supreme Court, that by allowing him to cross the efficiency bar, the Government must be regarded to have given the Respondent him a clean chit up to that date and in view of this, the reports of 1941 and 1942 should not have been taken into consideration against him. While dealing with this submission,

the Supreme Court pointed out:

7. In regard to the year 1948 and the charge abovementioned, it is enough to say that an enquiry was held against him and he was held entitled to an honorable acquittal.

65. On an analysis of the facts, the Supreme Court observed:

14. In our view, reports, earlier than 1942, should not have been considered at all inasmuch as he was allowed to cross the efficiency bar in that year. It is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could, have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944. It will be noted that there was no specific complaint in either of the two years and at best there, was only room for suspicion regarding his behaviour.

15 *** ** 16. There can be no doubt that the 1948 report was a very damaging one and if the allegations contained therein had any substratum of truth, the Respondent could, be dismissed from service on the strength of the charges based on those allegations alone. But, as already noted, the Respondent was cleared of this charge.

66. In *Dewan Chuni Lal* (supra), the Respondent had, in the year 1941 as well as 1942, received two adverse remarks in his confidential report. While dismissing him from service, the authorities concerned had considered these two reports too. Though the Supreme Court had noted that the 1942 report against the Respondent was a very damaging one and if the allegations contained therein had been proved, the Respondent could have been dismissed from service, yet, as the Respondent had been exonerated of the charge, which rested on the said report, the question arose as to whether the previous adverse remarks could have been taken into account by the authorities concerned for the purpose of dismissing the Respondent from service. The two aspects of the matter, which attracted the attention of the Supreme Court, were (i) the Respondent had been allowed to cross the efficiency bar, in the year 1944, despite the adverse remarks, which he had received in his confidential report in the years 1941 and 1942; and (ii) since the Respondent had been allowed to cross the efficiency bar notwithstanding the said adverse remarks in the two confidential reports given in the years 1941 and 1942, the adverse remarks could not have been taken into account as the authorities concerned must be taken to have not taken into account seriously the adverse remarks of dishonesty and inefficiency made in the two confidential reports aforementioned.

67. What is, now, of utmost importance to note is that it is the specific finding of the Supreme Court, in *Dewan Chuni Lal* (supra), at para 14, that "there was no specific complaint in either of the two years and, at best, there was only room for suspicion regarding his behaviour". Thus, not merely because of the fact that the Respondent had been allowed to cross the efficiency bar, in the year 1944, that

the Supreme Court treated the two adverse remarks, which the Respondent had received in his two confidential reports to have been condoned, but because of the reason that the adverse remarks were based only on suspicion and not on any specific material inasmuch as observed the Supreme Court, if we may, once again, point out, there was no specific complaint in either of the two years and, at best, there was only room for suspicion regarding his behaviour.

68. From a bare reading of the observations made, in *Dewan Chuni Lal* (supra), it becomes clear that the decision, in *Dewan Chuni Lal* (supra), has been rendered on the facts of the case and did not, as a matter of general proposition, lay down that whenever a person is allowed to cross efficiency bar, his misconduct, if any, shall be taken to have been condoned. The situation in hand is quite different in the sense that the case of the Respondent is not a case, where there are adverse remarks or entries in the annual confidential report; rather, there was a disciplinary proceeding drawn against the Respondent and the said proceeding resulted into imposition of penalty. However, the penalty was interfered with by the learned Tribunal not on merit, but on account of non-observance of the principles of natural justice. In such circumstances, when the Respondent came to be promoted on the ground that the period of penalty, imposed on him, had elapsed by efflux of time, the decision, in *Dewan Chuni Lal* (supra), cannot be applied to the facts of the present case.

69. Coupled with the above, it is also worth noticing that at no point of time, initiation or maintainability of the disciplinary proceeding, drawn against the Respondent, was ever questioned or adversely commented upon in any judicial proceeding. Thus, drawing of the disciplinary proceeding cannot, at this point, of time, be said to be illegal or without substance.

70. Coupled with the above, what cannot be ignored and must be taken note of is that the Supreme Court, in *Badrinath Vs. Government of Tamil Nadu and Others*, on survey and analysis of a large number of decisions in relation to the question, as to when adverse entries/remarks may have a bearing on the promotion of a Government employee, laid down as under:

58. From the above judgments, the following principles can be summarized. -

(1) Under Article 16 of the Constitution, right to be "considered" for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence.

(2) Courts will not interfere with assessment made by Departmental Promotion Committees unless the aggrieved officer establishes that the non-promotion was bad according to *Wednesbury* principles or it was *mala fides*.

(3) Adverse remarks of an officer for the entire period of service can be taken into consideration while promoting an officer or while passing an order of compulsory retirement. But the weight which must be attached to the adverse

remarks depends upon certain sound, principles of fairness.

(4) If the adverse remarks relate to a distant past and relate to remarks such as his not putting his maximum effort or so on, then those remarks cannot be given weight after a long distance of time, particularly if there are no such remarks, during the period before, his promotion. This is the position even in cases of compulsory retirement.

(5) If the adverse remarks relate to a period prior to an earlier promotion they must be treated as having lost their sting and as weak material, subject, however, to the rider that if they related to dishonesty or lack of integrity they can be considered to have not lost their strength fully so as to be ignored altogether.

(6) Uncommunicated adverse remarks could be relied, upon even if no opportunity was given to represent against them before an order of compulsory retirement is passed.

71. From the law laid down, in *Badrinath* (supra), what surfaces prominently is that when adverse remarks were made prior to an earlier promotion, such adverse remarks must be treated to have lost their value subject, of course, to a rider (and this is important) that if the remarks relate to dishonesty or lack of integrity, they can be considered to have not lost their strength fully so as not to be ignored completely meaning thereby that an adverse remark, with regard to dishonesty or lack of integrity, in the service record of an employee, who may have been promoted, despite such a remark would not lose its complete value, when the question of next promotion of such an employee arises. The mere fact, therefore, that not with standing an adverse remark relating to dishonesty or lack of integrity, when an employee is promoted, it cannot be said that adverse remark has lost all its weight and must be treated to have been fully condoned and can never ever be considered. In the case at hand, neither it is contended nor has it come on record that there was any conscious decision, on the part of the Government, not to proceed further with the disciplinary proceeding drawn against, the Respondent. Merely because of the fact that the learned Tribunal had set aside the penalty due to the failure of the disciplinary authority and the Inquiry Officer to observe the principles of natural justice, and the Government had issued the redundant and superfluous order, dated 22.5.2002, it can be inferred, far less confidently concluded, and held unhesitantly, that the misconduct, if any, of the Respondent had been condoned, by the Government.

72. The last but not the least important question, which we, now, face is this: Is it permissible, under the scheme of our Constitutional governance, to "condone" an employee's misconduct merely because of the fact that the Government has decided not to take action on allegations of misconduct of the employee or that the Government, having initiated a disciplinary proceeding against the employee, chooses, for some unknown and strange reasons, to "abandon" the disciplinary proceeding and "condone" the misconduct, if any?

73. Our quest for an answer to the above question brings us to our Constitution. It is important to note and emphasis that every action of the Government, under our scheme of Constitutional governance, has to be in public interest. Even when an act is done by the Government, by taking into account the welfare of an employee, such an act, in order to survive, must be in public interest, for, it is in the interest of the public and the society that the Government acts, while dealing with its employees, as a model employer, and takes welfare of its employees into account, while taking an action or while omitting to take an action. Thus, when an employee's transfer is modified by the Government, because of some personal difficulty of the employee, such an action, on the part of the Government, has to be in public interest, because the relationship of employer and employee between the Government and its employee is not a private affair, but an affair, wherein interest of the public is involved and it is here that there is a paradigm shift, in the vision of the State, i.e., between what its (States) vision used to be, when we were ruled, as subject of the British empire, and the vision of the State after the Constitution adopted by us, "We, the people of India", has started governing all of us. The paradigm shift is clearly visible in the decision of the Constitution Bench, in *Roshan Lal Tandon Vs. Union of India (UOI)*, wherein, while distinguishing the nature of jural relationship between master and servant, on the one hand, and the relationship between the Government and its employees, on the other, Ramaswamy, J, speaking for the Constitution Bench, pithily puts, thus:

It is "true that the origin of government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the government. In other words, the legal position of a government servant is more one of status than of contract. The hall-mark of status is the attachment to legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the government servant and his terms of service are governed, by statute or statutory rules which may be unilaterally altered, by the government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Article 310. But it is obvious that the relationship between the government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows: so we

may find both contractual and status obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of allegations defined by the law, itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by determining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts, as those of service, the tendency, in modern times, is to withdraw the matter more and more from the domain of contract into that of status.

(emphasis is added)

74. From the above observations, made in *Roshan Lal Tandonkunj Behari* (supra), what becomes transparent is that the duties of a Government servant are fixed by law and in the enforcement of these duties, society has an interest. The discharge of his duties by a Government servant is really a discharge of his obligation towards the society. Similarly, the powers of a Government employee given by law is held by the Government servant as a trustee of such powers and he, therefore, has the responsibility of discharging such powers in public interest and not otherwise. The interest of the Government or of the State is not, and cannot be, different from public interest. Mr. Deb is, therefore, correct in contending that there cannot be a conflict of interest between public interest and the interest of the State. When power is given to the State under the Constitution, the State becomes, repository of the power given to it by the people of India and, as a trustee of such powers, the State has to exercise its powers, where the exercise of such powers is called for; otherwise, public interest would be defeated and the rule of law would be a casualty. The right of the Government to proceed against an erring employee casts, in reality, an obligation, on the Government, to ensure that it, ordinarily, takes action against its erring employee. The Government cannot, therefore, arbitrarily exercise its power either to punish an employee or to "condone" the misconduct of the employee. Every action of the Government has to be tested on the anvil of its Constitutional obligations and if its action fails to satisfy such a test, the action cannot be sustained.

75. We may turn to yet another important, rather most important, aspect of law, which the present writ petitions have raised. We have already noticed that the Constitution Bench, in *Roshan Lal Tandonkunj Behari* (supra), while distinguishing the nature of the relationship between the ordinary master and servant, on the one hand, and the Government and the Government servant, on

the other, held, in no uncertain words, that the duties of status, which a Government servant acquires, are really fixed by law and in the enforcement of these duties, society has an interest.

76. While considering the statement of law made by the Constitution Bench, in Roshan Lal Tandonkunj Behari (supra), that the duties of status of a Government servant are fixed by law and, in the enforcement of these duties, society has an interest, it needs to be also noted that though a decision cannot be read as a statute, the fact of the matter remains that we cannot ignore, and must be aware of, the fact that though the system of governance, as was envisaged for this country, under the Government of India Act, 1935, has, to some extent, continued, the vision, the focus of attention and the spirit of governance has prominently changed and materially shifted from being merely a part of the administered area of the British Empire to a democratic republic. The Government of India Act, 1935, obliged the elected representatives and also its executives to be faithful and bear true allegiance to His Majesty. No wonder, therefore, that the oath of office, be he a Legislature or executive was to be faithful, and bear true allegiance to, His Majesty. In fact, the oath prescribed read, in substance, I, A.B., having been elected [or nominated or appointed] a member of this Council [or assembly], do solemnly swear [or affirm] that I will be faithful and bear true allegiance to His Majesty the King, Emperor to India, His heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter.

77. Thus, under the Government of India Act, it was the faithfulness and allegiance to His Majesty, which was material. The people of India did not occupy any place, far less eminent space, in the vision of the governance. The vision was to remain faithful, and hold allegiance, to His Majesty. However, the people, of India occupy, now, the central stage in the scheme of governance under the Constitution of India. Every action, therefore, of the Legislature, the executive and the judiciary has to be in the interest of the people of India. As a corollary, the Government cannot, merely because it so pleases, "condone" a public servant's misconduct unless the act of condoning" the public servant's misconduct is in public interest. There is nothing in the materials on record to show that the Government had, in public interest and consciously, decided to condone the Respondent's alleged misconduct and pursuant to such a conscious decision, the Government condoned the Respondent's alleged misconduct and, thereafter, allowed him to be promoted. In such circumstances, the contention of Mr. Sinha that the Government had condoned the Respondent's misconduct cannot be accepted at all.

78. In the case at hand, this Court cannot look at the facts of the case from the point of view of the Respondent alone. What we have to look for is the public policy. When a serious allegation of breach of integrity was made against the Respondent, such an allegation could not have been, and cannot be, simply pushed under the carpet. It was the obligation of the Government under the

scheme of our Constitutional governance and it has still remained the onerous duty of the State Government to take action, when the act of drawing of the disciplinary proceeding against the Respondent has never been challenged. Without any conscious decision having been taken in this regard by the Government and unless such a decision is found to be reasonable and in public interest, this Court, cannot, in the complete absence of any material on record, take the view that the Government had "condoned" the Respondent's misconduct, when it issued the superfluous and redundant order, dated 25.2.2002, following the order, dated 19.12.2001, passed by the learned Tribunal.

79. Turning to the third ground on which the learned Tribunal has interfered with the order, dated 30.7.1998, namely, that the said order had been passed mala fide, it needs to be pointed out that the learned Tribunal has merely mentioned in the order, which stands impugned in these writ petitions, that it had perused the relevant records and had formed the view that the order, dated 30.7.1998, had been passed by the Government mala fide. The conclusion that an action of the Government is mala fide is nothing but an inference drawn from certain facts. Unless these facts are placed on record leading to the inference, which a Tribunal draws, the inference drawn cannot be sustained. In the absence, therefore, of any fact having mentioned by the learned Tribunal, which could show that the order, dated 30.7.1998, was really mala fide, the learned Tribunal's conclusion that the said order, passed by the Government, was mala fide is nothing, but perverse and wholly untenable in law, particularly, when, even at the time of hearing of these writ petitions, nothing could be pointed out, on behalf of the Respondent, on a query made by this Court, as to how the order, dated 30.7.1998, passed by the Government, can be said to have been suffering from mala fide. Situated thus, we find that the learned Tribunal has seriously erred in law in setting aside and quashing the order, dated 30.7.1998, passed by the Government on the ground of mala fide.

80. In the result and for the reasons discussed above, both these writ petitions are allowed. The impugned order, dated 19.12.2008, passed by the learned Tribunal, is hereby set aside and quashed. The writ Petitioners may accordingly deal with the disciplinary proceeding drawn against the Respondent.

81. There shall, however, be no order as to costs.