SUPREME COURT OF INDIA

Indu Bhushan Dwivedi

Vs.

State of Jharkhand

C.A.No.4888 of 2010

(G.S. Singhvi and C.K. Prasad JJ.)

05.07.2010

JUDGEMENT

G.S. SINGHVI, J.

1. Leave granted.

2. This is an appeal for setting aside order dated 29.3.2007 passed by the Division Bench of Jharkhand High Court in Writ Petition No.2671 of 2006 whereby it set aside the dismissal of the appellant from service but imposed the punishment of compulsory retirement.

3. The appellant joined service as Munsif in 1982. He was promoted as Sub-Divisional Judicial Magistrate in 1996. While he was posted as Sub- Divisional Judicial Magistrate at Chaibasa, a news item appeared in `Dainik Jagran' dated 2.7.2003 suggesting that the appellant had misbehaved and manhandled an accused, named, Anup Kumar and Constable Sheo Pujan Baitha. On the next day,

i.e. 3.7.2003, the appellant made a representation to District and Sessions Judge, West Singhbhum at Chaibasa with the request that an inquiry be got conducted into the matter and appropriate action against the person who got published the misleading news.

4. The High Court of Jharkhand took cognizance of the newspaper report adversely commenting upon the conduct of the appellant and passed an order dated 5.7.2003 whereby he was placed under suspension and his headquarter was fixed at Chaibasa with a direction that he shall not leave the headquarter without obtaining prior permission from the Registrar General of the High Court.

5. In the meanwhile, the appellant appears to have submitted an application to the District Judge on 4.7.2003 for permission to go to Ranchi for his treatment and also avail holiday on 6.7.2003. After receiving the order of suspension, the appellant submitted an application to the Registrar General of the High Court stating therein that as per the advise of the doctor, he has to take complete rest for one month and, therefore, he is unable to return to Chaibasa. The appellant also indicated that he would join the headquarters after recovery from illness. This prayer of the appellant was rejected by the High Court and he was informed through the District Judge to comply with the direction contained in order dated 5.7.2003. The appellant responded to this communication by sending letter dated 19.7.2003 to the District Judge wherein he mentioned that he had to proceed on leave because he was suffering from acute and uncontrolled loose motions and he had left the headquarters after handing over charge and after seeking permission from the District Judge. He then reiterated his inability to return to the headquarter and described the direction contained in the letter of the High Court as merciless which could not be complied with at the cost of one's life. He also claimed that being a suspended employee, he cannot be compelled to stay at the headquarters.

6. After five months of his suspension, a regular departmental inquiry was initiated against the appellant on the following charges:

"Charge No.1 You, Shri Indu Bhushan Dwivedi while functioning as SDJM, West Singhbhum at Chaibasa was found in intoxicated condition on 1st July 2002 (a holiday) in your residential office when an accused Anup Kumar of a case no. C/7-60/2001 of the Court of Shri D. Mahapata, Judicial Magistrate, Ist Class, Chaibasa was produced before you in your residential office for remand by the Head Constable Shri Sheo Pujan Baitha in presence of Office Clerk Shri Baidyanath Ballav Kath of the Court of Shri D. Mahapatra.

At the time of production of the said accused Anup Kumar, you misbehaved and manhandled the accused Anup Kumar as well as constable Shri Sheo Pujan Baitha.

The aforesaid action on your part not only reflects on your reputation, dereliction of duty but also

shows the recklessness and misconduct in the discharge of duties.

The aforesaid action on your part is also unbecoming of a Judicial Officer.

Charge No.2 You, Shri Indu Bhushan Dwivedi, SDJM, Chaibasa was placed under suspension by Hon'ble High Court's order contained in letter No. 05/Apptt. dt. 5.7.2003 fixing your headquarter at Chaibasa. It was served on you on 5th July, 2003 by the District & Sessions Judge, West Singhbhum at Chaibasa.

On 4th July, 2003, you submitted representation applications before the District & Sessions Judge, West Singhbhum at Chaibasa to leave the headquarter on following Sunday i.e. 6th of July, 2003 (for one day) to proceed to Ranchi which was allowed by the District & Sessions Judge, West Singhbhum, Chaibasa.

Though during the period of suspension you are not supposed to attend duty or sign any Attendance Register but you are supposed to remain in the Headquarters and cannot leave the Headquarters without any permission of the competent authority, but you remained absent from headquarter from 6.7.2003 after making over charge to SDJM, Porahat on 5.7.2003 and you remained out of headquarter without any information till 10.9.2003.

The aforesaid action on your part and violation of Court's order amounts insubordination and misconduct.

Charge No.3. You, Shri Indu Bhushan Dwivedi, SDJM, Chaibasa (under suspension) when asked by the District & Sessions Judge, West Singhbhum at Chaibasa as to why you have not returned to headquarter by letter No.2501/G dated 10th of July, 2003 and to report you submitted reply and used derogatory words against the Court by your letter No. 5(P) of 2003 dt. 19th July, 2003 using expression "Merciless Direction of the Hon'ble Court".

The aforesaid remarks by you reflects on your conduct amounting to insubordination, indiscipline and unbecoming a Judicial Officer.

Shri Dwivedi has been charged of misconduct recklessness in discharge of his duties along with insubordination and for committing the acts most unbecoming of a responsible Judicial Officer, on the basis of the above mentioned allegation."

7. The appellant submitted reply and denied all the charges. After considering the reply, the High Court appointed District & Sessions Judge, East Singhbhum, Jamshedpur to conduct regular inquiry. The presenting officer examined 5 witnesses and produced 11 documents to substantiate the charges leveled against the appellant, who examined 2 witnesses and produced 17 documents.

8. For the sake of his convenience, the Inquiry Officer formulated the following points:

(i) Whether Shri Dwivedi was in an intoxicated condition on 1st July, 2003 in the residential Office when accused Anup Kumar was produced before him for remand? (ii) Whether Shri Dwivedi had misbehaved as also manhandled the accused Anup Kumar and Constable Sheo Pujan Baitha? (iii) Whether Shri Dwivedi had left his headquarter without prior permission from the competent authority and without any sufficient cause? (iv) Whether Shri Dwivedi had used derogatory language/word against the Hon'ble Court by his Letter No.5(p) 2003 dated 19.7.2003? and (v) Whether Shri Dwivedi had acted in a way which shows recklessness and misconduct in discharge of his duties along with insubordination and indiscipline which is unbecoming of a responsible Judicial Officer? After analyzing the evidence produced before him, the Inquiry Officer submitted report dated 4.6.2005 with the conclusion that charges No.2 and 3 have been proved against the appellant but charge No.1 has not been proved. While dealing with point Nos.1 and 2 which related to charge No.1, the Inquiry Officer referred to the statements of Pravakar Singh (A.W.1), the Registrar, Civil Courts, Chaibasa, Baidyanath Ballav Kant (A.W.2), Havildar Sheo Pujan Baitha (A.W.3), the accused Anup Kumar (A.W.5) and recorded the following conclusions:

"11. From perusal of the record, it appears that there is some force in the contention of the delinquent because A.W.2 Baidyanath Ballav Kant has specifically stated that on the date of occurrence, the delinquent had performed `Puja' and several persons were present there and after `Puja' Prasad was also given to him and two other persons and this fact has been supported by A.W.1 Prabhakar Singh. A.W.2 has further stated that the delinquent was not in an intoxicated condition when the accused was produced for remand. The said Havildar, A.W.3, has also nowhere stated in his evidence that the delinquent was in an intoxicated state.

12. On careful examination of the evidence oral and documentary, adduced by the parties and in view of the aforesaid discussions, I am of the view that the Charge No.1 that the delinquent was in an intoxicated condition when the accused was produced before him for remand, could not be proved by cogent evidence and similarly, this has also not been proved that the delinquent had assaulted the accused Anup Kumar and the Havildar Sheo Pujan Baitha. So, the Point No.4(i) and (ii) are decided in favour of the delinquent."

9. The Inquiry Officer then dealt with other three points and held that the delinquent (appellant

herein) appears to have managed the medical prescription from the doctors to justify non-compliance of the direction given by the High Court not to leave the headquarter without obtaining permission from the Registrar General and concluded that his action amounted to insubordination and indisciplined behaviour unbecoming of a responsible judicial officer.

10. The High Court accepted the inquiry report and directed that show cause notice be issued to the appellant for imposition of a major penalty.

Accordingly, the Registrar General of the High Court issued Memo dated 30.6.2005 to the appellant enclosing therewith a copy of the inquiry report and called upon him to show cause as to why a major penalty such as dismissal from service may not be inflicted upon him. In his reply dated 22.7.2005, the appellant challenged the findings recorded by the Inquiry Officer in respect of charges No.2 and 3 by contending that the same were based on erroneous appreciation of evidence and that there was no valid ground to discard the testimony of the doctor and prescriptions given by him. The appellant then pleaded that he neither had the intention nor he could have dared to disobey the direction given by the High Court. He submitted that non-compliance of the direction given by the High Court to stay at the headquarters during the period of suspension was due to his illness and pleaded that he may be pardoned for using the expression `merciless direction' for the communication sent by the High Court. He again tendered an unqualified apology for what he termed as wrong choice of the words. Simultaneously, he claimed that there was no adverse report regarding his integrity, honesty and sincerity and he was never found guilty of any act of insubordination or indiscipline and pointed out that in the latest report, the District Judge had commended his work. This is evinced from para 17 of the appellant's representation, which reads thus:

"17. Sir, most humbly and respectfully I submit that in the entire period of my service there is no report against my integrity honesty and sincerity. I was never found guilty of any act of insubordination or indiscipline ever before in this entire period of service also that recently proceeding this suspension my District Judges in their annual report have commended my work."

11. After considering the reply of the appellant, the High Court recommended his dismissal from service. The State Government accepted the recommendation of the High Court and passed order dated 22.2.2006 whereby the appellant was dismissed from service.

12. The appellant challenged the aforementioned order by contending that the same is vitiated due to violation of the rules of natural justice because while recommending his dismissal from service, the High Court had considered un-communicated adverse remarks recorded in the Annual Confidential Report without informing him that the same were being relied upon for deciding the quantum of punishment. Another ground taken by the appellant was that the punishment of dismissal from service was totally disproportionate to the charges found proved against him.

13. The Division Bench of the High Court first considered the question whether the past adverse record could be considered for imposing the punishment of dismissal, referred to the judgment of the Constitution Bench in State of Mysore v. K. Manche Gowda AIR 1964 SC 506 as also the judgment in State of U.P. v. Harish Chandra Singh AIR 1969 SC 1020 and held that when the High Court proposed the punishment of dismissal from service and the appellant himself made a request in paragraph 17 of his reply that his past record may be considered, no prejudice can be said to have been caused to him on account of consideration of the adverse reports.

Paragraphs 21 and 22 of the impugned order which contain the reasoning of the High Court on this issue are extracted below:

"21. Thus, the ratio decided in the above case is where the past records is considered for awarding lesser punishment, no notice about the proposal that the past records will be considered is necessary. In this case, the stand taken by the 2nd respondent, namely, the High Court, the past records were taken into consideration in addition to the charges proved only to consider if any lesser punishment than the dismissal could be inflicted, as desired by the petitioner. In case, the past records were not considered by the disciplinary authority, then the then the petitioner may raise a grievance non-consideration of his past records white awarding punishment in spite of his request.

Under those circumstances, the past records as admitted in the counter affidavit filed by the respondent No. 2 have been considered.

22. As indicated above, when specially the petitioner has made a request in his reply to consider his past records, while awarding punishment as his past records are good, the disciplinary authority was constrained to go into the past record. But, according to the counter by the respondent No.2, the past records did not support the claim of the petitioner that his past records were good. On the contrary, his past records contained various details about his bad records in so many words as mentioned in the counter. There is no question of consideration of past records for giving higher punishment than the disciplinary authority felt while issuing 2nd show cause notice that the maximum punishment alone, would commensurate the proved charges. In the aforesaid circumstance, there is no requirement to mention in the show cause notice regarding to mention in the show cause notice regarding his past records. As stated by the counsel for the respondent No.2, the past records were considered at the instance of the petitioner and also with a view to consider if any lesser punishment than the dismissal could be inflicted upon the petitioner. As such the first contention would fail."

14. The Division Bench then considered the appellant's plea that the punishment of dismissal was unduly harsh and disproportionate to the misconduct found proved against him, referred to the judgments in Om Kumar v. Union of India (2001) 2 SCC 386, Mahindra and Mahindra Ltd. v. N.B.

Jarawade (2005) 3 SCC 134, Hombe Gowda Educational Trust v. State of Karnataka (2006) 1 SCC 430, and held:

"Even at the threshold, it should be stated that, the disciplinary proceedings were initiated and suspension order was passed mainly on the basis of the report of an officer in the Civil Court complaining that the delinquent-petitioner, in an intoxicated condition, assaulted the accused who was produced before him for remand as well as the constable, who produced before the delinquent. This is truly a very serious charge. If this charge is proved, it would have been a very serious misconduct on the part of the judicial officer, which would entail him to maximum punishment. But, in this case, the inquiry officer has not only observed the charge is not proved, but also indicated that the delinquent had been falsely implicated at the instance of the police personnel of the local police station with whom relationship of delinquent was not cordial. It is true that merely, because the first charge had been held to be false, we cannot hold the other charges do not need any serious consideration.

Other charges also are serious, but it shall be remembered that they are not so serious as that of the first charge. As indicated above, the petitioner, himself, requested the disciplinary authority to take into consideration the past record. There is no dispute in the fact that the past records were taken into consideration where it was recorded as his conduct was not good in respect of some period. But the show cause reply sent by the delinquent, dated, 22.07.2005, would indicate that he has specifically asked the authority to take into consideration all the entire period of service. He further referred in his show cause that his District Judge, Chaibasa has commended his work in his annual report. Admittedly, there is no reference about this in the counter filed by the respondent No. 2. On the other hand, the counsel for the 2nd respondent would submit that his entire past records are not good.

In view of this, it would be better to look into the relevant entries in his A.C.R. This Court called for the A.C.R. and perused the same. The relevant entry in A.C.R. in respect of 1988-89, 1989-90, 1991-92, 1996-97 would show various adverse remarks, as referred to in the counter. However, in the counter, there is no mention about the entries made during the year 2002-2003. As per the entry, the District Judge, Chaibasa certified him as a good officer which is as follows:

Year 2002-2003 Name of Judgeship Chaibasa Reporting Officer /Hon'ble Mr. B.N. Pandey Judge Knowledge Good Promptness in disposal Yes Quality of Judgment Good Supervision of Business NA Efficiency Yes Reputation Yes Attitude towards Good behaviour Colleagues Relation with Bar & Good behaviour Public Net Result Good Officer There is no reason as to why the respondent No. 2 has not chosen to refer to these entries in relation to his good behaviour. The respondent No. 2 only was particular about giving reference about the earlier years in which some adverse remarks had been passed against him, but in the later year, as indicated above, he got an entry from the District Judge in his A.C.R. that his knowledge and behaviour is good and he was certified as good officer.

Thus, it is clear while imposing punishment, this aspect has not been taken into consideration despite the request made by the delinquent to take into consideration the recent entry made by District Judge, Chaibasa commending his work.

Admittedly, the suspension order was issued on 05.07.2003.

His suspension was not revoked during the pendency of the inquiry. The inquiry commenced and the charges have been framed only on 16.12.2003. The inquiry officer was appointed only on 28.05.2004. Thereafter inquiry held. The inquiry report was submitted on 04.06.2005. Show cause notice was issued on 30.06.2005. Show cause reply was sent on 22.07.2005.

Ultimately, dismissal order was passed only on 26.02.2006.

Thus, he was facing inquiry from 2003 to 2006. Admittedly, during the said period his suspension was not revoked and he was continued to be under suspension. Thus, he was facing inquiry for two years and seven months approximately and during that long period, he was constrained to stay at Chaibasa at Headquarters as per the direction of this Court. So, this aspect of the long delay as well as the good conduct certificate obtained by the delinquent in the recent past from the District Judge would be the relevant aspect which ought to have been taken into consideration by the disciplinary authority, while imposing punishment. Admittedly, both these aspects have not been considered."

15. In the end, the Division Bench concluded that the punishment of dismissal imposed on the appellant is not sustainable but declined to set aside the same on the ground that substantial time has lapsed since the initiation of the inquiry and proceeded to impose punishment of compulsory retirement upon the appellant. This is evinced from paragraphs 34 and 35 of the impugned order, which are extracted below:

"34. At this stage, we may refer to the powers of this Court as indicated by the Supreme Court for reviewing the punishment imposed upon the delinquent by the disciplinary authority. Let us refer to the relevant portion of judgment of the Supreme Court in (2001) 2 SCC 386 [Om Kumar versus Union of India]

14. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the

quantum of punishment. Only in extreme and rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, can the court substitute its own view as to the quantum of punishment.

35. In the light of the above rule, we are vested with the power to review the punishment. As we are of the view that the Wednesbury principles have been violated in this case, we are constrained to review the quantum punishment. As Supreme Court would observe, this Court would normally remit the matter to the disciplinary authority to take a fresh decision as to the quantum of punishment. However, this Court is no inclined to do the same, as in this case there has been a long delay in the time taken by the disciplinary proceedings as well as in the time taken in this Court. The proceedings were started in the year 2003. We are in 2007. Therefore, instead of remitting the matter, we ourselves inclined to review the punishment. In our view, instead of dismissing the petitioner from service, it would be appropriate to impose the punishment of compulsory retirement, which would meet the ends of justice."

16. Shri Raja Venkatappa Naik, learned counsel for the appellant reiterated both the grounds taken before the High Court and urged that the impugned order as also the one passed by the State Government are liable to be set aside because the action taken against the appellant is not only against the basics of natural justice but is wholly arbitrary, unreasonable and unjustified. Learned counsel emphasized that none of the four Annual Confidential Reports mentioned in paragraph 30 of the impugned order were communicated to the appellant so as to enable him to represent against the adverse remarks recorded therein and argued that the same could not have been considered for the purpose of imposing the punishment of dismissal without giving him opportunity to offer his explanation. Learned counsel submitted that even if the findings recorded by the Inquiry Officer in respect of charges No.1 and 2 are held to be correct, there was no justification to impose the punishment of dismissal ignoring that in his long service career of 24 years the appellant was not found guilty of any other act of insubordination or indiscipline. Learned counsel argued that when charge No.1, which was extremely serious in nature was not found proved, the High Court could not have imposed extreme penalty of dismissal from service by simply relying upon un-communicated adverse remarks recorded in his Annual Confidential Reports. Learned counsel criticized the imposition of the punishment of compulsory retirement by the Division Bench of the High Court by arguing that once the Division Bench came to the conclusion that punishment of dismissal is vitiated due to non consideration of the relevant material i.e., the latest Annual Confidential Report in which the immediate superior of the appellant had commended his work and conduct, then it should have set aside the order which was subject matter of challenge in the writ petition and directed the respondents to pass fresh orders after communicating adverse remarks to the appellant and giving him an opportunity to explain his position.

17. We shall first deal with the question whether consideration of the past adverse record of the appellant by the High Court had the effect of vitiating the ultimate order passed by the State Government. An exactly similar question was considered and answered in affirmative by the Constitution Bench in State of Mysore v. K. Manche Gowda (supra). The facts of that case were that while the respondent was holding the post of an Assistant to the Additional Development

Commissioner, Planning, Bangalore, the Government of Mysore appointed Shri G.V.K. Rao (Additional Development Commissioner) to conduct a departmental enquiry against him in respect of the false claims for allowances and fabrication of vouchers.

The Enquiry Officer framed four charges against the respondent. After holding an enquiry in accordance with relevant rules, the Enquiry Officer submitted report with the recommendation that the respondent might be reduced in rank. However, the government issued a notice to the respondent requiring him to show cause as to why he may not be dismissed from service. After considering his reply, the Government dismissed the respondent from service. The respondent challenged his dismissal by filing writ petition under Article 226 of the Constitution of India. The High Court quashed the order of dismissal on several grounds including the one that the respondent had not been foretold about the proposed consideration of his past adverse record. This Court approved the view taken by the High Court and observed:

"Under Art.311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges leveled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive.

The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action:

see the decision of this Court in State of Assam v. Bimal Kumar Pandit, Civil Appeal No.832 of 1962 D/- 12-2-1963 : (AIR 1963 SC 1612). If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the government servant. It would be no answer to suggest that every government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward

before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the government servant at the second stage reasonable opportunity to show- cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation."

(emphasis supplied)

18. The proposition laid down in the above noted judgment represents one of the basic canons of justice that no one can be condemned unheard and no order prejudicially affecting any person can be passed by a public authority without affording him reasonable opportunity to defend himself or represent his cause. As a general rule, an authority entrusted with the task of deciding lis between the parties or empowered to make an order which prejudicially affects the rights of any individual or visits him with civil consequences is duty bound to act in consonance with the basic rules of natural justice including the one that material sought to be used against the concerned person must be disclosed to him and he should be given an opportunity to explain his position. This unwritten right of hearing is fundamental to a just decision, which forms an integral part of the concept of rule of law. This right has its roots in the notion of fair procedure. It draws the attention of the authority concerned to the imperative necessity of not overlooking the cause which may be shown by the other side before coming to its decision.

When it comes to taking of disciplinary action against a delinquent employee, the employer is not only required to make the employee aware of the specific imputations of misconduct but also disclose the material sought to be used against him and give him a reasonable opportunity of explaining his position or defending himself. If the employer uses some material adverse to the employee about which the latter is not given notice, the final decision gets vitiated on the ground of the violation of the rule of audi alteram partem. Even if there are no statutory rules which regulate holding of disciplinary enquiry against a delinquent employee, the employer is duty bound to act in consonance with the rules of natural justice - Managing Director, Uttar Pradesh Warehousing Corporation and another v. Vijay Narayan Bajpayee (1980) 3 SCC 459. However, every violation of the rules of natural justice may not be sufficient for invalidating the action taken by the competent authority/employer and the Court may refuse to interfere if it is convinced that such violation has not caused prejudice to the affected person/employee.

19. In Harish Chandra Singh's case (supra), a three-Judge Bench of this Court considered a somewhat similar question in the backdrop of the fact that even though in the show cause notice, the competent authority had proposed dismissal of the respondent, after considering his reply, a lesser

punishment i.e. removal from service was imposed upon him. The respondent in that case had joined Police Department in 1947. He was dismissed from service on 21.6.1951 but was reinstated in January, 1952.

He was finally removed from service in 1956. In the year 1951 itself, punishment of reduction to the lowest scale of the post for a period of three years was imposed on the respondent. In 1955, his pay was reduced for a period of two years. In the course of service, the respondent had earned fifteen rewards and commendations. In the departmental inquiry which led to his removal from service in 1956, the respondent was found guilty of three charges of gross negligence in the performance of his duty of investigating the cases registered under various sections of the Indian Penal Code. The trial Court dismissed the suit filed by the respondent. On appeal, Additional District Judge, Varanasi decreed the same. The High Court confirmed the appellate judgment and dismissed the second appeal preferred by the State by observing that the respondent had not been given opportunity to explain the past punishments which were considered by the Deputy Inspector General of Police in arriving at his decision to remove the respondent from service. While considering the question whether it was necessary for the concerned authority to give notice to the respondent as a condition precedent for consideration of his past punishments, this Court referred to the factual matrix of the case and held that when the final punishment was lesser than the proposed punishment, consideration of the past adverse record was inconsequential. The Court referred to the arguments urged on behalf of the State and observed:

"The learned counsel for the State contends that on the facts of this case it is clear that the plaintiff had notice that his record would be taken into consideration because the Superintendent of Police had mentioned it towards the end of his order, a copy of which was supplied to the plaintiff. In the alternative he contends that if the record is taken into consideration for the purpose of imposing a lesser punishment and not for the purpose of increasing the quantum or nature of punishment, then it is not necessary that it should be stated in the show- cause notice that his past record would be taken into consideration.

It seems to us that the learned counsel is right on both the points. The concluding para of the report of the Superintendent of Police, which we have set out above, clearly gave an indication to the plaintiff that his record would be considered by the Deputy Inspector General of Police and we are unable to appreciate what more notice was required. There is also force in the second point urged by the learned counsel. In State of Mysore v. K. Manche Gowda (1964) 4 SCR 540 the facts were that the Government servant was misled by the show-cause notice issued by the Government, and but for the previous record of the Government servant the Government might not have imposed the penalty of dismissal on him. This is borne out by the following observations of Subba Rao, J., as he then was:

"In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the

contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service."

20. An analysis of the two judgments shows that while recommending or imposing punishment on an employee, who is found guilty of misconduct, the disciplinary/competent authority cannot consider his past adverse record or punishment without giving him an opportunity to explain his position and considering his explanation. However, such an opportunity is not required to be given if the final punishment is lesser than the proposed punishment.

21. In the light of the above, we shall now consider whether the High Court could have while recommending the appellant's dismissal from service taken into consideration un-communicated adverse Annual Confidential Reports and whether the Division Bench of the High Court was right in distinguishing the judgment of the Constitution Bench in Manche Gowda's case on the ground that appellant had himself made a request for consideration of the past record.

22. It is not in dispute that adverse remarks recorded in the Annual Confidential Reports of the appellant for the years 1988-1989, 1989-1990, 1990-1991 and 1996-1997 were not communicated to him. It can reasonably be presumed that if the adverse remarks were communicated to him, the appellant would have made representation for expunging the same.

However, as the adverse remarks were not communicated to him, the appellant could not avail that opportunity. He did not even know what were the adverse remarks and who had recorded the same. This Court cannot speculate about the appellant's fate if the High Court had informed him that there were adverse remarks in his Annual Confidential Reports which were being relied upon for the purpose of determining the quantum of punishment and that he can submit his representation against the same. If the appellant was made aware that the adverse remarks relate to his work, conduct or behaviour, he may have represented and successfully demonstrated that the remarks were recorded by the concerned officer without looking into the quality and quantity of the work done by him and that there was no complaint from any quarter regarding his conduct and behaviour. He could have also shown that in the past no such adverse remark had been entered in his Annual Confidential Report. If the remarks contained adverse reflection on his integrity, the appellant could have represented that the same were unfounded or were made due to bias or prejudice. He may have shown that his integrity was beyond doubt and he had discharged his duties sincerely and to the satisfaction of his superiors. However, the fact of the matter is that the adverse remarks were not communicated to him and on that account he could not represent against the same.

23. The ratio of Manche Gowda's case is that the past adverse record of the delinquent employee cannot be considered at the stage of imposing punishment unless he is put to notice and given an opportunity to explain his position. In the show cause notice issued to the appellant, it was not disclosed that the High Court had considered the un-communicated adverse remarks recorded in his Annual Confidential Reports for the purpose of forming an opinion that he should be dismissed from service. If the appellant had been told about this and given an opportunity to have his say against the un-communicated adverse remarks, he could have offered appropriate explanation and tried to convince the concerned authority that the remarks were either unfounded or were totally unjustified. He would have surely pleaded that after 1996-1997 no adverse comments were made about his work, conduct, behaviour and integrity and he had earned good reports (even the Division Bench of the High Court had noted that his confidential report for the year 2002-2003 was good on all counts). It is thus clear that the appellant was seriously prejudiced on account of non- disclosure of the fact that while recommending his dismissal from service, the High Court had taken into consideration un-communicated adverse remarks recorded in his four Annual Confidential Reports.

24. The inquiry was held against the appellant on three charges, the most serious of which was that after having consumed liquor, he had misbehaved and manhandled an accused and a constable. That charge was not found proved. The other two charges were that he had left headquarter without seeking permission from the Registrar General of the High Court in violation of the direction contained in order dated 5.7.2003 and that he had used derogatory words (merciless direction) qua the communication sent by the High Court. There cannot be two views that being a member of the subordinate judiciary, the appellant was bound to comply with the direction given by the High Court to stay at the headquarters but singular violation of such directive or use of intemperate language in representation dated 19.7.2003 were not that serious which warranted imposition of the extreme penalty of dismissal from service. In our view, the adverse remarks recorded in the Annual Confidential Reports of the appellant seems to have weighed heavily with the High Court while recommending his dismissal from service.

25. Since the un-communicated adverse remarks contained in the Annual Confidential Reports of the appellant became foundation of the decision taken by the High Court to recommend his dismissal from service and he was not noticed about the proposed consideration of those remarks, it must be held that the appellant was seriously prejudiced. We have mentioned all this only to reinforce the ratio of the judgment in Manche Gowda's case that consideration of the past adverse record without giving an opportunity to the delinquent to explain the same can cause serious prejudice to him.

26. The Division Bench of the High Court clearly misread the representation made by the appellant and distinguished the judgment of the Constitution Bench in Manche Gowda's case without any tangible reason.

A reading of paragraph 17 of the representation made by the appellant makes it clear that he had

only mentioned that there was no report against his integrity and honesty and he was never found guilty of any act of insubordination or indiscipline in his service career. This assertion, cannot by any stretch of imagination be construed as a request by the appellant for consideration of his past record. Thus, the finding recorded by the Division Bench of the High Court that the appellant's cause was not prejudiced on account of consideration of the past adverse record is clearly erroneous and unsustainable.

27. The judgment in Harish Chandra Singh's case is clearly distinguishable. At the cost of repetition, we consider it necessary to observe that the three-Judge Bench had not applied the ratio of Manche Gowda's case because on facts it was found that the past record had been considered by the disciplinary authority only for the purpose of imposing a lesser punishment on the respondent.

28. For the reasons stated above, the appeal is allowed. The impugned order of the Division Bench of the High Court is set aside. The High Court of Jharkhand shall now consider the issue of quantum of punishment afresh and make fresh recommendation to the State Government within a period of four months from the date of receipt/production of copy of this order. If the High Court still feels that the adverse remarks in the Annual Confidential Reports of the appellant for the year 1988-1989, 1989-1990, 1990-1991 and 1996-1997 should be considered, then such report(s) shall be communicated to him and he should be given an opportunity to make appropriate representation. While making fresh recommendation for imposing the particular punishment, the High Court is expected to take into consideration the good as well as adverse record of the appellant. The State Government shall pass appropriate order within three months from the date of receipt of fresh recommendation from the High Court. The parties are left to bear their own cost.