IN THE HIGH COURT OF JUDICATURE AT PATNA

Nageshwar Sharma

vs.

The State of Bihar and othr

Letters Patent Appeal No.298 of 2019

In

Civil Writ Jurisdiction Case No.8328 of 2017

06 December, 2023

(Honourable Mr. Justice P. B. Bajanthri

And

Honourable Mr. Justice Ramesh Chand Malviya)

Issue for Consideration

Issue arose as regards to "whether an employee can be punished in a departmental enquiry without giving an opportunity of being heard? "

Headnotes

In the present L.P.A., the appellant assailed the 0rder dated 15.01.2019 passed in C.W.J.C. No. 8328 of 2017. The appellant while working as Executive Engineer in Samastipur Division, a F.I.R was registered for the offences under Prevention and Corruption Act, 1988, in particularly, sub-Section 2 of Section 13 read with sub Section 1 (e) of section 13 - Parallely, departmental inquiry was initiated on the alleged allegation of disproportionate to the known source of income - he was placed under suspension on 06.12.2013 - charge memo issued In the charge memo, list of documents have been cited as No.1, 2 and 3 - There are no list of witnesses to adduce evidence on behalf of author of those documents – enquiry report without affording him due opportunity of cross-examination to the witness – it would fall in the category of no adequate hearing given - In such case, the validity of the order has to be decided on the touchstone of prejudice i.e. whether, the person concerned did or did not have a fair hearing - the rule of audi alteram partem [the primary principle of natural justice] the Court/ Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice - It is this objective which should guide them in applying the rule to varying situations that arise before them.

The appellant is government servant of the State of Bihar - He is governed by the Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (hereinafter referred to as "the Rules, 2005"). Rule 17 relates to procedure for imposing major penalties for the purpose of the present case, sub-Rule 3 of the Rule 17 is relevant.

The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

(a) the enquiry is held by a competent authority; (b) the enquiry is held according to the procedure prescribed in that behalf; (c) there is violation of the principles of natural justice in conducting the proceedings; (d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case; (e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations; (f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion; (vii) go into the proportionality of punishment unless it shocks its conscience." (g) the disciplinary authority had erroneously failed to admit the admissible and material evidence; (h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding; (i) the finding of fact is based on no evidence.

Under Articles 226/227 of the Constitution of India, the High Court shall not: (i) reappreciate the evidence; (ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law; (iii) go into the adequacy of the evidence; (iv) go into the reliability of the evidence; (v) interfere, if there be some legal evidence on which findings can be based; (vi) correct the error of fact however grave it may appear to be; (vii) go into the proportionality o punishment unless it shocks its conscience."

Non citing witnesses or authors of the documents in the present case and examination and non- examination of those authors are relevant in order to prove the alleged allegations levelled against the appellant, thereby the appellant has been declined to provide principle of natural justice - wherein it is held that in departmental enquiry if any document is required to be relied on in that event author of that document is required to be examined and cross examined - the need of compliance with certain requirements

in a departmental enquiry — at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence on which he is charged and to lead his defence — on this state of law, a simple question arises in the contextual facts. Has this been complied with? The answer however on the factual score is an emphatic “no”.

Taking note of the latest legal position read with order of learned Single Judge, the appellant has made out a case, so as to interfere with the learned Single Judge's order dated 15.01.2019 passed in C.W.J.C. No.8328 of 2017 - Accordingly, dismissal order dated 08.08.2023 and order of learned Single Judge dated 15.01.2019 passed in 8328 of 2017 stands set aside.

We are interfering the dismissal order as well as the order of learned Single Judge – Hence, Respondents are directed to conduct the enquiry afresh from the stage where it stood before the alleged vulnerability surfaced - However, for the purpose of holding fresh enquiry, the delinquent is to be reinstated and may be put under suspension – the question of back wages, etc. are determine by the disciplinary authority in accordance with law after fresh enquiry is concluded.

In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected - In case the appellants choose to hold a fresh enquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled to subsistence allowance till the conclusion of the enquiry - All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry With these observations, the appeal stands disposed of. No costs.”

In the present case, alleged allegation is that appellant acquired wealth disproportionate to the known sources of his income, which attract provisions of Prevention of Corruption Act, 1988.

Therefore, it is a case or remand to the disciplinary authority to commence the inquiry from the defective stage, namely, preparing list of documents and list of witnesses afresh and proceed to complete the inquiry within a period of six months from the date of receipt of this order.

The disciplinary authority is hereby directed to pass a reasoned order in light of Rule 97 of the Bihar Service Code in so far as as regulating the intervening period from the date of dismissal till conclusion of the departmental inquiry afresh. In other words, how to regulate the service or the intervening service period, such order shall be passed within period of three months from the date of conclusion of the departmental inquiry afresh.

In the light of setting aside the order of the dismissal dated 08.08.2016 read with the fact that appellant has attained age of superannuation and retired from service in the year 2018 is entitled to provisional pension - The provisional pension shall be considered from the date of his retirement and proceed to disburse the same till the conclusion of departmental inquiry under the Rules, 2005 read with Rule 43(b) of the Bihar Pension Rules.

The competent authority is hereby directed to examine in respect of continuation of inquiry against retired employee in light of Rule 43(b) of the Bihar Pension Rules.

Accordingly, the present L.P.A. No.298 of 2019 stands allowed in part.

Case Law Cited

Roop Singh Negi Vs. Punjab National Bank & Ors. reported in ***(2009) 2 SCC 570*** *; State of Uttar Pradesh & Ors. Vs. Saroj Kumar Sinha reported in* **2010 (2) SCC 772***; B.C. Chaturvedi Vs. Union of India & Ors. reported in* **AIR 1996 SC 484** *[paragraph nos. 12 & 13 are relevant]; Union of India v. H.C. Goel* ***[(1964) 4 SCR 718]*** *; State Bank of Patiyala & Ors. Vs. S.K. Sharma reported in* ***AIR 1996 SC 1669,*** *there the Court has ; Russell c. Duke of Norfolk* ***[1949 (1) All.E.R.109]*** *way back in1949 ; Mahender Singh Gill v. Chief Election commissioner,* ***(1978) 2 S.C.R.272 : (AIR 1978 SC 851)*** *;A.K.Roy v. Union of India* ***1982 (1) S.C.C.271) ;*** *Swadeshi Cotton Mills v. Union* ***(1981 (1) S.C.C.664)]*** *; A.K.Kraipak L Ors. v. Union d India & Ors.* ***(1969 (2) S.C.C.262)****; Liberty Oil Mills v. Union of India* ***(1984 (3) S.C.C.465)***; Union of India and Ors. Vs. Dalbir Singh *reported in* ***(2021) 11 SCC 321*** *(paragraph No.21)* ***;*** Union of India v. P. Gunasekaran [Union of India v. P.Gunasekaran, ***(2015) 2 SCC 610 : (2015) 1 SCC (L&S) 554]***; S.C. Girotra vs United Commercial Bank (Uco Bank), *reported in* ***1995 Supp. (3) SCC 212;*** *Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar Pant & Ors.***,**

reported in ***2001 (1) SCC 182,*** (paragraph Nos.21 and 22); *Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others*, reported in ***(1993) 4 SCC 727*** read with ***;*** *Chairman-Cum-Managing Director, Coal India Limited and others Vs. Ananta Saha and others,* reported in ***(2011) 5 SCC***
142 (paragraph No.48 to 50); *The State of Uttar Pradesh & Ors. Vs. Prabhat Kumar,* reported
in ***2022 Live Law (SC) 736***.

List of Acts

The Constitution of India; principle of Natural justice; Prevention and Corruption Act 1988; the Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 sub-Rule 3 of the Rule 17 is relevant . The Bihar pension rule, section 43 b.

List of Keywords

Departmental inquiry, disproportionate known source of income, misconduct or misbehaviour, principles of natural justice, theory of prejudice, Major Penalties, Continuation Of Inquiry

Case Arising From

Order dated 15.01.2019 passed in C.W.J.C. No. 8328 of 2017.

Appearances for Parties

For the Petitioner/s : Mr. Bishnu Kant Dubey, Advocate

For the Respondent/s : Mr. S. Raza Ahmad, AAG-5

Headnotes Prepared by Reporter: Sharang Dhar Upadhyay
Additional District and session Judge,Katihar(Retd.) Cum Reporter Patna High Court.

Judgment/Order of the Hon'ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.298 of 2019
In
Civil Writ Jurisdiction Case No.8328 of 2017

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Nageshwar Sharma S/o Late Badri Sharma, R/o Village Ratanpur, P.S. Daudnagar, District- Aurangabad, at present dismissed Executive Engineer, Department of Public Health Engineering, Government of Bihar, Patna.

... ... Appellant/s

Versus

1. The State of Bihar
2. The Principal Secretary, Department of Public Health Engineering, Government of Bihar, Patna
3. The Additional Secretary Department of Public Health Engineering, Government of Bihar, Patna
4. The Joint Secretary, Department of Public Health Engineering, Government of Bihar, Patna
5. The Special Officer, Public Health Engineering Department, Government of Bihar, Patna.

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr. Bishnu Kant Dubey, Advocate
For the Respondent/s : Mr. S. Raza Ahmad, AAG-5

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 06-12-2023

In the present L.P.A., the appellant assailed the order dated 15.01.2019 passed in C.W.J.C. No. 8328 of 2017.

2. The appellant while working as Executive Engineer in Samastipur Division, an FIR No.7 of 2013 was registered for the offences under Prevention and Corruption Act, 1988, in particularly, sub-Section 2 of Section 13 read with sub-

Section 1 (e) of section 13. Parallely, departmental inquiry was initiated on the alleged allegation of disproportionate to the known source of income. On these allegations, he was placed under suspension on 06.12.2013, charge memo was issued. In the charge memo, list of documents have been cited as No.1, 2 and 3. There are no list of witnesses to adduce evidence on behalf of author of those documents. In other words, it is a case of no evidence or perverse evidence for the reasons that certain documents have been taken note of and proceeded to conclude the inquiry and imposition of penalty of dismissal from service on 08.08.2016.

3. Learned Single Judge on page nos. 19 to 30 of the order dated 15.01.2019 passed in C.W.J.C. No. 8328 of 2017 held as under:

> *"....Third plea has been taken by the learned counsel for the petitioner that during enquiry, no witness has been examined to prove the charge on the basis of documentary evidence but, the Enquiry Officer submitted enquiry report, found the charges have been proved against the petitioner which is contrary to the view expressed in two judgments and has placed reliance, firstly in the case of Roop Singh Negi Vs. Punjab National Bank & Ors. reported in (2009) 2 SCC 570 and in the case of State of Uttar Pradesh & Ors. Vs. Saroj Kumar*

Sinha reported in 2010 (2) SCC 772.

The scope of judicial review has been deliberated by the Hon'ble Apex Court from time to time, its contour and scope has been limited to the extent that the writ court will not act as a court of appeal but, will only see that following elements while testing the decision of quasi-judicial authority dealing with the departmental proceeding matter as to whether the delinquent has been granted fair treatment during departmental proceeding in terms of natural justice as well as to see whether some material are available for arriving to a finding of guilt by the Disciplinary Authority and the findings recorded by the Disciplinary Authority should not be perverse, as no reasonable person could have arrived to such a finding and the findings are against the weight of evidence, the facts which were relevant for consideration having been left out and the fact which were not required to be taken has been taken into consideration, has been deliberated that Court will not ensure that the conclusion which the authority has arrived is necessarily correct in the eye of law and also to ensure that the competent authority has followed the rule of natural justice and the findings of the Enquiry Officer must be based on some evidence. Reliance can be placed to the judgment in the case of B.C. Chaturvedi Vs. Union of India & Ors. reported in AIR 1996 SC 484, paragraph nos. 12 & 13 being relevant are

quoted herein below:-

> *"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as*

appellate authority to re- appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.

13. The disciplinary authority is the sole judge of facts. Where appeal is presented. The appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C. Goel [(1964) 4 SCR 718], this Court held at page 728 that if the conclusion, upon consideration of the evidence, reached by the disciplinary

authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued."

In another judgment in the case of State Bank of Patiyala & Ors. Vs. S.K. Sharma reported in AIR 1996 SC 1669, there the Court has introduced the theory of prejudice in the context of departmental enquiry in the matter of procedural fairness in the sense that if the basics of natural justice as audi altaram partem has not been violated which is the core of the natural justice in the sense that if the enquiry has been conducted without giving notice or without giving any hearing, the proceeding is vitiated without examining other facets of natural justice but, if the challenge is that while conducting the departmental proceeding, certain provisions having been not followed and there is a deviation, in such circumstances, it will be obligation on the part of the government servant to show whether violation has caused any prejudice to the government servant in defending his case before the Enquiry Officer. The Hon'ble Apex Court has held that where the person is dismissed from service without hearing altogether, it would fall in the category of no notice, no hearing and, in such circumstances, the order of dismissal would be invalid or void but, where the person is dismissed from service without supplying him the copy of the

enquiry report or without affording him due opportunity of cross-examination to the witness, it would fall in the category of no adequate hearing given. In such case, the validity of the order has to be decided on the touchstone of prejudice i.e. whether, the person concerned did or did not have a fair hearing. The Hon'ble Apex Court says that the principle of natural justice cannot be put in a straight jacket formula, but is dependent upon the contexts, facts and circumstances of each case, for any and every violation, the proceeding will not vitiate but, has to be examined with different facets of natural justice, the order has been passed without any notice or without any enquiry, is void and ought to be set aside without further enquiry but, the theory of prejudice would apply in such cases where the complainant is not that there was no hearing, no notice and no opportunity but, one of not affording proper hearing and adequate hearing or of violation of procedural rule in conducting the enquiry, the complaint should be examined on the touchstone of prejudice as has been explained herein above, different facets and contours of principle of natural justice has been summarized in paragraph no. 27 & 32 of the aforesaid judgment, which reads as follows:

> *"27. The decisions cited above make one thing clear, viz., principles of natural justice cannot be to reduced to any hard and fast formulae. As said in Russell c. Duke of*

Norfolk [1949 (1) All.E.R.109] way back in 1949, these principle cannot be put in a straight-jacket. Their applicability depends upon the context and the facts and circumstances of each case. [See Mahender Singh Gill v. Chief Election commissioner, (1978) 2 S.C.R.272 : (AIR 1978 SC 851). The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. [See A.K.Roy v. Union of India 1982 (1) S.C.C.271) and Swadeshi Cotton Mills v. Union (1981 (1) S.C.C.664)]. As pointed out by this Court in A.K.Kraipak L Ors. v. Union d India & Ors. (1969 (2) S.C.C.262), the dividing line between quasi-judicial function and administrative function [affecting the rights of a party] has become quite thin and almost indistinguishable a fact also emphasized by House of Lords in C.C.C.U. v. Civil Service Union [supra] where the principles of natural justice and a fair hearing were treated as synonymous. Whichever the Cases it is from the standpoint of fair hearing - applying the test of prejudice, as it may be called - that any and every complaint of violation of the rule of audi alteram partem should be examined. Indeed, there may be situations where observance of the requirement of prior notice/no hearing may defeat the very

proceeding - which may result in grave prejudice to public interest. It is for this reason that the rule of post- decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases, e.g., Liberty Oil Mills v. Union of India (1984 (3) S.C.C.465). There may also be cases where the public interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of audi alteram partem altogether [as in the case of situations contemplated by clauses (b) and (c) of the proviso to Article 311(2)] or to disclose the material on which a particular action is being taken. There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate

- take a case where the person is dismissed from service without hearing him altogether [as in Ridge v. Baldwin]. It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression [Calvin v.Carr]. But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report [Managing Director, E.C.I.L. v.B.Karunkar] or without affording him a due opportunity of cross-examining a witness [K.L.Tripathi] it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the order has to be tested on the touch-stone of prejudice, i.e., whether, all in all, the person concerned did nor did not have a fair hearing. It would not be correct - in the light of The above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in B.Karunkar should govern all cases where the complaint is not that there was no hearing [no notice, no opportunity and no hearing] but one of not affording a proper hearing [i.e., adequate or

a full hearing] or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touch-stone of prejudice as aforesaid.

32. We may summarise the principles emerging from the above discussion. [These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee]:

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudicate, including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural

provisions which are of a fundamental character, whose violation is by itself proof of The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision g expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity inspite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory

characters the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it mays the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provisional which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirements either expressly or by his conduct. If he is found to have waived its then the order of punishment cannot be set aside on theground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not it or that the provision could no be waived by him, then the Court or Tribunal should make appropriate directions [include the setting aside of the order of punishment], keeping in mind the approach adopted by the Constitution

Bench in B.Karunkar. The ultimate test is always the same viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a total violation of natural justice [rule of audi alteram] and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between no opportunity" and no adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule [audi alteram partem]. (b) But in the

latter case, the effect of violation [of a facet of the rule of audi alteram] has to be examined from the standpoint of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle [No.5] does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem [the primary principle of natural justice] the Court/ Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing of the rule of

audi alteram partem. . In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision."

The principle emerges from the aforesaid judgment, it is very much clear that if the enquiry has been conducted without notice and no hearing, the order of dismissal is void but, when an issue is raised that he was not given the adequate opportunity to defend himself, in such circumstances, it has to be seen whether the violation, as alleged, goes to the root of the matter or, in any manner, is causing prejudice to the government servant/delinquent, in failure to show prejudice, the Court will not apply natural justice is mechanical manner, the court will refrain to interfere with the findings recorded by the Enquiry Officer.

It is not necessary that in every case, the witnesses are to be examined which is dependent on its own fact and if the government servant/delinquent does not deny the factual matrix of the charge, in such circumstances, failure to bring the witness will not in any way causing illegality.

4. The appellant is government servant of the State of Bihar. He is governed by the Bihar Government

Servants (Classification, Control & Appeal) Rules, 2005 (hereinafter referred to as "the Rules, 2005"). Rule 17 relates to procedure for imposing major penalties for the purpose of the present case, sub-Rule 3 of the Rule 17 is relevant. It is necessary to re-produce entire Rule 17 of the Rules, 2005:

> ***"17. Procedure for imposing major penalties. -***
>
> *(1) No order imposing any of the penalties specified in clauses [(vi) to (xi)] of Rule 14 shall be made without holding an inquiry, as far as may be, in the manner provided in these Rules.*
>
> *(2) Wherever the disciplinary authority is of the opinion that there are grounds for inquiring about the truth of any imputation of misconduct or misbehaviour against a government servant, he may himself inquire into it, or appoint under these Rules an authority to inquire about the truth thereof.*
>
> *[Provided that where the Department Enquiry Commissioner is appointed as inquiring authority in such cases the Department Enquiry Commissioner either himself conduct the inquiry or may transfer the case of enquiry to the Additional Departmental Enquiry Commissioner. In the matter of such transferred cases of enquiry the Additional Departmental Enquiry Commissioner may forward the records of enquiry along with Enquiry report directly to the Disciplinary Authority]*

Explanation. - Where the disciplinary authority himself holds the inquiry, any reference in sub-rule (7) to sub-rule (20) and in sub-rule (22) of this Rule to the inquiring authority shall be construed as a reference to the disciplinary authority.

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

(i) the substance of the imputations of misconduct or misbehaviour as a definite and distinct article of charge;

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

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

(b) a list of such document by which, and <u>a list of such witnesses by whom, the articles of charge are proposed to be sustained</u>.

(Underline supplied)

(4) The disciplinary authority shall deliver or cause to be delivered to the Government Servant a copy of the articles of charge, such statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the Government Servant to submit,

within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.

(5) (a) On receipt of the written statement of defence, the disciplinary authority may himself inquire into such of the articles of charge which are not admitted, or, if it thinks necessary to appoint, under sub-rule (2) of this Rule, an inquiry authority for the purpose he may do so and where all the articles of charges have been admitted by the Government Servant in his written statement of defence, the disciplinary authority shall record his findings on each charge after taking such evidence as it may think fit and shall take action in the manner laid down in Rule 18.

(b) If no written statement of defence is submitted by the Government Servant, the disciplinary authority may itself inquire into the articles of charge or may, if it thinks necessary to appoint, under sub-rule (2) of this Rule an inquiry authority for the purpose, it may do so.

(c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding an inquiry about such charge, it may, by an order, appoint a government servant or a legal practitioner to be known as the "Presenting officer' to present on his behalf the case in support of the articles of charge.

(Underline supplied)

(6) The disciplinary authority shall, where it is not

the inquiring authority, forward the following records to the inquiring authority-

(i) a copy of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(ii) a copy of the written statement of defence, if any, submitted by the government servant:

(iii) a copy of the statement of witnesses, if any, specified in sub-rule (3) of this Rule.

(iv) evidence proving the delivery of the documents specified to in sub-Rule (3) to the Government Servant; and

(v) a copy of the order appointing the "Presenting officer".

(7) The Government Servant shall appear in person before the inquiring authority on such day and at such time within ten working days from the date of receipt by him of the articles of charge and the statement of the imputations of misconduct or misbehaviour, as the inquiring authority may, by a notice in writing, specify in this behalf or within such further time, not exceeding ten days, as may be specified by the inquiring authority.

(8) (a) The Government Servant may take the assistance of other Government Servant posted in any office, either at his headquarter or at the place where the inquiry is to be held, to present the case on his behalf:

Provided that he may not engage a legal

practitioner for the purpose, unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner, or the disciplinary authority, having regard to the circumstances of the case, so permits:

Provided also that the Government Servant may take the assistance of any other Government Servant posted at any other station, if the inquiring authority having regard to the circumstances of the case, and for reasons to be recorded in writing so permits:

Provided further that the Government Servant shall not take the assistance of any such other Government Servant who has three pending disciplinary cases on hand in which he has to give assistance.

(b) The Government Servant may take the assistance of a retired government servant to present the case on his behalf, subject to such conditions as may be specified by the Government from time to time by general or special order in this behalf.

(9) If the Government Servant, who has not admitted any of the articles of charge in his written statement of defence or has not submitted any written statement of defence, appears before the inquiring authority, such authority shall ask him whether he is guilty or has to say anything for his defence and if he pleads guilty to any of the articles of charge, the inquiring authority shall record the

plea, sign the record and obtain the signature of the Government Servant thereon.

(10) The inquiring authority shall return a finding of guilt in respect of those articles of charge to which the Government Servant pleads guilty.

(11) The inquiring authority shall, if the Government Servant fails to appear within the specified time or refuses or omits to plead, require the Presenting Officer to produce the evidence by which he proposes to prove the articles of charge, and shall adjourn the case to a later date not exceeding thirty days, after recording an order that the Government Servant may, for the purpose of preparing his defence,-

(i) inspect within five days of the order or within such further time not exceeding five days as the inquiring authority may allow, the documents specified in the list in sub-rule (3);

(ii) submit a list of witnesses to be examined on his behalf;

Note:-If the Government Servant applies in writing for the supply of copies of the statements of witnesses mentioned in the list referred to in sub-rule (3), the inquiring authority shall furnish him with such copies as early as possible.

(iii) give a notice within ten days of the order or within such further time as the inquiring authority may allow for the

discovery or production of any documents which are in the possession of Government but not mentioned in the list specified in sub-rule (3) of this Rule:

Provided that the Government Servant shall indicate the relevance of the documents required by him to be discovered or produced by the Government.

(12) The inquiring authority shall, on receipt of the notice for the discovery or production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the document by such date as may be specified in such requisition:

Provided that the inquiring authority may, for reasons to be recorded by it in writing, refuse to requisition such of the documents as are, in its opinion, not relevant to the case.

(13) On receipt of the requisition specified in sub-rule (12) of this Rule, every authority having the custody or possession of the requisitioned documents shall produce the same before the inquiring authority:

Provided that if the authority, having the custody or possession of the requisitioned documents, is satisfied, for reasons to be recorded by it in writing, that the production of all or any of such documents will be against public interest or security of the State, he shall inform the inquiring

authority accordingly and the inquiring authority shall, on being so informed, communicate the information to the Government Servant and withdraw the requisition made by it for the production or discovery of such documents.

(14) On the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the disciplinary authority. The witnesses shall be examined by or on behalf of the Presenting Officer and may be cross-examined by or on behalf of the Government Servant. The Presenting Officer shall be entitled to re-examine the witnesses on any points on which they have been cross-examined, but not on any new matter, without the leave of the inquiring authority. The inquiring authority may also put such questions to the witnesses, as it thinks fit.

(15) If it shall appear necessary before the close of the case on behalf of the disciplinary authority, the inquiring authority may, in his discretion, allow the Presenting Officer to produce evidence not included in the list given to the Government Servant or may itself call for new evidence or recall and re-examine any witness and in such case the Government Servant shall be entitled to have, if he demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the inquiry for three clear days before the production of such new evidence, exclusive of the

day of adjournment and the day to which the inquiry is adjourned. The inquiring authority shall give the Government Servant an opportunity of inspecting such documents before they are taken on the record. The inquiring authority may also allow the Government Servant to produce new evidence, if it is of the opinion that the production of such evidence is necessary in the interests of justice:

Provided that new evidence shall not be permitted or called for or any witness shall not be recalled to supplement the evidence. Such evidence may be called for if there is any inherent lacuna or defect in the evidence, produced originally.

(16) When the case for the disciplinary authority is closed, the Government Servant shall be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the Government Servant shall be required to sign the record. In either case a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed.

(17) The evidence on behalf of the Government Servant shall then be produced. The Government Servant may examine himself in his own behalf if he so prefers. The witnesses produced by the Government Servant shall then be examined and they shall be liable to examination, cross-examination and, re-examination by the inquiring authority according to the provisions applicable to the witnesses for the disciplinary authority.

(18) The inquiring authority may, after the Government Servant closes his case, and shall, if the Government Servant has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling the Government Servant to explain any circumstances appearing in the evidence against him.

(19) The inquiring authority may, after the completion of the production of evidence, hear the Presenting Officer, if any, appointed and the Government Servant, or permit them to file written briefs of their respective case, if they so desire.

(20) If the Government Servant to whom a copy of the articles of charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the inquiring authority or otherwise fails or refuses to comply with the provisions of this Rule, the inquiring authority may hold the inquiry ex-parte.

(21) (a) Where a disciplinary authority competent to impose any of the penalties specified in clauses (i) to (v) of Rule 14 [but not competent to impose any of the penalties specified in clauses [(vi) to (xi)] of Rule 14], has himself inquired into or caused to be inquired into the article of any charge and that authority having regard to his own findings or having regard to its decision on any of the findings of any inquiring authority appointed

by it, is of the opinion that the penalties specified in clauses [(vi) to (xi)] of Rule 14 should be imposed on the government servant, that authority shall forward the records of the inquiry to such disciplinary authority as is competent to impose the penalties mentioned in clause [(vi) to (xi)] of Rule 14.

(b) The disciplinary authority to which the records are so forwarded may act on the evidence on the records or may, if he is of the opinion that further examination of any of the witnesses is necessary in the interests of justice, recall the witnesses and examine, cross-examine and re-examine the witnesses and may impose on the Government Servant such penalties as it may deem fit in accordance with these Rules.

(22) Whenever any inquiring authority, after having heard and recorded the whole or any part of the evidence in an inquiry ceases to exercise jurisdiction therein, and is succeeded by another inquiring authority which has and which exercises, such jurisdiction the inquiring authority so succeeding may act on the basis of evidence so recorded by its predecessor, or partly recorded by its predecessor and partly recorded by itself:

Provided that if the succeeding inquiring authority is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, it may recall, examine, cross-examine and reexamine

any such witnesses as hereinbefore provided.

(23)(i) After the conclusion of the inquiry, a record shall be prepared and it shall contain:-

(a) the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(b) the defence of the Government Servant in respect of each article of charge.

(c) an assessment of the evidence in respect of each article of charge,

(d) the findings on each article of charge and the reasons thereof.

Explanation. - If in the opinion of the inquiring authority the proceedings of the inquiry may establish any article of charge different from the original articles of the charge, he may record his findings on such article of charge:

Provided that the findings on such article of charge shall not be recorded unless the Government Servant has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

(ii) The inquiring authority, where it is not itself the disciplinary authority, shall forward to the disciplinary authority the records of inquiry which shall include-

(a) the report prepared by it under clause (i) of this sub rule;

(b) the written statement of defence, if any,

submitted by the Government Servant;

(c) the oral and documentary evidence produced in the course of the inquiry;

(d) written briefs, if any, filed by the Presenting Officer or the Government Servant or both during the course of the inquiry; and

(e) the orders, if any, made by the disciplinary authority and the inquiring authority in regard to the inquiry.

5. Sub-Rule 3 mandates that disciplinary authority shall drop or cause to draw up statement of imputation definite and distinct article of charges, statement of imputation in support of article of charge, statement of relevant facts including any admission or confession made by the government servant, a list of such documents by which a list of such witnesses by whom articles of charges are proposed to be sustained.

6. In the present case, undisputedly list of witnesses not made available along with articles of charges issued on 06.12.2013. Having regard to three documents vide list of documents and its authors have not been cited as witnesses, nor examined or cross-examined and appellant has not been provided opportunity to cross-examine them.

7. The learned Single Judge has committed error in ignoring sub-Rule 3 of Rule 17 of the Rules, 2005. No doubt, judicial review under article 226 is very limited. Time and again, Supreme Court has held that High Courts should not interfere with the disciplinary proceeding and imposition of punishment unless and until there are violation of statutory provision and violation of principle of natural justice. In this regard, the Apex Court in the case of ***Union of India and Ors. Vs. Dalbir Singh*** *reported in* ***(2021) 11 SCC 321****, in paragraph No.21 it is held as under:*

> ***"21. This Court in Union of India v. P. Gunasekaran [Union of India v. P. Gunasekaran, (2015) 2 SCC 610 : (2015) 1 SCC (L&S) 554] had laid down the broad parameters for the exercise of jurisdiction of judicial review. The Court held as under : (SCC pp. 616-17, paras 12-13)***
>
> > *"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, reappreciating even the evidence before the enquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is*

not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:

(a) the enquiry is held by a competent authority;

(b) the enquiry is held according to the procedure prescribed in that behalf;

(c) there is violation of the principles of natural justice in conducting the proceedings;

(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

(vii) go into the proportionality of punishment unless it shocks its

conscience."

(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;

(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

(i) the finding of fact is based on no evidence.

(Underline supplied)

13. Under Articles 226/227 of the Constitution of India, the High Court shall not:

(i) reappreciate the evidence;

(ii) interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii) go into the adequacy of the evidence;

(iv) go into the reliability of the evidence;

(v) interfere, if there be some legal evidence on which findings can be based;

(vi) correct the error of fact however grave it may appear to be;

(vii) go into the proportionality of punishment unless it shocks its conscience."

8. Non citing witnesses or authors of the documents in the present case and examination and non-examination of those authors are relevant in order to prove the alleged allegations levelled against the appellant, thereby the appellant has been declined to provide principle of natural justice.

9. The Apex Court in the case of ***S.C. Girotra vs United Commercial Bank (Uco Bank)***, *reported in* ***1995 Supp. (3) SCC 212*****,** wherein it is held that in departmental enquiry if any document is required to be relied on in that event author of that document is required to be examined and cross-examined.

10. In the case of ***Kumaon Mandal Vikas Nigam Ltd vs Girja Shankar Pant & Ors.,*** *reported in* ***2001 (1) SCC 182,*** the Apex court in paragraph Nos.21 and 22 it is held as under:

> *"21. Incidentally, Hidayatullah, C.J. in Channabasappa Basappa Happali v. State of Mysore recorded the need of compliance with certain requirements in a departmental enquiry — at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence*

on which he is charged and to lead his defence — on this state of law, a simple question arises in the contextual facts. Has this been complied with? The answer however on the factual score is an emphatic "no".

22. The sixty-five page report has been sent to the Managing Director of the Nigam against the petitioner recording therein that the charges against him stand proved — what is the basis? Was the enquiry officer justified in coming to such a conclusion on the basis of the charge-sheet only? The answer cannot possibly be in the affirmative; if the records have been considered, the immediate necessity would be to consider as to who is the person who has produced the same and the next issue could be as regards the nature of the records — unfortunately there is not a whisper in the rather longish report in that regard. Where is the presenting officer? Where is the notice fixing the date of hearing? Where is the list of witnesses? What has happened to the defence witnesses? All these questions arise but unfortunately no answer is to be found in the rather longish report. But if one does not have it — can it be termed to be in consonance with the concept of justice or the same tantamounts to a total miscarriage of justice. The High Court answers it as miscarriage of justice and we do lend our concurrence therewith. The whole issue has been dealt with in such a way that it cannot but be termed to be totally devoid of any

justifiable reason and in this context a decision of the King's Bench Division in the case of Denby (William) and Sons Ltd. v. Minister of Health may be considered. Swift, J. while dealing with the administrative duties of the Minister has the following to state:

> *"I do not think that it is right to say that the Minister of Health or any other officer of the State who has to administer an Act of Parliament is a judicial officer. He is an administrative officer, carrying out the duties of an administrative office, and administering the provisions of particular Acts of Parliament. From time to time, in the course of administrative duties, he has to perform acts which require him to interfere with the rights and property of individuals, and in doing that the courts have said that he must act fairly and reasonably; not capriciously, but in accordance with the ordinary dictates of justice. The performance of those duties entails the exercise of the Minister's discretion, and I think what was said by Lord Halsbury in Sharp v. Wakefield is important to consider with reference to the exercise of such discretion. He there said:*
>
> > *"Discretion" means when it is said that something is to be done within the discretion of the authorities*

that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke case ; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

11. Taking note of the latest legal position read with order of learned Single Judge, the appellant has made out a case, so as to interfere with the learned Single Judge's order dated 15.01.2019 passed in C.W.J.C. No.8328 of 2017. Accordingly, dismissal order dated 08.08.2023 and order of learned Single Judge dated 15.01.2019 passed in 8328 of 2017 stands set aside.

12. We are interfering the dismissal order as well as the order of learned Single Judge on technicality, therefore, we have to take note of Apex Court's decision in the case of ***Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others***, reported in ***(1993) 4 SCC 727*** read with ***Chairman-Cum-Managing Director, Coal India Limited and***

others Vs. Ananta Saha and others, reported in ***(2011) 5 SCC 142,*** in paragraph No.48 to 50 it is held as under:

> *"48. In ECIL v. B. Karunakar, this Court held that where the punishment awarded by the disciplinary authority is quashed by the court/tribunal on some technical ground, the authority must be given an opportunity to conduct the enquiry afresh from the stage where it stood before the alleged vulnerability surfaced. However, for the purpose of holding fresh enquiry, the delinquent is to be reinstated and may be put under suspension. The question of back wages, etc. is determined by the disciplinary authority in accordance with law after the fresh enquiry is concluded.*
>
> *49. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is reinstated, it would not automatically make him entitled to back wages as entitlement to get back wages is independent of reinstatement. The factual scenario and the principles of justice,*

equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide U.P. SRTC v. Mitthu Singh, Akola Taluka Education Society v. Shivaji and Balasaheb Desai Sahakari S.K. Ltd. v. Kashinath Ganapati Kambale.)

50. In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh enquiry, they are bound to reinstate the delinquent and, in case, he is put under suspension, he shall be entitled to subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry. With these observations, the appeal stands disposed of. No costs."

13. The Apex Court reiterated with the principle laid down in the **ECIL** (supra) in the case of ***The State of Uttar Pradesh & Ors. Vs. Prabhat Kumar,*** reported in ***2022 Live Law (SC) 736***. The over all principle in the aforementioned decisions are that in the event of setting aside the order in disciplinary

proceedings on technicality, in that event before remanding the matter to the disciplinary authority, it was duty of the Court to examine as to whether is there any financial implication or financial loss caused to the State Exchequer. In the present case, alleged allegation is that appellant acquired wealth disproportionate to the known sources of his income, which attract provisions of Prevention of Corruption Act, 1988. Therefore, it is a case or remand to the disciplinary authority to commence the inquiry from the defective stage, namely, preparing list of documents and list of witnesses afresh and proceed to complete the inquiry within a period of six months from the date of receipt of this order.

14. The disciplinary authority is hereby directed to pass a reasoned order in light of Rule 97 of the Bihar Service Code in so far as as regulating the intervening period from the date of dismissal till conclusion of the departmental inquiry afresh. In other words, how to regulate the service or the intervening service period, such order shall be passed within period of three months from the date of conclusion of the departmental inquiry afresh.

15. In the light of setting aside the order of the dismissal dated 08.08.2016 read with the fact that appellant has

attained age of superannuation and retired from service in the year 2018 is entitled to provisional pension. The provisional pension shall be considered from the date of his retirement and proceed to disburse the same till the conclusion of departmental inquiry under the Rules, 2005 read with Rule 43(b) of the Bihar Pension Rules.

16. The competent authority is hereby directed to examine in respect of continuation of inquiry against retired employee in light of Rule 43(b) of the Bihar Pension Rules.

17. Accordingly, the present L.P.A. No.298 of 2019 stands allowed in part.

(P. B. Bajanthri, J)

(Ramesh Chand Malviya, J)

S.Katyayan/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	18.12.2023
Transmission Date	18.12.2023