
(2012) 04 DEL CK 0009

In the Delhi High Court

Case No : Writ Petition (C) No. 9519 of 2009

Union of India and Another

APPELLANT

Vs

Kamal Kishore Dhawan and Another

RESPONDENT

Date of Decision : 18-04-2012

Acts Referred:

Central Civil Services (Conduct) Rules, 1964 — Rule 3(1), 3C
Constitution of India, 1950 — Article 226, 3
Income Tax Act, 1961 — Section 133A, 143(1), 143(3), 144A, 234A

Citation : (2012) 04 DEL CK 0009

Hon'ble Judges : Sudershan Kumar Misra, J;Anil Kumar, J

Bench : Division Bench

Advocate : R.V. Sinha with Mr. A.S. Singh, for the Appellant; P.S. Patwalia and Ms. Prem Lata Bansal with Mr. Amanpreet Singh and Mr. Ruchir Bhatia, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioners, Union of India, through the Secretary, Department of Revenue & Anr., have challenged the order dated 6th February, 2009 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No. 1179/2008, titled as "Kamal Kishore Dhawan v. Union of India through the Secretary, Department of Revenue & Anr.", allowing the original application of the Respondent No. 1 and quashing the charge-memo dated 28th April, 2003, the dissenting note recorded by the Disciplinary Authority dated 5th March, 2007 and the final order dated 1st April, 2008 imposing the punishment of compulsory retirement on the Respondent No.1. The petitioners were further directed to reinstate the Respondent No. 1 in service with all consequential benefits and to pay the costs of Rs 10,000/- to the Respondent No. 1, in view of the long agonizing departmental enquiry to which he was subjected with regard to assessment orders passed by him in his quasi judicial capacity. Brief facts to comprehend the disputes between the parties are that Respondent No. 1 is a Group "A" officer of 1977 batch of the Indian Revenue Service. He earned his

promotions to the posts of Deputy Commissioner, Joint Commissioner, Additional Commissioner and then Commissioner, Income Tax, which undoubtedly implied that he had been assessed as a meritorious officer, suitable and fit for the said posts. The next promotion was to the post of Chief Commissioner or Director General of Income Tax. However, he was issued a preliminary show cause notice dated 7th November, 2000 seeking an explanation regarding alleged lapses/irregularities in eight cases, out of which six cases were completed by him as Deputy Commissioner (Assessment/Assessing Officer) and remaining two, were pertaining to the period when he was the Deputy Commissioner-in-charge of the Range. In response to the preliminary show cause notice, the Respondent No. 1 by his letter dated 3rd January, 2001 had stated that the said preliminary show cause notice was regarding matters that had occasioned several years back and, therefore he would not be able to give a proper reply without referring to primary/original records. This request was followed by other letters dated 1st February, 2001 and 9th February, 2001 by the Respondent No. 1 again pointing out that the complete records were not supplied to him, nor was he allowed the inspection of the same.

2. Despite this, on the basis of whatever records were supplied to him, the Respondent No. 1 submitted his replies dated 9th February, 2001 and 12th March, 2001. However, no response to any of his letters and representations were received and instead a charge sheet was issued to him after a lapse of about two years i.e. on 28th April, 2003. According to the Respondent No. 1, the perusal of the chargesheet revealed that the imputations made therein were substantially different from the lapses/irregularities alleged in the preliminary show cause notice. The Respondent No. 1 denied the allegations made out in the charge sheet by his letter dated 27th May, 2003.

3. On 17th November, 2003, the Respondent No. 1 again made a request for inspection of the complete case records. On 10th November, 2005, the Respondent No. 1 had also requested for expeditious disposal of the enquiry proceedings as he was being punished in the form of frequent cross country transfers and sidelined postings, causing grave mental torture to him, as well as, his entire family. The education of his children also greatly suffered due to the frequent transfers.

4. Since there was no progress made in the enquiry, the Respondent No. 1 was compelled to approach the Jabalpur Bench of the Tribunal by way of OA No. 769/2005 praying for the quashing of the enquiry proceedings on the ground of delay and laches. The writ petition filed by the Respondent No. 1 was disposed of by order dated 19th October, 2005 directing the petitioners to conclude the departmental enquiry within a period of six months. However, the petitioners obtained an extension of time for three months through a miscellaneous application. Thereafter, they moved yet another misc. application for an extension of one month which was obtained by order dated 20th July, 2006. Still there was no compliance and instead the petitioners sought further extension by

moving the High Court in WPC No. 11525/2006. Thereafter, the High Court allowed an extension till the first week of November, 2006. However, the petitioners still did not comply with the orders of the High Court and further extension was allowed by order dated 15th December, 2006 up to 28th February, 2007 by imposing a cost of Rs. 5,000/- on the petitioners and again by order dated 2nd March, 2007 up to 15th April, 2007 subject to payment of cost of Rs. 5,000/- to the Respondent No. 1.

5. In the meantime, by letter dated 14th November, 2005 the Respondent No. 1 again wrote to the Enquiry Officer stating that the complete records were not shown to him which was, in fact, allowed by the Enquiry Officer. He also requested for allowing Sh. Keshav Prasad, retired member, ITAT, Lucknow to be his defense assistant. The Enquiry officer in his proceedings dated 23rd November, 2005 noted with concern the delay on the part of the disciplinary authority in the non-production of the complete records for the Respondent No. 1's inspection. Again on 5th December, 2005, the Respondent No.1 informed the Enquiry Officer that all the relevant documents which were permitted were not made available for inspection. The Enquiry Officer took cognizance of the same in his daily order sheet dated 5th December, 2005. However, by order dated 16th December, 2005 the Respondent No. 1 was refused to avail the services of Sh. Keshav Prasad as a defence assistant, and he was also directed to produce the defense documents. Thereafter, Respondent No. 1's representation dated 19th December, 2005 against the rejection of the defense assistant was not taken into consideration. On 2nd January, 2006, the regular hearing commenced and concluded on the same day in the absence of the defense assistant, as well as, the defense witnesses of the Respondent No. 1. On 1st February, 2006, a general examination of the Respondent No.1 was made by the Enquiry Officer again in the absence of his defense assistant and on 8th February, 2006 the Respondent No. 1 was made to submit his defense brief.

6. After a lapse of more than a year, the Respondent No.1 was served with a copy of the note of disagreement along with the enquiry report dated 27th October, 2006 and the second stage advice of the CVC on 5th March, 2007. According to the Respondent No. 1, on perusing the CVC advice, as well as, the note of disagreement, it was clearly evident that the Respondent No. 1 was held guilty at that very stage itself without giving him a reasonable opportunity to defend himself and thereby violating principles of natural justice. However, despite this the Respondent No. 1 submitted a detailed reply dated 5th April, 2007 to the note of disagreement contending that the disagreement note of the disciplinary authority was contrary to the facts, material and evidence available on record.

7. Since the enquiry was not completed and the final order in the matter had not been passed despite enough opportunities given, the Respondent No. 1 was compelled to again move the Administrative Tribunal of the Jabalpur Bench. The Jabalpur Bench of the Tribunal passed a final order on 21st August, 2007 in OA

No. 911/2007 holding that the enquiry proceedings would become non-existent and would be deemed to have become extinct, if the same would not attain finality by 31st October, 2007 in view of the decision of the High Court by order dated 25th June, 2007, subject to furthers costs of Rs. 5,000/- imposed on the petitioners. Despite extensions given time and again, instead of complying with the same, the petitioners again approached the High Court of Madhya Pradesh and by order dated 22nd April, 2008 the High Court of Madhya Pradesh granted a fifth and final extension to the petitioners up to 30th May, 2008 by imposing another amount of Rs. 10,000/- as cost on the petitioners.

8. Meanwhile, the petitioners, however, already passed the penalty order No. F.No.C-14011/17/2003, dated 1st April, 2008 imposing the major penalty of compulsory retirement on the Respondent No. 1, prior to the order passed by the Madhya Pradesh High Court on 22nd April, 2008. This fact was also not disclosed to the High Court of Madhya Pradesh. The cheque of Rs. 10,000/- was enclosed with the penalty order, when the same was served upon the Respondent No. 1 by registered post on 27th May, 2008. As per the Respondent No. 1, the penalty order was merely a verbatim reproduction of the note of disagreement, without taking into consideration the reply and submissions made by the Respondent No. 1 against the same.

9. Against penalty order and the note of disagreement dated 5th March, 2007 and charge sheet memo dated 28th April, 2003 the Respondent No. 1 filed an original application being O.A. No. 1179/2008 contending, inter alia, that the allegations against the Respondent No. 1 were without any evidence; that even the Inquiry Officer had only held that the some of the charges against the Respondent No. 1 were partly proved on account of only alleged technical error committed by the Respondent No.1; no mala fides or culpable negligence was attributable to him; that the Respondent No. 1 was greatly prejudiced since the disciplinary proceedings were initiated and conducted at a very belated stage. The allegations were regarding the assessment for the period of 1995 while the charge memo was issued only in 2003 and the enquiry was concluded after a period of 5 years in 2008. The disciplinary authority completely disagreed with the findings of the enquiry officer in a whimsical and arbitrary manner and concluded the guilt of the Respondent No. 1 without giving him an opportunity of being heard. The impugned order was passed without complying with the directions of the High Court of Madhya Pradesh.

10. Per contra, the petitioners had contended, inter alia, that the Respondent No. 1 has been engaged in protracted litigation with the department in respect of two disciplinary proceedings pending against him. The petitioners further contended that the directions of the High Court of Madhya Pradesh were duly complied with as the penalty order of compulsory retirement was served upon the Respondent No. 1 on 27th May, 2008 along with a cheque of 10,000/- as ordered by the Madhya Pradesh High Court. With regard to the averment that the allegations are in relation to certain assessment orders passes by the Respondent No. 1 as a

quasi judicial authority and therefore, it cannot be subjected to disciplinary proceedings, the petitioners alleged that the allegations fell within the six exception enumerated by the Apex Court in Union of India and Others Vs. K.K. Dhawan, holding that even officers exercising quasi judicial functions are liable to be proceeded within disciplinary proceedings. With regard to the contention of delay in initiating the disciplinary proceedings against the Respondent No. 1, the petitioners had urged that the same had already been argued before the Jabalpur Bench of the Tribunal in O.A. No. 769/2005 which was also considered by the Tribunal in its order dated 19th October, 2005. The petitioners had also contended that the permission to engage Sh. Keshav Prasad as defense assistant was rightly denied as on the date of hearing he was a legal practitioner, moreover the enquiry officer had very cogently mentioned in the daily order sheets dated 16th December, 2005 and 2nd January, 2006 that there was no need for any defense assistant as neither any prosecution witnesses were to be cross examined, nor any defense witnesses were to be examined as they were unable to attend the proceedings.

11. The Tribunal considered the pleas and contentions of both the parties and examined the documents on record. With regard to the plea that the orders of the High Court of Madhya Pradesh were not complied with on the ground that the costs directed to be given to the Respondent No. 1, was given along with the order of penalty and not prior to the penalty order, the Tribunal observed that just because the costs were not paid before the penalty order was passed, it could not be held that it was in non-compliance of the orders of the High Court of Madhya Pradesh.

12. The Tribunal, however, found merit in the contention that the disciplinary authorities dissenting note, dated 5th March, 2007 disagreeing with the findings of the enquiry officer was without affording reasonable opportunity to the Respondent No. 1 and in gross violation of principles of natural justice. The Tribunal observed that there was no manner of doubt that the disciplinary authority, while recording its disagreement note, predetermined the issues without taking into consideration the representation made by the Respondent No. 1. The relevant portion of the Tribunal's findings are as follows:-

We are not reproducing the discussion made by the disciplinary authority on articles of charge so as not to unnecessarily burden the judgment, as also for the reason that with regard to each article of charge, the disciplinary authority has drawn a firm conclusion. The conclusion has not been arrived at on each charge separately, like 1st, 2nd, 5th, 6th and 7th articles of charge as proved, whereas 3rd and 4th as fully proved, but collectively as well in conclusion drawn as extracted above. While disagreeing with the enquiry officers findings in relation to articles I to VII, articles I, II, III, IV, V and VII have been held to have been fully proved, article VI having been substantially proved, and only part (a) of charge under article VI has been viewed as not proved. There cannot be any manner of doubt that the disciplinary authority while recording its disagreement

note pre-determined the issues without taking into consideration the representation that may have been made by the applicant. This, in our view, clearly amounts to pre-judging the issue. Such a course is not permissible.

13. The Tribunal also relied on the judgments of Commissioner of Police v. Const. Pramod Kumar & Ors. CWP No. 2665/2002 & 4593/2001, Yoginath D. Bagde Vs. State of Maharashtra and Another, and Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, wherein it was held that while disagreeing with the findings of the enquiry officer, the disciplinary authority must arrive at a decision in good faith and he is also required to give the rationale for such a disagreement, while such decision is a tentative and not final.

14. The Tribunal further observed that in view of the facts and circumstances of the matter, it was clear that the disciplinary authority had not considered the representation of the Respondent No. 1 against the disagreement note. The relevant portion revealing the rationale for this finding is as follows:

15. In the facts as fully detailed above, we are of the considered view that the applicant has been deprived of giving his comments/representation against the disagreement note, or in other words, the disciplinary authority has returned an incorrect finding that the applicant had submitted nothing with regard to the note of disagreement made by the disciplinary authority. The disciplinary authority in the facts and circumstances as fully detailed above, only considered the reply of the applicant wherein he had mentioned that because of non-compliance of the orders passed by the Tribunal and the High Court, the proceedings had abated. His main reply dated 5.4.2007 sent through covering letter dated 22.8.2007 was not considered at all. While trying to explain the observations of the disciplinary authority that the applicant did not bring anything new on record which had not been considered earlier and that there was nothing new in the representation of the applicant which could lead to change in the view formed earlier, it is interesting to note that the disciplinary authority while mentioning that nothing new was brought on record, tried to explain that it was referring to the earlier opportunities provided to the applicant at the time of calling for his version before issuance of the chargesheet, as also the defence brief by him during the course of enquiry proceedings. All that the disciplinary authority thus considered was the defence projected by the applicant before the charge was submitted, or, at the most, the case as put up by him before the enquiry officer. The requirement of law at the stage when the disciplinary authority was to pass the final order was to consider the objections or representation of the applicant dated 5.4.2007 dealing with the dissent expressed by the disciplinary authority to the report of the enquiry officer. The same, it is proved, even though having been received, never came to be considered.

15. The Tribunal, thereafter, found it appropriate to decide the whole issue in the matter, instead of remitting the matter back to the disciplinary authority, since in the later scenario the charges would still be pending against the Respondent No. 1 and he would become disentitled for any substantive relief in case of charges

not getting established and as considerable delay had already been caused in conducting the enquiry. Thus, the Tribunal further considered the plea of delay in the initiation of the proceedings and also in concluding the same. With regard to the aspect of delay in concluding the proceedings in view of the sequence of events in the facts and circumstances of the case it was observed that since the petitioners had complied with the orders of the High Court as per the final extension allowed in the matter, within which the proceedings had indeed culminated, the same cannot be allowed to be re-agitated by the Respondent No. 1 before the Tribunal but it will be a relevant factor to consider and decide whether to decide the allegations against the Respondent No. 1 or to remand the matter back to the disciplinary authority. The plea of delay in initiating the proceedings against the Respondent No. 1 was not relied by the Tribunal to quash the charge sheet and punishment, observing that the Respondent No. 1 had raised such a plea in his original application before the Tribunal of Jabalpur Bench bearing OA. No 911/2006, but the Tribunal had only gone into the aspect of delay in concluding the proceedings. The Respondent No. 1 had also filed the two OA bearing No. 769/2005 and 911/2006 where this plea was also allegedly taken. The Tribunal held that the orders of the Tribunal and High Court of Jabalpur have attained finality and the same cannot be allowed to be re-agitated, as it would render the said orders to be non-existent. The relevant portion of the Tribunal's judgment is as follows:-

17..... Insofar as, the plea of the applicant with regard to delay is concerned, the same can be divided in two parts, the first would be delay in initiation of proceedings, whereas the second would be delay in concluding the proceedings. Insofar as, the second part of the case is concerned, that, in view of various orders passed by the Tribunal and the High Court referred to above, has to be decided against the applicant. It may be recalled that the applicant filed OA No. 769/2005 before the Tribunal at Jabalpur, which was disposed of on 19.10.2005 directing the Respondents to conclude the departmental enquiry within a period of six months. The Respondents thereafter obtained extension of time by three months through a miscellaneous application. They moved yet another misc. application vide which another extension of one month was obtained on 20.7.2006. Still there was no compliance, and the Respondents instead moved the High Court seeking further extension of time for completing the departmental proceedings. The prayer was allowed by the High Court in WP No. 11525/2006(s) and time was extended till the end of first week of November, 2006, making it clear that the proceedings should be concluded from all spectrums and no further extension would be granted. However, the Respondents did not comply with the order, and instead moved yet another application seeking extension of time, but this time the High Court extended the time vide order dated 15.12.2006 upto 28.2.2007 subject to payment of costs of Rs. 5000/- to the applicant. However, the proceedings were not completed by 28.2.2007, and the Respondents again pressed for another extension of time, which was extended upto 15.4.2007 subject to payment of a further sum of Rs. 5000/- as cost to the applicant, vide

order dated 2.3.2007. It was mentioned in the order that if the total cost of Rs. 10000/- was not paid within two weeks, the order dated 2.3.2007 would be deemed to have become extinct. Vide another misc. application No.1190/2007 before the High Court, the Respondents sought extension of time for a period of six months to fully comply with the order dated 2.3.2007. The High Court vide order dated 25.6.2007 allowed the prayer of the Respondents and granted extension of time as sought for, subject to a further payment of Rs. 5000/- as cost to the applicant. The Respondents were directed to ensure compliance of the orders passed by the High Court fully and positively by the end of October, 2007. From the events as given above, it is clear that the Respondents were successful in obtaining an order from the High Court granting time to them to finalise the proceedings by the end of October, 2007, by which time, admittedly the proceedings were completed. The plea of the applicant for quashing the proceedings on account of delay in finalisation of the same ultimately resulted only in partial success, when a time bound direction came to be issued and within the time last prescribed by the High Court, the proceedings were completed. This aspect of the case, in our considered view, cannot be re-agitated by the applicant. The second aspect is with regard to delay in initiation of the proceedings. The two OAs of the applicant bearing Nos.769/2005 and 911/2006, it may appear from records of the case, were for quashing the chargesheet on the ground of delay caused in both initiation and conclusion of the proceedings. In the order dated 21.8.2007 in OA No.911/2006, it is clearly recorded that the applicant had approached the Tribunal so as to quash the disciplinary proceedings initiated against him for certain alleged omissions committed by him during the period 1995 to 1998. Whereas, it may be true that the only aspect gone into by the Tribunal or for that matter, even the High Court, was delay in finalising the proceedings, and the issue with regard to delayed initiation of proceedings was not gone into, but it appears that such a plea was raised by the applicant. The applicant has not placed on records copies of the two OAs filed by him in the Jabalpur Bench. Once, there was a plea raised by the Respondents that the matter with regard to delay has achieved finality in view of the orders passed by the Tribunal or the High Court at Jabalpur, the applicant ought to have placed on records his two OAs to show that the plea with regard to delayed initiation of proceedings was not a subject matter of dispute before the Tribunal and the High Court at Jabalpur. The applicant has indeed filed a rejoinder, but there as well, nothing like that the plea with regard to delay in initiation or conclusion of the proceedings was not taken, has been mentioned. From the tenor of the orders passed, referred to above, and in particular the order dated 21.8.2007 in OA No. 911/2006, it appears that the plea to quash the charge was also based on the ground of proceeding against the applicant in 2003 for the alleged Rs. s of omission pertaining to the period 1995 to 1998. Be that as it may, the plea with regard to delayed initiation of departmental proceedings vis-a-vis the events was available to the applicant at that stage. Such a plea having not been raised, the applicant would not be permitted at this stage to agitate the matter. Even though, strict provisions of CPC may not be applicable, but this

Tribunal can take the view that all causes of action have to be joined in one lis, and that a party cannot be permitted to seek the same relief based on different grounds in different petitions. Further, in case, this Tribunal may hold initiation of proceedings to be delayed, warranting quashing of the charge, the orders passed by the Tribunal and the High Court would be as if non-existent. Once, the applicant has accepted the orders, as referred to above, and the Respondents were allowed to conclude the proceedings by the specified period, during which period they did complete the proceedings, the ground of delayed initiation of proceedings, in our considered view, cannot be taken into consideration at this stage.

16. The Tribunal also observed that the articles of charges could be broadly placed in three categories i.e. (i) not passing appropriate orders or passing the same in a casual manner (ii) committing irregularities or lapses and (iii) exhibiting gross negligence and total disregard to statutory provisions conferring undue benefit upon the assessee. The Tribunal also noted that the charges did not contain any allegations that while passing the various orders or conducting the proceedings as mentioned above, the Respondent No. 1 had malafide intentions or had passed the order on extraneous considerations, or that the said orders were an outcome of gross negligence. Regarding Article-II of the charges, it had been mentioned that the Respondent No. 1 had failed to correctly apply the provisions of Section 79 of the Income Tax Act, thereby conferring undue benefit to the assessee. The Tribunal held that the mere use of the language employed in the rule, like that the Respondent No. 1 had failed to maintain absolute integrity and devotion to duty and exhibited conduct unbecoming of a government servant in total contravention of provisions of rules is not enough. It was further held that the core allegations ought to have been pointing towards definite acts of omission and commission which would show that the employee had not maintained absolute integrity and devotion to duty or exhibited conduct unbecoming of a government servant. It was categorically held that, except for Article-II of the charges framed against the Respondent No. 1, none of the charges even remotely showed or imputed any culpable intention to the Respondent No. 1 or that he had passed orders on extraneous considerations. Even with regard to Article -II, the Tribunal observed that the Enquiry officer had rightly held that the charge was not proved, since the difference in view of the assessing authority and the Respondent No. 1 was on account of difference in perception and, in any case, the appellate authority in the matter had upheld the order of the Respondent No. 1. However, despite categorical and rational finding of the Enquiry Officer, the disciplinary authority disagreed with the same without giving any cogent reason and held that the same is proved on the premise that it was not a difference of opinion but the failure on the part of the Respondent No. 1 to carry out the basic requirements of verification and investigation. Though the Tribunal refrained itself from going into the merits of the decision passed by the Respondent No. 1 as specified in Article-II, it did however, categorically held that it was not a case of mala fides, or gross negligence and total disregard of

the statutory provisions. It was noted that if the disciplinary authority indeed disagreed with the finding of the enquiry officer, then the appellate authority who upheld the decision of the Respondent No. 1, also ought to have been chargesheeted. There was absolutely no cause to have singled out the Respondent No. 1. Thus, it was concluded that the disciplinary authority in departmental proceedings could not go into the legality of the order passed by the Respondent No. 1, particularly when the same was upheld in appeal.

17. The Tribunal also placed reliance on the judgment of the Apex Court in the matter of *Union of India and Others Vs. K.K. Dhawan*, wherein it was discussed whether disciplinary proceedings can be initiated against an employee while discharging quasi judicial functions. The Apex Court while holding that an officer who exercises judicial or quasi judicial powers acts negligently or recklessly or in order to confer undue favor on a person, is not acting as a judge, culled out the following six exceptions where an officer could be departmentally proceeded even while exercising judicial functions:-

- (i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;
- (ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;
- (iii) if he has acted in a manner which is unbecoming of a Government servant;
- (iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;
- (v) if he had acted in order to unduly favour a party;
- (vi) if he had been actuated by corrupt motive, however, small the bribe may be because Lord Coke said long ago though the bribe may be small yet the fault is great.

18. It was held that the above stated instances were not exhaustive, however, for a mere technical violation or merely because the order is wrong and the action is not falling under the above enumerated instances, the disciplinary action is not warranted. Thus each case is to be decided upon the facts and no absolute rule can be postulated.

19. Therefore, in view of the facts and circumstances and the judicial precedents, the Tribunal held that the department had miserably failed in its endeavor to prove the allegations of gross negligence against the Respondent No. 1, and that the disciplinary authority appears to have pre-judged the issue, which is fortified by the fact that the dissenting note appears to be a final order holding the charges proved. In any case, if the dissenting note was tentative in nature, even then the principles of natural justice have been violated, as the pleas and contentions of the Respondent No. 1 had not been taken into consideration by the disciplinary authority before passing the order of punishment on the basis of

dissenting note. The Tribunal was also of the view that the punishment of compulsory retirement is grossly disproportionate to the allegations of negligence, as there is no specific finding that the Respondent No. 1 had acted on extraneous considerations. The relevant portion of the judgment is as follows:

30. On facts, we are of the considered view that the department has miserably failed in its endeavour to show that the applicant while passing orders subject matter of article of charge-II and part (a) of article of charge-V had indulged in gross negligence. We have recorded the reasons to that effect hereinbefore. We may only state that the enquiry officer returned a firm finding with regard to both charges mentioned above that the applicant had not indulged in any misconduct, whereas the disciplinary authority fell into a serious and egregious error in reversing the findings of the enquiry officer. May be, if perhaps, the reply/representation of the applicant to the dissenting note of the disciplinary authority was properly gone into, the result would have been different. As mentioned above, even though, the disciplinary authority received the representation of the applicant against the dissenting note dated 5.3.2007, but it chose not to make even a reference of the same. We have already mentioned that at one stage we were thinking of remitting the matter to the disciplinary authority to consider the representation of the applicant against the dissenting note and pass speaking order, but in the facts and circumstances of this case, it does not appear appropriate or desirable. The reasons for that are manifold. The applicant, it may be recalled, was issued charge memo in the year 2003 with regard to orders passed by him in his quasi judicial capacity way back in 1995-86 and 1997-98. The applicant is an officer of 1977 batch. He was at the relevant time Deputy Commissioner of Income Tax. Thereafter, he was promoted to the rank of Joint Commissioner and further to that of Additional Commissioner and then Commissioner of Income Tax. The applicant has thus been subjected to departmental enquiry after he had got as many as three promotions. Even though, in the peculiar facts and circumstances of this case, and in particular, that the applicant may not be legally permitted at this stage to challenge the proceedings on the ground of unexplained delay, we have rejected his contention, but the fact remains that the applicant has been subjected to departmental enquiry with regard to absolutely stale matters. Further, the Respondents took as many as five years in completing the enquiry, and in the process sought number of extensions from the High Court, thus wasting valuable time, during which the applicant suffered cross-country transfers, naturally to his total disadvantage and inconvenience. Further, the applicant, it appears, is not likely to get any justice from the departmental authorities. The dissenting note and the final order, as mentioned above, are verbatim the same, but for the difference that in the final order, events subsequent to the dissenting note have been mentioned. The disciplinary authority, it appears, had pre-judged the issue, as would be further fortified from the fact that the dissenting note appears to be a final order holding the charges to be proved. As mentioned above, the dissenting note is not a tentative one. Further, even though while explaining in

the written statement the observations made in the impugned order that nothing new was stated by the applicant, it has been mentioned that the applicant had projected his defence on receipt of the charge memo and during the course of enquiry. However, we are surprised to note that even the said stand of the applicant was not considered by the disciplinary authority in the impugned order. The disciplinary authority did not choose to refer to what the applicant had already mentioned by way of his defence. As for the quantum of punishment, making only some lapses in the assessment order carried out by the applicant in his quasi judicial capacity perhaps would not have warranted such ghastly punishment as compulsory retirement, even if it may have been a case of gross negligence. It is pertinent to mention that there was no finding returned even by the disciplinary authority that the applicant had favoured the assessee for any extraneous considerations. Even a finding with regard to simply favouring the assessee is not recorded. Over and above the reasons given above, what we find is that no useful purpose at all would be served in remitting the matter to the disciplinary authority, as a clear and categorical finding can be returned on the basis of available records.

20. The Tribunal, therefore, held that there was no purpose in remitting the matter to the disciplinary authority, and, therefore, directed that the charge sheet memo dated 28th April, 2003, the dissenting note dated 5th March, 2007 and the final order dated 1st April 2008 imposing the punishment of compulsory retirement be quashed and set aside and the applicant be reinstated in service forthwith with all consequential benefits. A cost of Rs. 10,000 was also imposed on the petitioners which was payable to the Respondent No. 1 for putting him through such a long agonizing departmental enquiry and that too for assessment orders passed by him in his quasi judicial capacity.

21. The petitioners have challenged the order of the Tribunal dated 6th February, 2009 on the ground that the Tribunal failed to exercise its power of judicial review and instead acted as an appellate authority by passing an order which is clearly contrary to the law laid down by the Supreme Court in B.C. Chaturvedi vs. Union of India: AIR 1999 SC 484, State of Tamil Nadu and another Vs. S. Subramaniam, and Bank of India and Another Vs. Degala Suryanarayana,

22. As per the learned counsel for the petitioners, the decision of the Tribunal to not remand the matter to the Disciplinary Authority and instead to decide the issue on its own is contrary to the law laid down in the matter of Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., According to him, the Tribunal should not have acted as the Appellate Authority but instead should have only exercised its powers within the limitation prescribed under judicial review. Therefore, the learned counsel contended that in case the Tribunal was of the view that the procedure prescribed by law had not been followed while dismissing the Respondent No. 1 from the service or that the principles of natural justice had not been adhered to then instead of adjudicating the matter on its own, the Tribunal ought to have remanded the matter back to the Competent

Authority.

23. The learned counsel further contended that the Tribunal had erred in holding that the alleged charges framed against the Respondent No. 1 do not constitute misconduct being a part of the judicial functions of Respondent No. 1. The learned counsel also relied on the judgments of *Union of India and Others Vs. K.K. Dhawan*, ; *Union of India & Ors. v. Duli Chand*, (2006) 5 SCC 680, paras 5,7&9 and *Government of Tamil Nadu Vs. K.N. Ramamurthy*, . It has also been urged that the judgment of *Ramesh Chander Singh Vs. High Court of Allahabad and Another*, which has been relied on by the Tribunal while passing the impugned judgment is misplaced and contrary to the law of binding precedent and judicial propriety since it had referred to the judgment of the Nagarkar's case (supra) which was overruled in *Duli Chand's* case (supra) and also because the judgments of the Apex Court in the matter of *K.K. Dhawan* and *Duli Chand's* case were neither brought to its notice nor was it taken into consideration. In any case, as per the learned counsel for the petitioners, the said two judgments are binding precedents for the co-ordinate bench of the Supreme Court and, therefore, they could not be overruled by the Co-ordinate Bench of equal strength. It was also contended that at the most the observations in the matter of *Ramesh Chander Singh's* case would only be in the nature of obiter.

24. It was also argued by the learned counsel for the petitioners that the Tribunal had erred in holding that once the proceedings under the Income Tax Act had attained finality for the reasons that the order of the delinquent officer was not challenged or was challenged however, it did not find favour with the appellate forum or otherwise, the departmental proceedings could not be initiated. As per the learned counsel, the proceedings under the Income tax Act or the Customs Act and the disciplinary rules, both are distinct and different. Whereas, the proceedings under the I.T. Act or the Customs Act are in the nature of quasi-criminal requiring the proof of beyond reasonable doubt, whereas, the proceedings under the service rules are based on the preponderance of probability. In addition, the authorities under the Act and the disciplinary authorities under the service rules are different. While under the Income Tax Act, the proceedings pertain to the assessment and appeal thereof involving the revenue, whereas under the Service rule, one is proceeded with for the lapses under the conduct rules. Reliance was placed on the judgment of *Union of India (UOI) and Others Vs. Upendra Singh*, .

25. It was further contended that merely because the Respondent No. 1 had got promotions during the pendency of the disciplinary proceedings would not be a ground in itself to quash the charge memo or not proceed against him. In this regard, reliance had been placed on the judgment of *Union of India vs. B. C. Chaturvedi*, (1995) 6 SCC 750, Para 8.

26. Per contra, the learned counsel for the Respondent No. 1 has contended that the Tribunal has rightly concluded that the Respondent No. 1 has been put through a long agonizing departmental inquiry pertaining to the matters when he

was a Deputy Commissioner of the Income Tax and that too for the assessment of orders made by him in his quasi judicial capacity, which is why a cost of Rs. 10,000/- was also awarded in favour of the Respondent No. 1. According to the learned counsel, the present writ petition is not sustainable on the very ground that the order passed by the Disciplinary Authority is bad in law, in view of the inordinate delay, first in initiating the proceedings against Respondent No. 1 and then in completing the inquiry. The Charge-sheet was served against Respondent No. 1 only in the year of 2003 for the orders passed for the assessments years AY 1993-94 and 1994-95 in the year 1995-96 and 1997 and that too pertaining to matters regarding the exercise of his powers in his quasi judicial capacity. Even after the issuance of the charge sheet, there had been gross delay in the departmental proceedings initiated against Respondent No. 1 and in ultimately passing the final orders by the petitioners, which had only occasioned after lapse of 5 years i.e. in the year 2008. According to the learned counsel, the petitioners have been unsuccessful in explaining the delay and, therefore, on this ground alone the entire disciplinary proceeding is liable to be vitiated. In this regard the learned counsel for the Respondent No. 1 has relied on the judgment of P.V. Mahadevan Vs. M.D., Tamil Nadu Housing Board, wherein the Supreme Court has categorically held that protracted disciplinary enquiry against a government employee should be avoided not only in the interests of the government employees but in public interest and also in the interests of inspiring confidence in the minds of the government employees.

27. It is further contended that the findings of the Enquiry Officer on the charges framed against Respondent No.1 were based on facts and the evidence available on the record, however, the same was rejected by the Disciplinary Authority by way of a disagreement note, which culminated into the passing of the final order imposing the punishment of compulsory retirement on Respondent No. 1. As per the learned counsel for the Respondent No. 1 the findings of the Disciplinary Authority are not substantiated by any evidence on the record, and instead it is absolutely perverse and based on mere conjectures and surmises.

28. It is also argued that the allegations of misconduct on the part of Respondent No. 1 are baseless and that the petitioners have been unsuccessful in imputing any mala fides or culpable negligence as against the Respondent No. 1 to warrant the imposition of the punishment of compulsory retirement on him. Even if there is an error of judgment or an innocent mistake that is imputable against Respondent No. 1, the same would not constitute misconduct. Reliance has also been place on the judgment of Z.B. Nagarkar v. Union of India and Ors., (1999) 7 SCC 403.

29. Learned counsel for Respondent No. 1 further asserted on the dissenting note of the Disciplinary Authority not being tentative in nature and the same clearly revealing a predetermined mind and a final disposition prior to giving the Respondent No. 1 a fair opportunity of representing against it. Regardless, as per the learned counsel, the Disciplinary Authority did not even take into

consideration the representation of Respondent No. 1 against the disagreement note, and instead it merely reiterated its findings given in the disagreement note while passing the final order. This, according to the learned counsel, is a clear violation of the principles of natural justice and, therefore, it has been rightly quashed by the Tribunal. The judgments of *Yoginath D. Bagde Vs. State of Maharashtra and Another*, *Punjab National Bank and Os vs. Kunj Bihari Misra*, 1998 (7) SC 62 and *Commissioner of Police v. Constable Pramod Kumar*, W.P.(C) No. 2665 of 2002 decided on 15th September, 2002 have been relied on for substantiating this plea by the learned counsel for the Respondent No. 1.

30. According to the learned counsel, the Tribunal had rightly observed that having a particular perception in assessment orders passed by the Respondent No. 1 in his quasi judicial capacity which was also the perception of the appellate authority even though it may be at variance with the petitioner's assessment would not warrant such a disproportionate punishment of compulsory retirement. Therefore, it is contended that in the facts and circumstances the writ petition deserves to be dismissed, and that the directions given in the order impugned by the petitioners should be upheld.

31. This Court has heard the learned counsel for the parties in detail and has also carefully perused the documents on record, as well as, the order of the Tribunal and other orders. One of the pleas that requires to be resolved is whether or not the Tribunal was justified in not remanding the matter to the disciplinary authority on noticing various illegalities committed by the disciplinary authority? What is also to be seen is whether the Tribunal had assumed the role of the appellate authority or in no case the Tribunal should have considered the merits of the charges and ought to have remanded the matter to the disciplinary authority mechanically.

32. The Tribunal in not remanding the matter to disciplinary authority, has taken into consideration that none of the charges even remotely showed or imputed any culpable intention of the Respondent No. 1 or that he had passed orders on extraneous considerations; even regarding article II of the charge sheet, enquiry officer had held that the charge was not proved as difference in perception between the assessing authority/Respondent No. 1 and the petitioners would not be the proof of the charge and that the order of the Respondent No. 1 was even upheld by the appellate authority and no action was contemplated against the appellate authority for forming the same opinion on the basis of which charge was framed against the Respondent No.1; Disciplinary Authority could not go in legality of the order passed by the Respondent No. 1; inordinate delay of 7 years in issuing the charge sheet; a further delay of 5 years in concluding the departmental proceedings and that the Respondent No. 1 had been subjected to enquiry with regard to absolutely stale matters; Respondent No. 1 is on the verge of retirement and he has been unnecessarily harassed and that even after the alleged assessments of the year 1995-1997, the subject matters of the charge sheet, the Respondent No. 1 had been given three promotions to the

posts of Joint Commissioner, Additional Commissioner and Commissioner of Income tax; and that there is nothing on record to show that the Respondent No. 1 acted in a manner which would reflect on his reputation for integrity or good faith or devotion to duty, no material to show recklessness or misconduct on his part in discharge of his duty, nothing to show that he acted in manner which was unbecoming of a Government servant or that the Respondent No. 1 acted negligently in prescribing conditions or acted in manner to favour any of the assesses or that he had been actuated by corrupt motive.

33. A perusal of the order impugned by the petitioners clearly reveals that the Respondent No. 1 has been subjected to a long period of proceedings in framing the charges against him which aspect had been considered in detail by the Tribunal. After considering all the pros and cons and in the interest of justice, the Tribunal decided not to remand the matter to the disciplinary authority which would have resulted in further protracted proceedings, ensuing in the gross violation of the Respondent No. 1's rights.

34. There cannot be an absolute proposition that in every case of disciplinary proceeding, if the disagreement note is not tentative and the representation made against such a final opinion formed by the disciplinary authority, has been disposed of without considering the representation and imposing a harsh punishment almost after one and half decade, then necessarily the matter is to be remanded back to the disciplinary authority to issue a fresh tentative disagreement note and thereafter, to consider the representation made against such a tentative note and then to pass another order. In the interest of justice taking into consideration the facts and circumstances and the equities and the irreparable loss which may be caused to one of the parties and apparent lack of prima facie material in support of the allegation, the High Court and the Tribunal cannot be divested of the power to decide the fate of disciplinary proceedings and to remand the matter mechanically to the disciplinary authority who has delayed the matter for almost one and a half decade. In *Jagdish Kumar Vs. National Building Construction Corporation and Another* it was held that though the Disciplinary Authority has the power and jurisdiction to disagree with the findings of the Enquiry Officer by issuing a disagreement note and issue a notice to the delinquent officer as required. However, care has to be taken that the order of the Disciplinary Authority should not result in a second or de novo inquiry otherwise the inquiries could go on perpetually until the view of the Disciplinary Authority is accepted and this would be abuse of the process of law.

35. Whether or not to remand the matter to the disciplinary authority has to be decided in the backdrop of the facts and circumstances of each case and after considering various facets as enumerated hereinbefore. Rather, the Supreme Court has held in numerous cases that the interest of justice would be defeated, if the Courts start remanding the matter loosely and indiscriminately without application of mind. In order to appreciate the decision of the Tribunal not to remand the matter to the disciplinary authority, it would be appropriate to

consider as to what are the charges, the findings of the enquiry officer, disagreement of the disciplinary authority and the observations of the Tribunal.

36. Article I.

i. This article alleged that Respondent No.1 while working as the Deputy Commissioner of Income Tax, Spl Range-1 Surat, during the period of 1995-96, completed the assessment in the case of Sh. A Sivan for A.Y. 1993-94, u/s 143(3) of the Income Tax Act, in a very casual manner. It was also alleged that he had made lump sum additions to the manufacturing account without conducting any worthwhile investigations as regards the purchases and sundry creditors and without examining the authenticity of the excise registers, and that Respondent No. 1 also failed to initiate mandatory penalty proceedings u/s 271B of the IT Act.

ii. The Enquiry Officer, after carefully examining the evidence on record, had concluded that the said charge had not been proved. As per the Enquiry Officer, the Respondent No. 1 had sufficiently explained the reason for the lump sum addition made by him and also because the department had failed to produce any evidence showing that the other records, if verified, would have resulted in addition of some other higher amounts. With regard to the allegation that the charged officer had made the assessment in a casual manner, the Enquiry Officer had observed that no specific guidelines or procedure, which had been allegedly violated by the Respondent No. 1, had been brought out by the department. In addition, it could not be established from the record as to what more the Respondent No. 1 should have done or what further verification should have been carried out after the return was filed by the assessee. There was also nothing evident from the record that the actions of Respondent No. 1 had resulted in any loss of tax revenue. The Enquiry Officer after carefully considering the provision of Section 271-B of the IT Act had also come to the conclusion that initiation of the penalty proceedings under the said provision was unnecessary since Section 271 of the IT Act was not applicable prior to 1st July, 1995 while the matter contained in the charge pertained to the assessment carried out in the year 1993-1994.

iii. The Disciplinary Authority on the other hand was of the view that the charge had been proved since the Enquiry Officer had failed to appreciate the fact that it was the Respondent No. 1 who was required to call for the details of the sundry creditors and examine the same and also to verify the Excise Register, both of which wasn't done by Respondent No. 1 and, therefore, the assessment had been conducted in a casual manner. The Enquiry Officer's finding that the proceedings u/s 271B of the IT Act were unnecessary was also not accepted by the Disciplinary Authority, however, without giving any reason or rationale.

iv. The Tribunal observed that the Respondent No. 1 had made an assessment of Rs. 1,50,000/- higher than the returned income. Therefore, the order was passed by the Respondent No. 1 in favour of the Revenue and that rather aggrieved by

the said order, it was the assessee who had filed an appeal and challenged the order of the Respondent No. 1. Thereafter, the CIT (A) had confirmed the additions made by the Respondent No. 1. Rather CIT (A) had chosen to reduce the addition done by the Respondent No. 1 by one-half at Rs. 75,000/- in place of Rs. 1,50,000/- done by the Respondent No.1. Regardless, since the Respondent No. 1 had passed an order in favour of the Revenue it was held that it cannot be contended that he had the intension to confer any undue benefit on the assessee or that he had any mala fide intension.

v. In the disagreement note, the Disciplinary Authority has not relied on any rule or regulation which were allegedly violated by the Respondent No. 1 or which procedure for verification, while carrying out assessment had not been complied with. No facts or evidence and reasons have been relied on by the disciplinary authority to justify the charge, that the assessment had been carried out in casual manner. The fact that the CIT (A) had also not enhanced the addition during review assessment was though noted by the Disciplinary Authority, however the same was completely disregarded without any basis.

vi. Any conduct does not become misconduct merely because it is stated to be misconduct. The Disciplinary Authority was itself unable to impute any specific facts, evidence or reasons for misconduct so as to require reconsideration. Therefore, there is nothing on the record which requires reconsideration for establishing charge of misconduct against the Respondent No.1, nor the matter is to be remanded to be reconsidered by the disciplinary authority.

37. Article II

i. Article II alleged that Respondent No.1 had passed an assessment order u/s 143(3) for A.Y. 1993-94 in the case of M/s Sidmak Laboratories (India) Pvt. Ltd without gathering the necessary details warranting the various disallowances. It was further alleged that Respondent No. 1 had failed to correctly apply the provisions of Section 79 of the IT Act and thereby exhibited gross negligence and total disregard to the statutory provisions.

ii. The Enquiry Officer on taking into consideration the evidence on record and the defense of Respondent No.1 arrived at the conclusion that the allegation pertained to a matter of difference in perceptions of two officials exercising quasi judicial functions which does not establish that it was on account of some mala fides in any manner. It was held that the charge has not been proved. It was also observed that the action of the Respondent No. 1 pertaining to the allegation of not following of Section 79 of the IT Act was not upheld by the Appellate Authority and therefore, the allegations against Respondent No. 1 could not be sustained. It was categorically noted that the case did not seem to be a matter of under assessment or escapement of taxable income, therefore the failure to maintain absolute integrity could not be attracted in the said case and this was not even the charge.

iii. The Disciplinary Authority, however, in the disagreement note had observed

that the question of difference in opinion could not arise since the Respondent No. 1 had failed to carry out the basic requirements of verification and investigation and also not passed a reasoned order. As regards the allegation that non application of Section 79 of the IT Act by the Respondent No. 1 had been accepted by the Appellate Authority, it was stated that the same had not been accepted by the petitioners and that an appeal against the same was still pending. The Disciplinary Authority further disagreed with the Enquiry Officer's finding that there is no under assessment or escapement of income on two counts, firstly since it was Respondent No.1's conduct that was in question regardless of the loss of revenue and secondly, since under the IT Act, losses incurred in any A.Y. are allowed to be carried forward to be adjusted against the income of later or (successive) A.Y.s, therefore, it could not be held that no loss of revenue had resulted. Therefore, the Disciplinary Authority had concluded that the charge was proved.

iv. The Tribunal on examining the charge and its facets in detail was of the view that the only charge that could implicate the Respondent No. 1 in the allegation of gross negligence, was regarding the non compliance of Section 79 of the IT Act. The Tribunal carefully examined the record to ascertain whether or not the assessee had been unduly benefitted by the actions of Respondent No. 1 and whether he had any culpable intensions or passed the said order on extraneous considerations. The Tribunal observed that the order passed by the Respondent No. 1 dated 30th November, 1995 was the subject matter of challenge by the assessee in the matter to the extent of additions of Rs. 7,230/- made by Respondent No. 1. The Appellate Authority after carefully considering the contentions of the assessee and the facts of the said matter, recorded a short order dated 14th August, 1997 wherein it was decided that the matter was to be restored to the file of the assessing officer to re-frame a fresh assessment order. On remanding the matter the assessing authority i.e. the successor of Respondent No. 1 held that the provisions of Section 79 were applicable in the said matter which was a view contrary to the one taken by the Respondent No. 1. The said order was again challenged by the assessee in the matter, and the Appellate Authority by order dated 9th January, 2001 clearly held that the assessing officer had been in error in invoking Section 79 in the facts of the said case and thus the order passed by the Respondent No. 1 earlier had been upheld. Therefore, the Tribunal relied on the fact that the Appellate Authority had ultimately upheld the view of Respondent No. 1 in the matter of applicability of Section 79 of the IT Act in the said case. The Tribunal also took note of the two counts on which the Disciplinary Authority had disagreed with the Enquiry Officer. However, the Tribunal stated that it is not for the Tribunal to determine as to which of the two views, either the one passed by the Assessing Officer or the one rendered by the Appellate Authority is correct. Regardless, the very fact that the Appellate Authority took the same view as that of Respondent No. 1 only substantiated his plea that there was no gross negligence or mala fides or total disregard for statutory provisions. The Tribunal further observed that if indeed

the Respondent No. 1 is to be charged with gross negligence then the Appellate Authority who upheld the same view as that of Respondent No. 1, should also have been charge-sheeted and that the Respondent No. 1 could not be solely held responsible for the same. Therefore, the Tribunal concluded that Respondent No. 1 did not in any manner confer any undue advantage on the assessee and that the Disciplinary Authority perhaps was not justified to hold that the order passed by Respondent No. 1 was incorrect or against law, till such time that the appeal filed by the revenue audit before the ITAT is allowed, the fate of which was not informed to the Tribunal at that time. Even now the learned counsel for the petitioners was unable to disclose the fate of said appeal. The Tribunal also categorically held that the Disciplinary Authority in departmental proceedings could not go into the legality of the order passed by Respondent No. 1 in his quasi judicial capacity, particularly when the same was upheld in appeal.

v. This Court is of the view that since the Appellate Authority upheld the decision of the Respondent No. 1 with regard to non application of Section 79 of the IT Act, therefore, the same cannot be doubted to imply gross negligence or misconduct on the part of Respondent No. 1 since the Respondent No. 1 had merely passed an order in exercise of his quasi judicial functions and the petitioners too have been unsuccessful in imputing any mala fides or extraneous considerations on his part. In the facts and circumstances, this Court does not find any illegality or perversity in the reasoning of the Tribunal, nor the matter is such which requires re-consideration by the disciplinary authority, nor it is to be remanded in the circumstances.

38. Article III

i. Article 3 alleged that the Respondent No.1 committed the following irregularities while completing the assessments u/s 143(3) of the IT Act in the case of M/s United Phosphorous Ltd. for A.Y. 1994-93:-

(a) He failed to reduce various ineligible receipts from the profits of the business while entertaining the company's claim of deduction u/s 80HHC of the IT Act.

(b) He erroneously held an amount of interest u/s 244A of Rs. 42, 82,152/- as deductible having been taxed in an earlier year, whereas only an amount of Rs. 35, 52, 932/- should have been allowed as deductible for A.Y. 1994-95. (c) He failed to initiate penalty proceedings u/s 271(1)(c) of the IT Act on major issues which disallowance from the assessee's claims had been made both on legal and factual grounds.

ii. The enquiry officer held that with regard to the allegation (a) the deductions made by the Respondent No.1 u/s 80HHC were subject to Appeal and Audit and that in both the stages neither the CIT(A) nor the RAP had observed any irregularities therefore, the charge in this regard was not proved. For charge (b) in Article III, the Enquiry Officer observed that there seemed to be an arithmetical error which may not attract all the provisions of Rule 3(1) of the CCS (Conduct) Rules on the Respondent No. 1 i.e. failure to maintain integrity, etc.

However, the Enquiry Officer held that there was some error apparent on the amount of interest withdrawn in the matter and therefore, the Respondent No.1 ought to have left an office note for further verification, if required. Thus allegation (b) was held to be partly proved. With respect to allegation (c), the Enquiry Officer observed that there was no case made out by the prosecution establishing the fact that any penalty proceedings for the alleged concealment was required to be initiated in the said case and therefore, the said allegation was held to be not proved.

iii. The Disciplinary Authority disagreed with the findings of the Enquiry Officer on Article III and alleged in the disagreement note that the Respondent No.1 as an Assessing Officer is expected to be well versed in law and capable of deciding on the admissibility of deductions claimed by an assessee and therefore, there is a clear failure to examine the records properly on the part of the Respondent No. 1 for making correct disallowances on account of interest already allowed to the assessee. It was also stipulated that the Respondent No. 1 erred in not initiating the proceedings u/s 271(1)(c) of the Act. Therefore, the Disciplinary Authority was of the view that the allegation in Article III had been fully proved.

iv. With regard to Article III, the Tribunal observed that nil income had been returned by the assessee, and that Respondent No. 1 had made an assessment at Rs. 3.04 crores bringing in revenue of about Rs. 2.49 crores, and that the additions made by Respondent No. 1 were also confirmed in appeal by the CIT (A). Therefore, the charge could not be sustained. In any case, it is pertinent to note that the Disciplinary Authority has itself not imputed any mala fides, or gross negligence on the part of Respondent No. 1. Also at the most there could have been irregularity in the manner of computing the interest u/s 244A of the IT Act by the Respondent No. 1, however, this in itself does not amount to misconduct which is to be tried by way of a departmental proceeding.

v. This Court is of the view that the petitioners have failed to substantiate the allegations made in the said charge and therefore, even prima facie the charge is not made out. If that be so the matter is not liable to be remanded and the petitioners have failed to show any illegality, irregularity or perversity in the decision of the Tribunal. Allegations do not show even prima facie any recklessness or misconduct in the discharge of his duties by the Respondent No. 1 nor any negligence can be inferred in the facts and circumstances. Any corrupt motive or any undue favour to the assessee has not even been alleged. In the circumstances, if the Tribunal has not remanded the matter on account of other irregularities and illegalities committed by the petitioners, the order of the Tribunal cannot be termed to be perverse or contrary to law.

39. Article IV

i. Article IV alleged that the Respondent no. 1 passed order u/s 143(3) of the IT Act in the case of M/s Arochem Silvassa Ltd. for A.Y. 1993-94 without levying mandatory interest u/s 234A of the IT Act, while determining the taxes payable

on completion of scrutiny assessment.

ii. The Enquiry Officer on examining the documents on record in great detail concluded that the said charge had not been proved. The Enquiry officer had observed that in the Assessment Order the Respondent No. 1 had ordered interest u/s 234B & 234C etc. Therefore, it could not be held that any undue benefit of interest of Section 234A had been conferred on the assessee. The dispute in the matter remained regarding the issue, whether the revised return was a valid return and therefore, the question of the applicability of the tax u/s 234A had arisen. On perusing the assessment order, the Enquiry Officer was of the view that it was not evident that the Respondent No. 1 had treated the revised return as statutorily valid as alleged in the Article and that the prosecution also could not produce anything to show that the Respondent No.1 had accepted the revised return or considered the income disclosed in the revised return as acceptable. The Enquiry Officer further went a step forward and stated that even if it is to be assumed that the Respondent No. 1 had not discussed about the rejection of revised return in his assessment order, yet it is not a case of any mala fide intentions or undue benefit to the assessee.

iii. The Disciplinary Authority disagreed with the finding of the Enquiry Officer and stated that the Enquiry Officer had erred in concluding that there is no evidence to show that the Respondent No. 1 had considered the income of the revised return. It was observed that in the revised return the assessee has excluded a sum of Rs. 1, 15,379/- treating the same as income not attributed to the industrial activity. The Respondent No. 1 had taken the said amount into consideration while computing the deductions u/s 80H & 80I, as is evident from the assessment order.

iv. It is pertinent to notice that the Disciplinary Authority could not assume that the amount excluded in the revised return by the assessee had been taken into consideration. If that be so then how undue benefit had been conferred on the assessee or how the Respondent No.1 had relied on any extraneous material while taking the alleged decision. The fact that the irregularity, if any, amounted to "misconduct" is not apparent from the record and the allegations as has been noted and relied on by the Disciplinary Authority has not been made out even prima facie. Therefore, the departmental action taken against the Respondent No. 1 could not be justified on the said charge.

v. In the circumstances, since no prime facie material was available with the Disciplinary Authority to show any recklessness or misconduct on the part of the Respondent No. 1 in not considering the revised return, remanding the matter by the Tribunal would have been a futile exercise. In *Union of India Vs Duli Chand*, (2006) 5 SCC 680 in Para 9 the Supreme Court had held as under:-

9. In our opinion, Nagarkar case was contrary to the view expressed in *Union of India and Others Vs. K.K. Dhawan*, case. The decision in *K.K. Dhawan* (supra) being that of a larger Bench would prevail. The decision in Nagarkar case

therefore does not correctly represent the law.

vi. Consequently, there is no illegality or any irregularity in the order of the Tribunal not to remand the matter in this regard to the Disciplinary Authority, so as to require any interference by this court in exercise of its writ jurisdiction. It also cannot be held in the circumstances that the Tribunal has exercised its appellate jurisdiction in the facts and circumstances.

40. Article V

i. Article V alleged that the Respondent No.1 had committed the following lapses in the assessment of the case of M/s Ecoplast Ltd. A.Y. 1993-94, which was completed by him u/s 143(3) of the IT Act:-

(a) He passed the assessment order in a grossly negligent manner, without calling for the company's explanation on the disproportionate increase in supervision charges and other expenses.

(b) He failed to reduce the unabsorbed investment allowance of Rs. 6,83,679/- pertaining to the eligible Unit from the eligible profits of the Unit, for allowing the correct deduction u/s 80I of the IT Act, leading to an under assessment of income by Rs. 1,70,921/-

ii. With regard to allegation (a), the Enquiry Officer observed that the Respondent No. 1 had questioned the disproportionate expenses which is evident from the order sheet wherein he has written "Why increased" and he had also called for various details which is recorded in the order sheet and which is evident from the fact that the assessee had submitted the same in a separate folder. Therefore, the allegation of the department that the same had not been taken into consideration by the Respondent No. 1 could not be accepted. It was also observed that the department had failed to substantiate their allegation that the Respondent No. 1 had wrongly allowed deductions of amounts, since they did not contend as to what the correct admissible amount would have been which would not have resulted in under assessment or conferring undue benefit on the assessee. With regard to allegation (b), the Enquiry Officer observed that the irregularity in the same was highly technical in nature and that the same could perhaps be properly appreciated by an expert in the income tax laws. It was concluded that the said charge had been "partly proved" since the total income as assessed by Respondent No. 1 was Rs. 78,87,670/-, whereas the reassessment order specified the same to be Rs. 80,58,590/-.

iii. The Disciplinary Authority accepted that the assessee had given the details of the expenses, but went on to hold that despite abnormal increase in the said expenses, no explanation was obtained by the Respondent No.1 while examining the accounts and assessing the total income of the case under scrutiny, and that the five-fold increase in the supervision charges and almost 100% increase in other expenses in the current year compared to the accounts of the preceding year should have been enquired into assiduously by him and a reasonable

conclusion for the same ought to have been drawn on the nature, reasonableness and genuineness of the expenditure incurred and claimed, and also that the Respondent No. 1 had been grossly negligent in not putting across to the assessee any queries as regards the abnormal increase in the expenses compared to the preceding year.

iv. The Tribunal observed that inspite of the categorical finding of the Enquiry Officer that the Respondent No. 1 had made the necessary inquiries by relying on the order sheet of the Respondent No. 1 wherein the query regarding the increase had been posed to the assessee, and the details were called for by Respondent No. 1, still the Disciplinary Authority chose to disregard the same. The Tribunal also held that it was quite aware of having limited jurisdictional powers while reviewing the order passed by the departmental authorities, however, in case of a finding which had been returned by completely ignoring the evidence, as in the present case in the shape of documents, and by further misreading and misinterpreting the observations made by the Enquiry Officer in his report, thus in a way not giving any reason for disagreeing with the finding returned by the Enquiry Officer on the said issue, the Tribunal has ample power to look into the same. It was further held that no Court or Tribunal can ignore such illegalities by the Disciplinary Authority and blindly follow the findings returned by the disciplinary authorities, howsoever, grossly unjust and against the records the same may be.

v. In view of the fact that in the order sheet dated 20th July, 1995 relied on by the Enquiry Officer, it was categorically stipulated by the Respondent No. 1 as to why there has been an increase in the expenses as claimed by the assessee and also it has been mentioned that various records be called for in order to examine the same, it cannot be inferred that the Respondent No. 1 had not taken the necessary precautions or examined the requisite documents before passing the assessment order. Therefore, negligence against Respondent No. 1 could not be imputed in the facts and circumstances of the case. Also with regard to allegation (b) of Article V the irregularity as noticed by the Enquiry Officer himself is of a very technical nature, therefore it cannot be assumed that the Respondent No. 1 had made the said deductions or caused the under assessment with a malafide intension or that the same was based on any extraneous considerations. This also cannot be disputed that the hierarchy succeeding the Respondent No. 1 was more than capable to correct the technical error, if any, in the said assessment order.

41 Article VI

i. Article VI alleged that Respondent No.1 while passing the assessment order U/s. 143(3) in the case of M/s Demuric Holding P. Ltd. for A.Y. 1994-95, committed the following lapses:-

(a) he inappropriately allowed a set off of speculation loss of Rs. 24,31,100/- against the company's long term capital gain.

(b) he blindly accepted the valuation and revised valuation under Rule ID of the WT Act, with regard to equity shares of United Phosphorous Ltd., without obtaining the certified balance sheet of the company on the nearest date available to the valuation date.

(c) he unquestioningly accepted the unsecured loans of Rs. 1,95,29,500/- without causing any enquiry as regard Permanent Account Numbers of the loan givers and their creditworthiness.

(d) he failed to correctly reverse interest of Rs. 1,07,856/- allowed U/s 244A of the IT Act in an earlier intimation u/s 143(1)(a) in the same case, while determining the taxes payable in terms of his order u/s 143(3) of the IT Act.

ii. Regarding allegation (a) contained in Article VI, the Enquiry Officer observed that based on the evidence on record, it did not appear to be case of forward sale or speculation loss as alleged by the department and, therefore, he held this part of the charge as not proved. With respect to allegation (b) regarding blind acceptance of valuation of equity shares, the Enquiry Officer observed that both the department and the Respondent No. 1 had not produced any specific evidence in this regard, nor had the department successfully established as to what was wrong in the valuation accepted by the Respondent No. 1. Thus, it was held that the said charge was not made out. Regarding allegation (c), the Enquiry Officer noted that since there was no evidence produced by the department refuting the defence of the Respondent No. 1 the same had to be accepted as it is. With respect to allegation (d), it was held that the same was partly proved since there was error apparent on the rectification order passed by the Respondent No. 1, which was accepted by him as well. However, the Enquiry Officer also categorically noted that the possibility of the error being an inadvertent one could not be ruled out and that there was no evidence of any malafide intension to attract the provisions of Rule 3(1) of the CCS (Conduct) Rules and no such facts have been disclosed by the petitioners which would necessitate to remand the matter to the Disciplinary Authority in the facts and circumstances.

iii. The Disciplinary Authority accepted the finding of the Enquiry Officer with regard to the allegations (a) and (d) however, disagreed with the findings pertaining to the allegations (b) and (c) contained in Article VI. Allegation (b) had been merely refuted by the Disciplinary Authority without assigning any reasons and with regard to allegation (c) it had been noted that during examination of any cash credit introduced into the books, an Assessing Officer is required to examine (i) identity of the creditor, (ii) the creditworthiness of the creditor & (iii) the genuineness of the transaction, which had not been adequately discharged by Respondent No. 1, therefore, the said charge was proved.

iv. The Tribunal on examination of the record observed that in Article-VI, against the returned income of Rs. 30.29 lakhs the Respondent No. 1 had completed the

assessment at a taxable income of Rs. 99.93 lakhs in a detailed speaking order and the major addition of Rs. 74.88 lakhs was also confirmed in appeal by CIT (A) dismissing the assessee's appeal. Therefore, it is clear that the order which was passed by Respondent No. 1 was also in favour of revenue, and that it was the assessee who was aggrieved by the same and not the department. Thus, it cannot be held that the Respondent No. 1 had caused any undue benefit to the concerned assessee or that there was any prima facie material that the Respondent No. 1 had acted recklessly or negligently.

v. Consequently, there is no illegality or any irregularity in the order of the Tribunal not to remand the matter in this regard to the Disciplinary Authority so as to require any interference by this court in exercise of its Writ jurisdiction. It also cannot be held, in the circumstances, that the Tribunal has exercised its appellate jurisdiction in the facts and circumstances.

42. Article VII

i. Article VII alleged that Respondent No.1 had issued inappropriate and irregular directions u/s 144A of the IT Act to the ACIT Circle 2(2), Surat, in the case of M/s. Vijay Fabrics for A.Y. 1995-96, in as much as his directions to allow amendment to the statements of the partner, given in course of survey u/s 133A in this case, from an original "lakh metres" to "lakh rupees", was not actuated by any verification and was also not borne out from the facts of this case.

ii. The Enquiry Officer examined the said order passed by Respondent No. 1 and found it to be reasoned and detailed order. Therefore, the allegation that orders were issued without verification was held to be not correct. It was also observed that the assessment order passed by Respondent No. 1 was challenged before the Appellate Authority and the same was upheld and the stand taken by Respondent No. 1 was approved. Therefore, there was no material for sustaining the charge against the Respondent No. 1 particularly in view of CO's detailed directions, and thus the charge was not proved.

iii. The Disciplinary Authority disagreed with the finding of the Enquiry Officer and referred to in the disagreement note without any cogent reason and by stating that while issuing direction to the Assessing Officer u/s 144A of the IT Act, he had failed to take notice of basic facts and, therefore, it was held that the charge had been proved.

iv. On examining the report of the Enquiry Officer it was clear that it was observed that the concerned ACIT after getting the details from the firm and the ACIT who had conducted these survey had submitted to the Respondent No. 1 that "from the above figure it appeared that the partner during the course of statement had referred to the value of cloth in rupees and not in meters". This was also based on confirmation of Shri Peerya, ACIT, stating "mistake occurred inadvertently as claimed by the assessee" which is why Respondent No. 1 had finally issued directions to change the unexplained stock from 7 lakh meters to Rs. 7 lakh. The Enquiry Officer also gave a clear finding that in the said charge,

the responsibility to verify the discrepancies in the book of records was that of the concerned ACIT and not the Respondent No. 1. In any case, the Department had not been able to impute any mala fides against the Respondent No. 1 in the said charge. Thus, it cannot be held that the charge can be established against the Respondent No. 1. The petitioners have not disclosed such facts which would have required re-evaluation by the Disciplinary Authority in the facts and circumstances.

43. The Tribunal while considering the charges framed against the Respondent No. 1 had noted that none of the charges imputed that while passing the various orders or conducting the proceedings as alleged in the charges, the Respondent No. 1 had mala fide intentions or that he had passed the orders on extraneous considerations, or that the said orders were an outcome of gross negligence, except for Article-II and Article V (a). In the said charge, it was alleged that Respondent No. 1 had exhibited gross negligence and total disregard of the statutory provisions, by conferring undue benefit to the assessee. The Tribunal also held that by merely using the language employed in the charges framed, that the Respondent No. 1 had "failed to maintain absolute integrity and devotion to duty and exhibited conduct unbecoming of a government servant in total contravention of the provisions of the rules" is not enough. According to the Tribunal, the core allegation ought to have been pointing towards definite acts of omission and commission which would show that the employee did not maintain absolute integrity and devotion to duty or exhibited conduct unbecoming of a government servant. Therefore, the Tribunal held that barring Article II and Article V (a), none of the other Articles remotely showed that the Respondent No. 1 had any culpable intentions or had passed an order on extraneous considerations. The Tribunal further held that in view of the charges framed against the Respondent No. 1 it is clear that even the department had not attributed extraneous considerations to Respondent No.1 in passing the various orders. The orders passed by him at the most could only be alleged to have contained some irregularities or lapses. This Court on perusing the allegations contained in the charges framed against the Respondent No. 1 is also of the opinion that none of them except for Article II and Article V (a) imputes any "misconduct" on the part of Respondent No. 1 as per the ratio of the judgment of the Supreme Court in the case of K.K.Dhawan (supra).

44. Therefore, the petitioners could proceed against the Respondent No. 1 only in respect of Article II and Article V (a) regarding the Respondent No. 1 exercising his quasi judicial functions. However, these have also been analyzed to be without any legal and even factual basis. The Tribunal examined all the charges framed against the Respondent No. 1 in great detail and came to the conclusion that most of the orders passed by Respondent No. 1, which were stipulated in the charges, were in favour of the revenue, therefore, there couldn't have been even a remote possibility of the Respondent No.1 having any extraneous considerations in his mind while passing the said orders. There is also no evidence on the record that would reflect, even prima facie, that he had intended

to confer any undue benefit on the assessee concerned, or that he had any mala fide intentions while passing the orders. At the most certain charges could have been viewed as irregularities or lapses on the part of Respondent No. 1 which could have been rectified by the higher authorities.

45. The Tribunal also considered as to what acts of the Respondent No. 1 would constitute "misconduct" which was exhaustively dealt with in the impugned order by relying on the provisions of Rule 3(1)(i), 3(1)(ii) and 3(1)(iii) of the CCS (Conduct) Rules, 1964 and also by relying on the list of acts specified in the Notes on CCS(Conduct) Rules, 1964 3rd Edition, 1980, published by the Government of India, MHA, DP & AR, below rule 3-C of the 1964 Rules. The Tribunal noted that even though a straightjacket definition of misconduct could not be given, but as generally and normally understood, misconduct amounts to transgression of some established and definite rule of action.

46. The Tribunal referred to the judgment of the Supreme Court, *Union of India and Others Vs. K.K. Dhawan*, and held that in view of the six instances highlighted therein, in the instant case, it cannot be inferred that for a mere technical violation or merely because the order is wrong the disciplinary action was not warranted. The Tribunal also referred to the judgment of *Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others*, wherein it was held that in the said case there was nothing to show that the Disciplinary Authority had any information within its possession from which it could form an opinion that the Respondent No. 1 had showed any favour to the assessee by not imposing the penalty. He may have exercised his jurisdiction wrongly, however, that wrong could have been corrected in appeal as well, therefore, this reason alone would not form the basis for initiating the disciplinary proceedings against an officer while he is acting as a quasi judicial authority, since he is always subject to judicial supervision in appeal. It was also held that if every error of law is to be treated as a charge of misconduct, then it would impinge upon the independent functioning of quasi judicial officers.

47. The learned counsel for the petitioners had contended that the judgment of *Ramesh Chander Singh Vs. High Court of Allahabad and Another*, has been relied on by the Tribunal while passing the impugned judgment, which is misplaced and contrary to the law of binding precedent and judicial propriety, since the said judgment had relied on the judgment of the Nagarkar's case (supra) which was overruled in the case of *Union of India & Ors. v. Duli Chand*'s case and also because the judgments of the Apex Court in the matter of *K.K. Dhawan* (supra) and *Duli Chand*'s case (supra) were neither brought to its notice nor were they taken into consideration.

48. The learned counsel for the petitioners contended that the said two judgments are binding precedents for the co-ordinate benches of the Supreme Court and, therefore, they could not be overruled by the Co-ordinate Bench of equal strength. It was also contended that at the most the observations in the matter of *Ramesh Chander Singh*'s case would only be in the nature of obiter.

49. On perusing the impugned order it is clear that the Tribunal did not rely on the judgment of Ramesh Chander Singh (supra) in order to adjudicate upon the present matter. It had indeed referred to the same and had observed that there is a controversy regarding which ratio of either Duli Chand (supra) or Ramesh Chand (supra) would be a precedent. The judgments of K K Dhawan (supra), Duli Chand (supra) and Nagarkar (supra) which has been followed in the Ramesh Chander (supra) were duly examined and it was observed that while in the judgments of K K Dhawan (supra) and Duli Chand (supra) it was held that gross negligence can be a misconduct for which departmental enquiry can be held even if the charged officer was discharging functions in quasi judicial capacity, whereas, in the judgment of Nagarkar, which has been upheld in the case of Ramesh Chand (supra) it was held that it would have to be culpable negligence of an officer which can be tested in a departmental enquiry. The bench strength of the judgments in K K Dhawan (supra), Duli Chand (supra) and Ramesh Chand (supra) is also equal, consisting of a quorum of three judges. Thus which judgment would be a precedent for the controversy, whether negligence would constitute misconduct to entitle disciplinary proceedings against the charged officer was questioned? The Tribunal noted that while the learned counsel representing the Respondent No. 1 would insist that it is the law laid down by the Hon"ble Supreme Court in Nagarkar's case (supra) shall hold the field, which has been followed in Ramesh Chander Singh (supra), particularly, when the said judgment (Ramesh Chander Singh) is by a coordinate Bench and later in point of time than that of Duli Chand (supra), and that the Tribunal should hold that it is culpable negligence which can be subject matter of departmental enquiry when it may relate to allegations that may pertain to functions of an officer, which functions are discharged by him in his judicial or quasi judicial capacity. On the other hand, the counsel representing the petitioners would, however, insisted that the judgment of the Supreme Court in Duli Chand (supra) would hold the field, particularly when in the decision of Ramesh Chander Singh (supra) the decision in Duli Chand (supra) has not been considered. Ultimately the Tribunal concluded that even though it would not be difficult to determine this controversy, on the basis of judicial precedents covering the issue, however, it would refrain from doing so since it did not feel the necessity to do so in the present case. It further held that on the facts it is evident that the present case may not be one where the Respondent No. 1 can be saddled with the misconduct that may be grossly negligent. It also held that even though, there is a hierarchy of tribunals established under the Income Tax Act, the petitioners did not prefer any appeal or revision against the orders passed by Respondent No. 1 in some matters out of those mentioned in the charge sheet, where he might have passed orders against the revenue. In so far as, the orders that were in favour of revenue, the same had been appealed by the concerned assessee and the orders of the Respondent No. 1 had been ultimately upheld by the Appellate Authority.

50. As has been detailed herein above, in none of the Articles, except for Article II and Article V(a) gross negligence has been imputed against Respondent No. 1

nor has the department themselves alleged that the Respondent No. 1 had passed orders on extraneous considerations or with a mala fide intention. While in Article II and Article V (a), even though gross negligence has been alleged, however it could not be substantiated either in facts or in law.

51. Regardless of all this, it cannot be denied that most of the orders of Respondent No. 1 had been in favour of the Revenue with the assessee appealing against the same. Therefore, it could not be contended that he had conferred undue advantage on the assessee which is also evident from the record that the orders of Respondent No.1 had been upheld by the Appellate Authority, therefore gross negligence or mala fide intentions cannot be imputed against him nor can be inferred nor there are any grounds for the same.

52. The Tribunal in view of the charges framed against the Respondent No. 1 not being proved and taking into consideration that even if lapses on the part of the Respondent No. 1 while exercising his quasi judicial capacity were to be accepted, held that it could not warrant such a ghastly punishment of compulsory retirement and, therefore, decided that the final order dated 1st April, 2008 was liable to be quashed.

53. The Tribunal while setting aside the punishment order of compulsory retirement of the Respondent No. 1 has also held that the petitioners, disciplinary authority had pre judged the issue, as though the enquiry officer had absolved the Respondent No. 1 of most of the charges and had also held that the petitioners had failed to prove the allegation of gross negligence against the Respondent No. 1, the Disciplinary Authority while issuing dissenting note, disagreeing with the Enquiry Officer had held that the charges had been proved and the dissenting note was not at all a tentative note. While awarding punishment, the Disciplinary Authority did not take into consideration the representation made by the Respondent No. 1. The Disciplinary Authority had received the representation of the Respondent No. 1 against the dissenting note dated 5.3.2007, but it chose not to make even a reference of the same. The principles of natural justice had been violated, as the pleas and contentions of the Respondent No.1 had not been taken into consideration by the Disciplinary Authority. The Tribunal was also of the view that the punishment of compulsory retirement is grossly disproportionate to the allegations of negligence, as there is no specific finding that the Respondent No. 1 had acted on extraneous considerations.

54. The learned counsel for the petitioners has not been able to demonstrate that the dissenting note was tentative. When the punishment is already prescribed as against the charged officer in the disagreement note, then it is clearly indicative of the fact that the Disciplinary Authority has already closed its mind to the representation of the charged officer. It also discourages the charged officer, as after a report by the enquiry officer in his favour, he is intimated that the Disciplinary Authority not only disagrees but deems a certain punishment to be imposed would be clearly a denial of an opportunity of being heard making

the entire process reminiscent of a kangaroo court, wherein the proceedings are merely formalities and wholly irrelevant. Reliance for this can be placed on *Yoginath D. Bagde Vs. State of Maharashtra and Another*, In another matter of *Jiban Kumar Sarkar Vs. Union of India (UOI) and Others*, the Division Bench of the High Court of Calcutta had held as under:-

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

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

56. If a conclusion is already arrived at prior to giving the opportunity to represent against the disagreement note, then the entire preceding thereafter, would be rendered futile and would be a mere formality. A conclusion specifying the guilt of the charged officer would in itself discourage the whole purpose behind the proceedings and render the entire process nugatory and pointless. The enquiry report would virtually be rendered non-est.

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

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

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

60. The Tribunal on perusing the record also observed that there was no manner of doubt that the Disciplinary Authority while recording its disagreement note had predetermined the issues without taking into consideration the representation

made by the Respondent No.1. According to the Tribunal, this clearly amounted to prejudging the issue and therefore, the dissenting note deservedly was quashed. The Tribunal noted that the law is firmly entrenched that if instead of a tentative opinion, a final view is taken contrary to the view expressed by the Enquiry Officer, then it would be violative of the principles of natural justice.

61. Consequently, for the foregoing reasons the inferences of the Tribunal that the Enquiry Officer had returned a firm finding that the Respondent No. 1 had not indulge in any misconduct; the Disciplinary Authority fell into a serious and egregious error in reversing the findings of the Enquiry Officer; non-consideration of the representation of the Respondent No. 1 against the dissenting note dated 5.3.2007; not remanding the matter to the Disciplinary Authority for passing another speaking order after considering the representation of the Respondent No. 1 for the reasons that the charge memo was issued in 2003 for the assessment orders passed in 1995 - 1996 and 1997 - 1998, the Respondent No. 1 is an officer of 1977 batch and he had been promoted despite the departmental enquiry three times to the posts of Joint Commissioner, Additional Commissioner and Commissioner during the pendency of departmental proceedings and thus he had been subjected to departmental enquiry with regard to absolutely stale matters; the petitioners took 5 years in completing the departmental enquiry after seeking repeated extension from the High Court subject to cost from time to time, the Respondent No. 1 suffered cross-country transfers totally to his disadvantage and inconvenience; the Respondent No. 1 may not get any justice from the petitioners; the dissenting note and the final order are almost verbatim the same; for procedural flaws based more on his opinions in the assessment orders passed in quasi judicial capacity would not have warranted such ghastly punishment of compulsory retirement especially when there was not even the allegation that the Respondent No. 1 had even favored the assessee for any extraneous considerations and that no useful purpose at all would be served in remitting the matter as categorical findings can be returned on the basis of available records and the Respondent No. 1 is retiring soon, do not suffer from any illegalities, any regularities or any such perversities which shall entail any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. Therefore, for the foregoing reasons and in the facts and circumstances, the order of the Tribunal dated 6.2.2009 passed in O.A. No. 179 of 2008, titled as Kamal Kishore Dhawan Vs Union of India & Ors. setting aside and quashing the Charge Memo dated 28.4.2003, dissenting note dated 5.3.2007 and the order of punishment of compulsory retirement of the Respondent No. 1 and reinstating the Respondent No. 1 service forthwith with all consequential benefits and imposing the costs of Rs. 10,000 on the petitioners is upheld and it is held that the order is justified and in consonance with law and does not require any interference of any type from this Court. The Respondent No. 1 is further entitled for costs which is quantified as Rs. 30,000/- in the facts and circumstances. Costs imposed by this Court by this order be paid within four weeks. Any other costs imposed on the petitioners from time to time in any of

the judicial proceedings initiated by the petitioners, if not already paid, be also paid within four weeks. With these directions the writ petition of the petitioners is dismissed and the "Rule" issued on 21.7.2010 is discharged and the interim order dated 21.7.2010 staying the operation of the Tribunal's order is vacated. Ordered accordingly.