

(2017) 05 DEL CK 0222

In the Delhi High Court

Case No : Civil Writ Petition No. 7649 Of 2015, 215 Of 2016

Union Of India & Anr

APPELLANT

Vs

Sunny Abraham

RESPONDENT

Date of Decision : 28-05-2017

Acts Referred:

Central Civil Services (Classification Control And Appeal), Rules, 1965 — Rule 14, 14(2), 14(3), 15
Central Administrative Tribunal (Procedure) Rules, 1987 — Rule 24
Central Civil Services (Conduct) Rules, 1964 — Rule 3(1)(a), 3(1)(c)
Income Tax Act, 1961 — Section 133(A)
Uttar Pradesh Sugarcane (Purchase Tax) Act, 1961 — Section 3A, 3A(1)

Citation : (2017) 05 DEL CK 0222

Hon'ble Judges : Sanjiv Khanna, J;Chander Shekhar, J

Bench : Division Bench

Advocate : Madhurima Tatia, Shanker Raju, Nilansh Gaur, Puneet Jain, Christi Jain

Final Decision : Allowed

Judgement

Sanjiv Khanna, J

1. In view of similarity of the issue raised, these writ petitions are being disposed of by this common judgment. However, we would be noticing the facts separately.
2. The issue raised in these writ petitions relate to the effect and the impact of the decision of the Supreme Court in Union of India and Ors. Vs. B.V. Gopinath, 2014 (1) SCC 351. In the said decision the Supreme Court had examined Rule 14 (2) and Rule 14(3) of the Central Civil Services (Classification Control and Appeal), Rules 1965 (Rules, for short) and has held that Rule 14(3) enjoins the disciplinary authority to draw or cause to be drawn up the substance of imputations of misconduct or misbehavior into definite and distinct article of charges. The expression "cause to be drawn up" does not mean that definite and distinct articles of charge once drawn up do not have to be approved by the disciplinary

authority. The proposed articles of charge once drawn up must only be finalized by approval of the disciplinary authority. This is notwithstanding that initiation of disciplinary proceedings was after necessary approval of the disciplinary authority in terms of Rule 14(2). We would be subsequently examining the exact ratio and effect of the judgment in B.V. Gopinath (*supra*). We begin by referring to the relevant facts.

SUNNY ABRAHAM

3. Sunny Abraham, respondent in WP(C)No.7649/2015, was appointed as an Income-tax Officer on 30th December, 1980 and had earned promotions to the post of Inspector and Assistant Commissioner in the year 1991 and 2001, respectively.

4. On 19th September, 2002, disciplinary proceedings were initiated against Sunny Abraham with the approval of the disciplinary authority. The disciplinary authority in the present case was the Finance Minister, who while granting approval had examined the detail note with full particulars of the imputations.

5. Thereafter, charge memorandum dated 18th November, 2002 was issued and served on Sunny Abraham. This charge memorandum was not specifically approved by the disciplinary authority i.e. the Finance Minister.

6. Enquiry officer appointed, submitted his report on 13th July, 2007. Central Vigilance Commission (CVC, for short) has concurred with the finding of the enquiry officer vide letter/memorandum dated 23rd December, 2009. The respondent, Sunny Abraham was thereafter served with the enquiry report and the opinion of the CVC.

7. Sunny Abraham had filed OA No.228/2010 before the Ahmedabad Bench of the Central Administrative Tribunal (Tribunal, for short) challenging the enquiry report which petition was dismissed vide order dated 30th June, 2011, holding that there was no illegality or infirmity in the enquiry proceedings.

8. The respondent, Sunny Abraham thereafter filed OA No.344/2012 before the Principal Bench of the Tribunal, New Delhi for quashing of the chargesheet on the ground that the same was never approved by the Finance Minister. The OA was disposed of with the direction that Sunny Abraham would raise this objection or point before the disciplinary authority and in the case of an adverse order, he could approach the Tribunal again.

9. Sunny Abraham filed another OA No.1407/2012 before the Principal Bench of the Tribunal which was disposed of vide order dated 30th April, 2012, with the direction to the authorities to make sincere efforts to dispose of the pending enquiry within three months.

10. By letter/order dated 13th June, 2012, the representation of the petitioner that the charge-sheet was invalid and bad in law as it was not approved by the Finance Minister was rejected on the ground that the SLP against the decision in

B.V. Gopinath (Supra) was pending before the Supreme Court.

11. Sunny Abraham then filed another OA No.2286/2012 before the Principal Bench of the Tribunal which was disposed of as withdrawn vide order dated 17th December, 2012. In the meanwhile, the representation made by the petitioner against the enquiry report and the opinion of the CVC were rejected and the matter was referred to the Union Public Service Commission for statutory advice.

12. Aggrieved, Sunny Abraham filed MA No.1135/2013 in OA NO.2286/2012 under Rule 24 of the CAT (Procedure) Rule 1987 for execution, which was rejected vide order dated 28th October, 2013 as the authorities had dismissed the representation of Sunny Abraham on 24th December, 2012. In the meanwhile, the Supreme Court pronounced the judgment in the case of B.V. Gopinath (Supra) on 5th September, 2013. The appeal filed by the Union of India was dismissed. In view of the decision in the case of B.V. Gopinath (Supra), the matter was placed before the disciplinary authority i.e. the Finance Minister, who then accorded approval to the charge memorandum dated 18th November, 2002 on 8th January, 2014 after examining the facts and circumstances of the case.

13. Sunny Abraham then filed C.P. No.571/2013 in MA.No. 1135/2013 in OA No.2286/2012. By office Memorandum dated 23rd January, 2014 Sunny Abraham was informed that the charge memorandum dated 18th November, 2002 has been duly approved by the disciplinary authority and the disciplinary proceedings would continue from the stage where the proceedings stood before the charge memorandum dated 18th November, 2002 was formally approved. The contempt proceedings were closed vide order dated 6th March, 2014.

14. Thereupon Sunny Abraham filed OA No.1157/2014 before the Principal bench of the Tribunal which has been allowed by the impugned order dated 20th April, 2015. The Tribunal has quashed the office memorandum dated 23rd January, 2014 observing that the disciplinary authority had approved the charge memo dated 18th November, 2002 only on 8th January, 2014; and the approval could not have been granted ex-post facto i.e. the approval could not have been granted on 8th January, 2014 to the charge-sheet memorandum dated 18th November, 2002. The Tribunal has also directed the petitioner to open the sealed cover and grant or accord promotions to Sunny Abraham to the post of Deputy Commissioner of Income-tax and Joint Commissioner of Income-tax w.e.f. 19th September, 2006 and 30th March, 2011 respectively, and consequential benefits should also be given. However, liberty has been granted to the petitioner to issue a fresh memorandum of charge under Rule 14 of the Rules, as per law.

PAWAN VED

15. Pavan Ved had joined as Income-tax Officer on 31st December, 1981 and was promoted as Deputy Commissioner of Income-tax on 28th January, 1990. He was served with the charge memorandum dated 13th September, 2002. Enquiry officer appointed, vide report dated 19th March, 2004 held that the charges were not proved. However, the disciplinary authority did not agree and

the disagreement note dated 6th June, 2005 was issued. Pavan Ved thereafter submitted his reply on 20th July, 2005. After about 8 years the disciplinary authority sought advice from the Union Public Service Commission vide letter dated 15th January, 2013. Union Public Service Commission vide advice dated 17th June, 2013 suggested that interest of justice would be met by imposing a penalty of compulsory retirement from service and further to forfeit the admissible amount of gratuity. The disciplinary authority vide communication dated 12th July, 2013 sought comments from Pavan Ved. This communication had made reference to the Commission's advice dated 17th June, 2013.

16. At that stage, Pavan Ved, filed OA No.4476/2013 on the ground that the decision to initiate departmental proceedings against him was arbitrary, and charge-memo was vague and not supported by the documentary evidence. However, the primary plea was that the charge memo was not approved by the disciplinary authority before its issuance, and therefore, the disciplinary proceedings stand vitiated. In the meanwhile, Pavan Ved retired on attaining the age of superannuation on 31st August, 2013.

17. The Tribunal by the impugned order dated 22nd May, 2015 has allowed the OA No.4476/2013 filed by Pavan Ved relying upon their decision in Sunny Abraham (Supra) and after making reference to B.V. Gopinath (Supra). The Tribunal noticed that the charge memo was dated 13th September, 2002, whereas the ex-post facto approval was granted by the disciplinary authority i.e. the Finance Minister on 26th December, 2013 after more than 11 years from the date of issuance of the charge memo. We shall refer to other facets examined by the tribunal in the impugned order in this case subsequently.

LEGAL PROVISIONS

18. The relevant portions of Rule 14(2) and 14(3) of the CCA Rules read as under:

"14. PROCEDURE FOR IMPOSING MAJOR PENALTIES:

(2) Whenever the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a Government servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof.

(3) Where it is proposed to hold an inquiry against a Government servant under this rule and rule 15, the disciplinary authority shall draw up or cause to be drawn up-

(i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge;

(ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain-

(a) a statement of all relevant facts including any admission or confession made by the Government servant;

(b) a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained."

19. Rule 2 states that wherever disciplinary authority is of the opinion that there are grounds for enquiring into the truth of any imputation of misconduct or misbehavior against a government servant, it may enquire into, or appoint under this rule or under the provisions of Public Servants (Inquiries) Act, 1850 an authority to enquire into the truth. Sub-rule 3 states where it is proposed to have any enquiry under Rule 14 and 15, the disciplinary authority shall draw or cause to be drawn substance of imputation of conduct or misconduct into definite and distinct articles of charge. Clause (ii) refers to what the statement of misconduct or behaviour should contain, i.e. the statement of relevant facts and list of documents and witnesses.

DECISION IN B.V. GOPINATH (SUPRA), CONSEQUENCES, AND ITS APPLICATION TO THE PRESENT CASE

20. In B.V. Gopinath (Supra,) an Indian Revenue Service Officer was charge-sheeted and disciplinary proceedings were initiated in terms of Rule 14. It was noticed that the Finance Minister was the competent authority and he had to decide whether or not departmental proceedings were to be initiated and thereupon charge memo was to be issued. Referring to Article 311 (1) and (2) it was observed that no civil servant could be removed by an authority subordinate to them by which he was appointed. Moreover, the punishment of dismissal/removal or reduction in rank could only be imposed on the government servant once charges against him were proved in a departmental enquiry held in accordance with the principles of natural justice. This principle or rule against delegation was referred to as a principle recognized and accepted under the Administrative Law and in several court decisions. The contention that approval of the Finance Minister for initiation of the departmental proceedings would include approval of the charge memo, was rejected. At the initiation stage, the Finance Minister only takes a decision in principle as to whether the departmental proceedings ought to be initiated or not. The second stage would be when the charge memo was to put up for approval before the Finance Minister. It was accordingly held as under:

"51. Ms. Indira Jaising also submitted that the purpose behind Article 311, Rule 14 and also the Office Order of 2005 is to ensure that only an authority that is not subordinate to the appointing authority takes disciplinary action and that rules of natural justice are complied with. According to the learned Addl. Solicitor General, the respondent is not claiming that rules of natural justice have been violated as the charge memo was not approved by the disciplinary authority. Therefore, according to the Addl. Solicitor General, the CAT as well as the High Court erred in quashing the charge sheet as no prejudice has been caused to the

respondent.

52. In our opinion, the submission of the learned Addl. Solicitor General is not factually correct. The primary submission of the respondent was that the charge sheet not having been issued by the disciplinary authority is without authority of law and, therefore, non est in the eye of law. This plea of the respondent has been accepted by the CAT as also by the High Court. The action has been taken against the respondent in Rule 14(3) of the CCS(CCA) Rules which enjoins the disciplinary authority to draw up or cause to be drawn up the substance of imputation of misconduct or misbehaviour into definite and distinct articles of charges. The term "cause to be drawn up" does not mean that the definite and distinct articles of charges once drawn up do not have to be approved by the disciplinary authority. The term "cause to be drawn up" merely refers to a delegation by the disciplinary authority to a subordinate authority to perform the task of drawing up substance of proposed "definite and distinct articles of charge sheet". These proposed articles of charge would only be finalized upon approval by the disciplinary authority.

..... "

21. Paragraph 52 as afore-quoted upholds the findings of the Tribunal and the High Court quashing the charge-sheet. The contention that no prejudice has been caused was rejected as factually incorrect. It was observed that as the charge-sheet was not issued by the disciplinary authority, it was without authority of law and, therefore, non est in the eyes of law. The requirement of Sub-rule 3 to Rule 14 was that the disciplinary authority must draw up or cause to be drawn up the substance of imputation of misconduct or misbehavior, albeit there was a requirement of approval of the charge-sheet or articles of charge to be taken from the disciplinary authority. The charges may be drawn up by the authority to whom power has been delegated but the proposed articles of charge must be finalized upon approval of the disciplinary authority. The decision in the case of P.V.Srinivasa Sastry & Ors. Vs. Comptroller and Auditor General & Ors 1993 (1) SC 419 was distinguished on the ground that the said decision leaves it open to the Union of India or State Government to make any rule prescribing that disciplinary proceedings against a delinquent officer shall be initiated by the officer not subordinate to the appointing authority. The decision P.V. Srinivasa Sastry (Supra) was distinguished in the following words:

"52 ... Undoubtedly, this Court in the case of P.V.Srinivasa Sastry & Ors. Vs. Comptroller and Auditor General & Ors.1993 (1) SCC 419 has held that Article 311(1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, at the same time it is pointed out that "However, it is open to Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority." It is further held that "Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or

protection to the holders of a civil post."

53. Further, it appears that during the pendency of these proceedings, the appellants have, after 2009, amended the procedure which provides that the charge memo shall be issued only after the approval is granted by the Finance Minister.

54. Therefore, it appears that the appeals in these matters were filed and pursued for an authoritative resolution of the legal issues raised herein."

Paragraph 53 quoted above records that during the pendency of the appeal before the Supreme Court the respondents had issued an amended procedure which provides that the charge memo shall only be issued after the approval is granted by the Finance Minister.

22. Strictly speaking the Supreme Court in B.V. Gopinath (Supra) has not directly examined the question and issue raised in these writ petitions wherein ex post facto approval was granted during the pendency of the disciplinary proceedings. It is in this context that we would refer to the two decisions of the Supreme Court in Ashok Kumar Das & Ors. Vs. University of Burdwan & Ors,. (2010) 3 SCC 616 and Bajaj Hindustan Limited versus State of Uttar Pradesh and Others, (2016) 12 SCC 613 and also refer to different paragraphs of the judgment in B.V. Gopinath (Supra). We would quote from the note prepared for grant of approval for initiation of the departmental proceedings in the two different cases to expound the legal position in the factual matrix of the two cases.

23. The question raised before us is whether the ex-post facto approval granted by the Finance Minister to validate the charge-sheet was valid, even if the said permission was not taken at the initial stage when the charge-sheet was issued. The stand of the officers facing departmental enquiry is primarily predicated on the language and the words used by the Supreme Court in paragraph 52, which is to the effect that the charge-sheet which has been issued without the authority, is non est in law. The contention of the Union of India, on the other hand, is that Rule 14(3) does not prescribe or hold that there should be a prior approval. Reference is made to Ashok Kumar Das (Supra), wherein it has been held as under:

"11. In Black's Law Dictionary (Fifth Edition), the word "approval" has been explained thus:

"Approval. - The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another."

Hence, approval to an act or decision can also be subsequent to the act or decision.

12. In U. P. Avas Evam Vikas Parishad 1995 Supp. (3) SCC 456, this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:

"6. This Court in *Life Insurance Corpn. of India v. Escorts Ltd.* [(1986) 1 SCC 264], considering the distinction between "special permission" and "general permission", "previous approval" or "prior approval" in para 63 held that:

"63...we are conscious that the word 'prior' or 'previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act."

Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in *Lord Krishna Textiles Mills Ltd. v. Workmen* [AIR 1961 SC 860], that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

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15. The words used in Section 21 (xiii) are not "with the permission of the State Government" nor "with the prior approval of the State Government", but "with the approval of the State Government". If the words used were "with the permission of the State Government", then without the permission of the State Government the Executive Council of the University could not determine the terms and conditions of service of non-teaching staff. Similarly, if the words used were "with the prior approval of the State Government", the Executive Council of the University could not determine the terms and conditions of service of the non-teaching staff without first obtaining the approval of the State Government. But since the words used are "with the approval of the State Government", the Executive Council of the University could determine the terms and conditions of service of the non-teaching staff and obtain the approval of the State Government subsequently and in case the State Government did not grant approval subsequently, any action taken on the basis of the decision of the Executive Council of the University would be invalid and not otherwise."

24. In the said case, the issue had arisen as the resolution of the Executive Council dated 26th June, 1995 was approved by the State Government on 10th October, 2002. The contention was that resolution dated 26th June, 1995 would not apply to any promotions made prior to the said date because, under the statute, the Executive Council could determine the terms and conditions of service of non-teaching staff with the approval of the State Government and not otherwise. It is apparent the said contention was rejected by drawing distinction between the expression "approval" and "prior approval". Distinction was also drawn between "approval" and "permission" for in the latter prior approval or permission is required. It was held where approval was required, and the action holds good and only if it is disapproved, it loses its force. When the permission

was required, it does not become effective till permission was obtained.

25. Ashok Kumar Das (supra) was followed and applied in Bajaj Hindustan Limited (Supra). This case related to penalty under Section 3A of the U.P. Sugarcane (Purchase Tax) Act, 1961 as the sugar had been stored in the godown or space without prior approval of the assessing authority. The approval was granted ex-post facto. It was held as under:-

"7. As is clear from the above, the dictionary meaning of the word "approval" includes ratifying of the action, ratification obviously can be given ex post facto approval. Another aspect which is highlighted is a difference between approval and permission by the assessing authority that in the case of approval, the action holds until it is disapproved while in other case until permission is obtained. In the instant case, the action was approved by the assessing authority. The Court also pointed out that if in those cases where prior approval is required, expression "prior" has to be in the particular provision. In the proviso to sub-section (1) of Section 3-A word "prior" is conspicuous. For all these reasons, it was not a case for levying any penalty upon the appellant. We, therefore, allow this appeal and set aside the impugned judgment [Bajaj Hindustan Ltd. v. State of U.P., Misc. Single No. 3088 of 1999, order dated 30-9-2004 (All)] of the High Court as well as the penalty. No order as to costs."

26. However, question would arise whether this ratio would be applicable for as per the respondents as in B.V. Gopinath (supra), the Supreme Court has used the term "non est". The expression non est can be used as non est inventus or non est factum, which means a denial of the execution of an instruction sued upon. Non est inventus is a Latin phrase which means "he is not found". [See Black's Dictionary 8th Edition at page 1079-1980]. Indeed it could be argued that the use of the expression would indicate that the chargesheet was illegal and void for want of approval.

27. Lest there be any confusion, and as the contention requires deeper analysis and consideration, we would reproduce paragraph 55 in B.V. Gopinath (supra) in entirety:-

"55. Although number of collateral issues had been raised by the learned counsel for the appellants as well the respondents, we deem it appropriate not to opine on the same in view of the conclusion that the charge-sheet/charge memo having not been approved by the disciplinary authority was non est in the eye of the law."

We would also refer to paragraph 26 of the same decision, which again for the purpose of convenience, is reproduced below:-

"26. Mr Patwalia countered the submission of the learned Additional Solicitor General that it will not be in the interest of good administration to drop the inquiries which are already going on if the charge-sheets issued in such inquiries are required to be approved by the Finance Minister. In this context, it was

submitted that such a contention has already been rejected by this Court in *Coal India Ltd. v. Saroj Kumar Mishra* [(2007) 9 SCC 625 : (2008) 2 SCC (L&S) 321] . Our attention was also drawn to the following excerpt from the said case: (SCC p. 632, para 19)

"19. The floodgate argument also does not appeal to us. The same appears to be an argument of desperation. Only because there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away. This Court is bound to determine the respective rights of the parties."

Thus, it was submitted that the civil appeals are required to be dismissed."

28. Paragraph 55 states that the number of collateral issues had arisen, but they have not been decided in view of the conclusion that the charge memo having not been approved by the Disciplinary Authority was non est in the eyes of law. The Supreme Court affirmed the submission of the delinquent employees as recorded in paragraph 52, quoted in paragraphs 20 and 21 above. We perceive and believe that the reason was that in the said cases the Disciplinary Authority had not granted approval at any stage during the pendency of the disciplinary proceedings. It is in this context we have to refer to paragraph 26, which records the submission on behalf of the counsel for the chargesheeted employee. The submission made on behalf of the Government was that it would not be in the interest of good administration to drop inquiries, which were already going on if the charge sheet issued were required to be approved by the Finance Ministry. Thus, the Government had urged and argued that disciplinary proceeding should not be dropped for want of approval of the Finance Minister, the disciplinary authority. In *B.V. Gopinath* (supra) reference was also made to the changed stand and the position adopted by the Government, who had amended the procedure with the stipulation that the charge memo shall be issued after approval was granted by the Finance Minister. [See paragraphs 53 and 54 in *B.V. Gopinath* (supra)]. On the question whether the initial approval for initiation of departmental proceedings was sufficient in the said case, the Supreme Court observed:

"50. In our opinion, the Central Administrative Tribunal as well as the High Court has correctly interpreted the provisions of Office Order No. 205 of 2005. Factually also, a perusal of the record would show that the file was put up to the Finance Minister by the Director General of Income Tax (Vigilance) seeking the approval of the Finance Minister for sanctioning prosecution against one officer and for initiation of major penalty proceeding under Rules 3(1)(a) and 3(1)(c) of the Central Civil Services (Conduct) Rules against the officers mentioned in the note which included the respondent herein. Ultimately, it appears that the charge memo was not put up for approval by the Finance Minister. Therefore, it would not be possible to accept the submission of Ms Indira Jaising that the approval granted by the Finance Minister for initiation of departmental proceedings would also amount to approval of the charge memo."

29. Before we elucidate and dwell any further, we would like to refer to another judgment of the Supreme Court. In *Secretary, Ministry of Defence and Others versus Prabhash Chandra Mirdha*, (2012) 11 SCC 565, it was observed that the legal position as laid down by the Supreme Court interpreting Article 311 of the Constitution is that the removal and dismissal of a delinquent employee or misconduct must be by an authority not below the appointing authority. However, this does not mean that the disciplinary proceedings cannot be initiated by an authority lower than the appointing authority. Referring to the decision in *Inspector General of Police Vs. Thavasiappan* (1996) 2 SCC 145 it was held as under:-

"6. In *Inspector General of Police v. Thavasiappan* [(1996) 2 SCC 145 : 1996 SCC (L&S) 433 : (1996) 32 ATC 663] this Court reconsidered its earlier judgments on the issue and came to the conclusion that there is nothing in law which inhibits the authority subordinate to the appointing authority to initiate disciplinary proceedings or issue charge memo and it is certainly not necessary that charges should be framed by the authority competent to award the punishment or that the inquiry should be conducted by such an authority. In *SAIL v. R.K. Diwakar* [(1997) 11 SCC 17 : 1998 SCC (L&S) 1588 : AIR 1998 SC 2210] and *State of U.P. v. Chandrapal Singh* [(2003) 4 SCC 670 : 2003 SCC (L&S) 556] , a similar view has been reiterated.

7. In *Transport Commr. v. A. Radha Krishna Moorthy* [(1995) 1 SCC 332 : 1995 SCC (L&S) 313 : (1995) 29 ATC 113] , this Court held: (SCC p. 335, para 8)

"8. Insofar as initiation of enquiry by an officer subordinate to the appointing authority is concerned, it is well settled now that it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the dismissal/removal shall not be by an authority subordinate to the appointing authority. Accordingly it is held that this was not a permissible ground for quashing the charges by the Tribunal."

(See also *ESI v. T. Abdul Razak* [(1996) 4 SCC 708 : 1996 SCC (L&S) 1061 : AIR 1996 SC 2292] and *Coal India Ltd. v. Ananta Saha* [(2011) 5 SCC 142 : (2011) 1 SCC (L&S) 750] .)"

30. It is clear from the aforesaid quotation that earlier the view taken was that initiation of disciplinary proceedings can be by an authority subordinate to the appointing authority. This view was also responsible for the belief and foundation that the charge memo could be issued by an authority subordinate to the appointing authority and another approval viz. the formal chargesheet to be issued, was not required. This view has been specifically rejected and not accepted in *B.V. Gopinath* (supra). The ratio in *B.V. Gopinath* (supra) has to be applied with full vigour and force in cases where there is violation of Rule 14(3) of the Rules for after the departmental proceedings are over, possibility of ex-post facto approval is unacceptable and it is in this context that the term "non-est" has been used. However, the position would be different where the

departmental proceedings are pending and had been initiated after the due approval of the disciplinary authority, which in the present case is the Finance Minister. Pertinently, in the present cases when the approval with regard to initiation of disciplinary proceedings was granted, specific details as to the allegations and charges were recorded in the case of Sunny Abraham and Pavan Ved. For the sake of convenience, we would like to reproduce the relevant portions of the notes on which approval for initiation of disciplinary proceeding was granted. The said portions in the case of Sunny Abraham read as under:-

"2. Briefly, it may be recounted that the CBI had registered a preliminary Enquiry number 9 (A)/99-GNR dated 20th May, '99 against Shri K. K. Dhawan, DCIT and Shri Sunny Abraham, ITO. It had been alleged that Shri Sunny Abraham, the then ITO ward 2 (8), being in collusion with Sh. K. K. Dhawan, DCIT had, with ulterior motive, conducted a survey under section 133 (A) of the Income Tax Act, 1961, at 5 proprietary group concerns of Shri Mukeshchandra Dahyabhai Gajiwala and his family, on 3.3.1998. That the assessee had been harassed and mentally tortured during the survey, with the ulterior motive of obtaining illegal gratification and that Sh. Sunny Abraham had been present during the negotiation on 5.3.98, when Sh. K K Dhawan ultimately demanded Rs. 2 lakhs as bribe from Sh. M D Gajiwala, which bribe was later paid to Sh Dhawan.

3. The investigation report of the CBI was submitted on 24th December '99 (pgs 38-50/C)). The CBI have concluded that the allegations against the officers have been proved to the extent that Regular Departmental Action for major penalty has been recommended in the case. In the course of investigation, Shri K K Dhawan and Shri Sunny Abraham had denied the allegations against them. It was stated by them that the survey had been conducted at the premises of Shri MD Gajiwala, as per the target assigned. That the ITO Shri Abraham had territorial jurisdiction to conduct the survey in the case. That, although in the course of survey, it had been contended by the assessee Shri M D Gajiwala that he had disclosed income under the VDIS, 1997, the survey, once started, could not be withdrawn without directions of superior officers. The charge of any impropriety and of demand of bribe was denied by the officers.

4. However, the CBI report has cited various arguments and evidence to rebut the explanation/defence of the officers. As per record, the Income tax officials at Surat had been advised to abstain from surveys or searches in cases of assesseees who had made substantial declarations under the VDIS, 1997. Hence the conduct of survey in this case showed mala fide intention of the officers. The affidavits of Shri Mukeshchandra Dahyabhai Gajiwala and his father Shri Dhayabhai N Gajiwala are available as evidence, alleging harassment and demand of bribe by Shri K K Dhawan from Shri M D Gajiwala, as also complaint letter dated 19.3.98 of Shri Mitesh Modi, CA, addressed to CIT, Surat. The allegations made, particularly regarding demand of Rs. 5 lakhs by Shri K. K. Dhawan. through advocate Shri R M Gajjar, and the subsequent payment of Rs. 2 lakhs as bribe to Shri Dhawan at his residence on 5th March, '98, are supported

by the evidence of Shri Mitesh Modi, CA, his colleague Shri B N Shah Tax Consultant, Shri Suresh S Kadam, accountant of Shri MD Gajiwala, and Shri DN Gajiwala.

5. The matter had been referred to the CVC for its first stage advice. The CVC vide its OM No. 99/ITX/082 dated 21-8-2000 advised initiation of major penalty proceedings against Sh. Sunny Abraham, ITO as well as Sh. K. K. Dhawan. On another referral (in the case of Sh. K. K. Dhawan) for reconsideration of the advice, the CVC, vide its OM No. 99/ITX/082 dated 13-5-2002, has reiterated the advice for major penalty in the case."

In the case of Pawan Ved, the relevant portion of the note reads as under:-

"This is the case of Shri P.K. Ved, an Officer of the 1981 Batch of IRS (Civil List No. 81011, date of birth 12.8.1954). A vigilance inspection of the work of Shri Ved during his tenure as DCIT, Spl. Range, Rajkot was conducted by the CCIT, Ahmedabad and various acts of omission and commission were pointed out. A regular inspection was separately conducted by the CIT, Rajkot and further serious lapses made in various cases by Shri Ved were pointed out. Shri Ved was confronted with the findings in inspection and his version on the same was obtained. The facts have been examined in detail (nothing on pages 9/N to 62/ N). Explanation could not be provided by the officer in respect of various lapses/ irregularities as under:-

(i) Shri Ved displayed a casual approach while completing assessments in the cases of Balaji Hydro, Usha Transport, RMP Builders and Hathi Chemicals. Similarly, proper assessments were not made in the cases of Shri Kapoor Chand, Shri Shiv Chand and ATul D. Sheth, in as much as required enquiries were not made, the point raised in the Appraisal Report were not considered and some obvious items of income were not included in the taxable income.

(ii) In the case of M/s ACT Shipping, the officer exhibited gross negligence and undue haste in the completion of assessment and in the case of M/s DVS Salts Works, also, the assessment completed by the AO was found to be grossly improper, made without proper scrutiny of seized records, gathering of evidence, or application of mind. As a result, loss of revenue was caused and the element of malafide intention on the part of the officer cannot be ruled out.

2. The conduct of Sri P.K. Ved is thus found to be in violation of the CCS (Conduct) Rules and it is considered necessary to initiate penalty proceedings against the officer.

3. The matter was also referred to the CVC, for its first stage advice. The CVC, vide its OM dated 9.8.2001, has advised the initiation of major penalty proceedings in the case."

The approval granted pertinently took into consideration the specific charges.

31. It is in the aforesaid context that we have preferred to accept the position

that where departmental proceedings are pending and had been validly initiated, ex post facto sanction of the chargesheet would not violate the ratio of B.V. Gopinath (supra). This would be a practical and pragmatic approach given the fact that the departmental proceedings had remained pending and evidence etc. has been recorded. De novo or fresh proceedings would only delay the matter and would not serve any other purpose. We also do not think that the two respondents would be benefitted by the said recourse. There was a flaw in the absence of approval which has been rectified and corrected. This should not be treated as having caused prejudice.

32. In the case of Coal India Ltd. Vs. Ananta Saha & Ors., (2011) 5 SCC 142, a decision relied upon by Pavan Ved and also referred to by the Tribunal, the Supreme Court had expressly stated and held that when punishment awarded by the disciplinary authority is quashed by a tribunal or a Court on technical grounds, the authority has to be given an opportunity to conduct enquiry afresh from the stage where it stood before alleged vulnerability surfaced. Question of back wages etc. has to be decided after fresh enquiry is concluded. Reinstatement does not automatically entitle the employee to back wages.

33. Referring to the decision in Ananta Saha (supra), counsel for Pavan Ved had submitted that where the initial action is not in consonance with the law, subsequent proceedings would not have sanctity. Legal maxim *sublato fundamento cadit opus*, which means in case foundation is removed, the superstructure falls, is applicable. In the said case, it was held that initial initiation of disciplinary proceedings was bad and not by a competent authority. Thereafter on remand, the competent authority without application of mind had put its signature in a routine manner on a note for initiation of a fresh enquiry into the charges. Thus, there was non-application of mind at that stage which had vitiated the second enquiry. In the present context, we do not think that the said ratio can be applied and it is for this reason we have referred to, in detail, the notings recorded and the approval granted by the disciplinary authority at the time of initiation.

34. Pavan Ved has also relied upon decisions in Strawboard Manufacturing Company Ltd. Vs. Gutta Mill Workers Union 1952 SCR 439 and State of Orissa & Anr. Vs. Mamta Mohanti, (2011) 3 SCC 436 in support of the contention that where proceedings are bad at the inception, they cannot be rectified or regularized by ex post facto sanction or approval. The first decision in Strawboard Manufacturing Company Ltd. (supra) relates to the doctrine of *functus officio* and there being no power to extend the time. The second judgment in the case of Mamta Mohanti (supra) states that if illegality strikes at the root of the order, it would be beyond the competence of the authority to validate the same. This decision was relating to a case where the candidates, who did not fulfil the eligibility qualification were appointed notwithstanding there was no provision to condone any deficiency. The context was different. In the present case, however, the issue is of approval, which was required to be taken

from the disciplinary authority notwithstanding the approval already granted for initiation. It is this technical flaw or irregularity which has been corrected, and in that context we have referred to the decisions of the Supreme Court accepting the grant of ex post facto approval.

35. There is another aspect raised in the case of Pawan Ved, which relates to the delay in conclusion of the disciplinary proceedings. Inquiry report in favour of Pawan Ved was dated 19th March, 2004. The disciplinary authority did not agree with the report and had issued disagreement note dated 6th June, 2005 to which Pawan Ved had replied, on 20th July, 2005. What happened thereafter and as to why no further progress was made till advice was sought from the Union Public Service Commission vide letter dated 15th January, 2013, is a mystery and has not been ascertained or examined. Why and what was the reason, we do not know. Communication was written to the Union Public Service Commission only when it became apparent that Pawan Ved was to retire in August, 2014. The Union Public Service Commission vide their advice dated 17th June, 2013 suggested that justice would be met by imposing a penalty of compulsory retirement and forfeiture of admissible amount of gratuity. However, OA No.4476 of 2013 was preferred before any order was passed by the disciplinary authority. The disciplinary authority had written a letter dated 24th July, 2013 to Pawan Ved asking for his representation with reference to the advice given by the Union Public Service Commission. In the facts and circumstances, we believe that the disciplinary authority must first examine and decide the different aspects and thereafter pass an order which would examine and deal with all the aspects including the question of delay. This means the authority would have to examine whether the delay had occasioned at the behest and instance of Pawan Ved or for some other reason, and the effect and consequences. We do not even know whether the disciplinary authority would, in fact, impose any penalty and, if so, which penalty. It would not be correct and fair to pre-judge the issue without their being an order examining and deciding different aspects.

36. In *Chairman, Life Insurance Corporation of India and Others versus A. Masilamani*, (2013) 6 SCC 530, the Supreme Court while dealing with the question, whether when the Court or tribunal sets aside an order or punishment imposed in the disciplinary proceedings on technical grounds, etc., opportunity should be granted to complete the proceedings from the time it stood vitiated and whether on the ground of delay in initiation and conclusion, the said proceedings should be quashed, had observed:-

"16. It is a settled legal proposition, that once the court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, the court cannot reinstate the employee. It must remit the case concerned to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated, and conclude the same. (Vide *ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704 : AIR 1994 SC 1074] , *Hiran Mayee Bhattacharyyav. S.M. School for Girls* [(2002) 10 SCC 293 : 2003 SCC (L&S)

1033] , U.P. State Spg. Co. Ltd. v. R.S. Pandey [(2005) 8 SCC 264 : 2006 SCC (L&S) 78] and Union of India v. Y.S. Sadhu [(2008) 12 SCC 30 : (2009) 1 SCC (L&S) 126] .)

17. The second question involved herein is also no longer *res integra*. Whether or not the disciplinary authority should be given an opportunity to complete the enquiry afresh from the point that it stood vitiated depends upon the gravity of delinquency involved. Thus, the court must examine the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that courts/tribunals are not competent to quash the charge-sheet and related disciplinary proceedings, before the same are concluded on the aforementioned grounds.

18. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is *dehors* the limits of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show-cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by the court. The same principle is applicable in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question have to be examined taking into consideration the gravity/magnitude of charges involved therein. The essence of the matter is that the court must take into consideration all relevant facts and to balance and weigh the same, so as to determine if it is in fact in the interest of clean and honest administration, that the judicial proceedings are allowed to be terminated only on the ground of delay in their conclusion. (Vide *State of U.P. v. Brahm Datt Sharma* [(1987) 2 SCC 179 : (1987) 3 ATC 319 : AIR 1987 SC 943] , *State of M.P. v. Bani Singh* [1990 Supp SCC 738 : 1991 SCC (L&S) 638 : (1991) 16 ATC 514 : AIR 1990 SC 1308] , *Union of India v. Ashok Kacker* [1995 Supp (1) SCC 180 : 1995 SCC (L&S) 374 : (1995) 29 ATC 145] , *Prohibition & Excise Deptt. v. L. Srinivasan* [(1996) 3 SCC 157 : 1996 SCC (L&S) 686 : (1996) 33 ATC 745] , *State of A.P. v. N. Radhakishan* [(1998) 4 SCC 154 : 1998 SCC (L&S) 1044 : AIR 1998 SC 1833] , *M.V. Bijlani v. Union of India* [(2006) 5 SCC 88 : 2006 SCC (L&S) 919 : AIR 2006 SC 3475] , *Union of India v. Kunisetty Satyanarayana* [(2006) 12 SCC 28 : (2007) 2 SCC (L&S) 304] and *Ministry of Defence v. Prabhash Chandra Mirdha* [(2012) 11 SCC 565 : (2013) 1 SCC (L&S) 121 : AIR 2012 SC 2250] .)"

37. Papers produced before us show that in the present case at the initiating stage a note was prepared in the two cases setting out the exact charges and insinuations and that the CVC had advised initiation of penalty proceedings. The approval was sought from the Finance Minister for initiation of proceedings. At the same time, approval was also sought for appointment of the inquiry officer and the presenting officer in case oral inquiry was considered necessary. However, subsequently, during the pendency of the disciplinary proceedings in the light of the judgment of the Supreme Court in *B.V. Gopinath* (*supra*), formal

approval was sought from the disciplinary authority for the continuation of the disciplinary proceedings from the current stage as well as the charge memo, which had been issued earlier. The said approval was granted.

38. In view of the aforesaid findings and with the observations, the present writ petitions are allowed and the impugned orders dated 20th April, 2015 in OA No. 1157/2014, Sunny Abraham versus Union of India and Another and 22nd May, 2015 in OA No. 4476/2013, Pavan Ved versus Union of India and Others, are set aside. OA No. 1157/2014 filed by Sunny Abraham and OA No. 4476/2013 filed by Pavan Ved will be treated as dismissed. We clarify that nothing stated in the present judgment would be construed as expression of opinion on any of the charges which are the subject matter of the disciplinary proceedings. The authorities would examine the merits of the charges without being influenced by any observation in this judgment. In case of an adverse order, it would be open to the respondents- Sunny Abraham and Pavan Ved to challenge the said orders in accordance with law. In the facts of the case, there would be no order as to costs.