2021 INSC 920

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7764 OF 2021
[Arising out of Special Leave Petition (C) No. 30001 of 2017]

SUNNY ABRAHAM ……APPELLANT(S)

VERSUS

UNION OF INDIA & ANR. ….RESPONDENT(S)

J U D G M E N T

ANIRUDDHA BOSE, J.

Leave granted.

2. The appellant before us, at the material point of time was an Assistant Commissioner of Income Tax. The authorities issued a memorandum of charges (charge memorandum) proposing to hold an inquiry against him on 18th November, 2002 for major penalty under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. Disciplinary proceeding was initiated against him on 19th September, 2002. Allegation against him was that while functioning as an Income Tax Officer in Surat during the

year 1998, he, in collusion with a Deputy Commissioner of Income Tax, had conducted a survey under Section 133A of the Income-Tax Act, 1961 in five proprietary group concerns of one Mukeshchandra Dahyabhai Gajiwala and his family and demanded a sum of rupees five lacs other than legal remuneration from the said individual through his advocate for settling the matter. It was further alleged in the articles of charge that he, alongwith the said Deputy Commissioner, had demanded a sum of rupees two lacs other than legal remuneration from the same individual and later on, the Deputy Commissioner Shri K.K. Dhawan accepted the said amount. Disciplinary proceeding was initiated against the appellant with the approval of the Disciplinary Authority-the Finance Minister on 19th September, 2002. On 18th November, 2002, charge memorandum was issued to the appellant. This charge memorandum was however not specifically approved by the Finance Minister. Enquiry officer was appointed, who submitted his report on 13th July, 2007 and the Central Vigilance Commission (CVC) concurred with the findings of the enquiry officer and appellant was served with both the reports and advice of the CVC. Till the time of filing of the O.A. No. 1157 of 2014 before the Principal Bench of the Central Administrative Tribunal (CAT), the appellant instituted several proceedings, mainly

on procedural irregularities in CAT as well as the High Court. We, however, do not consider it necessary to refer to all of them in this judgment. Earlier, in one decision of the CAT, Principal Bench delivered on 5th February, 2009 in O.A. No. 800 of 2008 (**B.V. Gopinath vs. Union of India**) it was held, while examining the same Rule, that in absence of the approval of the charges by the competent authority, further proceedings in the disciplinary case could not be sustained. This view has been ultimately upheld by this Court in a judgment delivered by a Coordinate Bench in the case of **Union of India and Ors. vs. B.V. Gopinath** [(2014) 1 SCC 351] on 5th September, 2013. The ratio of this decision constitutes the sheet anchor of the appellant's case. We shall deal with that aspect of the appellant's case later in this judgment.

3. Relying on the **B.V. Gopinath** (supra) case decided by the CAT, the appellant had approached the same forum with O.A. No. 344 of 2012 for quashing the charge memorandum. The Tribunal disposed of that application giving liberty to the appellant to raise the point before the Disciplinary Authority. The said order specified that the appellant could approach the Tribunal again if adverse order was passed. Representation of the appellant to the Disciplinary

Authority on this count does not appear to have had been considered at that point of time, which prompted the appellant to bring another action before the Tribunal. This application of the appellant (O.A. No. 1047 of 2012) was disposed of on 30th April, 2012 with a direction upon the authorities to dispose of the pending enquiry within three months. The appellant's request for quashing the charges was ultimately turned down on the ground that the petition for Special Leave to Appeal was pending before this Court against the order of the CAT in the case of **B.V. Gopinath** (supra). Another application of the appellant (O.A. No. 2286 of 2012) before the Tribunal was dismissed as withdrawn giving liberty to the appellant to give detailed representation on reply to the inquiry report and CVC advice, which were directed to be disposed of by a reasoned and speaking order.

4. The appellant continued to file different applications and representations on the strength of the decision of this Court in the case of **B.V. Gopinath** (supra). By an Office Memorandum dated 23rd January, 2014, the appellant was informed that the charge memorandum dated 18th November, 2002 had been duly approved by the Disciplinary Authority and the proceedings could continue

from the stage where it stood before the charge memorandum dated 18th November, 2002 was formally approved. This Office Memorandum reads:-

"F.No.C-14011/10/99-V&L
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
New Delhi-110001

Dated: 23rd January, 2014

OFFICE MEMORANDUM

WHEREAS, disciplinary proceedings under Rule 14 of the CCS (CCA) Rules, 1965 were initiated against Shri Sunny Abraham, ACIT with the approval of the Disciplinary Authority on 10.9.2002 and consequently a Memorandum from F.No.C-14011/10/99-V&L dated 18.11.2002 was issued to him.

WHEREAS, in view of the judgment dated 5th September 2013 of the Supreme Court in the case of Union of India Vs. B.V. Gopinath & others (SLOP No.6348 of 2009), the Memorandum from F.No.C-14011/10/99-V&L dated 18.11.2002 issued to Shri Sunny Abraham, ACIT was placed before the Disciplinary Authority, who after examining the facts and circumstances of the case, has accorded approval to the same on 8.1.2014.

AND WHEREAS, the Disciplinary Authority has also approved continuation of disciplinary proceedings from the stage where the proceedings stood before the Charge Memorandum F.No.C-14011/10/99-V&L dated 18.11.2002 was formally approved by the Disciplinary Authority.

NOW THEREFORE, Shri Sunny Abraham, ACIT is hereby informed that he Charge Memorandum F.No.C-14011/10/99-V&L dated 18.1.2002 has been duly approved by the Disciplinary Authority and that the disciplinary proceedings in the matter would continue from the stage where the proceedings stood before the Charge Memorandum F.No.C-14011/10/99-V&L dated

18.11.2002 was formally approved by the Disciplinary Authority.

(By order and in the name of the President of India)

Sd/-
(Dr. Prashant Rhambra)
Under Secretary to the Government of India"

(quoted verbatim from the copy of the judgment as reproduced in the paperbook)

5. This Office Memorandum was quashed by the Principal Bench of the CAT on 20th April, 2015 in O.A. No. 1157 of 2014 brought by the appellant. View of the Principal Bench of the CAT was that such approval could not have been granted ex-post facto. The approval was sought to be given on 8th January, 2014 to a charge memorandum dated 18th November, 2002. Liberty was granted to the authorities to issue a fresh memorandum of charges under the aforesaid Rule 14. Union of India invoked the constitutional writ jurisdiction of the Delhi High Court challenging the said decision of Principal Bench of the CAT.

6. The applicable Rules of 1965 in this case are sub-clauses (2) and (3) of Rule 14, which had earlier come up for interpretation in the case of **B.V. Gopinath** (supra). In the said case, a Coordinate Bench of this Court had observed and opined:-

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

52. In our opinion, the submission of the learned Additional Solicitor General is not factually correct. The primary submission of the respondent was that the charge-sheet not having been issued by the disciplinary authority is without authority of law and, therefore, non est in the eye of the law. This plea of the respondent has been accepted by CAT as also by the High Court. The action has been taken against the respondent in Rule 14(3) of the CCS (CCA) Rules which enjoins the disciplinary authority to *draw up or cause to be drawn up* the substance of imputation of misconduct or misbehaviour into definite and distinct articles of charges. The term "cause to be drawn up" does not mean that the definite and distinct articles of charges once drawn up do not have to be approved by the disciplinary authority. The term "cause to be drawn up" merely refers to a delegation by the disciplinary authority to a subordinate authority to perform the task of drawing up substance of proposed "definite and distinct articles of charge-sheet". These proposed articles of charge would only be finalized upon approval by the disciplinary authority. Undoubtedly, this Court in *P.V. Srinivasa Sastry v. CAG* [(1993) 1 SCC 419] has held that Article 311(1) does not say that even the departmental proceeding must be initiated only by the appointing authority. However, at the same time it is pointed out that: (SCC p. 422, para 4)

> "4. … However, it is open to the Union of India or a State Government to make any rule prescribing that even the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority."

It is further held that: (SCC p.422, para 4)

> "4. …Any such rule shall not be inconsistent with Article 311 of the Constitution because it will amount to providing an additional safeguard or protection to the holders of a civil post."

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

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

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

56. For the reasons stated above, we see no merit in the appeals filed by the Union of India. We may also notice here that CAT had granted liberty to the appellants to take appropriate action in accordance with law. We see no reasons to disturb the liberty so granted. The appeals are, therefore, dismissed."

7. The Delhi High Court in the appellant's case primarily examined the issue as to whether having regard to the aforesaid Rules, a chargesheet or charge memorandum could be given ex-post facto approval or not. The main distinguishing feature between the case of the appellant and that decided in **B.V. Gopinath** (supra) is that in the facts of the latter judgment, the subject charge memorandum did not have the ex-post facto approval. Stand of the respondents is that there is no bar on giving ex-post facto approval

by the Disciplinary Authority to a charge memorandum and so far as the present case is concerned, such approval cures the defect exposed in **Gopinath's** case. On behalf of the appellant, the expression "non est" attributed to a charge memorandum lacking approval of the Disciplinary Authority has been emphasized to repel the argument of the respondent authorities.

8. The respondents' argument was accepted by the High Court mainly on two counts. First, there was no ex-post facto approval to the charge memorandum in **Gopinath's** case. Approval implies ratifying an action and there being no requirement in the concerned Rules for prior approval, ex-post facto approval could always be obtained. On this point, the cases of **Ashok Kumar Das and Others vs. University of Burdwan and Others** [(2010) 3 SCC 616] and **Bajaj Hindustan Limited vs. State of Uttar Pradesh and Others** [(2016) 12 SCC 613] are relevant. As regards the charge memorandum being declared non est, it was held by the High Court:-

> "26. However, question would arise whether this ratio would be applicable for as per the respondents as in B.V. Gopinath (supra), the Supreme Court has used the term "non est". The expression *non est* can be used as *non est inventus or non est factum*, which means a denial of the execution of an instruction sued upon. *Non est inventus* is a Latin phrase which means "he is not found". [See

> Black's Dictionary 8th Edition at page 1079-1980]. Indeed it could be argued that the use of the expression would indicate that the chargesheet was illegal and void for want of approval."
>
> (quoted verbatim from the copy of the judgment as reproduced in the paperbook)

The cases of **Ashok Kumar Das** (supra) and **Bajaj Hindustan Limited** (supra) were referred to for the proposition that the approval includes ratifying an action, which obviously could be given ex-post facto. The following passage from the case of **Bajaj Hindustan Limited** (supra) was quoted in the judgment under appeal:-

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

9. The following passage from the case of **Ashok Kumar Das** (supra) has also been quoted in the judgment under appeal:-

> "11. In *Black's Law Dictionary* (Fifth Edition), the word "approval" has been explained thus:
>
> > "*Approval.* – The act of confirming, ratifying, assenting, sanctioning, or consenting to some act or thing done by another."
>
> Hence, approval to an act or decision can also be subsequent to the act or decision.
>
> 12. In *U.P. Avas Evam Vikas Parishad 1955* Supp. (3) SCC 456, this Court made the distinction between permission, prior approval and approval. Para 6 of the judgment is quoted hereinbelow:
>
> > "6. This Court in Life Insurance Corpn. of India v. Escorts Ltd. [(1986) 1 SCC 264], considering the distinction between "special Permission" and "general permission", previous approval" or "prior approval" in para 63 held that:
> >
> > > "63….we are conscious that the word 'prior' or 'previous' may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29 (1) of the Act."
>
> Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in *Lord Krishna Textiles Mills Ltd. v. Workmen* [AIR 1961 SC 860], that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33 (1)."

XXX XXX XXX

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

10. As it has already been pointed out, the High Court sought to distinguish the case of **B.V. Gopinath** (supra) with the facts of the present case on the ground that in the case of the appellant, the Disciplinary Authority had not granted approval at any stage and in the present case, ex-post facto sanction of the charge memorandum or chargesheet was given when the departmental proceeding was pending. The High Court found such approach to be practical and pragmatic, having regard to the fact that the departmental

proceeding had remained pending in the case of the appellant and evidences had been recorded. The High Court thus considered the fact that in the case of **B.V. Gopinath** (supra), the proceeding stood concluded whereas in the appellant's case, it was still running when ex-post facto approval was given. That was the point on which the ratio of **B.V. Gopinath** (supra) was distinguished by the High Court.

11. We do not think that the absence of the expression "prior approval" in the aforesaid Rule would have any impact so far as the present case is concerned as the same Rule has been construed by this Court in the case of **B.V. Gopinath** (supra) and it has been held that chargesheet/charge memorandum not having approval of the Disciplinary Authority would be non est in the eye of the law. Same interpretation has been given to a similar Rule, All India Services (Discipline and Appeal) Rules, 1969 by another Coordinate Bench of this Court in the case of **State of Tamil Nadu vs. Promod Kumar, IPS and Another** [(2018) 17 SCC 677] (authored by one of us, L. Nageswara Rao, J). Now the question arises as to whether concluded proceeding (as in the case of **B.V. Gopinath**) and pending proceeding against the appellant is capable of giving different interpretations to the said Rule. The High Court's reasoning, referring to the notes on

which approval for initiation of proceeding was granted, is that the Disciplinary Authority had taken into consideration the specific charges. The ratio of the judgments in the cases of **Ashok Kumar Das** (supra) and **Bajaj Hindustan Limited** (supra), in our opinion, do not apply in the facts of the present case. We hold so because these authorities primarily deal with the question as to whether the legal requirement of granting approval could extend to ex-post facto approval, particularly in a case where the statutory instrument does not specify taking of prior or previous approval. It is a fact that in the Rules with which we are concerned, there is no stipulation of taking "prior" approval. But since this very Rule has been construed by a Coordinate Bench to the effect that the approval of the Disciplinary Authority should be there before issuing the charge memorandum, the principles of law enunciated in the aforesaid two cases, that is **Ashok Kumar Das** (supra) and **Bajaj Hindustan Limited** (supra) would not aid the respondents. The distinction between the prior approval and approval simplicitor does not have much impact so far as the status of the subject charge memorandum is concerned.

12. The next question we shall address is as to whether there would be any difference in the position of law in this case vis-à-vis the case of **B.V. Gopinath** (supra). In the latter authority, the charge memorandum without approval of the Disciplinary Authority was held to be non est in a concluded proceeding. The High Court has referred to the variants of the expression non est used in two legal phrases in the judgment under appeal. In the context of our jurisprudence, the term non est conveys the meaning of something treated to be not in existence because of some legal lacuna in the process of creation of the subject-instrument. It goes beyond a remediable irregularity. That is how the Coordinate Bench has construed the impact of not having approval of the Disciplinary Authority in issuing the charge memorandum. In the event a legal instrument is deemed to be not in existence, because of certain fundamental defect in its issuance, subsequent approval cannot revive its existence and ratify acts done in pursuance of such instrument, treating the same to be valid. The fact that initiation of proceeding received approval of the Disciplinary Authority could not lighten the obligation on the part of the employer (in this case the Union of India) in complying with the requirement of sub-clause (3) of Rule 14 of CCS (CCA), 1965. We have quoted the two relevant

sub-clauses earlier in this judgment. Sub-clauses (2) and (3) of Rule 14 contemplates independent approval of the Disciplinary Authority at both stages – for initiation of enquiry and also for drawing up or to cause to be drawn up the charge memorandum. In the event the requirement of sub-clause (2) is complied with, not having the approval at the time of issue of charge memorandum under sub-clause (3) would render the charge memorandum fundamentally defective, not capable of being validated retrospectively. What is non-existent in the eye of the law cannot be revived retrospectively. Life cannot be breathed into the stillborn charge memorandum. In our opinion, the approval for initiating disciplinary proceeding and approval to a charge memorandum are two divisible acts, each one requiring independent application of mind on the part of the Disciplinary Authority. If there is any default in the process of application of mind independently at the time of issue of charge memorandum by the Disciplinary Authority, the same would not get cured by the fact that such approval was there at the initial stage. This was the argument on behalf of the authorities in the case of **B.V. Gopinath** (supra), as would be evident from paragraph 8 of the report which we reproduce below:-

> "8. Ms Jaising has elaborately explained the entire procedure that is followed in each and every case before the matter is put up before the Finance Minister for seeking approval for initiation of the disciplinary proceedings. According to the learned Additional Solicitor General, the procedure followed ensures that entire material is placed before the Finance Minister before a decision is taken to initiate the departmental proceedings. She submits that approval for initiation of the departmental proceedings would also amount to approval of the charge memo. According to the learned Additional Solicitor General, CAT as well as the High Court had committed a grave error in quashing the departmental proceedings against the respondents, as the procedure for taking approval of the disciplinary authority to initiate penalty proceeding is comprehensive and involved decision making at every level of the hierarchy."

13. But this argument was repelled by the Coordinate Bench, as would be evident from the opinion of the Bench reflected in paragraphs 49 & 50 of the report, which reads:-

> "49. We are unable to accept the submission of the learned Additional Solicitor General. Initially, when the file comes to the Finance Minister, it is only to take a decision in principle as to whether departmental proceedings ought to be initiated against the officer. Clause (11) deals with reference to CVC for second stage advice. In case of proposal for major penalties, the decision is to be taken by the Finance Minister. Similarly, under Clause (12) reconsideration of CVC's second stage advice is to be taken by the Finance Minister. All further proceedings including approval for referring the case to DoP&T, issuance of show-cause notice in case of disagreement with the enquiry officer's report; tentative decision after CVC's second stage advice on imposition of penalty; final decision of penalty and revision/review/memorial have to be taken by the Finance Minister.
>
> 50. In our opinion, the Central Administrative Tribunal as well as the High Court has correctly interpreted the provisions of Office Order No. 205 of 2005. Factually also, a perusal of the record would show that the file was put up to the Finance Minister by the Director General of

> Income Tax (Vigilance) seeking the approval of the Finance Minister for sanctioning prosecution against one officer and *for initiation* of major penalty proceeding under Rules 3(1)(a) and 3(1)(c) of the Central Civil Services (Conduct) Rules against the officers mentioned in the note which included the respondent herein. Ultimately, it appears that the charge memo was not put up for approval by the Finance Minister. Therefore, it would not be possible to accept the submission of Ms Indira Jaising that the approval granted by the Finance Minister for initiation of departmental proceedings would also amount to approval of the charge memo."

14. We are conscious of the fact that the allegations against the appellant are serious in nature and ought not to be scuttled on purely technical ground. But the Tribunal in the judgment which was set aside by the High Court had reserved liberty to issue a fresh memorandum of charges under Rule 14 of CCS (CCA) Rules, 1965 as per Rules laid down in the matter, if so advised. Thus, the department's power to pursue the matter has been reserved and not foreclosed.

15. For these reasons we set aside the judgment of the High Court and restore the judgment of the Principal Bench of the Central Administrative Tribunal delivered on 20th April, 2015 in O.A. No. 1157 of 2014 subject to certain modification on operational part of it, which we express in the next paragraph of this judgment.

16. Considering the fact that the proceeding against the appellant relates to an incident which is alleged to have taken place in the year 1998 and the proceeding was initiated in the year 2002, we direct that in the event the department wants to continue with the matter, and on producing the material the Disciplinary Authority is satisfied that a fresh charge memorandum ought to be issued, such charge memorandum shall be issued not beyond a period of two months, and thereafter the proceeding shall take its own course.

17. The appeal is allowed in the above terms.

18. There shall be no orders as to costs.

.....J.
(L. NAGESWARA RAO)

.....J.
(ANIRUDDHA BOSE)

NEW DELHI;
DECEMBER 17, 2021.