CENTRAL ADMINISTRATVE TRIBUNAL
MUMBAI BENCH

ORIGINAL APPLICATION NO.1062 OF 1999

Date of Decision: 27/5/2004

D.S.Karant - Applicants

Shri G.K.Masand - Advocate for the Applicant

Versus

Union of India & 2 others - Respondents

Shri V.S.Masurkar - Advocate for the Respondents

CORAM:
Hon'ble Shri Anand Kumar Bhatt - Member (A)
Hon'ble Shri S.G.Deshmukh - Member (J)

(i) To be referred to the reported or not?

(ii) Whether it needs to be circulated to other Benches of the Tribunal?

(iii) Library.

(Anand Kumar Bhatt
Member (A)

mf

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
BOMBAY BENCH, MUMBAI.

ORIGINAL APPLICATION NO.1062/1999

Dated: 27/5/2004

Hon'ble Shri Anand Kumar Bhatt, Member (A),
Hon'ble Shri S.G.Deshmukh, Member (J).

D.S.Karant,
Additional Director General of Inspection,
Customs and Central Excise,
West Regional Unit, Transport House,
Poona Street,
Masjid (East),
Mumbai - 400 009. ...Applicant.
(By Advocate Shri G.K.Masand)

Vs.

1. Union of India through
   The Secretary
   Department of Revenue,
   Ministry of Finance,
   North Block,
   New Delhi - 110 001.

2. Chairman,
   Central Board of Excise & Customs,
   North Block,
   New Delhi - 110 001.

3. Secretary
   Union Public Service Commission,
   Dholpur House,
   Shahjahan Road,
   New Delhi - 110 011. ...Respondents.
(By Advocate Shri V.S.Masurkar)

: O R D E R :

{Anand Kumar Bhatt, Member (A)}

The applicant is a 1969 batch I.R.S. Officer. In 1986 he was promoted as Additional Commissioner and was posted at the relevant time as Additional Commissioner of Customs, Mangalore. According to the applicant, an information was received by one Shri K.A.Nayar, Appraising Officer that an Arab Dhow carrying 8 M.Ts of contraband silver had left Dubai on 9.12.1990 and was *en route* to Mangalore. DRI-I i.e. information Report in regard to

...2.

that was sent to Collector of Customs, Bangalore. The Arab Dhow was intercepted on the high seas on the night of 17/18th December, 1990. The informer was entitled to a reward of Rs.1000/- per kg of silver seized and therefore, Nayar vide his letter dt. 8.3.1991 to the applicant requested to recommend the reward to the Informer. The applicant recommended to the Collector of Customs, Bangalore for disbursal of Rs.87,77,000/- to the Informer. After the issue of this letter dt. 22.3.1991, the applicant was issued a charge sheet dt. 7.8.1995. The following were the Articles of Charge :

> "Article - I : The seizure of smuggled silver on 17/18.12.1990 was not based on any prior information received by Shri Nayar and that no such informer existed. The Informer was fictitious and had these facts not come to light in the enquiry subsequently conducted, reward of Rs.87 lakhs would have been disbursed to a non-existent informer. The applicant had "actively connived and helped" Shri Nayar in planting a non-existing informer with a malafide intention of appropriating the aforesaid reward amount.
>
> Article - II : During the period in question, the applicant failed to discharge his official duties as a senior supervisory officer, inasmuch as, while there was a regular establishment with an Assistant Collector and many other officers to look after the preventive and anti-smuggling activities in Mangalore, the applicant had authorised Shri Nayar, who was an Appraiser, to do preventive and anti-smuggling work, by passing the regular preventive unit. He had, thereby, "constituted" "an extra-legal and parallel establishment", "dislocating the normal functioning of the Custom House', leading to "circumstances wherein an attempt was made to plant a false informer?"

An inquiry was conducted. The Inquiry Officer held Charge No.I against the applicant as proved and Charge No.II as not proved. On 24.7.1997 a show cause notice was issued to the applicant in the name of the Hon'ble President of India that on the basis of pre-ponderance of probabilities, Charge No.II appears to be

...3.

established. The applicant was required to show cause as to why I.Os. Report in respect of Article - II be not dis-agreed with. The applicant gave a reply to the show cause notice. The reliance was placed by the Enquiry Officer, inter alia, on no mention of the seizure effected on the basis specific information in the Telex Message sent by the applicant on 18.12.1990, and manipulation in the despatch register. Both have been rebutted by the applicant as not implicating the applicant. The applicant also questioned the probable assumption that there are adequate reasons to believe that the reference to prior information related to the letter of DRI dt. 14.12.1990 (Annexure - A-27).

2. The applicant has further stated that in the writ petition filed by Dayananda Bangera the informer, the respondents suppressed the instructions issued by Department of Personnel & Training (for short, DOPT) which directed that once the case is taken up by CBI for investigation, a parallel investigation by the Administrative Ministry/Departmental Organisation should be avoided. It was only on the basis of such mis-representation that Karnataka High Court directed that the inquiry conducted by the CBI would not come in the way of the Disciplinary Proceedings conducted against the delinquent officer. The applicant filed OA No.232/96 before the Tribunal praying that he should be promoted as Commissioner w.e.f. 29.4.1990. The said OA was allowed on 4.6.1998 and the respondents were directed to promote the applicant to the Commissioner's grade as recommended by the Review DPC held in September, 1995. In compliance with the said Judgment, the applicant was promoted vide order dt. 19.5.1990. The applicant filed another OA (viz. OA No.451/99) in the Tribunal praying, inter alia, that the Disciplinary Authority

...4.

(for short, DA) be directed to grant the applicant an opportunity of personal hearing and the Tribunal disposed of the OA on 7.6.1999 saying that the matter relating to personal hearing be decided by the DA as per Rules. It was further directed that the DA shall dispose of the disciplinary case against the applicant expeditiously preferably within a period of four months from the date of receipt of the order of the Tribunal. The applicant in a representation addressed to the Hon'ble Finance Minister on 8.6.1999 and a Memorial to the Hon'ble President of India on 10.9.1999 reiterated his request for an opportunity of personal hearing. On 15.10.1999, the punishment order was passed imposing the penalty of reduction to the lower post in the grade of Rs.10,000-15,200 for an un-specified period till he was found fit for promotion to the higher post. The applicant states that the advice of the UPSC was made available to the applicant for the first time as an Annexure to the punishment order dt. 15.10.1999. The applicant states that a bare reading of the order reveals that it has reproduced the findings of the UPSC without any independent application of mind. The applicant challenged the order of the Tribunal dt. 7.6.1999 in OA 451/1999 before the Bombay High Court in Writ Petition No.1631/99. After the order of punishment was received by the applicant, the applicant moved Notice of Motion No.313/99 praying that the operation of the said order dt. 15.10.1999 be stayed. On 25.10.1999 the Hon'ble Bombay High Court directed that the order of 15.10.1999 be stayed pending further orders. On 3.12.1999, the said Writ Petition No.1631/99 was dismissed as withdrawn with liberty to the applicant to move the Tribunal against the order dt. 15.10.1999.

...5.

The ad-interim stay already granted by the High Court was directed to be continued for a further period of four weeks.

3. The grounds taken by the applicant in the said OA (1062/99) is that the impugned order is violative of principles of natural justice as the copy of the advice of UPSC which was obtained behind the back of the applicant was not made available to the applicant prior to the passing of the impugned order which has been passed without any application of mind. In the order dt. 15.10.1999 reply filed by the applicant has not been discussed. He stated that inspite of the request by the applicant, the denial of opportunity of personal hearing vitiates the entire proceedings. He relies on the decision of the Supreme Court in Yoginath Bagde. The applicant has further contended that the event had taken place in 1990 and charge sheet was issued in 1995 which is highly belated. In view of the informer himself approaching the Karnataka High Court for the reward money, no charge could be sustained against the applicant. He has also stressed the point that K.A. Nayar who is the prime delinquent as per the Memorandum of Charges issued to the applicant, as well as, to K.A.Nayar, has been imposed a lesser punishment of reduction to a lower stage in the same time scale of pay for a period of one year without cumulative effect, whereas, the punishment imposed upon the applicant is reduction by three stages from the post of Commissioner carrying pay scale of Rs.18,400-23,400 to that of Dy. Commissioner in the Grade of Rs.10,000-15,200 for an unspecified period. Whereas, the applicant was denied personal hearing, the same was granted to K.A.Nayar the main delinquent. OA No.1062/99 was disposed of on 27.2.2001. The Tribunal directed that the Review

...6.

Petition of the applicant filed under Rule 29A of CCS (CCA) Rules, 1965 filed on 9.3.2000 be decided by the Competent Authority within four months from the date of communication of the Tribunal's order and the Competent Authority shall take into consideration the points raised in the R.P. and also the observation made by the Tribunal in the said order. The Tribunal made a reference to the contention of the applicant regarding the ratio laid down by the Apex Court in Yoginath D.Bagde Vs. State of Maharashtra & Anr. {1999 (2) SC SLJ 324} on the question of giving an opportunity of hearing to the delinquent officer in case DA gives an order different from those of the Inquiry Officer being violative of the principles of natural justice and State Bank of India & Ors. Vs. D.C. Aggarwal {1993 SCC (L&S) 109} relating to essentiality of supply of the report of CVC to the delinquent officer. It was further directed by the Tribunal that the applicant shall be given an opportunity of being heard before decision is taken on the R.P. and maintenance of status quo in respect of service of the applicant till then. The applicant was given the liberty to file a fresh OA in case he was aggrieved by the decision in the said Review Petition. On M.P. 677/2001 filed by him, the Tribunal held that 'sealed cover procedure' be followed in case any DPC meeting is held before the expiry of period of one month stipulated as above for taking decision on the Review Petition. The Review Petition was rejected by the Competent Authority in the name of the President vide order dt. 31.12.2001. The applicant challenged the said order in OA No.48/2002 in which order was passed by the Tribunal

...7.

on 11.4.2002. In the said order, the Tribunal found that the order passed in M.P. Nos. 677/2001 and 852/2001 in OA N.1062/99 on 5.12.2001 has the effect of abating the disciplinary proceedings in case the Review Petition has not been decided in one month's time as stipulated. The Tribunal also found that there was no M.P. for seeking extension of time before the expiry of one month from 5.12.2001 or during the course of hearing of the argument. Only an oral request was made by the counsel for the respondents to extend time to pass fresh orders in accordance with the order given by the Tribunal on 27.2.2001 in which direction as given regarding personal hearing. It was found that there was no general or specific authorisation by the Hon'ble Finance Minister and for personal hearing and the Review Petition was decided on the basis of the earlier personal hearing which was given by the Additional Secretary to Government of India. The Tribunal held that therefore in view of the order passed on 5.12.2001 in MP No.677/2001, disciplinary proceedings against the applicant stands abated. The matter was ultimately taken to High Court in Writ Petition No.2749/2002 in which consent minutes were passed by the High Court on 27.1.2003 by which order dt. 27.2.2001 in OA No.1062/99, dated 5.12.2001 pased in MP Nos. 677 and 852/2001 in OA No.1062/99 and order dt. 11.4.200 passed in OA No.48/2002 were set aside and OA No.1062/99 was restored to the file of the Tribunal for being heard and disposed of on merits.

4. The High Court permitted the parties to file further pleadings in 1062/99 and the applicant gave further pleadings on 1.10.2003.

5. In the additional pleadings the applicant has contended that

...8.

the DA has not considered a number of relevant documents, The circular of Directorate General of Vigilance, Customs & Central Excise dt. 14.9.1998 have directed that the DA, as well as, Appellate/Review authority are obliged to accept the advice of the CVC because of which DA has blindly and with a closed mind imposed upon the applicant the penalty, in the absence of any evidence whatsoever. He has contended that the observation that blind acceptance by the CO of DRI - I as genuine while forwarding the claim of Rs.87,00,000/on 22.3.1991 is incorrect as in his recommendation dt. 22.3.1991 to Collector he had mentioned that the advance reward may not be disbursed until DPO investigation is concluded and Board's approval obtained. The applicant states that this has not been considered by the CDI and DA. The applicant was not the Competent Authority to sanction the reward and had he not forwarded the proposal of Shri Nayar, he would have been charge sheeted for violating the departmental instructions which required advance reward to be paid to the informer immediately on seizure. The sealed cover containing the informer's thumb impression was not opened. The reward was not actually paid. The applicant has explained his absence during the period of seizure that he was in the habit of going to Bangalore every week end and it would have aroused suspicion if he had not gone as was his habit. He has stated that non-mention of specific prior information in the seizure report vide telex message dt. 18.12.1990 does not in any way reduce the veracity of the claim. The applicant has further contended that as HOD he cannot be held directly responsible for manipulation in the despatch register. Regarding finding that Shri Nayar was not given preventive work as per distribution of work, it has been

...9.

stated by the applicant that he was legally competent to exercise the powers of Collector in allocating any work to an officer subordinate to him. The huge seizure after a gap of over 5 years is itself a proof of sound and intelligent deployment of staff in the context of ground realities. The applicant has again mentioned the Apex Court ruling in the case of Yoginath Bagde (supra). The applicant has stated that the UPSC advice dt. 24.8.1998 was given to him only along with the punishment order and para 2.2 of the said advice states that the disciplinary authority tentatively decided to impose the penalty of reduction in present rank of the Charged Officer in the grade of Rs.14300-18300 (S-24) to the post of Deputy Commissioner in the revised ordinary grade of Rs.12000-16500 (S-21) to be restored to the post of additional commissioner after a period of one year. There is no justification for deviating from the tentative decision of the DA and this also shows the mechanical acceptance of UPSC advice by the DA. Regarding the finding that the Charged Officers have tailored the information of A.D., DRI which was passed on them on 14.12.1990 as their own information has been rebutted by the applicant by stating that the said letter dt. 14.12.1990 mentioned generally that on 14/15th December, 1990 an attempt will be made to land Silver and Gold in and around Kaup light House and though the area was patrolled on 14th, 15th and 16th no seizure was made. In the said letter itself the applicant had made endorsement that "we have more specific information received in this regard". The applicant has stated that the finding that it was a chance seizure is not correct and having specific prior information has been admitted by the Department in COFEPOSA case and in the criminal prosecution. The

...10

applicant states that J.P.Kaushik was not examined by the Inquiry Officer and no attempt was made to take the evidence of Bangera. The applicant has relied heavily on the discriminatory treatment meted out to the main culprit i.e. K.A.Nayar and himself. Not holding common proceedings is a procedural irregularity.

6. In the replies filed by the respondents, it has been stated that the request of the applicant for personal hearing was examined. However, as there is no provision for grant of personal hearing to the charged officer after the regular inquiry has taken place, his request was not acceded to. The writ petition filed by the alleged informer was duly considered and it was decided not take any cognizance of the writ petition unless some tangible results came. They have further stated that filing of writ petition by a person claiming himself to be the informer after a period of 9 years does not mean that the High Court has awarded the judgment in his favour. There is no provision to give copy of the UPSC advice to the charged officer before issue of the order and therefore, it was not given. The dis-agreement of the DA to part of the report of the Inquiry Officer was duly communicated to the Charged Officer. They have stated that prior to the 42nd amendment to the Constitution of India, there was a provision for second show cause notice before issue/passing final orders. However, after this amendment, this provision has been done away with. The respondents have cited the case of Ram Chander Vs. Union of India {AIR 1986 SC 1173} which relied on the majority decision in the case of Union of India Vs. Tulsiram Patel {AIR 1985 SC 1416} and have held that the only stage at

...11.

which a civil servant can exercise the said valuable right was by enforcing his remedy by way of departmental appeal or revision or by way of judicial review. The applicant is an ACC appointee and the procedure laid down for such a government servant has been duly followed. As the DA gave a notice to the applicant regarding his difference with the report of the IO, the Judgment of the Apex Court in the case of **Yoginath Bagde** (supra) cited by the applicant does not make any difference. In the case of **Chiranjilal Vs. Union of India & Ors.** {O.A. No.1744/97 before the Principal Bench of the Tribunal} decided on 22.4.1999 (FB), it has been held that non-supply of UPSC advice it pre-decisional stage is not a denial of fair hearing. As regards non-supply of copy of CVC's advice, the Respondents have stated that it is only an expression of its opinion on the material placed in the inquiry and not something which was extraneous to the material disclosed during the inquiry.

7. In the oral submissions made by Shri G.K.Masand for the applicant he pointed out that on 20.8.1990 the applicant had issued general instructions to tighten up the administration. As regards DRI information dt. 14.12.1990 (Annexure A-27) he stated that Nayar passed on specific information, whereas, the information received from DRI was general. Nayar had given the applicant note on 15.12.1990 in the morning at the Bus Stand when the applicant was leaving for Bangalore. Shri Masand said that the respondents have concluded that the seizure was accidental, Nayar did not have any prior information and the Board was going to Karwar. However, if that be the case, why Nayar was on the boat Both in the seizure report and in the press conference on

...12.

18.12.1990 it was mentioned that there was prior information. In the prosecution in one criminal case also the fact of prior information was admitted by the Department. The entire case against the applicant is based on surmises and conjunctures and it was not put across to the applicant as to what was incriminating against him. The non-supply of CVC report, as well as, the UPSC report before awarding punishment is a serious flaw in the procedure as held by the Apex Court in the case of State Bank of India & Anr. Vs. D.C.Aggarwal & Anr. {1993 SCC (L&S) 109}. He also stressed on the discriminatory punishment given to Nayar and the applicant. Shri Masand drew our attention to the circular issued by the Directorate General of Vigilance, Customs & Excise dt. 14.9.1998 (Annexure A-25) where it has been stated in para 2 that :

> " The Disciplinary Authority has to accept the advice of the CVC for imposing penalty."

He stated that the discrimination of the DA is fettered by this circular. The tentative punishment proposed by the Department was enhanced by the UPSC and DA has simply imposed the penalty using verbatim the opinion given by the UPSC. The applicant did not mechanically forward Nayar's proposal for release of reward to the informer as is clear from his letter to the Commissioner where he has stated that the recommendation was conditional on getting approval from CBDT. The actual disbursement of reward was not done. The fact of bogus informer has been presumed and such assumption can never take the place of evidence, it can only supplement it, whereas basic evidence is not there to prove the charges.

...13.

8. Shri Masand has cited a number of cases as below:

(i) State Bank of India and Ors. Vs. D.C.Aggarwal and Anr. {1993 SCC (L&S) 109} :

Material not supplied or shown to the delinquent officer cannot be taken into account by DA in passing order of punishment. The CVC dis-agreed with the Enquiry Officer's report exonerating the charged officer and recommended imposition of major penalty of removal. However, copy of the recommendation of the CVC denied to the respondent on ground of it being a privileged document. Held that such denial of the recommendation of CVC which was prepared behind the charged officer's back without his participation and taking decision against him relying on the recommendation are violation of principles of natural justice.

(ii) Ministry of Finance and Anr. Vs. S.B.Ramesh {1998 SCC (L&S) 865} :

It was held that in departmental inquiry witnesses whose statements are relied on must be produced.

(iii) S.R.Shivsharan Vs. Union of India & Ors. {OA No.48/1995 decided by the CAT Bombay Bench on 3.1.2000}:

This case has discussed Rule 14 (18) of CCS (CCA) Rules, 1965 and the above judgment of the Apex Court in S.B.Ramesh and Government of Tamil Nadu Vs. S.Veekaj {1997 (1) SC SLJ 226} and set aside the order of DA.

(iv) Moni Shankar Vs. Union of India & Anr. {OA No.283/2002 decided by Bombay Bench on 6.1.2003} :

As the trap was not laid as required in the manual and the main witness was not called in the inquiry and as the

...14.

examination of the charged officer was not done in accordance with Rule 9 (21) of Discipline & Appeal Rules, the order of punishment was set aside.

(v) Management of M/s.M.S.Nally Bharat Engineering Co. Ltd. Vs. State of Bihar & Ors. {1990 SCC (L&S) 189} :

Industrial Disputes Act, 1947 - Transfer of proceedings from one Labour Court/Tribunal to another - Opportunity of pre-decisional hearing and reasoned order are essential for a valid order of transfer. It is fundamental principle of good administration showing that justice not only done but seen to have been done.

(vi) Ravendra Mohan Vs. Union of India & Ors. {A decision of Nagpur Bench of the High Court in Writ Petition No.2225/2003 dt. 25.2.2004. :

The enquiry proceedings were held to have abated as the respondents did not comply with the specific directions given by CAT, as well as, the Hon'ble High Court.

(vii) Yoginath D.Bagde Vs. State of Maharashtra & Anr. {1999 (2) SC SLJ 324} :

In case where charge was not proved in the inquiry and the Disciplinary Authority dis-agreed with the Enquiry Report, not giving opporunity of hearing to the delinquent officer before taking a final decision is violation of principles of natural justice.

These cases will be discussed later appropriately.

9. Shri V.S.Masurkar for the respondents made a preliminary objection that the High Court order was dated 27.1.2003 and additional pleadings was submitted by the applicant on 1.10.2003,

...15.

Whereas, the High Court had directed that additional pleadings can be given only within a period of one month. He stated that, therefore, the additional pleadings which are from pages 292 to 323 of the paperbook cannot be taken on record. Regarding non-examination of Kaushik by the Inquiry Officer, he mentioned that this has been raised by the applicant for the first time and in any case, the applicant could have brought him as a defence witness. The files relating to COFEPOSA and Criminal Proceedings etc. have also been asked for the first time and such request was not made before the Disciplinary Authority. He cited the case of **State of Tamil Nadu and Anr. Vs. S.Subramaniam** {1996 SCC (L&S) 627}, where it has been held that the Tribunal is not a Court of Appeal and that technical rules of evidence have no application to the Disciplinary Proceedings and the authority is to consider the material on record. Re-appreciation of evidence and arrival at its own conclusion is beyond the jurisdiction of the Tribunal. The applicant has mentioned various witnesses who have not been examined by the IO. However, instead of raising objection now they could have been introduced as defence witnesses by the applicant. Shri Masand stated that there are some mandatory requirements in departmental proceedings and some optional and in the latter case test of prejudice has to be applied. As regards violation of Rule 14 (18) of CCS (CCA) Rules, the applicant has to show prejudice. In the Review Application filed by the applicant, the point relating to Rule 14 (18) of CCS(CCA) Rules has not been raised. He stated that the ratio of **Yoginath Bagde** (supra) is not applicable here as in that case charged officer was exonerated by the I.O. which is not the case here. He cited the case of State Bank of

...16.

Patiala and Ors. Vs. S.K.Sharma {1996 SCC (L&S) 717} in support of his arguments. In this case, it has been held that substantive provisions in a departmental proceedings have normally to be complied with and in case of procedural provision which is not of substantial or mandatory character, if no prejudice is caused to the person proceeded against, no interference of the Court is called for. Even in case of mandatory procedural provision if it is in the interest of the person proceeded against and not in public interest and if such person waives the requirements thereof, then also non-compliance with such requirements would not vitiate the action. It was further held in the said case that where there is total violation of the principles of natural justice i.e. no opportunity of hearing was given then the action would be invalid, but if there is violation of only a facet of principles i.e. inadequate opportunity/no fair hearing was given test of prejudice should be applied. If no prejudice is caused no interference would be called for. The respondents have pointed out that there is no specific provision in the Rules for personal hearing and it was provided to the applicant at the review stage on the order of the Tribunal. Regarding the so called informer, the applicant or Nayar also did not produce him in the inquiry. As regards the advice of UPSC, it has been given with the order of Disciplinary Authority in acordance with Rule 17 of CCS (CCA) Rules. Shri V.S.Masurkar further stated that Nayar has been given a show cause notice for enhanced punishment by the Appellate Authority. However, he has obtained a stay from the High Court. As regards common proceedings, this point also has not been raised by the applicant before the DA and this decision is the discretion of

...17.

the President. On the question of scope of judicial review, he cited the case of Union of India Vs. G.Ganayutham {1997 SCC (L&S) 1806}, where it has been held that :

> "According to Wednesbury case, while examining 'reasonableness' of an administrative decision the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Cout to substitute its view."

10. In rebuttal, for the applicant Shri Masand reiterated the submissions made earlier. Regarding preliminary objection by the counsel for the respondents he stated that after the case was decided by the High Court,. tThe first hearing in the Tribunal was on 7.10.2003 and he file the additional affidavit on 1.10.2003. The point raised in the preliminary objection has not been raised by the Respondents in the sur-rejoinder which was filed by them on 27.11.2003.

11. We have carefully considered the written and oral pleadings made by both the sides. We have also considered all the citations given by the Learned Counsel for the applicant, as well as, the respondents. First, let us consider whether it is a case of 'no evidence'. In the limited scope of judicial review sufficiency or otherwise of evidence cannot be looked into by the Tribunal. We have only to see whether there was evidence on the basis of which the Respondents could have proceeded against the applicant. There are two charges. First is that the applicant connived and actively helped K.A.Nayar, Appraiser in fabricating

...18.

and falsifying the records and in making a false claim that the seizure of smuggled silver bar worth Rs.5.8 crores with an Arab dhow "Al Mushraq" on the night of 17/18.12.1990 near Mangalore was based on specific prior information received by Shri Nayar. The second Article of Charge is that he asked K.A.Nayar, Appraiser to do the preventive and anti-smuggling work by-passing the regular preventive unit. The applicant went to Bangalore as usual on the week end and when the seizure was made he was at Bangalore and he could reach Mangalore only after his superior officer air-dashed to the place. In the light of such important information it does not seem probable that Incharge Officer would have left the Headquarters. The explanation given by the applicant that he went to Bangalore as he was in the habit of doing so every week end and his stay otherwise at Bangalore would have drawn attention is not very convincing. The Telex Message did not mention about the previous information. There is circumstantial evidence to substantiate the charge that DRI-I was prepared and sent after the seizure was effected. There is manipulation in the despatch register. As per the statement of one witness Ravindran DRI-I was given by Nayar on 18.12.1990 around 6 p.m. The patrol boat was going to Karwar. The applicant has stated that both in the criminal proceedings and in the press conference prior information was mentioned. There was a letter dt. 14.12.1990 by Directorate of Revenue Intelligence (for short, DRI) in which there was information regarding attempt to land Silver and Gold in and around Kaup light House either on 14th or 15th December, 1990. The Customs Vessel Shakti was proceeding from Mangalore to Karwar on the request of A.C. Karwar, Arab Dhow hit it around

...19

Malpe area. Apparently, Nayar was working on general intelligence rather than on any specific prior information. As regards the writ petition filed by the so called informer in the Karnataka High Court, the only direction that has been issued by the High Court is to CBI to expedite the inquiry. As regards the second charge it was not found proved by the Inquiry Officer although the DA was not satisfied on this finding of the I.O. This charge is relating to by-passing the regular channel and giving the work of anti-smuggling activity to an Appraiser. However, as the amount of reward was very large and there is evidence on record for the first charge, we do not consider it to be a case of 'no evidence' the benefit of which can be given to the applicant.

12. The second point is about not giving CVC report to the applicant. The order of the DA is dt. 15.10.1999. There are two Apex Court Rulings on this point. The first is <u>Sunil Kumar Banerjee Vs. State of West Bengal and Ors.</u> {1980 SCC (L&S) 369. It was held in the said case that :

> " The conclusion of the disciplinary authority was not based on the advice tendered by the Vigilance Commissioner but was arrived at independently, on the basis of the charges, the relevant material placed before the Enquiry Officer in support of the charges, and the defence of the delinquent officer. Therefore, the disciplinary authority's findings and decision cannot be said to be tainted with any illegality merely because the disciplinary authority consuted the Enquiry Officer and obtained his views on the very same material.
>
> In the preliminary findings of the disciplinary authority, which were communicated to the delinquent officer, there was no reference to the views of the Vigilance Commissioner. The findings which were communicated to the delinquent were those of the disciplinary authority and it was wholly unnecessary for the disciplinary authority to furnish the delinquent with a copy of the report of the Vigilance Commissioner. That

...20.

> the preliminary findings of the disciplinary authority happened to coincide with the views of the Enquiry Officer is of no consequence."

This judgment was given on 26.3.1980 by a three Judge Bench. The next landmark judgment on this point is State Bank of India & Ors. Vs. D.C.Aggarwal and Another {1993 SCC (L&S) 109}, this was decided on 13.10.1992 by a Division Bench consisting of two Judges. The decision in the case was as follows :

> " But non-supply of C.V.C. recommendation which was prepared behind the back of the respondent without his participation and one does not know on what material which was not only sent to the Disciplinary Authority but was examined and relied, was certainly violative of procedural safeguard and contrary to fair and just inquiry."

And, again,

> "Taking action against an employee on confidential document which is the foundation of order exhibits complete misapprehension about the procedure that is required to be followed by the Disciplinary Authority. May be that the Disciplinary Authority has recorded its own findings and it may be coincidental that reasoning and basis of returning the finding of guilt or same as in the C.V.C. report but it being a material obtained behind the back of the respondent without his knowledge or supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order."

It may be noted here that C.V.C. have since decided that a copy of their first stage advice be given to the Charged Officer along with the charge sheet. A copy of the second stage advice has to be supplied to him along with the copy of the report of inquiry forwarded to him for his reply/representation. These instructions were issued on 28.9.2000, whereas, the punishment order in the present case was passed on 15.10.1999. In view of the three Judge Bench judgment in Sunil Kumar Banerjee (supra) and the fact that the CVC instructions regarding supply of copy

...21.

of the advice to the delinquent officer is of a later date than the impugned punishment order, we do not consider that the non-supply of this document is such a serious flaw that it will vitiate the entire proceedings.

13. The next point is about the non-supply of UPSC advice in time especially when the tentative punishment proposed by the Department was lesser and it was on the advice of the UPSC that an enhanced punishment was meted out to the applicant. There is no ruling of the Apex Court on the mandatory nature of the supply of the UPSC advice before the order of the D.A. The respondents have stated that UPSC advice has been given to the applicant in accordance with Rule 17 of CCS (CCA) Rules. Rule 17 is as follows :

> " Orders made by the disciplinary authority shall be communicated to the Government servant who shall also be supplied with a copy of the report of the inquiry, if any, held by the disciplinary authority and a copy of its findings on each article of charge, or where the disciplinary authority is not the inquiring authority, a copy of the report of the inquiring authority and a statement of the findings of the disciplinary authority together with brief reasons for its disagreement, if any, with the findings of the inquiring authority unless they have already been supplied to him and also a copy of the advice, if any, given by the Commission, and where the disciplinary authority has not accepted the advice of the Commission, a brief statement of the reasons for such non-acceptance."

It is apparent from the above that there is no infirmity in the supply of UPSC advice along with the order of the DA which has been done by the respondents.

14. The applicant has stated that DA has blindly followed the advice of the UPSC and there is no application of mind on the part of D.A. and even the phraseology of the UPSC advice has been

...22.

lifted in the order of DA. We have seen the file relating to the Disciplinary Proceedings against the applicant. It has been examined at various stages and it has also been seen and approved by the highest authority in the Country and it cannot be said that there is no application of mind on the part of the respondents before passing of the punishment order. The applicant has also stated that some witnesses who should have been examined have not been examined by the IO. The Presenting Officer presents the case as per his understanding and discretion and in case the applicant thought that evidence of some official or person can go in his favour, a request can always be made for calling them as defence witnesses, which has not been done.

15. The applicant has also contended that common proceedings should have been taken. The Rule relating to common proceedings is in Rule 18 of the CCS (CCA) Rules. Rule 18 (1) is as follows:

> "(1) Where two or more Government servants are concerned in any case, the President or any other authority competent to impose the penalty of dismissal from service on all such Government servants may make an order directing that disciplinary action against all of them may be taken in a common proceeding."

Thus, it is discretionary on the part of the Competent Authority to take disciplinary action in a common proceedings. There is nothing mandatory about it.

16. The applicant has laid great stress on the discriminatory punishment meted out to the main culprit and the applicant who according to charge memo itself only connived and helped the main culprit. K.A. Nayar who has been given comparatively a very light punishment of "reduction of pay in the same post for a period of one year", whereas the applicant has been given the

...23.

punishment of reduction to a lower post by three levels/grades for unspecified period. However, it has been brought out by the Respondents that the Appellate Authority in the case of K.A.Nayar has given a notice to him for enhancement of the punishment. Nayar, in turn has obtained a stay from the High Court and no final decision has been taken in the case. Under the circumstances, the argument of the applicant loses force.

17. The applicant has also raised the issue that Rule 14 (18) of CCS (CCA) Rules has not been properly followed. The said sub-rule is as follows :

> "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."

The applicant has stated that the record of this general examination shows that the rule was not followed in letter and spirit. The record of the general examination of the charged officer is at Annexure - A-5 (page 36 of the paper book). This is paraphrased and not in the form of question and answer. Many a time in the inquiry proceedings and even in the criminal proceedings such paraphrasing is done and we do not consider it to be a serious irregularity.

18. It is an established principle in case of procedural provisions which are not of substantial or mandatory character that if no prejudice is caused to the person proceeded against, no interference of the Court is called for. Even in the case of

...24.

mandatory procedural provision if it is in the interest of the person proceeded against and not in public interest and if such person waives the requirement thereof then also non-compliance as such would not vitiates the action. This is the ratio established in State Bank of Patiala Vs. S.K.Sharma (supra). Applicant has cited number of cases most of them relating to procedural irregularity or prejudice caused. However, in the present case no major procedural flaw is detected.

19. The applicant has also stated that personal hearing was not given to him as directed by the Tribunal on 5.12.2001. It was also stated in the said order of the Tribunal that it was open for the Finance Minister to issue general or special directions as to at what level the hearing to be given to the applicant. The original order in 1062/99 was given on 27.2.2001 in which the direction was for personal hearing to the applicant. However, all these orders viz. order dt. 27.2.2001 in OA No.1062/1999, 5.12.2001 in M.P. 677 and 852 in OA No.1062/99 and 11.4.2002 passed in OA No.8/2002 were set aside by the High Court in Writ Petition No.2749/02 in which order was passed on 27.1.2003, so the question becomes irrelevant now.

20. To sum up, for the above reasons we do not find any reason to interfere with the order of DA and that passed in the Review Application. OA is accordingly dismissed. No costs.

(S.G.DESHMUKH)
MEMBER(J)

(ANAND KUMAR BHATT)
MEMBER (A)

B.