

(2012) 07 DEL CK 0008

In the Delhi High Court

Case No : Writ Petition (C) Nos.8171 of 2008 and 8423 of 2008

Union of India and Others

APPELLANT

Vs

Yateendra Singh Jafa

RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Border Security Force Act, 1968 — Section 20

Constitution of India, 1950 — Article 226, 311(2), 311(2)(b), 311(2)(c)

Citation : (2012) 07 DEL CK 0008

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

Bench : Division Bench

Advocate : R.V. Sinha and Ms. Sangita Rai, for the Appellant;

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioners have challenged the judgment dated 25th July, 2007 passed by the Central Administrative Tribunal, Principal Bench, New Delhi quashing the charge-sheet dated 12th August, 2004 and the suspension order dated 24th November, 2003, as well as the subsequent proceedings initiated against the respondent and directing the petitioners to promote the respondent to the grade of DGP from the date his immediate junior Sh. Singarabal was promoted w.e.f. 22nd March, 2002 if found fit by the Selection Committee, with all consequential benefits. The brief facts as to comprehend the disputes are that the respondent is an officer of the Indian Police Service of 1967 batch of the Maharashtra Cadre. He was on central deputation and was, therefore, posted in the BSF as IG, Srinagar from 1991-92. On the intervening night of 23rd -24th March, 1992, a raid was conducted by the 116thBn BSF in the house of one Mohd. Maqbool in Srinagar. In the said operation some terrorists were also apprehended. The raiding party had seized huge quantities of arms, ammunitions, jewellery and other items from the terrorists' hideout. According to the petitioners, the seized items were not listed properly and the discrepancies were brought to the notice of the respondent. The respondent had also written to

Sh. Ashok Kumar, DIG, on 31st March, 1992 directing him to submit a report on the seized articles.

2. A complaint was thereafter, received in the BSF Headquarters that the arms and ammunitions, gold jewellery, cash and other items seized were not properly accounted for. Subsequently, Sh. T. Ananthachari, DG, BSF, had visited Srinagar on 4th April, 1992 to assess the situation. Thereafter, the respondent was shifted from Srinagar and Sh. A.K. Patel, IG, BSF, who had taken over at the time, had ordered for a Staff Court of Inquiry to be conducted by Sh. Chaman Lal, IG, BSF. Sh. Chaman Lal, IG, submitted his report on 7th August, 1992 according to which, he found the following officers blameworthy for the incident:

- (1) Sh. Y.S. Jafa, IPS
- (2) Sh. Ashok Kumar, DIG, BSF
- (3) Sh. M. L. Purohit, Comdt., BSF
- (4) Sh. B. L. Nayak, Asst. Comdt. BSF
- (5) Sh. Kuldeep Singh, Subedar, BSF
- (6) Sh. K.B. Gurung, Subedar, BSF

3. Based on the report of the Enquiry Officer, DG, BSF, the Ministry of Home Affairs was recommended to take actions against the respondent by invoking the provisions of Article 311(2)(c) of the Constitution of India. The other officers were to be proceeded against under the provisions of Rule 20 of the BSF Act, as they, were governed by the BSF Act and Rules. Thereafter, order dated 1st June, 1993 was issued by the competent authority for the dismissal of Sh. Ashok Kumar and Sh. ML Purohit.

4. In the meantime, a proposal was sent from the BSF to the Ministry of Home affairs to invoke the provisions of Article 311(2)(c) of the Constitution of India against the respondent, which was duly examined and approved by the Competent Authority on 21st May, 1993. The case was thereafter sent to the Committee of Advisors, who also approved the same on 16th July, 1993.

5. Aggrieved by the actions of the petitioners, and apprehending his dismissal, the respondent filed an original application, bearing O.A. No. 1430/1993, before the Principal Bench of Central Administrative Tribunal on 13th July, 1993. On the application of the respondent, the Tribunal passed an interim order dated 9th September, 1993, restraining the Govt. of India from taking action under Article 311(2) of the Constitution of India and dismissing the respondent without initiating regular disciplinary action in accordance with law. The petitioners challenged the interim order passed in the original application of the respondent and filed a SLP (SLP), which was however, dismissed by the Supreme Court on 10th November, 1994. While dismissing the SLP of the petitioners, the Supreme Court also observed that the dismissal of the SLP will not preclude the petitioners to take action against the respondent as per law.

6. Ultimately, on 13th August, 1999, the Tribunal dismissed the original application of the respondent, on the ground that it was premature. Thereafter, the respondent filed a writ petition, bearing WP (C) No. 5156/1999, before the High Court of Delhi, which also got dismissed. The respondent challenged the said dismissal by filing an SLP, however, it too was dismissed by the Supreme Court by order dated 29th September, 2000.

7. Thereafter, the Central Government initiated the proceedings against the respondent with the approval of the Competent Authority and again placed the matter before the Committee of Advisors. The Committee on consideration recommended the invocation of Article 311(2)(c), which was approved by the Competent Authority. Therefore, the respondent was dismissed from service w.e.f. 23rd January, 2001.

8. The respondent aggrieved by his dismissal from the service approached the Central Administrative Tribunal, Principal Bench by filing another original application bearing OA No. 729/2001. The Tribunal by its order dated 29th July, 2003 allowed the OA of the respondent and set aside the dismissal of the respondent from the service by invoking Article 311 (2) (c) of the Constitution of India. The relevant portion of the Tribunal's decision is as follows:

57. In the above view of the matter, the OA succeeds and is accordingly allowed. The impugned order dated 23/24-1-2001 is quashed and set aside. The applicant is ordered to be reinstated immediately. This does not come in the way of the applicant being proceeded against in a duly constituted inquiry in terms of AIS (D&A) Rules, 1969. If the respondents deem it necessary to do so, they may initiate the proceedings accordingly. We also direct that the period between the date of his dismissal and his reinstatement be regularized by the competent authority in accordance with law and the outcome of the disciplinary proceedings, if the same are to be initiated. In view of the above directions, the interim relief granted against respondent No. 3, on the aspect of eviction of the applicant from the official quarter is made absolute and the applicant is permitted to continue in the quarter in the usual terms and conditions.

9. Pursuant to the directions of the Tribunal in OA no. 729/2001, the respondent contended that the petitioners were required to reinstate the respondent immediately, as well as pay the full arrears of pay and allowance from 23rd January, 2001, and also consider him for promotion to the grade of DGP w.e.f. 23rd March, 2002, the date on which his immediate junior Sh. Singarabal was promoted with all consequential benefits.

10. The petitioners instead issued the order dated 24th November, 2003, whereby the respondent was deemed to have been placed under suspension w.e.f. the date of the order of dismissal i.e. 23rd January, 2001. The said order of suspension was passed 6 days before the respondent was to attain the age of superannuation on 30th November, 2003.

11. The respondent, on attaining the age of superannuation, had also made a

representation dated 23rd March, 2004 by which he requested that he may be paid the arrears as per the direction of the Tribunal and all other retirement benefits due to him. However, no such payment were made by the petitioners except for the subsistence allowance paid to him for the period of 23rd January, 2001 to 30th November, 2003, which was intimated to the respondent by letter dated 12th October, 2004.

12. The respondent assailed the said order dated 24th November, 2003 by filing a contempt petition bearing C.P. No. 190/2004 before the Tribunal. During the pendency of the said C.P., the petitioners issued the order dated 3rd June, 2004 ordering that the respondent be paid subsistence allowance @ 50% of his pay last drawn for the first 3 months and @ 75% of his pay last drawn for the remaining period of his deemed suspension till his retirement on 30th November, 2003. The said order further directed that the respondent would be paid provisional pension and other retirement benefits on the said basis. The Tribunal by its decision dated 3rd September, 2004 held that it could not go into the legal validity of the orders dated 24th November, 2003 and 3rd June, 2004 in a Contempt Petition and, therefore, it disposed of the said contempt petition with the liberty to the respondent to challenge the said orders in substantive proceedings.

13. Therefore, the respondent approached the Tribunal by filing an original application, bearing OA No. 2754/2004, wherein the following prayers were made:

- (i) Call for the records of the case.
- (ii) Quash and set aside the impugned order dated 24-11-2003 and 03/06/2004 at Annexures A-1 and A-2 respectively.
- (iii) Direct the respondents to pay the full arrears of Pay and allowances from 23-01-2001 till 30-11-2003 to the applicant:
- (iv) Direct the respondents to promote the applicant as DGP w.e.f. 22-3-2002 when his immediate junior was promoted with all consequential benefits including arrears of pay and allowances"
- (v) Direct the respondents to pay all the retrial benefits including regular pension, Gratuity commutation of pension, TA, DA and lump sum grant for transfer of residence, provident fund, encashment of accumulated earned leave to the applicant wef 3011-2003 forthwith:
- (vi) Direct the respondent to pay interest @ 24 % per annum on the aforesaid amounts;
- (vii) Direct the respondents to give all consequential benefits to the applicant;
- (viii) Direct the respondents to pay the cost of litigation to the applicants;
- (ix) Pass any other order or direction which this Hon''ble Tribunal thinks fit and

proper in the facts and circumstances of the case.

14. In view of the directions given by the Tribunal in its order dated 29th July, 2003, in O.A. No. 729/2001, the petitioners initiated the disciplinary proceedings against the respondent under Rule 8 of the All India Services (D&A) Rules, 1969. The petitioners, therefore, issued a charge sheet dated 12th August, 2004 and also by order dated 6th January, 2005 appointed an Inquiry Officer and the Presenting Officer.

15. Against the said charge sheet and orders of appointing of the Inquiry Officer and the Presenting Officer, the respondent filed another original application, bearing OA No. 370/2005, on the grounds that the order dated 24th November, 2003 is illegal as deemed suspension could not be given effect to retrospectively; that the provisions of Rule 3(6) do not apply to the facts of the present case; that the order dated 3rd June, 2004 is also not sustainable as when the respondent superannuated on 30th November, 2003, no disciplinary proceedings were pending against him; that the petitioners are precluded from initiating disciplinary proceedings in relation to an alleged incident which had admittedly taken place in the year 1992, i.e. after an unexplained delay of nearly 12 years; that the respondent is entitled to be promoted to the grade of DGP w.e.f. 23rd March, 2002 as he wasn't considered in the year 2002, since he was dismissed at the time due to the dismissal order dated 23rd January, 2001 which was subsequently set aside, and in his place his immediate junior Sh. Singarabal was promoted.

16. The petitioners refuted the pleas and contentions raised by the respondent in his original application on the grounds that the Tribunal had set aside the order dated 23rd January, 2001 in O.A. No 729/2001 on merely technical grounds and not on merits. Reliance was also placed on Rule 3(6) of All India Service (Disciplinary & Appeal) Rules, 1969 (herein after referred to as "AIS(D&A) Rules, 1969") on the basis of which, as a consequence of the decision of the Tribunal, the disciplinary authority after carefully considering the circumstances of the case had decided to hold further inquiry against the respondent, on allegations on which the penalty of dismissal was originally imposed. It was also contended that as per Rule 3(6) of Rules 1969 deemed suspension was imposed on the respondent by the Central Government from the date of the original order of dismissal. It was further contended that disciplinary proceedings are deemed to have been initiated when the member of the Service is placed under suspension and as per the provisions of Rule 6(1)(a) of the All India Service (Death Cum Retirement Benefits) Rules, 1958 (herein after referred to as "AIS(DCRB) Rules, 1958") the same will have deemed to have continued under this rule even after the delinquent's retirement. The petitioners further contended that at the time of promoting the junior of the respondent, he was dismissed from the service, even though he was reinstated later on by Court's orders, after which he was placed under suspension by order dated 24th November, 2003. Therefore, it was contended that his promotion could be effected only after the disciplinary case

initiated against him would culminate.

17. The Tribunal considered two questions while considering the original applications filed by the respondent. Firstly, whether deemed suspension order could be passed by taking recourse to the provisions of Rule 3(6) of the AIS(D&A) Rules, 1969 and secondly, whether the charge memorandum initiating the departmental proceedings is legally sustainable in the eyes of the law. After careful consideration, OA no. 2754/2004 and OA no. 370/2005 were decided by the Tribunal by its common order dated 25th July, 2007, whereby the original applications of the respondent were allowed, and the charge sheet dated 24th November, 2003 and 12th August, 2004 were set aside and the petitioners were directed to promote the respondent, if found fit by the Selection Committee, in view of the promotion of his immediate junior, Sh. Singarabal on 22nd March, 2002. It was further directed that the respondent would be entitled to regularization of the period of service from the date of his dismissal till his reinstatement, with all consequential benefits.

18. The petitioners have challenged the order passed by the Principal Bench, Central Administrative Tribunal by invoking the writ jurisdiction of this Court contending, inter alia, that the Tribunal erred in comprehending the import of the ratio in the judgment of Mahender Singh Vs. Union of India (UOI) and Another, relied on by the Tribunal. According to the learned counsel for the petitioners, the judgment of Mahender Singh (supra) supports the plea taken by the petitioners in view of the fact that the respondent had been dismissed by order dated 23rd January, 2001, as a measure of penalty and subsequently, the respondent was deemed to be under suspension as per Rule 3(6) of the AIS(D&A) Rules 1969 from the order of dismissal.

19. According to the learned counsel for the respondents, as per Rule 6 of the AIS(DCRB) Rules, 1958, the disciplinary enquiry commences with the issuance of the suspension order, and in the present case, the respondent was deemed to have been under suspension w.e.f. the date of the order of penalty i.e. 23rd January, 2001. Thus, the disciplinary proceedings for the purpose of the aforementioned rules are deemed to have commenced against him from the said date. Also it is pointed out that the order dated 24th November, 2003 imposing the suspension on the respondent had been passed before the date of retirement of the respondent.

20. It is also contended that the Tribunal erred in concluding that the departmental proceedings had not been initiated against the respondent within four years of the alleged incident as per the requirements of Rule 6 of the AIS(DCRB) Rules, 1958, since, in fact, the proceedings had been initiated against the respondent in the year 1992 itself on 16th July, 1992 i.e. well within four months from the date of the misconduct on 23rd March, 1992 under Article 311(2)(c) of the Constitution of India.

21. The learned counsel for the petitioners also attempted to explain the delay in

issuing the charge sheet by contending that the same is attributable to the respondent himself, since he had filed the OA No. 1430/1993 before the Tribunal on 13th July, 1993 for seeking an injunction against the action proposed to be taken against him under Article 311(2)(b) of the Constitution of India. In any case, it is urged that delay in initiating disciplinary proceedings cannot be said to be always fatal or vitiate the same.

22. The pleas and contentions of the petitioners have been refuted by the respondent. He relied on the reasoning given by the Tribunal and by reiterating the pleas and contentions raised by him before the Tribunal.

23. This Court has heard both the parties and has also considered the documents appended to the writ petitions, as well as, the record placed before the Tribunal. This cannot be disputed that the alleged misconduct had taken place in the year 1992 and till year 2003, no suspension order or even an inquiry had been initiated against the respondent. The petitioners have contended that the reason for the delay in initiating the disciplinary inquiry against the respondent was the fact that action under Article 311(2) (c) of the Constitution of India had been initiated against the respondent, pursuant to which a dismissal order dated 23rd January, 2001 was passed. However, since the respondent had sought a stay against the action of the petitioners under Article 311(2)(c) by filing OA No. 1430/1993, delay had occasioned. Therefore, the learned counsel for the petitioners has contended that since the delay in the proceeding is attributable to the respondent, he cannot be allowed the benefit of the same.

24. However, perusal of the record reveals that in the OA No. 1430/1993 an interim stay was granted by the Tribunal on 9th September, 1993 only against the action sought to be taken under Article 311(2) of the Indian Constitution by the petitioners. However, there was no bar implied or express for initiating any disciplinary proceeding against the respondent. Moreover, when the petitioners had filed an SLP against the stay granted by the Tribunal the Supreme Court had dismissed the same by order dated 10th November, 1994 with the categorical observations that the petitioners were not precluded from initiating disciplinary proceedings as permissible under law against the respondent. The said order is reproduced as follows:

Delay Condoned.

No affidavit is filed as contemplated by the Court's order dated 5th August, 1994, inspite of two opportunities being given. The petitioner for special leave is dismissed.

It is made clear that the petitioners are not precluded from taking such disciplinary proceedings against the respondent as are permissible in law.

25. Thus, it is clear that interim order of stay was only against the dismissal of the respondent without initiating an appropriate inquiry. Thus despite the clarification given by the Supreme Court, the learned counsel for the petitioners

has failed to explain as to why no disciplinary proceedings were initiated against the respondent. It is only after a lapse of almost 10 years from the order of the Supreme Court that a charge sheet dated 12th August, 2004 was issued against the respondent, that too after his retirement on 30th November, 2003. This delay was also noted by the Tribunal in its order dated 29th July, 2003 in OA No. 729/2001. The relevant portion of the judgment is as follows:

f) Further, the proceedings have been initiated after nearly nine years without any fresh cause arising in the intervening period. According to the applicant, the incident which has led to the entire chain of action had taken place as far back as March, 1992, while the impugned order is of January, 2001. This delay was unreasonable. On the other hand, the respondents state that as the applicant was under the protective umbrella of judicial clearency, they had, in due deference to Tribunal's order, postponed the action till such time they were given the clear "go ahead" by the Delhi High Court. Their action could, therefore, not be challenged. The fact, however, is different. It is true that the applicant had, apprehending departmental action, moved this Tribunal in OA -1430/93, when an interim order was issued on 9.9.1993 directing the respondents "not to resort to any action under Article 311 (2) of the Constitution without initiating regular disciplinary action in accordance with law". The same was duly upheld by the Hon"ble Supreme Court on 10.11.1994 while dismissing the SLP but with the order that the "the petitioners are not precluded from taking such disciplinary proceedings against the respondent as are permissible under the law". This was also duly noted by the Tribunal on 15.5.1995, while directing the OA to be taken up for disposal in its turn. It was thus clear that the respondents have been given full liberty to deal with the applicant in accordance with law, i.e. in terms of AIS (D&A) Rules, 1969. The OA was finally dismissed on 13.8.1999 holding it to be premature on the basis of the averment of the learned counsel for the respondents that Govt. had not taken any decision, as in terms of the interim order dated 9.9.1993, they were precluded from taking any action. This was upheld by the High Court on 6.9.2000, whereunder permission o invoke Article 311 (2) also was granted. Hon"ble Apex Court approved this decision on 29.9.2000. The impugned order was issued on 23.1.2001. According to the respondents, nothing irregular has been committed by them and they were only waiting for the clearance from the Tribunal/High Court. The fact, however, remains that the respondents did not at all take any action to deal with the applicant in accordance with law, which in terms of the Hon"ble Apex Court's order dated 10.11.1994. They could have taken, as provided under law. The delay caused by the respondents was of no basis as the ultimate action was not taken on any fresh material but on the same facts of 1992 and that too after the applicant has been long repatriated to his parent cadre where he had also earned promotion as Addl. DGP. Obviously, the respondents had taken a decision to deal with the applicant under Article 311 (2) from the very beginning though they had denied it before the Court while contesting OA-1430/99. Only when the Delhi High Court permitted that Article 311 (2) can also be invoked, the respondents

acted. The applicant's averment that this delay was unjustified and motivated, is correct.

26. Thus, it is clear that the petitioners have failed to explain the delay of 12 years in initiating disciplinary proceedings against the respondent, when by their own admission they were well aware of the alleged incident and the alleged culpability of the respondent in the matter and especially when the Supreme Court by its order dated 10th November, 1994 had clarified that the petitioners were not precluded from proceeding against the respondent by initiating appropriate disciplinary proceedings. The petitioners have also failed to impute any delay being caused on account of the respondent or attributable to the respondent.

27. The learned counsel for the petitioners have further contended that in any case, the delay in initiating disciplinary proceedings cannot be fatal or vitiate the same on this sole ground. In catena of cases, the issue of delay in disciplinary cases has been dealt in detail by the Courts, some of which are as detailed hereinafter.

28. In the case of State of Andhra Pradesh Vs. N. Radhakishan, , the Supreme Court had held that whether a disciplinary proceeding is to be quashed on the ground of delay is to be determined according to the facts and circumstances of each case and that the essence of the matter is that the Court has to take into consideration all the relevant factors, to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The relevant portion of the judgment of the Supreme Court is as follows:

19. It is not possible to lay down any predetermined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the court has to take into consideration all the relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when the delay is abnormal and there is no explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether the delay has vitiated the disciplinary proceedings the court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer

entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take their course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the court is to balance these two diverse considerations.

29. Similarly, in *The State of Madhya Pradesh Vs. Bani Singh and another*, , at page 740 the subject matter of irregularities were allegedly taken place in 1975-77 and the Department was aware of the said irregularities. The investigations were allegedly going on since then. The Apex Court had held that it is unreasonable to think that the Department would have taken more than 12 years to initiate the disciplinary proceedings. In para 4 of the said judgment, the Supreme Court had observed as under:

4. The appeal against the order dated December 16, 1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned counsel. The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-77. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in April 1977 there was doubt about the involvement of the officer in the said irregularities and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case there are no grounds to interfere with the Tribunal's orders and accordingly we dismiss this appeal."

31. The principles regarding the consideration of memorandum of charge which have been issued after in ordinate delay can be summarized as under:

1. The competent authority should be able to give an explanation for the in ordinate delay in issuing the memorandum of charge;
2. The charge should be of such serious nature, the investigation which would take a long time and would have to be pursued secretly;
3. The nature of charges would be such as to a long time to detect such as embezzlement and fabrication of false records;
4. If the alleged misconduct is grave and a large number of documents and the statement of witnesses had to be looked into, delay can be considered to be valid;

5. The court has to consider the nature of charge, its complexity and on what account the delay has occurred;
6. How long a delay is too long always depends on the facts of the given case;
7. If the delay is likely to cause prejudice to the charged officer in defending himself, the enquiry has to be interdicted; and
8. The court should weigh the factors appearing for and against the disciplinary proceedings and a decision on the totality of circumstances. In other words, the court has to indulge in process of balancing.

31. In *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, the Supreme Court's Constitution Bench in paragraph 54 of the judgment had considered the propositions emerging from several decisions and observed that "ultimately, the court has to balance and weigh the several relevant factors - "balancing test" or "balancing process" - and determine in each case whether the right to speedy trial has been denied in a given case". It has also been held that, ordinarily speaking, where the Court comes to the conclusion that right to speedy trial of the accused has been infringed the charges or the conviction, as the case may be, will be quashed. At the same time, it has been observed that that is not the only course open to the court and that in a given case, the nature of the offence and other circumstances may be such that quashing of the proceedings may not be in the interest of justice. In such a case, it has been observed, it is open to the court to make such other appropriate order as it finds just and equitable in the circumstances of the case.

32. Similarly, in the case of *State of Punjab and Others Vs. Chaman Lal Goyal*, the delay was taken into consideration and the principles enunciated in the case of *A.R. Antulay (supra)* were reiterated and it was held that "it is trite to say that such disciplinary proceeding must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, mala fides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges. But how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted, Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances. In other words, the court has to indulge in a process of balancing.

33. In the matter of *Shri M.L. Tahiliani Vs. D.D.A.*, this Court had quashed the charge sheet which was issued 4 days before the retirement of the petitioner in regard to an alleged incident which had taken place 10 years back. The accused had joined the DDA in the post of Assistant Engineer in October 1969 and was

promoted to the post of an Executive Engineer on 1.12.1978. It was alleged that he was in charge of the Housing Division-XII, which was for the internal development at Avantika. The estimate cost of the works was Rs. 1,56,660/- and it was to be completed between 17.5.1983 and 16.7.1983. The work was, however, abandoned/rescinded and was subsequently executed at the risk and costs of the original Contractor. The Counter-Claim for Rs. 86,194/- was filed against the original Contractor but was rejected by the Arbitrator. The Memorandum of Charges was issued on 25.11.1985, to which the petitioner replied on 30th January 1986, i.e. within two months. However, no progress was made by the DDA for one full decade, but strangely another Memorandum was issued on 9.4.1996. This was again replied to by the petitioner on 30.8.1996 and was followed by Reminders dated 17.12.1996 and 8.9.1997. The impugned Charge-Sheet was issued on 22.10.1997, i.e. just four days prior to the petitioner's retirement. Except stating that the matter was being investigated, no explanation was given by the concerned authorities as to why it took the DDA eighteen long months to prepare a Charge-Sheet in a matter which had been lingering for ten long years. This Court had concluded that the only possible conclusion is that the inordinate delay in the inquiry deserves that it be quashed. This Court, in the facts and circumstances, had held as under:

15. A distillation of the plethora of precedents would yield the results that the Court must balance public interest against the rights of the individual. Neither should be scarified at the alter of the other. While public servants ought to be enduringly answerable for the manner in which they discharge their duties, they are not disentitled from claiming the protection of the tenets of natural justice. However this longer period of accountability attached to public office should not become a test of their endurance. The normal rule is that the initiation and the culmination of an enquiry should be diligently expeditious, since unexplained and/or unjustified delay would invalidate the exercise at its every stage. While "zero tolerance" would apply to trivial/minor misconduct, latitude would increase with the gravity of the offence. Protraction of proceedings, deliberate or derelictional, must be abjured. It is needless to explain that where the delay is caused by the delinquent, the Enquiry must be allowed to continue to its end. Once the alleged misconduct is detected the process must proceed with all reasonable dispatch. A late detection should not render the Enquiry irregular. Public interests would be served by a quick and speedy end to the Enquiry; it is not cynical to profess the view that Enquiries are deliberately stretched in order to protect the accused or to ensure that a pandora's box is not opened, revealing a larger conspiracy and accountability. Permitting inordinate delay runs counter to the common weal. Most often it is deliberately planned so that the truth does not surface. Enquiries usually commence with a defalcation becoming a public scandal, and delay directly results in its hushing up, since public memory is infamously short. If Courts stringently quash delayed enquiries the result would be their expeditious conclusion since otherwise the Department, which is already embarrassed by the scandal, would be rocked by failure to prove or disprove the charges. That the

protraction of proceedings may be a concerted effort of all concerned can be gathered from the needless reference of moot of the cases to the Central Vigilance Commission (CVC) even though the DDA has its own vigilance machinery. In condoning delay, the Court tends to allow uncomfortable truths to be swept under the carpet into obscurity. Where enquiries coincide with the promotional rights/chances of the officer charged with misconduct, the Judge must be alive to the likelihood of it being intentional and motivated, rather than coincidental and truthful. While deciding a writ petition challenging the legal propriety of continuance of Inquiry proceedings on the grounds of inordinate delay, the Court is not expected to assess the relative strengths of the prosecution's case and/or of the defense. That is essentially the function of the Inquiry. However, once substantial delay has transpired, what the Court must carefully examine is whether, even on a cursory perusal of the Charges, the case is worthy of continuance. This is primarily for the reason that where the departmental proceedings have become inordinately protracted the requirement of conducting a speedy trial has been violated but also that it would be fair to infer from the delay that the Enquiry was initiated and continued for some oblique motive. Charge-Sheets and Enquiry can never be permitted to be misused as tools for a witch-hunt or an inquisition, or a means to steal a march in promotions. Where progress to the next higher post is impeded because of the initiation of a Charge-Sheet or Enquiry, innocence must be zealously presumed until guilt stands established. This approach is definitely conducive for proper administration, including that of justice.

35. In the matter of DDA v. D.P. Bambah and Anr. LPA No. 39/1999, a Division Bench of this Court after taking note of the aforesaid decisions, summarized the legal position as under:

15. In our opinion the legal position, when an action is brought seeking quashing of a charge-sheet on grounds of issuance of the charge-sheet or grounds of inordinate delay in completion of the disciplinary inquiry may be crystallised as under:

(i) Unless the statutory rules prescribe a period of limitation for initiating disciplinary proceedings, there is no

period of limitation for initiating the disciplinary proceedings;

(ii) Since delay in initiating disciplinary proceedings or concluding the same are likely to cause prejudice to the charged employee, courts would be entitled to intervene and grant appropriate relief where an action is brought;

(iii) If bone fide and reasonable explanation for delay is brought on record by the disciplinary authority, in the absence of any special equity, the court would not intervene in the matter;

(iv) While considering these factors the court has to consider that speedy trial is a part of the facet of a fair procedure to which every delinquent is entitled to vis-

a-vis the handicaps which the department may be suffering in the initiation of the proceedings. Balancing all the factors, it has to be considered whether prejudice to the defence on account of delay is made out and the delay is fatal, in the sense, that the delinquent is unable to effectively defend himself on account of delay.

(v) In considering the factual matrix, the court would ordinarily lean against preventing trial of the delinquent who is facing grave charges on the mere ground of delay. Quashing would not be ordered solely because of lapse of time between the date of commission of the offence and the date of service of the charge-sheet unless, of course, the right of defence is found to be denied as a consequences of delay.

(vi) It is for the delinquent officer to show the prejudice caused or deprivation of fair trial because of the delay.

(vii) The sword of damocles cannot be allowed to be kept hanging over the head of an employee and every employee is entitled to claim that the disciplinary inquiry should be completed against him within a reasonable time. Speedy trial is undoubtedly a part of reasonableness in every disciplinary inquiry.

35. Thus, it is clear that delay when unjustified and unaccounted for may be a ground to vitiate the disciplinary proceedings. In the present facts and circumstances, it is clear that the learned counsel for the petitioners has failed to justify the delay of 12 years in issuing a charge sheet against the respondent. Before the Tribunal also, the petitioners had failed to disclose sufficient reason and explanation for undue delay in issuing charge sheet to the respondent. In the circumstances, the decision of the Tribunal in quashing the charge sheets on account of unexplained delay on the part of the petitioners cannot be faulted and there are no cogent grounds for this Court to interfere with the order of the Tribunal as the petitioners have failed to show any illegality, irregularity or perversity in the reasoning of the Tribunal in this regard.

36. It is also contended by the petitioners that there is no illegality in the order dated 24th November, 2003, by which the respondent was deemed to have been suspended from the date of the dismissal order dated 23rd January, 2001 by resorting to the provisions of Rule 3 of the AIS (D&A) Rules, 1969. This plea has been dealt with in detail by the Tribunal in its judgment.

37. The Tribunal considered Rule 3 of the AIS(D&A)Rules, 1969, and Rule 10 of the CCS (CCA) Rules, 1965 and observed that sub rule (1) of Rule 10 is totally distinct and different viz-a-viz sub rule (1) of Rule 3, since under Rule 10 (1) of the CCS (CCA) Rules 1965, there is no requirement of drawing up of charges before placing the delinquent under suspension, which is a condition precedent while invoking Rule 3(1) of the AIS(D&A) Rules, 1969. While on the other hand it was observed that as per the language used under Rule 3(6) of the AIS(D&A) Rules, 1969 viz-a-viz to Rule 10(4) of the CCS(CCA) Rules, 1965 it is identical and *pari-materia*. Thus, it was noted that there are four ingredients that need to

be satisfied for the application of Rule 3(6), which are (1) member of service is dismissed, removed, or compulsorily retired as a measure of penalty (2) such penalty is set aside or declared or rendered void by a decision of the Court of Law (3) it is decided to hold "further enquiry" against the member of service on the allegations on which the original order of penalty was imposed and (4) Court has passed an order purely on a "technical ground" without going into the merits of the case.

38. If these ingredients are satisfied, then the member of the service could be placed under deemed suspension by the Central Government from the date of the original order of dismissal, removal or compulsory retirement, and he/she shall continue to remain under suspension until further orders.

39. The Tribunal, therefore, carefully assessed the provisions of Article 311(2) of the Indian Constitution in order to ascertain if the order dated 29th July, 2003 was passed without going into the merits of the case, and thus whether it was passed purely on "technical grounds". The Tribunal after careful consideration concluded that the ingredients of Rule 3(6) had not been complied with so as to justify a deemed suspension. It was noted that on 23rd January, 2001 provisions of Article 311(2)(c) was invoked in order to dismiss the respondent, which ex-facie shows that the President was satisfied that in the interest of the security of the State it was not expedient to "hold such inquiry". While on the other hand, Rule 3(6) clearly prescribes that "deemed suspension" could be resorted to only when the disciplinary authority on consideration decides to hold "further inquiry". Thus, the Tribunal noted that when on an earlier occasion it was felt that it was not expedient to hold an inquiry, then the question of holding "further inquiry" could not arise.

40. The Tribunal also categorically noted that on perusing the order dated 29th July, 2003, it is clear that it was not passed on technical grounds but was, in fact, passed on merits. Therefore, Rule 3(6) could not be invoked and applied by the petitioners in case of the respondent. The Tribunal also relied on the judgment of State of Bihar and others Vs. Mohd. Idris Ansari, and concluded that since the suspension order could be passed or issued under the provisions of Rule 3(1) of the AIS (D&A) Rules, 1969 only when the articles of charges have been "drawn up", which condition was not satisfied in the case of the respondent before his retirement. Perusal of the suspension order dated 24th November, 2003 also reveals that it was not passed by taking recourse to the provisions of AIS(D&A) Rules, 1969, therefore, the retrospective deemed suspension could not be imposed on the respondent.

41. This Court does not find any illegality, irregularity or perversity in the reasoning of the Tribunal, nor the learned counsel for the petitioners have been able to impeach the reasoning of the Tribunal. It is clear that in order to apply Rule 3 of the AIS(D&A) Rules, 1969 and to direct deemed suspension, the condition precedent was the issuance of a charge sheet, which in the present facts and circumstances was not complied with prior to the respondent's

retirement. The charge sheet stipulating the allegations was issued against the respondent only on 12th August, 2004 after the respondent's retirement i.e. on 30th November, 2003, prior to which no inquiry was conducted against the respondent, nor any charge sheet was issued. Perusal of the Tribunal's judgment in OA No. 729/2001 clearly reveals that the action of the petitioners under Article 311 (2) (c) of the Constitution of India was set aside on merits and not only on technical grounds.

42. The Tribunal in its judgment dated 29th July, 2003 in O.A. No. 729/2001 had given detailed reasons and had observed that there was clear violation of the principles of natural justice in the SCOI proceedings, which is the basis for the allegations charged against the respondent, in which he was merely called upon as a witness. The Tribunal also noted the plea of the respondent that the alleged incident concerning the raid on the terrorists, was neither planned, nor ordered by the respondent but was, in fact, undertaken by one Sh. M. L. Purohit, Commandant of 116 Bn. BSF, on his own initiative and that the respondent was informed regarding the raid only subsequently. The Tribunal held that even though the respondent would be responsible for the actions of the juniors in the area where he was posted, however, since it is evident from the record that the Commandant or the DIG had not consulted with the respondent in the planning or the execution of the raid, and that the respondent had come to know of it only after the raid was completed successfully, therefore, the respondent's culpability, if any, is less than that of the Commandant or the DIG. The Tribunal also noted that the report of the SCOI regarding the allegations imputed against the respondent was not fully correct. The Tribunal further observed that the respondent was treated at a different footing in comparison to the DIG and Commandant, in that while in the case of the respondent the provisions of Article 311(2) (c) had been invoked, however, in the case of the others, Article 311(2) (b) had been applied, in spite of the fact that it was evident from the record that the respondent did not have more culpability in the matter than the DIG and the Commandant.

43. The Tribunal also carefully considered if the order dated 23rd January, 2001 dismissing the respondent by invoking Article 311 (2) (c) of the Indian Constitution was justified. The Tribunal observed that Article 311 (2) (c) is invoked in circumstances of expediency, or in cases involving the security of the state, when in view of the facts and circumstances of the case, it is considered impracticable to hold an inquiry. However, the Tribunal observed that in the present matter, there was no expediency, nor was there any issue of security. The matter was examined in detail by the SCOI and the findings of the same had become public and over a period of nine years nothing had taken place, nor had any fresh material brought on record, so as to imply a threat to the security, in order to justify resorting to Article 311 (2) (c) of the Constitution of India. The Tribunal also carefully analysed the law laid down by the Supreme Court in the judgments of *Union of India & Anr. v. Tulsiram Patel*, 1985 SCC (L&S) 672; *A.K. Kaul and another Vs. Union of India and another*, *Union of India & Anr. v. Balbir*

Singh & Anr. JT 1998(3) SC 695; S.R. Bommai and others Vs. Union of India and others etc. etc., and the OM dated 26th July, 1980 which lays down the procedure for dealing with the cases of the Government servant engaged in or associated with subversive activities in so far as the applicability of proviso to Article 311 (2) is concerned and ultimately held that the order of dismissal dated 23rd January, 2001 was not sustainable in law. The relevant portion of the Tribunal's reasoning is as follows:

42. Having regard to the aforesaid, we observe that initially the SCOI held by the BSF where applicant was on deputation, found the applicant to be guilty of lapses of supervision, command and control. This proceeding has been carried out as per the BSF Rules during the course of which of it several witnesses mostly BSF officers have been examined and explanations have been sought from the concerned. The applicant was one of the witnesses. On the basis of the findings of the SCOI, a proposal was drawn up to invoke against the applicant proviso to Article 311 (2) (c) of the Constitution in the interest of the security of the State. The move was stayed by the Tribunal and the Hon''ble Supreme Court but with the directions that the respondents are free to take action against the applicant in accordance with law. However, only on much later date, after the OA was dismissed as pre-mature and liberty was granted to the respondents by the Hon''ble High Court, it was felt needed to hold a meeting of the Committee of the Advisers.

43. OM No.34012/1(5)/79-Estt.(B0 dated 26.7.1980 lays down procedure for dealing with the cases of Government servant engaged in or associated with subversive activities in so far as applicability of proviso to Article 311 (2) is concerned. As per this OM on receipt of the information regarding subversive activities a Committee of Advisers is constituted and to first decide (i) whether the allegations made against the suspect or any of them should be disclosed to the suspect and he should be given an opportunity to furnish his information; or (ii) whether on grounds of national security or the nature of allegations made against the suspect, it is not advisable or necessary to disclose the allegations against the suspect or to call upon his reply thereto. Thereupon, after consideration recommendations of Committee of Advisers is to be forwarded to the President.

44. As per the guidelines cases of government servant engaged in subversive activities are re-classified in clause (b) (3) with reference to the activities prejudicial to the interest of sovereignty and integrity of India.

45. It is also not disputed that in pursuance of SCOI not only applicant but other officers including DIG Ashok Kumar has been indicted and course of action was suggested. Accordingly, Ashok Kumar who was terminated resorting to Section 20 of the B.S.F. Act. However, the orders been set aside by the Division Bench of Jammu & Kashmir High Court on 21.4.1999, against which SLP preferred before the Apex Court is still sub judice. In the meanwhile, directions have been issued by the Hon''ble Apex Court not to terminate the services of the concerned officer

without further orders. He is thus continuing service all these while.

46. As per the decision of the Apex Court, in cases where dismissal has been resorted to under Article 311 (2) (c) judicial review of this Tribunal is not barred. However, the same is limited to the examination as to whether the satisfaction of the President arrived at is not vitiated on extraneous or irrelevant considerations and whether it is mala fide or not. It is also to be examined whether the satisfaction is based on circumstances which have a bearing on the security of the State. In a judicial review even if the material found is irrelevant and the relevant material sustain the action cannot be challenged. Truth or correctness of the material or its adequacy by substituting opinion for the President is also precluded. This cannot be questioned in arriving at a conclusion. The Court is precluded from lightly presuming misuse of the power.

47. Having regard to the aforesaid we find that when the matter has been referred to the Advisory Committee on second time there has been total non-application of mind to the relevant consideration as envisaged in OM of 1980 *ibid*. The earlier decision of the Committee which met on 16.7.1993 has only been re-iterated and adopted. As mandated upon, the Committee was to examine whether the nature of allegations be disclosed to the suspect. Grant of reasonable opportunity, which is a right of government servant before his services are dispensed with is in-built in a situation where protection to the employees granted in Article 311 (2) is sought to be curtailed. Constitution of India protects those rights subject to the just exceptions out of which Article 311 (2) (c) is one. A reasonable opportunity to defend could be dispensed with if the disclosure of material alleged against the suspect would not be in the interest of the security of the State. Enquiry cannot be avoided in a weak case or material not sufficient to prove the charges. The constitutional provisions cannot be bypassed and short-cuts cannot be permitted which would interfere with the rights of the individual on the alleged grounds of just exceptions. In our considered view and from the perusal of material in support of the satisfaction arrived at placed before us, we find that the relevant material on the basis of which applicant has been indicted in SCOI had already been made public. The witnesses have been examined to arrive at the findings about the lapses of supervision, command and control on the post of the applicant t. the security of the State was not at all disturbed or affected from its disclosure, yet the same material has been avoided and not taken into consideration, which showed total lack of application of mind, while recommending course of action against applicant.

48. The relevant consideration as to gaps in the evidence also shows mala fides to avoid holding of inquiry against applicant.

49. A national interest can never be adversely affected in case of holding of a disciplinary proceeding but it is the security of the State which matters. From the perusal of the SCOI conducted by the BSF it transpires that the outcome of the allegations, in the opinion of the inquiry officer then or now being treated as

hazardous to the security of the State. It is after 9 years, at the remote point of time when disclosure of the material in SCOI has no effect at all over the security of the State, resort to Article 311 (2) (c) has been taken.

50. Any action of the Government has to pass through the cardinal test of fairness in action and deprivation of rights of the parties. The fact that a few officers have been punished is not a relevant consideration to deny the applicant permission to avail himself of his right to know the allegations against him and to effectively defend it. Arbitrariness in any action can never be upheld. The duty to act fairly is inbuilt. Though no satisfaction arrived at is based on the circumstances which do not even have an iota of an affect on the security of the State.

44. From the above, it is thus clear that the dismissal order was not set aside on merely technical grounds, but was, in fact, set aside on merits, and since the petitioners had not challenged the Tribunal's judgment dated 29th July, 2003, the same has attained finality. Therefore, in the facts and circumstances, since the charge sheet was issued against the respondent under the provisions of AIS(D&A) Rules, 1969 as required under Rule 3(1) and the dismissal order dated 23rd January, 2001 had been set aside on merits and not only on technical grounds, it is clear that the provisions of Rule 3 of the AIS (D&A) Rules, 1969 could not be applied in the present facts and circumstances, and thus the Tribunal's decision to set aside the order of suspension dated 24th November, 2003 cannot be faulted.

45. With regard to the memorandum dated 12th August, 2004, the learned counsel for the petitioners has urged that it ought not to have been set aside by the Tribunal in view of the provisions of Rule 6 of the AIS(DCRB) Rules, 1958 which clearly lays down that when disciplinary proceedings are initiated prior to the retirement of the charged officer, it will have deemed to have continued even after the delinquent's retirement.

46. The Tribunal dealt with this plea as well, and analysed Rule 6 of the AIS(DCRB) Rules, 1958 and Rule 43 (b) of the Bihar Pension Rules and observed that the provisions of the said rules are *pari-materia*. It was also held that the memorandum dated 12th August, 2004 could not be covered under the explanation to Rule 6 (1) of the AIS (DCRB) Rules, 1958 and that framing of the charges, relating to events more than four years old at the time of initiation of proceedings, was illegal, impermissible, unjustified & beyond the time-limit prescribed under proviso (b) to Rule 6 (1) of the 1958 Rules. Thus, it was held that neither of the orders dated 24th November, 2003 and 12th August, 2004 are sustainable in law.

47. This Court does not find any illegality, irregularity or any perversity in the reasoning of the Tribunal. Careful consideration of Rule 6 of the AIS (DCRB) Rules, 1958 clearly reveals that as per clause (b) of Rule 6, in cases where departmental proceedings, if not instituted while the pensioner was in service,

whether before his retirement or during his re-employment, shall not be instituted save with the sanction of the Central Government; and it shall be in respect of an event which took place not more than four years before the institution of such proceeding. However, in the present case, it is clear that the alleged incident had taken place in the year 1992 while the charge sheet was issued against the respondent after a lapse of almost 12 years in the year 2004 after his retirement. Thus clearly the provision of Rule 6 of the AIS (DCRB) Rules, 1958 cannot apply. The learned counsel for the petitioners has contended that the since the suspension order was issued against the respondent before his retirement on 24th November, 2003 w.e.f. 23rd January, 2001 and also since the proceedings under Article 311(2) (c) had been initiated in the year 1992 itself the same has to be deemed to have continued even after the respondent's retirement. However, as detailed hereinbefore it is clear that retrospective application of the suspension order dated 24th November, 2003 is not possible and no proceedings were initiated under Article 311 (2) (c), which was the very purpose of invoking the said provision. Thus, it cannot be held that the disciplinary proceedings against the respondent had been initiated prior to his retirement. As per the record, it is also evident that the charge sheet was issued on 12th August, 2004 against the respondent only after his retirement and thus merely since the suspension order dated 24th November, 2003 was issued against the respondent 6 days prior to his retirement on 30th November, 2003, it cannot be inferred that disciplinary proceedings had been initiated against the respondent before his retirement and that the same would continue even after his retirement as per Rule 6. As discussed above, there is no cogent reason given by the learned counsel for the petitioners to have not initiated the disciplinary proceedings against the respondent, for almost 12 years.

48. In the facts and circumstances, in view of the unjustified delay in initiating the disciplinary proceedings, the issuance of the suspension order dated 24th November, 2003 only 6 days prior to the respondent's retirement and the issuance of the charge sheet dated 12th August, 2004 only after the retirement of the respondent, the judgment of the Tribunal quashing the charge sheets and directing the petitioners to promote him in case his case is recommended by the selection committee with all consequential benefits, cannot be faulted as the learned counsel for the petitioners has failed to show any illegality, perversity or irrationality in the order of the Tribunal. In the totality of the facts and circumstances and for the foregoing reasons, there are no grounds for this Court to interfere with the order and directions of the Tribunal and there are no ground to invoke the jurisdiction by this Court under Article 226 of the Constitution of India against the order and directions of the Tribunal. The writ petitions, in the facts and circumstances, are without any merit and they are, therefore, dismissed. The petitioners shall also be liable to pay a costs of Rs.30,000/- to the respondent. Costs be paid within four weeks.