IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7196 of 2021

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Pramod Tiwari, Son of Sri Sudama Tiwari, resident of Qtr No. C/3, NEW, BSEB, Colony, Shastri Nagar, Near- Shiv Mandir, Patna, District- Patna, Bihar.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Energy Department, Government of Bihar, Patna.
2. The Principal Secretary, Energy Department, Government of Bihar, Patna.
3. The Chairman cum Managing Director, Bihar State Power (Holding) Company Limited, Vidyut Bhavan, Bailey Road, Patna.
4. The Managing Director, Bihar State Power Generation Company Limited, Vidyut Bhavan, Bailey Road, Patna.
5. The Managing Director, Bihar State Power Transmission Company Limited, Bailey Road, Patna.
6. The General Manager (HR and Adm.), Bihar State Power Transmission Company Limited, Vidyut Bhavan, Bailey Road, Patna.

… … Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Y. V. Giri, Sr. Advocate Mr. Pranav Kumar, Advocate Ms. Srishti Singh, Advocate
For the Respondent Nos. 3-6:		Mr. Mrigank Mauli, Sr. Advocate Mr. Kumar Ravish, Advocate Mr. Sanket, Advocate Ms. Siddhi Aashana, Advocate
For the Respondent Nos. 1-2:		Mr. Ravish Chandra, AC to SC-6

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Service Law---Constitution of India---article 311---Bihar Government Servant (Classification, Control and Appeal) Rules, 2005---Rule 2 (f) Nd (j), 16---Departmental Enquiry---Dismissal---writ petition to challenge the order of dismissal passed by the disciplinary authority after holding Petitioner liable for act of gross financial irregularities, mismanagement and negligence, amounting to misconduct---argument on behalf of Petitioner that there is no charge of financial embezzlement or misappropriation against the Petitioner causing monetary gain of the Petitioner and corresponding financial loss to the Company and that the finding of the Inquiry Officer was based on no evidence---further argument that the departmental proceeding initiated against Petitioner was void ab initio as it was not initiated by the Appointing Authority of the Petitioner---Respondents countered by submitting that the department suffered pecuniary loss due to non-application of mind by the Petitioner in respect

of finance and account, and continuing negligence by showing certain sum received by the Department as loan---further argument that the Petitioner failed to exhaust the statutory provisions as laid down in CCA Rules by not filing the statutory appeal before the Board of Directors.

*Findings: there is nothing in law which inhibits the authority subordinate to the appointing authority to initiate disciplinary proceeding or issue charge memo and it is certainly not necessary that the charges should be framed by the authority competent to award the punishment or that the inquiry should be conducted by such authority---when the order of punishment was passed with the approval of the highest authority of the holding company, no fruitful purpose would have been served by filing an appeal before the appellate authority---misconduct and mens rea are not synonymous to each other while mens rea involves culpable intention and criminal mindset, in misconduct it is not necessary to prove culpable intention---even in cases where the charged employee is not charged for wrongful gain on account of financial irregularities, there may be misconduct as a result of repeated and gross negligence and deliberate act causing financial loss of the public sector undertaking or its subsidiaries---the Petitioner always knew that the amount transferred by the holding company to the subsidiary companies was to be treated as equity capital which is apparent from his statement before the Income Tax Departments and yet he continued to represent before the CAG that the said amount was not equity but a loan by the State Government and because of this the company had to incur liabilities of Rs. 30.19 Crores to the Income Tax Department---act of Petitioner was willful, deliberate and against the interest of the company amounting to misconduct---no reason to interfere with the order passed by the disciplinary authority---writ dismissed. (**Para 16, 22, 44, 49, 50, 57, 64, 67)**

(2012) 11 SCC 565, (1996) 2 SCC 145, (1997) 11 SCC 17, (2003) 4 SCC 670, AIR 2023 SC 781, (1979) 2 SCC 286, AIR 1966 SC 1051, (1967) 2 SCR 566, AIR 1963 SC 1756 ……..**Relied Upon.**

(1977) 2 SCC 724, (2000) 10 SCC 482 ……...**Referred To.**

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Versus

1. The State of Bihar through the Principal Secretary, Energy Department, Government of Bihar, Patna.
2. The Principal Secretary, Energy Department, Government of Bihar, Patna.
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4. The Managing Director, Bihar State Power Generation Company Limited, Vidyut Bhavan, Bailey Road, Patna.
5. The Managing Director, Bihar State Power Transmission Company Limited, Bailey Road, Patna.
6. The General Manager (HR and Adm.), Bihar State Power Transmission Company Limited, Vidyut Bhavan, Bailey Road, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Y. V. Giri, Sr. Advocate
		Mr. Pranav Kumar, Advocate
		Ms. Srishti Singh, Advocate
For the Respondent Nos. 3-6:		Mr. Mrigank Mauli, Sr. Advocate
		Mr. Kumar Ravish, Advocate
		Mr. Sanket, Advocate
		Ms. Siddhi Aashana, Advocate
For the Respondent Nos. 1-2:		Mr. Ravish Chandra,
		AC to SC-6

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CORAM: HONOURABLE MR. JUSTICE BIBEK CHAUDHURI

CAV JUDGMENT

Date : 25-07-2024

Prologue

1. The Petitioner was initially appointed as a temporary Accounts Officer on 10th of May, 1993 in Bihar State Electricity Board (BSEB). By a Notification No. 31/08, dated 30th of October, 2012 under Bihar State Electricity Reforms Transfers Scheme, BSEB was decided to be restructured into a Holding Company and under the said Holding Company, four subsidiary companies were constituted. The name of the Holding Company is Bihar State Power Holding Company Limited and the subsidiary companies are Bihar State Power Transmission Company Limited (BSPTCL), Bihar State Power General Company Limited (BSPGCL), North Bihar Power Distribution Company Limited (NBPDCL) and South Bihar Power Distribution Company Limited (SBPDCL). After restructuring, Petitioner was consigned to the role of Deputy General Manger (Terminal Benefits) at Bihar State Power Holding Company Limited (BSPHCL). Subsequently, by other Notification No. 407, dated 26th of April, 2013, the Petitioner was deputed to BSPTCL as Deputy General Manger (Accounts). That on 10th of July, 2017, he was transferred to BSPGCL as Deputy General Manger (Finance and Accounts).

2. In its meeting, dated 1st of March, 2019, the Board of Directors (BoDs), BSPTCL accorded approval on reversal of Rs. 340.055 Crores booked as State Government loans in the balance-sheet as on 31st of March, 2018 by transferring Rs. 195.9595 Crores into equity and Rs. 144.60 Crores into Inter Company Balances as on 1st of April, 2018. It was further resolved that administrative action shall be taken against all the personnel responsible in this regard. When the Petitioner was posted as General Manager (F&A), BSPGCL, he received communication from the Respondent company seeking for his explanation within 3 days from the receipt of the letter, dated 7th of March, 2019 with regard to the accounting of Rs. 340.55 Crores as loan and share.

3. It was further stated that the Petitioner had used his position to cause financial irregularity during the year 2016 and 2018 by providing incorrect information regarding the accounting of the aforesaid amount. The Petitioner submitted his explanation, which was found to be unsatisfactory. Subsequently, on 26th of June, 2019, a resolution was drawn and communicated to the Petitioner under the signature of the General Manger (HR & Admin) BSPGCL to the effect that since the Petitioner has been found *prima facie* guilty of gross

misconduct and negligence, departmental proceeding is contemplated against him.

Initiation of the game

4. The Petitioner was served with a Memorandum of Charge, duly signed by the General Manager (HR & Admin), BSPTCL. The departmental charge in 6 heads is recorded below:-

> *1. A sum of Rs. 195.9595 crores was wrongly presented as Loan by you intentionally as per your convenience and financial irregularity was committed giving incomplete and misleading information to the Board of Directors of the Company. You have not only affected the accounts of the company unnecessarily for personal objective without caring the interest of the Company but also demeaned the impression of the Company before Statutory Authorities like the Accountant General and the Income Tax Department presenting wrong and misleading facts and at the same time the Company was portrayed as an Income Tax defaulter.*
>
> *2. You have presented the transaction occurring in between Bihar State Power Transmission Company Limited and Bihar State Power (Holding) Company Limited unnecessarily as in between Bihar State Power*

Transmission Company Limited, Energy Department and Finance Department with a view to crate confusion. In this regard, you have taken approval from the Managing Director, Bihar State Power Transmission Company Limited on letter dated 17.08.2016, addressed to the Principal Secretary, Energy Department, Government of Bihar. Your only objective of obtaining approval from the company management on this confusing proposal was to create a defence from various audit objections as after seeking approval on the draft letter addressed to the Principal Secretary, Energy Department, Government of Bihar misusing your post, this letter was not issued.

3. When you doubted during audit for the year 2017-18 that financial irregularity committed since the year 2014 may come to the knowledge then you gave the proposal in 68th meeting of the Board of Directors of the company adding Rs. 195.9595 crore with share capital of Rs. 3616.7441 crore based on incomplete and wrong facts as per your nature of forgery without the approval of Managing Director that the entire amount of Rs. 3812.7036 crore can be allotted towards share capital and accordingly got the said arbitrarily raised loan converted into share capital by forgery, no approval has been obtained by you from the Managing Director in

this regard. This is very serious matter of giving wrong facts before the Board of Directors.

4. Whereas at present, the said amount of Rs. 195.9595 crore has been got converted into share capital by you committing forgery without any prior approval, despite that in Show Cause asked by the GM (HR), Bihar State Power Transmission Company Limited vide his Memo dated 07.03.2019, instead of accepting the financial irregularities committed, you have stated with a view to create a situation of confusion that correct accounting of Rs. 195.9595 crores have been done as Loan by you in the books of accounts of the company and there is the need to account the same as loan. This shows your gross misconduct and gross arbitrariness.

5. You have always not only accounted wrongly Rs. 195.9595 crores as per your convenience misusing your post under a well planned conspiracy with arbitrary action and nature of forgery but also committed misconduct of misleading company management and the Board of Directors based on contradictory and incomplete facts. Due to your such action, the Company had to make payment of Rs. 30.19 crores as income tax. Whatever wrong facts have been given by you to the Income Tax Department there is the possibility of increasing this liability during tax

assessment in future.

6. You have deliberately shown Rs. 144.59 crores as loan as per your convenience. Out of Rs. 200.86 crores sanction under State Plan, Rs. 55.89 crores have been accounted by you in company accounts in Inter-Company head during Financial Year 2013-14 received from the holding company, on the other hand Rs. 144.59 crores received in the year 2016-17 from holding company was accounted as Loan of the State Government and interest of Rs. 10.50 % p.a. was provided without any authority on the aforesaid State Loan arbitrarily. Due to accounting differently of the money received on different dates in same head as per your will, the image of the Company before different statutory authority have been demeaned and scheduled action have been started by the Income Tax Department in charge of submitting wrong accounts on the company. The unavoidable liabilities of Rs. 30.19 crores have been paid by the company unnecessarily.

Stand taken by the Petitioner

5. According to the Petitioner, a sum of Rs. 195.9595 Crores, sanctioned by the Government of Bihar and received by the BSPTCL, was a loan and not an investment against which equity was to be issued. The term “ऋण" “Loan”

was used in the communication regarding the said amount. Secondly, it was contended by the Petitioner that annual financial statement of BSPTCL were audited by the statutory auditor every financial year appointed by the Comptroller and Auditor General of India and by the Auditor General, Bihar. It is pleaded in his written statement by the Petitioner that Rajyadesh (राज्यादेश) No. 2175, dated 30th of June, 2014, specifically speaks:-

> "…..राज्य योजना के अन्तर्गत उपलब्ध करायी जानेवाली राशि को अंश पूँजी के रूप में निवेश उपलब्ध कराने की स्वीकृति प्रदान की जाती है।"

6. This order clearly refers to the amount to be released in future by the State Government with prospective effect in future only. There is nothing on record that the Petitioner violated Rajyadesh (राज्यादेश) No. 2175, dated 30th of June, 2014, by making otherwise interpretation as contemplated in the Memorandum of Charge.

7. Thus, the Petitioner reiterated that Rs. 195.9595 Crores sanctioned by the Government of Bihar and received by the BSPTCL was a loan and not an investment. The Petitioner never made any misrepresentation regarding transactions between BSPTCL and BSPGCL being presented as transactions with the Energy and Finance Departments. He was not

responsible for the draft letter, dated 17th of August, 2016 because he assumed charge of his office as General Manager (F&A) by virtue of an order, dated 16th of January, 2017 and later rejoined BSPTCL on 18th of May, 2017.

Proceeding

8. The respondent authority was not satisfied with the written statement of defence submitted by the Petitioner. Accordingly, departmental inquiry was initiated. The Petitioner was found negligent in respect of preparation of statement with regard to amount received under different heads of accounts. Such act and omission by the Petitioner was held to be act of gross financial irregularities, mismanagement and negligence, amounting to misconduct. The inquiry report was placed before the disciplinary authority. The disciplinary authority passed an order of dismissal with the approval of the Chairman and Managing Director of BSPHCL. The Petitioner has challenged the said order passed by the disciplinary authority by filing the instant writ petition. In this regard, it is specifically contended by the Petitioner that since the order of dismissal was passed against the Petitioner by the disciplinary authority being recommended by the CMD, preference of an appeal would be a futile formality because CMD is the appellate authority who

already approved the order of the disciplinary authority.

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9. The order of dismissal was challenged by the petitioner invoking plenary jurisdiction of this Court under Article 226 of the Constitution of India.

10. Contentions of the petitioner are as follows :-

1. That the dismissal was arbitrary and without proper basis. The procedural steps leading to the administrative action taken by the respondent must be thoroughly examined to determine compliance with legal principles. The chronology of events and relevant documents (Annexures - 6, 7 and 8) indicate potential procedural lapses. The Petitioner argues that the decision was taken without giving proper consideration to the explanation provided, highlighting a potential violation of the principles of natural justice.

2. The Petitioner claims that the enquiry report was not prepared in accordance with Rule 17 of the CCA Rules, 2005. The procedural adherence needs to be evaluated against the prescribed guidelines to determine if the enquiry was conducted fairly. The Petitioner contends that crucial documents and evidence were overlooked or misinterpreted, potentially leading to an unjust conclusion. The role and actions of the enquiry officer must be

scrutinized, especially considering the detailed reply and supporting documents submitted by the Petitioner (Annexures - 9, 9A and 10)

3. The core issue revolves around the interpretation of memo no. 2175 dated 30.06.2014. The Petitioner maintains that this memo was intended for future amounts to be released by the State Government and not for the previously received amount of Rs. 195.9595 Crores. The Petitioner's interpretation is supported by the statutory auditor's response (Annexure-10), which states that the amount should be treated as a loan and not equity. The proper application and understanding of this memo are crucial in determining the legality of the Petitioner's actions.

4. The Petitioner asserts that relevant documents were not supplied during the enquiry, which compromised his ability to defend himself effectively. This allegation raises concern about the fairness and thoroughness of the enquiry process. The right to access all relevant documents is a fundamental aspect of a fair trial, and any failure to provide these documents can be deemed a violation of the principles of natural justice. The communication and response related to document requests should be reviewed to assess the validity of this claim.

5. The Petitioner argues that the

Presenting Office should have sought opinions form the Energy Department and BSPHCL regarding the issues raised in the show-cause notice. The failure to obtain these opinions might indicate a lack of comprehensive investigation. The opinions from relevant authorities could have provided additional insights or clarifications, potentially impacting the outcome of the enquiry. This oversight, if proven, suggests that the enquiry process was incomplete and potentially biased.

6. The Petitioner contends that the case is primarily about the interpretation of financial documents rather than actual financial irregularity. This distinction is important as it affects the nature and severity of the allegations. The Petitioner's argument is that the financial records were maintained and interpreted in good faith based on the available guidelines and communication from the State Government. Any discrepancies, therefore, should be viewed as interpretative issues rather than intentional misconduct.

7. The Petitioner challenges the compliance of the enquiry office with Rule 17(3) of the CCA Rules, 2005. This rule outlines the procedural steps that must be followed during an enquiry, including the presentation of evidence, cross-examination, and the submission of the enquiry report. Any

deviations from these prescribed steps could invalidate the findings of the enquiry. The procedural records and actions taken by the enquiry office need to be closely examined to insure adherence to Rule 17(3).

8. The Petitioner claims that he was not provided with sufficient time to prepare his defense. The timeline and procedural steps should be reviewed to determine if the time allotted was adequate for a fair defense. The principles of natural justice require that an accused be given reasonable time and opportunity to prepare and present their case. Any undue haste or unreasonable deadlines can compromise the fairness of the enquiry.

9. The Petitioner points out that the enquiry did not seek clarification from the Energy Department regarding the disputed documents. The lack of such clarification could indicate a superficial or biased enquiry. The Energy Department's input would have been critical in resolving ambiguities related to the interpretation of financial documents and the classification of funds as loans or equity.

10. The Petitioner argues that the allegations of misleading the company, abusing his post, arbitrary conduct, and forgery are not supported by evidence. The burden of proof lies with the respondent to substantiate these allegations with concrete evidence. The enquiry

report and supporting documents need to be meticulously reviewed to assess the validity of these charges. Any gaps or inconsistencies in the evidence presented can undermine the credibility of the allegations.

11. The Petitioner cites the Roop Sing Negi vs. Punjab National Bank & Ors. (2009) 2SCC 570 case, arguing that the principles laid out in this case were violated. The principles from this case should be compared with the present case to determine if similar violations occurred. The ratio decidendi of Roop Sing Negi emphasizes the need for fair enquiry procedures and importance of evidence in substantiating allegations.

12. The Petitioner questions the legality of the appointment of the enquiry officer and presenting officer. The procedural records and appointments should be examined to ensure they were made in accordance with the relevant guidelines and rules. Any irregularities in the appointment process could impact the impartiality and legality of the enquiry.

13. The Petitioner argues that the respondent's actions violated Article 14 and 21 of the Constitution of India, which pertain to the right to equality and the right to life and personal liberty. The administrative actions and procedural steps taken by the respondent should be evaluated against these constitutional

provisions to determine if there were any violations. Any actions that are found to be arbitrary, discriminatory, or unfair can be deemed unconstitutional.

Prayer

11. The Petitioner has invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India praying for the following reliefs: -

(i) To issue an appropriate writ order direction in the nature of Certiorari for quashing the memo no. 395, dated 03.02.2020 issued under the signature of General Manager, HR/Adm. whereunder on the basis of the decision taken the Petitioner has been dismissed from service with immediate effect (Annexure-19, pg. 286)

(ii) To issue an appropriate writ order direction in the nature of Certiorari for quashing the enquiry report dated 25.10.2019 whereunder the enquiry officer has held the Petitioner guilty of the charges as contained in memo of charge without considering the explanation offered. (Annexure- - 15 Pg. 182)

(iii) To issue an appropriate writ order direction in the nature of mandamus commanding the Respondents to reinstate the Petitioner and grant all consequential reliefs to the Petitioner, including but not limited to,

wages denied, after quashing the memo no. 395, dated 03.02.2020 from the date of joining the service.

(iv) To issue an appropriate writ order direction in the nature of mandamus restraining the Respondents from taking any coercive action against the Petitioner during the pendency of the present writ application by way of withdrawing the facilities provided to the Petitioner i.e., quarter and other related facilities attached with the service.

(v) To any other relief for which the Petitioner appears to be found entitled by the Hon'ble Court.

Case of the Respondents

12. By filing counter affidavit on behalf of Respondent Nos. 5 and 6, the case of the Petitioner was specifically denied and disputed. Preliminary objection, taken on behalf of the Respondents, is that the writ petition is not maintainable as the Petitioner has not exhausted the alternative remedy of filing an appeal before the Board of Directors, which is the Appellate Authority. It is further contended on behalf of the Respondents that the charges against the Petitioner were serious in nature, involving financial irregularities and all the charges were proved on the basis of documentary evidence. It is not alleged by the Petitioner that the Inquiry Officer was unfair

or that the proceeding was conducted in violation of the established norms. It is the specific case of the Respondents that due to financial mismanagement, the Company suffered significant financial loss because the Company had to pay income tax, amounting to Rs. 30.19 crores for negligent accounting by the Petitioner.

Arguments on behalf of the Petitioner

13. It is submitted by Mr. Y. V. Giri, learned Sr. Counsel appearing on behalf of the Petitioner that careful perusal of Memorandum of Charge would depict, at best, that the Petitioner misinterpreted Rajyadesh No. 2175, dated 30th of June, 2014, for which he allegedly shown a sum of Rs. 195.9595 crores as loan, giving incomplete and misleading information to the Board of Directors. There is, however, no charge of financial embezzlement or misappropriation against the Petitioner causing monetary gain of the Petitioner and corresponding financial loss to the Company. Such act of the Petitioner can, at best, be treated as an act of negligence, error of judgement or mistake. Referring to the Hon'ble Supreme Court decision in the case of ***Union of India & Ors. v. J. Ahmed***, reported in ***(1979) 2 SCC 286***, it is submitted by the learned Sr. Counsel appearing on behalf of the Petitioner that an

act of negligence, error of judgement or mistake does not constitute misconduct. On the same principle, the learned Sr. Counsel appearing on behalf of the Petitioner refers to another decision of the Hon'ble Supreme Court in the case of ***In Re v. Mehar Singh Saini, Chairman, Haryana Public Service Commission & Ors.***, reported in (2010) 13 SCC 586. It is held by the Hon'ble Supreme Court in ***Mehar Singh Saini*** (supra) that mere error of judgement, carelessness or negligence in performance of duty, without the act complained of bearing forbidden quality or character would not constitute misconduct. The same principle was adopted by this Court in ***Ganesh Prasad Yadav v. State of Bihar & Ors.***, reported in ***2021 (5) BLJ 256***, wherein it is held that failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct.

14. Secondly, it is vehemently urged by the learned Sr. Counsel appearing on behalf of the Petitioner that the finding of the Inquiry Officer was based on no evidence. The crux of allegation against the Petitioner is non-compliance of Memo No. 2175, dated 30th of June, 2014. Being Inquiry Officer, the Presenting Officer, however, did not take any attempt to prove the said “Rajyadesh” by examining the author thereto. In

support of his contention, he refers to the case of the ***State of Uttar Pradesh & Ors. v. Saroj Kumar Singh***, reported in ***(2010) 2 SCC 776*** and submits that a document cannot be proved without examination of witness. He also refers to the decision of the Hon'ble Supreme Court in the case of ***Roop Singh Negi v. Punjab National Bank & Ors.***, reported in ***(2009) 2 SCC 570*** and submits that the charges levelled against the delinquent officer must be found to have been proved. The Inquiry Officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The learned Sr. Counsel appearing on behalf of the Petitioner, however, argues that a disciplinary proceeding is a quasi judicial proceeding and the Inquiry Officer enjoins quasi judicial power and, therefore, it is the basic duty of the Inquiry Officer to follow the principles of Natural Justice. Rule of Natural Justice speaks of evidentiary probity of charges levelled against a Charged Officer. Non-examination of any witnesses on behalf of the prosecution leads to an irresistible conclusion that the departmental proceeding was proceeded on no evidence and on the basis of such proceeding a Charged Officer cannot be held guilty for misconduct.

15. The learned Sr. Counsel appearing on behalf of

the Petitioner next submits that the Petitioner sought for clarification from Energy Department on the purport of Memo No. 2175, dated 30th of June, 2014. He mentioned the said fact in both of his replies to the show-cause, i.e., after service of Memorandum of Charge and subsequently after the decision of the Inquiry Officer. However, no reply was given by the Respondents to him.

16. The learned Sr. Counsel appearing on behalf of the Petitioner next submits that the departmental proceeding initiated against him was *void ab initio*. In order to substantiate his argument, he also pointed out that the departmental proceeding was initiated against the Petitioner by the Managing Director, BSPTCL. However, the Chairman, BSPHCL (erstwhile BSEB) was the Appointing Authority of the Petitioner. Thus, the disciplinary proceeding was initiated against the Petitioner in violation of Rule 16 read with Rule 2 (f) Nd (j) of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005. The law on this point is no longer *res integra* that Appointing Authority is the only disciplinary authority and no other authority can initiate any proceeding. The learned Sr. Counsel appearing on behalf of the Petitioner further refers to a reply, dated 9th of November, 2020, issued under the

Right to Information Act (Annexure-23 of the supplementary affidavit filed by the Petitioner), wherein it is clearly mentioned that since the posting of the Petitioner is with BSPGCL, approval of the CMD, BCPHCL was required for initiating of the departmental proceeding and since the departmental proceeding was initiated without approval of the CMD, BSPHCL, it is submitted on behalf of the Petitioner that the departmental proceeding was void *ab initio*.

17. On Charge No. 1, it is submitted by the learned Sr. Counsel appearing on behalf of the Petitioner that a sum of Rs. 195.9595 crores was received by the BSPTCL during the period between 1st November, 2012 and 31st of March, 2014. The Petitioner was deputed as Deputy General Manager (Accounts), BSPTCL on 26th of April, 2013. The letter accompanied the said sum of Rs. 195.9595 crores used the term "Loan" and also had accompanying loan conditions. In the said letter, it is also stated that amount would be accounted under the major head as 6801 – loan for energy projects. Therefore, the Petitioner did not find any alternative interpretation except stating the amount received as "Loan". The Respondents failed to produce any document to show that the Government of Bihar being the sanctioning authority treated the said sum as equity.

Being posted as Deputy General Manager, the Petitioner had no authority to take any final decision with regard to treating an amount either as loan or as equity. It is the ultimate power of the General Manager of the subsidiary Companies to take final decision and forward the said decision to the Holding Company. The learned Sr. Counsel appearing on behalf of the Petitioner frankly admits that there was an audit observation raised that in accordance with Energy Department Rajyadesh No. 2175, dated 30th of June, 2014, the said investment was to be treated as equity in the books of account, however, the statutory auditor confirmed that since no notification had been issued by the State Government for converting the amount of loan into equity, it had properly been shown under the head of long-term borrowing as loan.

18. With regard to 2nd Charge, the learned Sr. Counsel appearing on behalf of the Petitioner submits that the Petitioner rejoined BSPTCL as General Manager on 18th of May, 2017. After his rejoining, he could not trace out his earlier letter, dated 17th of August, 2016. Therefore, he put up another draft before the Managing Director, which was approved by him and bears his signature. The said draft was placed in the year 2017 as evident from the entry on the top left of the draft. Therefore,

the Managing Director had approved the said draft and the approved draft was issued as letter as per the prevailing procedure in the office. Therefore, the allegation that he presented the transaction occurring in between BSPTCL and BSPHCL unnecessarily as in between BSPTCL, Energy Department and Finance Department with a view to create confusion, does not have legs to stand.

19. With regard to Charge No. 3, the learned Sr. Counsel appearing on behalf of the Petitioner has elucidated the stand of the Petitioner. It is submitted by him that Company Secretary, BSPHCL at the behest of the then General Manager (Finance & Accounts), BSPHCL, added the sum of Rs. 195.9595 crores to Rs. 3616.7441 crores making it a total of alleged amount of Rs. 3812.7035 crores, which is evident from letter dated 20th of April, 2018 (Annexure-12A). The Managing Director had approved the amalgamation of the said amount on 20th April, 2018 without the knowledge of the Petitioner for placing the same before the Board of Directors for further approval.

20. According to the learned Sr. Counsel appearing on behalf of the Petitioner, Charge No. 4 is repetition and has already been responded.

21. With regard to 5th and 6th Charge, the learned Sr. Counsel appearing on behalf of the Petitioner submits that through letter dated 17th of August, 2016, the Petitioner sought for approval from the Chief Secretary, Energy Department for conversion of loan to equity. However, without doing so, on the letter prepared by the Chief Secretary, BSPHCL, the amount was approved for conversion by the Managing Director and Board of Directors, which led to the income tax liability of 30.19 crores, which cannot be attributed to the Petitioner. It is also submitted by the learned Sr. Counsel appearing on behalf of the Petitioner that a sum of Rs. 144.59 crores was transferred in two parts by BSPHCL on 6th of September, 2016 and 28th of September, 2016. However, there was no forwarding letter along with it to indicate whether it was loan or equity. In relation to Rs. 144.59 crores, it is contended on behalf of the Petitioner that the said sum was part of Rs. 200 crores received prior to restructuring of BSEB. For this, clarification was also sought through several letters including letter dated 30th of August, 2016. In relation to Rs. 55.89 crores, the Petitioner relied on letter no. 878, dated 10th of September, 2013 (Annexure-18) and letter no. 504, dated 4th of February, 2016, which clearly establish that the said sum was received as fixed deposit. Thus,

the learned Sr. Counsel appearing on behalf of the Petitioner concludes that the Respondents failed to prove any of the charges levelled against the Petitioner and accordingly, the order of dismissal is illegal, unjust, unfair and liable to be quashed. He is also entitled to reinstatement in service.

Arguments on behalf of Respondent Nos. 5 & 6

22. Mr. Mrigank Mauli, learned Sr. Advocate appearing on behalf of the Respondents, at the outset, with his usual fairness, submits that the Petitioner did not face departmental proceeding for his wrongful gain of any kind and corresponding wrongful loss to the Respondents due to embezzlement or misappropriation of funds. The department suffered pecuniary loss due to non-application of mind by the Petitioner in respect of finance and account, misinterpretation of Memo No. 2175, dated 30th June, 2014 and continuing negligence by showing certain sum received by the BSPTCL as loan. With this introduction, it is submitted by the learned Sr. Advocate on behalf of the Respondents that the Petitioner not only misrepresented BSPTCL and its Managing Director but also deliberately be-fooled by giving two contradictory statements before a Statutory Authority and a Constitutional Authority being the Income Tax Department and the Controller

and Auditor General, respectively, mentioning the said amount of Rs. 195.9595 crores as equity and loan respectively – While before the Income Tax Authorities the Petitioner represented that the said amount of Rs. 195.9595 crores was an equity and hence is liable to be treated as “capital receipt” along with the interest earned on it – while the objection of the Income Tax Authorities was that the interest accrued on the said amount ought to be treated as “Revenue Receipt” and hence liable to income tax.

23. The Income Tax Authorities initiated proceedings for the assessment year 2014-2015, claiming an interest earned to the tune of Rs. 69,56,14,673/-, as a “Revenue Receipt” and liable to income tax. In response, the Petitioner referred to Letter No. 2175, dated 30th of June, 2014, informing the Income Tax Authorities that the amount of Rs. 195.9595 crores was an equity infusion by the State Government and the interest earned thereon was to be treated as “Capital Receipts” and therefore was not taxable.

24. It is needless to say that equity capital is treated as capital receipt representing the Company’s capital and funds to be used for development of assets of the company and as such exempted from income tax. On the contrary, Revenue Receipts are income earned by a Company in the regular course of

business and all interests income are treated as Revenue Receipt and are to be transferred to the profit and loss account and applicable taxes are required to be paid on the same as per regulatory requirements.

25. As against the objections raised by the Controller and Auditor General treating the period between 31st March, 2014 to 31st of March, 2016, the Petitioner consistently took stand that the said amount of Rs. 195.9595 crores was a loan amount and the same was not equity. It is vehemently urged on behalf of the Petitioner that the interpretation placed by him was confirmed by the Statutory Auditors when in fact the said opinion was itself based on the explanation furnished by the Petitioner to the Statutory Auditors.

26. The case of the Respondents is not with regard to the interpretation of the Letter No. 2175, dated 30th of June, 2014. On the contrary, the defence case is that due to misrepresentation by the Petitioner before the Income Tax Authority, the Company's image was maligned and a liability of Rs. 30.19 crores for payment of income tax was created upon the BSPTCL. Secondly, as a result of the stand taken before the CAG, terming the equity as loan at the rate of 10.50 percent, had led to increase in Long Term Borrowing of BSPTCL and the

increase in the cost of transmission further led to increase in the tariff for the residents of the State of Bihar. It is submitted by the learned Sr. Advocate for the Respondents that the Petitioner always knew that the Letter No. 2175, dated 30th of June, 2014 specifically stated that the amount transferred after the date of reorganization was to be treated as an equity capital which is apparent from his statement before the Income Tax Authorities and yet the continued to represent before the CAG that he said amount was not an equity but a loan by the State Government.

27. With regard to the Charge No. 2, the learned Sr. Counsel on behalf of the Respondents submits that the Petitioner misrepresented that the said sum of Rs. 195.9595 crores was granted by the State Government in favour of BSPTCL. However, the fact remains that the said transfer of funds was done by BSPHCL to BSPTCL and the entire transaction had nothing to do with the State Government. It is also submitted by the learned Sr. Advocate on behalf of the Respondents that all the subsidiary Companies of BSPHCL had already converted the investment of the BSPHCL into equity in favour of BSPHCL and yet the Petitioner has ensured writing of a letter, dated 28th September, 2017 by the Managing Director of BSPTCL to the Principal Secretary, Department of Energy,

Government of Bihar, Patna, asking him to clarify the nature of investment of Rs. 195.9595 crores. This was specifically and deliberately done at the behest of the Petitioner only to suppress his act of misrepresentation and negligence.

28. On the issue of Charge No. 3, the learned Sr. Advocate for the Respondents has elaborately dealt with the defence in his written notes of argument. I am tempted to reproduce his argument stated in the written notes, which is as follows:

"It is with regard to conversion of Rs. 195.9595 crores into equity without taking approval of the Managing Director.

Timeline evident from his own letters and that of BSPHCL is telling -

28.09.2017 Pg. 229	The Petitioner ensured the Managing Director writing a letter inquiring about the nature of Rs. 195.9595 crores.
05.02.2018 Referred in the letter dated 03.04.2018 at Pg. 224	Letter asking the BSPHCL for conversion of Rs. 3592.36 crores into equity.
03.04.2018 Pg. 224	The Petitioner as a GM (F&A) writes to GM, BSPHCL informing them about the objection of CAG and sought conversion of the

	investment (Rs. 3592.36 crores) of BSPHCL into equity.
20.04.2018 Pg. 222 Pg. 223	G.M. Finance of BSPHCL writes to BSPTCL to convert Rs. 3812.703 crores which included Rs. 195.9595 crores into equity.
20.04.2018 Starts from Pg. 226 relevant at pg. 227	Proposal for conversion of Rs. 3812.703 crores which included Rs. 195.9595 crores into equity was initiated by Company Secretary BSPHCL to which the Petitioner signed without any demur.
23.05.2018 Referred at Pg. 189 i.e., part of the enquiry report and document no. (X) of the list of charge-sheet document Pg. 69	The Petitioner initiates conversion of an amount of Rs. 3812.7036080 crores which included Rs. 195.9595 crores into equity and in this regard the proposal of this Petitioner in the form of agenda note dated 23.05.2018 has been quoted by the enquiry officer in this inquiry report.

On 28.09.2017, the Petitioner gets the MD, BSPTCL to write a letter to State Government quizzing them about the nature of the investment of Rs. 195.9595 Crores. On 05.02.2018, within four months of writing the letter to State Government – and without awaiting the response of the State Government – the Petitioner initiates the process of conversion of the said amount into equity by writing letter to BSPHCL for conversion and follows it with letter dated 03.04.2018. In the grab of letter of BSPHCL (*referred at Pg. 224*). Based on the

reply dated 20.04.2018 of BSPHCL he conveniently concurs with the proposal and then on 23.05.2018 places an agenda note (*quoted at page 189 as part of the enquiry report and the same was part of list of documents at page 69 Serial no. X),* without the approval of the Managing Director BSPTCL, before the Board of Directors with regard to conversion of Rs. 3812.7036080 Crores which included Rs. 195.9595 crores into equity.

At no point of time the Petitioner did ever object to the figures of 3812.7036080 Crores that was to be converted into equity in favour of BSPHCL. The letter and the agenda sheet of Company Secretary BSPHCL is being used as a fig-leaf defence when in fact he ought to have objected to inclusion of Rs. 195.9595 crores in the amount of Rs. 3812.7036080 Crores as there was no response from the State Government and that he had stoutly been defending his action before CAG. He allowed the process of conversion go on without demur as it was now becoming inconvenient for him to defend.

This shows that he was always aware of his own wrong representations and at convenient time he allowed the entire thing to be converted into equity in favour of the BSPHCL and this also goes to show that this Petitioner was

aware that the entire transaction was between BSPHCL and BSPTCL and it had nothing to do with the State Government

29. As regard Charge No. 4, the Petitioner practically insisted continuously to treat Rs. 195.9595 crores as loan amount even in his explanation submitted after receipt of Memorandum of Charge as well as in the reply against the second show-cause. The learned Sr. Counsel on behalf of the Respondents submits that his stand to treat the said amount as a loan amount was contradictory to his own stand before the Income Tax Authorities when he admitted that the said amount of Rs. 195.9595 crores were an equity infusion, relying upon the letter no. 2175, dated 30th of June, 2014. He also misrepresented the Board of Directors in his agenda note dated 23rd of May, 2018. Even during the departmental enquiry and before this Court, the Petitioner continued to show the said sum as loan.

30. Charge No. 5 relates to the pecuniary loss incurred by BSPTCL.

31. Charge No. 6 also relates to financial irregularities inasmuch as it relates to treating an amount of Rs. 144.59 Crores given to BSPTCL by BSPHCL.

32. This amount was part of a total amount of Rs. 200.86 Crores which BSPHCL had received under the State

Plan for transfer to BSPTCL.

33. An amount of Rs. 55.89 Crores had been transferred by BSPHCL to BSPTCL on 11.03.2013 and the balance of Rs. 144.59 Crores was transferred on 06.09.2016 and 28.9.2016 – in two tranches.

34. While Rs. 55.89 Crores received in the year 2013 was reflected in the books of BSPTCL as "*inter Company Transfer*", the amount of Rs.144.59 Crores received in the year 2016 was reflected in the accounts as a loan by BSPHCL at the rate of 10.5% interest leading to a liability under the income Tax Act and an additional expense on the cost of transmission.

35. The Petitioner was always aware that the amount of Rs. 144.59 Crores was part of the Rs. 200.89 Crores of funds received under the '*State plan'* but because of the differential treatment given to the part of the said amount, led to additional liability of income tax as the same was again shown as a loan and as a capital receipt before the income tax authorities.

36. This act of differential treatment was deliberate as Rs. 144.59 Crores was transferred to BSPTCL after his repeated insistence – through different letters written by him personally [*The same can be seen at running Pg. 217*

(30.08.2016 letter), Pg. 218 (04.02.2016) and Pg.220 (10.09.2013)] – of release of the balance of Rs. 200.86. Thus he was always aware that Rs. 144.59 Crores was part of the same Rs. 200.86 Crores under the "*State Plan*" and thus there was no reason to make differential treatment by showing Rs. 55.89 Crores as '*Inter Company Transfer*' and Rs. 144.59 Crores as loan @10.50%.

37. The failure to reflect the interest earned upon the said amount as revenue receipt and reflecting the same in the profit and loss account led to an interest liability which the company had to reverse to the income tax authorities.

38. Under the above-mentioned backdrop, it is submitted by the learned Sr. Advocate on behalf of the Respondents that the authority found that the Petitioner cannot be entrusted with a position wherein he is under objection to take care of public money and he was not fit for the post of General Manager (Finance) and, therefore, he was dismissed from service.

39. According to Mr. Mrigank Mauli, any willful conduct leading to financial loss and the loss of public money amounts to misconduct. In support of his contention, the learned Sr. Advocate refers to the decision of the Hon'ble Supreme

Court in ***State of U.P. & Ors. v. Ramesh Chandra Mangalik***, reported in ***(2002) 3 SCC 443,*** wherein it has been held that an act of omission or lack of inefficiency or failure to attain highest standard of administrative ability cannot by itself amounts to or constitute misconduct. Error of judgement in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct. However, if it is found that the nature of charges is different, which cannot be said to be mere omission on the part of the Petitioner or it may be attributed to lack of competence or inamptitude etc., such financial irregularities may be attributed to lack of competence or inampitude. In the instant case, not only the lack of competence or inampitude, deliberate misrepresentation before the Income Tax Authorities and the Controller and Auditor General by the Petitioner ought to be considered as misconduct, for which the Petitioner is liable to be punished.

40. On the same issue, he next refers to the case of ***Mihir Kumar Hazara Choudhury v. Life Insurance Corporation & Anr***., reported in ***(2017) 9 SCC 404***. In paragraph 23 of the said report, it is observed by the Hon'ble Supreme Court that an employee, in discharge of his duties is required to exercise higher standard of honesty and integrity. In

a case where he deals with the money of depositors and customers, it is all the more necessary for him to be the more cautious in his duties because he deals with the money transactions for and on behalf of his employer. However, such employee / Officer is, therefore, required to take all possible steps to protect the interest of his employer. He must, therefore, discharge his duties with utmost sense of integrity, honesty, devotion and diligence and must ensure that he does nothing, which is unbecoming of an employee / Officer. Indeed, good conduct and discipline are inseparable from the functioning of every employee/officer of any Institution and more when the institution deals with money of the customers. Any dereliction in discharge of duties whether by way of negligence or with deliberate intention or with casualness constitutes misconduct on the part of such employee/officer. In paragraph 27, the Hon'ble Supreme Court was pleased to observe “There is no defense available to a delinquent to say that there was no loss or profit resulting in a case when officer/employee is found to have acted without authority. The very discipline of an organization and especially financial institution where money is deposited of several depositors for their benefit is dependent upon each of its employee, who acts/operates within the allotted sphere as

custodian of such deposit. Acting beyond one's authority by itself is a breach of discipline and thus constitutes a misconduct rendering the delinquent to suffer the adverse orders."

41. The learned Sr. Advocate on behalf of the Respondents next refers to ***Suresh Pathrella v. Oriental Bank of Commerce***, reported in ***(2006) 10 SCC 572***. Paragraphs 19, 20 and 21 are important for our purpose and are quote below:-

> ***"19.*** *In Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik [(1996) 9 SCC 69 : 1996 SCC (L&S) 1194] this Court held that a bank officer acting beyond his authority constituted misconduct and no further proof of loss is necessary.*
>
> ***20.*** *In Regional Manager, U.P. SRTC v. Hoti Lal [(2003) 3 SCC 605 : 2003 SCC (L&S) 363] this Court held in para 10 at SCC p. 614 as under:*
>
> *"If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench*

of the High Court do not appear to be proper. We set aside the same and restore order of the learned Single Judge upholding the order of dismissal."

21. *In Chairman and MD, United Commercial Bank v. P.C. Kakkar [(2003) 4 SCC 364 : 2003 SCC (L&S) 468] , this Court said in para 14 at SCC pp. 376-77 as under:*

"14. A bank officer is required to exercise higher standards of honesty and integrity. He deals with the money of the depositors and the customers. Every officer/employee of the bank is required to take all possible steps to protect the interests of the bank and to discharge his duties with utmost integrity, honesty, devotion and diligence and to do nothing which is unbecoming of a bank officer. Good conduct and discipline are inseparable from the functioning of every officer/employee of the bank. As was observed by this Court in Disciplinary Authority-cum-Regional Manager v. Nikunja Bihari Patnaik [(1996) 9 SCC 69 : 1996 SCC (L&S) 1194] , it is no defence available to say that there was no loss or profit resulted in case, when the officer/employee acted without authority. The very discipline of an organization more particularly a bank is dependent upon each of its officers and officers acting and operating within their allotted sphere. Acting beyond one's authority is by

itself a breach of discipline and is a misconduct. The charges against the employee were not casual in nature and were serious. These aspects do not appear to have been kept in view by the High Court."

42. The learned Sr. Advocate on behalf of the Respondents next argues that during the process of enquiry or before the Disciplinary Authority, he did not make any allegation regarding any procedural violation which has caused prejudice to him. The learned Sr. Advocate on behalf of the Petitioner submits that the Petitioner was not produced with any document and in order to prove the document especially, Letter No. 2175, dated 30th June, 2014, was not proved by the Disciplinary Authority by adducing evidence. It is found from the averments made in the writ petition that the sheet-anchor of defence of the Petitioner was Letter No. 2175, dated 30th of June, 2014 in view of Section 53 of the Bhartiya Sakshya Adhinium, 2023, no fact need to be proved in any proceeding which the parties thereto or their attendants agreed to admit at the hearing. In other words, an admitted document need not be proved. Thus, the contention of the learned Sr. Advocate on behalf of the Petitioner that the disciplinary proceeding was based on no evidence does not have any leg to stand. In support of his contention, he refers to the case of ***State Bank of India &***

Ors. v. Narendra Kumar Pandey, reported in ***(2013) 2 SCC 740***. In this decision, it was held by the Hon'ble Supreme Court that if the charges are borne out from the documents kept in the normal course of business, no oral evidence is necessary to prove those charges.

43. He also relies upon another decision of the Hon'ble Supreme Court in the case of ***Union of India & Ors. v. Dilip Paul***, reported in ***2023 SCC OnLine SC 1423*** and submits that if the Principles of Natural Justice is violated, the Petitioner was not given any opportunity to place his case before the Inquiry Officer as well as Disciplinary Authority, it may cause prejudice to him but in respect of procedural provision other than of a fundamental nature, the theory of substantial compliance would be available and in such cases, objections on the score have to be adjudged on the touchstone of prejudice. According to the learned Sr. Counsel for the Respondents, the Petitioner was not prejudiced in course of departmental enquiry. Therefore, there is no reason to hold that the Petitioner was prejudiced on account of non-supply of documents.

44. The learned Advocate for the Respondents further submits that the Petitioner failed to exhaust the statutory provisions as laid down in Bihar Government Servants

(Classification, Control and Appeal) Rules, 2005 by not filing the statutory appeal before the Board of Directors. It is contented by him that the Board of Directors are the Appellate Authority and not the CMD. The appeal ought to have been filed before the Board of Directors. The contention on behalf of the Petitioner that no fruitful purpose would be served on filing statutory appeal on the ground that the order passed by the Disciplinary Authority was on the basis of approval by the CMD.

My Finding

45. (a) **On Maintainability**: - The Petitioner has raised issue that indisputably he was appointed by the erstwhile BSEB. On the date of initiation of departmental proceeding, BSPHCL was the Appointing Authority and, therefore, Disciplinary Authority. The Petitioner was posted in BSPTCL after the reorganization / reconstitution of subsidiary Companies under the Holding Company. However, it cannot be denied that BSPHCL is the Disciplinary Authority of the Petitioner. In order to establish the said fact, the Petitioner brought on record the Notification No. 17, dated 30th of October, 2012 (Annexure-2), by which, the transfer scheme of BSEB was published. Clause 6.2 of the scheme states that the personnel of the Board, i.e.,

those involved in Distribution, General, Transmission and Common Services would stand transferred to the Holding Company. Clause 6.3 states that subject to sub-clause 6.2, the personnel shall stand transferred further from Holding Company, which includes all personnel working with the Transmission, Generation and Distribution functions and activities. Though the Petitioner was posted as General Manager, Finance and Accounting, the nature of service of the Petitioner falls under the Common Services. Therefore, service rendered by the Petitioner in BSPTCL may be on deputation or lien, but the Appointing Authority was always BSPHCL. Entry-2, Part-II of Schedule-F to the Scheme refers to the Common Services which includes Accounts and Finance. This would indicate that the Petitioner continues to be under the Holding Company. The transfer orders (Annexure-3) of the Petitioner were passed by the BSPHCL. Therefore, the order of dismissal was approved by the CMD, BSPHCL though at the relevant point of time the Petitioner was posted at BSPGCL. Therefore, according to the Petitioner, initiation of departmental proceeding by submission of charge-sheet by the General Manager (HR/Adm.) of BSPTCL is bad in law and a nullity.

46. While the Petitioner challenged maintainability

of the disciplinary proceeding, the Respondent challenged maintainability of the writ petition filed by the Petitioner. It is alleged on behalf of the Respondents that the Petitioner filed the instant writ petition without availing and exhausted the efficacious remedy of appeal before the Board of Directors. Against the dismissal order, there is remedy of appeal before the Board of Directors, yet the Petitioner did not file any appeal and straightway approached this Hon'ble Court under Article 226 of the Constitution of India. The writ petition is not maintainable and only on this ground, the same is liable to be dismissed.

47. It is true that the departmental proceeding was not started by BSPHCL, it was started on the basis of Memorandum of Charge submitted by the General Manager (HR/Adm), BSPTCL.

48. In ***Ministry of Defence v. Prabhash Chandra Mirdha*** reported in ***(2012) 11 SCC 565,*** the Hon'ble Supreme Court has laid down legal proposition while interpreting the provisions of Article 311 of the Constitution of India that the removal and dismissal of a charged officer on misconduct must be by the authority not below the appointing authority. However, it does not mean that disciplinary proceedings may not be initiated against the delinquent by the authority lower

than the appointing authority.

49. It is permissible for an authority, higher than the appointing authority, to initiate the proceedings and impose punishment, in case he is not the appellate authority so that the delinquent may not lose the right of appeal. In other case, the delinquent has to prove as to what prejudice has been caused to him.

50. The Hon'ble Supreme Court in the case of ***Inspector General of Police v. Thavasiappan,*** reported in ***(1996) 2 SCC 145*** reconsidered its earlier judgement on the issue and came to the conclusion that there is nothing in law which inhibits the authority subordinate to the appointing authority to initiate disciplinary proceeding or issue charge memo and it is certainly not necessary that the charges should be framed by the authority competent to award the punishment or that the inquiry should be conducted by such authority.

51. While coming to this decision, the Hon'ble Supreme Court was pleased to consider the decision in ***Steel Authority of India & Anr. v. Dr. R.K. Diwakar & Ors,*** reported in ***(1997) 11 SCC 17*** and ***State of U.P. & Anr. v. Chandrapal Singh & Anr.,*** reported in ***(2003) 4 SCC 670.***

52. In view of such precedent, I am not in a

position to hold that the disciplinary proceeding is bad in law and void *ab initio,* since it was initiated by the appointing authority.

53. At the same time, it is found from the record that the order of punishment was passed with the approval of the CMD, BSPHCL. So, there is no procedural error in the disciplinary proceeding and punishment.

54. Now, let me come to a preliminary objection raised by the Respondents on the ground of maintainability of writ petition as it is filed against the order of the disciplinary authority without resorting to the recourse of statutory appeal.

55. In a very recent judgement in the case of ***Godrej Sara Lee Ltd. v. Excise & Taxation Officer, AIR 2023 SC 781,*** the Hon'ble Supreme Court decided the issue as to whether a writ petition should be dismissed as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. It is held by the Hon'ble Supreme Court as hereunder:

> *"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by article 226 of the Constitution having come across certain*

orders passed by the High Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a

writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition "not maintainable". In a long line of decisions, this court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the "maintainability" of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the High Courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a

High Court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5. A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in [1958] SCR 595 (State of Uttar Pradesh v. Mohammad Nooh) had the occasion to observe as follows :

"10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and

decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.. . ."

6. At the end of the last century, this court in paragraph 15 of its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation v. Registrar of Trade Marks, Mumbai) carved out the exceptions on the existence whereof a writ court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under :

(i) where the writ petition seeks enforcement of any of the fundamental rights ;

(ii) where there is violation of principles of natural justice ;

(iii) where the order or the proceedings are wholly without jurisdiction ; or

(iv) where the vires of an Act is challenged.

7. Not too long ago, this court in its decision reported in [2021] SCC Online SC 884 (Assistant Commissioner of State Tax v. Commercial Steel Limited) has reiterated the same principles in paragraph 11.*

*8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of U. P. v. Indian Hume Pipe Co. Ltd.)** and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the High Court could entertain a writ petition in its discretion even though the alternative remedy was not availed of ; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this court found the issue raised by the appellant to be pristinely legal requiring determination by the High Court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the High Court instead of dismissing the writ petition on the ground of an*

alternative remedy being available."

56. That apart, we may also usefully refer to the decisions of this Court reported in ***(1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.***) and ***(2000) 10 SCC 482 (Union of India v. State of Haryana)***. What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available.

57. Bearing the above principles enunciated by the Hon'ble Supreme Court while examining the submission of Mr.

Giri, learned Senior Counsel on behalf of the Petitioner, this Court finds that when the order of punishment was passed with the approval of the highest authority of the holding company, no fruitful purpose would have been served by filing an appeal before the appellate authority.

58. In this regard also, this Court finds that the instant writ petition maintainable.

59. (b) ***Mens Rea*** - The Hon'ble Supreme Court in the case of ***Union of India & Ors. v. J. Ahmed*** reported in ***(1979) 2 SCC 286*** explained the manner, scope and purport of the word "misconduct".

60. In paragraph 11 of the judgment, Hon'ble Supreme Court has noted the defence of misconduct in Stroud's Judicial Dictionary which runs as under:

> *"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."*

61. The Hon'ble Supreme Court further held that in industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in ***Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik [AIR 1966 SC 1051]*** in the absence of standing orders governing the employee's

undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In ***S. Govinda Menon v. Union of India [(1967) 2 SCR 566]*** the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences, the same may amount to misconduct as was held by this Court in ***P.H. Kalyani v. Air France, Calcutta [AIR 1963 SC 1756]*** wherein it was found that the two mistakes committed by the employee while checking the loading-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would *ipso facto* constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute

misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a Railway Cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil. But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

62. An employee may be of average quality. Due to his failure to understand any particular direction given by the

authority, he may take decision against the interest of his employer or the authority. In such cases of failure, an employee cannot be said to have been committed an act of misconduct.

63. The pith and substance of the Hon'ble Supreme Court's decision in **J. Ahmed** (Supra) says:-

> *(i) Lack of efficiency and failure to attain highest standard of administrative ability while holding high post would not by themselves constitute misconduct. There have to be specific acts of omission and commission;*
>
> *(ii) Negligence in discharge of duty where consequences are irreparable or result and damage is heavy constitutes misconduct;*
>
> *(iii) Gross habitual negligence in performance of duty may no involve mens rea but still constitutes misconduct.*

64. Thus, misconduct and *mens rea* are not synonymous to each other while *mens rea* involves culpable intention and criminal mindset, in misconduct it is not necessary to prove culpable intention. Therefore, even in cases where the charged employee is not charged for wrongful gain on account of financial irregularities, there may be misconduct as a result of repeated and gross negligence and deliberate act causing financial loss of the public sector undertaking or its subsidiaries.

65. In the instant case, the Petitioner showed Rs. 195.9595 Crores as a loan amount and it was not an equity. Under the Income Tax Act, it is already stated that the equity capital is treated as capital receipt representing company's capital to be used for the development of the assets of the company and as such exempted from income tax. However, the loan amount is not equity and for such amount, the company had to pay tax to the Income Tax Department. Because of the stand taken by the Petitioner with regard to the said amount, the company had to incur liabilities of Rs. 30.19 Crores to the Income Tax Department.

66. As per letter, dated 2175, dated 30th of June, 2014, the Petitioner always knew that the amount transferred after the date of reorganization, i.e., 1st of November, 2012, by the holding company to the subsidiary companies was to be treated as equity capital which is apparent from his statement before the Income Tax Departments and yet he continued to represent before the CAG that the said amount was not equity but a loan by the State Government.

67. Thus, the specific act and omission on the part of the Petitioner does not amount to a mere negligence or misinterpretation of letter no. 2175 dated 30th of June, 2014. The

act of Petitioner was willful, deliberate and against the interest of the company. Therefore, such gross negligence amounts to misconduct.

Conclusion

68. For the reasons stated above, I do not find any reason to interfere with the order passed by the disciplinary authority.

69. The instant writ petition is liable to be dismissed on merit.

70. Accordingly, the instant writ petition is dismissed on contest.

71. However, there shall be no order as to costs.

(Bibek Chaudhuri, J)

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