CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA 508/2005

..MONDAY this the 3rd day of July, 2006

CORAM

HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. GEORGE PARACKEN, JUDICIAL MEMBER

K.A.Nayar, Appraiser
Customs House,Cochin-682009
residing at Raghavanparambil Madhom,
TherlakLane, Sanskrit College Road,
Tripunithura-682301. ....Applicant

(By Advocate M/s N.N.Sugunapalan (Sr.) and Balakarishnan Gopinath.

V.

1 The Commissioner of Customs, Customs House, Cochin-682009

2 The Under Secretary, Cust.Ad.V
Government of India,
Ministry of Finance,Department Revenue,
Central Board of Excise & Customs,
New Delhi.1.

3 The Central Board of Excise and Customs,
North Block, Parliament Street,
Sansad Marg, New Delhi.1.
Represented by its Chairman.

4 President of India & Appellate Authority,
Rashtrapathy Bhavan, New Delhi.

5 Union Public Service Commission
represented by its Secretary
Dholpur House, Shajahan Road
New Delhi.1

6 Union of India, represented by
Secretary, Ministry of Finance,

Department of Revenue,
New Delhi.110 001. ....Respondents

(By Advocate Mr.TPM Ibrahim Khan, SCGSC)

The application having been heard on 6.6.2006, the Tribunal on 3.7.2006 delivered the following:

ORDER

Hon'ble Mr. George Paracken, Judicial Member

The applicant is aggrieved by Annexure.A8 show cause notice dated 20.12.01 by which the second respondent, namely, the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs on behalf of the respondent No.4 ie., the President of India, the Appellate Authority calling upon him to explain as to why the penalty imposed on him vide the Order- in-Original dated 10.5.2000 (Annexure A3) by the Commissioner of Customs, Cochin shall not be revised under Rule 27(2) of CCS (CCA) Rules, 1965 and to enhance it on consideration of his appeal. He is also aggrieved by the A9 letter dated 10.2.04 issued by the Joint Commissioner of Customs in the Office of Respondent No.1 directing him to submit the reply to the said show cause notice dated 20.12.2001 within fifteen days of the receipt of the documents listed in Anenxure.A6 and Annexure. A8 of Original Application No. 208/02 filed by the applicant before this Tribunal earlier. Further, he is aggrieved by the A13 Order-in-Appeal dated 15.6.05 not only ejecting his appeal but also modifying the penalty of *"reduction of pay from Rs. 8100/- to Rs.*

6500/- in the time scale of Rs. 6500-200-10500 for a period of one year with further direction that Shri Nayar will not earn any increment of pay during the said period and on expiry of the said period and on expiry of the said period, the reduction will not have the effect of postponing future increments of his pay" imposed upon him by the Disciplinary Authority vide Order in original dated 10.5.2000 to that of "dismissal from service."

2 The brief facts of the case are that the applicant who was serving as Appraiser, Customs House,Cochin was proceeded against under Rule 14 of the CCS (CCA) Rules, 1965 and a Memorandum dated 1.12.95 containing the following articles of charge was issued to him:

> "i) that the charged officer while functioning as Appraiser in the Customs House, Mangalore during 1990 fabricated and falsified official documents and made false claim that the seizure of 250 silver bars worth Rs. 5.8 crores with an Arab Dhow "Al Musharak" on the night of 17/18th December, 1990 was based on a specific information received by him. The charged officer with the help and connivance of Shri D.S.Karanth, the then Additional Collector of Customs, Mangalore attempted planting a non-existing informer with the malafide intention of appropriating the reward amount. But for the subsequent inquiry, the reward amount of Rs. 87 lakhs would have been disbursed to a non-existing informer; and
>
> ii) that during the aforesaid period, while functioning as Appraiser, the charged officer exceeded the jurisdiction of his official work assigned to him and actively engaged in anti-smuggling work like patrolling the sea. There was a regular set up of Preventive Unit with an Asst. Collector (Preventive) and other officers to do the anti-smuggling work and as Appraiser, the charged officer was not expected to do any anti-smuggling/preventive

> work. The charged officer with the active help and connivance of the then Addl. Collector of Customs, acted beyond his jurisdiction and taking advantage of such acts, attempted to plant a non-existent informer for claiming reward of Rs. 87 lakhs in the seizure of 250 slabs of silver with an Arab Dhow on the night of 17/18.12.1990 near Mangalore."

3 The Inquiry officer after a detailed inquiry, submitted his report dated 28.1.97 (A2) holding that the Charge No.1 above has been proved but the Charge No.2 was not proved. The Commissioner of Customs, Cochin who is the disciplinary authority vide his order dated 10.5.2000 (A3) disagreed with the findings of the inquiry officer that the Charge No.2 was not proved. A notice was issued to the charged officer along with a copy of the Inquiry Report and the reasons of the disciplinary authority to disagree with the said report. The disciplinary authority after considering the representation submitted by the applicant imposed the penalty of *"reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the Government servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay"* and passed the following.

> "The pay of Shri K.Achuthan Nayar, Apparaiser,Custom House, Cochin be reduced from Rs. 8100/- in the time scale of pay of Rs. 6500-200-10500 to the minimum in the time scale of Rs. 6500/- for a period of one year with effect from the date of this order. Shri K. Achuthan Nayar will not earn any increment of pay during the said period. On expiry of the said period, the reduction will not have the effect of postponing

future increments of his pay."

The conclusion arrived at by the disciplinary authority while imposing the aforesaid punishment was as under:

> "I have examined this matter in detail. I do not agree with the findings of the Inquiry officer. Mangalore Custom House at the relevant time was administratively controlled by the Addl. Collector of Customs who was under the Collector of Customs, Bangalore and Shri D.S.Karanth was holding this post. There existed a Preventive Unit under an collector which was handling anti-smuggling operations in their jurisdiction. Shri Karanth in his statement dated 12.4.94 has explained the circumstances under which the preventive and intelligence work was entrusted to the charged officer. The powers under various Sections of the Customs Act can be delegated to different category of officers by the Board or by the Collector. In this case, however, no such order issued by the Collector appointing the Appraiser in Mangalore Custom House as proper officer to deal with functions of anti-smuggling operations has been produced. I have seen the judgment delivered by the Addl. Sessions Judge and I find that the point discussed in this judgment was whether the charged officer being an Appraiser was authorized to seize the vessel or any contraband. It has been held by the Court that an Appraiser in the Customs Department who effected seizure in this case is a proper officer as defined under sub-Sec.(34) of Section 2 of the Customs Act and is, therefore, empowered to effect seizure under Sec.110 of the Act. There is no dispute in this matter. However, the allegation in Charge II is not that the seizure was effected by the charged officer unauthorizedly, but that he actively engaged in anti-smuggling work without any delegation as required under the Act. As discussed above, no proper authority has been produced to substantiate that the charged officer was delegated to perform anti-smuggling functions in Mangalore Custom House.
>
> I have already come tot he conclusion that Charge I has been proved. In my view Charge I and Charge II are closely linked. It was possible to plant a fake informer only because Shri Karanth, Addl.

Collector authorized the charged officer to overstep his duties and responsibilities as Appraiser by using the vessel for anti-smuggling and patrolling purposes. It should be borne in mid that this is not the normal work of an Appraiser. Hence I disagree with the findings of the Inquiry officer as regards Charge II. I hold that Charge II which is complementary to Charge I is established.

From the records I find that the allegations which led to these proceedings commenced as early as 1991 and the Memorandum of Charges was issued during 1995. The charged officer has submitted that the inordinate delay of more than a decade in finalizing the case has caused untold mental agony and financial loss. I find that the officer has not been allowed to cross E.B which was due in February, 1991 thereby suffering very heavy financial loss for the last nine years. His career in service has also suffered in as much as a large number of his juniors got promoted as Asst. Commissioner."

4 Shri D.S.Karant, who was working as Additional Director General of Inspection at the relevant time and a co-delinquent along with the applicant was also charge-sheeted on 7.8.95. The charges in substance was that he colluded with the applicant in this OA and actively helped him in fabricating and falsifying the records in making a false claim of seizure of smuggled silver bars worth Rs. 8.5 Crores which was on the basis of a specific information received by the applicant and helped him in planting a non-existing informer with malafide intention of appropriating the award money of Rs. 87 lacs. On the basis of an inquiry held separately, the disciplinary authority imposed the penalty of reduction to the lower post and re-designating him as Deputy Commissioner. Shri Karant challenged the orders of the Disciplinary Authority vide OA1062/99 before the Bombay Bench

of this Tribunal. He also preferred a review under Rule 29A of CCS (CCA) Rules, 1965 against the Disciplinary Authority's order. The said OA 1062/99 was disposed of by order dated 27.2.2001 directing the respondents to dispose of the Review Petition after giving him a personal hearing within four months. This time was extended upto 5.12.2001. As the respondents did not comply with the directions of the Tribunal, disciplinary proceedings got abated and Shri Karant was declared entitled for all the consequential benefits.

5 The applicant filed the appeal dated 25.5.2000 (A4) before the President under Rule 24 of the CCS(CCA) Rules, 1965 within the statutory period of 45 days to set aside the order of the disciplinary authority in its entirety and further to order the grant of reliefs including monetary and departmental promotions which were due to him from time to time but denied solely on account of the proceedings initiated against him. He had also prayed for the disposal of the appeal at an early date. According to him, he was deprived of various promotions and increments in pay from 1990 onwards. However, the said appeal was disposed of only by the impugned Annexure A13 order dated 15.6.05 ie.,after a period of more than five years. While the aforesaid appeal was pending, the currency of the peanlty imposed by the disciplinary authority vide his order dated 10.5.2000 itself expired on 10.5.2001 and his pay was re-fixed from the same date vide the order dated 14.5.2001 (A5). He was granted financial up-gradation under the ACP Scheme with

effect from 9.8.99 in the scale of pay of Rs. 8000-13500 vide Annexure.A6 order dated 30.5.01. His pay was also fixed under FR 22(I)(a)(I). This was followed by the Annexure.A7 order dated 6.6.01 re-fixing his pay. It is thereafter that the impugned A8 show cause notice dated 20.12.01 was issued to the applicant proposing to review the Order-in-original dated 10.5.2000 under the provisions of Rule 27(2) of the CCS (CCA) Rules, 1965 to enhance the penalty on consideration of the appeal. While giving the applicant an opportunity to submit his explanation as to why the penalty imposed on him vide Order-in-Original dated 10.5.2000 by the Commissioner of Customs, Cochin shall not be revised under Rule 27(2) of CCS (CCA) Rules, 1965 to enhance the penalty by way of consideration of his Appeal the Appellate authority has observed in the said show cause notice as under:

> "AND WHEREAS the President has examined the Appeal filed by Shri K.A.Nayar, Appraiser and the advice of the UPSC carefully. It is observed that the I.O., the Disciplinary Authority and the UPSC have unequivocally observed that the Article Iof the Charge as proved ie.,Shri Nayar with the help and connivance of Shri D.S.Karanth, Addl. Collector tried to fabricate and falsify official records by planing a non-existing informer to appropriate a reward of Rs. 87 lakhs for a chance seizure of silver bars worth rs. 5.8 Crores. Further, the IO had held Article II ie., exceeding of jurisdiction by Shri Nayar and engaging in anti-smuggling work for planting fake informer to claim the said reward, as "not proved". However, the disciplinary authority issued Show Cause Notice to CO in disagreement with the findings of IP vis-a-vis Art.II of the charge and gave detailed reasoning in the Order-in-Original as to how the said charge is established against CO. However, the Commission while agreeing

with IO has disagreed with the findings of the Disciplinary authority with regard tot he element (i) of the Art.KII ie., taking advantage of his role of anti-smuggling work, he attempted to plant non-existent informer to claim reward of Rs. 87 lakhs and has held the same as "not proved". However, the other element of Art.II has been observed by the Commission as established. Definitely, the proven elements of charge as per the findings of Disciplinary authority are grave enough to warrant imposition of deterrent penalty. Equally, the Commission has also observed that there is ample evidence to prove the sinister design of the Appellant to fabricate and falsify official documents to claim prize money of Rs. 87Lakhs. The collusion of the Appellant with Shri D.S.Karanth,Addl. Collector in the entire episode to appropriate the reward money has also been proved to the hilt. In the case of Shri D.S.Karanth, Addl. Collector, the penalty of reduction in rank has already been imposed on him. The disciplinary authority though had made a detailed examination of the case while coming to the conclusion that Art.I and II as proved, had failed to gave any extenuating circumstances to show leniency on C.O excepting giving reason of long-drawn proceedings,mental agony of CO and financial and career loss. It is observed in this regard that there was never any deliberate attempt to delay the proceedings and when it is not so, the other losses are only bit natural. But the fact remains that a grave offence has been committed by the CO and the same is established on the basis of oral and documentary evidence. Hence there is no room for any leniency to be shown to the CO. Rather, the grave offence calls for a deterrent penalty commensurate with the offence committed by the appellant and also to maintain uniformity of penalty in the cases of delinquent officers involved in this case.

AND WHEREAS the President being the Competent Authority to revise a penalty imposed by the disciplinary authority for enhancement by way of consideration of appeal in terms of Rule 27(2) of CCS (CCA) Rules, 1965, has ordered to revise the penalty imposed vide Order-in-Original dated 10.5.2000 in this case."

6 The applicant moved OA 208/02 before this Tribunal for

furnishing him certain relevant documents required by him for giving reply to the Annexure.A8 show cause notice. The Tribunal directed the respondents to furnish the required documents to the applicant and thereafter the respondents have, vide Annexure.A9 order, extended the time for reply to the show cause notice by 15 days after the receipt of the documents. The applicant vide his detailed reply at Annexure.A10 dated 20.2.04 to the show cause notice requested the Appellate authority to allow his appeal in its entirety appreciating the mitigating evidence and facts submitted by him. Thereafter the applicant approached this Tribunal vide OA 494/04 stating that he was apprehending termination of his service. However, this Tribunal restrained itself to interfere as the matter was still pending before the appellate authority and disposed of the OA vide order dated 27.6.2005 with the limited direction to the respondents to dispose of the appeal dated 20.12.01 in the light of the reply given by the applicant keeping in view the averments urged in the original application. Meanwhile, the 4th respondent through the 6th respondent passed the impugned order in appeal dated 15.6.05 modifying the original order of the appellate authority imposing the penalty of reduction of pay of the applicant for a period of one year to that of dismissal from service.

7 The applicant challenged the aforesaid orders on various grounds. He has submitted that Rule 27(2) of the CCS (CCA) Rules which allows enhancement of penalty imposed upon an employee

provided that *"the appellate authority shall make such orders as it may deed fit after the appellant has been given a reasonable opportunity of making representation against the proposed penalty"*. Thus what is envisaged in Rule 27(2) is that the Appellate Authority has to first of all formulate a proposal to impose a particular penalty as listed in Rule 11 (ibid) which is atleast one higher than the penalty already imposed upon the charged official by the Disciplinary authority and inform the same to him and to afford him sufficient opportunity to make his representation against the said "proposed penalty". In the Annexure.A8 show cause notice there is no mention of any "proposed penalty" sought to be imposed on the applicant and as such the Annexure.A8 show cause notice is vitiated and unsustainable in the eyes of law. Further, the Annexure.A13 Order-in-appeal dated 15.6.05 imposing the penalty of dismissal from service amounts to double jeopardy as the applicant had already suffered punishment/penalty in full imposed upon him by the disciplinary authority and that for a period of 15 years he has been denied all service benefits due to him including promotion and annual increments. After the completion of the punishment period and after having suffered punishment in full the applicant was granted his next increment and pay fixation and the appeal itself has become infructuous and making it alive by the Respondents by invoking the powers under Rule Rule 27(2) of the CCS (CCA) Rules is in violation of the constitutional provisions contained in Article 20(2) which

prevents a person being punished twice for the same offence. It was also the contention of the applicant that the directions of this Tribunal in the orders in OA 208/05 dated 11.8.03 to supply him the required official documents sought by him within a period of four weeks was not complied with in time and it was only after lapse of six months the relevant documents were supplied to him. Therefore, the applicant contend that the proceedings pending against him stood abated due to efflux of time. The whole circumstances and the various events commencing from the submission of the appeal go to show that the action of the respondents are vitiated and it is hit by inordinate laches and, therefore, it deserves to be interfered with. The Additional Collector of Customs Mr.D.S.Karant who was holding the charge as HOO at Mangalore at the time of the alleged incidents in 1990 and who was also proceeded against by the department was also found guilty and punishment awarded. However, the punishment awarded to him was stayed by the Bombay Bench of the Tribunal and, therefore, he did not undergo any punishment and he got all his due promotions, whereas the applicant had undergone the punishment in full and was denied all the promotions due to him and thereby the applicant had been clearly discriminated against Mr.D.S.Karant at the instigation of the vested interests. The appellate authority has not examined the evidence in the case and circumstances in its correct perspective. The disciplinary authority has not taken into account the imposition of a lesser penalty, nor had

any equitable principles been followed in imposing a lesser penalty on the applicant.

8 The counsel for the applicant has relied upon the following judgments in support of his contentions:

1 Ram Chander Vs. Union of India and others , AIR 1986 SC 1173

2 Narayanankutty Vs. State of Kerala, 1999(2) KLT 172

3 S.K.Chatterjee Vs. Union of India, and others 1986(2)SLR 513

4 Senior Supdt. RMS Division Cochin Vs. Raghavan, 1984 KLT 145

5 State of Punjab and others Vs.Chamanlal Goyal, (1995) 2 SCC 570

6 Abdul Rehman Antulay and others Vs. R.S.Nayak and another, (1992) 1 SCC 225

9 In the case of Ram Chander (supra) the Apex Court was considering the question whether the order passed by the Railway Board dismissing the appeal preferred by the appellant was not in conformity with the requirements of Rule 22 (2) of the Railway Servants (Discipline & Appeal) Rules, 1968 which is in pari materia with Rule 27(2) of the CCS (CCA) Rules, 1965. In that case, in terms of Rule 22(2) of the Railway Servants (Discipline and Appeal), Rules, 1968, the Railway Board has considered the appeal of the petitioner against the orders of the General Manager, Northern Railway, New Delhi imposing on him the penalty of removal from service and have observed that by the evidence on record, the findings of the

disciplinary authority was warranted and the penalty of removal from service imposed on him was merited. The Apex Court has allowed the appeal mainly on the ground that the aforesaid appellate order was just a mechanical reproduction of the phraseology of Rule 22(2) of the Railway Servants (Discipline and Appeal) Rules without any attempt on the part of the Railway Board either to marshel the evidence on record with a view to decide whether the findings arrived at by the disciplinary authority could be sustained or not. The Apex Court has further held that after the constitutional change brought about with the judgment of the Apex Court in **Union of India and another Vs. Tulsiram Patel and connected cases, (1985) 3 SCC, 398,** the only stage at which now a civil servant can exercise his valuable right is by invoking his remedy by way of departmental appeal or revision or by way of a judicial review. Such being the legal position, it is of utmost importance after the 42nd amendment as interpreted by the majority in Tulsiram Patel's case (supra) that the appellate authority must not only give a hearing to the government servant concerned but also pass a reasoned order dealing with the contentions raised by him in the appeal. The Apex Court has therefore directed the Railway Board to hear and dispose of the appeal after affording a personal hearing to the appellant on merits and pass a reasoned order in conformity with the requirements of Rule 22(2) of the Railway Servants (Discipline and Appeal)Rules, 1968.

10 In Narayanankutty's case (supra) the disciplinary authority has imposed the penalty of recovery of an amount of Rs. 1732/- from the petitioner. That was appealed against by the petitioner. While the appeal was being considered, the respondents enhanced the penalty by imposing on him under Rue l31(2)(e) of the Kerala Civil Services (Classification,Control and Appeal) Rules after an opportunity was given as provided in the proviso to the said rule. After considering the explanation confirming the punishment already proposed, the respondents also ordered that the next two increments of the petitioner would be barred with cumulative effect. The effect of the appellate authority is that two penalties are imposed. The Hon'ble High Court of Kerala in the aforesaid circumstances partly allowed the petition with the liberty to the respondents to consider imposition of an enhanced penalty in accordance with law, if they wish so.

11 In the case of Senior Supdt. RMS Division,Cochin (supra) a similar view was taken by the Hon'ble High Court of Kerala and held as under:

> "When an employee who is evidently aggrieved by the imposition of a minor penalty files an appeal, if the appellate authority seeks to invoke his power to alter the punishment into a major penalty necessarily the employee has to be heard as to what he has to say on the proposal for major penalty. That is a fundamental requirement of rules of natural justice. It would be thoroughly unfair to such an employee to be told in his Appeal that not only he does not succeed in his appeal but he is visited with the serious consequences of imposition of a major penalty. No doubt the power to enhance penalty is reserved by the rule in the appellate authority. But the exercise of that

power must be be fair, honest and equitable. The procedure adopted by the authority should not offend principles of natural justice. In fact the second clause to proviso to Rule27(2) did not provide for such an opportunity as it stood at the time Ext.P.7 was passed. But it was amended sometime prior to the passing of Ext.P.10 order. Perhaps that was by reason of the 42nd Amendment of the Constitution taking away the right of second opportunity under Article 311 of the Constitution. We are not really concerned with such an opportunity here. We are not speaking of constitutional guarantee of opportunity,. Every rule has to be read as a reasonable and fair rule if such reading will not be opposed to the plain language of the rule. So long as there is no indication that without hearing the party aggrieved the punishment can be changed from a minor to major one we should readily notice it as a requirement of a natural justice inbuilt in the rule. The need for such a construction is more than illustrated by the situation with which we are faced in this case."

12 In S.K.Chatterjee's case (supra) the Calcutta Bench of this Tribunal allowed the OA on the ground that the reviewing authority has enhanced the punishment with a closed mind. On the one hand the reviewing authority regarded the punishment was inadequate in view of the gravity of the offence but he did not say a single word as to why he considered the offence to be grave, when the disciplinary authority thought that the applicant was only technically responsible nor did he say a word about the alleged manipulation of entry from which the applicant was totally exonerated. The Bench held that a justifiable reason from the reviewing authority is expected when he differ from the disciplinary authority.

13 The case of State of Punjab Vs.Chamanlal Goyal (supra)

and A.R.Antulay Vs. R.S.Nayak (supra) relied upon by the counsel for the applicant are on the question of delay. He has relied upon the first part of para 9 of the judgment in Chamanlal Goyal's case wherein the Hon'ble Supreme has held as under:

> "Now remains the question of delay. There is undoubtedly a delay of five and a half years in serving the charges. The question is whether the said delay warranted the quashing of charges in this case. It is trite to say that such disciplinary proceedings must be conducted soon after the irregularities are committed or soon after discovering the irregularities. They cannot be initiated after lapse of considerable time. It would not be fair to the delinquent officer. Such delay also makes the task of proving the charges difficult and is thus not also in the interest of administration. Delayed initiation of proceedings is bound to give room for allegations of bias, malafides and misuse of power. If the delay is too long and is unexplained, the court may well interfere and quash the charges."

13 In the case of A.R.Antulay (supra) the Hon'ble Supreme Court has of course held that "right to speedy trial flowing from Art.21 emcomapsses all the stages,namely, the stage of investigation, inquiry, appeal, revision and re-trial."

14 The respondents in their reply submitted that since serious charges were proved against the applicant, it was decided to review the order passed by the disciplinary authority. Accordingly, Annexure.A8 show cause notice was issued to the applicant by the competent authority calling upon him to explain as to why the penalty imposed upon him as per Annexure.A3 Order-in-Original dated 10.5.2000 shall not be revised under Rule 27(2) of the CCS (CCA) Rules, 1965 to enhance the penalty by way of consideration of his

appeal. The respondents denied the contention of the applicant that it was due to the withholding of some documents by the respondents that the applicant was not able to give reply to the show cause notice and was constrained to move this Tribunal in OA 208/02. After the issuance of the show cause notice dated 20.12.2001, the applicant vide his letter dated 17.1.2002 requested for extension of one month's time to submit his reply and the same was granted. He further requested vide letter dated 18.2.2002 for extension of two month's on the ground that his own case records entrusted with his advocate got misplaced because of the shifting of the advocate's office and this request was also acceded to. The applicant then filed a third representation dated 28.2.2002 in which he, for the first time, asked for copies of some documents pertaining to his case and he was informed that those documents could not be supplied to him since the same pertains to some other office. Then the applicant moved this Tribunal in OA 208/02 to get those documents. The respondents have also submitted that it was not only the applicant who has been penalized but Shri D.S.Karanth the other charged officer was also imposed with penalty of reduction in rank. It was also submitted that when the applicant approached this Tribunal vide OA 494/05 he had furnished wrong information with regard to the stage of the proceedings. Actually by that time the Hon'ble President of India had already passed the order of dismissal on 15.6.05.

15 In reply to the grounds taken by the applicant, the

respondents have submitted that Proviso (iii) to Rule 27(2) of CCS (CCA)Rules, 1965 stipulates that *"if the enhanced penalty which the appellate authority proposes to impose is one of the penalty specified in Clauses (v) to (ix) of Rule 11, the Appellate Authority shall make such orders as it may deem fit provided the appellant has been given reasonable opportunity for making representation against the proposed penalty."* The applicant was given reasonable opportunity to show cause as to why the penalty imposed on him vide order in original dated 10.5.2000 by the Commissioner of Customs shall not be revised by way of enhancement in terms of Rule 27(2) of the CCS (CCA) Rules, 1965 and this would cover all major penalties commencing with dismissal. The respondents have also denied that the punishment of dismissal from service imposed by the President of India on the applicant amounts to double jeopardy. The appeal preferred by the applicant against the Order-in-Original dated 10.5.2000 was duly considered. The appellate authority found that the disciplinary authority had shown leniency in the case of awarding the lesser penalty and that the proved elements of charge are grave enough to warrant imposition of a deterrent penalty commensurate with the offence committed. The respondents have also submitted that as per para 6(iv) of the order dated 11.8.2002 of this Tribunal in OA 208/02, the respondents were directed to have two weeks time to submit his explanation/representation regarding the proposal for enhancement of the penalty from the date of receipt of the copies of

the documents and as such the applicant was given 15 days time to submit his representation. The respondents have also denied any deliberate attempt on the part of the respondents to delay the proceedings.

16 The applicant filed a rejoinder reiterating the various grounds taken by him in the original application. The respondents have also filed an Additional Reply Statement defending their action against the applicant.

17 We have heard Shri N.N.Sugunaplan, Senior Advocate for the applicant and Shri TPM Ibrahim Khan, Sr.CGSC for the respondents. We are called upon to consider mainly the validity of Annexure.A8 show cause notice dated 20.12.01 and the Annexure.A13 Order-in -Appeal dated 15.6.2005 modifying the order of the disciplinary authority thereby dismissing the applicant from service. Even though Annexure.A13 Order was issued after considering the appeal filed by the applicant dated 25.5.2000 (A4) against the order of the disciplinary authority dated 10.5.2000 (A3) imposing the punishment of reduction to a lower stage in the time scale of pay for a period of one year, the same has not been challenged by the applicant on the ground that he has already suffered the said punishment and with the efflux of time the appeal itself has become infructuous as there was a delay of nearly five years in passing the appellate order dated 15.6.2005 on his appeal dated 25.5.2000.

18 In the above conspectus of the case the main questions

to be decided are :

(i) whether the impugned Annexure.A13 Order-in-appeal dated 15.6.2005 has been passed in contravention of proviso (iii) of Rule 27(2)of the CCS (CCA) Rules, 1965.

(ii)whether the impugned Annexure.A13 Order-in- Appeal dated 15.6.2005 amounts to double jeopardy which is against the constitutional protection n guaranteed under Article 20(2) of the Constitution, and

(iii) whether there was any inordinate delay in passing the impugned Annexure.A13 Order-in-Appeal dated 15.6.2005 by the Appellate Authority to warrant its quashing.

19 Rule 27 of the CCS (CCA) Rules, 1965 prescribes the manner the Appellate Authority has to consider the appeals against the order of suspension, order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said Rules and the appeal against any other order specified in Rule 23 and to make such orders as it may deem fit. We shall extract Rule 27 below:

> "27. **Consideration of appeal:** (1) in the case of an appeal against an order of suspension, the Appellate Authority shall consider whether int eh light of the provisions of Rule 10 and having regard to the circumstances of the case, the order of suspension is justified or not and confirm or revoke the order accordingly.

(2)In the case of an appeal against an order imposing any of the penalties specified in Rule 11 or enhancing any penalty imposed under the said rules, the Appellate Authority shall consider--

(a) whether the procedure laid down in these rules has been complied with and if not, whether such non-compliance has resulted in the violation of any provisions of the Constitution of India or in the failure of justice;

(b) whether the findings of the Disciplinary Authority are warranted by the evidence on the record; and

(c)whether the penalty or the enhanced penalty imposed is adequate, inadequate or severe;

and pass orders–

(i)confirming, enhancing, reducing, or setting side the penalty;

or

(ii)remitting the case to the authority which imposed or enhanced the penalty or to any other Authority with such direction as it may deem fit in the circumstances of these cases.

Provided that--

(i)The Commission shall be consulted in all cases where such consultation is necessary.

(ii)If such enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in Clauses (v) to (ix) of Rule 11 and an inquiry under Rule 14 has not already been held in the case, the Appellate Authority shall, subject tot he provisions of Rule 19, itself hold such inquiry or direct that such inquiry be held in accordance with the provisions of Rule 14 and thereafter, on a consideration of the proceedings of such inquiry and make such orders as it may deem fit;

(iii)if the enhanced penalty which the Appellate Authority proposes to impose is one of the penalties specified in Clauses (v) to (ix) of Rule 11 and an inquiry under Rule 14 has been held in the case, the Appellate Authority shall make such orders as it may deem fit after the appellant has been given a reasonable opportunity of making a representation against the proposed penalty; and

(iv)no order imposing an enhanced penalty shall be made in any other case unless the appellant has

been given a reasonable opportunity, as far as may be in accordance with the provisions of Rule 14, of making a representation against such enhanced penalty.

(d) In an appeal against any other order specified in Rule 23, the Appellate Authority shall consider all the circumstances of the case and make such orders as it may deem just and equitable.

20 We find merit in the allegation of the applicant that the Appellate Authority has passed the impugned Annexure.A13 order dismissing him from service in violation of proviso (iii) of Rule 27(2) of the CCS (CCA) Rules, 1965 . According to Rule 27(2), it is incumbent upon the Appellate Authority to consider the appeal against an order imposing any of the penalties specified in Rule 11 to see whether the penalty imposed is adequate, inadequate and severe. If in the opinion of the Appellate Authority, the order imposing the penalty is inadequate, he shall pass orders enhancing the penalty already imposed but after meeting the conditions prescribed in the provisos (i) to (iv) of the Rule. The first proviso envisages that the Commission shall be consulted in all cases where such consultation is necessary. Provisos (ii) and (iii) envisage the formulation of the "proposed penalty" before it is actually imposed upon the government servant. According to the proviso (ii), if the enhanced penalty so proposed by he Appellate Authority is one of the penalties specified in Clause (v) to (ix) of Rule 11 and inquiry under Rule 14 has not already been held, after holding the inquiry in accordance with the provisions contained in Rule 14, such enhanced

penalty can be imposed on consideration of the proceedings of such inquiry. The proviso (iii) is applicable in the case where inquiry under Rule 14 has already been held and the Appellate Authority may pass any order of enhanced penalty after the appellant was given an opportunity of making a representation against the 'proposed penalty". Such an opportunity for making a representation is, of course, by issuing a show cause notice proposing to enhance the penalty to one of the penalties specified in Clauses (v) to (ix) of Rule 11. In other words the Appellate Authority has to specify which one of the 5 penalties listed in clauses (v) to (ix) in Rule 11, he proposes to impose upon the government servant. This is a specific requirement of Rule 27(2)(iii) as the Disciplinary Authority, under Rule 15(4), had already considered the findings on all or any of the articles of charges and on the basis of the evidence adduced during the inquiry and imposed one of the penalties specified in clauses (v) to (ix) of Rule 11 on the government servant and the appeal made by the government servants was against that specific penalty so imposed on him. When the Appellate Authority under Rule 27(2)(iii) is proposing to enhance the penalty after due consideration of the appeal and coming to a tentative conclusion that the penalty imposed on the government servant is inadequate and going to impose a more severe one, the government servant ought to know which penalty it was proposing to impose on him by way of enhancement so that he can make an appropriate representation against such

proposed penalty. Once such a representation is received on the proposed enhanced penalty, the Appellate Authority has to consider it before making such orders it may deem fit. On consideration of the representation, the Appellate Authority may be convinced not to enhance the punishment at all as proposed or not to enhance the penalty to the proposed one. However, if the Appellate Authority is convinced that the penalty proposed by him is the appropriate penalty to be imposed upon the government servant, it may make such orders enhancing the penalty. Thus in terms of the 3rd and 4th proviso, it is a condition precedent that the Appellate Authority shall arrive at a tentative proposal as regards the penalty proposed to be enhanced and it shall inform such proposed penalty to the government servant and give him a reasonable opportunity of making a representation against it. Till that stage, the proposed penalty is merely provisional. However, the contention of the Respondent is that by issuing a notice to show cause as to why the penalty imposed upon the applicant by the disciplinary authority should not be revised by way of enhancement, the requirement of Rule 27(2)(ii) of the CCS (CCA) Rules, 1965 will be met and such a notice would cover all penalties specified in clauses (v) to(ix) of Rule 11 and the proposed penalty is not to be specified. This contention of the Respondents is contrary to the provision of the aforesaid rule and therefore, the same is rejected. As held by the Apex Court in **Bhavnagar University Vs. Palitana Sugar Mills (P) Ltd and**

others, (2003) 2 SCC 111 *"when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof."*

21 Before we part with this issue, we would trace back certain constitutional and other statutory developments regrading opportunity to be afforded to a government servant on the proposed penalty. It was with the (Fifteenth Amendment) Act, 1963, the provision to grant a reasonable opportunity of making a representation on the penalty proposed was incorporated in Article 311(2) of the Constitution. Article 311(2) of the Constitution as originally enacted was in the following terms:

> 311 *Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or State:-*
> (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
> (2)No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:
> Provided that this clause shall not apply–
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction or a criminal charge;
> (b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause; or
> (c) where the President or Governor or

Rajpramukh, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give to that person such an opportunity.

(3)If any question arises whether it is reasonably practicable to give to any person an opportunity of showing cause under Clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank, as the case may be, shall be final.

22 By the Constitution (Fifteenth Amendment) Act, 1963, Clause (2) of the Article 311 was substituted by the following clause:

(2)No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry;

Provided that this clause shall not apply–

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction or a criminal charge;

(b) where an authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or;

(c)where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

23 However, the Constitution (forty-second amendment) Act, 1976 made further amendment to Clause 2 of Art.311 and the provisions to grant opportunity of making representations on the penalty imposed was withdrawn. The amended clause reads as

under:

> 311 *Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or State*:-
> (1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.
> (2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges':
>
> Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed.
>
> Provided further that this clause shall not apply--
>
> (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction or a criminal charge;
>
> (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
>
> (c)where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

24 As held by the Apex Court in **Khem Chand V. Union of India AIR 1958 SC 300** before the 42nd amendment the government servants enjoyed the reasonable opportunity which included:

> (a) an opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based.
>
> (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and finally

(c)an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the inquiry is over and after applying his mind to the gravity or otherwise of the charges proved against the government servant tentatively proposes to inflict one of the three punishments and communicates the same to the government servant.

25 With the 42nd amendment, the requirement of Clause (2) of Article 311 to give a reasonable opportunity of making representation on the proposed penalty to be given to a government servant was deleted and in its place the first proviso was inserted, which expressly provides that it is not necessary to give a delinquent government servant any opportunity of making representation on the proposed penalty. With the amendment of Clause 2 of Art.311 of the Constitution and the consequential change brought about in Rule 15 (4) of the CCS (CCA) Rules, 1965, it is no longer necessary to afford a second opportunity to the delinquent servant to show cause against the punishment. The said Amendment deleted Clause (2) of Art.311 the requirement of a reasonable opportunity of making representation on the proposed penalty and, further, it has been expressly provided inter alia in the first proviso to cl.(2) that "provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed." Now the requirement of Cl.(2) of Article 311 will

be satisfied by holding an inquiry in which the Government servant has been informed of the charges against him and given a reasonable opportunity of being heard. But the safeguard earlier available for showing his innocence at the second stage ie., after the disciplinary authority has come to a tentative conclusion of guilt upon a perusal of findings reached by the Inquiry Officer on the basis of the evidence adduced, as also against the proposed punishment, has been removed. In view of the said amendment of Art. 311(2) of the Constitution. Rule 15(4) of the CCS (CCA) Rules, 1965 has been substituted to bring it in conformity with Cl.(2) of Art.311, as amended. R.15(4) as substituted provides as follows:

> "15(4). If the disciplinary authority, having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry, is of the opinion that any of the penalties specified in clauses (v) to (ix) of Rule 11 should be imposed on the government servant, it shall make an order imposing such penalty and it shall not be necessary to give the government servant any opportunity of making representation on the penalty proposed to be imposed:
>
> Provided that in every case where it is necessary to consult the Commission, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making an order imposing any such penalty on the railway servant.

26 In Union of India **V. Tulsiram Patel(1985) 3 SCC 398: (AIR 1985 SC 1416)**, a five Judge Bench by a majority of 4:1 held that after the 42nd amendment, the requirement of Clause .2 of Article 311 of the Constitution will be satisfied by holding an inquiry in which the government servant has been informed of the charges against

him and given a reasonable opportunity of being heard. The right to make a representation on the proposed penalty is no more available to a Government servant.

27 However, Rule 27 of the CCS (CCA)Rules, 1965 and other Rules which are in pari materia with the said Rules remained untouched by the 42nd Amendment Act, 1976.

28 Next we shall consider the second question whether the impugned Annexure.A13 Order-in-Appeal dated 15.6.05 amounts to double jeopardy. According to the scheme of CCS (CCA)Rules, 1965, all orders passed under Rules 10,15,16,19 and 21 will come into force with immediate effect. Appeals can be preferred against these orders under Rule 25 (ibid) within the statutory period of 45 days. However, there are no provisions under the Rules to keep the penalty orders in abeyance during the pendency of the appeal. Therefore, the government servants start suffering from the impacts of penalty order immediately from the date of the order of the disciplinary authority. Though there is a statutory limitation for the government servants for preferring the appeal, yet there is no such corresponding provision binding the appellate authority to consider those appeals and dispose them of in accordance with the rules within a definite time frame. Only there are certain executive instructions which have been issued urging the appellate authorities for the early disposal of the appeals often with little effect on them. The minor penalties (i) to (iv)and major penalties (v)to (vi) specified in

Rule 11 have their respective period of currency. The major penalties at (vii), (viii) and (ix) of the said rules, namely, compulsory retirement, removal from service and dismissal from service brings the service of a government employee to an end instantly. In the present case, the Order of the disciplinary authority imposing the punishment of reduction to a lower stage in the time scale of pay for a period of one year commenced from its date of issue ie., 10.5.2000. The applicant preferred the statutory appeal within the stipulated limitation period on 25.5.2000. It was expected of the appellate authority to consider the appeal in accordance with the rules and to pass an appropriate order within a reasonable time. When it is binding on the government servant to make the appeal within the statutory limitation of 45 days, the reasonable period within which the appellate authority to dispose it of, by passing an appropriate order is also cannot be an unduly long period. However, the show cause notice under Rule 27(2) of the CCS (CCA) Rules, 1965 to enhance the penalty by way of consideration of his appeal has been issued only on 20.12.2001 which is after nearly one and half years of passing the disciplinary authority's order dated 10.5.2000 and the appeal made by the applicant on 25.5.2000. By this time the currency of the penalty imposed by the disciplinary authority on 10.5.2000 has already been over after its expiry of one year on 10.5.2001. Once the penalty imposed on the government servant has already been suffered by him and it ceased to be in

operation after the expiry of the period of its currency, it cannot be said that the very same penalty has been enhanced. In order to impose an enhanced penalty, the lesser penalty imposed on the government servant should have been subsisting. In the absence of any such lesser penalty subsisting, a more severe penalty imposed upon the government servant by way of enhancement can only be considered as a second penalty for the same charge which is in violation of the Fundamental Right guaranteed to a person as contained in clause (2) of Article 20, which reads thus:

> "No person shall be prosecuted and punished for the same offence more than once."

29 As regards the delay is concerned, it has to be seen on the touch stone of prejudice it would cause to the applicant. As observed earlier, even though there is a statutory limitation period for the Government employee to make an appeal against the orders of the disciplinary authority, no such corresponding period of limitation has been incorporated in the rules for the appellate authority to consider and dispose of the appeal in accordance with rules. When the order of the appellate authority is to reduce or set aside the penalty imposed by the disciplinary authority, even if the appellate order is a delayed one, the prejudice that would cause to the government servant would be minimal. However, if the delayed order of the appellate authority is confirming or enhancing the penalty or remitting the case to the authority which imposed or enhanced the

penalty, such orders would cause great prejudice to the government servant adversely affecting his future career itself. In the present case, the show cause notice itself was issued after a period of one and half years after the appeal has been preferred by the government servant and the final order was issued after nearly five years. The currency of the period of penalty imposed by the disciplinary Authority had expired much before the date on which the said show cause notice was issued. No reason whatsoever has been given by the respondents for such an inordinate delay in issuing the show cause notice. Though there were reasons for the delay occurred in passing the appellate order after the issuance of the show cause notice till the representation has been received, there is again no reason which explained the undue delay of one year four months that occurred in considering the said reply to the show cause notice before the impugned order dated 15.6.2005 enhancing the penalty and dismissing the applicant was issued. Therefore, there is no denial of the fact that great prejudice has been caused to the applicant warranting interference of this Tribunal.

30 As regards other contentions raised by the applicant, in view of the submissions made by the respondents, it is not necessary to go into them. However, we note that the disciplinary proceedings initiated against the co-delinquent Shri D.S.Karant have also abated which entitled him for all the consequential benefits.

31 In view of the above discussion, we are of the considered

opinion that this OA should be allowed and we order accordingly. Consequently the impugned Annexure.A8 show cause notice and the Annexure.A13 Order-in-Appeal dismissing the Applicant from service are quashed and set aside. The applicant shall be re-instated in service with all consequential benefits within a period of two months from the date of receipt of this order. However, in the facts and circumstances of the case, there shall be no order as to costs.

Dated this the 3rd day of July, 2006

GEORGE PARACKEN
JUDICIAL MEMBER

SATHI NAIR
VICE CHAIRMAN

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