CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

O.A. NO. 481/08

Dated the 5th February, 2010.

C O R A M

HON'BLE DR. K.B.S. RAJAN, JUDICIAL MEMBER
HON'BLE SMT. K. NOORJEHAN, ADMINISTRATIVE MEMBER

K. Achuthan Nayar
Appraiser, Customs House, Cochin
resident of Maliakkal Madam, Balavinayaka Temple Road
Kannankulangara, Tripunithura
Cochin-682301 ..Applicant

By Advocates S. Radhakrishnan & S. Rajmohan

Vs

1 Union of India represented by the
Secretary to the Govt. Of India
Ministry of Finance, Department of Revenue
Government of India, North Block
New Delhi-110 001

2 Central Board of Excise & Customs
represented by its Chairman & Special Secretary
to Government of India
North Block, Parliament Street
New Delhi.

3 The President of India (Appellate Authority)
Rashtrapathi Bhavan, New Delhi.

4 Union Public Service Commission
represented by its Secretary
Dholpur House
Shajahan Raod,
New Delhi.

5 The Commissioner of Customs
Customs House, Cochin-682 009 ..Respondents

By Advocate Mr.Sunil Jacob Jose, SCGSC for R 1-3 & 5
Advocate Mr Thomas Mathew Nellimoottil for R-4

The Application having been heard on 31.12.2009, the Tribunal delivered the following:

O R D E R

HON'BLE SMT. K. NOORJEHAN, ADMINISTRATIVE MEMBER

The applicant challenges the Annexure A-1 order dated 7th May, 2008 modifying the penalty of reduction of pay from Rs. 8100/- to Rs. 6500/- in the time scale of pay of Rs. 6500-200-10500 for a period of one year on the applicant, imposed vide order dated 10.5.2000 passed by the Commissioner of Customs, Cochin to that of "dismissal from service".

2 The applicant is approaching the Tribunal for the fourth time. The brief facts of the case are as follows. According to the applicant, while working as Customs Officer in Mangalore Customs House during 1990, on receiving secret information from informer, he seized an Arab dhow carrying bricks of silver worth about Rs. 5.8 crores and Arab Dhow worth about Rs. 84 lakhs on 17/18.12.1990. Since the quantum of the informer award was a huge amount, there was vigilance investigation in this regard and the applicant was served with Memorandum of charges alleging that he fabricated false document and attempted to misappropriate the informer award amount and that he had exceeded in his jurisdiction by actively engaging in anti-smuggling activities. An inquiry was constituted in which the applicant was found guilty of charge

No. II pertaining to attempt to plant a non-existing informer with the help and connivance of the Addl. Commissioner of Customs with malafide intention of appropriating the reward money which would have been disbursed but for the subsequent enquiry. The DA disagreed with that finding of the IO whereby finding in one charge was rendered as not proved, and found that both charges were proved and imposed a penalty of reduction in pay to the minimum of the pay scale for a period of one year. The applicant preferred an appeal and the authorities obtained the advice from the UPSC which advised that the penalty imposed was itself lenient which cannot further be reduced. By this time the penalty imposed was already suffered by the applicant. However, thereafter, the Department approached the UPSC for their advice for enhancement of the punishment and the UPSC opined that since earlier appeal was dismissed in case the appellate authority wanted to enhance the penalty, a fresh show cause notice should be issued. Thus, after the expiry of the period of currency of penalty imposed, the Appellate Authority invoked the provisions under Rule 27 (2) and issued a show cause notice to the applicant. The applicant challenged the same before the Tribunal through O.A 494/2005 which was disposed of directing the respondents to supply the required documents to the applicant on payment. After inquiry, the Disciplinary Authority imposed the penalty of dismissal from service on the applicant which was approved by the UPSC. The applicant again approached the Tribunal challenging the Rule 27(2) notice and appellate order before the Tribunal through O.A. 508/2005. The Tribunal quashed the notice and directed to reinstate the applicant. The department challenged the order of the Tribunal before the High Court of Kerala through W.P(C)No. 25841 of 2006 which upheld the order of

the Tribunal with liberty to the Appellate Authority to issue fresh show cause notice meeting all the requirements of law. The Appellate Authority then followed the procedure for issue of a show cause notice and ultimately dismissed the applicant from service (A-1). The applicant in this O.A is challenging Annexure A-1 order mainly -

(a) due to non-supply of vital and crucial documents,

(b) non-examination of important witnesses,

(c) refusal to permit cross examination of witnesses,

(d) relying upon documents without producing the originals,

(e) relying upon statements recorded in the preliminary investigation behind the back of the applicant,

(f) refusal to hold a common proceeding under Rule 18 and supply of documents of the co-delinquent and relied upon by the respondents,

(g) inordinate and unexplainable delay in initiating and completing the proceedings,

(h) contending that the appellate order is not in tune with Rule 27(2) and the instructions issued by the Govt., fairness and

(i) non compliance of principle of natural justice and mandatory enshrined under Article 311 of the Constitution and Rule 14 of CCS Rules.

3 Respondents 1 to 3 and 5 filed reply statement justifying the action of the respondents in imposing the penalty of dismissal. According to them, the charges against the applicant were serious, that he with the active connivance of the then Additional Collector of Customs attempted to plant a non-existing informer with the malafide intention of appropriating the reward amount of Rs 87 lakhs which would have been disbursed but for subsequent inquiry and that he exceeded his jurisdiction and actively engaged in anti-smuggling works and that

the enquiry was conducted, the first charge was found proved while the second one was not proved. The DA disagreed with the findings of the Enquiry Officer and holding that both the charges are proved, imposed the penalty of reduction of pay. The applicant appealed against the punishment which, on consultation with the UPSC was dismissed. However, later, the Appellate Authority, keeping in mind the gravity of the offence and the punishment imposed on the Assistant Collector, decided to impose a more stringent punishment of dismissal from service on the applicant under Rule 27(2) of the CCS (CCA) Rules with the approval of the UPSC. They submitted that the punishment was imposed in accordance with the rules.

4 We have heard learned counsel on either side at length and perused the records produced before us.

5 The learned counsel for the applicant strenuously argued on the following points:-

(a) that the Appellate Authority, without application of mind and without considering the mandatory provisions of Rule 27 of CCS (CCA) Rules, came to the illegal conclusion that the applicant has fabricated the records whereas the proceedings in the enquiry and the statement of the witnesses prove otherwise. The counsel relied on the statement given by Shri M.J.K. Ravindran in support of his argument.

(b) As regards the disagreement of the DA with the Inquiry Officer on the 2nd charge the counsel argued that he was directed by the Addl. Collector of Customs to engage in anti-smuggling activities to effect seizure, that the Department consistently maintained the stand that the applicant is an authorized Officer under Section 23(34) of the Customs Act in

the Criminal proceedings before the courts and Sessions Court and the High Court upheld this contention.

© The Appellate Authority has not considered the evidence of Annexure A-17 of Mr. Sudheer, Preventive Officer, Mr. Joseph the Skipper of the vessel, M.K. Aravindran. He has also raised certain procedural irregularities in the conduct of the enquiry.

(d) The applicant was not given the requisite opportunity to cross examine the witnesses and that the enquiry officer solely relied on the statements given by the witnesses in the preliminary enquiry.

(e) It is an admitted case that allegations against the applicant and Mr. Karant are interconnected, the statement recorded from Mr. Karant was not furnished to the applicant.

(f) Under Rule 18 duty is cast upon the competent authority to order common proceedings in a case where the charges are interconnected or where they are the same or when it is based upon same cause of action. This was not considered by the DA/AA.

(g) From the impugned order at Annexure A-1, it is evident that the advice of UPSC on 26.4.2001 was to dismiss the appeal filed by the applicant. But the Ministry cited the case of Mr. D.S. Karant and sought advice for enhancement of the penalty solely on the ground that a higher penalty was imposed on Shri D.S. Karanth who was reduced to the minimum of the scale. If the request for enhancement of penalty was to maintain equity, the decision to dismiss the applicant from service is clearly illegal and arbitrary.

The penalty of reduction in pay to the minimum of the pay scale for a period of one year imposed on the applicant on 10.5.2000, was over and on 6.6.2001 the salary of the applicant was restored. The appellate order was issued after a long span of five years after the filing of the appeal. The penalty now imposed is actually one shocking the conscience of judiciary and has no proportion to the alleged cause of action.

6 The learned counsel for the respondents on the other hand opposed the arguments of the learned counsel for the applicant and submitted that initially the UPSC observed that the penalty already imposed upon the applicant was lenient and therefore they did not advise any reduction in the penalty already imposed upon him. However, the Ministry citing the case of Shri Karant referred the case to UPSC upon which the UPSC advised that if the Ministry was contemplating to enhance the punishment of the applicant, a show cause notice might be issued to him. Accordingly the appellate authority issued show cause notice to the applicant proposing to impose a more stringent punishment by modifying the earlier order. The applicant sought further documents, but his request was turned down. Thereafter the applicant moved O.A.208/02 and in obedience of the orders of the Tribunal in O.A. 208/02, all documents sought by the applicant were given to him and the applicant submitted reply to the show cause notice. The Appellate Authority, after considering the facts of the case tentatively decided to impose a more stringent punishment. The counsel further argued that as the statutory requirement of consultation with UPSC for deciding the appeal has already been complied with and as no new points have emerged warranting a different penalty from the one as advised by

the UPSC, no fresh reference to UPSC was considered necessary. Therefore, the Appellate Authority having found collusion of the appellant with the Addl. Collector to appropriate the reward proved beyond doubt, the appellant knew very well that there was no informer and therefore he fabricated a fake story about a non existing bogus ghost informer with an evil intention to grab the reward money to the tune of Rs. 87.00 lakhs, that the applicant had actively engaged in anti-smuggling work without any delegation as required under the customs Act, 1962 modified the penalty to dismissal from service.

7 The questions that come up for consideration is whether the action of the respondents to enhance the punishment is legally sustainable in the facts and circumstances of the case.

8 It is an undisputed fact that disciplinary proceedings were initiated against the applicant under Rule 14 of CCS(CCA) Rules, 1965 vide charge memo dated 1.12.1995. On denial of the charges, an enquiry was conducted in which Article I was proved and Article II as not proved. The Disciplinary Authority disagreeing with the findings of the IO imposed penalty of reduction of pay for a period of one year with a direction that he will not earn increment during the period and that the reduction will not have the effect of postponing his future increments of pay. The applicant filed an appeal which was referred to UPSC for advice. The UPSC advised that the appeal was devoid of merit and that the penalty already imposed on him is lenient. Around this time, the penalty imposed was also suffered by the applicant. Thereupon, the Department proposed to enhance the penalty imposed on the applicant keeping in mind the observation of the UPSC that the punishment

imposed on Shri D.S. Karanth, the then Assistant Commissioner who was separately proceeded with was more harsher. The case was again referred to UPSC for advice. The UPSC did not give any advice but cautioned that in case the Department proposed to enhance the penalty, issue of show cause notice to the applicant is a *sine-qua-non*. Accordingly the Department issued show cause notice to him. On receipt of reply from the Commission, it was proposed to impose the penalty of dismissal from service. The case was again referred to UPSC who finally concurred with the proposal for enhancing the punishment.

9 The applicant challenged the show cause notice dated 20.12.01 for calling upon him to explain as to why the penalty imposed on him shall not be revised under Rule 27(2) of CCS (CCA) Rules, 1965 before the Tribunal through O.A.508/05. The Tribunal in its considered order elaborately dealt with various grounds raised by the applicant and Rule 27(2) of the CCS (CCA) Rules, 1965 ordered reinstatement of the applicant within two months. When the Department took the matter before the High Court of Kerala in Writ Petition the High Court upheld the order of the Tribunal making it clear that it will be open to the appellate authority to issue a fresh show cause notice containing all the requirements of law. The applicant has challenged the action of the respondents right from the stage of inquiry report. In fact, in his representation against the Inquiry Report itself the applicant had brought forward of the same. It was for the Disciplinary Authority to consider the same and decide. If there be any deficiency in the part played by the Disciplinary Authority in respect of the provisions of the CCS(CC&A) Rules, and the same is brought to the notice of the Appellate Authority, the Appellate Authority shall act as per the

procedure laid down in Rule 27(2) of the CCS(CC&A) Rules, 1965. After exhausting all the above, when the applicant moves the judicial forum, judicial review could be conducted subject to the limitation. It has been held in the case of *Ranjit Thakur* v. *Union of India (1987) 4 SCC 611 as under:-*

> "25. Judicial review generally speaking, is not directed against a decision, but is directed against the 'decision-making process'. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review."

The above has been cited in a recent case of ***Ramvir Singh v. Union of India,(2009) 3 SCC 97.*** Also see ***H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons, 1992 Supp (2) SCC 312,*** wherein it has been held by the Apex Court as under:-

> Judicial review, it is trite, is not directed against the decision but is confined to the decision making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorized by law to decide, a conclusion which is correct in the eyes of the Court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself.

(The above has also been extracted in the case of Union of India vs Upendra Singh, (1994) 3 SCC 357. Also see Transport Commissioner vs A. Radhakrishnamoorthy (1995) 1 SCC 332, B.C. Chaturvedi vs Union of India (1995) 6 SCC 749, Apparel Export Promotion Council Vs A.K. Chopra (1999) 1 SCC 759 Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar,(2003) 4 SCC 364, Lalit Popli v. Canara Bank,(2003) 3 SCC 583, Indian Rly. Construction Co. Ltd. v. Ajay Kumar,(2003) 4 SCC 579 Damoh Panna Sagar Rural Regional Bank v. Munna Lal Jain,(2005) 10 SCC 84, V. Ramana v. A.P. SRTC (2005) 7 338,

State of Rajasthan v. Mohd. Ayub Naz,(2006) 1 SCC 589 , Ram Saran v. IG of Police, CRPF,(2006) 2 SCC 541, State of U.P. v. Sheo Shanker Lal Srivastava,(2006) 3 SCC 276, Union of India v. K.G. Soni,(2006) 6 SCC 794, at page 798, Union of India v. Dwarka Prasad Tiwari,(2006) 10 SCC 388, Govt. of India v. George Philip,(2006) 13 SCC 1, and Ramvir Singh v. Union of India,(2009) 3 SCC 97,)

10 Thus, if the Tribunal comes to the conclusion that the Inquiry Report (as modified by the Disciplinary Authority) itself is found to be vitiated (with reference to the procedure adopted and not by way of re-appreciation of evidence), the further edifice erected upon the same too would meet Waterloo. Instead, if the inquiry report cannot be found fault with, as to any legal lacuna, but there be some deficiency in the order of the Disciplinary Authority (here again, the decision making process alone would be tested by the judicial forum), then from that stage, including the appellate order, the proceedings have to be held as illegal and invalid. And, if there be no such lacuna in the procedure adopted by the disciplinary authority, but according to the applicant there has been lacuna in the appreciation of evidence which when rectified would entail in the exoneration of the applicant from the charges, and the disciplinary authority, despite the same being brought out in the representation against the inquiry report, failed to consider the objection, then it is for the Appellate Authority to consider the evidence to see whether the Disciplinary Authority had acted properly. It is for this reason that the appellate authority has been cast with the responsibility of ensuring "whether the findings of the Disciplinary Authority are warranted by the evidence on the record".

11 As to the consideration of evidence by the Tribunal, though hitherto, the scope of judicial review in that regard was restricted to ascertaining whether the case is one of no evidence, in a recent case of

Moni Shankar v. Union of India,(2008) 3 SCC 484, the Apex Court has held as under:-

> 17. The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. (See *State of U.P.* v. *Sheo Shanker Lal Srivastava* and *Coimbatore District Central Coop. Bank* v. *Employees Assn. (2007) 4 SCC 669*)
>
> 18. We must also place on record that on certain aspects even judicial review of fact is permissible. (*E* v. *Secy. of State for the Home Dept.2004 QB 1044*) (Emphasis supplied)

12 Thus, since applicant has challenged the following aspects, the case has to be examined in respect of each ground:-

(a) Ground A(i): Complete disregard to the provisions of Rule 27 (2) by the Appellate authority. According to the applicant the appellate authority has arrived at "a mechanical and callous conclusion, without considering any of the points raised by the applicant and without considering whether the mandatory provisions of CCS(CC&A) Rules were complied with." Thus, according to the applicant, there is thorough non application of mind, non consideration of relevant aspects and the action of the appellate authority is **not in tune with the letter and spirit of Rule 27.**

In this regard, it is pertinent to mention that apart from Rule 27, in the Government of India instructions No. 4 under the

said Rule, vide order dated 1st October, 1980, it has been stated, "Thus, the rule requires that even if the appellant has not brought out any new points in the appeal, it is obligatory on the part of the Appellate Authority to discuss how there has been no procedural flaw or denial of opportunity of defence and that the findings of the Disciplinary Authority are based on evidences and are just." The instant case is one where the penalty initially imposed is not one of dismissal against which the appeal has been preferred. It is a case where a lesser penalty has been imposed, and the UPSC initially did not recommend any enhancement of penalty, but later at the second reference of the appellate authority intending to enhance the penalty, the UPSC has advised that if so, show cause notice is a must. Under such a circumstance, the appellate authority is expected to meticulously follow the procedure laid down in the CCS (CC&A) Rules. The following are the decisions of the Apex Court where the obligations of the appellate authority in dealing with an appeal have been spelt out elaborately:-

(i) Nelson Motis v. Union of India, (1992) 4 SCC 711,

*The grounds mentioned in Rule 27 (2) permit the appellate authority to re-appraise the evidence on the record for examining whether the findings recorded by the disciplinary authority are warranted by such evidence. So far non-compliance of a procedural rule is concerned, **the appellate authority is enjoined**, by clause (a) of Rule 27 to consider whether such non-compliance has resulted in the failure of justice or in the violation of any constitutional provision, before interfering with the punishment. In view of its sub-rule (3), the same consideration arises under Rule 29. Similarly, the provisions of Rule 29-A indicate that the power to review can be exercised by the President only on discovery of such new evidence which has the effect of changing the very nature of the case. Sub-rule (3) of Rule 10 is applicable to these groups of cases, where the interference with the penalty is connected with the merits of the charge against the government servant.*

(ii) B.C. Chaturvedi v. Union of India, (1995) 6 SCC 749:

18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct.

(iii) In *Ram Chander v. Union of India, (1986) 3 SCC 103*

"4. The duty to give reasons is an incident of the judicial process. So, in R.P. Bhatt v. Union of India (1986) 2 SCC 651 this Court, in somewhat similar circumstances, interpreting Rule 27(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 which provision is in pari materia with Rule 22(2) of the Railway Servants (Discipline and Appeal) Rules, 1968, observed:

It is clear upon the terms of Rule 27(2) that the appellate authority is required to consider (1) whether the procedure laid down in the rules has been complied with; and if not, whether such non-compliance has resulted in violation of any of the provisions of the Constitution of India or in failure of justice : (2) whether the findings of the disciplinary authority are warranted by the evidence on record; and (3) whether the penalty imposed is adequate; and thereafter pass orders confirming, enhancing etc. the penalty, or remit the case to the authority which imposed the same.

It was held that the word consider in Rule 27(2) of the Rules implied due application of mind. The Court emphasized that the appellate authority discharging quasi-judicial functions in accordance with natural justice must give reasons for its decision. There was in that case, as here, no indication in the impugned order that the Director General, Border Road Organization, New Delhi was satisfied as to the aforesaid requirements. The Court observed that he had not recorded any finding on the crucial question as to whether the findings of the disciplinary authority were warranted by the evidence on record."

(iv) In *Narinder Mohan Arya v. United India Insurance Co. Ltd.,(2006) 4 SCC 713:*

37-Consideration of appeals .

37 (1) In case of an appeal against an order of suspension, the Appellate Authority shall consider whether in the light of the provisions of Rule 20 and having regard to the circumstances of the case the order of suspension is justified or not and confirm or revoke the other accordingly.

(2) In the case of an appeal against an order imposing any of the penalties specified in Rule 23, the Appellate Authority shall consider:

(a) whether the procedure prescribed in these Rules has been complied with and if not, whether such non-compliance has resulted in failure of justice;

(b) whether the findings are justified; and

(c) whether the penalty imposed is excessive, adequate or inadequate, and pass orders:

I setting aside, reducing, confirming or enhancing the penalty; or

II. remitting the case to the authority which imposed the penalty or to any other authority with such direction as it may deem fit in the circumstances of the case.

X X x x x x

32. The Appellate Authority, therefore, while disposing of the appeal is required to apply his mind with regard to the factors enumerated in sub-rule (2) of Rule 37 of the Rules. ..... He was required to show that he applied his mind to the relevant facts. He could not have without expressing his mind simply ignored the same.

33. An appellate order if it is in agreement with that of the disciplinary authority may not be a speaking order but the authority passing the same must show that there had been proper application of mind on his part as regards the compliance with the requirements of law while exercising his jurisdiction under Rule 37 of the Rules.

34. In Apparel Export Promotion Council v. A.K. Chopra which has heavily been relied upon by Mr Gupta, this Court stated:

> *16 . The High Court appears to have overlooked the settled position that in departmental proceedings, the disciplinary authority is the sole judge of facts and in case an appeal is presented to the Appellate Authority, the Appellate Authority has also the power/and jurisdiction to reappreciate the evidence and come to its own conclusion, on facts, being the sole fact-finding authorities. (emphasis supplied)*

35 The Appellate Authority, therefore, could not ignore to exercise the said power.

36. The order of the Appellate Authority demonstrates total non-

application of mind. The Appellate Authority, when the Rules require application of mind on several factors and serious contentions have been raised, was bound to assign reasons so as to enable the writ court to ascertain as to whether he had applied his mind to the relevant factors which the statute requires him to do. The expression consider is of some significance. In the context of the Rules, the Appellate Authority was required to see as to whether (i) the procedure laid down in the Rules was complied with; (ii) the enquiry officer was justified in arriving at the finding that the delinquent officer was guilty of the misconduct alleged against him; and (iii) whether penalty imposed by the disciplinary authority was excessive.

Keeping in view the aforesaid decisions of the Apex Court, it is to be seen whether the impugned appellate order conforms to the stipulations as contained in the Rule as also whether the same is in tune with the above decision.

13 The rules provide for the mandatory provisions to be complied with by the inquiry officer. One of them is as provided for in rule 14 (18) which reads as under:-

> 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.

This provision is pari materia with Rule 9(21) of the Railway Servants (Discipline and Appeal) Rules, which has been referred to in the case of Moni Shankar v. Union of India,(2008) 3 SCC 484, wherein the Apex Court has held as under:-

> **20.** The enquiry officer had put the following questions to the appellant:
>
> "Having heard all the PWs, please state if you plead guilty? Please state if you require any additional documents/witness in your defence at this stage? Do you wish to submit your oral defence or written defence brief? Are you satisfied with the enquiry proceedings and can I conclude the enquiry?"
>
> 21 Such a question does not comply with Rule 9(21) of the Rules. What were the circumstances appearing against the appellant had not been disclosed.

14 The inquiring authority shall have to specifically put forth that point which goes against the delinquent official and ask him as to whether he has anything to say about it. In the instant case, as to the first charge, the inquiring authority had arrived at the conclusion that the charge stood proved and he had, to substantiate his findings, relied upon some documents/sequence of events. These ought to have been put forth to the applicant if he himself did not stand in the witness box. The inquiry proceedings do not go to show that such a procedure was followed by the inquiring authority. This issue ought to have been examined by the appellate authority even if the appeal did not contain the same. There has been no inkling that this part of the duty has been performed by the Appellate Authority. In the instant case, the prosecution completed its case on 11-12-1996. On that day, the I.O. has, inter alia recorded as under:-

> **"As the CO did not offer himself as a witness in his own case, so he was examined in general by me. With this, RH concluded."**

The above recital in the order sheet is nowhere near fulfillment of the requirement under Rule 14(18) of the C.C.S(CC & A) Rules. As stated in Moni Shankar (supra), "*What were the circumstances appearing against the appellant had not been disclosed.* There may be other such procedure lacuna which the applicant has raised in his appeal, but which have not been considered meticulously by the appellate authority. Thus, ground A(i) raised in the O.A is fully justified.

15 As regards ground A(ii), the applicant has referred to the deposition of one Shri Ravindran SW 1 who is stated to have deposed that the applicant did not ask him to correct the previous entries in the

despatch register by writing the despatch letters one addressed to the DGRI and the other to Collector of Customs. He has not corrected any entries in the said register (Ex S-7) as he was not the in charge of the Despatch Register... whereas, the appellate authority's conclusion is "He was advised by Sh. K.A. Nayar to make entries in the vacant portion available in the dispatch register against Sl. No. 12891 and 12892 which he did. This point has been stated in the summary of the points congealed by the appellate authority, as item No. (i) that it was Ravindran who had made the entries, whereas the appellate authority has not specifically dealt with this deposition and contrasted before he came to the conclusion as contained in the appellate order. This is also for the Appellate Authority to consider and arrive at by way of re-appreciation of evidence.

16 The applicant in ground A(iii) raised a point that the Appellate Authority failed to seek the advice of the UPSC before passing this order on the ground that no new point has been added. He has stated that the earlier advice sought for merges with the earlier appellate order, which stood quashed. As such, fresh opinion should be called for. Counsel for the applicant stressed this ground at the time of hearing. There is full substance in the submission. For, a fresh show cause notice was issued vide Annexure A-14 dated 15-03-2007 and the applicant had furnished his representation dated 03-04-2007 vide Annexure A-15. UPSC's last opinion was of 26th April, 2005. With the issue of a fresh show cause notice and representation thereof, the matter has to be treated afresh from that stage. None of the previous proceedings could be invoked. From that point of view, fresh consultation with the UPSC is absolutely necessary and the same cannot

be warded of holding that no new point has been added. It would have been a different matter if the applicant did not respond to the show cause notice, in which event, the respondents would be justified in not consulting the UPSC (See ***P. Joseph John v. State of Travancore-Cochin,(1955) 1 SCR 1011 wherein it has been held,*** 'In this case the report of the Commissioner was placed before the Public Service Commission and the latter approved of the action proposed to be taken. The appellant was given another opportunity to show cause but he did not avail himself of that opportunity or submit any explanation or show any cause on which the Public Service Commission could be consulted. The order of dismissal having been made there was in the circumstances no further necessity to consult the Public Service Commission.) Hence, the order of the appellate authority suffers from this serious legal lacuna.

17 As regards grounds B and C, these fully revolve round the facts of the case and may require re-appreciation of evidence and as such the Tribunal is not inclined to consider the same.

18 As regards non supply of documents, para 8 and 9 of the Annexure A-15 representation against the Show Cause Notice deal with the same in *extenso*. Two of the documents are those which are sought to be relied upon by the applicant, but which are in the custody of the respondents. One of them is the log book of vessel Shakti. It is the case of the applicant vide Ground D(i) that the log book of CAC Sakthi and XT-1 Diary for the days 14th & 15th of December, 1990 were not furnished to the applicant. These are, according to the applicant crucial, since the Inquiry Officer to disprove the endorsement of timing

in the note by Karanth, the Additional Collector, has relied upon the presence in the said vessel of the applicant till 08.15 AM. In the course of argument, the counsel for the applicant submitted that the vessel had disembarked at 5 AM on 15th December, 1990 at New Mangalore Port after patrol duty. However, when the records were inspected, out of the ten documents called, for the requisition of Log book does not figure in. XT-I Diary was requisitioned but not made available as per the records perused. Thus, prima facie principles of natural justice have been violated inasmuch as the inquiring authority came to a conclusion on the basis of some records at the back of the applicant. This point needs analysis by the Appellate authority, as the applicant has clearly narrated the same vide para 8 of his representation against the show cause notice. But, the appellate authority though referred to in para (iv) of the impugned order has simply brushed aside stating that documents were all made available.

19 It is curious to note one important aspect here. Vide internal page 22 of the Inquiry report SW-2 was stated to be Shri D.S. Karanth who confirmed his earlier statement marked as Ex S-8. At internal page 25, the I.O. States, "Vide Ex S-8 (statement of the CO)....." Again, vide internal page 26 of the inquiry report, the I.O. refers to Ex S-9, (statement of Shri Nayar) and gives a brief account of the conversation on telephone between the applicant and his wife and later remarks, "On 15-12-90, he(the applicant) personally met the CO at his residence before his leaving for Bangalore..." At page 27 of the report, the inquiry officer observes, "the CO ordered on 15-12-90 at 8 AM that 'let Shakti vessel be at the disposal of Shri Nayar. Watch be kept on 17th and 18th night from 8 PM to next day 5 PM on both days vide Ex. S-8

(Statement of the CO) page 3, the CO has mentioned that Shri Nayar met him at abut 9 AM and the time indicated by him as 8 AM on Ex S-11 is incorrect which must have been written in a hurry. He left for Bangalore on 15-12-90 and remained there till 17-12-90. Vide page 2, para 3 of Ex S-8, the CO has mentioned that on 15-12-90, he was in a hurry to catch the 10 O'clock Bus to Bangalore and ...." Thus, in some places the applicant has been shown as the CO and in some other places, it is Shri Karanth who has been shown as the CO. In other words, if the I.O. in the two cases is one and the same, he has mixed up the matter (perhaps by the process of cut/copy and paste in the computer). But this lapse only goes to show that adequate attention had not been given by the Inquiry Officer in preparation of his report on the basis of which the entire edifice had been erected. It is for the appellate authority to consider this aspect itself.

20 The applicant has contended that there ought to have been a common proceeding in this case but the same had been denied and this is a serious legal lacuna according to the counsel for the applicant. We are not persuaded on the same. For, it is the discretion given to the disciplinary authority to hold common proceedings. Vide Rule 18 the competent authority "may" make an order directing that disciplinary action against all of them may be taken in a common proceeding. The counsel for the applicant argued that the term 'may' assumes the meaning of 'shall' in certain cases and in respect of rule 18, the term 'may' means only 'shall' and hence it is mandatory. This argument has to be rejected for, in the very same rule 18, vide sub rule (2) thereof, the word, 'shall' has also been used. Thus, when in the same section/rule, at two places, two different words, 'may' and 'shall' have

been used, their literal meaning alone could be given. Though the counsel tried to argue that the use of the term may in Rule 18(1) used by the legislature is with a sense of humility as it is a direction to the "President or any other authority competent to impose the penalty of dismissal" whereas such a direction is not addressed to such dignitaries in rule 18(2) which pertains only to any order passed by them. Though the argument is novel, the same cannot be accepted.

21 Various other grounds have been raised by the applicant but these need not detain us, for the above discussion would go to prove that sufficient grounds are already available to quash and set aside the order of the Appellate Authority, the same being not in conformity with the provisions of Rule 27(2), much less the law laid down by the Apex Court in the case of ***Ram Chander, Narinder Mohan Arya and Moni Shankar (supra).***

22 In view of the above the OA is allowed. Impugned order dated 7th May 2008 is quashed and set aside. The respondents are directed to reinstate the applicant in service forthwith. The Appellate Authority will reconsider the representation of the applicant against the show cause notice, keep in view while so considering the mandates of the provisions of Rule 27(2) and attendant rules of the CCS (CC&A) Rules, as observed in the decisions by the Apex Court referred in this Order and after consulting the UPSC, pass appropriate orders.

23 As this is the fourth round of litigation and as the case relates back to 1990 and as the applicant has been out of service, the Appellate Authority may ensure that the decision is taken within a reasonable period, and in any event not later than six months from the

date of communication of this order. No cost.

Dated 5.2.2010

K. NOORJEHAN
ADMINISTRATIVE MEMBER

K.B.S. RAJAN
JUDICIAL MEMBER

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