CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.863/2001

New Delhi this the 12th day of Septemebr, 2001.

HON'BLE MR. GOVINDAN S. TAMPI, MEMBER (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Awadesh Shukla,
Assistant Commissioner of Customs,
(now redesignated as Deputy Commissioner)
S/o Sh. Dev Sharan Shukla,
R/o C/14, Customs & Central Excise Quarters,
Katrak Road,
Wadala (West),
Mumbai-400 031. -Applicant

(By Advocate Ms. Geetanjali Goel)

-Versus-

1. Union of India,
through Secretary,
Ministry of Finance,
Deptt. of Revenue,
Central Board of Excise & Customs,
North Block,
New Delhi.

2. Union Public Service Commission,
through Secretary,
Dholpur House,
Shahjehan Road,
New Custom House,
New Delhi.

3. Commissioner of Customs,
Export Promotion,
New Custom House,
Ballard Estate,
Mumbai-38.

4. Central Vigilance Commissioner,
Central Vigilance Commission,
Vikas Sadan,
INA, New Delhi.

5. Sh. R.K. Bajaj,
Inquiry Officer &
Commissoner for Departmental
Inquiries, C/o Central Vigilance Commission,
Vikas Sadan,
INA, New Delhi. -Respondents

(By Advocate Shri R.R. Bharti)

O R D E R

By Mr. Shanker Raju, Member (J):

The applicant, who has been working as a Deputy Commissioner, has assailed an order dated 30.1.2001 whereby

after consultation with the UPSC under Rule 14 of the CCS (CCA) Rules, 1965 the applicant has been awarded a major punishment of reduction of pay from Rs.11,300/- to Rs.10,000/- for a period of six years w.e.f. 1.2.2001 with loss of increments and postponement of future increments.

2. Briefly stated, the applicant in the year 1990 was posted as Assistant Collector of Customs (Preventive) at Bhavnagar, Gujarat under Collector of Customs (Preventive), Ahmedabad. As an Assistant Collector his duty is to collect information and intelligence regarding smuggling activities within the jurisdiction of Bhavnagar Custom Division. One vessel MV Marvan 10 which has caught fire earlier was brought to Alang for shipbreaking by M/s Nagarsheth Shipbreakers, Alang on 24.5.90 which was boarded by the officers of the Office of Assistant Collector of Central Excise, Bhavnagar and the same was beached at Plot No.7 allotted to M/s Nagarsheth Shipbreakers. The importer of this vessel has already filed a bill which was assessed by the Superintendent. There was no entry of any cement cargo and the custom duty only for the vessel was computed and deposited on 28.6.90. On receiving information by the applicant regarding the illicit cargo of cement imported in the ship verification was conducted and contract was made to Assistant Collector of Central Excise, Bhavnagar. As he was out of station the applicant seized the cement and the ship as it was apparent that the same was illegally imported vide a Seizure Memo drawn by Superintendent of Customs (Preventive) in local Gujarati language. The applicant passed this information immediately to Collector of Customs (Preventive) at Ahemedabad his superior by a wireless messages dated

16.7.90 and 17.7.90 and the brief facts pertaining to seizure were also communicated to the Central Government on 17.7.90. M/s Nagarsheth Ship Breakers applied for provisional release of the ship and the recommendation was made by the applicant after physical verification of the ship and the cement, it was established beyond doubt that the cargo had not been loaded on to the ship by its buyer M/s Nagarsheth Ship Breakers but this was a part of the last cargo loaded on to the ship before it caught fire and was sold as scrap. Moreover due to the approaching monsoon, offloading of the cargo was topped so that the ship, a dead vessel could be towed to India before the onset of monsoon. As such there was no intention to smuggle and preparation for the same. The ship was subsequently released provisionally on 23.7.90 by the Collector. The cement was lying inside the ship in extreme humid conditions. As the applicant apprised the Collector and after his assent dated 23.7.90 initiated the process of disposal of the cement. On notice board also the description and conditions of the goods to be auctioned and place and time of auction were clearly mentioned in the aforesaid notice and also a wireless message was sent to the Assistant Collectors of Customs at different places with the information that auction of 20,000 bags of imported cement and 500 bags of damaged cement is fixed on 30.7.1990. Having failed to detect the cement cargo, the Collector, Customs and Central Excise, Rajkot lodged a complaint dated 26.9.90 with the CBI. The applicant was issued a major chargesheet where it has been alleged that he failed to maintain absolute integrity and committed misconduct in collusion with Sh. Praveenbhai Saralal Nagarsheth by not mentioning the quantity of smuggled

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cement in weight and also did not mention the crane smuggled with the said Cement and also allowed the auction of the said Cement without ascertaining the quality and value and also without advertising the said sale in newspaper in nearby locality. The applicant preferred his reply. Simultaneously in a proceeding drawn up under Section 124 of the Customs Act, 1962 against M/s Nagarsheth Ship Breakers. The penalty order was set aside by the CEGAT by an order dated 14.2.2000. This order has become final as no review was filed against it. The applicant has also apprised the respondents about this order and has contended that the very basis of the charge has gone and as such no penalty can be awarded to him. After the enquiry was completed the matter has been referred to the UPSC and after its consultation a major penalty, aforesaid, has been awarded to the applicant.

3. The applicant has mainly contended that he has been discriminated arbitrarily in the matter of punishment and the chargesheet has been issued without any explanation for the inordinate delay after a gap of about seven years. It is also stated that the impugned order has been passed by the disciplinary authority without application of mind and on the dictate of the UPSC which is not permissible as held in Mohd. Muzhar Hussain v. Collector of Customs & Central Excise, 1991 (4) SLR 174. It is also stated that it was mandated upon the respondents to have supplied copy of the UPSC advice before taking a final decision and in this view of the matter the ratio of the Apex Court in Nagaraj Shivrao v. Syndicate Bank, AIR 1991 SC 1507 has been placed reliance. The applicant further stated that the applicant has been punished on no

misconduct and merely on suspicion, surmises and no evidence. What has been alleged against him is not a misconduct as lack of highest standard efficiency does not amount to a misconduct, as held by the Apex Court in Union of India v. J. Ahmed, AIR 1979 SC 1022. As regards the delay in chargesheet the applicant has placed reliance on the decision of the Apex Court in State of M.P. v. Bani Singh, AIR 1990 SC 1308. It is also stated that the punishment imposed is shocking, disproportionate and harsh, not commensurate with the misconduct against him. The applicant stated that the charges levelled against him are vague and lacking material in particular.

4. As regards the charge of not obtaining the expert opinion to determine the value of cement at the time of seizure it is stated that there is no such procedure either in the Adjudication Manual or any other law which requires the officer to obtain opinion of experts in respect of the seized item. The Panchnama was drawn at the spot and as provided under Rule 8 of the Customs Valuation Rules, 1988 the principle of best judgment was adopted. The applicant has taken the service of two leading Architects of Bhavnagar who inspected the cement, which has been mentioned by him in his XT-1 diary. The applicant has also contacted a local cement dealer, who has opined that the cement had lost some of its strength, which has been communicated to the Collector of Customs (Preventive) by letter dated 20.7.90. The superiors of the applicant had duly verified the entries made by the applicant in this respect. Despite this a charge has been levelled against him that he did not take expert opinion which cannot be a misconduct and does not call for any punishment. As

regards the allegation that the applicant did not levy any fine on the owner of the ship as required under Section 115 of the Import Export Act, it is contended that there is no provision which empowers the applicant to levy such a fine. As regards the charge of not advertising the sale in Newspaper in nearby locality, it is stated that the relevant portion at item No.8 D under Chapter II (Seizure of Goods) deals exclusively with the 'Notice of Auction' that due notice of the auction should be given by the Superintendent. The notice should ordinarily take the form of advertisement in suitable local newspapers and handbills indicating among other things the place and time during which intending purchasers may inspect the goods. The exact form and extent of publicity should be determined with reference to the nature and the value of the goods and class of persons likely to be interested in the purchases. As the notice has been displayed on the notice board at Customs Division office and also caused i t to be displayed to the notice of the interested parties in the entire State of Gujarat through copies to all the Custom Formations there is no misconduct against the applicant. It is also stated that as the cargo was perishable and the cement being hygroscopic substance and on account of on set of monsoon the cement has been disposed of at the earliest which finds support from para-3 of MOS (DR) F.N.715/14/81-LC (AS) dated 14.10.81 which stresses that utmost expedition must be adopted for disposal of perishable goods.

5. As regards the permission for auction the seized cement it is stated that wireless message was sent to the Collector of Customs (Preventive) on 16.7.90

informing about the seizure and orders have been sought to dispose of the cement as it was perishable. By letter dated 23.7.90 the applicant has been allowed to dispose of the seized goods by the Collector of Customs but the same has not been taken into consideration by the departmental authorities. As regards the non-mentioning of the quality and value of cement, it is stated that there was no tampering with the cement bags or attempts to remove some quantity of cement from the bags. The number of cement bags and the quantity therein having been mentioned, not mentioning the total weight no prejudice has been caused. Panchnama had shown each bag as having 50 kg weight. As regards non-mentioning of the crane in the punchnama is concerned, it is stated that the punchnama was drawn by the Superintendent Sh. S.N. Desai in local Gujarati language, which is alien to the applicant. The statement of Sh. Desai was recorded by the CBI but has not been brought during the enquiry proceedings. It is also stated that this is not the allegation that the applicant has tried to misuse the omission of crane in the panchnama and even for such a small omission charge of a high misconduct is harsh and excessive. The issue regarding crane when raised by the Collector of Customs the applicant has given a satisfactory reply and the same was acted upon but yet the same figured as a charge against him in the memorandum.

6. As regards the charge of manipulation of two letters dated 3.8.90, no evidence has come on record to prove the said charge and no reasons have been recorded on the same. The applicant has been made a scapegoat whereas other involved have been allowed to go scot-free. It is also stated that in pursuance of the decision of the CEGAT,

the very basis of the allegation, have gone and the orders passed by CEGAT have not at all been gone through either by the UPSC or by the disciplinary authority while awarding him punishment. As the persons with whom he is alleged to have colluded have been let off with the charge against them, the applicant cannot be punished on this charge by the respondents. The applicant lastly contended that the present punishment has adversely affected his promotional avenues and is not legal.

7. Strongly rebutting the contentions of the applicant, the learned counsel for the respondents, at the outset, stated that in judicial review the Tribunal cannot re-apprise the evidence and there cannot be a substitution of judgement for that of administrative authorities and for this he placed reliance on Apparel Export Council v. A.K. Chopra, JT 1999 (1) SC 61. The respondents further stated the charges have been validly proved against the applicant and after consulting the UPSC the punishment has been awarded and the delay in taking the proceedings is not attirbutable to them as on account of CBI proceedings and other preliminary enquiries the chargesheet has been delayed which cannot be attributed to the respondents. As regards the supply of the UPSC advice it is stated that as per Rules 17 and 32 of the CCS (CCA) Rules, 1965 advice of the UPSC is to be furnished along with the final order. The learned counsel for the respondents contended that the certificate of no malafide intention has been accorded by the applicant which shows his connivance with them. It is also stated that by hurriedly auctioning the cement the malafide of the applicant is proved on record as there is no evidence that advertisement was issued regarding the

auction of the cement and consultation with any professional Govt. approved auctioneers to ascertain the value and status of the cement. The applicant has not exercised due diligence in disposing of the seized cement. As regards the CEGAT order it is stated that the same has not relevance to the departmental proceedings. As regards UPSC advice, it is stated that the disciplinary authority is not bound by the same and has considered all aspects of the same and thereafter imposed the penalty on the applicant which is adequate and commensurate with the misconduct. It is stated that on the date of seizure, i.e., 16.7.90 itself the value of cement was determined at Rs.14 lacs which is confirmed in the report dated 17.7.90 and this goes to show that the quality and value was already determined but this has been done without consulting any expert. The quantity of seized cement has not been mentioned in the panchnama and the crane was also not seized as the same is conspicuously missing from the panchnama. The learned counsel of the respondents has also furnished the record of the disciplinary proceedings for our perusal.

8. We have carefully considered the rival contentions and perused the material on record. The contention of the applicant that the enquiry is vitiated on account of delay in initiating the proceedings, as the chargesheet has been issued after 7 years from the date of misconduct and there has been inordinate and unexplained delay in issuing the chargesheet, cannot be countenanced. The allegations relate to 1990 and after completion of the investigation by the CBI the applicant was placed under suspension only in 1993 which was revoked in 1997 and

thereafter the applicant was placed under suspension. Previously the CBI has recommended the prosecution who finally on consultation with the Central Vigilance Commission to initiate the major penalty proceedings the chargesheet was issued. On the basis of the explanation given by the respondents and on perusal of the record we are satisfied that there has been no inordinate or unexplained delay in issuing the chargesheet. As such this plea of the applicant is rejected.

9. As regards the ground of the applicant pertaining to supply him a copy of the UPSC advice e before a final decision is arrived at by the disciplinary authority is concerned, the same has been based on a decision of this court in Charanjeet Singh Khurana v. Union of India which has already been over-ruled in a Full Bench decision in the same case where it is held that according of second opportunity by way of furnishing him a copy of the UPSC advice would be contrary to Rules 17 and 32 of the CCS (CCA) Rules, 1965 and would also amount to second show cause notice which has been done away after the 42nd amendment. However, in this case it has been observed that in case there is disagreement the situation would be different. However, we find no disagreement in the present case, as such it was not incumbent under the rules to supply the copy of the advice of the UPSC to the applicant before awarding the penalty and the same has been rightly furnished to the applicant along with the order of punishment. We find no legal infirmity in the procedure adopted by the respondents, as such this contention of the applicant is rejected.

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10. As regards the issue whether there is any misconduct made out from the allegations levelled against the applicant and whether any evidence has come to substantiate the same? Though we are aware of our jurisdiction to interfere with the disciplinary proceedings but as held in Union of India v. Upendra Singh, 1994 (2) SLJ 77 as well as Kuldeep Singh v. Commissioner of Police, JT 1998 (8) SC 603 the enquiry can be interfered with when there is no misconduct proved from the evidence recorded or by applying the test of a common prudent man that the findings are perverse or based on no evidence. We have also considered the ratio in the case of J. Ahmed (supra), wherein it has been held that "lack of efficiency or attainment of highest standard in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable loss or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence."

11. Having regard to the aforesaid ratio we proceed to examine whether the allegations levelled against the applicant do constitute a misconduct or are in violation of the guidelines of the statutory rules framed in this regard. The applicant in the memorandum has been

alleged to have not maintained absolute devotion to duty and acted unbecoming of a Government servant as he colluded with one Nagarsheth by not mentioning the quality of smuggled cement in weight and also did not mention the crane smuggled with the said cement and allowed the auction of the said cement without ascertaining and quality and value and also without advertising the said sale in newspaper in nearby locality. The aforesaid stated acts according to the respondents are in contravention of Rule 3 (1)(I),(ii) & (iii) of the CCS (Conduct) Rules, 1964. We are of the considered view that in order to show that the allegations constitute a misconduct warranting any disciplinary proceeding or punishment it has to be shown that the alleged acts which constituted negligence or lapses in performance of duty are directly attributable to negligence having high degree of culpability and the consequences are irreparable. It is also to be proved that the act committed is malafide with a resultant loss to the Government and also the same conclusively points towards dereliction of duty and is contrary to the laid down norms. From the facts and circumstances of the present case we are of the considered view that the acts attributable to the applicant, as alleged by the respondents as misconduct, however, does not constitute misconduct and rather in good faith in discharge of his duty. An error or negligence per se which has not attributed a culpability of very high nature would not warrant any punishment. Applying the ratio to the facts and circumstances of the present case and as admitted on record that the applicant while posted as Assistant Collector at the relevant time before making necessary orders for auction of cement and also seizure after seizure had informed the Collector of Customs on

16.7.90 and by a letter dated 23.7.90 from the office of the Collector of Customs (Preventive) who is the controlling officer of the applicant after according permission to allow the applicant to dispose of the seized goods, which has been brought on record, clearly proves the bonafide of the applicant and once he has been allowed to auction the cement after apprising the Collector of Customs about the circumstances, he cannot be held guilty of the charge of alleged discrepancy while dealing with the cement which has been brought in a ship.

12. As regards the collusion of the applicant with M/s Nagarsheth and not mentioning the quantity of alleged cement in weight the respondents have not applied their mind to the circumstances of the case. The applicant at the time of seizure on 16.7.90 mentioned about 20,000 plus 500 bags of cement valued at 14,00,000/- and also described the weight of each bag by giving the exact quantity and the weight. Hence, there is no logic to charge him for not mentioning the quantity of the cement in weight. As such the allegations to this regard constitute no misconduct and apart from it, no evidence had come on record to show that the applicant has failed to mention the quantity and weight of each cement bag, in the memo rather the same has been admitted.

13. As regards the allegation of not allowing the auction of the cement without advertising the same in the newspaper, Item No.8 D under Chapter II (Seizure of Goods) clearly stipulates that advertising in the newspaper is not a mandatory requirement. It lies within the jurisdiction of the concerned officer to determine the

exact form and extent of publicity with regard to the nature of good. As the cement was a hygroscopic substance and of perishable nature and on account of on set of rainy season the same has been disposed of at the earliest. The auction through proper notices have been put on notice board and sent to all concerned offices. Apart from it, the letter of Collector of Customs dated 23.7.90 allowed the disposal of the cement on the basis of the efforts made by the applicant and this shows that whatever action has been taken by the applicant was in accordance with the procedure and ratified by the higher authority. As such the action of the applicant was bonafide and as per the rules and failure to advertise the auction in the newspaper which is not a mandatory requirement as per the guidelines, no misconduct is made out. The fact of putting the notice of auction on the Notice Board and its communication to the concerned departments and later on permission of the Collector of Customs has not been denied by the respondents.

14. As regards the allegation that the applicant has not taken the opinion of the experts with regard to the seized items, the value of the goods had been determined not by the applicant but he has taken the opinion of two leading Architects. It has been duly mentioned in X-T-1 diary and also a local cement dealer was contacted. The aforesaid efforts clearly show that the applicant has acted in accordance with rules and on this count he cannot be held liable for any misconduct.

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15. As regards the contention that the crane has not been mentioned in the panchnama, the panchnama was prepared in local Gujarati language by the Superintendent. The applicant who does not even know Gujarati is alleged to have recorded the statement of Nagarsheth in the same language which is not proved on record and rather it has been written by one Sh. Ojha, Inspector of Customs and the applicant had signed as a witness. Apart from it, regarding the crane the applicant has given his explanation to Collector of Customs, which has been relied on and no misconduct was found. As such without any ulterior motive and malafide the same cannot be attributable to the applicant to warrant such a punishment.

16. As regards the CBI is concerned, the applicant has not at all been implicated as an accused in the criminal case. Furthermore, the CEGAT by their order clearly observed that the ports department of Um All Quinn shows that the goods were waste cement which would be dumped. It only shows that the goods could be sold only as a scrap. In this view of the matter the CEGAT has exonerated the Nagarsheth from levy of a penalty order by order dated 14.2.2000 which has not been carried in any review and clearly shows that the findings of the CEGAT has been accepted by the respondents, which totally belies the allegation of collusion of the applicant with the Nagarsheth. Apart from it, in order to prove the conduct to be a misconduct sufficient evidence has to be brought on record. In absence of any evidence on record regarding the collusion of the applicant with Nagarsheth finding even at the yardstick of a common prudent man is perverse and is based on no evidence.

17. In this view of the matter we are of the considered view that once the actions of the applicant have been ratified and approval has been given by the Collector who was the higher authority despite being aware of all the procedure adopted by the applicant clearly shows that his actions have been found correct. Apart from it, we find from the additional documents filed by the learned counsel of the applicant that according to the letter written by the Commissioner of Customs, Ahmedabad on 24.9.99 that no strong evidence has been found to establish his guilt in a court of law, as he had made the seizure of cement, as soon as it came to his notice that the same were contraband goods. The only point, according to the Commissioner is that, he allowed auction of the seized cement without calling for tenders, etc. According to him this has been found on account of on set of monsoon and having regard to the perishable nature of the good no pecuniary interest of the applicant was found. This inquiry has been held without taking into consideration the aforesaid letter and the applicant has been held guilty which is not justified and rather it smacks of bias and arbitrariness on the part of the respondents to hold the applicant guilty of the charge and punish him later on. We also find from the record that although the order of the CEGAT was forwarded to the UPSC and was also in the knowledge of the disciplinary authority the same has neither been taken into consideration by the UPSC nor by the disciplinary authority while recommending/awarding the major punishment on the applicant, which has greatly prejudiced him as the CEGAT order where the penalty has been set aside clearly establishes that the applicant has not at all colluded with

the Nagarsheth and the cement was a scrap. In this view of the matter the allegations levelled against the applicant are in conflict with the order passed by the CEGAT and having no evidence on record to conclusively establish the allegations the punishment is not legally tenable. Another aspect of the matter is that the disciplinary authority passed the orders without application of mind and without dealing with the contentions of the applicant, which has greatly prejudiced his rights. The enquiry report too suffers from the same lacuna. The IO has not recorded detailed reasons go come to the finding of guilt arrived at against the applicant, without meticulously dealing with his defence statement.

18. Though we have not at all gone into the correctness of the charge in the preceding paragraphs. Our attempt was to go into the evidence and the material to ascertain whether the allegations constitute a misconduct or not. On perusal of the entire record, we are satisfied that the respondents have failed to prove the misconduct of the applicant as alleged against him and what has been alleged does not amount to a misconduct, but rather a bonafide action of the applicant in good faith on the approval of the higher authority and applying the test laid down in J. Ahmed's case (supra) the impugned orders are not sustainable in the eye of law.

19. In the result and having regard to the reasons recorded above, we set aside the order of punishment dated 30.1.2001, as well as the findings of the Inquiry Officer. The applicant shall also be entitled to all consequential benefits, in accordance with law. These

directions shall be complied with by the respondents within a period of three months from the date of receipt of a copy of this order. No costs. O.A is allowed.

S. Raju

(Shanker Raju)
Member (J)

(Govindan S. Tampi)
Member (A)

'San.'