CENTRAL ADMINISTRATIVE TRIBUNAL

BANGALORE BENCH

Second Floor,
Commercial Complex,
Indiranagar,
BANGALORE - 560 038.

Dated: 22 JUN 1995

APPLICATION NO. 919 of 1993.

APPLICANTS: Mr.M.Manik, Bangalore

V/S.

RESPONDENTS: The Secretary, Ministry of Finance, Dept.of Revenue, New Delhi & Others.

To

1. Dr.M.S.Nagaraja, Advocate, No.11, Second Floor, Sujatha Complex, First Cross, Gandinagar, Bangalore-9.

2. Sri.M.S.Padmarajaiah, Senior Central Govt.Standing Counsel, High Court Bldg, Bangalore-560 001.

Subject:- Forwarding copies of the Orders passed by the Central Administrative Tribunal, Bangalore-38.

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Please find enclosed herewith a copy of the Order/ Stay Order/Interim Order, passed by this Tribunal in the above mentioned application(s) on 12-06-1995.

Issued on 22/06/95

for DEPUTY REGISTRAR
JUDICIAL BRANCHES.

gm*

CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH

O.A. NO.919/93

MONDAY THIS THE TWELFTH DAY OF JUNE 1995

Shri V. Ramakrishnan ... Member [A]

Shri A.N. Vujjanaradhya ... Member [J]

Sri M. MANI,
Aged 60 years,
S/o Sri B. Muniswamy,
19, 7th Cross, B Street,
Jayabharathnagar,
Bangalore-560 033. ... Applicant

[By Advocate Dr. M.S. Nagaraja]

v.

1. Union of India
represented by
Secretary to Government,
Ministry of Finance,
Department of Revenue,
New Delhi.

2. Central Board of Excise &
Customs represented by
the Secretary,
Central Board of Excise & Customs,
New Delhi.

3. The Collector of Central Excise,
Central Revenue Buildings,
Queen's Road,
Bangalore-560 001. ... Respondents

[By Advocate Shri M.S. Padmarajaiah ...
Senior Standing Counsel for Central Govt.]

O R D E R

Shri A.N. Vujjanaradhya, Member [J]:

1. The applicant is aggrieved by the imposition of penalty of 20% cut in the monthly pension of the applicant for a period of five years.

2. The allegations against the applicant are that

while working as Supdt. of Central Excies at Bannerghatta Range of Lalbagh Division, Bangalore, during the year 1982-83 he failed to verify the correctness of the rate of duty furnished by M/s.Bond Food Products Private Ltd., Bangalore, in their classification list dated 3.4.1982 and 10.9.82 and further failed to apply notification No.80/80 dated 19.6.80 properly so as to return the payment of excise duty by the aforesaid company for the year 1982-83 and thereby caused loss of revenue to the Central Government to the tune of Rs.98,431.50. It is further alleged that by the above act of omission, the applicant has contravened the provisions of Rule 3[i], [ii] and [iii] of the CCS [Conduct] Rules 1964. The applicant was proceeded against departmentally by issue of charge sheet dated 23.9.1988 under Rule 14 of the CCS [Classification, Control and Appeal] Rules, 1965 ['Rules' for short] as in Annexure A-1. The applicant had retired on superannuation on 31.8.1990. Earlier the applicant was issued charge sheet under Rule 16 of the Rules on 16.8.1988 as in Annexure A-2 which was dropped by order dated 23.9.1988 as in Annexure A-3 because of the initiation of major penalty action which was felt necessary. On completion of enquiry the Enquiry Officer ['EO' for short] made a report dated 31.8.1990 [Annexure A-4] stating that though no pecuniary personal gain was proved, the applicant was found to have caused loss on account of evasion of excise duty and

to that extent the charge was proved. By his order dated 2.7.1993, the Disciplinary Authority ['DA' for short] imposed the penalty as aforesaid observing that after considering the findings of the EO, submissions of the applicant Shri Mani on the EO's report and the advice of Union Public Service Commission ['UPSC' for short] it is observed that all the charges against the applicant are proved and in view of the above facts the advice of UPSC appears to be reasonable in the instant case and the same is accepted [Annexure A-5].

3. The applicant seeks to challenge the impugned order of the DA on the following grounds:

a. The delay in initiation of Departmental Enquiry ['DE' for short] is abnormal and it is not satisfactorily explained and, therefore, the proceedings are illegal;

b. For the purpose of continuing the DE after retirement of the applicant, the Presidential sanction was not obtained as required under Rule 9 of the CCS [Pension] Rules and thus the proceedings is vitiated;

c. When the EO had made the report that only part of the charge was proved, the DA who disagreed with the EOs finding ought to have given opportunity to the applicant before passing the order and the denial has resulted in causing injustice to the applicant;

d. Non-supply of a copy of the advice of UPSC to the applicant has also resulted in causing prejudice to the applicant;

e. The applicant was discharging quasi-judicial function and there was no culpable negligence which was actionable;

f. There is no speaking order passed by the DA and a perusal of the order of the DA would indicate that it was passed without application of mind.

Controverting the above contentions the respondents seek to justify the action.

4. We have heard Dr. M.S. Nagaraja, learned counsel for the applicant and Shri M.S. Padmarajaiah, learned Senior Standing Counsel for the respondents and have perused the file relating to the proceedings.

5. The alleged misconduct of the applicant was during the year 1982-83. The Anti Evasion Staff found out the said misconduct during the year 1985 and thereafter a memo calling for the explanation was issued to the applicant on 3.4.1986. The Central Bureau of Investigation ['CBI' for short] took up the matter in FIR No.31/85 on 15.10.85 and made its report on 19.10.1986 and thereafter action was taken to initiate DE by issuing charge sheet in August 1988 and September 1988 as can be seen from Annexures A-1 and A-2. Dr. Nagaraja has contended that there was unexplained delay in the initiation of the DE and thus the same has vitiated the proceedings. According to him nothing prevented the Department from initiating the DE immediately after the explanation of the applicant was called during the year 1986 and there was no necessity for the report of the CBI and thus the delay is not satisfactorily explained and on this score alone the impugned order requires to be quashed. In this connection learned counsel sought support from the decision

in E. VEDAVYAS V. GOVERNMENT OF ANDHRA PRADESH reported in [1989]11 ATC 257. Learned counsel drew our attention to the observation in para 6 of the decision rendered by a Bench of this Tribunal wherein it was observed after referring to various decisions on the subject that a reading of the decisions discloses that while delay in holding an enquiry may not by itself be a ground for quashing an enquiry the unexplained delay in initiating the enquiry could be one of the grounds for setting aside or quashing the disciplinary proceedings. It was further observed that another more relevant circumstance which should be taken into consideration is the dicta as laid down by the Hon'ble Justice M.P. Thakkar that having regard to the nature and content of the charges, if the accusation has been levelled after a long lapse of time it would constitute denial of reasonable opportunity, the reason being an employee cannot be expected to have a computer like memory and he cannot be expected to adduce evidence to establish his innocence after inordinate delay. But the learned counsel did not further point out as to how the alleged delay has caused prejudice to the applicant and if at all he had any difficulty in explaining the circumstance leading to the alleged misconduct because of the alleged delay. However, the fact remains that there is some delay in the initiation of the DE. According to the learned Standing Counsel there is no deliberate

delay and the department had been diligent in pursuing the matter. Consequently it is the contention of the respondents that the alleged delay contended by the applicant cannot be the basis to quash the impugned order. Regard being had to the various stages in which the action was required to be preceded before the initiation of DE we do not think that there is delay by itself isfatal to the proceedings but this is one of the circumstances to be taken into account if the other circumstances weigh in favour of the applicant in tilting the balance in his favour.

6. The DE initiated against the applicant was continued even after his retirement during the year 1990. The contention of Dr. Nagaraja is that for such continuance of DE, the Presidential sanction was a mandatory requirement and as such sanction was not obtained the continuance of the proceeding is without any authority and is illegal. To substantiate this contention, learned counsel relied upon Rule 9 of the Pension Rules. Rule 9[2][a] which was particularly referred to by the learned counsel may be quoted. It reads --

> "9[2][a] The departmental proceedings referred to in sub-rule [1], if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant

had continued in service:

> Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President."

Neither this portion nor any other portion of Rule 9 stipulates that in case of retirement of the Government servant against whom the DE is initiated was required to be continued, sanction of the President for such continuance is mandatory. However, the learned counsel has strongly relied on the decision in G.K. PUKHAN V. STATE OF ASSAM AND OTHERS reported in 1986[1] AISLJ 178. In the said decision Rule 21 of Assam [Services] Pension Rules, 1969, was under consideration. This Rule 21 is almost similar to Rule 9 of Pension Rules except the order in which the different clauses are formulated. While discussing the said rule, the Gauhati High Court in para 10 observed thus:

> "10. The language of clause [a] may now be examined. The expression 'deemed to be a proceeding under this rule', in our opinion, patently indicates recognition of the position that power to continue against an ex-employee in a pending disciplinary proceeding is not warranted in law. And, because, it will be a proceeding against a 'pensioner' for the purpose merely of taking action under Rule 21, the nature and character of the proceeding is required to be indicated. The object of continuing the proceeding is obviously to spare the person concerned, if possible, the ordeal of a de novo proceeding which is contemplated under clause [b]. It is for expeditious disposal of the matter, because, the Pension Rules, as alluded, mandate early disposal of applications for pension. It is merely an enabling provision meant to benefit the prospective pensioner. The expressions 'shall be continued'

is not a mandate. The word 'shall' is not to be read in the mandatory sense. That use of the expression 'shall' is not considered decisive is well-settled by canons of constitution. In a recent decision rendered, in Ajit Singh's case, the law on this point has been summarised and the dominant norm of interpretative technology in this field has been vocally projected. The meaning to be attached to the term shall be determined, according to their Lordships, by answering the question 'whether the object of the legislature will be defeated or furthered'. There is intrinsic evidence written in Rule 21 itself which is to be read as a whole to indicate that the expression 'shall be continued' does not carry in it any mandate. Because the nature and object of the proceeding under R.21 is entirely different. The pending proceeding even if continued cannot end in the punishment contemplated under the Disciplinary or Service Rules. Rule 7 of the Service Rules contemplates different kinds of penalties which may be imposed on a Government servant. Although clause [iii] contemplates 'recovery from pay of the whole or part of any pecuniary loss caused by negligence or breach of orders to the Government', under Rule 21 what can be done is 'recovery from a pension of the whole or part of any pecuniary loss caused to the Government' on the condition that the person concerned in the pending proceeding is found guilty of 'grave misconduct or negligence'. Having regard to Explanation [a] to Rule 21 wherein mention is made of 'statement of charges', we feel persuaded to take the view that unless the person concerned is apprised of the intention by the Government of continuing the pending proceeding in terms of Rule 21 there shall be no jurisdiction to do so in the authority which had commenced the same. ..."

Contending that this decision of the Gauhati High Court is squarely applicable to the facts of the present case, the learned counsel contended that the proceeding which is not continued with the Presidential sanction has to be quashed. The learned Standing Counsel pointed out that rule 9 does not contemplate any Presidential sanction for continuance of department

proceedings against a government servant who was proceeded before his retirement and as such no permission of President was required to be sought or sanction obtained for such continuation. According to him Presidential sanction would be necessary only under Rule 9[2][b] in case departmental proceeding was not initiated before the retirement of Govt. servant and is sought to be initiated after his retirement. He further contended that the decision of the Gauhati High Court is per incuriam as the rule does not refer to any such sanction of the President. Contending that the decision of Gauhati High court is a reasoned one it was urged for the applicant that it cannot be brushed aside by terming it as per incurium. However, learned counsel when questioned, submitted that he could not lay his hand to any decision of any other High Court or that of Karnataka High Court on the point. Because Rule 9 of the Pension Rules is clear and unambiguous, as rightly contended by the learned Standing Counsel, we are unable to be persuaded by the decision rendered in G.K. Pukhan's case. Therefore, we are unable to agree with the contention of the learned counsel for the applicant that the proceeding is vitiated because of want of Presidential sanction for continuance of the same after the retirement of the applicant.

7. The report of the EO [Annexure A-4 would disclose

that there was no pecuniary personal gain proved against the applicant but the application of wrong provision of Notification No.80/80 has resulted in causing loss to the State on account of evasion of Excise duty and the same was proved. Para 8 of the DA's order states that all the charges against Shri M. Mani, Supdt.[Retired] were proved. Dr. Nagaraja argues that the DA had proceeded on the basis that both the portion of the charge ie., pecuniary personal gain as well as causing wrongful loss were proved, However, he did not afford any opportunity to the applicant before arriving at such a conclusion. Dr. Nagaraja has relied on several decisions to support his contention that opportunity ought to have been given by the DA before differing from the view of the EO and denial of such an opportunity has prejudiced the case of the applicant. Apart from the decisions reported in [1987] 2 ATR 885 and 1994 Lab IC 256 in VAKIL CHANDER JAIN V. CENTRAL BANK OF INDIA, the learned counsel for the applicant has strongly relied on the decision in NARAYAN MISRA V. STATE OF ORISSA decided by the Supreme Court 1969 SLR 655. In this decision it was observed that when no notice or opportunity was given to the delinquent official about the attitude of punishing authority, the order of removal being violative of natural justice and fairplay ought to be set aside. The Supreme Court in the latest decision in STATE BANK OF INDIA V. S.S.

KOSHAL [1994]27 ATC 834 has taken a different view. Shri Padmarajaiah sought to rely on para 6 of this decision which reads thus:

> "6. So far as the second ground is concerned, we are unable to see any substance in it. No such fresh opportunity is contemplated by the regulations nor can such a requirement be deduced from the principles of natural justice. It may be remembered that the Enquiry Officer's report is not binding upon the disciplinary authority and that it is open to the disciplinary authority to come to its own conclusion on the charges. It is not in the nature of an appeal from the Enquiry Officer to the disciplinary authority. It is one and the same proceeding. It is open to a disciplinary authority to hold the inquiry himself. It is equally open to him to appoint an Enquiry Officer to conduct the inquiry and place the entire record before him with or without his findings. But in either case, the final decision is to be taken by him on the basis of the material adduced. This also appears to be the view taken by one of us [B.P. Jeevan Reddy, J.] as a Judge of the Andhra Pradesh High Court in Mahendra Kumar v. Union of India. The second contention accordingly stands rejected."

Dr. Nagaraja sought to distinguish this decision with the earlier decision by the fact that the decision of NARAYAN MISRA of the same court was not referred to. We do not propose to enter into controversy of resolving the binding nature of precedent at this stage inasmuch it is not required to be finally resolved to render the decision in this case.

8. The learned counsel for the applicant next contended that applicant ought to have been furnished with a copy of the advice of UPSC and because of such lapse the applicant had no opportunity to put forth his

say in the matter. The learned counsel for the applicant has referred us to the decision of a Bench of this Tribunal rendered in R.R. PRASHAD V. UNION OF INDIA reported in II[1993]CSJ [CAT]89[PB][copy furnished by the applicant]. Therein it was held that the advice of the UPSC, admittedly constituted record of the proceedings and it would, therefore, be fair and just to furnish a copy of such advice to the petitioner in such a case where no detailed enquiry is held. The learned Standing Counsel points out that the enquiry proceeding initiated against R.R. PRASHAD was under Rule 16 of the Rules where no detailed enquiry was held and, therefore, such an observation came to be made by the Principal Bench of this Tribunal. Because in the present case the enquiry held against the applicant is a detailed enquiry under Rule 14 of the Rules and according to the Standing Counsel this decision rendered in Prashad's case can be distinguished. The learned counsel for the applicant has also relied on another decision STATE BANK OF INDIA V. AGARWAL reported in [1993]23 ATC 403 and contended that non-supply of Central Vigilance Commission report has resulted in violation of the principles of natural justice and, therefore, the proceeding was sought to be quashed. But the contention on behalf of the respondents in this regard is that the advice tendered by the UPSC is regarding the quantum of punishment whereas CVC had written an independent report which was a fresh material brought on record of the

enquiry proceeding and, therefore, such an observation came to be made in the case of STATE BANK OF INDIA V. AGARWAL and for that reason learned counsel for the applicant cannot seek much support from the same. The advice rendered by the UPSC, as can be seen from the order of the DA is only regarding the quantum of punishment to be imposed on the applicant ie., a cut of 20% pension. We are of the view that the applicant against whom the enquiry was initiated under Rule 14 which is a major penalty proceeding wherein the applicant had fair and reasonable opportunity of defending himself, we do not think the fact that DA had not furnished the copy of the advice of the UPSC regarding the quantum of punishment is such as to vitiate the procedings and to call for our interference.

9. The applicant, it is not disputed, was discharging quasi judicial function at the relevant point of time and the misconduct or lapse levelled against him was during such discharge of quasi judicial function the official can be proceeded against for such lapse or misconduct as pointed out by the Supreme Court in UNION OF INDIA V. K.K. DHAWAN reported in AIR 1993 SC 1478. In para 28 of the said decision, the Supreme Court observed that disciplinary action can be taken in the cases viz.,

[i] where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

[ii] if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

[iii] if he has acted in a manner which is unbecoming of a government servant;

[iv] if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

[v] if he had acted in order to unduly favour a party; and

[vi] if he had been actuated by corrupt motive however, small the bribe may be.

Dr. Nagaraja has also referred to another decision of the Supreme Court in UNION OF INDIA V. R.K. DESAI reported in [1993]24 ATC 74 wherein it was observed that a disciplinary action would lie depending upon the facts and circumstances of each case where the delinquent was discharging quasi judicial functions. Dr. Nagaraja had contended that the applicant was singled out for such lapse even though the higher authority who was also equally responsible to take necessary action by giving necessary orders to the applicant was not proceeded against. But the fact remains that even an officer taking decision in the exercise of quasi judicial function is not immune from disciplinary proceedings, as observed by Supreme Court in UNION OF INDIA AND OTHERS V. K.K. DHAWAN reported in [1994]23 ATC 1 but the contention of the learned counsel for the applicant is that the non-reporting of the matter to the superior authority was

not a charge and, therefore, it ought not to have been reckoned while considering the quantum of punishment to be imposed. So far as this point is concerned we would take its consideration while discussing the next ground of the applicant. So far as the applicant being entitled to an opportunity to have his say about the advice of the UPSC, it would depend upon the facts and circumstances of each case as observed in the case of K.K. DHAWAN.

10. The strong ground on which the decision in this application rests is the contention of the applicant that there is non-application of mind by the DA which has resulted in miscarriage of justice. While pointing out that the EO has reported that only a part of the charge was proved, the DA proceeded on the basis that all the charges are proved [para 8 of the order]. The charges against the applicant as per the charge sheet dated 23.9.1988 were both pecuniary personal gain as well as causing wrongful loss to the State. The learned Standing Counsel did not dispute this fact and he admitted that there was some mistake in the order of the DA who has concluded that both the portions of the charge ie., pecuniary personal gain to the applicant as well as causing wrongful loss to the state, were proved. He cannot however, tell us as to why there is nothing in the DA's order to indicate that he had come specifically to the conclusion that there was pecuniary personal gain to the

applicant even though the EO had held that this charge is not proved and also as to on what basis he came to this different conclusion. Another glaring factor indicating the non-application of mind as rightly contended by the applicant, is that the DA has proceeded on the basis of the charge sheet dated 16.8.1988 as in Annexure A-2 which was actually dropped under Annexure A-3 dated 23.9.1988 and a fresh charge sheet under Rule 14 of the Rules for major penalty proceeding was initiated on 23.9.1988 as in Annexure A-1. Learned Standing Counsel also did not dispute the fact that there is mistake in the proceeding of the DA. Thus it is clear that there was no application of mind on the part of the DA in passing the impugned order dated 23.7.1993 as in Annexure A-5. Though the alleged misconduct came to the knowledge of the department during the year 1985 and the explanation of the applicant was called for by memo dated 3.4.1986, the action was not initiated immediately thereafter to proceed against the applicant. Coupled with the clear indication of non-application of mind on the part of the DA, the delay in initiation of enquiry assumes importance and, therefore, we are of the view that impugned order of the DA dated 2.7.1993 as in Annexure A-5 cannot be sustained and it will have to be quashed. Accordingly the impugned order is quashed by allowing this application. No order as to costs.

CENTRAL ADMINISTRATIVE TRIBUNAL BANGALORE

TRUE COPY

22/6/95

Section Officer
Central Administrative Tribunal
Bangalore Bench
Bangalore

Sd-

MEMBER [J]

Sd-

MEMBER [A]

bsv