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**(2012) 02 DEL CK 0202**  
**In the Delhi High Court**  
**Case No : W.P (C) 4207 of 2011**

UOI

APPELLANT

Vs

Sr Tewari and Another

RESPONDENT

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**Date of Decision :** 01-02-2012

**Acts Referred:**

**Citation :** (2012) 8 AD 565 : (2012) 189 DLT 601 : (2012) 2 ILR Delhi 422

**Hon'ble Judges :** V.K. Jain, J;Badar Durrez Ahmed, J

**Bench :** Division Bench

**Advocate :** M.K. Bhardwaj, for the Appellant; Paras Kuhad for Respondent No. 1 with Mr Ravi Prakash, Ms Avni Singh and Mr Jitiin Chaturvedi, for the Respondent

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## Judgement

V.K. Jain, J.—This writ petition is directed against the order dated 11th February, 2011, passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the Tribunal") in OA No. 3234/2009, whereby the order dated 08th September, 2010, dismissing respondent No. 1 from service, was set aside and he was reinstated in service with consequential benefits.

2. The respondent No.1, an officer of Andhra Pradesh Cadre of Indian Police Service joined Border Security Force (BSF) on deputation and was posted as IG, North Bengal Frontier. A charge memo containing as many as eight charges was issued to him on 23rd March, 2007, followed by a Departmental Enquiry into those charges. The Inquiry Officer, vide report dated 23rd December, 2008, held that Charges No. III, IV and VI were partly proved, whereas the Charges No. I, II, V, VII and VIII were not proved. Even with respect to charges which, in the opinion of the Inquiry Officer, were partly proved, no mala fides on the part of the respondent was involved. The Disciplinary Authority, however, disagreed with the report of the Inquiry Officer in respect of Charges I to V and was of the opinion that Charges No. I to IV were fully proved, whereas Charge No. 5 was partly proved. As regard Charge No. 1, CVC as well as UPSC were of the view that the same stands established, whereas the Inquiry Officer was of the opinion that the same does not stand proved. In respect of Charges No. III, IV and VI,

CVC as well as UPSC concurred with the Disciplinary Authority. Regarding Charge No. V, no observation was made by UPSC, whereas CVC was of the opinion that it does not stand established.

3. With respect to the power of the Tribunal or for that matter this Court to interfere with the finding recorded in a Departmental Inquiry, this Court in a recent judgment dated 19.1.2012 in WPC 2431/2011 Ex. Head Constable Manjeet Singh v. Union of India & Ors inter alia observed as under:

It is by now a settled proposition of law that the Court, while considering challenge to the orders passed in disciplinary proceedings does not act as an Appellate Authority and does not reassess the evidence led in the course of the inquiry nor can it interfere on the ground that another view in the matter is possible on the basis of the material available on record. If the Court finds that the inquiry has been conducted in a fair and proper manner and the findings rendered therein are based on evidence, the adequacy of evidence or the reliability of the evidence are not the grounds on which the Court can interfere with the findings recorded in the departmental inquiries. It is not open to the Court to interfere with the finding of fact recorded in such inquiries unless it is shown that those findings are based on "no evidence" or are clearly perverse. A finding would be considered to be perverse if no reasonable person could have recorded such a finding on the basis of material available before him. Another ground on which the Court can interfere with the findings recorded in a disciplinary proceeding is violation of principles of natural justice or statutory rules or if it is found that the order passed in the inquiry is arbitrary, mala fide or based on extraneous considerations. This proposition of law has been reiterated by Supreme Court in a number of cases including Union of India and another Vs. G. Ganayutham (Dead) by LR., , Bank of India and Another Vs. Degala Suryanarayana, and High Court of Judicature at Bombay v. Shahsi Kant S. Patil: 2001 (1) SCC 416.

4. In State of Andhra Pradesh Vs. Sree Rama Rao, , a three Judges Bench of Supreme Court held as under:

The High Court is not constituted in a proceeding under Article 226 of the Constitution as a court of appeal over the decision of the authorities holding a departmental enquiry against a public servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the

statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution.

In *State of U.P. and Another Vs. Man Mohan Nath Sinha and Another*, Supreme Court held as under:

The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision making process. The Court does not sit in judgment on merits of the decision. It is not open to the High Court to re- appreciate and reappraise the evidence led before the Inquiry Officer and examine the findings recorded by the Inquiry Officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it was a court of appeal.

In *Union of India and Anr. v. B.C. Chaturvedi* (1995) 6 SCC 750, a three-Judges Bench of Supreme Court, inter alia, observed as under:-

Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held that proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

5. Since the main contention of the learned senior counsel before us was that this was a case of no evidence at all, it would be appropriate for us to set out the charges which were served upon the respondent No.1 and then consider whether there was some evidence, on the basis of which the respondent No.1 could be held guilty of one or more of these charges. The following were the Articles of Charges against the respondent No.1:-

## Article of Charge

### Statement of Imputation of misconduct or misbehaviour in support of charge

Article-I That the said Shri S.R. Tiwari, while functioning as Inspector General, Ftr. Hqrs North Bengal, during the period from 23.06.2005 to 14.11.2006, indulged in living with a lady by name Smt. Chandrakala, not being his legally wedded wife.

In the discreet inquiry conducted by the ADG (East), BSF, it was found that Shri S.R. Tiwari and Smt. Chandrakala were living as husband and wife. Smt. Chandrakala ordinarily lives in Hyderabad, but periodically visited Ftr. HqrsKadamtala where she used to stay with Shri Tiwari. Shri Tiwari admitted that he is legally wedded to her and he has a son and a daughter by her. Shri Tiwari also admitted that his first wife is alive and he has one son and two daughters by her. Certain instances, which prove that Smt. Chandrakala stayed with Shri S.R. Tiwari at Ftr. HQ BSF North Bengal as his wife are as under:-

(a) She presided over the welfare

meeting of 118 Bn BSF which is located in Kadmtala itself on 24.04.2006. Since such functions are official in nature, therefore only lady wives of Jawan and officer participate in these functions. Smt. Chandrakala presided over above function in the capacity of lady wife of Shri S.R. Tiwari. (b) In the inaugural ceremony of PCO at Ftr. HQ BSF N/Bengal, a Pooja was performed as per Hindu ritual. In this Pooja, Shri S.R. Tiwari and Smt. Chandrakala participate as husband and wife. (c) In the Independence Day ceremony on 15.08.2006 celebrated at Ftr. HQ BSF N/Bengal, Smt. Chandrakala participate in all official functions as wife of Shri S.R. Tiwari. She accompanied Shri S.R. Tiwari to the BSF Hospital and distributed gifts to BSF personnel who were admitted in the hospital

Article-II That during the aforesaid period and while functioning in the aforesaid office, the said Shri S.R. Tiwari, deliberately allowed unauthorized interference by Smt. Chandrakala living with him in official functioning of North Bengal Ftr., causing premature release of four Constables from the Quarter Guard.

As learnt by the ADG (East) in the discreet inquiry, Shri S.R. Tiwari visited SHQ CBR from 22.04.2006 to 23.04.2006. During the above visit, Smt. Chandrakala accompanied him. While the officer was busy in official work, Smt. Chandrakala accompanied by lady wives of the local officers unauthorizedly visited the Quarter Guard of 142 and 182 Bns BSF. There, she spoke to BSF personnel in prison and got premature release of

Cost BabuLal of 142 Bn BSF, Ct. Raja Pal, Ct. Gayan Singh Pawak and Ct. Dalbir Singh?all of 182Bn BSF serving various prison terms, by using her influence. Subsequently, the IG formalized their release by condoning the remaining period of the prison terms.

Article-III That during the aforesaid period and while functioning in the aforesaid office, discharged the discipline propriety and guidelines on the subject in complete disregard to the rules and without jurisdiction, reviewed punishment awarded and mitigated the sentence awarded to No. 86161306 Const. Prakash Singh by Ftr. Hq. BSF South Bengal.

As per official record No. 86161306 Ct. Prakash Singh, who was a L/NK under 08 Bn BSF, was reduced to the rank of Ct. w.e.f. 16.07.2001 having been found guilty by a Force Court for having ?used insubordinate language to his superior officer.? On the basis of a prayer submitted by the Const. on 17.05.2006, Shri Tiwari, commuted the sentence ?to forfeit pay and allowances for a period of 14 days w.e.f. 17.07.2001 to 30.07.2001? under FTR. HQ NB Order No. 4638-45 dated 06.06.2006. During the time of award for the punishment, the Const was serving under IG SB, whereas the IG NB did not have the jurisdiction to review the punishment awarded to the said Const, grant of Rank Pay also, from same date.

Article-IV That during the aforesaid period and while functioning in the aforesaid office, showed favoritism and manipulated the selection of Headmaster in BSF Primary School Kadmatata even though the candidate did not possess essential qualification and was not eligible.

As alleged by Smt. Sharmistha Saha, Primary Teacher, BSF Primary School Kadamtala, Shri Tiwari had selected and appointed Shri S.S. Majumdar as Headmaster of BSF Primary in complete violation of the rules. Shri Majumdar did not even meet the eligibility standards for the

post. While one of the essential qualifications for the post is Graduation with 55 per cent marks in aggregate, Shri Majumdar had secured only 43 per cent marks in the B.Sc examination. The matter was enquired into and the ADG (East), BSF directed Shri Tiwari to cancel the appointment order and arrange for appointment of a qualified person to the post of Headmaster, as per the recruitment rules after issuing fresh advertisement for the purpose. Shri Tiwari instead of issuing formal cancellation order, waited for Shri Majumdar to resign from the post on 03.04.2006. On the same day Shri Tiwari appointed him as a regular primary teacher w.e.f the date he joined as Headmaster of the School. Shri Majumdar was earlier engaged as a temporary teacher. Shri Majumdar was appointed as a regular teacher in the pay scale of Rs 4500-125-7000 in violation of the policies/ instructions circulated by the FHQ. No Selection Committee was constituted in regard to the appointment of Shri Majumdar as a regular teacher, nor was the approval of the FHQ taken. Besides Shri Majumdar had secured only 43 per cent marks in his B.Sc examination, whereas one of the essential qualifications for such appointment is 45 per cent marks in aggregate in the degree examination.

Article-V

That during the aforesaid period and while functioning in the

aforesaid office, helped one person of his native Distt. Balia, UP in enrolment in BSF by fraudulent means and also amended the Board proceedings by commenting upon medical fitness which he was not qualified to do.

In one of the anonymous/pseudonymous petitions

against the IG received at HQ, ADG (East) BSF, following five persons were allegedly recruited as followers, based on fabricated domicile certificates:- (a) Shri Brijesh Kumar, S/o Girja Prasad, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (b) Shri Panchanan Ram S/o Ganga Ram, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (c) Shri MunnaPrakashVill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (d) Shri Ashwani Kumar Singh, S/o Ram Nath Singh, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (e) Shri OmPrakash Ram, S/o Kasnji Ram, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling However, it was found that only Shri Brijesh Kumar, S/o Girja Prasad, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling

was recruited as follower in BSF. He was recruited on the basis of domicile certificate which showed him to be a resident of PS Matigara, Distt-Darjeeling (West Bengal), whereas, actually he hails from BaliaDistt. of

Uttar Pradesh. The recruitment of followers was held at BSF Campus Radhabari (Jalpaiguri, ) w.e.f 12.012.2005 to 16.12.2005, the Board of Officers, which included a Medical Officer, submitted the proceedings of the recruitment for approval by the IG, NB. Shri S.R. Tiwari in the capacity of the IG of the Ftr rejected the candidature of one cook, one sweeper, one water carrier, one washer man on the basis of overweight/underweight, which he was not competent to do, whereas these candidates were found fit by the Medical Officer of the recruitment board. In place of these rejected candidates, Brijesh Kumar, S/o Girja Prasad, was asked to submit an application for re-medical since he was earlier found unfit by the recruitment board. The re-medial was carried out by Ftr FQ BSF N/ Bengal itself and Shri Brijesh Kumar, S/o Girja Prasad was found medically fit and thus he was issued an appointment order to join BSF as sweeper.

#### Article-VI

That during the aforesaid period and while functioning in the aforesaid office, Shri S.R. Tiwari had allegedly misused government vehicle, Arms and ammunition and

BSF personnel at the time of marriage of his son that was solemnized on 15 February, 2006, at his native place in Balia, UP.

Vehicle No. WB-74J-4337 (Bolero) was detailed to proceed to THQ 89 BN BSF, which was located in Patna (Bihar). No. 89298601 CT/DVR Ajit Singh of 89 BN BSF along with two

others at FTR HQ BSF N/Bengal left FTR HQ BSF N/Bengal in above vehicle for THQ 89 BN BSF. However the vehicle did not report to THQ 89 BN BSF and instead went to the home place of Shri S.R. Tiwari, located in Balia Distt. of U.P. As brought out in the discreet enquiry by the ADG (East), BSF, the officer has admitted that, he did take the Mahindra Bolero Van of his FTR to his native place during his visit to organize his son's marriage, which was solemnized on 15.02.2006. The officer further stated that he has been declared a 'Y' category protectee due to threats from Naxalites. He had taken the vehicle as his escort from Patna to Balia, as he had to travel through Naxalite-infested areas of Bihar. On asking for the copy of the order vide which he was declared a 'Y' category protectee, Police intelligence Deptt, AP Hyderabad sent the same through FAX. The Police authority however, clarified that such protectees are ordinarily provided with a house guard and 2 PSOs. Some of them however are also provided with BP Vehicles. No such order has been issued by the BSF authorizing Shri Tewari to use vehicular escort during his private journeys. In any case movement of vehicles beyond the IG's functional jurisdiction, requires the approval of HQrs, which was not taken.

It was further gleaned in the discreet

inquiry that Const. Anil Kumar accompanied the IG to his native place from 08.02.2006 to 21.02.2006 during the latter's visit to organize his son's marriage. 50 rounds of 9 mm were issued to him from the Ftr. Kote. Shri Tewari did not admit that Const Anil Kumar had fired some rounds during the ceremony, as part of the fanfare. Actually 41 rounds were fired in such firing and only 9 live rounds were returned to the Kote on his return from tour. The shortage has apparently been made up by manipulating the records of ARCF.

Article-VII That during the aforesaid period and while functioning in the aforesaid capacity, kept two Constables of 47 BN BSF and two Constables of 122 BN BSF at Hyderabad. BSF has no unit in Hyderabad. Apparently the Constables were used for private work of Shri Tiwari.

A Information was received at Hq. ADG (East) that Shri S.R. Tiwari had been keeping two Constable of 47 Bn BSF and two Constables of 122 BN BSF at Hyderabad unauthorizedly beyond the jurisdiction of BSF deployment. It was verified during discreet enquiry that No. 87102682 Const B.L. Kamalaiah of 47 Bn BSF and No. 93009473 Const D.V. Ramana of 47 Bn BSF were called to the N/Bengal FtrHQrs on 06.07.2005 and 25.10.2005 respectively. Both of them were sent to Hyderabad where Const B.C. Kamalaiah stayed up to 02.12.2005 and Const. D.V. Ramaiah till 19.04.2006. Further No. 97009634 Const Sayed Ahmed of 122 BN BSF was sent to the residence of Shri S.R. Tiwari at Hyderabad in the month of August, 2006 and he remained there till 15.12.2006.

It also came to the notice that, No. 99101220 Const T. Bhaskar of 122 BN BSF as sanctioned 15 days C/L w.e.f. 01.08.2006 to 07.09.2006 and was directed by Shri S.R. Tiwari to report his house at Hyderabad after termination of his leave.

However, the parent unit of the individual i.e. 122 BN BSF was not informed accordingly. As a result, when the individual did not report for his duty in time, 122 BN BSF sent letters at the home address of Const T. Bhaskar to rejoin his duty without any delay. Const. T. Bhaskar in turn reported the matter to Shri S.R. Tiwari. In order to regularize his OSL period, Ftr HQ BSF N/Bengal informed 122 BN BSF on 14.01.02006 that, Const T. Bhaskar joined the Recruitment Board of North Bengal Frontier which was in Bangalore in connection with the recruitment of Constables in southern States on expiry of his leave. BSF has no unit in Hyderabad, Apparently the constables were used for private purposes of Shri Tiwari.

#### Article-VIII

That during the aforesaid period and while functioning in the aforesaid office, discharged the discipline propriety and guidelines on the subject and indulged in favoritism/nepotism by way of attaching Const. Prakash Singh with Ftr. Hq. N/ Bengal despite contrary remarks of the PSO, N/Bengal Ftr. On the subject which were based on the Constable's past record.

As per the official documents, Cost. Prakash Singh was posted to NB Ftr. by Shri Tiwari over-ruling the objection of the PSO. The PSO had objected to posting of Const. Prakash Singh to Ftr. Hq. N/Bengal based on latter's pas record.

#### Article-I

6. A perusal of the Article of Charge and the Statement of Imputation of Misconduct or misbehaviour in support of the charge would show that the allegation against the respondent No.1 was that he and Smt. Chandrakala were living as husband and wife. This was also the case of the Department that the respondent No.1 had admitted being married to Chandrakala and having a son and a daughter by her. This charge was also sought to be proved from the circumstances (a) Chandrakala presided over the welfare meeting of a battalion of BSF on 24.04.2006, in the capacity of a wife of the respondent No.1; (b) in the inaugural ceremony of a PCO at FTR. Hqr. BSF North Bengal, the respondent No.1 and Smt. Chandrakala participated in a pooja as a husband and wife and (c) during Independence Day ceremony in the year 2006, Smt. Chandrakala participated in the official function as the wife of the respondent No.1 and accompanied him to a hospital, where she distributed gifts, to the BSF personnel admitted in the hospital. As noted earlier, the Inquiry Officer held the charge to be "not proved". In the Disagreement Note, the Disciplinary Authority, inter alia observed as under:-

During the preliminary inquiry Shri Tiwari has admitted to the allegation but claims that he is legally wedded to Smt. Chandrakala and has a son and daughter by her. He also admitted that his first wife is alive and he has a son and two daughters by her.

The Inquiry Officer has failed in the charge sheet. The circumstantial evidence of



photographs and CDs reveal that Smt. Chandrakala was attending the function as a prominent person in the life of the C.O. She was extended courtesies as given to the spouse of the Charged Officer during the function. During the function she was addressed as Mrs. Tiwari/Madam Tiwari/First lady by different persons during their speeches. This was never corrected by the Charged Officer or by Smt. Chandrakala at any point of time.

Disciplinary Proceedings are quasi-judicial proceedings and Evidence act does not apply to such proceedings. The guiding principle is to take into account the evidence in such disciplinary proceedings on preponderance of probability. In view of the above, this charge against the CO stands proved.

7. Admittedly, no evidence was led by the Department to prove that the respondent No.1 had admitted, in the course of preliminary inquiry, that he had married Chandrakala and has a son and a daughter by her. In fact, as noted by the Tribunal, preliminary inquiry report was not even a listed document and the author of the report, though listed as a witness, was not examined.

We also note that in his representation to the Disciplinary Authority, the respondent No.1 had denied having made any such admission. In view of denial by the respondent No.1, it was incumbent upon the Department to prove the alleged admission in the course of inquiry. Even if such an admission was made during the preliminary inquiry, but, was not proved in the course of the Departmental Enquiry against the respondent No.1, the alleged admission could not have been taken into consideration for holding that the charge against the respondent No.1 stands proved. If the Department was relying upon a document evidencing the admission, alleged to have been made by the respondent No.1, it was incumbent upon it to supply the copy of that document to the respondent No.1, prove that document during the course of inquiry and an opportunity was to be given to the respondent No.1 to cross-examine the witnesses with respect to such a document. No reliance could have been placed by the Disciplinary Authority on a document, copy of which was not made available to the respondent No.1 and which was not proved during the course of Departmental Enquiry.

8. As regards a CD relied upon by the Disciplinary Authority, the Tribunal has noted that no CD was ever relied upon by the Presenting Officer or the Inquiry Officer though it was listed as a document. The contents of the CD were never made known to the respondent No.1, nor was the CD opened or played in his presence. The author of the CD was not examined. Since no such evidence was either relied upon or proved during the course of inquiry, it was not permissible for the Disciplinary Authority to take the contents of the CD into consideration for holding that the charge against the respondent No.1 stands established.

In Bareilly Electricity Supply Co. Ltd. Vs. The Workmen and Others, , Supreme Court, inter alia, observed as under:

Even if all technicalities of the Evidence Act are not strictly applicable except in

so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced.

The view taken by the Tribunal is therefore, in consonance with the above-referred decision.

9. As regards the photographs (Ex.S-1 and S-2), relied upon by the Department as circumstantial evidence to prove this charge, the Tribunal noted and, in our view, rightly so, that they would show Smt. Chandrakala attending various functions of BSF, but they do not indicate that she had attended those functions as the wife of IG, BSF North Bengal. The case of the respondent No.1, as disclosed in his representations to the Disciplinary Authority, was that Smt. Chandrakala was a family friend and had stayed in his house in the guest room and attended the function as a guest. As regards distribution of sweets, he had claimed in his written statement of defence, that the functions were attended by Smt. Chandrakala without his knowledge and at the behest of the wife of Commandant 118 Battalion/DIG (PSO). He also stated that some functions in the school were attended by family members of officer, jawans and civilians and being a family friend, Chandrakala also attended the function and after function at the school, he visited the hospital with 20-25 persons and other officers and almost all of them, including Chandrakala were given opportunity to distribute sweets to patients in the hospital. Therefore, the photographs (Ex.S-1 and S-2) by themselves do not indicate any relationship of husband wife between the respondent No.1 and Smt. Chandrakala. What is important is that there is no evidence of the respondent No.1 having introduced Smt. Chandrakala to anyone as his wife. There is no evidence of anyone having addressed Smt. Chandrakala as the wife of the respondent No.1, in his presence. Obviously, if Chandrakala was not addressed as wife of the respondent No.1 in his presence, there was no occasion for him to rebut such an address. If Smt. Chandrakala accompanied the respondent No.1 to certain functions as his guest and some BSF personnel, attending those functions, merely on account of Chandrakala accompanying the respondent No.1, presumed her to be his wife, the respondent No.1 cannot be blamed for such a wrong impression in the mind of those who saw Chandrakala attending the function with him. There is no evidence of Smt. Chandrakala having presided over any function of BSF as the wife of IG, BSF North Bengal. We are in agreement with the Inquiry Officer and the Tribunal that mere attendance of some functions of BSF and distributing sweets to the patients admitted in a BSF hospital, when other persons who went to the hospital from the school where the functions were held, were also given a similar opportunity, does not prove the relationship of husband and wife between the respondent No.1 and Smt. Chandrakala. There is absolutely no evidence of Smt. Chandrakala having been given a treatment which is normally accorded to the wife of IG, BSF

North Bengal, in the presence of the respondent No.1. Had that been done, it could have been said that by keeping silent, despite Chandrakala being accorded treatment and courtesies which are accorded only to the wife of the IG, BSF North Bengal, the respondent No.1 had given an impression that Smt Chandrakala was his wife and, therefore, was entitled to such a treatment.

10. Though it is alleged in the Statement of Imputation of Misconduct of Misbehaviour that the respondent No.1 and Smt. Chandrakala performed pooja as husband wife, the charge was denied by the respondent No.1 and no evidence was led during the course of inquiry, to substantiate the charge.

11. We agree with the Inquiry Officer and the Tribunal that merely on account of Smt. Chandrakala having stayed in the house of the respondent No.1 2-3 times, in the guest room, no relationship of husband and wife between the respondent No.1 and Chandrakala can be presumed, even if the wife of the respondent No.1 was not present in the house during the days Smt. Chandrakala stayed there as a guest.

12. For the reasons given hereinabove, we are entirely in agreement with the view taken by the Tribunal in respect of Article-I and hold that the Disciplinary Authority had no legally admissible evidence before it to prove this charge and the finding recorded by it, to the extent it pertains to this charge, is perverse in law, in the sense that no reasonable person, acting upon the evidence, which was produced during the course of inquiry, could have held the charge to be proved.

## Article II

13. In a nutshell, the charge against the respondent No.1 under this Article is that he, acting under influence from Smt. Chandrakala, ordered premature release of Constable Babu Lal, Constable Raja Paul, Constable Gayan Singh Pawak and Constable Dalbir Singh, who were undergoing imprisonment for different terms. The Inquiry Officer held that this charge to be not proved. The Disciplinary Authority, however, recorded the following Disagreement Note with respect to this charge:-

The Charged Officer during the preliminary inquiry had admitted that Smt. Chandrakala accompanied him during his visit to SHQ, CBR on 22.04.2006 and 23.04.2006. He also admitted that she visited the BSF Quarter Guard where the prisoners have been kept. After her visit, four Constables were released from the Quarter Guard. Subsequently Shri Tiwari formalized their releases.

The Charged Officer in his defence statement has mentioned that Smt. Chandrakala was his guest. Even if it is so, allowing a guest to visit the BSF Quarter Guard and release the prisoners and release the prisoners undoubtedly establishes interference in the official work functioning of the Charged Officer. This reflects the misconducts on the part of the Charged Officer. The I.O. has not considered this aspect in his findings. This charge against the charged Officer

stands proved.

14. Admittedly, no evidence was led by the Department to prove, during the course of the Departmental Enquiry, that the respondent No.1 had in preliminary inquiry admitted that Smt. Chandrakala had accompanied him to SHQ CBR on 22.04.2006 and 23.04.2006. There is no admission on the part of the respondent No.1 that the constables were released by him on account of intervention of Smt. Chandrakala or at her instance. As noted earlier, no copy of the Preliminary Inquiry Report was supplied to the respondent No.1 and the author of the report was not examined as a witness. Since no such admission was proved by the Department during the course of the Departmental Enquiry, it was not permissible for the Disciplinary Authority to take the alleged admission into consideration to hold the respondent No.1 guilty of this charge. We would like to note that the defence of the respondent No.1 with respect to this charge was that it were the wives of Commandant 142 Battalion and 182 Battalion, who had taken Chandrakala to their Battalion Area, including the Quarter Guard and when these ladies visited the Quarter Guard, the detainees expressed their problems to them and thereupon the wife of the Commandant agreed to look into their grievance and if possible get them released. This, according to the respondent No.1, was conveyed to him in Cooch Behar, where he at that time was, and after ascertaining details and being fully satisfied in the matter, he ordered release of these Constables and later confirmed the release in writing. He specifically stated that Chandrakala had no role to play in the premature release of the Constables and the decision was taken by him on its merits.

15. There is absolutely no evidence of Smt. Chandrakala having visited the Quarter Guard along with the respondent No.1. There is no evidence of Smt. Chandrakala having played any role in the release of these Constables on the orders of the respondent No.1. There is no evidence of the respondent No.1 having allowed Smt. Chandrakala to visit the Quarter Guard. If Chandrakala visited the Quarter Guard with the wives of other BSF officer, on their invitation, the respondent No.1 cannot be faulted for her visit. Therefore, it cannot be said that the respondent No.1 had allowed Smt. Chandrakala to visit a place which was not accessible to an outsider. In fact, the Inquiry Officer has returned a finding that Smt. Chandrakala did not speak to any officer of BSF to get these Constables released. In our view, there was no legally admissible material on record, on the basis of which, the Disciplinary Authority could have held this charge to be proved. We, therefore, agree with the Inquiry Officer and the Tribunal that this Article of Charge does not stand established against the respondent No.1. We, therefore, see no good reason to interfere with the finding returned by the Inquiry Officer and the view taken by the Tribunal with respect to this Article of Charge.

### Article III

16. In a nutshell, the charge against the respondent No.1 is that he commuted the sentence of Constable Prakash Singh, who at the time of award of

punishment was serving under IG (South Bengal) and being IG (North Bengal), the respondent No.1 did not have jurisdiction to review the punishment awarded to him. The Inquiry Officer held that the charge was partly proved. The Inquiry Officer held that the respondent No.1 considered the mercy petition of a Constable, who at the time of committing the offence, was outside his jurisdiction and he was not authorized to decide that petition. He, however, on the basis of the evidence on record, felt that the decision taken by the respondent No.1 was in the larger interest of BSF. The Disciplinary Authority, however, felt that the charge stands wholly proved and recorded the following disagreement note in this regard:-

Shri Prakash Singh, Constable was serving under IG, South Bengal, BSF when he was awarded the punishment of reduction in rank on 16.07.2001 being found guilty by a Force Court for having used insubordinate language about his superior officers. He was later on posted on attachment basis to North Bengal Frontier, BSF in July 2005 under the command of Shri Tiwari. An officer not below the rank of DIG or the prescribed officer may review the punishment awarded to any person under whose command such person was serving at the time of conviction, as prescribed in Section 128 of the BSF Act.

Shri Prakash Singh was serving under the command of IG, South Bengal at the time of his conviction (July 2001). The Charged Officer was in-charge of North Bengal Frontier, and as such he is not competent to review the punishment awarded to Shri Prakash Singh in his capacity as the Prescribed Officer. This clearly establishes misconduct on the part of the Charged Officer and this charge against him stands proved.

17. Section 128 of BSF Act, to the extent it is relevant, provides that an officer not below the rank of Deputy Inspector General, within whose command a person convicted by a Security Force Court of any offence, was at the time of conviction serving or the Prescribed Officer may pardon the person or remit the whole or any part of the punishment or mitigate the same or commute such punishment for any less punishment mentioned in the Act or release him on parole. Since Constable Prakash Singh was admittedly not working in the command of the respondent No.1 at the time he was convicted nor is there any evidence of the respondent No.1 having been prescribed as the person who could exercise the power u/s 128 of BSF Act, the respondent No.1 was not competent in law to interfere with the sentence awarded to Constable Prakash Singh. The next question which arises is whether the respondent No.1 can be said to be guilty of "misconduct" on account of his having exercised the power u/s 128 of BSF Act in respect of Constable Prakash Singh. The Tribunal has noted that the petition of the Constable was processed by law officer of BSF, who indicated that the respondent No.1 had the authority to commute the sentence in question and when the file came up before him for decision, there was no view to the contrary expressed by anyone on the file. The Tribunal also noted that it was not the case of the Department that the respondent No.1 had extended any favour to

Constable Prakash Singh by reducing his sentence and in fact the Constable had a case on merit for reduction of the sentence awarded to him. The Inquiry Officer was of the view that the respondent No.1 had exceeded his jurisdiction while reviewing the sentence of Constable Prakash Singh, but, this decision was taken by him in the larger interest of BSF as the BSF Jawans, who work in difficult conditions at Borders should not be penalized vindictively by the seniors on trivial issues. The offence alleged to have been committed by Constable Prakash Singh was of abusing, in a threatening language, Head Constable Jaspal Singh and in the opinion of SCOI, Prakash Singh was harassed and abused by Shri Ram Singh, AC, Company Commander.

18. It is not in dispute that while hearing the mercy petition of Constable Prakash Singh u/s 128 of BSF Act, the respondent No.1 was acting in a quasi-judicial capacity and there was no allegation of mala fide or any culpable negligence against him. The Tribunal, in holding that this charge does not stand proved, relied upon the following observations made by Supreme Court in *Zunjarrao Bhikaji Nagarkar Vs. U.O.I. and Others*, :

If, every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings.

In the aforesaid case, the appellant was posted as Collector of Central Excise, Nagpur in the year 1995. The appellant, while holding adjudication proceedings u/s 33 of Central Excise Act, confirmed the confiscation of the goods of an assessee as well as the excise duty demanded from it. He, however, chose not to impose any penalty. He was, however, served with a charge-sheet on the allegation that he had favoured the assessee M/s Hari Vishnu Packaging Ltd by not imposing penalty on it under Rule 173Q of Central Excise Act, 1944 while passing the Order in Original dated 02nd March, 1995 wherein he had held that the assessee had clandestinely manufactured and cleared the excisable goods and evaded the excise duty. The order passed by the appellant did not indicate any reason in not imposing the penalty. Challenging the inquiry, it was contended on behalf of the appellant that he could not be subjected to the disciplinary

proceedings merely because he had chosen not to impose any penalty in the facts and circumstances of the case. Allowing the appeal filed by the appellant, the Supreme Court observed that negligence in quasi-judicial adjudication is not the negligence perceived as carelessness inadvertence or omission but as culpable negligence. The Supreme Court referred to the view taken by it in an earlier decision in *State of Punjab and Others Vs. Ram Singh Ex. Constable*, , where it was held that mere error in judgment, carelessness or negligence in performance of duty does not come within the purview of misconduct.

19. The Tribunal, in our view, has applied a correct principle of law in holding that since the respondent No.1 while passing order on the petition of Constable Prakash Singh u/s 128 of BSF Act was acting in a quasi-judicial capacity and there is no allegation of any mala fides nor had it been alleged that he intended to extend a favour to the Constable by reducing his sentence, the order passed by him could not have been held to be an act of misconduct. If BSF was aggrieved on account of the order passed by the Tribunal u/s 128 of BSF Act, it could have challenged that order in an appropriate forum, but, in the absence of any mala fides or an element of corruption or culpable negligence on his part, it would be difficult to say that the quasi-judicial order passed by the respondent No.1 amounted to misconduct. We, therefore, see no good reason to interfere with the view taken by the Tribunal, with respect to this charge.

#### Article IV

20. One Shri S.S. Majumdar was working as a teacher in BSF Primary School on a temporary basis. BSF issued an advertisement, inviting applications for appointment to the post of Headmaster of that primary school. The essential qualifications for the aforesaid post were fixed with the approval of the respondent No.1. One of the essential qualifications approved for the post was graduation with 55% marks in aggregate. Four persons, including Shri S.S. Majumdar, applied for the aforesaid post. The Screening Board set up to scrutinize the applications recommended only two candidates, who were found to be fulfilling the eligibility criteria. Since Shri S.S. Majumdar did not have 55% marks in graduation, he was not found eligible and, therefore, was not recommended by the Screening Board. The respondent No.1, however, allowed all the four candidates to appear before the Interview Board. The respondent No.1 was the Chairman of the Board which interviewed the candidates and selected Shri S.S. Majumdar for the post of Headmaster. Representations were made against appointment of Shri S.S. Majumdar and FHQ, New Delhi, asked North Bengal Ftr. for clarification, which was sent under signatures of the respondent No.1. Additional Director General (E) directed Frontier HQ North Bengal to cancel the appointment of Shri S.S. Majumdar, since he did not possess the requisite educational qualification. Shri S.S. Majumdar resigned from the post of Headmaster in April, 2006, but, the respondent No.1 appointed him as a regular teacher, retrospectively from the date he was appointed as the Headmaster. In his letter dated 09.09.2006 sent to Director General, BSF, the

respondent No.1 claimed that he was not well-versed with BSF Education Code and after going through the code, it was found that the selection was not in conformity with the same and accordingly Shri S.S. Majumdar was asked to resign. It also came in evidence that in fact none of the four applicants possessed the required experience of ten years and, therefore, none of them was eligible for the interview. It also came in the deposition of SW-19 that no codal formalities were observed by the respondent No.1 in appointment of Shri S.S. Majumdar, a primary teacher. The respondent No.1 later issued notice terminating the services of seven primary teachers, including Shri S.S. Majumdar, who did not fulfill the qualification as per BSF Education Code. FHQ, New Delhi, however, allowed IG, North Bengal Frontier to keep all the teachers since they were working for a long time. Out of those seven teachers, the respondent No.1 had appointed only Shri S.S. Majumdar whereas the remaining six persons were appointed by the other officers. The Inquiry Officer held that the charge was partly proved but there was no favouritism and manipulation. In taking this view, the Inquiry Officer also noted that the department had failed to produce any evidence to indicate the procedure to be followed for appointment of primary teachers. The Disciplinary Authority, however, held the charge to be proved and recorded the following disagreement note with respect to this charge:

The essential qualification prescribed for the post of Head Master, BSF Primary School is graduation with 55% marks in aggregate. Shri Mazumdar, Primary School teacher, BSF had secured only 43% in his graduation (B.Sc.). The Charged Officer has mentioned that he acted upon the notings of the Dy. Commandant, In-charge of BSF Primary School who had indicated that there is no eligibility criteria prescribed in the BSF education code and IG as Chairman of Selection Board, is competent to decide the criteria for selection to the post of Headmaster.

Shri Mazumdar was not fulfilling, the eligibility criteria and he was not recommended by the selection Board to the post of Headmaster. Allowing Shri Mazumdar for the interview though he does not fulfill the criteria, establishes favouritism by the Charge Officer. BSF Headquarters directed the Charged Officer to cancel the appointment of Shri Mazumdar and take action for filling of the post of Headmaster after issuing fresh advertisement. Shri Mazumdar submitted his resignation from the post of Headmaster on 03.04.2006. On the same day, the Charged Officer appointed him as a primary teacher. The above conduct of the Charged Officer establishes favoritism extended by him in selection and appointment of Shri Mazumdar, Headmaster. Thus the charge against him stands proved.

21. The Tribunal, however, noted that the decision to appoint Shri S.S. Majumdar as Headmaster was a unanimous decision of the Selection Board, the respondent No.1 being only a member of the Board though he also was its Chairman. The decision of the Board being a joint unanimous decision, the Tribunal found it difficult to infer mala fide, favoritism or manipulation. The Tribunal was of the



view that when none of the candidates applying for the post of Headmaster was eligible, there was nothing wrong if all of them were called for the interview. The Tribunal relied upon the decision of the Supreme Court in Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, . In the aforesaid case, the respondent was a member of the Price Negotiation Committee and the charge against him was that he had failed to assess reasonable price of the land and appointed a valuer, violating the due process of tendering and accepted the fictitious price fixed by the valuer. The Tribunal relied upon the following observations made by the Court :-

After going through the report and the finding recorded by the Division Bench of the High Court, we are of the opinion that in fact the Division Bench correctly assessed the situation that the respondent alone was made a scapegoat whereas the decision by all three Committees was unanimous decision by all these members participating in the negotiations and the price was finalized accordingly. It is not the respondent alone who can be held responsible when the decision was taken by the Committees. If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee.

22. In our view, the finding recorded by the Disciplinary Authority with respect to this charge cannot be said to be based on no evidence nor can it be said to be perverse. The Tribunal, in our view, was not correct in holding that this charge against the respondent No.1 does not stand established on the basis of the material available on record. As noted earlier, the eligibility criterion was fixed by none other than the respondent No.1. Advertisements were issued in the newspaper, inviting applications from those who fulfilled the published eligibility criteria. The Screening Board found only two out of the four applicants to be eligible and accordingly recommended that only those two who were found eligible by them, to be called for interview. The respondent No.1, however, decided to call all the four applicants for the interview. Once the educational qualifications were fixed and duly notified by way of advertisements in newspapers, it was not permissible to anyone, including the respondent No.1 who himself had approved those educational qualifications, to allow anyone who did not possess the notified qualification, to appear for the interview. If none of the applicants was eligible for the post, on account of none of them having experience of ten years, it was not open to anyone, including the respondent No.1 to permit any or all of them to appear in the interview. If no eligible candidate applied for the post of Headmaster, the only option available to the respondent No.1 was to re-advertise the post either with the same qualification and experience and experience or with revised educational qualification and/or experience. The respondent No.1 could not have allowed any ineligible person to appear in the interview, so long as the educational qualification and/or prescribed experience, if any, were not relaxed and the relaxed qualification and experience were not duly notified to the public. It has to be kept in mind that had the

essential qualifications and/or experience been revised and notified to the public, those who did not fulfil the qualifications and experience that were initially notified, but fulfilled the revised qualification and experience, could also have applied for the post. By allowing ineligible persons to appear in the interview and appointing one such person, the respondent No.1 denied opportunity to others, who did not possess the initially prescribed marks in graduation, but possessed as many marks as Shri S. Majumdar possessed, to apply and compete for the post of Head Master in BSF school.

23. The next question which comes up for consideration is as to whether the act of the respondent No.1 in allowing all the four applicants to appear in the interview was a bona fide, though wrong, decision or it was an act of favoritism. As noted earlier, the Screening Board had recommended only two persons to be called for the interview and Shri S.S. Majumdar was not one of them. The circumstances of the case indicate that by allowing all the four applicants to appear in the interview, the respondent No.1 clearly favoured Shri S.S. Majumdar. Though the second person who was not recommended by the Screening Board but was allowed to appear in the interview was also a beneficiary of the decision and in case none of the applicants was eligible to be called for the interview, all of them were beneficiaries of the decision, the subsequent conduct of the respondent No.1 clearly indicates that the aim of the respondent No.1 in allowing all the four candidates to appear in the interview was to favour Shri S.S. Majumdar, by appointing him as the Headmaster. Had the respondent No.1 permitted only Shri S.S. Majumdar while disallowing the fourth candidate to appear for interview, the favour would have been just too obvious and too open. The act of the respondent No.1, firstly, in appointing Shri S.S. Majumdar and then, appointing him as a regular teacher and that too retrospectively, from the date he was appointed as Headmaster, is a clear indicator that he intended to benefit none other than Shri S.S. Majumdar when he allowed all the four applicants to appear in the interview. Therefore, in our view, the act of the respondent No.1 in allowing Shri S.S. Majumdar to appear in the interview for the post of Headmaster in BSF Primary School was an act of favoritism, amounting to misconduct.

24. Had this been a case only of recommendation of an ineligible person for his appointment to the post of Head Master, the decision of Supreme Court in the case of Bongaigaon Refinery & P.C. Ltd. (supra), would have been applicable and it could have been said that the decision of the Selection Board, being unanimous, the respondent No.1 could not have been selectively targeted for the disciplinary action, for recommending an ineligible person for appointment to the post. Here, the misconduct on the part of the respondent No.1 is established from a series of acts in (i) his allowing Shri S.S. Majumdar to appear in the interview, despite his being not eligible (ii) his selection by the Selection Board chaired by the respondent No.1 and (iii) his appointment by the respondent No.1 in his capacity as IG, North Bengal, followed by his appointment as a regular teacher with retrospective effect which clearly indicate that the purpose of

allowing the ineligible candidates to appear in the interview was to enable Shri S.S. Majumdar to appear in the interview so that he could be selected and appointed as the Head Master of BSF Primary School.

25. We would like to take note of the fact that no codal formalities were observed by the respondent No.1 in appointing Shri S.S. Majumdar as a primary teacher on his resigning from the post of Head Master. The Tribunal has observed that the codal formalities were not brought on record during the course of the inquiry. Even if it is so, since the appointment of Shri S.S. Majumdar as a regular was made without even constituting a Selection Committee which would be the essential codal formality for any such appointment and he possessed less than 45% marks in his graduation, it cannot be said that the finding recorded by the Disciplinary Authority with respect to this charge was based on no evidence or was perverse in law or on facts. It was contended by the learned counsel for the respondent No.1 that appointment of Shri S.S. Majumdar as a regular teacher was not the charge against the respondent No.1 and, therefore, it was not open to the Disciplinary Authority to hold him guilty for the said appointment. A perusal of the Imputation of Misconduct or misbehaviour with respect to this charge would show that it was clearly alleged therein that on the day Shri S.S. Majumdar resigned from the post of Head Master, he was appointed as a Primary Teacher with effect from the date he had joined as Head Master and his appointment as a regular teacher was in violation of policies/instructions circulate by FHQ. It was also stated that no Selection Committee was constituted with regard to the appointment of Shri S.S. Majumdar as a regular teacher nor was the approval of FHQ taken. Besides that, Shri S.S. Majumdar had secured only 43% marks in his B.Sc., whereas one of the essential conditions for such appointment was 45% in aggregate in the degree examination. In his reply to the charge-sheet, the respondent No.1 stated that Shri S.S. Majumdar was regularized as a school teacher because he was the senior most temporary teacher to be regularized, already having served as temporary teacher for 10 years. In his reply, the respondent No.1 did not dispute that the appointment of Shri S.S. Majumdar as a regular teacher was in violation of policies/instructions circulated by the FHQ since no Selection Board was constituted for his appointment as regular teacher nor was the approval from FHQ taken. He also did not dispute that the essential qualification for appointment as regular teacher was 45% marks in aggregate in the degree examination. He expressly admitted that Shri S.S. Majumdar had 43% marks in his graduation. Since the respondent No.1 did not claim that he had violated the policies/instructions circulated by FHQ in appointment of Shri S.S. Majumdar as a regular teacher nor did he dispute a person could be appointed as a regular teacher only if he had obtained at least 45% marks in graduation, it was not necessary for the Department to prove by producing documentary evidence, during the course of the inquiry, that the aforesaid appointment was contrary to the policies/instructions issued by BSF in this regard. In any case, it can hardly be disputed that setting up a Selection Committee for appointment of a regular teacher would be an essential codal

requirement for any appointment under the Government and appointment of a person who did not possess the minimum prescribed marks in his graduation, would also be illegal. The respondent No.1 claimed that he had regularized Shri S.S. Majumdar as a teacher as he was the senior most teacher and has experience of 10 years. There is no evidence of BSF having formulated a policy for regularization of temporary teachers as regular teachers nor was any such policy alleged by the respondent No.1 in his reply to the charge-sheet. In the absence of any such policy, the respondent No.1 could not have regularized Shri S.S. Majumdar as a school teacher even if he had the experience of 10 years. Added to this, is the fact that on account of his having secured less than 45% marks in the graduation, Shri S.S. Majumdar was not eligible to be appointed as a regular teacher. On the top of it, Shri S.S. Majumdar was appointed as regular teacher with a retrospective effect and not prospectively. These are the circumstances, indicating that the respondent No.1 was determined to favour Shri S.S. Majumdar and that is why he first allowed him to appear in the interview despite his not being an eligible even in terms of the educational qualification fixed by the respondent No.1 himself, then the Interview Board headed by him recommended his appointment, the respondent No.1 accepted the recommendation as IG, BSF and appointed Shri S.S. Majumdar as the Head Master of the primary school and when the matter was reported to the Headquarter and Shri S.S. Majumdar had no option but to resign, the respondent No.1 appointed him as a regular teacher with retrospective effect.

26. It has come in evidence that as many as 7 persons were appointed as teachers, none of whom were eligible and Shri S.S. Majumdar was only one of those teachers. However, the fact remains that as far as the respondent No.1 is concerned, he appointed only Shri S.S. Majumdar. The remaining teachers having been appointed by other officers of BSF and the appointment made by him was an act of favouritism as is evident from the facts and circumstances discussed hereinabove. Even if we proceed on the basis that the respondent No.1 could not have been held guilty of showing favour to Shri S.S. Majumdar in his appointment as a regular teacher, his subsequent conduct in appointing him as a regular teacher, with retrospective effect, without even the basic codal formality of constitution of a Selection Committee and without his possessing the prescribed minimum marks, is a strong circumstance which indicates that the appointment of Shri S.S. Majumdar as the Head Master of the primary school, Kadamatala was an act of favouritism shown to him by the respondent No.1. It has also come in evidence that later on, when the respondent No.1 sought to terminate the services of all the seven teachers, BSF Headquarter allowed them to continue. This, to our mind, was a decision taken on administrative grounds and does not absolve the respondent No.1 from the act of favour shown by him to Shri Majumdar. We, therefore, disapprove the view taken by the Tribunal with respect to his charge and hold that the finding of the Disciplinary Authority with respect to this charge was justified on facts and in law.

Article-V

27. In a nutshell, the charge is that one Brijesh Kumar was appointed as Follower in BSF on the basis of a domicile certificate showing him to be a resident of PS Matigara, District Darjeeling (West Bengal), whereas actually he was a resident of Balia, District Uttar Pradesh. It is alleged that the respondent No.1 rejected the candidature of one cook, one sweeper, one water carrier and one washer man, recommended by the Board of officers, which included a medical officer, on account of their being overweight/underweight, despite they having been found fit by the Medical Officer and Shri Brijesh who was earlier found unfit by the Recruitment Board was asked to submit an application for another medical examination in which he was declared fit and later appointed as a sweeper in BSF. The Inquiry Officer held the charge to be not proved. The Disciplinary Authority, however, held the charge to be partly proved and recording the following disagreement note in this regard:-

The service records of Shri Brijesh Kumar, recruited as a Follower by the Charged Officer show his domicile as Village Ujanu Shivnagar, Dist. Darjeeling. The residents of North Bengal Districts and Sikkim are only eligible to appear before the Recruitment Board for selection to the post of Followers. The domicile certificate of Shri Brijesh Kumar issued by the SDO, Silliguri shows his domicile as Village-Digilijote, PO-Kadamatala. Neither any examination of SDO staff, Siliguri, nor steps were taken by the Charged Officer for verification of the records of the SDO, Silliguri to confirm the genuineness of domicile of Shri Brajesh Kumar. During the inquiry, the prosecution did not produce the evidence to show that Shri Brajesh Kumar belongs to Balia, in U.P.

The Tribunal noted that the Presenting Officer had not pressed this charge and hence, there could be no reason or even justification to examine the evidence and hold the charge to be proved or partly proved. It was further observed that the allegations on which the charge was held to be proved, were not the subject matter of the charge and, therefore, no finding of guilt could have been recorded on the basis of such allegations. The Tribunal, in taking this view relied upon the decision of Supreme Court in M.V. Bijlani Vs. Union of India (UOI) and Others, , where the Apex Court, inter alia, observed as under:-

He cannot enquire into the allegations with which the delinquent officer has not been charged with.....

In Director (Inspection & Quality Control) Export Inspection Council of India and Others v. Kalyan Kumar Mitra & Others: 1987 (2) CLJ 344 it was held that the Inquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject matter of the charges is wholly illegal.

The ratio of these judgments is that a person cannot be held guilty of acts which did not form part of the charges served upon him.

28. On a perusal of the Articles of Charge and Imputation of Misconduct or Misbehaviour served upon the respondent No.1 with the reasons for

disagreement recorded by the Disciplinary Authority in the disagreement note, we find that the conclusions drawn by the Disciplinary Authority, with respect to this Article of Charge, were altogether different from the allegations contained in the charge-sheet served upon the respondent No.1. In the charge-sheet, there was no allegation that the respondent No.1 had failed to examine the record of SDO, Siliguri to confirm the genuineness of the domicile of Shri Brijesh Kumar, or that when the discrepancies with respect to his domicile were brought to the notice of the respondent No.1, he failed to take action against Shri Brijesh Kumar. The respondent No.1 therefore, was not subjected to any inquiry with respect to the charges which the Disciplinary Authority held to be proved against him, under Article V of the charge-sheet. In any case, the Inquiry Report does not disclose any evidence on the basis of which such a finding could be recorded by the Disciplinary Authority. With respect to the allegation contained in the charge-sheet, the Inquiry Officer noted that the Presenting Officer, in his written brief, had stated that the witnesses had failed to prove anything against the respondent No.1, as far as this charge was concerned. It was also noted by the Inquiry Officer that the respondent No.1 had observed "overweight/underweight?", while rejecting the recommendation of the Board in respect of 04 candidates. He also noted that the department had not produced any evidence to show that Shri Brijesh Kumar belonged to Balia. He took note of the fact that in his deposition SW-31 Shri Brijesh Kumar had stated that though his place of birth was Balia, after passing High School in 1995 he had worked in his father's barber shop in Siliguri and the domicile certificate was issued to him by the Councilor from Ward No.46 in Matigara, Siliguri. Shri Brijesh Kumar also stated before the Inquiry Officer that he was found medically unfit due to "hydrosil" and thereafter he went to Review Medical Board which declared him fit. Another witness Shri Stephen Tirky, in his deposition as SW-30, stated before the Inquiry Officer that Shri Brijesh Kumar was in fact a domicile of West Bengal. No fault, therefore, can be found with the conclusion drawn by the Inquiry Officer with respect to this charge. We are of the view that the finding of the Disciplinary Authority with respect to this charge, besides being beyond the charge-sheet served upon the respondent No.1, was also based on no evidence at all and, therefore, was vitiated in law.

#### Article No. VI

29. The allegation against the respondent No.1 is that vehicle No. WB-74 J 4337, which was detailed to proceed to THQ 89 Battalion of BSF located in Patna was taken by him to his home place in Balia District of UP. It is also alleged that Constable Anil Kumar, who accompanied him to his native place and who was issued 50 live rounds fired 41 rounds during the marriage function and returned only 09 rounds on his return from the tour and the shortage was made up by manipulating the record.

The respondent No.1, while replying to the charge-sheet, admitted that he had taken the aforesaid vehicle to his native place in Balia on his visit to attend the

wedding of his son, solemnized on 15.2.2006. He claimed that since he was a "Y" category protectee due to threat from Naxalities he had taken the vehicle as his escort vehicle from Patna to Balia. He also admitted that Constable Anil Kumar had accompanied him to the aforesaid marriage. He further stated that earlier, ADGP (Intelligence) Andhra Pradesh had intimated AFHQ about his security categorization and providing security to him as per "Y" scale and on the basis of that message AFHQ had asked North Bengal Frontier to take necessary action. According to him, in his honest belief, he thought that the endorsement was enough for him to take security as per the prescribed scale and depending upon the threat and local circumstances. Regarding use of ammunition, he claimed that no government ammunition was used to his knowledge and all the 50 rounds issued to Constable Anil Kumar were deposited by him with the Headquarter.

It is thus, an admitted case that vehicle No. WB-74 J 4337 which was detailed to proceed to THQ-89 Battalion of BSF, did not report at its destination and the respondent No.1 took the aforesaid vehicle to his native place in Balia along with 03 BSF personnel including Constable Anil Kumar. The only question which arises for consideration is whether the respondent No.1 had the permission for using the aforesaid vehicle as an escort vehicle, on his private visit or he was otherwise entitled to an escort vehicle on his private visit without any prior permission from BSF Headquarter. The Inquiry Officer held that though the respondent No.1 was provided "Y" category security, he was not entitled to an escort vehicle for his road journeys, even under "Y" category security and therefore use of the aforesaid vehicle by the respondent No.1 was not justified nor was it permitted by the Competent Authority. During the course of arguments before us, the learned Counsel for the respondent No.1 relied upon a letter dated 8.7.2005 purporting to be written by Directorate General of BSF to Inspector General, HQ North Bengal Frontier of BSF stating therein that DGP, Intelligence, Hyderabad had intimated that the respondent No.1 was categorized as "Y" security and therefore necessary security be provided to him. Annexed to his letter is the copy of a letter dated 1.7.2005 sent by DG of BSF to FTR HQ BSF North Bengal, forwarding a photocopy of the message received from Additional Director General of Police (Intelligence) Andhra Pradesh. A copy of the message sent by Additional Director General (Intelligence) Andhra Pradesh, which is annexed to this letter, would show that vide his message BSF was requested to provide security, as per "Y" scale category, to the respondent No.1. A list of categorized police officers was also made available to us by the learned Counsel for the respondent No.1. This list would show that the respondent No.1 was entitled to "Y" category security with bullet proof car. However, vehicle No. WB-74 J 4337, which the respondent No.1 took to Balia on his private visit was used as an escort vehicle and not as the vehicle in which he travelled to Balia. Though the respondent No.1 was entitled to a bullet proof car, for his personal travel, there is no material on record to show that he was entitled to an escort vehicle. There is no document on record to indicate that the respondent No.1 asked for any permission to take

the aforesaid vehicle as an escort vehicle on his private visit to Balia. There is no evidence on record to indicate that a "Y" class protectee was entitled to an escort vehicle. Therefore, it cannot be disputed that the respondent No.1 misused the government vehicle No. WB-74 J 4337, by using it as an escort vehicle, on his private visit to Balia on the occasion of marriage of his son. The Tribunal felt that the charge was held to be partly proved, without taking into consideration the explanation of the respondent No.1 that as a "Y" class protectee he was entitled to round-the-clock security, including a bullet proof vehicle and no permission was therefore required to take vehicle, in question, to Balia. The Tribunal was of the view that they had two options available to them in the matter; the first being to remit the matter to the concerned authorities, but, in the peculiar facts and circumstances of the case, they were refraining from doing so, because the charge, to the extent it was held to be proved, was required to be ignored, inasmuch as the respondent No.1 was entitled to take the vehicle and PSOs to Balia and therefore not obtaining prior permission for this purpose, would not be a serious issue. We are, however, not in agreement with the view taken by the Tribunal, for the simple reason that even if we proceed on the assumption that the respondent No.1, being a "Y" class protectee, was entitled to a bullet proof car even on his private visits, he certainly was not entitled to use a vehicle of BSF as an escort vehicle, whereas, vehicle No. WB-74 J 4337 was used by him as an escort vehicle and not as the vehicle for his personal travel to Balia.

30. It was contended by the learned Counsel for the respondent No.1 that if the Disciplinary Authority disagreed with the findings of the Inquiry Officer, it could have only recorded tentative reasons for the disagreement, whereas in the present case, the Disciplinary Authority concluded in the reasons for the disagreement itself that the charge against the respondent No.1 had stood proved and therefore the order imposing penalty is liable to be struck down, on this ground alone. In support of his contention, the learned Counsel for the respondent No.1 relied upon *Yoginath D. Bagde Vs. State of Maharashtra and Another*, .

In the case before Supreme Court, the Inquiry Officer had recorded the findings that the charges against the respondent No.1 were not proved. These findings were submitted to the Disciplinary Committee which disagreed with those findings and issued a notice to the appellant requiring him to show-cause why he should not be dismissed from service. The reasons on the basis of which Disciplinary Committee disagreed with the findings of the District Judge were also communicated to the appellant along with the show-cause notice. However, instead of forming a tentative opinion, the Disciplinary Committee had come to final conclusion that the charges against the appellant were established. Allowing the appeal filed by the delinquent, the Supreme Court inter alia held as under:

In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges leveled against him but also at the stage at which those findings are considered



by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.

Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in *Punjab National Bank and Others Vs. Sh. Kunj Behari Misra*, were violated.

.....a final decision with regard to the charges leveled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of *Punjab National Bank* (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case.

In the case before this Court, the Inquiry Officer, in his report in respect of Article IV held that the evidence on record established that the appointment of Shri Mazumdar as primary teacher was not in accordance with BSF Education Code and the charge had been partly proved to the extent of wrong selection of Headmaster and Primary Teacher in BSF Primary School by the respondent No.1, without any favoritism and manipulation. The only disagreement recorded by the Disciplinary Authority was with respect to the allegations of favoritism and manipulation, which the Inquiry Officer held to be not proved but the Disciplinary Authority held to be proved. As far as Article VI is concerned, the Inquiry Officer held the same to be partly proved and there was no disagreement note recorded by the Disciplinary Authority. A perusal of the letter dated 6.10.2009 whereby the disagreement note was forwarded to the respondent No.1 through the Chief Secretary Government of Andhra Pradesh, would show that the disagreement note along with the copy of CVC's second stage advice was forwarded to the respondent No.1 and he was advised to submit his representation, if any, on the same within 15 days from the date of receipt of the letter. (emphasis supplied). In the case of Yoginath (*supra*) while supplying copy of a disagreement note to the appellant, he was called upon to show-cause against the proposed punishment of dismissal, whereas in the case before this Court no punishment was proposed in the letter dated 6.10.2009 whereby the disagreement note was sent to the respondent No.1. In the case before Supreme Court, no opportunity was given to the appellate to convince the Disciplinary Authority that the findings already recorded by the Inquiry Officer were just and proper and there was no good ground for reviewing, the findings or taking of a contrary view by the Disciplinary Authority. On the other hand, in the case before this Court, the respondent No.1 was particularly advised to submit his representation on the disagreement note and CVC's second stage advice as well as on the report of the Inquiry Officer. The respondent No.1 therefore had adequate opportunity to convince the Disciplinary Authority that the findings recorded by the Inquiry Officer did not call for any review by it, the reasons recorded in the disagreement note were not germane and the finding recorded by the Inquiry Officer was not liable to be interfered with. It is also not in dispute that the respondent No.1 did submit a detailed reply on receipt of communication from the Disciplinary Authority and a perusal of the order dated 8.9.2010 whereby penalty was imposed on the respondent No.1 would show that the submissions made by the respondent No.1 were duly considered by the Disciplinary Authority before concluding that a major penalty needs to be imposed on him. The order would also show that on receipt of submissions of the respondent No.1 the matter was referred to UPSC for its statutory advice and thereafter only a decision was taken to impose a major penalty of dismissal of service on the respondent No.1. Therefore, though the Disciplinary Authority did not say that the findings recorded in the disagreement note were tentative, the facts and circumstances indicate that the findings were treated by the Disciplinary Authority only as tentative findings and that is why the respondent No.1 was given an opportunity to make a representation against those findings and the submissions made by

him were duly considered, in consultation with UPSC, before imposing penalty upon the respondent No.1. Therefore, the findings ultimately recorded by the Disciplinary Authority do not stand vitiated in law on account of findings in the disagreement note not being termed as tentative.

31. For the reasons given in the preceding paragraphs we are of the view that the finding of the Disciplinary Authority in respect of Article IV of the charge-sheet which was held to be fully proved and Article VI which was held to be partly proved cannot be said to have been passed on "no evidence" or were otherwise perverse inasmuch as it could not be said no reasonable person acting on the basis of the material disclosed during the course of the inquiry could have taken such a view. Therefore, in our view the Tribunal was not justified in interfering with the findings recorded by the Disciplinary Authority in respect of the aforesaid two Articles of Charge.

### CONCLUSION

32. In view of the foregoing discussion, we are of the view that the impugned order passed by the Central Administrative Tribunal, to the extent it held that none of the charges against the respondent No.1 was proved or partly proved, cannot be sustained. However, since the order passed by the Disciplinary Authority imposing penalty of dismissal from service upon the respondent No. 1 was based on the premise that Articles I, II, III and IV were fully proved and Articles V & VI were partly proved, it cannot be allowed to stand, and the Disciplinary Authority is required to pass a fresh order on the question of penalty, taking Article No. IV as proved and Article VI as partly proved as indicated in this order. We therefore, while setting aside the impugned order passed by the Tribunal, direct the Disciplinary Authority to pass a fresh order on the quantum of punishment within 06 weeks from the date of this order. In the facts and circumstances in the case, there shall be no order as to costs.