OA 207/97

Central Administrative Tribunal
Mumbai Bench

O.A. 385/96
with
O.A. 358/96, O.A.207/97,
O.A.263/97 and O.A.400/96

Mumbai this the 31st day of August, 2001

Hon'ble Smt. Lakshmi Swaminathan, Vice Chairman(J).
Hon'ble Smt. Shanta Shastry, Member(A).

1. O.A. 385/96

S.N.Thapa,
R/o F-22, Hyderabad Estate,
Nepean Sea Road,
Bomaby-400 026. ... Applicant.

(By Advocate Shri G.K. Masand)

Versus

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

2. Chairman,
Central Board of Excise and
Customs, North Block,
New Delhi.

3. Estate Manager,
Govt. of India,
old CGO Building,
Annexe 3rd Floor,
Maharshi Karve Road,
Mumbai-400 020.

4. The DIG (CBI),
C-7, Ministerial Bungalow,
Madam Cama Road, Opp. Mantralaya,
Mumbai-400 032. ..... Respondents.

(By Advocates Shri M.I. Sethna, Sr. Counsel with Shri V.D. Vadhavkar - for respondents 1&2, Shri V.S. Masurkar - for respondent 3, S/Shri A.B. Belkar, A.S. Kulaye - for respondent 4)

2. O.A.358/96

Shri Ranjit Kumar Singh
Baleshwar Prasad,
Assistant Commissioner of Customs ... Applicant.

(By Advocate Shri Suresh Kumar)

Versus

Union of India & Ors. ... Respondents.

(By Advocates Shri M.I. Sethna, Sr. Counsel with Shri V.D. Vadhavkar - for respondents 1&2, Shri V.S. Masurkar - for respondent 3, Shri A.S. Kulaye / Shri A.B. Belkar for respondent 4)

3. O.A. 207/97

Jayvant Keshav Gurav,
Inspector of Central Excise,
Mumbai III, Commissionerate,

Resident of:

C-7, Clangeshwar Chhaya,
Retti Bunder Road,
Opposite Rokade Building,
Dombivali (West),
Dist: Thane. ... Applicant.

(By Advocate Shri Suresh Kumar)

Versus

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

2. Commissioner of Central Excise,
Mumbai III Commissionerate,
Nav Prabhat Chambers,
Ranade Road, Dadar (West),
Bombay-400 028. ... Respondents.

(By Advocates Shri M.I. Sethna, Sr. Counsel with Shri V.D. Vadhavkar)

4. O.A.263/97

Mohammed Sultan Sayyed,
Superintendent of Central
Excise Mumbai III,
Commissionerate Resident of 1,
Milan Apartments, K' Villa, Rabodi,
THANE 400 601. ... Applicant.

(By Advocate Shri Suresh Kumar)

Versus

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

2. Commissioner of Central Excise,
Mumbai III Commissionerate,
Nav Prabhat Chambers,
Ranade Road, Dadar (West),
Bombay-400 028. ... Respondents.

(By Advocates Shri M.I. Sethna, Sr. Counsel with Shri V.D. Vadhavkar)

5. O.A.400/96

Mr. Sudhanwa Sadashiv Talavdekar,
S/o late Shri Sadashiv Krishna Talavdekar,
R/o Bombay, last employed as
Superintedent of Central Excise and
Customs, Bombay Commissionerate III,
Nav Prabhat Chambers,
Ranade Road, Dadar (W),
Bombay-400 028. ... Applicant.

(By Advocate Shri Suresh Kumar)

Versus

1. Shri Tarsem Lal,
Under Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi-110 001.

2. Commissioner of Central Excise,
Bombay III,
Nav Prabhat Chambers,
Ranade Road, Dadar (W),
Bombay-400 028. ... Respondents.

(By Advocates Shri M.I. Sethna, Sr. Counsel with Shri V.D. Vadhavkar)

O R D E R

Hon'ble Smt. Lakshmi Swaminathan, Vice Chairman(J).

The applicants in the above five O.As have impugned the action of the respondents in issuing the orders dated 7.2.1996. In those orders, it has been stated that the President is satisfied that under clause (c) of the second proviso to Clause (2) of Article 311 of the Constitution in

the interest of the security of State, it is not expedient to hold an inquiry in each of their cases and they were dismissed from service with immediate effect. Learned counsel for the parties have submitted that the relevant facts and issues are similar in these cases and, hence, they have been heard together and are being disposed of by a common order. The legal arguments submitted by Shri G.K. Masand, learned counsel in **S.N.Thapa Vs. Union of India & Ors.** (O.A.385/96) have have also been adopted by the learned counsel in the other four cases. In the circumstances, for the sake of convenience, the facts and issues raised in OA 385/96 have been referred to and such other arguments the others have advanced have been referred to later.

2. The brief relevant facts of the case are that the applicant, Shri S.N. Thapa, while posted as an Additional Collector of Customs in Marine and Preventive Wing of Customs (P) at the Bombay Collectorate, was arrested on 28.4.1993 in connection with what has been referred to as the Bombay Bomb Blasts case, which occurred on 12.3.1993 and was subsequently suspended by order dated 3.5.1993. According to him, while he was working in the Marine (Preventive) Section, Customs, where he was appointed in January, 1991, he was a terror to the persons involved in smuggling activities and had, in fact, brought in huge amounts of revenue to the Government in the years 1990-1992. He says these have not been rebutted by the respondents. Shri G.K. Masand, learned counsel, has submitted that instead of the respondents recognising the applicant's good work in preventing smuggling by the under-world "Dons" who are dangerous anti-social persons

working against India, they have taken opposite action against him by dismissing him from service and that too without even holding an inquiry. The applicant has explained that the Customs (Preventive) Department has invariably to work on the basis of information received from secret sources and informers. He had received such information in January, 1993 that a landing of a big consignment of contraband silver was likely to take place at Shekhadi in Raigad District between 29.1.1993 and 31.1.1993. Prior to that, the applicant had also received a copy of a D.O. letter dated 25.1.1993, addressed by Shri S.K. Bhardwaj, Collector of Customs (P), Bombay to Shri R.K. Singh, applicant in OA 358/96, by which the Collector had conveyed an intelligence that ISI of Pakistan was likely to send automatic weapons along with silver and gold or separately in the next 15-30 days. Shri G.K. Masand, learned counsel, has submitted that the applicant had taken prompt and correct action in response to this message and had also personally led the party with regard to the operation to keep a watch and apprehend the smugglers of the contraband goods. He has submitted that although they had been camping in that place for two days, no landing took place and the applicant had to return to Bombay without either the smugglers or the contraband goods. The applicant has contended that at all times he had taken all necessary action and steps based on the information received with regard to the smuggling of the contraband goods, like, RDX, arms and ammunition, etc., during the relevant period. He has submitted that he learnt from Shri R.K. Singh, Superintendent, Customs that no landing had taken place of gold or silver or any other articles in the night of 2/3.2.1993.

3. On 12.3.1993, the city of Bombay was rocked by a series of Bomb Blasts which left many hundreds of innocent persons dead and many more injured, besides destruction of property worth crores of rupees. Shri G.K. Masand, learned counsel for the applicant has submitted that during the investigations, Police got a clue that the Bombay Bomb Blasts were master-minded by smugglers like Abdula Mustaq @ Tiger Memom, Mohd.Dosa and Dawood Ibrahim Kaskar, etc. with the help of ISI of Pakistan. He has also submitted that the Bombay Police which was investigating the blasts case was perhaps convinced that the police staff at Raigad District was mixed up with the smugglers. He has stated that the first landing of arms and ammunition had taken place on 9.1.1993 at Dighi and later at Shekhadi on 3rd, 4th, 7th and 8th February, 1993. According to the applicant, none of the landing agents have directly or indirectly implicated him in the landing of the smuggled goods.

4. The applicant has also filed MP 777/98 on 19.11.1998. In this MP, he states that he has referred to and relied upon various documents in the O.A. as well as in the affidavits dated 28.8.1996 and 9.12.1996 filed in rejoinder to the affidavits filed by the respondents. Reference has also been made to the charge-sheet filed by the prosecution in case No. I of 1993 before the Special Designated Court for Bombay Bomb Blast case (in short referred to as "TADA Court"). He has submitted that the charge-sheet pertaining to C.R. 132/ 1993 relating to Dighi, numbered as Book II has been dropped. CR No. 133 of 93 relating to landing at Shekhadi is numbered as Book

III, supplementary charge-sheet together with supporting documents filed on 25.8.1994 by the prosecution, after the applicant's release on bail in pursuance of the order dated 5.4.1994 passed by the Hon'ble Apex Court is numbered as Book IV, documents/orders passed by TADA court are numbered as Book V and confessions/statements sought to be relied upon by the prosecution, are numbered as Book VI. He has prayed that these documents in the Books which have been submitted by the prosecution in the TADA Court where the trial is in progress, may be taken on record in the O.A. Shri G.K. Masand, learned counsel, has submitted that the materials submitted by the prosecution in the criminal case before the TADA Court against S.N. Thapa, and other applicants in the aforesaid O.As, will show that irrelevant and distorted materials had been placed before the President of India who had passed the impugned orders dated 7.2.1996. Learned counsel has submitted that when the charge-sheet was submitted in the TADA court, the prosecution had furnished copies of charge-sheets to all the accused persons by censoring the names of all the witnesses. There are 3520 prosecution witnesses and identity of 706 potential witnesses was with-held. He has submitted that the prosecution had prayed in the criminal court that the identity of these potential witnesses should not be disclosed as they are dangerous. He has also relied on the prosecution submission that those cases must be heard in camera but the Designated Judge of TADA court passed the order dated 9.6.1995, holding that it will not be possible to hold the proceedings in camera. The Hon'ble Court further held that (a) names, identity and address of all witnesses except those who are public servants shall not be published; (b) names, identity and address of eye

witness and panch witness concerned with recovery of arms and ammunition shall not be disclosed and they shall be known by code numbers given by the prosecution. He has, therefore, submitted that accordingly, the prosecution had declared the names of all those witnesses along with the code numbers given earlier and had also submitted the list of all remaining potential witnesses without disclosing the identity and names. He has submitted that the complete list of all formal as well as potential witnesses of CR No.132/93 and CR No. 133/93 had been declared in the criminal court on 3.7.1995. In the circumstances, he has taken a serious objection to the averments made by the respondents in their reply that the charge-sheets are supported by material collected by the Maharashtra Police and CBI and statements of witnesses whose identity has been kept secret by giving them code numbers. He has also submitted that the prosecution in the Designated Criminal Court is about to be completed shortly as the proceedings are going on there.

5. Learned counsel's main contention is that since all the statements of the material witnesses relied upon by the President are being publicly relied upon by the prosecution in the TADA Court in which the court has ruled against "in camera proceedings", there was no reason at all to pass the impugned order dated 7.2.1996 under proviso (c) to Article 311(2) of the Constitution. He has submitted that against the applicant and the other four applicants who were Customs officials, a Departmental inquiry on specific charge-sheets could have been easily conducted for their alleged acts of commission and omission of allowing transportation of silver, arms, ammunition and

explosives/RDX which had landed in Dighi, Shekhadi, etc. in January-February, 1993 which were later used in the explosions that took place in Bombay on 12.3.1993. The statements and also material witnesses whose identity was no longer secret could have been easily produced before the Departmental inquiry. He has very vehemently contended that in the circumstances of the case, there was no need for the President to resort to the exercise of powers under Article 311(2), second proviso clause (c). He has submitted that the exercise of power by the President cannot also be supported as there was no threat at all to the security of the State, as alleged by the respondents, when the order of dismissal was passed.

6. Learned counsel has submitted that against the applicant, the main evidence consists of the confessional statement made by Shri R.K. Singh, who had admitted that out of the money received for helping the smugglers landing contraband goods into the country, he had passed on a portion of this illegal gratification to S.N. Thapa. Shri G.K. Masand, learned counsel, has submitted that later on in the presence of certain important witnesses, including some Maharashtra Police officers, he had retracted the statement. He wondered whether this fact had been placed before the Committee of Secretaries who had given their advice to the President. He has contended strongly that he fails to understand what other material was before the Committee, other than what he refers to as "distorted material" which was placed before them, which led them to believe that there was enough material to take recourse to Article 311(2), second proviso clause (c). He has submitted that the pleadings in this case are important

and, according to him, whatever he has said regarding the material evidence in the criminal case which has also been relied upon by the respondents in taking a decision under Article 311(2), proviso clause (c) are distorted and, therefore, unreliable. He has submitted that the respondents in their reply have nowhere denied the averments made by the applicant or said that there were other material, besides what is stated in the reply affidavit, to enable them to arrive at a proper conclusion. He has submitted that these are distorted and incomplete material which he can demonstrate on the basis of the documents filed with MP 777/98 which should, therefore, be admitted. He has fervently pleaded that the evidence before the TADA court must be looked into by the Tribunal in order to arrive at a fair and proper decision in the O.A.

7. Learned counsel for the applicant has submitted that another important evidence against S.N. Thapa consists of the additional material filed by the CBI along with the supplementary charge-sheet in the TADA court. He has submitted that a perusal of the material which has been placed before the TADA Court shows that the applicant had knowledge at the relevant time that contraband (not necessarily explosives and arms but possibly silver), had been landed or was likely to land in his jurisdiction but he had not made sufficient efforts to seize the contraband and further, he had given certain directions, such as sending the patrolling party to a point other than what the informer had passed on. He has submitted that these are such material which could have been easily verified in the Departmental proceedings. He has further stressed that the

applicant had at all times acted in the best interests of the State and had not assisted in the smuggling of goods or its transportation to Mumbai. He has relied on the judgement of the Supreme Court dated 5.4.1994 granting the applicant bail on the ground that, there was no legal evidence to prima facie establish that he was connected with the smuggling of contraband goods. Learned counsel has submitted that the provisions under the Terrorist and Disruptive Activities Act (TADA Act) are very stringent where "imprisonment is the order and bail is an exception". This he claims is also a strong point in Thapa's favour to quash the impugned order dated 7.2.1996. He has also submitted that it is not even the allegation before the Trial Court that the applicant had ever introduced R.K. Singh (applicant in OA 358/96) to "Tiger Memon", let alone introducing him as "His Man". Shri Masand, learned counsel, has very emotionally summed up stating that the applicant undertakes to withdraw the O.A. if the respondents produce any proof or legal evidence of such a statement or document being made out in the charge-sheet in the criminal case in the TADA court.

8. Another point urged by the applicant's counsel is that admittedly Shri S.K. Bhardwaj, who was the Collector of Customs, Bombay, below whom S.N. Thapa was working, had given certain instructions which had been carried out by the applicant. His contention is that if the applicant, Thapa, could be held guilty of being involved with the smugglers in allowing into the country contraband material during the relevant period, he has

questioned the decision of the respondents not to proceed equally against Shri S.K. Bhardwaj who was his superior officer.

9. During the course of hearing, the applicant has submitted a chart showing the hierarchy of the officers in the Customs (Preventive) Collectorate, Bombay. From this, it is seen that at the relevant time, Shri S.K. Bhardwaj was the Collector, applicant Shri S.N. Thapa was the Additional Collector (M&P), applicant, Shri R.K. Singh, was the Assistant Collector, Raigad District at Alibag, applicants, M.S. Sayyed and S.S. Talwadekar, were Superintendents of Customs at Alibag and Srivardhan, respectively and applicant, Gurav, Sawant, Rane were Inspectors at Shrivardhan. The applicant, S.N.Thapa, has stated that he had taken tough action against all his subordinate officers and further that nothing incriminating was found when his residence was searched by the Maharashtra Police. Much reliance has been placed by the applicant's counsel on the fact that the Supreme Court had granted interim bail to the applicant. He has also submitted that the gist of the conversation recorded in some cassettes, purportedly in the hand-writing of accused Yakoob Memon, which was supposed to have been seized from him at the time of his arrest referred to payment of certain amounts (Rs.22 lacs) for facilitating landing of contraband. He has submitted that the cassettes have been tampered with and the recording was garbled and made inaudible on which the TADA court has come to certain conclusions regarding the association of the applicant with Tiger Memon or his involvement in the smuggling activities and so on. Part of the evidence against Thapa was that he has received specific information

on 2.2.1993 from another Addl. Collector in his office regarding likely landing of silver by Tiger Memom at Mhasla. However, it is alleged that the officer sent a mis-leading wireless message to the concerned officers relating to some activity at Bankot and also other information regarding landings of silver and chemicals on 3.2.1993 at Shekhadi. Shri Masand, learned counsel, has very vehemently submitted that these are matters which in case, there is any dereliction of duties, the Department could have very well inquired into in Departmental proceedings and if the Customs officials are found guilty appropriate action could have been taken against them.

10. The applicant, S.N. Thapa, who was present in Court, had repeatedly interjected his counsel to say that he had been shot at by unknown persons at least five times in the meantime after the application was filed. During the hearing, learned counsel for the applicant, has also relied on the Constituent Assembly Debates on proposed Article 311(2), proviso (c). According to him, the threat to the security of the State should be established in not holding such an enquiry as provided under Article 311(2). After the applicant was arrested on 28.4.1993, the respondents placed him under suspension on 3.5.1993. He has submitted that the respondents could have continued to keep him under suspension and held a Departmental enquiry, which they have failed to do. He has also pointed out that they have taken nearly three years to pass the orders of dismissal on 7.2.1996 when they were expected to take urgent action in case there was any threat to the security of the State. He has relied on the judgements of the Supreme Court in Satyavir Singh and Ors. Vs. Union of

India & Ors. (1986 AISLJ (1)-1 - Three Judges), **Union of India & Anr. Vs. Tulsiram Patel** (1985 (2) SLJ 145), **A.K. Kaul & Anr. Vs. Union of India & Anr.** (1985 (4) SCC 73), **Union of India & Anr. Vs. Balbir Singh and Anr.** (1998 (5) SCC 216); **S.R. Bommai Vs. Union of India** (1994(3) SCC 1) and Andhra Pradesh High Court in **B. Bhaskara Reddy Vs. The Govt. of Andhra Pradesh, Hyderabad and Anr.** (1981 (1) SLR 249). He has contended that unlike the facts in the case of **Satyavir Singh** (supra) where the order of dismissal was passed on the same day, undue delay has taken place in the present case where nearly three years have elapsed between the Bombay Bomb Blasts and the impugned order being passed. He has also relied on Paragraph 175 of **Tulsiram Patel's case** (supra). His contention is that if the proviso to Article 311(2) had to be resorted to, it was necessary for the respondents to take prompt action on the decision that the conduct of an inquiry would not be in the security of the State. That situation is not applicable to the present case where a long lapse of time has occurred between the happening of the events in March, 1993 and the impugned orders. He has submitted that in paragraph 3 of the judgement in **Balbir Singh's case** (supra), it has been stated that the Committee of Advisors, after considering all the facts was required to recommend whether action should be taken for the dismissal or removal of the Government servant under the second proviso (c) to Article 311(2) of the Constitution without a Departmental inquiry. The Committee had to consider whether on the ground of national security, it was not desirable to disclose the materials as it would affect the security of the State. He has contended that as per the Ministry of Home Affairs Circular dated 26.7.1980, which is reproduced in **Balbir**

Singh's case (supra), only the situation dealt with in clause (c) is applicable to the present case i.e. anti-national activities. Shri G.K. Masand, learned counsel, has very vehemently submitted that if only materials which are available before the Criminal/TADA Court were before the High Powered Committee, then clause (c) of this Circular cannot be invoked but it would mean that an inquiry ought to have been held and opportunity given to the applicant to defend his case. He has submitted that the Head-Note in **Balbir Singh's** case (supra) where it is mentioned that the judgement of the Andhra Pradesh High Court in **B. Bhaskara Reddy's** case (supra) stands impliedly over-ruled is wrong, as according to him, it has merely been distinguished but not over-ruled. His contention is that in Paragraph 10 of **Balbir Singh's** case (supra) which refers to **B. Bhaskara Reddy's** case (supra), what has been stated is that the "Tribunal has not noted that the material which was placed by the Intelligence Bureau before the Advisory Committee and the President did not relate merely to the assassination of the Prime Minister. It related to various other activities of the respondent, as well, which the authorities considered as prejudicial to the security of the State". He has, therefore, repeatedly submitted that the Tribunal in the present case, must satisfy itself whether there was any "other" material or evidence that was placed before the Advisory Committee/competent authority. If not, his contention is that, then the satisfaction of the President is not bonafide or supported by relevant materials, other than what he refers to as distorted materials, which have also now been relied upon by the Prosecution in the criminal case before the TADA court. He has relied on

paragraphs 101 and 175 in **Tulsiram Patel's case** (supra). In paragraph 101, their Lordships of the Supreme Court have laid down that the principle of natural justice has been expressly excluded by a Constitutional provision, namely, the second proviso to Article 311(2). Learned counsel, has contended that the second proviso to the Article must, however, be applied bonafide and should not be applied in a mala fide manner. The Supreme Court has held that "where a clause of the second proviso to Article 311(2) or an analogous service rule is applied on an extraneous ground or a ground having no relation to the situation envisaged in such clause or rule, the action of the disciplinary authority in applying it would be mala fide and, therefore, bad in law". His contention is that Thapa's case is one such case where the President's action is mala fide.

11. Learned counsel for the applicant has, therefore, contended that unless and until the Tribunal can find some other material on the basis of which the Advisory Committee could have advised the President under the proviso to clause (2) of Article 311, to exclude the principles of natural justice, which were otherwise available to the applicant, the action of the respondents has to be held as mala fide and untenable. Much reliance has also been placed by the learned counsel on the judgement of the Andhra Pradesh High Court in **B. Bhaskar Reddy's case** (supra). He has stressed on the findings of the High Court that under the proviso clause (c) to Article 311(2) of the Constitution, the President can dispense with the inquiry, if the conduct of the inquiry into the charges is not expedient only in the interest of the security of the State and not on any other ground. This, he states is

not the position in the present case because only distorted materials have been relied upon by the Advisory Committee and nothing else. So, relying on the cases of S.R. Bommai and A.K. Kaul (supra) he has submitted that the evidence before the TADA Court as well as the materials placed before the Advisory Committee, on the basis of which the impugned order dated 7.2.1996 was passed should be looked into in detail by the Tribunal, to satisfy itself if there was any threat to the security of the State, as contended by the respondents in holding a Departmental inquiry. On these grounds, Shri G.K. Masand, learned counsel, has prayed that the impugned order dated 7.2.1996 may be quashed and set aside with consequential benefits.

12. S/Shri Suresh Kumar and S.P. Kulkarni, learned counsel in the other four connected cases have adopted the legal arguments submitted by Shri G.K. Masand, learned counsel in OA 385/96 and have also submitted written statements, placed on record. Shri Suresh Kumar, Ld. Counsel, has submitted that retracted statements of witnesses have been relied upon by the respondents in taking a decision to dismiss the other applicants, also under the proviso clause (c) to Article 311(2). He has submitted that the confession of the applicant in OA 263/97 has been got after beating him and he has not received an amount of Rs.1.5 lacs, as alleged, which is also mentioned before the Designated TADA Court. Shri Suresh Kumar, learned counsel has submitted that similar facts exist in OA 207/97, O.A.400/96 and OA 358/96. On behalf of the applicant, Shri R.K. Singh, it has been submitted that the satisfaction of the President under Article 311(2), second proviso clause (c) is not based on any relevant material as he was made to give certain

statements under duress to the police which was later retracted in 1993 itself, which has been relied upon by the respondents. He has repeated the contentions of Shri G.K. Masand, learned counsel that the reasons given by the respondents in their affidavits are that the identity of witnesses is secret in TADA proceedings, whereas that Court has already ordered that proceedings are not to be held in camera. He has also relied on the fact that the charge-sheets have already been filed in the criminal court and the statements of the accused and the witnesses have already been given in the TADA court along with their names and identity. He has contended that the Committee only met in October and November, 1995, which had advised the President, on the basis of which the impugned orders have been passed in February, 1996. Therefore, he has contended that there was no other material available with the State, other than what is before the Criminal Court. He has also relied on the judgement of the Supreme Court in **Balbir Singh's** case (supra). In page 3 of the written statement, the applicant has contended that the serial Bomb Blasts at Bombay had never posed a serious threat to the State. Learned counsel's main contention was that in such a situation of alleged smuggling of contraband goods, like arms and ammunition, silver, RDX, etc., it could not have been done only by the Customs officials. His grievance is that the Maharashtra Police was also involved in such activities but they were not proceeded under the proviso to Article 311(2) and were facing public trial. However, it is relevant to note that learned counsel could not substantiate his submissions from any averments in the O.As. Shri G.K. Masand, learned counsel who was also present in the Tribunal, submitted that this was not at all his case.

Shri Suresh Kumar, Learned counsel had also referred to the grounds taken in OA 358/96. The applicant had questioned the validity of the procedure adopted by the President in terms of the Ministry of Home Affairs Circular dated 26.7.1980. This ground can be straightway rejected as the procedure adopted by the respondents in terms of the Circular of 1980 has been upheld by the Hon'ble Supreme Court in **Balbir Singh's** case (supra).

13. We have seen the replies filed by the respondents and heard Shri M.I. Sethna, learned Sr. Counsel as well as S/Shri A.B. Belkar and A.S. Kulaye, learned counsel for Respondent4/CBI.

14. Shri Sethna, learned Sr. Counsel has submitted that there is no infirmity at all in the impugned orders dated 7.2.1996. With regard to the submissions made on MP 777/98, learned Sr. counsel has vehemently resisted the same from the beginning, which was filed on 19.11.1998. Learned Sr. Counsel, has submitted that for deciding the vires of the orders dated 7.2.1996, which is what is under challenge in the present applications, other documents which form part of the records in the criminal/TADA Court, which are sought to be introduced by way of MP 777/98, cannot be so done or relied upon. He has submitted that any documents after 1996 are not relevant to the question under consideration here. Learned Sr. counsel had pleaded that a decision may, therefore, be first taken on MP 777/98 and in case it is allowed, respondents may be given an opportunity to address the Tribunal further regarding the evidence before the criminal court, if necessary. He has submitted that CBI was impleaded as necessary party after

the M.P. was filed. In the reply filed by respondent 4-Supdt. of Police, CBI, they have referred to the fact that Bombay city was rocked by a series of explosions which left 257 persons dead, 713 injured and property worth about Rs.27 crores destroyed. The applicant, S.N. Thapa, is one of the accused in the criminal case before TADA Court filed by the Mumbai Police. Both learned counsel for CBI, have submitted that the criminal case is in progress but is yet to be completed, where a large number of material witnesses have been heard. Shri M.I. Sethna, learned Sr. Counsel, has submitted that the facts and evidence being brought in the criminal case, which is yet to be completed cannot, therefore, be relied upon by applicant's counsel to support his version that distorted facts were placed before the Advisory Committee/President. Learned Sr. counsel has fervently submitted that the Tribunal, when looking into the file that was submitted before the President for taking a decision whether to apply second proviso clause (c) to Article 311(2) or not in the cases before us, should not look into the other evidence or materials or comment upon the same, as they are before the TADA court, which is the competent Criminal Court. He has, therefore, submitted that by no stretch of imagination, the materials that were placed before the Committee of Secretaries and relied upon by the President can be treated as distorted materials. According to him, in any case there was sufficient material for the Committee to arrive at the conclusion it did that in the security of the State it is not expedient to hold Departmental enquiries before dismissing the applicants. Learned Sr. counsel, has submitted that the prayer of the applicant, Thapa, to take on record the documents which have been placed before the Criminal Court/TADA court

should not be agreed to, especially when that court has yet to give its findings. He has submitted that in the circumstances, MP 777/98 may be dismissed as it would not be proper for the Tribunal to comment on documents and evidence submitted before the Criminal Court where the hearing has yet to be concluded. It will be for that Court to comment on the evidentiary value of the materials against the accused who are facing criminal trial.

15. Learned Sr. counsel has submitted that the five applicants in the aforesaid O.As were involved in the conspiracy to allow smuggling of items into the country and it was immaterial whether they knew that they were explosive items or anything else. They were posted in the Customs (Preventive) Section in the concerned areas where the contraband articles were smuggled into the State during the relevant period. He has, therefore, contended they were answerable for deliberately closing their eyes when these illegal imports were taking place, despite information received by them from higher officers and informers. He has submitted that additional charge-sheets have been framed in the TADA Court against the applicant, S.N. Thapa, (OA 385/96) that he had been informed that certain articles were to be smuggled into the country which was prejudicial to the security to the State. Learned Sr. counsel has also relied on more or less the same judgements, as referred to and relied upon by Shri G.K. Masand, learned counsel but some different paragraphs, to support his case. He has submitted that in **Balbir Singh's** case (supra), the Supreme Court has held that the Court or the Tribunal ought not to interfere "<u>even if some materials are not relevant</u> which was placed before the Committee of

Advisors who are not likely to abuse the powers vested in them under the Constitution". (emphasis added) He has contended that the Tribunal, in exercise of the powers of judicial review, cannot substitute its decision for that of the competent authority. He has emphasised that in **Balbir Singh's** case (supra), Shri G.K. Masand, learned counsel, has only referred to and relied upon part of paragraph 10 of the judgement, to distinguish the Andhra Pradesh High Court judgement in **B. Bhaskar Reddy's** case (supra). Learned Sr. counsel has contended that the Supreme Court has held that "the fact that the respondent was subsequently acquitted by this Court in the criminal trial will not make any difference to the order which was passed by the President on the totality of the material which was before the authorities long prior to the criminal trial". He has submitted that in the present cases also, the criminal trial is still proceeding in the TADA court and, therefore, there is no infirmity in the orders passed by the Govt. of India in the present set of cases, which is not dependant on the outcome of the criminal verdict but stands on its own. He has submitted that regarding MP 777/98, there may be references to documents after 1996 with which we are not concerned. He has also vehemently submitted that the materials and evidence placed before the criminal court cannot be seen or relied upon by the applicants to impugn the orders dated 7.2.1996 dismissing them from service as they stand on a different footing, which has been done strictly in accordance with the law and procedure laid down under the proviso to Article 311(2) of the Constitution. He has emphasised that in **Balbir Singh's** case (supra) even the acquittal of the respondent in the criminal case was held to be immaterial for the decision

taken by the respondents to dismiss him where they considered the activities of the respondent prejudicial to the security of the State. Such being the law laid down by the Supreme Court, learned Sr. counsel has submitted that it would not be proper for the Tribunal to look into the evidence placed before the TADA court or make any comments or evaluation thereon at this stage.

16. He has submitted that similarly the reliance placed by the applicant, S.N. Thapa, on the judgement of the Supreme Court dated 12.4.1996 regarding granting him bail relates to an event which is later to the facts taken into account by the Committee of Advisors and so it is not relevant. He has submitted that what is relevant is to consider the situation when the impugned orders were issued on 7.2.1996; whether there was sufficient material placed before the competent authority to arrive at its conclusion in accordance with law. He has relied on Paragraphs 87,88 and 89 in **Satyavir Singh's** case (supra) and has submitted that in considering the interests of security of the State, the security of witnesses ~~are~~ is also contemplated. As background facts to the present cases, he has submitted that the Bombay serial Bomb Blasts which took the city by surprise on 12.3.1993 had occurred soon after the occurrence of the demolition of the Babri Masjid on 6th December, 1992. He has emphasised that in the circumstances, communal disharmony was also in the mind of the Government and all these relevant factors should be kept in view, when considering whether the respondents were correct in dealing with the applicants under Article 311(2), second proviso, clause (c). He has submitted that the facts of the present cases should be viewed in the

correct background at the relevant time, which were of a much more serious kind than the situation which arose in **Satyavir Singh's** case (supra), where the Supreme Court has upheld the exercise of such powers by the respondents. In that case, the appellants were employed in the Research and Analysis Wing, Cabinet Secretariat, Government of India and had been dismissed from service in exercise of the powers conferred by clause (b) of the second proviso to Article 311(2) of the Constitution read with Rule 19 of the CCS (CCA) Rules, 1965, without serving any charge-sheet upon them and without holding any inquiry. According to the learned Sr. Counsel, all the applicants in the present applications were directly concerned with Customs (Preventive) activities. Relying on the judgement in **S.R. Bommai's case** (supra), he has submitted that the decision taken in the present cases is neither arbitrary nor mala fide as there was sufficient material before the competent authority, whose satisfaction is a subjective satisfaction and subsequent events cannot be referred to. He has also contended that the Ministry of Home Affairs Circular issued on 26.7.1980 has been upheld in **Balbir Singh's case** (supra) and this procedure has been strictly followed in the present cases.

17. With regard to the alleged delay and lack of prompt decision taken by the Government in issuing the impugned orders, Shri Sethna, learned Sr. counsel, has submitted that this is also no ground to set aside the impugned orders. He has explained that the orders dated 7.2.1996 were passed after a detail examination of the relevant materials for nearly two years before the decision was taken. He has submitted that the records will show

that the Ministry of Law and Justice had called for certain information and had also raised a number of queries which were carefully examined by the concerned authorities in the Department. The Commissioner of Police, State of Maharashtra had then stated that he will not be in a position to show certain documents. He has submitted that all this shows that great care has been taken to see that the law was fully complied with, in particular with reference to applicant, S.N. Thapa. In the case of the other four applicants, there were much more evidence against them and so great care had been taken to see that no injustice was done to S.N.Thapa, then Additional Collector of Customs. Learned Sr. Counsel has submitted that the case involves smuggling activities involving a number of persons which is an economic offence and this does take time to investigate and inquire into. He has, therefore, submitted that merely because much care has been taken to see that there was sufficient material before taking an appropriate decision under the Constitution against S.N. Thapa, does not by itself vitiate the order. He has submitted that doing things in a hurry in such a case might not only have resulted in a wrong decision but to the accusation that there was non-application of mind. According to him, there is no such infirmity in the impugned order, on the ground that immediate action was not taken as in the case of **Satyavir Singh** (supra).

18. Learned Sr. Counsel for the respondents has submitted that the emphasis placed by Shri G.K. Masand, learned counsel, that there must be some other material before the President to arrive at his conclusion, other than what is before the TADA Court, is totally irrelevant

and misleading. According to him, it is enough if the conclusion can be arrived at on the basis of the materials available with the Government of India, that the applicants were involved in some aspects of smuggling, as they had actively helped in bringing in goods from smugglers and Pakistan agents and they were all working in unison. He has fervently submitted that what has to be seen is the subjective satisfaction of the President about the brewing danger to the security of our country. He has also submitted that it has also to be fully appreciated that the respondents have not dealt with the applicants, and, in particular, S.N. Thapa, lightly and arbitrarily but have fully considered the material placed before the President, keeping in view the security of the State. He has relied on Paragraphs 82,83,84 and 86 of the Judgement in **Satyavir Singh's** case (supra). His contentions are that the import of RDX, arms and ammunition into the State, per se will show that it affects the security of the State and holding of an inquiry regarding such activities against the officers who are responsible for preventing import of such items, would also be a threat to the security of the State and, whether the applicants were responsible or not is not the only question.

19. On the question of judicial review to be exercised by the Tribunal, he has relied on observations in the judgement in **Satyavir Singh's** case (supra). He has submitted that in the facts and circumstances of the case, the Tribunal should follow the judgement, wherein it has been held that where two views are possible in such cases, the Court should decline to interfere. Relying on Paragraphs 110 and 111, he has further submitted that the

decision of the President that "it is not expedient in the security of the State to hold an inquiry" being a subjective satisfaction, it would not be a fit matter for judicial review.

20. Referring to the submissions made by Shri G.K. Masand, learned counsel for S.N. Thapa/ applicant, that the Government had relied on certain statements/confessions made by the applicants, for example, R.K. Singh (applicant in OA 358/96) which had been later retracted, Shri Sethna, learned Sr. Counsel, has submitted that even if in such a case it may not have evidentiary value then the Criminal Court may not also accept it. It is for the Criminal Court to comment on the retraction or not even accept it. According to him, the Committee of Secretaries could have also ignored the retraction which does not mean that they have acted arbitrarily. His contention is that even if the retraction statement had not been placed before the Committee, it would make no difference regarding the other four applicants. In the case of S.N. Thapa also, there were sufficient materials to show that RDX, arms, ammunition, silver, etc. were smuggled into the State when he was one of the officers responsible for anti-smuggling activities in Customs (Preventive) along with the other four applicants. He has also referred to the chart showing the hierarchy of the officers submitted by Shri G.K. Masand, learned counsel, during the relevant period. He has relied on the judgement in **United States Vs. Falcone** (420 US 671) also referred to **State of Maharashtra** Vs. **S.N. Thapa & Ors.** (1996(4) SCC 659), that the very import of these items into the State endangered the security of the State.

21. On the ground raised by Shri Suresh Kumar, learned counsel, regarding the fact that Maharashtra Police would have also been involved in the smuggling activities, learned Sr. Counsel has submitted that the smuggling of the items in question like RDX, itself shows the serious threat to the security of the State. Therefore, taking action against the Customs officials who were clearly responsible to prevent activities, cannot be considered as mala fide or arbitrary. He has also contended that even if the particular import of arms and ammunition were not known to the applicants, they were clearly involved in allowing the smuggled goods into the country from smugglers, including from Pakistan. In the facts and circumstances of the case, learned Sr. counsel has emphasised that as no mala fides have been established by the applicants in the action taken by the Government of India, following the judgement of the Supreme Court in **A.K. Kaul's case** (supra), we should not assume that the Hon'ble Prime Minister, Finance Minister and senior level officers who have examined the matter have not dealt with the case properly. He has also submitted that upto the judgement of the Supreme Court in **Balbir Singh's case** (supra), no court has ever quashed or set aside orders of dismissal passed against government servants in similar circumstances under the proviso to Article 311(2) of the Constitution.

22. Learned Sr. counsel has submitted the relevant Departmental records which were placed before the Committee of Advisors for our perusal. Shri G.K. Masand, learned counsel, had repeatedly submitted that he would be fully satisfied, if the Tribunal after perusal of the

records came to the conclusion that the impugned orders have been correctly passed or not, taking into account his submissions.

23. We have carefully considered the pleadings and the submissions made by the learned counsel for the parties as well as the official records submitted by the learned Sr. counsel for the respondents.

24. Regarding MP 777/98, we see force in the submissions made by Shri M.I.Sethna, learned Sr. Counsel, that it is not proper or necessary for this Tribunal to see or comment on the evidentiary value of the materials which have been placed as evidence before the Designated TADA court, especially when the criminal case is sub-judice. We are unable to agree with the contentions of Shri G.K. Masand, learned counsel that on the basis of the books of evidence which have been revealed/placed before the Designated TADA court, the materials before the Committee of Advisors/competent authority were necessarily and deliberately distorted or that there was no material on the basis of which the respondents could have taken a decision to pass the impugned orders dated 7.2.1996. Such is not the case. The relevant materials and evidence placed before the Committee of Advisors was sufficient for them to come to the conclusion they did. In the facts and circumstances of the case, we are also unable to agree with the contentions of learned counsel for the applicant that MP 777/98 should be allowed or we have to see the evidence and materials placed before the criminal court, when that case is still to be finally heard and concluded. What is the material question before us, is the satisfaction of the

President which is to be exercised under clause (c) of the second proviso to Article 311(2) of the Constitution at the relevant time in 1995-1996, that it is not expedient in the interest of the security of the State to hold an inquiry. This has been held to be satisfaction i.e. subjective satisfaction of the President, which cannot mean judicial review by the Court/Tribunal based on evidence placed before the Criminal/TADA Court. In this view of the matter, MA 777/98 is rejected.

25. Under clause 2 of Article 311 of the Constitution, no civil servant can be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. It has been held that where the President or the Governor exercises his pleasure under Article 310(1), it is not required that such an act should be exercised by himself, but it must be an act of the President or the Governor in the Constitutional sense, that is, with the aid and on the advice of the Council of Ministers. Clause (2) of Article 311 enshrines the mandatory principles of natural justice and the audi alteram partem rules by which no civil servant can be dismissed or removed from service or reduced in rank until after an inquiry has been held, in which he has been informed of the charges and has been given a reasonable opportunity of being heard in respect of the charges. The second proviso to Article 311(2) provides as follows:

"Provided further that this clause shall not apply,

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

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

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

The above provision under the second proviso shows that the source of the power to dispense with the enquiry is mandatory. It is inbuilt in the Constitution itself and is not based on any service rule which does not apply to cases falling under the three clauses (a), (b) and (c) of the proviso. In **Satyavir Singh's case** (supra), it has been held that, therefore, there is no scope for introducing into the second proviso some kind of inquiry or opportunity to show cause by a process of inference or implication. This proviso has been in the Constitution since its enactment. Shri G.K. Masand, learned counsel, has referred to the Constituent Assembly Debates. It is relevant to note that the second proviso has been retained in the Constitution by the Framers of the Constitution as a necessary provision to be used in exceptional situation as enumerated therein. As a matter of public policy in the public interest, under clause (c) of the second proviso, the inquiry under Article 311(2) of the Constitution is dispensed with where the President is satisfied that in the interest of the security of State it is not expedient to hold such an inquiry. This is the clause which will be applicable to the facts in the present case and which is considered in the present cases.

26. In connection with the action to be taken against the Government servant engaged in or associated with activities prejudicial to the security of the State, under the second proviso, clause (c) to Article 311(2) of the Constitution, the Government of India, Ministry of Home Affairs, have issued a Circular dated 27.6.1980. The procedure laid down in this Circular which has been adopted by the Government has been upheld by the Supreme Court in **Balbir Singh's** case (supra). These include cases where Government servants have engaged in activities which may affect or endanger the security of the State, such as associations engaged in subversive activities in secret organisations which, while professing to work in a democratic way, in fact, engage to over-throw the present political system or organisations which have foreign inspirations and liaison for similar objections.

27. It is also relevant to note that the power to be exercised under the proviso to Article 311 (2) of the Constitution is to be exercised by the President or the Governor, as the case may be, in exceptional circumstances. Therefore, it goes without saying that the conditions laid down in clause (c) must be satisfied in all respects. The disciplinary authority cannot, therefore, dispense with the disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the civil servant is weak and must fail, as held in **Satyavir Singh's** case (supra). While dealing with clause (c) of the second proviso, the President has to be satisfied that in the interest of the security of the State, it is not expedient to hold such an inquiry. In the present cases

the serial Bomb Blasts occurred in the city of Bombay and the security was consequently confined to that part of the country and not to the country as a whole or even to the State of Maharashtra. But it was sufficient to show the seriousness of the situation. The security of the State can be affected by various means and if the applicant in any of five cases before us was in fact involved in the smuggling of RDX, arms and ammunitions, silver, etc. into the country by smugglers and ISI agents, then by no means it is any body's case that it does not involve the security of the State. The very nature of the articles involved in the smuggling was sufficient. Shri G.K. Masand, learned counsel has very emotionally submitted that such a person should be "hanged" as he had affected the security of the country. This is one type of activity which has been referred to by the Supreme Court where they have held that "the security of the State can be done openly or clandestinely and it could be done by actual acts or by the likelihood of such acts taking place". The satisfaction of the President under clause (c) of the second proviso can be arrived at as a result of secret information received by the Government about the threat to the security of the State. In **Satyabir Singh's** case (supra), the Supreme Court has explained the security of the State as follows:

> "83. In an Inquiry into acts affecting the interest of the State, several matters not fit or proper to be made public, including the source of information involving a civil servant in such acts, would be disclosed and thus in such cases an inquiry into acts prejudicial to the interest of the security of the State would as much prejudice the interest of the security of the State as those acts themselves would.
>
> 85. Such satisfaction is not required to be that of the President or the Governor personally but of the President or the Governor, as the case may be, acting in the Constitutional sense.

18.

86. "Expedient" means "advantageous, fit, proper, suitable or politic". Where, therefore, the President or the Governor, as the case may be, is satisfied that it will not be advantageous or fit or proper or suitable or politic in the interest of the security of the State to hold an inquiry, he would be entitled to dispense with it under clause (c) of the second proviso".

(Emphasis added)

The Hon'ble Supreme Court in **Tulsiram Patel's** case (supra) which judgement has been referred to by both the parties, it has been held:

> "The police are the guardians of law and order. They stand guard at the border between the green valleys of law and order and the rough and hilly terrain of lawlessness and public disorder. If these guards turn law-breakers and create violent public disorder and incite others to do the same, we can only exclaim with Juvenal. "Quis custodient ipsos Custodes?" "Who is to guard the guards themselves?" (Satires, VI, 347)

28. The above anguish of their Lordships has been felt also in the present case. Shri M.I. Sethna, learned Sr. counsel has submitted that the Customs officials involved in the present situation were from Customs(Preventive) Department, who were the guardians at the borders of our country to prevent smuggling. If they had themselves facilitated the smugglers to smuggle in the contraband goods like arms, ammunitions, etc, then the same question arises which the Supreme Court has raised with reference to the Police. While this proposition may not be open to attack as such, the other query raised by Shri G.K. Masand, learned counsel, is that in such a situation the action should be taken properly, which according to him has not been done in the present case. The learned counsel for the applicant has repeatedly urged that if the material which was placed before the competent Committee is the very material which was already made public during the

proceedings in the Designated TADA Court by way of statements made/deposed by witnesses and it formed the basis of the decision arrived at by the Committee, then invoking Article 311(2), second proviso, clause (c) was unwarranted. His contention all along was that the statements having been made in open court, there is no security angle involved any more and no question of any security risk. Further, even if a regular enquiry were to be conducted this factor of security risk would not have come in the way of the enquiry as only a few persons would have been called as witnesses, and the D.E. could have been conducted in camera. His other main contention was that there was no other/ extraneous material as in the case of **Balbir Singh** (supra) to lead the Committee to believe that there was a security threat if the regular enquiry was to be conducted.

29. We have carefully considered the record of materials which were placed before the Committee of Advisors. The Committee has been set up in accordance with the Office Memorandum dated 27.6.1980. It consisted of four Secretaries, namely, that of Ministry of Home, Ministry of Law and Justice, Department of Personnel and Training and the Department of Revenue. This Committee has met on 31st October, 1995 and 15th November, 1995. We have perused the relevant record which was placed before the High Powered Committee as we considered it essential to ascertain as to what was the thinking that went behind the decision to dismiss the applicants under Article 311(2), second proviso, clause (c) of the Constitution. The record consists, inter alia, of the self contained note placed before the Committee, other notings in consultation with

the Law Ministry, the correspondence of the Govt. of India with the State Government of Maharashtra, the statements recorded of various witnesses without disclosing the names of witnesses, private witnesses and the second charge-sheet. We find that there does not appear to be any material other than what is made public such as the charge-sheet, supplementary charge-sheet and the statements of witnesses recorded. In the referring note to the Committee, relevant materials, including statements of then coded witnesses have been referred to. These statements indicate direct involvement of the applicants R.K. Singh, Talwadekar, Sayyed and Gurav. There are ample statements indicating that they helped the smugglers on a regular basis and got the money for the same. They did so in the case of RDX smuggling also. Their confessional statements confirm the same. As far as applicant, S.N. Thapa is concerned, statements reveal that in the various smuggling operations whether of silver or chemicals (so called), his tacit approval was there and his share of money was passed on to him, sometimes Rs.1 lakh, sometimes Rs.5 lakhs. Even if the confessional statement of R.K. Singh is retracted, there are other statements of other witnesses who have categorically stated about giving money to "Thapa". He knew the smugglers particularly "Tiger Memon". He was given a message by another Additional Collector. He argued with him about the place of smugglers' activity and relayed the message of something happening at Bankot and not at Mhasala, Dighi and Shekhadi. Even when the subordinates tried to persuade him to go to the right place, he over-ruled them and stuck to his Bankot theory and kept vigil for two nights at the wrong junction, on the wrong route while the smugglers coolly escaped in the meantime

He called off by another route the vigil when the thing could have happened during any time in a fortnight. He directed his subordinates not to act until there were specific directions from him. His telephone numbers were found in the diary of the smugglers. The cassette tape revealed his contacts with smugglers.

30. No doubt, the above facts and details were discussed during the bail application of the applicant, S.N. Thapa in the Supreme Court. The Supreme Court did not find the evidence adequate enough to refuse the bail. It is not for us to reassess the evidence or to substitute our conclusions for that of the Committee. Judicial review is confined to see whether the apprehension of the Committee of Advisors that conducting a regular Departmental enquiry would jeopardise the security of the State was well founded.

31. The Departmental files submitted by the respondents also show that prior to the relevant materials being placed before the Committee, there has been thorough and minute examination of the cases by a number of senior officers in the concerned Ministries/Departments. This is so, particularly with reference to applicant, S.N. Thapa, and the other officers involved in the smuggling of arms and ammunition and other contraband goods into the country, by smugglers and ISI/Pakistan agents. While in **Satyavir Singh's** case (supra) and **Tulsiram Patel's** case (supra), prompt and urgent action was necessary to be taken, we find force in the submissions made by Shri M.I. Sethna, learned counsel. Taking into account the facts and circumstances in the present cases namely smuggling of goods which have

been done most secretly and clandestinely, the mere fact that the respondents have taken time to analyse, examine and re-examine the materials, before they were placed before the Committee of Advisors to ensure that they kept within the four corners of clause (c) of the second proviso to Article 311(2) cannot vitiate their action. In **Satyavir Singh's** case (supra), referring to **Tulsiram Patel's** case (supra), the Supreme Court has indeed referred to situations there, where prompt and urgent action was required to bring the situation under control. In one case M.P. District Police Force and the M.P. Special Armed Force had indulged in violent demonstrations and rioted at the Mela Ground, attacked the Police station there and so on, which had led to an immediate and urgent action after discussion at the Cabinet meeting. In the other case, when the orders of suspension were issued against the appellants, employees of the Cabinet Secretariat (RAW), the all India pen-down strike of the employees was spreading to more Centres in India. After the first batch of dismissal orders were served upon some of the appellants on 8.12.1980, the pen-down strike was called off on 9.12.1980. In such situations, the Supreme Court has pointed out that not taking prompt action may result in the trouble spreading or the situation worsening. In the cases before us, the smuggled goods had already resulted in the serial Bomb Blasts in Bombay which occurred on 12.3.1993. The law laid down by the Hon'ble Supreme Court has to be followed and applied taking into account the facts and circumstances of each case. In this connection, the judgement of the Supreme Court in **Balbir Singh's** case (supra) would be

relevant. In that case, in connection with the assassination of the then Prime Minister, Mrs. Indira Gandhi, the respondent was arrested on 8.12.1984 and was placed under suspension. The order of suspension stated that a Departmental inquiry will be conducted against the respondent. The conviction of the respondent by the High Court was set aside by the Supreme Court by order dated 3.8.1988. On the basis of the recommendations of the Committee of Advisors, the President acting under clause (c) of the second proviso to Article 311(2) had dismissed him from service w.e.f. 16.3.1985 and the Departmental inquiry ordered against him vide order dated 8.12.1984 was dropped. Thereafter, the applicant filed an application before the Tribunal on 23.4.1990 challenging the order of dismissal dated 16.3.1985, praying for quashing the same with a direction to the Government to reinstate him in service with all consequential benefits. In that case also it is relevant to note that although the assassination of the then Prime Minister had occurred on 31.10.1984, the respondent was dismissed from service under clause (c) of the second proviso to Article 311(2) on 16.3.1985, i.e. after several months. The dismissal of the respondent was upheld by the Supreme Court taking into account the facts and circumstances of the case by allowing the appeal filed by the Union of India. Therefore, taking into account the facts and circumstances of the present case, the contention of Shri G.K. Masand, learned counsel that if at all the respondents wanted to dismiss the

applicant under the proviso to Article 311(2), they ought to have done it immediately after the Bomb Blasts on 12.3.1993 or his suspension on 3.5.1993 and not in a leisurely manner as they have done, is untenable. Further, we are fully satisfied from a perusal of the relevant records that there has been minute and detailed examination of the cases and, in particular, the case of applicant Thapa, to ensure that the Constitutional provisions of law and procedure are complied with. Therefore, any hasty action to dismiss the applicants from service in the present cases would not have been called for taking into account the nature of his activities involving smuggling of contraband goods vs. activities. The disciplinary authority is also not expected to dispense with a disciplinary enquiry "lightly or arbitrarily", as held in **Satyavir Singh's** case (supra). Accordingly, the argument of the learned counsel for the applicant that as the respondents have not taken immediate and urgent action to dismiss the applicant under the provisions of clause (c) of the second proviso to Article 311(2) of the Constitution, such action cannot be upheld, is rejected.

32. As laid down in the judgements in **Balbir Singh's** case (supra) and **A.K. Kaul's** case (supra), the permissible limits of judicial review regarding the satisfaction of the President can be examined within the

limits laid down in **S.R. Bommai's** case (supra). In this case, the relevant portion of the majority judgement is as follows:

> "(i) the satisfaction of the President while making a Proclamation under Article 356(1) is justifiable;
>
> (ii) it would be open to challenge on the ground of mala fides or being based wholly on extraneous and/or irrelevant grounds;
>
> (iii) even if some of the materials on which the action is taken is found to be irrelevant, the Court would still not interfere so long as there is some relevant material sustaining the action;
>
> (iv) the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material and it will also not substitute its opinion for that of the President;
>
> (v) the ground of mala fides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power or what is sometimes called fraud on power;
>
> (vi) the court will not lightly presume abuse or misuse of power and will make allowance for the fact that the President and the Union Council of Ministers are the best judge of the situation and that they are also in possession of information and material and that the Constitution has trusted their judgement in the matter; and
>
> (vii) this does not mean that the President and the Council of Ministers are the final arbiters in the matter or that their opinion is conclusive.

33. The Supreme Court has repeatedly held (see for example Para 29 in **A.K.Kaul's case** (supra) that the order of the President can be examined to ascertain whether it is vitiated either by <u>mala fides</u> or is based on wholly

extraneous or irrelevant grounds. The court, however, cannot question the correctness of the material or substitute its own satisfaction for the satisfaction of the President. In other words, so long as there is some material before the President which is relevant for arriving at his satisfaction as to the action being taken under clause (c) to the second proviso to Article 311(2), the court would be bound by the order so passed. Shri G.K. Masand, learned counsel, has very vehemently contended that distorted and irrelevant materials were placed before the Committee of Advisors without reference to the relevant facts, for example, the retraction of the confession by R.K. Singh regarding payment to S.N. Thapa or being told that Tiger Memom is "his man" and so on. He has also repeatedly submitted that the applicant had, on receipt of the message from Shri S.K. Bhardwaj, Collector of Customs, taken care to pass on the message to his subordinate officers for apprehending the smugglers. On the other hand, the smuggling did not take place on those days and it had taken place at some other place. He has submitted that if the applicant had, in fact, wrongly sent the officers to Bankot instead of Mhasla, where the landings were stated to be expected, that by itself did not show that he was mixed up with the smugglers for which inquiry was the only answer. These material facts and evidence have indeed been placed before the Committee of Advisors which consisted of senior officers of the ranks of Secretaries to the Government of India and as again repeatedly cautioned by the Hon'ble Supreme Court, the Court/Tribunal cannot lightly presume, abuse or misuse of the power exercised by the President and the Council of Ministers. On careful perusal of the relevant records submitted by the learned

Sr. Counsel for the respondents we have no doubt in our mind that there was sufficient material on which the President could come to the conclusion to pass the orders of dismissal dated 7.2.1996 against the applicant.

34. The learned counsel for applicant had tried cleverly to keep our attention rivetted on the point of no other material being placed before the Committee except for the one already made public, thus diverting from other factors. We cannot deny that this is correct to some extent that there was no other documentary material. But the Committee cannot see beyond this material. In spite of the statements being made public, the Committee perceived a threat to security. As discussed in the judgement in **Satyavir Singh's** case (supra), the security risk cannot be assessed merely on the basis of evidence which is recorded. There can be an indirect threat. If an enquiry were to be held these very witnesses would have had to be called. During the hearing, Shri Sethna, learned Sr. Counsel had also said that Thapa might have wanted to call "Tiger Memon" or other such witness in the enquiry and how this would have been possible. In the absence of identity of some private witnesses, only official witnesses could have been called. Most of them were subordinates of Thapa and other applicants. The indirect angle of security cannot be explained in black and white on paper but it cannot also be ignored. The atmosphere was charged and the issue became very sensitive. It was certainly not expedient to conduct the enquiry without the names of the key witnesses being available. The accused and the witnesses both were not safe as is evident from the statement made by Thapa and his learned counsel that Thapa himself was shot at five times

later on. Thus, the matter was not dead. The relations of some of the witnesses with the accused were thick and close enough. The gravity of the situation had not diminished. In such matters, not even an insignificant piece of material can be overlooked. The perception of the learned counsel for the applicant that there was no threat to the security of the State was involved when the decision was taken in 1996 cannot, therefore, be agreed to. The criminal case is still pending. Even if it is taken that the records relied upon by the respondents for passing the impugned orders will form part of the records in the criminal case, even then there is an indirect element of security which is involved in the present case. So the security element leading to the action taken by the respondents cannot be held to be either belated or mala fide. Therefore, this ground also fails.

35. The edifice of the applicant's case is built on the assumption that there was no other material available to the Committee except what was already in public knowledge. In our considered view, it is not merely the factual position as reflected through the statements recorded, which needed to be weighed, there were certainly other considerations as reflected through the notings on the files which weighed heavily in the minds of the Members of the Committee. The Committee analysed the situation time and again after consultation with the concerned Ministries/Departments and having applied its mind, decided on invoking Article 311(2), second proviso, clause (c). We, therefore, do not see any justification to interfere on this ground also.

18.

36. The contention of Shri G.K. Masand, learned counsel, that the editor of the Law report has wrongly stated that **B. Bhaskara Reddy's** case (supra) has been impliedly over-ruled by the Supreme Court in **Balbir Singh's** case (supra) is incorrect, cannot be agreed to totally. His further contention that the decision in **Balbir Singh's** case (supra) means that there must be some other material over and above what was the material placed before the criminal case in the TADA court and if there is no such material, the impugned orders have to be quashed and set aside, cannot be agreed to. This will be against the ratio of the judgement of the Supreme Court in **Balbir Singh's** case (supra). It has been held in that case that the fact that the respondent was subsequently acquitted by the Supreme Court in the criminal trial will not make any difference to the order which was passed by the President on the totality of the material which was before the authority, long before the conclusion of the criminal trial. The criminal trial in the present cases has also yet to be concluded and it cannot affect the decision of the President taken in this case.

37. There was also much said by the learned counsel on behalf of Thapa, that he had conveyed the correct message received from his superior officer to his subordinates. The materials on record show that he had received a message about information regarding smuggling into the country materials like RDX by smugglers and anti-social persons, inimical to the welfare of our country, Shri Thapa has tried to justify his action that he had instructed his subordinates correctly, whereas the goods were smuggled in some other places. The documents in

the files also reveal that there are several witnesses who had given statements about the receipt of money by the Customs officials, including the applicant Thapa. The learned counsel for Respondent No.4/CBI had relied on the judgement of the Supreme Court in **State of Maharashtra Vs. Som Nath Thapa** (1996 (4) SCC 659). In this case, the Apex Court has held that to establish a charge of conspiracy, knowledge and intent were required. However, in some cases "intent of unlawful use being made of the goods or services in question may be inferred from the knowledge itself". Therefore, persons participating in transportation of materials like RDX, arms and ammunition into India, from the very nature of the goods, must know that "it cannot be put to any lawful use".

38. Another point stressed by Shri M.K. Sethna, learned Sr. Counsel, is that even the fact of acquittal in the criminal case by the Supreme Court itself of the respondent in **Balbir Singh's** case (supra), has been held not to make any difference to the order which was passed by the President, on the totality of the material which was placed before the Committee long prior to the conclusion of the criminal trial. In the present case, admittedly, the criminal case before the TADA court against Thapa and other accused persons is still in progress and no decision, and let alone a decision of acquittal, has taken place. The materials placed before the Committee of Advisors/President much earlier in May and October, 1995 leading to the order issued in February, 1996, cannot, therefore, be faulted. The argument of the learned counsel for the applicants that if the criminal case can be held then the same materials could also have been relied upon in the Departmental

inquiry and no security of the State is, therefore, involved, has to be rejected in the light of the decision of the Supreme Court in **Balbir Singh's** case (supra). In that case, the Apex Court held:

> "The Tribunal is under a misapprehension when it holds that if the respondent could be criminally prosecuted a departmental enquiry could have been held on the basis of the same material. The respondent placed reliance on the observations to this effect made by the Andhra Pradesh High Court in **B. Bhaskara Reddy v. Govt. of A.P.** The Tribunal has not noted that the material which was placed by the Intelligence Bureau before the Advisory Committee and the President did not relate merely to the assassination of the Prime Minister. It related to various other activities of the respondent as well, which the authorities considered as prejudicial to the State".

39. In **Satyavir Singh's case** (supra), the Supreme Court has held as follows:

> "108. In examining the relevancy of the reasons given for dispensing with the inquiry, the court will consider the circumstances which according to the disciplinary authority, made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, the order dispensing with the inquiry and the order of penalty following upon it would be void and the court will strike them down. In considering the relevancy of the reasons given by the disciplinary authority, the court will not, however, sit in judgement over the reasons like a court of first appeal in order to decide whether or not the reasons are germane to clause (b) of the second proviso or an analogous service rule. The court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable manner would have done. It will judge the matter in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of court room, removed in time from the situation in question. Where two views are possible, the court will decline to interfere.
>
> 111. Where a civil servant is dismissed or removed from or reduced in rank by applying clause (c) of the second proviso or an analogous service rule to his case the satisfaction of the President or the Governor that it is not expedient in the interest

of the security of the State to hold an inquiry being a subjective satisfaction would not be a fit matter for judicial review".

(Emphasis added)

40. The materials placed before the Advisory Committee of the President in the present cases show that there was sufficient material to show the involvement of the applicants in the smuggling of goods, including RDX, arms and ammunition and silver into India. We find force in the contentions of Shri M.I. Sethna, learned Sr. counsel, that if that is so, the holding of an inquiry regarding such persons who are responsible for the activities itself is a threat to the security of the State. In the circumstances of the case, it cannot be held that the disciplinary authority has dispensed with the disciplinary inquiry either lightly or arbitrarily because of any ulterior motive or merely to avoid holding of the inquiry. The notes in the files and records submitted by the respondents show clearly the anxiety and care with which each of the points have been minutely analysed and examined by senior officers in various Departments, including the officers from the Ministries of Home, Finance and Law. As stated earlier, this examination has consumed some time which by itself cannot be held to have vitiated the action or orders passed by the President taking into account the activities, i.e. smuggling of goods into the country which is of a clandestine nature. Sufficient materials have been provided by the other Wings of the Government including the Intelligence Bureau which have in turn been looked into by the Committee of Secretaries. In the circumstances of the case even if as alleged by Shri J.P. Hasand, learned counsel the retraction of the

confession earlier made by R.K. Singh, had not found place in the materials placed before the Committee of Advisors, there are other sufficient materials to sustain the action of the respondents. In the circumstances, having regard to the judgement in **A.K.Kaul's case** (supra), we do not think it would be proper for us to presume that there has been abuse or misuse of powers vested in the President and the Union Council of Ministers in the present cases to justify any interference in the matter under the powers of judicial review.

41. We are also unable to come to the conclusion that the decision of the President in the present cases is either mala fide or is based on any extraneous or distorted ground. The President had sufficient material to hold that it was not expedient in the interest of the security of the State to hold an inquiry. We respectfully reiterate the observations of the Supreme Court in **Satyavir Singh's** case (supra) that where two views are possible, the Court will decline to interfere in such matters althuogh here, there appears to be only one view possible which the respondents have taken. This statement had been made in connection with the reasons to be given under clause (b) of the second proviso but the same will apply to the facts of the case where it is the subjective satisfaction of the President. The contention of Shri G.K. Masand, learned counsel, that distorted materials were placed before the Advisory Committee is without any basis. His further contention that the Tribunal should consider and compare the evidence that is being placed before the Designated TADA Court to question the decision taken by the President within the cool and detached atmosphere of the Court room is again

unwarranted and improper. The then prevailing situation in the country was relevant to be kept in view, where the security of the State was threatened. In Paragraph 140 in **Tulsiram Patel's** case (supra), the Supreme Court has held as under:

> "The expression "law and order", "public order" and "security of the State" have been used in different Acts. Situations which affect "public order" are graver than those which affect "law and order" and situations which affect "security of the State" are graver than those which affect "public order". Thus, of those situations those which affect "security of the State" are the gravest. Danger to the security of the State may arise from without or within the State. The expression "security of the State" does not mean security of the entire country or a whole State. It includes security of a part of the State. It also cannot be confined to an armed rebellion or revolt. There are various ways in which security of the State can be affected. It can be affected by State secrets or information relating to defence production or similar matters being passed on to other countries, whether inimical or not to our country, or by secret links with terrorists. It is difficult to enumerate the various ways in which security of the State can be affected. The way in which security of the State is affected may be either open or clandestine..."
>
> (Emphasis added)

42. From the Organisation chart submitted by the applicant himself, it is noticed that the applicant, who was then the Additional Collector, Customs (M&P) at Bombay, was in-charge of places, including Shrivardhan Circle, where admittedly contraband goods involved in the cases were smuggled in by anti-social persons and smugglers, including ISI agents. His contentions that he has faithfully carried out the orders of the Collector, Shri S.K. Bhardwaj, and in case he is found guilty of lapses in carrying out his duties, Shri S.K. Bhardwaj should also have been similarly treated or alternatively, that as Shri S.K. Bhardwaj has been let off he should also be let off

has no merit in the circumstances of the case. His further submission that the applicant Thapa had done a fine job in preventing smuggling during the period from 1991-92 by itself will not absolve him in his subsequent failure to check smuggling. With regard to S.N. Thapa, we would like to refer to two paragraphs of the Supreme Court Judgement in 1996 (**State of Maharashtra Vs. S.N. Thapa & Ors.** (supra) where the additional charge was framed against him where it has been observed:

> "51. This appellant's role (S.N. Thapa) in the tragedy is of a higher order inasmuch as being an Additional Collector of Customs, Preventive, the allegation is that he facilitated movement of arms, ammunition and explosives which were smuggled into India by Dawood Ibrahim, Mohmed Dosa, Tiger Memon and their associates. The Additional Solicitor General was emphatic that a foolproof case relating to framing of charge against him does exist. Shri Shirodkar was equally emphatic in submitting that materials on record fall short of establishing a prima facie case against this appellant.
>
> 52. Let the additional charge framed against him be noted: "That you Somnath Kakaram Thapa during this period you were posted as Additional Collector of Customs, Preventive, Bombay and particularly during the period January, 1993 to February, 1993 in pursuance of the aforesaid criminal conspiracy and in furtherance of its object abetted and knowingly facilitated the commission of terrorists acts and acts preparatory to terrorists act i.e. bomb blast and such other acts which were committed in Bombay and its suburbs on 12-3-1993 by intentionally aiding and abetting Dawood Ibrahim Kaskar, Mohmed Dosa and Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon and their associates and knowingly facilitated smuggling of arms, ammunition and explosives which were smuggled into India by Dawood Ibrahim Kaskar, Mohmed Dosa, Mushtaq @ Ibrahim @ Tiger Abdul Razak Memon and their associates for the purpose of committing terrorist acts by your non-interference in spite of the fact that you had specific information and knowledge that arms, ammunition and explosives are being smuggled into the country by terrorists and as Additional Collector of Customs, Preventive, you were legally bound to prevent it and that you thereby committed an offence punishable under Section 3(3) of TADA (P) Act 1987 and within my cognizance"

43. Similarly, the contention of Shri Suresh Kumar, learned counsel, that because the Maharashtra Police officials were not dealt with under the provisions of the Constitution as the applicants have been dealt with, will also not assist him. His argument proceeded on the premise that the Customs officials could not have acted alone, without the help of the Maharashtra Police, and so they should also have been let off. From a perusal of the above mentioned organisational chart, there is no doubt that the applicants in the five cases were posted in the places where goods like RDX, arms and ammunitions and silver were smuggled into our country. In the circumstances of the case, they cannot claim equality or protection under Article 14 of the Constitution. It is relevant to mention that in the Departmental records, the then Secretary (Revenue) has observed, inter alia, that "What will history say about their Department if they protect such persons from invoking Article 311(2)" during the threadbare examination of the applicant/Thapa's case. In case, as the learned counsel for applicants alleges wrong action has been taken by the State of Maharashtra in not taking action against the police officers involved, that cannot assist them to advance an argument that the Union of India has exercised its powers under the provisions of Article 311(2) second proviso clause (c) of the Constitution illegally. It is settled law that Article 14 cannot be relied upon in such circumstances, when the Union of India had sufficient materials to proceed against the Central Government servants under clause (c) of the second proviso to Article 311. Apart from that, the State of Maharashtra is not a

party before us and their stand is not known. Therefore, this argument is rejected.

44. The events that took place in Bombay, the financial capital of the nation, on 12.3.1993 sent shock waves throughout the country. The magnitude of the loss of life and property is unimaginable. This had happened because of persons like the applicants who were involved in a deep-routed conspiracy against our country out of motives, like greed or vengeance or thirst for violence. In the circumstances of the case, if the resort by the Government of India to the provisions of clause (c) of second proviso to Article 311(2) of the Constitution cannot be upheld in the present application, as contended by the applicants' counsel, then one wonders what other circumstances could have possibly been envisaged by the framers of the Constitution as sufficiently grave to the security of the State. The security of the State stands on the highest pedestal and is of paramount importance, being much more grave than disturbances to public order or law and order. Therefore, it has to be viewed with equal severity on those, like the applicants, who attempt to violate the Nation's security in the manner they have done.

45. With regard to the other applicants, other than Thapa, we again find sufficient materials on the basis of which the President could take action to dismiss them under clause (c) of the second proviso to Article 311(2) of the Constitution.

46. We have also considered the other contentions raised by the learned counsel for the applicants but whichever way we look at them, we find no merit in the same having regard to the settled law enunciated by their Lordships of the Supreme Court in the above mentioned cases. Applying these judgements to the facts in the present cases, we find no merit in these five applications.

47. By interim order dated 22.4.1996, the respondents were restrained from evicting the applicant, Thapa, from the Government quarter he was occupying which order has been continued. Similar orders are there in some of the other O.As.

48. Before we part with these cases, we wish to place on record the valuable assistance rendered by Shri G.K. Masand, learned counsel for the applicant and Shri M.I. Sethna, learned Sr. counsel for the respondents.

49. In the result, for the reasons given above, as there is no merit in the above applications, they are dismissed. Accordingly, interim orders stand vacated. There will be no order as to costs.

50. Let a copy of this order be placed in O.A.358/96, O.A.207/97, O.A.263/97 and O.A.400/96.

(Smt. Shanta Shastry)
Member(A)

(Smt. Lakshmi Swaminathan)
Vice Chairman (J)

'SRD'