

Pradip Kumar Chatterjee Vs. State of West Bengal and ors.

Pradip Kumar Chatterjee Vs. State of West Bengal and ors.

SooperKanoon Citation : sooperkanoon.com/866760

Court : Kolkata

Decided On : Jun-12-1995

Reported in : (1997)2CALLT4(HC)

Judge : Satya Brata Sinha, J.

Acts : [Constitution of India](#) - Article 226; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 11

Appeal No. : Matter No. 2066 of 1994

Appellant : Pradip Kumar Chatterjee

Respondent : State of West Bengal and ors.

Advocate for Def. : Jaydeep Kar, Adv.

Advocate for Pet/Ap. : Sanat Chowdhury, Adv.

Disposition : Petition allowed

Judgement :

Satya Brata Sinha, J.

1. This application is directed against the order dated 10.5.89 as contained in annexure K to the writ petition whereby and whereunder the petitioner was dismissed from service as also the order dated 22.8.91 passed by the appellate

authority.

2. The fact of the matter shortly stated is as follows:-

3. The petitioner at all material times was working as a clerk attached to the office of the Sub-divisional Officer, Barasat. Ten criminal cases were instituted against the petitioner at the instance of one Sri Purnendu Bose, Treasury officer in February 1983. The petitioner was discharged from all the aforementioned criminal cases in terms of the provisions of Section 167(5) of the Code of Criminal Procedure as no charge sheet was filed within the statutory period. During the pendency of the aforementioned criminal cases, on 18th May, 1983 the petitioner was served with a chargesheet. The petitioner filed an application before the Enquiry Officer for stay of the departmental proceeding but the same was refused. He filed a writ application in this court, but the same was dismissed by an order dated 3.2.84. The appeal against the said order being FMAT 492 of 1984 was also dismissed by an order dated 15th March, 1984. The petitioner appeared before the Enquiry Officer but did not file his written statement. Inter alia on the ground that thereby he would be disclosing his defence. On 2.4.84 the petitioner sought for the assistance of a helper stating that he was ill and the petitioner was facing 25 charges. It was further pointed out that the Enquiry Officer is a law knowing person. In answer to the charges which related to forgery of certain bills payable to some pensioners, the petitioner denied the same and raised a contention that the said bills are forged and fabricated. It is the petitioner's definite case that the said bills were written by one Shankar Sen Gupta, LDC. He, therefore, made a prayer that the said bills be sent to the Handwriting Expert which was not considered by the Enquiry Officer. The petitioner has raised also other contentions with regard to the irregularities and or illegalities in the conduct of the disciplinary proceedings.

4. On 14.1.85 the petitioner sought for an adjournment but by a letter dated 16.1.85 which was served upon the petitioner on 31.1.85, the petitioner was asked to appear on 21.1.85. The petitioner appeared before the Enquiry Officer on 2.2.85 but allegedly no opportunity was given to him to argue his case. The Enquiry Officer submitted his report on 4.2.85 a copy whereof was served on the petitioner

on 17.2.86 along with second notice to show cause. He questioned the said second show cause notice by filing a written application which was dismissed by an order dated 18.3.86. The petitioner gave reply to the second show cause notice on 8.3.86. By an order dated 10.5.89 the petitioner was dismissed from service. He preferred an appeal before the Commissioner, Presidency Division. As according to the petitioner, the said appeal had not been disposed, he again made a representation praying for early disposal of the appeal. On 8.7.94 this writ application was filed. According to the petitioner, he came to learn from the affidavit-in-opposition that the said appeal has been dismissed on 22.8.91. The petitioner has filed a supplementary affidavit questioning the said order of the appellate authority.

5. In their affidavit-in-opposition the respondent Nos. 1,2 and 3 inter alia, contended that the petitioner was afforded full opportunity to defend his case in the departmental enquiry. It has been urged that as the petitioner has withdrawn the group insurance amount as also the amount of general provident fund, he must be held to have accepted the order of dismissal. It is stated that the petitioner could have maintained further appeal against the order of the appellate authority before the Board of Revenue.

6. Sri Amitabha Mukherjee, District Magistrate and Collector, North 24-parganas, has also affirmed an affidavit. In the said affidavit apart from the contentions raised in the affidavit-in-opposition of the respondent Nos. 1, 2 and 3, a contention has been raised that this application is barred under the principle of res-Judicata and/or constructive res-judicata.

7. Mr. Chowdhury the learned counsel appearing on behalf of the petitioner has raised various contentions in support of this application. He firstly submitted that the rejection of the petitioner's prayer by the Enquiry Officer that the petitioner be allowed to be assisted by a helper, is wholly illegal and without jurisdiction. It was pointed out that Sri Purnendu Bose, Treasury Officer, who was appointed as presenting officer was the first informant in the criminal case against the petitioner by the Enquiry Officer although he was a witness in the departmental proceeding, which demonstrates bias on the part of the Enquiry Officer. Reliance in this

connection was placed on AIR 1958 SC 86 and : (1993)IILLJ549SC .

8. It was submitted that the petitioner prayed for copies of the statements of the witnesses so as to enable him to cross examine them effectively, but the said prayer had also been rejected by the Enquiry Officer on the ground that he had not received any direction from the disciplinary authority to give him copies.

9. This according to the petitioner also shows bias and thus the disciplinary proceeding must be held to be vitiated in law. Reliance in this connection has been placed on : [1975]2SCR370 and 1993 Vol. 5 Service Law Reporter page 532.

It was submitted that the statements made in paragraph to 28 of the writ petition having not been traversed in the affidavit-in-opposition the same must be deemed to have been admitted. It was further pointed out that on N. N. Dam, one of the petitioner allegedly made a confession before the Sub-Divisional Magistrate are behind his back. Although neither Sri Dam not the concerned Sub-Divisional Magistrate were examined as witnesses in the departmental proceedings, the said purported confession was relied upon by the Enquiry Officer which was violative of the principles of natural justice as the petitioner did not get any opportunity to cross examine him. No pensioner who had allegedly been benefited has also been examined. Reliance in this connection has been placed on 1992 Labour and Industrial Cases Page 420, 1986 SC page 995, 1970 SC page 20, 1991 Vol.4 Service Law Reporter page 70(P&H;) and 1972 Labour and Industrial Cases page 627(SC). It was further submitted that some of the important documents namely, sanction order, pension payment order, CVP sanction order have been withheld although the same had been asked for by the Enquiry Officer, withholding of such vital documents, according to the petitioner, also vitiates the proceedings being violative of the principles of natural justice. Reliance in this connection has been placed on 1989 (1) Calcutta Law Times page 129.

10. It was urged that the petitioner had asked the Enquiry Officer to seize all documents and keep the same with him. It. was pointed out that in few copies of the bills signature of the officer was missing but the enquiry Officer only did not accede to the said request but allowed the prosecution to plus the loopholes. It was urged that in the departmental proceedings the then Treasury Officer

Chinmay Chakraborty and Accountant Bidyut Das who were directly responsible for passing of the relevant disputed bill were neither proceeded against nor were cited as witnesses. It was also contended that while the Treasury Officer P.N. Bose was being examined despite objection by the petitioner, the other witnesses namely, Chinmay Chakraborty and Bidyut Das were allowed to be present inside the room which also show bias on the part of the Enquiry Officer. It is also contended that the Enquiry Officer admitted xerox copies of the original bills although the original was available and were not produced by the department. It is stated that the report of the Enquiry Officer is perverse as he took into consideration inadmissible evidence. Reliance in this connection has been placed on : (1983)ILLJ1SC and : (1978)ILLJ84SC .

11. It has been pointed out that the petitioner's wife was seriously ill and as such he prayed for adjournment of the proceeding, but despite the same, a letter dated 14th January, 1985 was sent which was received by the petitioner on 31.1.85 although the date fixed before the Enquiry Officer was 21.1.85 and on that date the proceedings were held behind the back of the petitioner. The petitioner served a notice upon the Enquiry officer dated 2.2.85 which was received in his office on 4.2.85. It was contended that the disciplinary authority did not at all consider the petitioner's representation. He passed a laconic order which demonstrates total non-application of mind on his part and on that ground too the impugned order is vitiated. Reliance in this connection has been placed on 1968 Labour and Industrial Cases page 543 (Mysore) and : AIR 1972 SC2083 . It was further submitted that the appellate order was also not served upon the petitioner and he came to learn about the dismissal of appeal only from the affidavit in-opposition. The petitioner submits that it was the duty of the appellate authority to communicate the said order to him. Reliance in this connection has been placed on 1993 Vol.2 Calcutta Law Times Page 128; 92 CWN page 2135. The appellate order was also questioned by the petitioner on the ground that prior to the disposal of the appeal no opportunity of personal hearing was given to him. Reliance in this connection has been placed on : 1978(2)ELT378(SC) . It was further submitted that even the charges framed against him were vague as the same did not contain any particulars or date. The petitioner also submitted that keeping in view the fact that a long time has elapsed this court may not give any direction for any further

enquiry. The petitioner in this connection has placed strong reliance upon a decision of the Supreme Court In AIR 1981 SC page 858.

12. Mr. Kar learned advocate appearing for the respondent, however, submitted that this application is barred under the principles of res judicata and/or estoppel. It was submitted that the petitioner had earlier filed a writ application in this court, which was dismissed and, thus, no writ application is maintainable on the self same cause of action.

13. Reliance to this connection has been placed on : AIR 1986 SC391 (Forward construction Co. and Ors. v. Prabhat Mandal and Ors) and 1990 Supp. SCC 746 (Government of Andhra Pradesh v M. Narashlma Murthy).

14. It was further submitted that in view of the fact that the petitioner has withdrawn General Provident amount as also the Group Insurance amount, he must be held to have accepted the order of dismissal, and, thus, he is estopped and precluded from questioning the same.

15. Mr. Kar in support of the said contention relied upon Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association and Ors. 1988 Supp. SCC page 55; 1988 SC 233 and Mukesh Kumar Aggarwal & Company v. State of M.P. and Ors. reported in 1994(4) SCC 422 as also upon the definition of the word 'Waiver' as contained in Black's Law Dictionary.

16. It has further been submitted that the disciplinary proceedings had been held upon compliance with the principles of natural justice as also the provisions of West Bengal Civil Services (Classification, Controls & Appeals) Rules, 1971.

17. With regard to the contention of the petitioner that he had been denied the assistance of a defence helper, my attention has been drawn to Sub-rule 5(2) of Rule 10 of the West Bengal Services (Classification, Control & Appeal) Rules, 1971 and it was submitted on the basis thereof that it was not obligatory on the part of the Enquiry officer to allow a delinquent to be presented by a defence helper unless he asks therefor. It was submitted that the prayer of the petitioner was not turned down and, in fact, upon the application filed by the petitioner, the

hearing was adjourned to 3.4.84. From 4.6.84 the petitioner appeared before the Enquiry Officer without any defence whatsoever and he was estopped and precluded from contending that he is prejudiced by being unable to be defended by a defence assistant.

18. The learned counsel next contended that the petitioner has not been prejudiced by reason of the fact that the presenting officer was a witness examined on behalf of the disciplinary authority. According to the learned counsel the bias on the part of the presenting officer ought to have been raised during the disciplinary proceeding. The learned counsel, in this connection, has relied upon a decision of the Bombay High Court in *Asiatic Salvors v. Doelsal Pvt. Ltd.* reported in AIR 1986 Bombay, 335.

19. In regard to the contention of the petitioner that his prayer for copies of the statements of the witnesses had been denied for effective cross-examination, the learned counsel contended that the witnesses have been examined only for the purpose of explaining the documents. According to the learned counsel, the entire report of the Enquiry Officer is based upon the documentary evidence produced as against the petitioner and thus he was not prejudiced by not getting copies of the statements of the witnesses. Reliance, in this connection, has been placed on *K.L. Tripathi v. State Bank of India*, reported in : (1984)ILLJ2SC .

20. Mr. Kar contended that the consideration of the confession of Mr. Dam by the Enquiry Officer do not vitiate all the charges as the same had been taken into consideration only in respect of Charge No. 1. According to the learned counsel such confession was admissible in terms of Section 24 of the Evidence Act.

21. With regard to the withholding of the alleged Important documents and the seizure thereof by Enquiry officer, it was submitted that from the report of the Enquiry Officer it would appear that all documents which were required to be produced to substantiate the charges were produced before the Enquiry Officer. It is submitted that along with the chargesheet a list of documents and list of witnesses were disclosed and such documents were duly inspected by the petitioner. The learned counsel contends that this court, in fact in exercise of its jurisdiction under Article 226 of the [Constitution of India](#), cannot evaluate

evidences, and in support of the said contention reliance has been placed in the decision in Maharashtra State Board of Secondary & Higher Secondary Education v. K. S. Gandhi and Ors. reported in 1992(2) SCC 216.

22. With regard to the submission of Mr. Chowdhury to the effect that the other persons had not been proceeded against, Mr. Kar submitted that it is the employer who has the proper authority to consider as to who should be proceeded against. According to the learned counsel non-initiation of a proceeding against others cannot be a ground for setting aside the findings of the disciplinary authority, against the petitioner.

23. With regard to the question of presence of other witnesses while the presenting officer was examined, the learned counsel has reiterated that the entire enquiry report is based on the documentary evidence.

24. The learned counsel further submitted that the xerox copies of the documents were admissible in evidence in terms of Section 63 of the Evidence Act. According to the learned counsel the enquiry proceedings were conducted fairly as would appear from the records of the enquiry proceeding. The learned counsel contends that the findings of the Enquiry Officer cannot be said to be perverse inasmuch as various documents have been relied upon by the Enquiry Officer in support of his findings.

25. Before dealing with other question, 11 u, preliminary objections raised by the learned advocate appearing on behalf of the respondents may be considered. The petitioner filed a writ application questioning the second show cause notice. The said writ application was dismissed in limine on the ground that the same was not maintainable.

26. It is beyond any cavil of doubt that an unreasoned order does not operate as res judicata. The principles pf res judicates as engrafted under Section 11 of the Code of Civil Procedure would be attracted in a case where there had been final adjudication of the issue. I have perused the order passed by Banerjee J. dated 18.3.1986, passed in CO. No. 2891 (W) of 1986. The said order reads thus; 'In my view this writ petition is not maintainable as such, this writ petitions dismissed'. In

view of the fact that this court dismissed the said writ petition without assigning any reason, the same cannot operate as res judicata.

27. It is now well known that a pure question of law touching the jurisdiction of the authority to pass an order will not attract the principles of res judicata. It is further well known that dismissal of a writ application in limine on the ground of alternative remedy or delay or on such similar grounds does not operate as res judicata. In Chief Justice of Andhra Pradesh and Anr. v. L.V.A. Dikshitulu and Ors. reported in : [1979]1SCR26 the apex court held that an order passed wholly without jurisdiction cannot be sustained on the ground of estoppel or res judicata.

28. There is another aspect of the matter. The learned Judge must have dismissed the application filed by the petitioner in limine as no penal action had been taken against him till then. In Chanan Singh v. Registrar, Co operative Society, reported in : (1976)1ILLJ98SC , the Supreme Court held that when no punitive action had been taken the writ petition will not be maintainable.

29. In Mathura Prasad v. Dossibai, reported in : [1970]3SCR830 the Supreme Court held :

'A question relating to the jurisdiction of a court cannot be deemed to have been finally determined by an erroneous decision of the court. If by an erroneous interpretation of the statute the court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the court assumes jurisdiction which it does not possess under the statute the question cannot operate a res-judicate between the same parties, whether the cause of action in the subsequent litigation is the same or otherwise.

30. yet recently in Krishan Reddy v. K. Ramularma reported in AIR 1995 A. P. 70, a Full Bench of the Andhra Pradesh High Court clearly held that a pure question of law does not operate as a res judicate.

31. Moreover, in this case the cause of action of filing the present writ applications absolutely different than the cause of action which was prevailing at the time when the earlier writ application was filed. As indicated hereinbefore, the petitioner, in

this case, has questioned an order of dismissal. The respondents themselves in their affidavit-in-opposition categorically stated that the petitioner's appeal has also been rejected. By filing a supplementary affidavit, the petitioner has questioned the said appellate order also. Thus, this writ application, being passed on a separate cause of action, the same will not operate as res judicata. Reference, in this connection, may be made to Hoshnak Singh v. Union of India and Ors. reported in : [1979]3SCR399 and Smt. Puraji Rai etc. v. Madan Gopal (dead) Lrs. viz. Smt. Jaiwanti and Ors., reported in : [1989]3SCR383 .

32. There cannot be any doubt, whatsoever, that the general principles of res judicata are applicable in a proceeding under Article 226 of the Constitution. However, in Forward Constructions case (supra), the Supreme Court was considering the question as to whether a public interest litigation can operate as a res judicata. In that case, the adjudication was conclusive and final. The Supreme Court held that when an adjudication is conclusive and final the same would operate as res judicata not only as to the actual matter of determination but as to every other matter which the parties might and ought to have litigated and have if decided as understandably or essentially connected with the subject matter of the litigation. The Supreme Court in that case, inter alia, held that the principles underlined in Explanation IV to Section 11 of the CPC would be attracted in writ application also. However, in that case it was held that in the earlier public interest litigation being not a bonafide one, the later writ application would operate as a res judicata in terms of explanation 6 to Section 11 of the CPC.

33. To the same effect is the decision in Government of Andhra Pradesh v. M. Narashima Murthi, reported in 1990 supplementary SCC 746.

For the self same reasons, the question of estoppel raised in the instant application also cannot be said to have any relevance.

'Waiver' has been defined in the Black's Dictionary as follows:-

'The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in

possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it.'

The decision in *Municipal Corporation of Greater Bombay v. Dr. Hakim Wari, Tenants', Association*, reported in 1988 supplementary SCC 55, relied upon by Mr. Kar militates against his contention. The Supreme Court held that in order to constitute waiver, there must be voluntary and intentional relinquishment of a right, the absence of a waiver is an estoppel and when there is no estoppel there is no waiver.

34. In *Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh* reported in : [1968]2SCR548 the apex court held that a waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights.

35. In *West Bengal Headmasters Association and Ors. v. State of West Bengal and Ors.* reported in 1991(2) CLJ 188 it was held:-

'In the case of *Bashesar Nath v. Commissioner of Income Tax, Delhi and Rajasthan and Anr.* : [1959]35ITR190(SC) it has been said:-

'Waiver is a troublesome term in the law. The generally accepted connotation is that to constitute 'waiver', there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege.'

36. Again in the case of *Motilal Padampat Sugar Mills Co. Ltd. v. The State of Uttar Pradesh and Ors.* (supra) it was said by the Supreme Court.

'waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be 'an intentional act with knowledge' per Lord Chelmsford L.C. in *Earl of Darnley v. London, Chatham and*

Dover Rly. Co. (1862) 2 HL 43 at p. 57. There can be no waiver unless the person who is said to have waived is fully informed as to his right with full knowledge of such right, he intentionally abandons it. It is pointed out in Halsbury's Laws of England (4th Edn.) Vol. 16 In para 1472 at p.994 that for a 'waiver' to be effectual it is essential that the person granting it should be fully informed as to his rights' and Issacs, J. delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 has also emphasised that waiver must be with knowledge, an essential supported by many authorities.'

37. It is true that whether a right has been waived, can be determined even on basis of conduct of the party in question, reference may be made to a passage in 'The Law Relating to Estoppel by Representation', by George Spencer Bower, (Third Edition) at page 47:

'54. It is a question of fact, where there is evidence both ways, whether the particular acts alleged took place, or not, and whether in virtue thereof the party made the particular representation alleged. It is a question of law, however, whether there is any evidence of the alleged acts and conduct, and also whether proved or admitted conduct does or does not amount to an unequivocal and conclusive representation of the precise character alleged.'

It was pointed out on behalf of the State that as the teachers and employees opted for the revised scales of pay it should be held on basis of their admitted conduct that they have waived their right for being considered for extension. In this connection reference was made to Mulla's The Indian Contract and Specific Relief Acts (9th Edn). page 451 where it has been said:-

The word waive was confined to its own legal contention i.e. waiver is a doctrine of some arbitrariness Introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions. It is a conclusion of law when the necessary facts are established.'

But in the same book at the same page in respect of law of waiver it has been stated as follows.

'Waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right, waiver must be an intentional act with knowledge. Firstly, some distinct act ought to be done to constitute a waiver, next it must be intentional, and lastly it must be with knowledge'.

38. When the necessary facts relating to waiver of a right are established or admitted, the conclusion is question of law only. But as has been repeatedly pointed out by English Courts as well as the Supreme Court, the abandonment of a right more so when it is statutory in nature, then it must be established on evidence or by admission that such right has been waived intentionally and with knowledge. It has been said in the Halsbury's laws of England (fourth edition) Vol. 9, paragraph 574:-

'Waiver may be express or implied from conduct, but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concessions granted must act in reliance of the concession.' Waiver means abandonment of a right which includes a statutory right where no public policy is involved. Such relinquishment must be intentional and voluntary of a known right. There can be no waiver unless a person who is supposed to have waived is fully informed of such right and thereafter he intentionally abandons it.'

39. Thus, in order to make out a case of waiver of a legal right there must be clear, unequivocal and decisive act, of a party showing such purpose as acts amounting to an estoppel on his parts.

40. In the instant case, the petitioner has merely withdrawn his General Provident Fund amount as also the Group Insurance amount. The General Provident Fund as also Group Insurance amounts were payable to the petitioner on his own right. It cannot be said that only because the petitioner had withdrawn the said amounts, he has waived his right to question the order of dismissal nor can it be contended that thereby the petitioner has accepted the same. It is the case of the respondents themselves that the petitioner had approached this court earlier

questioning the fairness of the disciplinary proceedings on more than one occasions. He, therefore, had been agitating the grievances with regard to the non-compliance of the principles of natural justice and denial of fair procedure in the matter of holding of departmental proceeding against him. In this view of the matter Mr. Kar's submission cannot be accepted that this writ petition is barred under the principles of waiver.

41. In the instant case, the petitioner has raised violation of the principles of natural justice on various counts.

42. The petitioner categorically stated that he had sought for assistance of a helper. The Presenting Officer was a Treasury Officer. The petitioner further stated that the Enquiry Officer had also knowledge of law. The petitioner was denied assistance by any helper although keeping in view the facts and circumstance of the case the petitioner could have been prayed for assistance through a lawyer, inasmuch as, there are as many as 25 charges of serious misconduct, inter alia for defalcation had been levelled against him. The Enquiry Officer had taken into consideration more than 200 documents. The petitioner is a non Matric. He was initially employed as a Class IV employee but was later on promoted to Class III employee.

43. In *The Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni and Ors.* reported in : (1983)ILLJ1SC , the apex court observed:-

'12. x x x x x xIn our view we have reached a stage in our onward march to fairplay in action that where in an enquiry before a domestic tribunal the delinquent office is pitted against a legally trained mind, if he seeks permission to appear through a legal practitioner the refusal to grant this request would amount to denial of a reasonable request to defend himself and the essential principles of natural justice would be violated. This view has been taken by a learned single Judge and while dismissing the appeal in limine approved by the Division Bench of the High Court commends to us. Therefore, this appeal is liable to be dismissed.'

44. In *Bhagat Ram v. State of Himachal Pradesh and Ors.* reported In : (1983)ILLJ1SC the apex court at p.457 held:-

'5. x x x x x At any rate the Enquiry Officer at least must enquire from the delinquent officer whether he would like to engage anyone from the department to defend him and when the delinquent is a Government Servant belonging to the lower echelons of service, he would further Informed that he is entitled under the relevant rules to seek assistance of another Government servant belonging to department to represent him. If after this information is conveyed to the delinquent Government Servant, he still chooses to proceed with the enquiry without obtaining assistance, there is substantial compliance with the rules. But in the absence of such information being conveyed, if the enquiry proceeds, as it has happened in this case, certainly a very vital question would arise whether the appellant delinquent Government Servant was afforded a reasonable opportunity to defend himself and if the answer is in the negative, the next questions whether the enquiry is vitiated? In this connection, we would like to refer to a decision of this court in *G.L. Subramaniam v. Collector of Customs, Cochin* : (1972)ILLJ465SC wherein it was held that the fact that the case against the appellant was being handled by a trained prosecutor was by itself a good ground for allowing the appellant to engage a legal practitioner to defend him least the scales would be weighed against him. That was the case in which the disciplinary authority was represented by a trained prosecutor and the question was whether the delinquent officer was entitled to the assistance of a legal practitioner? And the answer was in the affirmative. The position is slightly different here. The department was represented by a presenting officer, code linquent, a superior officer of the appellant was equally represented by an Officer of his choice and this forest guard had to fend for himself.'

45. In the instant case the bias of the Presenting Officer is also beyond any doubt. The Presenting Officer lodged the first information report as against the petitioner. He was the superior office of the petitioner. He kept with himself all the relevant documents, without filing the same before the Enquiry Officer. He became a witness in the enquiry proceedings. It is now well settled that fairness in a disciplinary proceeding is one of the limbs of the principles of natural justice with a

view to see that a departmental proceeding is conducted in a fair manner. Not only the Enquiry Officer but also the Presenting Officer should be free from bias. It is now well-settled that the procedures in a departmental proceeding resembles those in a court proceeding although the standard of proof to prove a charge as against the delinquent officer may not be the same. It is wholly inconceivable that a Presenting Officer, who had been prosecuting the matter on behalf of the department in a criminal case shall also become a witness in a departmental proceeding. The Presenting Officer is also required to act with a detached mind. It is true, as has been submitted by Mr. Kar that in *State of U.P. v. Mohammad Nooh*, reported in 1958 SC 86, the Supreme Court was concerned with a case where the Presiding Officer got his testimony recorded. In my opinion, the said principle, in a given situation, may also apply inasmuch as the Presenting Officer was a witness in the departmental proceeding and he was to appear as a witness in the criminal case also being the author of the first information report. Moreover, other facts borne out from the records also show the act of unfairness on the part of the enquiry officer.

46. In *Ratan Lal Sharma v. Managing Committee Dr. Hari Ram (Coeducation) Higher Secondary School and Ors.* reported in 1993 SC 2155, it was held that when one of the members of the Enquiry Committee appeared as a witness, the findings made by the said committee must be held to be a proof of a biased and prejudiced mind. It is now wellknown that justice not only must be done but manifestly be seen to be done.

From the order sheet dated 4.2.1984, it appears that the proceedings were directed to be held at the office of the Treasury Officer, i.e. the Presenting Officer. On that date the documents were to be produced which shows that the said documents were allowed to be kept with the Presenting Officer.

47. Documents were examined in various sittings by the Enquiry Officer without the same being tendered or proved. It is not the case of the respondents that the documents were admitted by the petitioner. He, in fact, suggested that the documents had been interpolated and some documents did not seen his signature.

48. As regards Charge No. I and II documents were produced by the Presenting Officer on 13.7.1984, in relation to charge No. HI & IV on 19.7.1984 and as regards charge No. V, VI and VII on 2.8.1984 and so on.

49. On 10.8.94, the Enquiry Officer examined the documents and kept notes behind the back of the petitioner. He did the same thing on 20.1.1987. From the order sheet dated 4.2.1988 it appeared two other officials helped during the process of enquiry and other witnesses were not examined on the ground that the charges were related to documents. The petitioner was found guilty in respect of charge No.I to XXV except charge No. XVII although from the said order sheet, it does not appear that prior thereto the petitioner was asked to advance any argument or any argument was advanced by the Presenting Officer.

50. However in a separate order sheet dated 4.4.1994 it has been recorded that two witnesses were examined in relation to charge No, XVII an XXIII. '

51. From the records it is nor clear as to what procedure was adopted by the Enquiry Officer.

He had recorded the statements of witness but there is nothing to indicate that the petitioner was given any opportunity to cross-examine the said witnesses. It is also not clear as to how and in what manner the witness were allowed to examine themselves i.e. whether all the charges were taken up for consideration or some of them together or separately.

52. He appears to have recorded separately the analysis of documents only in respect of the charges.

53. It is now well settled that procedural fairness in a domestic enquiry is a part of the principles of natural justice. It is clear from the records of the enquiry proceedings that the delinquent officer at no point of time was informed of his rights. This was all the mere necessary in view of the fact that the petitioner, despite representation, was not allowed to be represented by a helper, whereas the Presenting Office was the Treasury Officer and the Enquiry Officer was a law knowing person. In respect of some of the charges, evidence was taken ex parte.

54. It is worth taking notice that the statements made by the petitioner in paragraph 1-28 of the writ application containing various allegations pointing out various infirmities in the enquiry proceeding has not been traversed at all in the affidavit in opposition.

55. It further appears that the petitioner has applied for copies of the statement of the witness for effective cross-examination and the same was admittedly refused.

56. The petitioner, as a matter of right, was entitled to the copies of the statements of the witness. The petitioner made an application before the Enquiry Officer. The Enquiry Officer refused to grant the same, inter alia, on the ground that he had not received any instruction in this regard from the disciplinary authority. The Enquiry Officer must be an independent person. While conducting a disciplinary enquiry, he is not to be guided by the disciplinary authority. If the disciplinary authority interferes in the disciplinary proceeding, the same itself will be violative of the principles of natural justice and fairplay. It is interesting to note that the Disciplinary authority by a letter dated 31.1.1984 directed the enquiry officer to meet the Collector, 24-Parganas who was the Disciplinary Authority to meet him on 1.2.1984 during office hours along with all papers regarding progress of enquiry report. The disciplinary authority, in the event, appoints a Disciplinary Authority, in my considered view, cannot interfere with the enquiry proceedings which is quasi-judicial in nature. The Enquiry Officer having thus been acting in terms of the directions of the Disciplinary Authority must be held to have committed an illegality.

57. In *State of Punjab v. Bhagat Ram* reported in 1974 SC 2335, the apex court held that the object of supplying statements is that the Government Servant will be able to refer to the previous statements of the witness proposed to be examined against the Government Servant and unless such statements are given, he would not be entitled to have an effective and useful cross-examination.

58. The submission of Mr. Kar to the effect that the charges have been proved only on the basis of the documentary evidence, is misconceived. For the purpose of proving the documents, witnesses have been examined. The witness have also explained the documents. The petitioner in no uncertain terms has stated that

some of the documents did not bear the signature and, therefore, made a prayer for sending the said disputed signature for their comparison by a Handwriting Expert. The petitioner, therefore, was entitled to cross-examine the witnesses with regard to the genuineness of his signature as also with regard to the contents thereof. The petitioner in cross-examination also could have shown that he had nothing to do with the alleged mis-conduct and the acts of illegalities, if any, have been committed by other officers. It may be recorded that the petitioner has made out a specific case that he had to direct hand in such matters. The decision of the Supreme Court in K.L. Tripathi, v. State Bank of India reported In : (1984)ILLJ2SC upon with strong reliance has been placed by Mr. Kar, is not applicable in the facts and circumstances of the case. In Tripathi's case (supra) the delinquent officer admitted his guilt and it was only in that situation the Supreme Court observed that by non-cross-examination of the witnesses; the concerned delinquent officer did not suffer any prejudice.

59. It further appears that the Enquiry Officer has considered the confession of one Sri N.N. Dam in respect of charge No. 1. Shir Dam was examined by the Sub-Divisional Magistrate in the criminal case. In the event the respondents intended to use the same for the purpose of proving its case, it was incumbent upon them to examine Shri Dam so as to enable the petitioner to cross-examine the said witness. Shri Dam stood in the category of an accused. His evidence before the Judicial Magistrate as Judicial confession might have been used against him in terms of Section 24 of the Evidence Act in the criminal case but such a statement cannot be used against a third party In a departmental proceeding.

In State of Gujarat v. Vlnuhhal Maganlal Thakker reported in 1992 Labour & Industrial Case 420, the Gujarat High Court held:-

'The departmental enquiry has also not been properly conducted in view of the fact that a statement of one of the witnesses for the department, alleged to have been made before the Anti-corruption Bureau was relied on by the Disciplinary Authority without disclosing the same to the delinquent officer and/or without giving him any opportunity to explain the same.'

The learned Judges also observed:-

'If on the evidence adduced in a disciplinary proceeding, one view or the other is possible, either on the basis of the direct evidence or on the basis of the reasonable inference drawn from the evidence adduced in the proceeding and view has been taken by the disciplinary authority, there is no occasion for the writ court to supplement its own finding on scrutiny of the evidence adduced in the departmental proceeding. But, if there is no evidence whatsoever, on the basis of which even a reasonable inference of fact can be drawn, and the finding rests purely in the realm of surmise and conjecture, then the law is well settled by the Supreme Court that the requirement of evidence cannot be substituted by surmise and conjecture, suspicion cannot be permitted to take the place of the requirement of proof or evidence in support of the department's case. If the finding has been made on pure surmise and conjecture, in the absence of any evidence whatsoever, such finding must be held to be perverse and not sustainable in law.'

60. In view of my aforementioned findings, and the order proposed to be passed, it is not necessary to consider the other points submitted at the bar. For the reasons aforementioned the impugned order cannot be sustained.

61. The question which now arises for consideration as to whether in the facts and circumstances of the case a de-novo enquiry should be directed to be initiated.

62. It is true that in *Union of India v. P.N.L. Das* AIR 1981 SC 858, the Supreme court refused to direct for a fresh enquiry. But it has to be borne in mind that the court before passing such an order should take into consideration all the relevant factors. The petitioner has been charged with defalcation and various other serious charges. Out of 28 charges, only one could not be proved against him. Admittedly more than 200 documents were produced in the disciplinary proceedings. The petitioner himself took many adjournments and adopted a non-cooperative attitude. His wife even refused to accept the notice. He was, thus, also responsible for delay in disposal of the departmental proceedings. The petitioner was discharged from the criminal cases only on technical ground. In this situation, in my opinion, it would be just and proper if the respondents are directed to hold the enquiry against the petitioner afresh.

63. Recently in *State of Punjab v. Chamanlal Goyal* reported in : (1995)IILLJ679SC the Supreme Court held that initiation of a departmental proceedings on the ground of delay may be viewed from the same angle as in the case of a criminal trial in the light of the decision of the Supreme Court in *A.R. Antuley's case* : 1992 CriLJ2717 . It held that court before quashing the departmental proceedings the court is required to weigh all factors.

64. In this view of the matter I am of opinion that no hard and fast rule can be laid down in a matter of this nature. Each case has to be considered on its own merits. Keeping in view of the facts and circumstances I am of the opinion that interest of justice demands that the petitioner should face a de-novo enquiry.

65. In the result this application is allowed, the impugned order of dismissal dated 10.5.1989 as well as the appellate order dated 24.8.1991 are set aside and the disciplinary authority is directed to hold a de-novo enquiry and conclude the same at an early date and preferably within four months from the date of communication of this order. The Disciplinary Authority should appoint another enquiry officer and a presenting officer. He may, however, place the petitioner under suspension. However, in the facts and circumstances of the case, there will be no order as to costs.