Central Administrative Tribunal
Principal Bench

OA No. 581/2011
OA No.4140/2010

Reserved on: 07.08.2015
Pronounced on:03.12.2015

Hon'ble Mr. Justice Syed Rafat Alam, Chairman
Hon'ble Dr. B. K. Sinha, Member (A)

OA No. 581/2011

Shri T. R. Malik
s/o Late A. Ram
R/o "Satnam" 702, 7th Floor,
29th Road, Bandra (West)
Mumbai 400050. ...Applicant

(By Advocate Sh. Ajay Kumar Singh)

Versus

1. Ministry of Finance
   Government of India
   Department of Revenue
   Through its Secretary

2. Union Public Service Commission (UPSC)
   Dholpur House, Shahjahan Road,
   New Delhi 110 069,
   Through its Chairman

3. Central Board of Excise & Customs
   Central Secretariat, North Block
   New Delhi 110 001
   Through its Chairman ...Respondents

(By Advocate: Shri R. N. Singh)

OA No.4140/2010

Sh. R.P.S.Panwar s/o Sh. Bihari Lal
R/o House No.86-A, Radhey Shyam Park,
Gali No.2, Parwana Road,
Delhi – 110 051. ...Applicant

(By Advocate: Sh. R.P. Kapoor)

Versus

1. Union of India
Ministry of Communications and
Information Technology,
Department of Telecommunications,
Through its Secretary,
Sanchar Bhawan,
New Delhi-110 017.

2. The Disciplinary Authority through
Under Secretary to the Govt. of India,
Sanchar Bhawan,
20, Ashoka Road,
New Delhi – 110 017.

3. Shri A.K. Garg,
Inquiring Authority through
Secretary to the Govt. of India,
Department of Telecommunications,
Sanchar Bhawan,
20, Ashoka Road,
New Delhi-110 017.

4. The Union Public Service Commission
Through its Secretary,
Dholpur House,
Shahjahan Road,
New Delhi – 110 069.

5. The Central Vigilance Commission
Through its Director,
Satarkta Bhawan,
G.P.O. Complex,
Block-A, INA,
New Delhi – 110 023. …Respondents

(By Advocate: Sh. Krishan Kumar)

O R D E R

By Dr. B.K. Sinha, Member (A):

The instant two OAs have been remanded by the Hon'ble High Court of Delhi vide order dated 15.07.2013 passed in WP(C) No. 6156/2012 and WP(C) No.6157/2012.

The common question of law involved in the afore stated two writ petitions and in WP(C) No.4539/2012 was to the effect as to whether the advice of the UPSC was required to be supplied to the charged officer along with the report of the Enquiry Officer and not along with the order levying penalty. The Hon'ble High Court, after elaborate discussion on conflicting decisions rendered in *Union of India V/s. T.V. Patel* [2007 (4) SCC 785] and *S.N. Narula V/s. Union of India & Ors.* [2011 (4) SCC 591], ruled that advice of the UPSC was indeed required to be served upon the applicant along with the report of the enquiry officer and, therefore, quashed the Tribunal's orders dated 27.04.2012 and 24.11.2011 passed in OA Nos. 581/2011 and 4140/2010 respectively. This is how both the cases have been heard together and are being disposed of by this common order.

2. The applicant in OA No.581/2011, who retired as Joint Commissioner of Central Excise on 31.10.2002, is aggrieved by the Presidential order dated 12.07.2010 (Annexure A-1) imposing penalty of 30% cut in monthly pension for a period of five years. The applicant in OA No.4140/2010 is aggrieved by the impugned order dated 24.09.2010 withholding of 10% monthly pension otherwise admissible to him.

3. The reliefs prayed for by the applicants in both the OAs are as under:-

Sl.No.	*OA No.581/2011*	*OA No. 4140/2010*
(a)	*Quash and set aside the order No. F.No.14011/37/99-Ad.V dated 12.07.2010 vide which the applicant has been illegally imposed the penalty of 30% cut in monthly pension for 5 years.*	*That the records of the case be called for from the respondent nos. 1 to 5. The applicant is respectfully praying to Hon'ble Tribunal to be pleased to also call for the original records as per Annexure-III to the memorandum of charges dated 05.10.2006. The very nature of original documents is such their photocopies are not effective, clear and understandable.*
(b)	*Pass any other or further order as may be deemed fit and proper in the facts and circumstances of the case.*	*That the impugned penalty order dated 24.09.2010 (Annexure A-1) in respect of holding applicant guilty and withholding of 10% of pension and for three years; the UPSC's advice dated 16.08.2010 (Annexure A-2); statement of articles of charges dated 05.10.2006 with Annexures-I, II, III & IV (Annexure A-3); Inquiry Report dated 27.02.2009 (Annexure A-4); and the C.V.C's Office Memorandum dated 04.09.2009 (Annexure A-5) and the entire disciplinary proceeding/Departmental proceeding, be quashed and set aside; and kinly declared as not valid and as of no adverse consequence against applicant.*
(c)	*Grant cost of this application to the applicant.*	*That the respondent nos. 1 and 2 be held as not entitled to maintain the memorandum of charges dated 05.10.2006 and disciplinary proceeding.*
(d)		*That the applicant be granted all consequential benefits; and such other and further orders, including any other relief, be also kindly granted, in the facts and circumstances of the case, as may be deemed fit and proper with costs of the case.*

4. For the sake of convenience, OA No. 581/2011 [*T.R. Malik V/s. Union of India*] is treated as the lead case, facts of which are that the applicant, as per his version, was a highly appreciated officer belonging to the Indian Revenue Service

(Customs & Central Excise)[hereinafter referred to as 'IRS (C&CE)']. He was posted as Deputy Commissioner of Customs at the Chhatrapati Shivaji Sahar International Airport, Mumbai and was entrusted the work of '*all matters relating to SEEPZ, Diamond Plaza, Airline Bonds, COFEPOSA and Prosecution'.* He was subsequently promoted as Joint Commissioner of Customs at the same Airport. On 25.11.1999, the applicant directed arranging facilitation of one Sarban Singh Keer, a friend of the family of his married daughter to receive the passenger, who was later identified as one Sanjay B. Chavan. The said passenger, who was found illegally carrying 1329 mobile phone handsets and other accessories having value of Rs.1,37,80,200/- and with a market value of Rs.2,19,74,150/-, was arrested and criminally prosecuted. Subsequently, the applicant was proceeded departmentally on the following Article of charge:-

> "*Whereas during the year 1999, said Sh. T.R. Malik while he was posted and functioning as Joint Commissioner (Customs), CSI Airport, Mumbai, committed gross misconduct and failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of a Government Servant in as much as he tried to influence his subordinate officers viz. Sh. L.J.Aguiar, PRO (Customs) and Sh. T.S. Jayaram, Asstt. Commissioner (Customs), CSI Airport, Mumbai in arranging facilitation of a passenger Sh. Sanjay B. Chavan, who arrived on 25.11.99 from Hong Kong by Cathay Pacific CX-751. On being examined, the baggage of Sh. Sanjay B. Chavan, was found containing 1326 mobile phone handsets and other accessories having a CIF value of Rs.1,37,80,200/- and with a market value of Rs.2,19,74,150/-, which were recovered and seized by the concerned officer of Customs, Mumbai. Whereas, on being informed of the recovery of 1326 mobile phone handsets and accessories from the baggage of Sh. Sanjay B. Chavan. Shri T.R. Malik directed Shri T.S. Jayram, Asstt. Commissioner (Customs), Mumbai for charging Customs Duty of Rs. 1 or 2 lakhs and to allow the passenger Sh. Sanjay B.*

Chavan to go and attempted to cause undue pecuniary loss to the Government Exchequer."

5. In the departmental enquiry conducted against the applicant the charge levelled against him was found proved and he was asked to submit his representation on the enquiry report, which was subsequently submitted to the UPSC for its advice. The UPSC suggested a cut of 30% in monthly pension for a period of five years. Accordingly, the impugned order dated 12.07.2010 came to be passed which, for the sake of greater clarity, is being reproduced hereunder:-

"*Shri T.R. Malik, Joint Commissioner (retired on 31.10.2000) was issued a charge memo dated 8.5.2002 for the allegation that while functioning as Deputy Commissioner at Sahar Airport at Mumbai during November, 1999, he tried to influence his subordinate officers for arranging facilitation of a person who arrived from Hong Kong on 25.11.99. On examining the passenger, namely, Shri Sanjay B. Chavan, it was found that he was carrying 1329 mobile handsets and other accessories having value of Rs. 1,37,80,200/- and with a market value of Rs.2,19,74,150/-. On being informed of recovery, Shri Malik directed the AC concerned for charging customs duty of Rs. 1 or 2 lakh and to allow the passenger to go.*

Whereas an inquiry was conducted. The IO submitted its inquiry Report on 7.11.2005 and held the charge as proved. After considering the Inquiry Report and reply of CO thereof, DA decided to impose a formal penalty on Shri TR Malik, JC, retired.

Whereas the matter was placed before UPSC for their statutory advice. UPSC in their advice dated 3.6.2010 (copy enclosed) advised that end of justice would be met if a penalty of withholding 30% cut in pension otherwise admissible to Shri Malik, is imposed on CO for a period of 5 years. Further, the gratuity admissible to him should be released if not required otherwise. The advice of the Commission has been considered by the Disciplinary Authority and considered as fair, reasonable and correct and has, therefore, been accepted by the DA.

Now, therefore, the President of India, in exercise of powers vested vide Rule 9 of CCS Pension Rules, 1972 after careful examination of all relevant facts of the case has decided to impose

penalty of 30% cut in monthly pension for five years upon Shri T.R. Malik, Joint Commissioner (Retd.).”

6. It is a part of history that the impugned order came to be challenged by the applicant vide the instant OA, which was disposed of by this Tribunal vide order dated 27.04.2012, which was challenged before the Hon’ble High Court of Delhi by way of Writ Petition No.6156/2012. The Hon’ble High Court finding merit in the aforesaid Writ Petition, quashed the Tribunal’s order, restored the Original Application and remanded the same to this Tribunal for decision.

7. Though the applicant has alleged non-application of mind and *mala fide* against the respondents but has neither impleaded any person as a party in personal capacity nor made any specific allegation against any of the impleaded respondents. The applicant has, however, alleged that one T.S.Jayaram, Assistant Commissioner, Intelligence Unit, who was on duty in Module-I on 25.11.1999 had been inimical to the applicant. He could not have been influenced in any way by the applicant as he was not subordinate to him. He further alleged that the enquiry report also ignored that it was the applicant at whose behest the action had been taken against Sarban Singh Keer and Sanjay B. Chavan on his verbal directions over the telephone. The

applicant has more vehemently stressed on the charge of delay relying upon decisions of the Hon'ble Supreme Court in *P.V. Mahadevan V/s. M.D. Tamil Nadu Housing Board* [2005 AIR SCW 5690] and *State of Punjab V/s. Chaman Lal* [1995 (2) SCC 570]. The applicant has further urged that the power to withhold or withdraw or reduce pension can be exercised only in case of grave misconduct or negligence of duty and not in all cases of misconduct, whereas the applicant has been imposed with a penalty on the basis of surmises and conjectures which cannot sustain in the eyes of law [para 5.14, page 13 of the paper book]. The applicant further alleged that the said T.S. Jayaram had demanded a sum of Rs. 20.00 lakhs for releasing the passenger and since no negotiations could be settled with the said Sarban Singh Keer and Sanjay B. Chavan, the said T.S. Jayaram decided to take this action [Cross-examination of one Raju, page 66-67 of the paper book).

8. The respondents in their counter affidavit denying all the averments made by the applicant in the OA submitted that the applicant has not been able to point out any violation of the rule and/or binding instructions which would render the departmental proceedings infructuous. Hence, no cause of action has accrued to the applicant inasmuch as the impugned penalty order is a fair and well

reasoned order. The respondents have further contested the assertion of the applicant that it was he who had been responsible for detection of the case; rather it was T.S. Jayaram, Assistant Commissioner - the officer on duty, who had been responsible for detection of the case and prosecution of the culprit. To the contrary, the applicant had tried to influence the officers on duty to let the passenger go after charging duty of Rs. 1 or 2 lakhs [page 107 of the paper book]. The respondents have also denied that the enquiry officer has submitted his report without having considered full facts of the case. Per contra, they have stated that the enquiry report has covered all the grounds raised by the applicant and have relied upon the decision of the Hon'ble Supreme Court in *Anil Kumar V/s. Presiding Officer* [AIR 1985 (SC) 1121] wherein it has been observed that "*an enquiry report is a quasi judicial inquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the inquiry officer. It has to be speaking order in the sense that the conclusion is supported by reasons"*[page 4 (xv), page 108 of the paper book].

9. The respondents have further submitted that the UPSC had meticulously scrutinized the matter and submitted a fair advice. The respondents have also relied upon the decision of the Hon'ble Supreme Court in *Union of India V/s. Sardar*

Bahadur [1972 (2) SCR 218] wherein it has been ruled that the test of departmental proceedings is preponderance of probability and not proof beyond reasonable doubt.

10. The respondents have also denied the charge of delay on the ground that the respondent-department has acted with promptness and due diligence but the procedures and safeguards involved required to be adhered to strictly so that no injustice is done to the charged officer. The respondents have given a detailed account of the procedures followed and submitted that there was no delay on part of the DA which could be termed as either deliberate or on account of casual approach. The respondents have also relied upon decisions of Hon'ble Supreme Court in *Registrar, Co-op. Societies Madras V/s. F.X. Fernando* [1994 (2) SCC 746].

11. The applicant has not filed any rejoinder. Instead he has submitted a note of written submissions wherein the grounds urged have been more or less the same. The applicant has further submitted that the case has become very old and he has suffered enough mental agony on account of the disciplinary proceedings, therefore, he should not be made to suffer any further. Moreover, he has already retired from government service on 31.10.2002.

12. We have minutely gone through the pleadings as well as the documents adduced by the rival parties and patiently heard the oral submissions made by the learned counsel for the parties.

13. The first of the issues to be considered by us is as to what is the scope of judicial intervention in departmental proceedings. This issue has been dealt with in a number of decisions by this Tribunal as well as by superior courts. It is essential to lay down the scope of departmental enquiry and the power of the Courts/Tribunals to intervene in such matters. In case of ***S.R. Tiwari versus Union of India & Another versus R.K. Singh & Another*** [2013 6 (SCC) 602], the Hon'ble Supreme Court has held that the scope to interfere in departmental enquiry by a court/tribunal is indeed limited. The Hon'ble Court has held as under:-

> *"28. The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide: Union of India & Ors. v. Bodupalli Gopalaswami, (2011) 13 SCC 553; and Sanjay Kumar Singh v. Union of India & Ors., AIR 2012 SC 1783).*
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> *29. In Union of India & Ors. v. R.K. Sharma, AIR 2001 SC 3053, this Court explained the observations made in Ranjit Thakur (supra) observing that if the charge was ridiculous, the punishment was harsh or strikingly*

disproportionate it would warrant interference. However, the said observations in Ranjit Thakur (supra) are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds.

30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide: Rajinder Kumar Kindra v. Delhi Administration, AIR 1984 SC 1805; Kuldeep Singh v. Commissioner of Police & Ors., AIR 1999 SC 677; Gamini Bala Koteswara Rao & Ors. v. State of Andhra Pradesh thr. Secretary, AIR 2010 SC 589; and Babu v. State of Kerala, (2010) 9 SCC 189).

31. Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible."

14. Again in the case of **GAIL India Vs. Gujarat State Petroleum Corporation** [2014 (1) SCC 329], the Hon'ble Court was faced with a question of deciding the price fixation mechanism and has held that such issues are best left to the Government itself and the Court should be cautious to make intervention in such matters. For the sake of clarity, relevant paras of the judgment are extracted as under:-

"27. As many as 150 existing buyers had signed long term agreements with the appellant without any provision for review of price during the currency of contract. However, the respondent did not accept the offer and did not sign long term sale agreement. Instead, it agreed to sign the second Price Side Letter which contained a provision for review of the price before expiry

of 5 years term on 31.12.2013. The respondent also insisted that RLNG price for the period from 1.4.2014 to 1.1.2019 should be mutually agreed between the parties. These terms were incorporated in the Price Side Letter sent by the respondent to the appellant vide e-mail dated 26.12.2008. The Price Side Letter which was finally signed by the parties indicate that the price of gas had been mutually agreed between the parties. This was also mentioned in letters dated 1.10.2011 and 26.12.2011 sent by the respondent to the appellant. Therefore, the premise on which the High Court recorded the conclusion that the appellant had acted arbitrarily was non-existent and on this ground alone the order under challenge is liable to be set aside.

28. We also agree with Shri Nariman that the remedy of arbitration available to the respondent under paragraph 15.5 of the GSA was an effective alternative remedy and the High Court should not have entertained the petition filed under Article 226 of the Constitution of India. The contents of the GSA, the Price Side Letters and the correspondence exchanged between the appellant and the respondent give a clue of the complex nature of the price fixation mechanism. Therefore, the High Court should have relegated the respondent to the remedy of arbitration and the Arbitral Tribunal could have decided complicated dispute between the parties by availing the services of experts. Unfortunately, the High Court presumed that the negotiations held between the appellant and the respondent were not fair and that the respondent was entitled to the benefit of the policy decision taken by the Government of India despite the fact that it had not only challenged that decision but had also shown disinclination to accept the offer made by the appellant to supply gas at the pooled price and had insisted on mutually agreed price.

29. In Arun Kumar Agrawal v. Union of India and others (2013) 7 SCC 1, this Court was called upon to consider the scope of judicial review of complex economic decision taken by the State or its instrumentalities. The Government of India, ONGC and Shell entered into a production sharing contract with a private enterprise for exploration and exploitation of crude oil and natural gas in respect of the Rajasthan Block. After due deliberation, the Government of India endorsed the decision taken by ONGC. While refusing to interfere with the decision of the Government, this Court observed:

> *"41. We notice that ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its*

> *monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."*

15. In the case of ***Union of India versus Upendra Singh*** [1994 (3) SCC 357], the Hon'ble Supreme Court was faced with identical issues as the one in the case in hand wherein the Hon'ble Court, after having considered the matter, held as under:-

> *"4. When the matter went back to the tribunal, it went into the correctness of the charges on the basis of the material produced by the respondent and quashed the charges holding that the charges do not indicate any corrupt motive or any culpability on the part of the respondent. We must say, we are not a little surprised at the course adopted by the tribunal. In its order dated 10/09/1992 this court specifically drew attention to the observations in A.N. Saxena that the tribunal ought not to interfere at an interlocutory stage and yet the tribunal chose to interfere on the basis of the material which was yet to be produced at the inquiry. In short, the tribunal undertook the inquiry which ought to be held by the disciplinary authority (or the inquiry officer appointed by him) and found that the charges are not true. It may be recalled that the jurisdiction of the central Administrative Tribunal is akin to the jurisdiction of the High court under Article 226 of the Constitution. Therefore, the principles, norms and the constraints which apply to the said jurisdiction apply equally to the tribunal. If the original application of the respondent were to be filed in the High court it would have been termed, properly speaking, as a writ of prohibition. A writ of prohibition is issued only when patent lack of jurisdiction is made out. It is true that a High court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom,*

yet the basic principles and norms applying to the said writs must be kept in view, as observed by this court in T.C. Basappa v. T. Nagappa . It was observed by Mukherjea, J. speaking for the Constitution bench:

> *"The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme court as well as of all the High courts in India extend to issuing of orders, writs or directions including writs in the nature of 'habeas corpus, mandamus, quo warranto, prohibition and certiorari' as may be considered necessary for enforcement of the fundamental rights and in the case of the High courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of 'certiorari' in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."*

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6. In the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed (read with imputation or particulars of the charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be. The function of the court/tribunal is one of judicial review, the parameters of which are repeatedly laid down by this court. It would be sufficient to quote the decision in H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal v. Gopi Nath & Sons . The bench comprising M.N. Venkatachaliah, J. (as he then was) and A.M. Ahmadi, J., affirmed the principle thus :

> *"Judicial review, it is trite, is not directed against the decision but is confined to the decision-making process. Judicial review cannot extend to the examination of the correctness or reasonableness of a decision as a matter of fact. The purpose of judicial review is to ensure that the individual*

> *receives fair treatment and not to ensure that the authority after according fair treatment reaches, on a matter which it is authorised by law to decide, a conclusion which is correct in the eyes of the court. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."*
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> *7. Now, if a court cannot interfere with the truth or correctness of the charges even in a proceeding against the final order, it is ununderstandable how can that be done by the tribunal at the stage of framing of charges? In this case, the tribunal has held that the charges are not sustainable (the finding that no culpability is alleged and no corrupt motive attributed), not on the basis of the articles of charges and the statement of imputations but mainly on the basis of the material produced by the respondent before it, as we shall presently indicate."*

16. From the above decisions, it clearly emerges that the Hon'ble Supreme Court has required the Tribunals/Courts to be indeed circumspect to intervene in the departmental proceedings and not to assume the place of the appellate authority nor to go into re-appraisal of the evidence or the adequacy of the evidence on which the order of punishment has been passed. They can only intervene where there is violation of any express statutory provision or gross malafide has been reflected in the conduct of the proceedings or there is procedural laches which serve to render the entire proceeding *ab initio void.* In no other cases can the Tribunal/Court intervene.

17. We also find that the applicant has not been able to point out any infringement of the procedures which would

vitiate the proceedings. The only violation of procedure alleged by the applicant pertains to submission of advice of the UPSC which the Hon'ble High Court has already taken care of by remanding the OA for re-hearing. Since the copy of the advice is already there with the applicant and he has the latitude to make submissions over it, this procedural lacuna has already been taken care of.

18. As regards *mala fide*, we take note of the fact that *mala fide* is required to be alleged in specific terms against persons and they need to be impleaded as parties in their personal capacity so that they can reply to the allegations levelled against them. In the instant case, the applicant does appear to be making allegations of *mala fide* against one T.S. Jayaram, however, he has not been impleaded personally as a party, and the respondents in their counter have vehemently denied the said allegation. We also cannot go into the charges of corruption levelled by the applicant during the course of his cross-examination for the reason that the said T.S. Jayaram has not been impleaded as party respondent.

19. The term *malafide* has been defined by the Apex Court in the case of ***State of Punjab & Another versus Gurdial Singh & Others*** [(1980) 2 SCC 471] while discussing what is *mala fide* and how it is to be proved and held as under:-

> *"9. The question then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfaction - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated. "I repeat..... that all power is a trust- that we are accountable for its exercise that, from the people, and for the people, all springs, and all must exist." Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to affect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power of extraneous to the statute, enter the verdict or impels the action mala fides on fraud on power vitiates the acquisition or other official act."*

20. Further, in the case of ***Ravi Yashwant Bhoir versus District Collector Raigarh & Others*** [2012 (4) SCC 407], the Hon'ble Supreme Court made a comprehensive view of its own earlier judgment and held as under:-

> *"47. This Court has consistently held that the State is under an obligation to act fairly without ill will or malice-in fact or in law. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. "Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable*

cause, and not necessarily an act done from ill feeling and spite.

48. Mala fide exercise of power does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law. (See: Addl. Distt. Magistrate, Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207; Union of India thr. Govt. of Pondicherry & Anr. v. V. Ramakrishnan & Ors., (2005) 8 SCC 394; and Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors., AIR 2010 SC 3745).”

21. In the case of in ***Institute of Law versus Neeraj Sharma*** Manu SC0841/2014 the Hon’ble Apex Court has held as under:

“29. Further, we have to refer to the case of ***Akhil Bhartiya Upbhokta Congress*** *v.* ***State of M.P. and Ors.*** (2011) 5 SCC 29, wherein this Court has succinctly laid down the law after considering catena of cases of this Court with regard to allotment of public property as under:

> 50. For achieving the goals of justice and equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and the State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good……In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of the rule of law.
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> XXX XXX XXX
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> 54. In *Breen* v. *Amalgamated Engg. Union*, Lord Denning MR said: (QB p. 190, B-C)
>
> … The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That

means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield* v. *Minister of Agriculture, Fisheries and Food* which is a landmark in modern administrative law.

55. In *Laker Airways Ltd.* v. *Deptt. of Trade* Lord Denning discussed prerogative of the Minister to give directions to Civil Aviation Authorities overruling the specific provisions in the statute in the time of war and said: (QB p. 705, F-G)

Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.

56. This Court has long ago discarded the theory of unfettered discretion. In *S.G. Jaisinghani* v. *Union of India*, Ramaswami, J. emphasised that absence of arbitrary power is the foundation of a system governed by rule of law and observed: (AIR p. 1434, para 14)

14. In this context it is important to emphasise that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.....

XXX XXX XXX

59. In *Kasturi Lal Lakshmi Reddy* v. *State of J&K*, Bhagwati J. speaking for the Court observed: (SCC pp. 13-14, para 14)

14. Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid....

61. The Court also referred to the reasons recorded in the orders passed by the Minister for award of dealership of petrol pumps and gas agencies and observed: (*Common Cause* case, SCC p. 554, para 24)

> 24. ... While Article 14 permits a reasonable classification having a rational nexus to the objective sought to be achieved, it does not permit the power to pick and choose arbitrarily out of several persons falling

> in the same category. A transparent and objective criteria/procedure has to be evolved so that the choice among the members belonging to the same class or category is based on reason, fair play and non-arbitrariness. It is essential to lay down as a matter of policy as to how preferences would be assigned between two persons falling in the same category....

62. In *Shrilekha Vidyarthi* v. *State of U.P.* the Court unequivocally rejected the argument based on the theory of absolute discretion of the administrative authorities and immunity of their action from judicial review and observed: (SCC pp. 236, 239-40)

> *29.* It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional....

22. In the case of ***Kumaon Mandal Vikas Nigam Ltd. V. (2001) 1 SCC 182,*** the Apex Court has held as under:-

> *"5. Whereas fairness is synonymous with reasonableness - bias stands included within the attributes and broader purview of the word 'malice' which in common acceptation means and implies 'spite' or ill will'. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a malafide move which results in the miscarriage of justice (see in this context Kumaon Mandal Vikas Nigam v. GiriJa Shankar Pant & Ors.1. In almost all legal enquiries, "intention as distinguished from motive is the all important factor' and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. In the case of Jones Brothers (Hunstanton) Ltd. v. Steuens, the Court of Appeal has stated upon reliance on the decision of Lumley v. Gye3 as below :*
>
> > *"For this purpose maliciously means no more than knowingly. This was distinctly laid down in Lumley v. Gye, where Crompton, J. said that it was clear that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service commits a wrongful act for which is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse : Bromage v. Prosser, [1825(1) C. & P. 673], "Intentionally" refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though*

> *sometimes, as, for instance to rebut a plea of privilege in defamation, malice in fact has to be proved."*

23. In view of the above judicial pronouncements and in view of the fact that since the applicant has neither alleged specific allegations nor have the persons, against whom the allegations deem to have been made, been impleaded in their personal capacity, the charge of *mala fide* does not stand proved.

24. Regarding non-application of mind, the Hon'ble Supreme Court in *Anil Kumar V/s. Presiding Officer* (supra) held as under:-

> *"6. Where a disciplinary enquiry affects the livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, the minimum expectation is that the report must be a reasoned one. The Court then may not enter into the adequacy or sufficiency of evidence. But where the evidence is annexed, to an order-sheet and no correlation is established between the two showing application of mind, we are constrained to observe that it is not an enquiry report at all."*

25. Though a copy of the enquiry report does not appear to have been filed by either of the parties in OA No.581/2011, the applicant in his representation and the UPSC in its advice have heavily relied upon the same. In this regard, para 4.34 and 4.4 of the UPSC advice are being extracted below:-

> *"4.34 As claimed by Shri T.R. Malik, no officer has said that Shri Malik has told them to facilitate the clearance of the baggage of Shri Sanjay Balkrishan Chavan by name. However, when a senior officer gives a message that such and such person is going to receive his relative/friend and should be allowed entry into the baggage hall of the Airport, it is understood that the clearance of*

baggage of such passenger, whom that person has gone to receive, may be facilitated. After finding out that the person who had gone to receive him (Shri Sanjay Balkrishan Chavan) was recommended entry into the baggage hall by the Joint Commissioner of Customs himself, needle of suspicion could automatically move towards Shri Malik only, more so in the circumstances of the case, as discussed above. In such cases, it is not easy to have direct evidence against anybody, except the carrying passenger but the behaviour and movement of various persons and overall circumstances indicate the implications of others. It is true that nobody should be framed and punished merely on the basis of suspicion but acts and omissions on the part of a Government servant in the circumstances cannot be and should not be overlooked. The CO says that Shri Ashish Chaudhary @ Ashish Khanna was a casual informer of Shri Malik. However, a casual informer being in so much telephonic touch with a senior officer of Customs posted at Airport on a day on which a big case is detected at Airport, not on the information of that casual informer, is a matter of concern when such a casual informer accompanies fhri Sarbans Singh Keer upto the Airport and enters Shri Keer's name in the Airport Entry Register in his own handwriting. Moreover, when the passenger, whom Shri Sarban Singh Keer had gone to receive, was caught with huge quantity of contraband goods, a phone goes to Shri Malik's residence from the phone of passenger himself and it is not known and also immaterial as to whether any conversation took place between them or not and proves some nexus of the passenger with Shri Malik through Shri Keer. Shri Sarbans Singh Keer also slipped away from the baggage hall and disappeared after finding that any help could not be managed by him. In these circumstances, Shri Ashish Chaudhary @ Ashish Khanna and Shri Malik keeping in touch by repeated phones from both sides at those hours on the so called some other matters, is not convincing when it was Shri Ashish Chaudhary @ Ashish Khanna himself who had accompanied Shri Sarbans Singh Keer upto the Airport and made entry in the Airport Entry Register for Shri Keer. There is no denying of the fact that Shri Sarbans Singh Keer was a man behind the smuggling of the mobile phone handsets by Shri Sanjay Balkrishan Chavan, whom he had gone to receive and his entry in the baggage hall was recommended by Shri T.R. Malik and Entry Register was filled up by Shri Ashish Chaudhary @ Ashish Khanna. A phone call from the passenger's phone itself to Shri Malik's residence either by the passenger or by Shri Sarbans Singh Keer itself shows the proximity, even if Shri Malik claims that no conversation took place. Shri Ashish Chaudhary @ Ashish Khanna also became anxious about the seizure at that point of time and repeatedly kept in touch with Shri T.R. Malik. Shri Ashish Chaudhary @ Ashish Khanna himself being very close to Shri Sarbans Singh Keer, does not show a good picture of Shri Malik in these circumstances. Shri Malik's plea that he was not concerned at all with the passenger Shri Sanjay Balkrishan Chavan and his baggage and he knew Shri Ashish Chaudhary @ Ashish Khanna as a casual informer and that Shri Sarbans Singh Keer was recommended to him by his daughter being the father-in-law of her friend, is not convincing in light of the above facts.

4.4 The Commission note that the IO in his report has clearly brought out the incriminating evidence against CO that he was in association with other accused persons, S/Shri Ashish Chaudhary @ Ashish Khanna and Sarbans Singh Keer who had gone to receive the pax named Shri Sanjay Balkrishan Chavan on the night of 25.11.1999 at airport. CO helped by giving telephone call to PRO for arranging the entry pass in favour of Shri Sarbans Singh Keer into arrival hall. From the IO's report, it is evident that the CO had called the A.C. (Shri T.S.Jayaram) on 25.11.1999 for entry pass of Shri Sarbans Singh Keer who had gone to airport to receive the passenger from whose baggage the commercial quantity of mobile phone LMV Rs.2,19,74,150/- were recovered. Later on, it was found that Shri Sarbans Singh Keer suddenly disappeared. Thus, it is prove by circumstantial evidence and preponderance of probability that CO was associated with the persons engaged in smuggling of said mobile phones in huge quantity which could not have been bonafide baggage of a passenger. The argument of CO that Shri Ashish Khanna was his casual informer is too facile to be accepted. Besides, other circumstantial evidences like repeated telephone calls made by the accused pesons on CO's residential phone before and after the incident, entry of Gate pass of Shri Sarbans Singh Keer who had gone to receive the pax (Shri Sanjay Balkrishan Chavan), disappearance of Sh. Sarbans Singh Keer after the incidence etc. clearly go to establish that the conduct of the CO was questionable and reprehensible and unbecoming of a Govt. servant."

26. It appears from the UPSC's advice, which heavily relied upon the enquiry report, that the enquiry officer has gone into all points in some detail. Therefore, in light of the decision in *Anil Kumar V/s. Presiding Officer* (supra), enquiry report is a reasoned and well argued and cannot be accused of non-application of mind by any stretch of imagination.

27. Insofar as the issue of delay is concerned, it has been dealt with by this Tribunal in the case ***Dhirendra Khare versus C.B.D.T.*** [OA No.1606/2014 decided on 16.02.2015]. Relevant portion of the decision is extracted hereunder:-

*"25. ...in the case of **R.K. Gupta vs. Coal India Ltd.** (supra) wherein the learned Judge relied upon the case of **Union of India Vs. Md. Habibul Haque** [1978(1)SLR 748]. Here the appellant was found guilty of trying to smuggle goods belonging to one C.I. Rodrigue, Chief Steward of the M.V. Bampora which was lying*

berthed at 4, King George's Block. Hon'ble Division Bench of the Calcutta High Court observed as under:-

> *"18. Considering the facts and circumstances of the case the Division Bench in paragraphs 4, 5, 6 & 7 observed as follows:-*
>
> *"The statements in paragraphs 18 & 18 of the writ petition were not denied in the affidavit-in-opposition of the appellants, but the same were admitted. In paragraph 30 of the affidavit-in-opposition it was stated as follows:-*
>
> > *'30. In regard to paragraphs 18 and 19 of the writ petition I say that the petitioner has since been promoted to the post of Preventive Officer Grade I with effect from August 9, 1974 as per the findings of the Departmental Promotion Committee. Besides this, no further comment is necessary as regards the contentions of the petitioner made in the paragraph under reply.'*
>
> *19. It follows from the statements made in paragraphs 18 and 19 of the writ petition and paragraph 30 of the affidavit-in-opposition that before granting promotion to the respondent his records were considered. It may be reasonably inferred from those statements that the authorities concerned also considered the fact that the respondent was charged for misconduct and was penalized by the reduction of his pay and that after such consideration he was found fit for promotion and was granted the promotion. The learned Judge, in our view, has rightly observed that the authorities had condoned the misconduct of the respondent for which he had been punished and his state been wiped clean. It is, however, contended on behalf of the appellants that the fact that the respondent was granted promotion in spite of the fact that he was punished is a matter to be considered by the reviewing authority. We are, however, unable to accept this contention. In our view, before issuing the show-cause notice, that authority should have taken into consideration the fact of the respondent's being promoted to the post of Preventive Officer, Grade I. The authority, therefore, did not apply its mind properly before it proposed for the imposition of the penalty of dismissal on the respondent."*

Likewise, in the matter of State of Punjab Vs. Dewan Chuni Lal, [AIR 1970 (SC) 2086] wherein the respondent was a Police Sub-Inspector was allowed to cross efficiency bar although there was charge of inefficiency and dishonesty on the basis of adverse confidential reports of superior officers. The said reports related to period earlier than the year in which he was allowed to cross efficiency bar. It was held that the said report should not be considered in enquiry. The Supreme Court observed at paragraph 14 of the said judgment at page 2089 as follows:-

> *"In our view, reports earlier than 1942 should not have been considered at all inasmuch as he was allowed to cross the efficiency bar in that year. It is unthinkable that if the authorities took any serious view of the charge of dishonesty and inefficiency contained in the confidential reports of 1941 and 1942 they could have overlooked the same and recommended the case of the officer as one fit for crossing the efficiency bar in 1944. It will be noted that there was no specific complaint in either of the two years and at best there was only room for suspicion regarding his behaviour."*

In the case of R.K. Gupta (supra), Hon'ble Court held as under:-

> *"27. In view of the principles settled by the aforesaid decision of the Supreme Court and also of this Court, I am of the opinion since the petitioner was promoted on several occasions and the allegations prior to such promotion should not be taken into account by the concerned authority and show-cause notice and charge issued after long delay should be directed to be quashed and the petitioner should be allowed to be promoted accordingly.*
>
> *28. Under such circumstances, in my opinion, the writ petitioner should succeed. The charges against the petitioner are quashed and the petitioner is entitled to be promoted. There will be a direction upon the respondents to give effect to the recommendation of the Departmental Promotion Committee and to place the petitioner in a suitable post. Such posting is to be made within six weeks from the date. The petitioner, however, will be entitled to the benefit of higher salary and other benefits and seniority retrospectively from March 2, 1990."*

26. It is also pertinent to note that in case of State of A.P. versus N. Radhakishan (supra), where the delay was only to the extent of seven years, Hon'ble Supreme Court was pleased to uphold the order of the Hyderabad Bench of the Tribunal quashing the proceedings. Likewise, in the case of P.V. Mahadevan (supra), the proceedings were quashed after a delay of ten years. The Hon'ble Court held in the case of State of A.P. versus N. Radhakishan (supra) as under:-

> *"19. It is not possible to lay down any pre-determined principles applicable to all cases and in all situations where there is delay in concluding the disciplinary proceedings. Whether on that ground the disciplinary proceedings are to be terminated each case has to be examined on the facts and circumstances in that case. The essence of the matter is that the Court has to take into consideration all relevant factors and to balance and weigh them to determine if it is in the interest of clean and honest administration that the disciplinary proceedings should be allowed to terminate after delay particularly when delay is abnormal and there is no*

explanation for the delay. The delinquent employee has a right that disciplinary proceedings against him are concluded expeditiously and he is not made to undergo mental agony and also monetary loss when these are unnecessarily prolonged without any fault on his part in delaying the proceedings. In considering whether delay has vitiated the disciplinary proceedings the Court has to consider the nature of charge, its complexity and on what account the delay has occurred. If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or when there is proper explanation for the delay in conducting the disciplinary proceedings. Ultimately, the Court is to balance these two diverse considerations.

20. In the present case we find that without any reference to records merely on the report of the Director General, Anti-Corruption Bureau, charges were framed against the respondent and ten others, and all in verbatim and without particularizing the role played by each of the officers charged. There were four charges against the respondent. With three of them he was not concerned. He offered explanation regarding the fourth charge but the disciplinary authority did not examine the same nor did it choose to appoint any inquiry officer even assuming that action was validly being initiated under 1991 Rules. There is no explanation whatsoever for delay in concluding the inquiry proceedings all these years. The case depended on records of the Department only and Director General, Anti- Corruption Bureau had pointed out that no witnesses had been examined before he gave his report. The Inquiry Officers, who had been appointed one after the other, had just to examine the records to see if the alleged deviations and constructions were illegal and unauthorised and then as to who was responsible for condoning or approving the same against the bye-laws. It is nobody's case that respondent at any stage tried to obstruct or delay the inquiry proceedings. The Tribunal rightly did not accept the explanations of the State as to why delay occurred. In fact there was hardly any explanation worth consideration. In the circumstances the Tribunal was justified in quashing the charge memo dated July 31, 1995 and directing the State to promote the respondent as per recommendation of the DPC ignoring memos dated October 27, 1995 and June 1, 1996. The Tribunal rightly did not quash these two later memos."

27. We also take note of the order of this Tribunal in the case of S.K. Ahuja Vs. Government of NCT of Delhi [OA No.3507/2010 decided on 10.01.2012 by the Principal Bench of CAT], where the Tribunal condoned the delay of 4 years in issuing the chargesheet. However, the law laid down by the Hon'ble Supreme Court in the case of P.V. Mahadevan (supra) remains uncontroverted and, therefore, the law would depend upon the facts of each case.

28. It is clear from the above that mere delay is not sufficient ground for quashing of the chargesheet. It has to be decided in consonance with all other factors. We also take note of the fact that the case of the applicant had been examined on a number of occasions within the department and he had been found guilty of the charges by the department."

28. Further, we take note of the decision in *Registrar, Co-op. Societies Madras V/s. F.X. Fernando* (supra), wherein the Hon'ble Supreme Court held as under:-

"17. Then again the finding that there is long delay in initiating of departmental proceedings cannot be supported because in this case the Directorate of Vigilance and Anti-Corruption had not been prompt. Therefore, the appellant cannot be faulted. Accordingly, we set aside the order of the tribunal and direct that the matter be proceeded with from the stage at which it was left. It is a settled principle of law that justice must not only be done but must be seen to be done..."

29. In *State of Haryana V/s. Chandra Mani* [AIR 1996 (SC) 1623], the Hon'ble Supreme Court observed as under:-

"10. …delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible."

30. In *State of Punjab V/s. Chaman Lal Goyal* [1952 (2) SCC 570], the Hon'ble Supreme Court observed as under:-

"9. .. how long a delay is too long always depends upon the facts of the given case. Moreover, if such delay is likely to cause

prejudice to the delinquent officer in defending himself, the enquiry has to be interdicted. Wherever such a plea is raised, the court has to weigh the factors appearing for and against the said plea and take a decision on the totality of circumstances..”

31. In the circumstances of the case, we take note of the fact that the case was of a senior officer and all the steps provided by the Supreme Court had to be followed. The respondents have submitted the following Chart:-

ñ*Chronology of events up to the issuance of Charge Memo to Shri T.R. Malik*

1	*25.11.1999*	*The day when Shri Malik is alleged to have committed the misconduct as per the Charge Memo issued to him.*
2	*26.11.1999 to 8.5.2002*	*This period relates to in-house investigation (preliminary inquiry) by Commissioner of Customs (General) Mumbai as well as CBI inquiry in the case vide PE No.2 2001 A0001 dated 9.1.2001 against Shri Malik. Preliminary inquiry clearly indicated Shri Malik's involvement/indulgence in committing the misconduct. Reference was made to CVC for their 1st stage advice by the Directorate General of Vigilance on 8.1.2001 after CBI too recommended initiation of major penalty proceedings against Shri Malik, prosecution was however not recommended. CVC gave its advice for major penalty proceedings against Shri Malik vide their letter dt. 17.1.2002. The President being the disciplinary Authority in cases of Group, approval of the Hon'ble FM was obtained on 1.5.2002 and charge sheet issued on 8.5.2002.*
3	*23.10.2002*	*Shri Malik vide his letter dtd 23.10.2002 denies the charges against him.*
4	*08.06.2003*	*Corrigendum to the charge memo dtd. 8.5.2002 issued whereby name of Shri Ashish Chaudhary is added at Sl. No.12 of the Annexure IV to the above Charge Memo as a witness.*
5	*05.07.2003*	*Shri Malik replies to the Corrigendum.*
6	*1.9.2003*	*Shri K.P. Mishra Commissioner of Customs (Preventive) and Shri D.S. Dagar Inspector CBI, ACI (II) New Delhi appointed as IO and PO respectively.*
7	*7.11.2005*	*IO submits his report*
8	*24.04.2006*	*IO's report and CVC's 2nd stage advice given to CO for his comments/representations.*
9	*05.05.2006*	*Shri Malik submits his written representation against the IO's report.*
10	*29.05.2006*	*Directorate general of Vigilance gives their comments on the representation of Shri Malik.*
11	*12.07.2006*	*Reference is made to Hon'ble FM for his approval*

		to impose 30% cut in Shri Malik's pension for six years before seeking concurrence of the UPSC.
12	*27.05.2006*	*Hon'ble FM approves the penalty.*
13	*03.04.2008*	*Case records referred to UPSC for their statutory advice after procuring all the original/ authenticated documents as per check list.*
14	*10.06.2008 to 07.06.2010*	*UPSC returns the case records pointing out certain deficiencies vis a vis principles of natural justice. IO accordingly was informed to take the corrective steps before submitting the report. UPSC advises penalty of 30% cut reducing for five years instead of six years.*
15	*24.06.2010*	*Fresh reference is made to Hon'ble FM for his approval to impose the reduced penalty and Hon'ble FM approves the same on 24.6.2010.*
16	*12.07.2010*	*Penalty order is issued to Shri Malik.*

32. From the above chart, we find that the department has not been sleeping over the matter, but the procedure itself took time. The enquiry report was submitted on 07.11.2005, IO report and CVC second stage advice were given to the CO for his representation on 24.04.2006; the applicant submitted his representation on 05.05.2006 and on 29.05.2006, the Director General gave his comments. There was a period of two years involved between 27.05.2006 and 03.04.2008 i.e. between the approval of the FM and reference to the UPSC because it involved collection of original and authenticated documents, UPSC has consumed the period from 10.06.2008 to 07.06.2010. On 24.06.2010, a fresh reference was made to the UPSC, and on 12.07.2010 the impugned penalty order was issued.

33. We must not lose sight of the fact that the charges leveled against the applicant are serious in nature. If a

custom officer of the rank of Joint Commissioner, who is the custodian of the Customs duties of the country, indulges in helping persons evading custom duties by way of smuggling in contrabands, there could be nothing more serious than that. Hence, we find that there is no delay on the part of the respondents. Rather the delay is attended by reasons as explained by the respondents in the Chart, quoted above.

34. In sum and substance, we find that the scope of judicial intervention in the departmental proceedings is limited; the courts are not to re-evaluate the evidence and/or to act as superior appellate authority; we also find that *mala fide* has been alleged but not in specific format and no person has been made a party, hence, the burden of proof alleging *mala fide* does not stand discharged; we also find that the charge of non-application of mind is not sticking as the report of the enquiry officer is thorough, exhaustive and appears to have taken all the points raised by the applicant into consideration.

35. In view of our above discussion, we find no merit in OA No. 581/2011, which is accordingly dismissed, leaving the parties to bear their own costs.

OA No. 4140/2010

36. The applicant in this case, who was serving as General Manager (Telephones), Moradabad, was detained in police

custody on 18.09.2003 by the CBI pursuant to which he was placed under deemed suspension from 18.09.2003 under Rule 10 of the CCS (CCA) Rules, 1965 and was charged with having failed to direct the subordinate officers to complete tender proceedings leading to extension of tender from 29.09.2000 to 29.05.2002 despite instructions from the Corporate Office; he further allowed the security to lapse and, therefore, tender for security arrangement could only be invited after seven months from the date of expiry of the previous tender during which the old contractor namely M/s. Sirohi Detective & Security Agency (P) Ltd., Ghaziabad was allowed to continue for which a sum of Rs.56 lakhs were paid to the said Detective Agency whereas the estimated cost of previous tender was Rs.15 lakhs. The applicant was further charged with having not getting the documents vetted by IFA nor had he himself approved the same, even then tender documents were released without the approval of the competent authority in order to favour the contractor. The applicant had not raised any objection when the file finally came for his approval. Therefore, he was charged with committing misconduct and having failed to maintain absolute integrity, exhibiting lack of devotion to duty and acting in a manner unbecoming of a government servant thereby violated the provisions of Rule 3(1)(i), (ii) & (iii) of CCS (Conduct) Rules, 1964. Accordingly,

departmental proceeding was launched against the applicant wherein he did not participate despite the fact that he had been noticed on each date of hearing. The defence assistant of the applicant also did not conduct the enquiry. The enquiry officer submitted his report and found the charges leveled against the applicant proved and the advice of the UPSC was obtained vide letter dated 15.08.2010 stating that since the charges have been proved against the applicant and the same constitutes a grave misconduct, imposition of penalty of 10% cut in pension for a period of three years would meet the ends of justice. Accordingly, the disciplinary authority imposed the impugned penalty upon the applicant.

37. The applicant has mainly relied upon three grounds in support of his case. In the first instance, the applicant submits that there has been only the procedural lapse which could not be termed as grave misconduct by any stretch of imagination. Hence, he cannot be imposed any penalty under Rule 9 of CCS (Pension) Rules, 1972 and his conduct was not on charges of corruption and/or relating to moral turpitude. He further submitted that Rule 9 of CCS (Pension) Rules does not cover minor lapse. In the second place, the applicant alleges number of procedural violations which serve to vitiate the proceedings. In the third place, the applicant submits that he was only provided with

photocopies of the documents relied upon and was not even granted permission to inspect such documents.

38. The respondents have filed their counter affidavit rebutting all allegations of the applicant. The respondents, however, submitted that the applicant, despite having been given ample opportunities to join the enquiry proceedings on each occasion, failed to attend the same and was not even represented through his defence assistant. The respondents have further stated that the enquiry had been conducted and charges were found certainly grave by the UPSC by contending that the action of the applicant was such which led to financial loss to the Government. The respondents further submitted that all procedures have scrupulously been followed, qua supply of photocopies of the documents to the applicant, the respondents submitted that as all the original papers relating to the enquiry had been seized by the CBI, photocopies had been provided to the applicant. The respondents, however, submitted that had the applicant appeared before the enquiry officer; joined the enquiry proceedings; and pleaded the ground of non-supply of original papers, some arrangements could have been made by the enquiry officer.

39. The applicant has submitted a rejoinder which merely consisted of reiteration of the facts of the OA.

40. For the sake of convenience, we reproduce the charges levelled against the applicant, which read thus:-

"*ARTICLE:*

That the said Shri RPS Panwar while posted and working as GMTD Moradabad during the period 19.4.1999 to 16.62002 committed following irregularities while approving and extending the tender of security guards which amount to misconduct:-

1. *During the aforesaid period, tender of M/s. Sirohi Detective and Security Agency (P) Ltd., Ghaziabad was extended from 29.9.2000 to 29.5.2002 despite receipt of instructions from corporate office to engage security guards through DGR sponsored agency and favoured M/s. Sirohi Detective and Security Agency (P) Ltd., Ghaziabad for more than 1½ years. The said Shri RPS Panwar failed to direct subordinate officers to complete the tender processing at the earliest.*
2. *Tender of security arrangement was valid up to 28.9.2000. Fresh tenders for security arrangements were invited after 7 months from the expiry of previous tender and old contractor M/s. Sirohi Detective and Security Agency (P) Ltd., Ghaziabad was allowed to perform security arrangement till new arrangements were made. The said Shri RPS Panwar failed to notice the non-processing of the case for fresh tender well in advance before expiry of period of earlier tender.*
3. *There were clear instructions to make security arrangement through DGR sponsored agencies, even then open tender in the name of watch and ward arrangement were invited vide NIT no. GMTD/MRD/Admn/Tender/Watch & Ward.02-03 dated 6.03.2002.*
4. *Estimated cost of previous tender was Rs. 15 Lac whereas during extended period an amount of more than Rs. 56 Lac has been paid to M/s. Sirohi Detective Agency. The said Shri RPS Panwar failed to object while the bills were processed for the same through him.*
5. *Tenders were invited vide NIT no.GMTD/MRD/ ADmn./Tender/Watch & Ward.02-03 dated 26.03.2002 at AGM (Plg.) level. NIT and tender documents were neither vetted by IFA nor approved by Shri RPS Panwar the then GMTD Moradabad, even then the NIT and tender documents were released without the approval of Competent Authority. There was another irregularity in financial bid of tender as both the no. of guards required and type i.e. Gunman and Dandaman were mentioned, (while to receive the competitive rates it was essential to mention these Data in financial documents of tender) rather equipped capacity of exchange and name of office were given. While contractor has nothing to do with equipped capacity of exchange or name of office. It appears that whole exercise was made to favour some particular firms. The said Shri RPS Panwar did not raise any objection whenever the file came to him for approval of tender*

opening committee (TOC), tender evaluation committee (TEC) and tender negotiation committee (TNC).

Thus by his above acts, the said R.P.S. Panwar, committed misconduct, failed to maintain absolute integrity, exhibited lack of devotion to duty and acted in a manner unbecoming of a Govt. servant and thereby violated the provisions of Rule 3(!)(i), (ii) & (iii) of CCS (Conduct), Rules 1964."

41. The general issues have already been considered while dealing with OA No.581/2011. Here, we find that enquiry report has been placed at page no.125 of the paper book. The applicant has prayed for stay of the enquiry till conclusion of the case. However, as submitted by the learned counsel for the respondents that since there has been no stay order, the enquiry proceeded and enquiry report was submitted and served upon the applicant by post. Thereafter, the applicant did not attend the enquiry nor he deemed it proper to be represented through his defence assistant. We also find that despite the applicant staying away from the enquiry, the enquiry was completed in the manner prescribed; the documents were properly exhibited and the enquiry officer in a detailed and well reasoned order found the charges proved against the applicant after going through the evidence on record. For sake of convenience, relevant part of the enquiry report is extracted hereunder:-

"*6.0 <u>FINDINGS</u>*

Though sufficient opportunity was given to the CO to participate in inquiry, but CO on one or the other pretext did not join inquiry even once, meaning thereby that CO was not inclined to participate in the inquiry. Hence, it was conducted ex-parte.

My findings in respect of all charges mentioned in article of charge of charge sheet based on above analysis of evidence are as under:-

Para (1)	*Proved.*
Para (2)	*Proved.*
Para (3)	*Proved.*
Para (4)	*Proved.*
Para (5)	*Proved."*

42. We have already taken into consideration the facts of the case. Here, we find that the applicant had stayed away from the enquiry without sufficient reasons. We also take note of the fact that it is well recognized that departmental enquiry can be conducted simultaneously with the criminal proceedings as has been held by the Hon'ble Supreme Court in *State of Rajasthan V/s. B.K. Meena* [1996 (6) SCC 714].

43. The proper course of action for the applicant would have been to appear before the enquiry officer and submit his defence which he failed to do. We have also carefully perused the record and found that there is no infirmity in the departmental proceedings conducted against the applicant rather we find that the enquiry officer has been careful and meticulous in conducting the enquiry and observing all the proceedings.

44. As regards the charge of misconduct being not grave, the matter has been dealt with in *Sukhdev Singh Karkhal V/s. Union of India* [OA No.3168/2013 decided on

05.01.2015], relevant portion whereof is reproduced hereunder:-

> *"14. Insofar as the second issue is concerned, the argument of the applicant is that no misconduct has been made out from the charges. We have a word of caution here that from the examination of the previous issue, it clearly emerges that even while dealing with the subject whether misconduct is made out, we are not required to delve into all the evidence adduced, as the same may prove prejudicial to the proceedings at the subsequent stage…*
>
> *15. It is well accepted that the Government employee constitutes a category distinct from those in the private sector being charged with the responsibility not only towards Government but also towards public with whom they come in contact during the course of the discharge of their duties. The essence of public service is the sense of discipline to which all Government employees are subject to privileges to which in general, they are entitled to. These two aspects are fully covered by two sets of service rules i.e. Central Civil Services (Conduct) Rules, 1964 and Central Civil Services (Classification, Control and Appeal) Rules, 1965. A Government servant, who violates any provision of the CCS (Conduct) Rules, 1964, can be imposed, for good and sufficient reasons, any of the penalties mentioned in Rule 11 of CCS (CCA) Rules, 1965. The Government employees are required to adhere to certain standards of conduct, both in their official and private capacities. These requirements have been laid down in CCS (Conduct) Rules, 1964. Of these, Rule 3(1) is most sweeping in its coverage and operation, which reads as under:-*
>
> > *"(1) Every Government servant shall at all times-*
> >
> > *(i) maintain absolute integrity;*
> > *(ii) maintain devotion to duty; and*
> > *(iii) do nothing which is unbecoming of a Government servant.*
> >
> > *2(i) Every Government servant holding a supervisory post shall take all possible steps to ensure the integrity and devotion to duty of all Government servants for the time being under his control and authority;*
> >
> > *(ii) No Government servant shall, in the performance of his official duties, or in exercise of powers conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior;*
> >
> > *(iii) The direction of the official superior shall ordinarily be in writing. Oral direction to subordinates shall be avoided, as far as possible. Where the issue of oral direction becomes unavoidable, the official*

superior shall confirm it in writing immediately thereafter;

(iv) A Government servant who has received oral direction from his official superior shall seek confirmation of the same in writing as early as possible, whereupon it shall be the duty of the official superior to confirm the direction in writing.]"

16. The fundamental requirements of these Rules are integrity, honesty, efficiency and good behavior of public servant. Most of the disciplinary proceedings arise from the breach of these rules, charges of lack of integrity, wary from naked corruption and abuse of official position. Integrity, on the other hand, is wholesome uprightness honesty and purity; departmental action can be taken against the public servant for lack of integrity. Devotion to duty is the third aspect. A public servant, who habitually fails to perform task assigned to him, shall be deemed to be lacking in devotion to duty. Every Government servant holding a supervisory post shall take all possible steps to ensure that his subordinates maintain absolute integrity and devotion to duty. Rule 1(4) expects that the conduct of the employee should conform to the ordinary norms of the ancillary prevailing in the society and one should not violate the laws of the land. Conduct unbecoming of a Government servant has been left to the discretion to the Government. A Government servant should not bring discredit to the services. Action can also be taken for the past misconduct committed by the Government Servant. Even not vacating quarter /mis-utilizing of the advance taken from the government refunding or not refunding in time even at the private level amounts to misconduct, unbecoming of a Government servant as does moral turpitude. Rule 3-A of the Conduct Rules, 1964 deals with Promptness and Courtesy:

No Government servant shall-

(a) in the performance of his official duties, act in a discourteous manner;

(b) in his official dealings with the public or otherwise adopt dilatory tactics or willfully cause delays in disposal of the work assigned to him.

Rule 3-B deals with Observance of Government's policies:

Every Government servant shall, at all times-

(i) act in accordance with the Government's policies regarding age of marriage, preservation of environment, protection of wildlife and cultural heritage;

(ii) observe the Government's policies regarding prevention of crime against women.

Rule 3-C deals with Prohibition of sexual harassment of working women:

(1) No Government servant shall indulgence in any act of sexual harassment of any woman at her work place.

(2) Every Government servant who is in-charge of a work place shall take appropriate steps to prevent sexual harassment to any woman a such work place".

Rule 4 of Conduct Rules, 1964 prohibits employment of near relatives of Government servants in Companies or firms. For the sake of greater clarity, Rule 4 is reproduced as under:-

> *"4. Employment of near relatives of Government servants in companies or firms*
>
> *(1) No Government servant shall use his position or influence directly or indirectly to secure employment for any member of his family in any company or firm.*
>
> *(2) (i) No class I Officer shall, except with the previous sanction of the Government, permit his son, daughter or other dependant, to accept employment in any company or firm with which he has official dealings or in any other company or firm having official dealings with the Government.*
>
> *Provided that where the acceptance of the employment cannot await prior permission of the Government or is otherwise considered urgent, the matter shall be reported to the Government; and the employment may be accepted provisionally subject to the permission of the Government.*
>
> *(ii) A Government servant shall, as soon as he becomes aware of the acceptance by a member of his family of an employment in any company or firm, intimate such acceptance to the prescribed authority and shall also intimate whether he has or has had any official dealings with that company or firm.*
>
> *Provided that no such intimation shall be necessary in the case of a Class I Officer if he has already obtained the sanction of, or sent a report to the Government under Clause (i).*
>
> *(3) No Government servant shall in the discharge of his official duties deal with any matter or give or sanction any contract to any [company or firm] or any other person if any member of his family is employed in that [company or firm] or under that person or if he or any member of his family is interested in such matter or contract in any other manner and the Government servant shall refer every such matter or contract to his official superior and the matter or contract shall thereafter be disposed of according to the instructions of the authority to whom the reference is made."*

Rule 8(5)(b) of the CCS (Pension) Rules, 1972 provides as under:-

> *"the expression 'grave misconduct' includes the communication or disclosure of any secret official code or password or any sketch, placen, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923), (which was obtained while holding office under the Government) so as to prejudicially affect the interests of the general public or the security of the State."*

However, it is not an exclusive definition of grave misconduct as has been given in the afore Rule 8(5)(b).

17. The Hon'ble Supreme Court in Union of India & Ors. Vs. B.Dev, (1998)7 SCC 691, held as under:-

> *"9. The enquiry was continued under Rule 9 of the CCS (Pension) Rules after the date of superannuation of the respondent. The Tribunal is of the view that "grave misconduct" as defined in Rule 8 (5), explanation (b) (sic) of the CCS (Pension) Rules has not been committed. Hence no action for grave misconduct can be taken under Rule 9. Now, under Rule 8 pension is subject to future good conduct. Under sub-rule (3) of Rule 8 if the authority considers that the pensioner is prima facie guilty of grave misconduct, it shall, before passing an order, serve upon the pensioner notice as specified therein, take into consideration the representation, if any, submitted by the pensioner; and under sub-clause (4), where the authority competent to pass an order is the President, the Union Public Service Commission shall be consulted before the order is passed. Sub-rule (5) referred to by the Tribunal does not appear to be relevant in the present case. It deals with appeals from orders passed by an authority other than the President. Under the explanation (b) to Rule 8, the expression 'grave misconduct' is defined "to include the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 . . . . . ." The explanation clearly extends grave misconduct to cover communication of any official secrets. It is not an exhaustive definition. The Tribunal is not right in concluding that the only kind of misconduct which should be held to be grave misconduct is communication etc. of an official secret. There can be many kinds of grave misconduct. The explanation does not confine grave misconduct to only the type of misconduct described there."*

18. One has to distinguish here as to what is misconduct as distinguished from grave misconduct. In laymen language, misconduct is violation of any of the rules contained in CCS (Conduct) Rules, 1964. On the other hand, grave misconduct is misconduct, which has been committed willfully. In other words, elements of mens rea have to be necessarily present. What constitutes a grave misconduct is a matter of Government perception or judicial conscience of the court. Assessment of the

gravity of the offence is necessary in order to determine the quantum of punishment. In the case of B.V. Kapoor Vs. Union of India, the Hon'ble Supreme Court quashed the order of dismissal where it had been awarded in the case of absence of duty for a period of two months and odd days. However, we rest at the point that the applicant has been charged in the following manner in the charge memorandum dated 26.6.2012:-

> *"Shri S.S. Karkhal, SAG/IRPS, Northern Railway while functioning as Sr. DPO, Northern Railway, Firozpur, during 2007-2008, committed gross misconduct, the details of which are mentioned hereinunder:-*
>
> *In a selection to fill up 21 posts of Ticket Collectors in Grade Rs.3050-4590 against 16 2/3% departmental quota for Group 'D' employees, he deliberately and irregularly approved relaxation of eligibility conditions for SC/ST candidates, as detailed in the statement of imputation. This enabled two ineligible candidates to appear in the selection, one of whom was his own brother.*
>
> *By the above acts of commissions and omissions, the said Shri S.S. Karkhal failed to maintain absolute integrity, exhibited lack of devotion to duty and acted in a manner unbecoming of a railway servant, thereby contravening Rule.1(i), 3.1(ii) and 3.1(iii) of the Railway Services (Conduct) Rules, 1966."*

19. From the above, we are of the opinion that the charge-sheet is quite clear and it makes out misconduct in the terms discussed above against the applicant. We have also stated that we do not want to delve further into the matter by making appreciation of the evidence tendered for the simple reason that it is beyond our scope of consideration and any findings at this stage would be in absence of full evidence, which would include examination and cross-examination of witnesses. It would also have bearing on the departmental proceedings to be conducted. Therefore, prima facie, it appears that the charge-sheet makes out a charge in the departmental proceeding against the applicant. We leave the mater at that. The issue is accordingly decided against the applicant."

45. In conclusion we hold that the applicant has not acted correctly in staying away from the enquiry proceedings. We have already stated that had the applicant appeared before the enquiry officer and joined the enquiry proceedings by stating his grounds, it might have been that the enquiry

officer could have taken different view. However, the applicant had shot himself in the foot by not attending the enquiry for which he himself is to blame. Moreover, the charges are so grave in nature, that they are covered within the ambit of 'grave misconduct'. Hence, we find that the applicant has failed to establish his case given limited scope of judicial intervention in such matters, and the impugned penalty of 10% cut in pension appears to be justified and fair.

46. In view of our above discussion, we find this OA bereft of merit and the same is also dismissed with no order as to costs. Registry is directed to keep a copy of this order in the files of both these OAs.

(Dr. B.K. Sinha)
Member (A)

(Syed Rafat Alam)
Chairman

/AhujA/