IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH

ORIGINAL APPLICATION NO: O.A. NOS.1010/92 and 1018/92.

Date of Decision: 15/12/98

A.H.K.Memon & Anr. .. Applicant

Shri S.R.Atre. .. Advocate for Applicant

-versus-

Union of India & Ors. .. Respondent(s)

Shri R.K.Shetty. .. Advocate for Respondent(s)

CORAM:

The Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman.

The Hon'ble Shri D.S.Baweja, Member (A).

(1) To be referred to the Reporter or not ? no

(2) Whether it needs to be circulated to other Benches of the Tribunal ? no

(R.G.VAIDYANATHA)
VICE-CHAIRMAN.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI.

1. ORIGINAL APPLICATION NO.1010/92.
2. ORIGINAL APPLICATION NO.1018/92.

Pronounced, this the 15th day of December 1998.

Coram: Hon'ble Shri Justice R.G.Vaidyanatha, Vice-Chairman,
Hon'ble Shri D.S.Baweja, Member(A).

1. Original Application No.1010/92.

A.H.K.Memon,
127, M.G.Road,
Pune - 411001. ...Applicant.
(By Advocate Shri S.R.Atre)
Vs.

1. Union of India through the
Secretary, Government of
India, Ministry of Defence,
South Block,
NEW DELHI.

2. The Director General,
Research & Development,
Government of India,
Ministry of Defence,
Director General,
Research & Development,
NEW DELHI - 110 011.

3. The Director,
Explosives Research & Development
Laboratory, Pashan,
PUNE - 411 021. ...Respondents.

(By Advocate Shri R.K.Shetty)

2. Original Application No.1018/92.

V.S.Hajirnis,
154, Rastha Peth,
Pune. 411 011. ...Applicant.

(By Advocate Shri S.R.Atre)

Vs.

1. The Union of India through
the Secretary, Government of
India, Ministry of Defence,
South Block, New Delhi.

...2/-

2. The Director General,
Research and Development,
Government of India,
Ministry of Defence,
Directorate Gen. Research &
Development,
DHQ Post,
NEW DELHI.

3. The Director,
Explosives Research & Development.
Laboratory, Pashan,
PUNE - 411 021. ...Respondents.

(By Advocate Shri R.K.Shetty).

O R D E R

(Per Shri Justice R.G.Vaidyanatha, Vice-Chairman)

These are two applications filed under section 19 of the Administrative Tribunals Act, 1985. The respondents have filed reply in both the cases opposing the applications. Since common questions arise for consideration and since both parties are represented by same advocates, we are disposing of these two OAs by this common order. We have heard Mr.S.R. Atre,learned senior counsel on behalf of the two applicants and Mr.R.K.Shetty, the learned senior counsel for the respondents in both the cases.

2. The applicant in OA 1010/92 Mr. A.H.K.Memon was working as Senior Scientific Assistant and Mr.V.S.Hajirnis applicant in OA 1018/92 was working as Junior Scientific Officer in the office of the Director Explosives Research and Development Laboratory at Pune at the relevant time. Simultaneous charge sheets were issued against both the applicants alleging mis-conduct in respect of some purchases made on behalf of their institution from private concerns. The allegations against both the applicants are common, in that both of them and some others have colluded together in committing irregularities in local purchase of the Stores by violating the Rules with an intent to show favour to

the private firms in which they had some personal interest. Though separate charge sheets were issued to both the applicants, they are issued on the same day viz. 29.7.1980 and the main substance of the impugations is common to both the applicants.

Both the applicants filed their written statements denying the allegations of mis-conduct.

An Enquiry Officer was appointed, number of witnesses were examined on behalf of the Prosecution and some witnesses on behalf of the applicants. Both sides presented their written briefs. Then after regular enquiry, the Enquiry Officer submitted two separate reports holding that the charges are not proved against the applicants.

The Disciplinary Authority while dis-agreeing with the report of the Enquiry Officer, held on the basis of the evidence on record that the charges are proved on both the applicants and passed separate orders dt. 28.12.1981 imposing a penalty of dismissal from service against both the applicants.

Then both the applicants challenged the order of the Disciplinary Authority by filing suits in the Civil Court at Pune. After the coming into force of the Administrative Tribunals Act, 1985 both the suits were transferred to this Tribunal and were numbered as Transferred Application No.323/86 and Transferred Application No.333/86. This Tribunal set aside the orders of the Disciplinary Authority on a technical ground viz. that the enquiry report had not been furnished to the applicants before it passed the order of penalty. The respondents challenged the order of this Tribunal

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before the Supreme Court. The Supreme Court also upheld the orders of this Tribunal and dismissed the appeals.

Then the Disciplinary Authority furnished copies of the Enquiry Report to the applicants and called upon them to make a representation which would be considered by the Disciplinary Authority before passing final orders. Accordingly, after receiving letter of the Disciplinary Authority both the applicants submitted their representations requesting the Disciplinary Authority to exhonerate them on the basis of the Enquiry Report and they also made a request to close the matter by accepting their request for voluntary retirement.

The Disciplinary Authority i.e. the President of India after considering the Enquiry Report and the representation of the applicant's and perusing the evidence adduced during the enquiry and considering the admissions made by the applicants in their statements, disagreeing with the findings of the Enquiry Officer, held that the charge of mis-conduct is proved against both the applicants and again imposed the penalty of dismissal from service.

Being aggrieved by the order of the Disciplinary Authority both the applicants have filed these two applications challenging the order of the Disciplinary Authority.

3. The applicants have taken identical grounds in both the OAs for challenging the order of the Disciplinary Authority. It was stated that the Disciplinary Authority has not given any indication about an intention to

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dis-agree with the findings of the Enquiry Officer and therefore, the order of the Disciplinary Authority is bad in law. That the Disciplinary Authority has taken into consideration documents, which are not part of the record. That many documents which are necessary were not produced during the enquiry and there was violation of principles of natural justice in conducting the disciplinary enquiry. It is a false and fabricated case against the applicants; that there was no evidence to prove the mis-conduct against the applicants as has been rightly held by the Enquiry Officer. Then many allegations are made in both the OAs regarding the merits of the case to show that there was no evidence against the applicants. That the preliminary enquiry report was not produced during the Enquiry and this has prejudiced the case of the applicants and it amounts to denial of natural justice to the applicants. That one of the co-delinquents who was separately charge sheeted viz. Dr.Bahadur has been exonerated and on that basis both the applicants should also have been exonerated. Therefore, it is stated that the orders of the Disciplinary Authority in both the cases are illegal and liable to be quashed.

4. The respondents have filed separate written statements in both cases and they have referred to the facts and circumstances of the case which led into the initiation of disciplinary action against the applicants All the facts are mentioned in the written statement. They have justified the action taken against the applicants by the disciplinary authority. It is therefore, prayed that the applicants have no case and the applications are liable to be dismissed.

5. Mr.S.R.Atre, the learned senior counsel for the applicants, raised common grounds in support of the two applications. He argued that the preliminary investigation report was not produced before the Enquiry Officer inspite of the requests made by the applicants and thereby the enquiry

has not been conducted fairly and this amounts to violation of principles of natural justice. Similarly, it was pointed out that the Disciplinary Authority has referred to some letters in the impugned orders, but those letters were not produced during the enquiry. Then it was argued that the Disciplinary Authority has relied upon the previous statements of the applicants during preliminary enquiry and this could not have been done unless the statements were confronted to the applicants in the present enquiry. He argued that there is nothing to show that the previous statements of the applicants in the preliminary enquiry were brought on record as exhibits of the present enquiry. Then it was submitted that the Disciplinary Authority has not given any show cause notice to the applicants indicating his tentative decision to disagree from the finding of the Enquiry Officer and this has resulted in causing prejudice to the applicants and then on merits it was argued that there was no evidence to prove the mis-conduct against the applicants. On the other hand, the learned counsel for the respondents contended that this Tribunal cannot sit in appeal over the findings recorded by the Disciplinary Authority. He argued that the enquiry has been done as per rules by observing principles of natural justice and no case is made out for interfering with the order of the Disciplinary Authority. He pointed out that this Tribunal cannot re-appreciate the evidence adduced in the enquiry like an Appellate Court. He further argued that the findings of the Enquiry Officer are not binding on the Disciplinary Authority could and he could take his own independent view. Then he also pointed out that the statements of both the applicants in the preliminary enquiry were confronted to the applicants during their deposition and then marked as exhibits in the case. That it was like a joint enquiry where both the applicants were charged for a common mis-conduct

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and almost all the documents and all the witnesses were common to both the enquiries against the applicants and that the applicants have made number of admissions in their previous statements during the preliminary enquiry. He, therefore, argued that there is no merit in both the applications. While reiterating his earlier arguments the learned counsel for the applicants finding that the statements of the applicants in their preliminary enquiry were confronted to them and were marked as exhibits in the case, came out with another argument that Mr.Memon was examined as a state witness against Mr.Hajirnis and Mr.Hajirnis was examined as a state witness in Memon's case and the statements were confronted to them in those cases and they cannot be used in their own cases.

6. The learned counsel for the respondents has produced the enquiry records before us which contains the depositions, exhibits, order sheets and other materials. Both the counsels also referred to some authorities.
Now, we will take up the first contention of the learned counsel for the applicant that the preliminary enquiry report was not produced in the enquiry inspite of being asked by the applicants and this has caused prejudice to the applicants in their defence and this amounts to violation of principles of natural justice.

7. The applicants' counsel also referred to some decisions on this point. In particular he relied on 1998 A.I.R. SCW 2897 (State of U.P. Vs. Shatrughan Lal and Anr.), where the Supreme Court has observed that the documents relied on in the charge sheet should be furnished to the delinquent particularly when they have asked for them and copies of documents on which the prosecution is relying must be furnished to the delinquent official.

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In 1997 (36) ATC 164 (J.N.Shukla Vs. Union of India & Ors.), a Division Bench of this Tribunal at Allahabad has also observed that the copy of the preliminary enquiry report on which the prosecution is relying on must be furnished to the delinquent official failing which there will be violation of principles of natural justice.

In another case reported in 1997 (35) ATC 79 (Radhayshyam Sharma Vs. Union of India & Ors.), the copy of the sole document on which the Enquiry Officer rested his finding was not furnished to the delinquent official.

In all the above cases it was a case of not supplying documents on which the charge sheet is based or on which the prosecution was relying to prove its case. In our view, none of these decisions have any bearing on the point under consideration.

In the present two cases the prosecution never relied on the enquiry report and hence production of the some before the Enquiry Officer or furnishing of the copy of the same to the delinquent official does not arise for consideration.

Similarly, some of the decisions relied on by the learned counsel for the applicants say that preliminary enquiry report should not be taken into consideration unless the author of the report or a member of the preliminary enquiry committee is examined to prove the report and his evidence is tested by cross-examination by the delinquent official also does not arise since the prosecution is not relying on the preliminary enquiry report in these two cases. Hence, it is not necessary to refer other decisions on this point.

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8. It appears during the enquiry the applicants wanted the production of the preliminary enquiry report, but the administration claimed privilege and did not produce it. Therefore, this is not a case where the prosecution is relying on the preliminary enquiry report. It is a case where the delinquent officials wanted the preliminary enquiry report,may be to prove their defence. Now, let us for a moment accept that the delinquent official had a right for the production of the preliminary enquiry report to prove their defence and the said document was not produced by the prosecution and if so the question is whether the enquiry is vitiated or not.

It is not necessary to refer to any decisions of the Tribunal on this point, since the point is now covered by one of the recent decisions of the Apex Court reported in 1996(1) SC SLJ 440 (State Bank of Patiala & Ors. Vs. S.K.Sharma), wherein the Supreme Court referred to the earlier Constitution Bench decision and laid down general propositions as to when an enquiry is vitiated. One of the points considered by the Supreme Court was about non-production of documents and then considered the question whether the enquiry is going to be vitiated. The Supreme Court also considered violation of ordinary procedural laws or even mandatory provisions of law and then considered whether it vitiates the entire enquiry proceedings. The Supreme Court has observed in all such cases viz. non-production of documents, violating of procedural rules and violation of mandatory provisions and then held that due to these mis-conducts or flaws the enquiry is not vitiated as a matter of course. The Supreme Court has pointed out that in all such cases test of prejudice must be applied. If, as a result of any flaw in the enquiry process any prejudice is caused to the delinquent official which has to be

demonstrated, then only the enquiry is vitiated. If no prejudice is pleaded and demonstrated before a Court or Tribunal, the Supreme Court observes, the enquiry does not gets vitiated even if there are some flaws in the procedure.

Therefore, in the present case it is not sufficient for the applicants to merely say that they wanted the Enquiry Report to be produced and since it was not produced the enquiry is vitiated. The applicants must establish by pleading and by demonstration that non-production of the preliminary enquiry report has prejudiced their defence. Nowhere, in the lengthy pleadings we get any idea as to how the case of the applicants would have improved if the preliminary enquiry report had been produced. It is not the applicants case that they had been exonerated in the preliminary enquiry. They have not stated as to how prejudice is caused to them or how their case would have improved if the preliminary enquiry report had been produced. Then it could be argued that unless the applicants had known what are the contents of the preliminary enquiry report, how it is possible for them to demonstrate that prejudice is caused. If the applicants are not even aware of the contents of the particular document then they cannot be heard to say that any prejudice is caused if a particular document is not produced.

There is one more important point to be noticed and that is now the respondents have produced the preliminary enquiry report of Col.Satish Chandra's Committee and is placed on record in Memon's case viz. OA 1010/92, the respondents have produced number of documents along with Col.Satish Chandra's Committee Report along with their M.P. 611/97 and copies of all

the documents produced along with the M.P. are given to the applicants counsel on 23.10.97 as could be seen from the endorsement on the M.P.

Similarly, in Hajirnis case viz. O.A. 1018/92, the respondents have produced number of documents along with Col. Satish Chandra's preliminary enquiry report along with M.P. 610/92 and copies of the M.P. along with documents have been served on applicants counsel on 23.10.1997 which could be seen from the endorsement on the M.P. Therefore, long prior to the arguments in this case, by way of an M.P., the preliminary enquiry report has been furnished to the applicants. The applicants could have filed a reply to the MP to show as to what prejudice has been caused to them on the ground that the preliminary enquiry report was not earlier produced during the pendency of the enquiry. At least at the time of argument before us which went on for two days, the learned counsel for the applicants made no attempt to address us on this point to demonstrate as to what prejudice, if any, caused to the applicants for not producing this enquiry report during the enquiry.

Therefore, it is not sufficient to merely say that a particular document was called for and it was not produced during the enquiry. As observed by the Apex Court in the case mentioned above the applicants must plead and demonstrate as to what prejudice has been caused due to non-production of a particular document and then only the Court can consider whether enquiry is vitiated or not.

Since in these present cases, the applicants have neither pleaded nor demonstrated at the time of arguments that any prejudice is being caused to them for non-production of the preliminary enquiry report during the enquiry and when that enquiry report is not relied on in the charge sheet and not relied on by the prosecution during the enquiry, we find no prejudice is caused to the applicants for non-production of the same and therefore the enquiry is not vitiated.

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9. The contention that Disciplinary Authority has referred to some letters which are not part of the record has no merit. In support of its impugned order dt. 25.9.1991 dismissing the applicants from service, the Disciplinary Authority has annexed an annexure recording his reasons for coming to his conclusion. In this annexure, which is at page 126 of the paper book of OA 1010/92 (similar copy of the document is also filed in (O.A. No.1018/92), what the Disciplinary Authority has stated is that Mr.Hajirnis was confronted by this letter which he has admitted before the preliminary enquiry and in that connection there are letters dt. 28.11.1975 and 7.12.1975. Therefore, the Disciplinary Authority has not referred to the letters as such, but admissions of Mr.Hajirnis in respect of those two letters in his statement during the preliminary enquiry. Hence, it is not a case where the Disciplinary Authority is referring to any letters which are not part of the record. Those letters are not produced during the enquiry and they are not independently considered by the Disciplinary Authority. The Disciplinary Authority is only referring to the admissions of Mr.Hajirnis in respect of these two letters in his statement during the preliminary enquiry. Hence, there is no merit in the contention that the Disciplinary Authority has taken into consideration some documents which were not produced during the enquiry.

10. We have already seen how the learned counsel for the applicant took two different stands at the time of arguments. He first contended that the statements of the two applicants during the preliminary enquiry were not brought on record during the enquiry and were not confronted with the applicants and therefore, the Disciplinary Authority could not have referred to them in the reasons given in support of the impugned order. But, later, when the respondents counsel pointed out that these statements of the applicants during preliminary enquiry were marked as exhibits during the present regular enquiry and the applicants were confronted with the same, the learned counsel for the applicants in their reply submitted that the previous statements are not brought on record properly, in the sense that in Hajirnis's

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case Mr.Memon is examined as State witness and therefore, it cannot be used against Mr.Memon in his own case: similarly Mr.Hajirnis's statement was brought on record as an exhibit in Mr.Memon's case and therefore, it cannot be used against Mr.Hajirnis in his own case. In our view, this argument is a hyper-technical argument and in the facts and circumstances of the case, we do not find any illegality or irregularity in taking the statements of the two applicants in both the cases.

Even granting for a moment that some irregularity has occurred or there is some violation of procedural law or some mistake in not marking a document as an exhibit, the question is whether the entire enquiry case stands vitiated. In our view, in all such cases,the test is whether any prejudice has been caused to the applicants due to the mistake committed by the Enquiry Officer or about any violation of procedural law. If no prejudice is caused to the applicants then the enquiry is not vitiated. But, if any prejudice is caused to the applicants, then of course, the enquiry may get vitiated. We are fortified, in our view, by a recent Judgment of the Apex Court in the case of State Bank of Patiala and Ors. Vs. S.K.Sharma reported in 1996(1) SC SLJ 440. The Supreme Court has referred to number of irregularities in conducting the enquiry like non-supply of documents, violation of procedural provisions etc. Then the Supreme Court has pointed out that if it is a case of an ordinary procedural provision the test is whether there is substantial compliance or not and then whether any prejudice is caused to the delinquent employee. They even go to the extent of observing that even in the case of violation of a mandatory provision, even then the test of prejudice will have to be applied. The Supreme Court has observed that the element of test is always the same viz. test of prejudice or the test of fair hearing, as it may be called. Now, in this light, let us examine if there is any irregularity and if any prejudice is caused to the applicants.

11. There was some preliminary enquiry in which both the applicants came

to be examined by the Preliminary Enquiry Committee. Those two earlier statements during preliminary enquiry have been marked as exhibits in the two cases before us.

What has happened is that the applicant in the first case OA 1010/92, Mr.Memon was examined as S.W.17 on 7.4.1981, his statement before the preliminary enquiry committee was marked as Exhibit S-23. When he was confronted with his earlier statement Ex.S-23, Mr.Memon admitted the correctness of the same except a few portions which are separately marked. That means, except those few portions which he did not admit, he admitted the rest of the contents of his earlier statements.

Similarly, on the same date viz. 7.4.1981 Mr.Hajirnis the applicant in OA 1018/92 was examined as a State Witness in the Disciplinary Enquiry against Memon and he was also examined as S.W.17, his earlier statement during preliminary enquiry was given the same Exhibit as S-23 in this case. So far there cannot be any dispute. Now in the impugned order while giving reasons the Disciplinary Authority has referred to the statements of both Mr.Memon and Hajirnis in both the cases. In other words, Memon's statement is used not only in Hajirnis case where he was examined as a witness, but also in his own case, and the same thing is followed in Hajirnis's case as far as Mr.Hajirnis's earlier statement is concerned.

It may be Mr.Memon's earlier statement which was marked as Exhibit S-23 in Mr.Hajirnis case was not formally marked as an Exhibit in Memon's case. Similarly, Mr.Hajirnis earlier statement was marked S-23 in Memon's case, but it was not formally marked as Exhibit in Hajirnis case itself. Inspite of this technical flaw not marking the earlier statements in both the cases, question is whether any irregularity is committed and even if irregularity is committed whether any prejudice is caused to the applicants.

12. The learned counsel for the applicants' has referred to some authorities where the questions were statement of witnessess in earlier case cannot be produced in any other case unless the witness himself is produced

and the delinquent had opportunity of cross-examining him (vide 1990 (2) (ATC) 809 and 1996 (32) ATC 731). In our view, the argument is mis-placed and the decisions cited have no application to the facts of the present case. There the test is the statement of a witness in some other case cannot be produced in any other case without examining that witness and subjecting him to cross-examination.

. Here, the delinquent Mr.Memon is examined as a witness in the case of Mr.Hajirnis and Mr.Memon's earlier statement is referred as an Exhibit and he is confronted with the same and he admitted major portions of his statements except small portions which he denied and therefore he knows what is his case and he knows it is his earlier statement which he is admitting except small portions and what prejudice can be caused to him if his own statement is taken into consideration in his own case.

. From a perusal of the materials on record, we find that both the applicants are sailing together. The enquiry in respect of one transaction viz.the department placing orders and purchasing some goods from two private firms with the collusion of both the applicants who had pecuniary interest in those two firms. The charge is same against both the applicants and in respect of the same transaction and same two private firms, though for practical purposes separate enquiries are held against the applicants.

. From a perusal of the enquiry file we find that the Prosecution Witnesses are common to both the cases, it is not only simply common, but it is identical in both the cases. From the record we find that each witness is examined in one case and typed copy of deposition is kept in the other case. The enquiries are held on the same day in both the cases and some witnesses are examined and the depositions are identical in both the cases being typed copies. Though the applicants had engaged two separate defence assistants,

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the cross-examination is one and the same for both the cases, since typed copy of the same depositions is kept in both the cases. All prosecution exhibits are identical and common to both the cases. Therefore,when all the prosecution witnesses and all the prosecution exhibits and when all the defence exhibits are common to both the cases we do not find that the Disciplinary Authority has committed any illegality or irregularity in taking into consideration the earlier statement of each applicant in both the cases. The Disciplinary Authority has relied on only the admitted portion of the statement of each applicant and not that portion of the statement which he has retracted.

. Therefore, worst come worst, what will happen if we take different view. We can remand the matter to the Disciplinary Authority and direct him to give an exhibit number to Mr.Memon's statement in his own case and to the statement of Mr.Hajirnis in his own case and then pass a fresh order. If it was a disputed document the matter would have been different. If it is a document which has to be proved then the matter would be different. But, here Mr.Memon is examined as a witness and he admits his earlier statement except small portions and his statement is marked in Mr.Hajirnis's case and what legal objection he can have if his own statement is read as an exhibit in his own case. Same reasoning applies to Mr.Hajirnis's case. Therefore, in the facts and circumstances of the case, we do not find that the Disciplinary Authority has committed any illegality or irregularity in taking into consideration the earlier statements of both the applicants in both the cases.

13. We may also note that the applicants have almost a common defence in their respective cases. They have engaged same advocate in both the cases, there is no hostile interest in between the two applicants, on the other hand they are hand-in-glove and are conducting this litigation both in the first round and in the second round jointly. As already stated, both the enquiries are held on the same day,with same witnesses and same exhibits and typed

copies of depositions are kept in both cases. This clearly shows that practically and virtually it was one enquiry or common enquiry for all practical purposes and therefore, taking into consideration Mr.Memon's statement in both the cases though it was marked as exhibit in only one case and similarly taken into consideration the statement of Mr.Hajirnis in both the cases though it was exhibited in only one case, no illegality or irregularity has been committed by the Disciplinary Authority. Even granting for a moment that there is some irregularity since the document is not separately marked as an exhibit in one case, it will not vitiate the enquiry proceedings unless the test of prejudice is satisfied. What prejudice can Mr.Memon say has been caused to him when his own statement is taken into consideration though it is not marked as an as an exhibit, something applies to statement of Mr.Hajirnis.

Let us for arguments sake accept the position that the preliminary statement of each delinquent should not be considered in his own case since it is not formally marked as an exhibit. In the case of Mr.Memon, the other delinquent Hajirnis is examined as a state witness and his earlier statement in the preliminary enquiry has been confronted to him and it is marked as exhibit except certain portions which are retracted by him. Practically there is no cross-examination of Hajirnis except one or two formal questions. Therefore the evidence of Hajirnis and his earlier statement during the preliminary enquiry has practically remained un-challenged. The objection is only to mark the Memon's previous statement in Memon's case. Even if we exclude Memon's earlier statement in Memon's case, in our view, the un-challenged evidence of Hajirnis and his earlier statement during preliminary enquiry itself contains number of statements which are sufficient to prove the mis-conduct of Mr.Memon.

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The same reasoning holds good in Hajirnis's case where Memon is examined as a state witness and his earlier statement during preliminary enquiry has been marked as an exhibit subject to certain portions which are retracted by him. In our view, the same reasoning holds good and Memon's unchallenged evidence in Hajirnis's case along with his earlier statement is sufficient to prove mis-conduct of Hajirnis, even if we exclude statement of Hajirnis in preliminary enquiry. . Having regard to the facts and

Having regard to the facts and circumstances of the case, we do not find any merit in the contention of the applicants on this point.

14. It was argued that the Disciplinary Authority has dis-agreed with the finding of the Enquiry Officer without issuing a show cause notice to the delinquents about the intention to disagree and giving tentative reasons in support of that tentantive opinion. Though at one stage there were some conflict of opinions in some of the decisions of the Apex Court, now the position is well settled by a recent judgment reported in 1988 SC SLJ 117 (Punjab National Bank and Ors. V/s. Sh.Kunj Behari Misra), where the Supreme Court has now held that if the Disciplinary Authority disagrees with the findings of the Enquiry Authority, then he must give tentative reasons for such disagreement and give an opportunity to the delinquent officer to give his representation. The Supreme Court has overruled some of the earlier decisions taking a contrary view.

No doubt in the present case no such show cause notice is issued by the Disciplinary Authority by giving tentative reasons for disagreeing with the view of the Enquiry Officer who had exonerated both the applicants.

The question is whether the procedure adopted by the Disciplinary Authority stands vitiated in the facts and circumstances of the case.

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The Supreme Court has explained the object for giving such a show cause notice. The object is that the Enquiry Officer has given reasons and exonerated the delinquent official. The Disciplinary Authority is not bound by the report of the Enquiry Officer. It has been held by a Constitution Bench in Karunakaran's case (1993(4)(SCC) 727) that furnishing of Enquiry Report to the delinquent is a must, since that will give an opportunity to the applicant to give his representation against the findings of the Enquiry Officer if Enquiry Officer has exonerated the applicant then the delinquent may think that he would succeed before the Disciplinary Authority and he need not give any reasons in his representation. But if the Disciplinary Authority gives his tentative opinion that he is likely to take a different view then the delinquent may in his representation give proper explanation to pursuade the Disciplinary Authority not to take a different view to follow or accept the view taken by the Enquiry Officer. This is the reason given by the Supreme Court to make it obligatory on the part of the Disciplinary Authority to convey his tentative opinion to the delinquent official in case of disagreement, so that the delinquent can effectually represent his case. If this is the object of the rule, the question is whether in the peculiar facts and circumstances of the present case any prejudice is caused to the applicants by the Disciplinary Authority by not giving tentative opinion in support of disagreement to the applicants.

15. We have given anxious consideration to the point raised by the learned counsel for the applicants and we have gone through the entire records and find that in the peculiar facts and circumstance of these two cases, no prejudice is caused to the applicants and they can be imputed with full knowledge about the intention of the Disciplinary Authority to take a different view and about the reasons which may weigh with the Disciplinary Authority.

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16. Since the enquiry officer had exonerated both the applicants, there is no necessity of sending the enquiry report to the applicants. The Disciplinary Authority could have simply accepted the Enquiry Report and closed the matter. Sending the exoneration report of the Enquiry Officer to the delinquent official arises only if the Disciplinary Authority wants to take a different view. This can be gathered from the contents of the letter forwarding the enquiry report to the applicant. The Disciplinary Authority has passed an order dt. 13.1.1991 (which is at page 121 of OA 1010/92 and similar copy of the order is in the other case also) where the disciplinary authority has mentioned that in view of the order of the Supreme Court the order of dismissal is being set aside and a necessity is felt to continue the disciplinary enquiry from the stage of supplying of copy of Enquiry Officer's Report and then number of sub-paragraphs are given and for our purpose sub-para (iii) is relevant and it reads as follows :

> "Directs the said A.H.K.Memon to submit his representation, if any, on the enquiry officer's report (copy enclosed) within 30 days of the receipt of this order. His representation, if submitted within the said time limit, would be considered by the President before passing final orders."

Same paragraphs find a place in the copy of the order sent to Mr.Hajirnis except the change of name.

As already stated, since it was an exoneration report, sending of the copy of the report to the delinquent does not arise unless the Disciplinary Authority wants to take a different view. The above paragraph gives an indication that after the delinquent officer gives his representation it will be taken into consideration before passing final order.

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. Both the applicants have understood the mind of the Disciplinary Authority as could be seen from their replies to the letter. Both the applicants have given identical replies and of the same date viz. 26.4.1991. Copy of these representations of both the applicant
s are produced along with
the two MPs viz. M.P. 610/97 in OA 1018/92 and M.P. 611/97 in O.A. 1010/92.

. The representations of both the applicants are identical. They say in this representation that the enquiry authority has held that both the charges are not proved and therefore, they want the Disciplinary Authority to accept the Enquiry Report. Then both the applicants make one more request in the representation viz. that they may be permitted to go on voluntary retirement. That means, both the applicants want either exoneration and reinstatement or in the alternative they should be permitted to retire voluntarily.

. Then, what is more. The applicants have also sent one more representation in continuation of representation dt. 26.4.11991. The further representation of one of the applicants is before us viz. Hajirnis which the applicant has himself produced in OA 2028/93 at page 88 of the paper book. This is the further representation of the applicant Hajirnis dt. 14.5.1991 in continuation of his earlier representation dt. 26.4.1991. In the covering letter he has requested the Disciplinary Authority to re-examine the whole issue and do justice. Then he has given a brief resume of the facts of the case and his contentions to show that he has not committed any irregularity. Therefore, the applicants knew or they can be imputed with the knowledge that the Disciplinary Authority may take a different view and therefore they have given reasons in support of their representations and tried to pursuade the Disciplinary Authority to exonerate them by accepting the Enquiry Report or alternatively their request for voluntary retirement may be accepted.

17. Then we come to another important circumstance appearing in both the cases.

It is not a simple case that on getting the Enquiry Report and without hearing the applicants, the Disciplinary Authority has passed the order.

It may be recalled that in the first instance,no doubt on the basis of the Enquiry Report and without hearing the applicants, the Disciplinary Authrity passed the earlier penalty order of dismissal from service on 28.12.1991. We have already seen how both the applicants filed suits challenging the order of dismissal and the suits were transferred to this Tribunal and this Tribunal quashed both the orders only on the ground that Enquiry Report was not sent to the applicants. This order was confirmed by the Supreme Court on appeal. Therefore, we find that in the previous case a direction is given by the Tribunal to the Disciplinary Authority to furnish copy of the Enquiry Report to the applicants and after getting their representation it must proceed to pass orders according to law. We have seen the previous order dt. 28.12.1981 where the Disciplinary Authority has given detailed reasons in support of the order of dismissal. Therefore, the applicants know the mind of the Disciplinary Authority and the reasons he had given to hold that the charges are proved. The applicants grievance was that since they were not heard in the matter and the Enquiry Report was not given to them, the order is vitiated. Therefore, the reasons formulated by the Disciplinary Authority coming to the conclusion that the charges are proved are made known to the applicants since reasoning was furnished along with the copy of the order. Therefore, when the applicants submitted their fresh representation after getting the Enquiry Report they knew or they could be imputed with the knowledge that Disciplinary Authority may again stick to the old view and that is why we find that the applicants have given detailed representation to show that the charges are not proved. Since the applicants

...23.

were aware of the reasoning of the Disciplinary Authority given earlier and gave a detailed representations after getting the Enquiry Report, in the peculiar facts and circumstances of this case, no prejudice is caused to the applicants. The materials on record are sufficient to indicate that the Disciplinary Authority has given a hint or indication that he may take a different view after after considering the representations of the applicants and the reasons given while passing the previous orders of dismissal are sufficient to give indication to the applicants and they have already given their representations and after re-consideration of all materials the Disciplinary Authority has again passed the fresh impugned orders of dismissal against both the applicants along with annexure containing detailed reasons.

We, therefore, find that in the facts and circumstances of the case there is no legal flaw or legal lacuna in the order of the Disciplinary Authorities and therefore we do not find any merit in the submission of the applicants counsel that the Disciplinary Authority has not given indication about disagreement with the enquiry report in the show cause notice. In our view, in a matter like this, each case has to be considered on the facts and circumstance of the case. As already stated, the test is one of prejudice being caused to the applicants due to violation of any procedure. Since the applicants were made known of the facts and they have given detailed representations to the show cause notice, principles of natural justice are complied with.

8. The next and the last contention of the learned counsel for the applicants is on merits of the case.

...24.

Before we go into the merits of the case, we must mention about the scope of judicial review. Though we have seen that number of Judgments of the Tribunals previously have gone into the question of merits and given findings on merits and on that basis orders of the Disciplinary Authority were set aside. But we have recently seen in a number of decisions of the Apex Court taking a consistent view that the scope of judicial review is very limited. Now the Tribunals or Courts exercising judicial review can only go into the question of the legality of the decisions making process and not about the legality of the actual decisions.

It is now fairly well settled by a catena of decision of the Apex Court that the Tribunal or Court cannot sit in appeal over the factual findings recorded by the Competent Authority in a domestic inquiry. It is well settled that the Tribunal cannot sit in appeal over the findings of the Disciplinary Authority or Appellate Authority. This Tribunal cannot re-appreciate the evidence and take a different view, even if another view is possible. A judicial review cannot be treated as an Appellate forum for dealing with disciplinary cases. In a judicial review, the Tribunal is only confined to find out whether the enquiry has been done according to law and whether there is any violation of principles of natural justice and whether sany prejudice is caused to the delinquent. The Tribunal or Court cannot act as a appellate court while exercising judicial review, vide :

" i. 1998 (1) SC SLJ 74 (Union of India & Ors. V/s. B.K.Srivastava).

ii. 1998 (1) SC SLJ 78 (Union of India & Ors. V/s. A.Nagamalleshwar Rao).

iii. 1996 SCC L&S 1280 (State of T.N. V/s. Thiru K.V.Perumal & Ors.)"

9. Now, on the basis of legal position mentioned above, let us go to the

merits of the case.

. Both the applicants were working in the Stores section of ERDL at Pune, which is an organisation under the Ministry of Defence. In the case of applicant Memon two charges were framed. Though the Enquiry Officer held that both charges are not proved, the Disciplinary Authority has held that the second charge is proved. As far as the applicant Hajirnis is concerned there was only one charge.

. The substance of the imputations is common to both the applicants. It is the case of the prosecution that both the applicants committed irregularities in the matter of local purchase of stores in violation of the rules and procedures and they showed favour on two firms in which they had some pecuniary interest, which resulted in loss of revenue to government and undue favour to the firms. The details of the manipulation done by the two applicants and others are mentioned in the statement of imputations. Number of irregularities are mentioned regarding the different items of stores in the statement of imputations.

. It is interesting to notice that both the applicants are friends and worked hand-in-glove according to the administration in manipulating records to show undue favours to the firms and as a result causing loss of revenue to the exchequer. The materials on record also point out that one of the applicants, Memon's cousin was a partner of the firm in which Memon's wife also was a partner. It has further come on record that brother of Hajirnis had also interest in the firm. It is also seen that the applicantMemon is are residing in the same building in which the office of the firm is said to have

been located. It is also seen from the documents that Hajirnis has written letters on behalf of firms and what is more, some letter-heads of the firm are found in the office drawers of Hajirnis.

. The administration examined 19 witnesses in Memon's case and same 19 witnesses were examined in Hajirnis case. The administration relied on 25 exhibits in both the cases. The defence examined some witnesses and produced some documents.

. Though the Enquiry Officer exonerated the applicants, his report is not binding on the Disciplinary Authority. The Disciplinary Authority can consider the materials on record and take its own view. Now in the two impugned orders which are identical, the Disciplinary Authority has considered the materials on record and has come to a different conclusion.

20. For the reasons given in support of the order of dismissal from service, the Disciplinary Authority has referred to the charges framed against both the applicants, it has referred to the report of the Enquiry Officer and the substance of his report holding that the charges are not proved. Then the Disciplinary Authority has given a finding that the conclusion of the Enquiry Officer is mis-conceived, he has not taken into consideration the admissions made by the two delinquents in their earlier statements given before the preliminary enquiry committee, which has not been taken into consideration by the Enquiry Officer. In particular, the Disciplinary

...27.

Authority mentions the admissions of Hajirnis as follows :

"(i) the letter dt. 28.11.75 from M/s.Meta Chemical Oriental regarding supply of hose-pipe samples had been written by Shri Hajirnis himself;

(ii) the cousin of Shri AHK Memon was a partner in the firm and Shri Hajirnis was aware of it and had written the aforesaid letter on behalf of Shri Memon's cousin;

(iii) a letter dated 7.12.75 from another firm viz. M/s. Besto Engineering Works was also in the hand-writing of Shri Hajirnis who had written the same at the behest of his own brother who had interest in the said firm; and

(iv) Shri Hajirnis had been keeping letter heads of the suppliers firms in his office drawers."

Similarly, the Disciplinary Authority mentions to the admissions made by Mr.Memon as follows:

"(i) the firm M/s.Meta Chemical Oriental Pune was owned by his nephew and was operating from the same building where Shri Memon had residence;

(ii) the name of the above firm was subsequently changed to M/s.Akmar Chemicals and it continued to operate from the same address. Shri Memon's cousin brother who also had interest in the firm resided in the same building;

(iii) Shri Memon had signed one of the letter from M/s.Meta Chemicals Oriental on behalf of his wife who had become the proprietor of M/s.Akmar Chemicals subsequently and;

(iv) Shri Memon admitted having recommended M/s.Meta Chemical Oriental for procurement of Mica Powder. Further, S/Shri Memon and Hajirnis had made a number of corrections in their statements before signing after going through each and every question and answer and some of the corrections bear their initials too. While the Presenting Officer has failed to utilise the opportunity of cross-examining Shri Memon and Shri Hajirnis for the purposes of corroboration of the replies given by them to various questions put to them in the preliminary investigations, there is still sufficient material which confirms that the supplier firms had been floated by them in the name of their close relatives. They had gone even to the extent of writing letters in their own hand writing from the suppliers to the organisation where they were working. The facts revealed by their deposition in the preliminary enquiry, which have not been disowned in their deposition in Oral Inquiry, sufficiently incriminate Shri AHK Memon"

Then the Disciplinary Authority has commented on some of the wrong conclusions or wrong inferences of the Enquiry Officer. Then, the Disciplinary Authority has concluded as follows:

"As would be seen from the above, it is proved that Shri Hajirnis

...29.

and Memon were vitally interested in the supplier firms with an bestow favours on them as these were owned wholly by their close relatives. A departmental disciplinary proceedings is not a criminal case of judicial nature and the standard of proof required in departmental proceedings is that of pre-ponderance of probability and not proof beyond reasonable doubt.

In view of the above, while it is agreed that adequate evidence has not been produced in support of the charges against Shri Hajirnis relating to irregularities committed in the matter of purchases, it stands sufficiently proved that S/Shri Hajirnis and Memon were vitally interested in the supplier firms wholly owned by their close relatives with an intent to bestow favours on the said firms.

21. From the above discussion, we find that the Disciplinary Authority has applied his mind to the facts of the case and the evidence on record and has taken into consideration the admissions made by the two applicants in their earlier statements and then has recorded categorical finding that both the applicants have committed the mis-conduct as per the charges framed against them.

. This is not a case of no evidence. This is not a case of the Disciplinary Authority ignoring any evidence, there is voluminous evidence on record both in the form of depositions of witnesses and number of documents coupled with the admissions made by both the applicants during the preliminary

enquiry. Even if we exclude the retracted portions of their earlier statements, the admitted portions of the statements of the two applicants taken along with other evidence on record is sufficient to hold that the charges are proved against the applicants.

. As already stated, we cannot sit in appeal over the findings of the Disciplinary Authority. To satisfy our conscience we have gone through the entire bulky record containing the depositions of witnesses and number of exhibits including the two earlier statements of the two applicants during preliminary enquiry. We are satisfied that there is material on record to support the findings of the Disciplinary Authority in both the cases. We have already pointed out that the Enquiry has been done as per rules. The applicants had sufficient opportunity to defend themselves during the enquiry. They have cross-examined all the witnesses in detail through their defence assistants, they have produced defence witnesses and produced documents on their behalf. They have given detailed written arguments, they have given detailed written brief running into number of pages. When the enquiry has been done as per rules and principles of natural justice have been complied with this Tribunal cannot re-appreciate the evidence and take a different view, even if any other view is possible.

. After going through the materials on record, we are satisfied that the findings of the Disciplinary Authority is passed on proper appreciation of the evidence adduced in both the enquiries. We do not find any illegality or irregularity in both the cases. Hence, even on merits we do not find that the applicants have any case.

....31.

. No other points are urged before us. In view of the above discussion both the applications have to fail.

32. In the result, both the applications O.A. 1010/92 and O.A. 1018/92 are hereby dismissed. In the circumstances of the case, there will be no orders as to costs.

(D.S.BAWEJA)
MEMBER(A)

(R.G.VAIDYANATHA) 15/12/98
VICE - CHAIRMAN

B.