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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL

CALCUTTA BENCH

O A No. 350/1291 of 2017

M.A No. 350/621/2018

In the matter of:

An application u/s 19 of the

Administrative Tribunals Act, 1985

And

In the matter of:

Arvind Mohan Sahay

son of Late Inderdev Sahay, aged

about 60 years, retired from the post

of Commissioner of Central Excise,

Central Excise-II, Kolkata having

residence at 601B, Wing Tulsi

Niwas, Opposite B.M.C. Office,

Santracruz, Mumbai 400055 and also

at 2D, Tower 15, Sankalpa 4, New

Town, Kolkata 700156.

..... Applicant

- Versus -

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

2. The Chairman,

Central Board of Excise & Customs,
Department of Revenue, Government
of India, North Block, New Delhi 110
001

3. The Principal Chief
Commissioner of GST & Central
Excise, Kolkata Zone, Kendriya
Utpad Shulk Bhawan, 180
Shantipally, Rajdanga Main Road,
Kolkata 700107

4. The Principal Commissioner
of GST & Central Excise, North
Commissionerate Kolkata, Kendriya
Utpad Shulk Bhawan, 180
Shantipally, Rajdanga Main road,
Kolkata 700107

5. The Additional Commissioner
of GST & Central Excise (P&V),
North Commissionerate Kolkata,
Kendriya Utpad Shulk Bhawan, 180
Shantipally, Rajdanga Main road,
Kolkata 700107

6. The Under Secretary to the
Govt. of India, Ministry of Finance,

Department of Revenue, Central

Board of Excise & Customs, Hudco

Vishla Building, North Block, New

Delhi 110 001

..... Respondents

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH
KOLKATA

No.O A.350/1291/2017
M.A.350/621/2018

Date of order: 22.1.2020

**Coram : Hon'ble Mrs. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member**

ARVIND MOHAN SAHAY
VS.
UNION OF INDIA & OTHERS
(CENTRAL EXCISE)

For the applicant : Mr. M. Basu, counsel
Mr. B. Bhusan, counsel

For the respondents : Mr. P. Pramanik, counsel

ORDER

Bidisha Banerjee, Judicial Member

The ld. counsels were heard and the records were perused.

2. This original application, preferred by a compulsorily retired Commissioner of Central Excise & Customs, is directed against the alleged arbitrary action of the respondent authorities in rejecting his representation for release of his retirement benefits including pension, gratuity and other accumulated dues along with all consequential benefits arising out of the order of compulsory retirement on 18.03.2016, issued under the signature of Under Secretary, CBEC, Ministry of Finance, Department of Revenue, Government of India. The reliefs prayed for in this O.A. are as under:-

"a) Direction do issue directing the respective respondent authorities to cancel and/or withdraw the following orders:

i. Memo dated 15th June, 2017 issued by the Additional Commissioner(P&V), Central Excise, Kolkata-I Commissionerate



having the new nomenclature of GST & Central Excise, North Commissionerate Kolkata being Annexure "A-7" hereto;

ii. Vigilance Status Report dated 30th March, 2017 issued by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue being Annexure "A-8" hereto;

iii. Memo being No.II(25)4-Pen/H. Q./C.Ex./Kol-I/16/ dated 18th July, 2017 was issued by the Under Secretary of the Joint Commissioner (P&V), CGST & Ex, Kolkata Central Commissionerate being Annexure "A-9" hereto and/or to act strictly in accordance with law;

b) Direction do issue upon the respondent authorities, their men/agents/subordinates to make payment of the retirement benefits of the applicant including gratuity, pension and other accumulated dues including arrear of the service benefit of the suspension period of the applicant and/or all other consequential benefit in terms of 7th Pay Commission including the payment of balance amount of leave encashment upon calculating the same on the basis of the 7th Pay Commission along with 18% interest and further to act and proceed strictly in accordance with law;

c) Prohibition do issue prohibiting the respondent authorities, their men/agents/subordinates from acting on the basis of the following orders

i. Memo dated 15th June, 2017 issued by the Additional Commissioner(P&V), Central Excise, Kolkata-I Commissionerate having the new nomenclature of GST & Central Excise, North Commissionerate Kolkata being Annexure "A-7" hereto;

ii. Vigilance Status Report dated 30th March, 2017 issued by the Under Secretary to the Government of India, Ministry of Finance, Department of Revenue being Annexure "A-8" hereto;

iii. Memo being No.II(25)4-Pen/H. Q./C.Ex./Kol-I/16/ dated 18th July, 2017 was issued by the Under Secretary of the Joint Commissioner (P&V), CGST & Ex, Kolkata Central Commissionerate being Annexure "A-9" hereto and/or from withholding the payment of retirement benefits of the applicant including pension, gratuity and other accumulated dues of the applicant and/or all other consequential benefit and further to prohibit them from acting otherwise than in accordance with law;

d) Direction do issue upon the respondent authorities to produce and/or cause to be produced the entire records relating to the matter and on such production being made to render consonable justice;

e) Cost and costs incidental hereto;

f) And/or to pass such other or further order or orders as to Your Lordships may seem fit and proper."

3. The M.A. has been preferred to seek the following reliefs:-

"In the aforesaid circumstances, your applicant most respectfully prays that this Hon'ble Tribunal shall be pleased to quash the memorandum No.11/2018 and pending hearing of the way, any further proceeding be stayed in respect of the above memorandum. Pending hearing of the O.A. the respondents should be restrained from proceeding with the above memorandum."



4. The order dated 18.03.2016 whereby and whereunder the applicant was compulsorily retired under Clause(J) Rule 56 of Fundamental Rules is extracted herein below :-

F.No.C-50/09/2016-Ad.II
 Government of India
 Ministry of Finance
 Department of Revenue
 Central Board of Excise & Customs

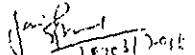
North Block, New Delhi
 Dated. the 18th March, 2016

ORDER No. 26 / 2016

WHEREAS the President is of the opinion that it is in the public interest to

so:

NOW THEREFORE in exercise of the powers conferred by clause (j) of Rule 56 of the Fundamental Rules, the President hereby retires Shri A.M. Sahay, IRS(C&CE:1990), Commissioner of Customs and Central Excise (U/S); with immediate effect, he having already attained the age of 50 years. The President also directs that Shri A.M. Sahay shall be paid a sum equivalent to the amount of his pay plus allowances for a period of three months calculated at the same rate at which he was drawing them immediately before his retirement.


 (Jai Prakash Sharma)
 Under Secretary to the Government of India

Shri A.M. Sahay, IRS(C&CE:1990)
 Commissioner (U/S),
 Kolkata Central Excise-II,
 Kolkata

The order spells out that the applicant, Shri A.M. Sahay would be paid a sum equivalent to the amount of his pay plus allowances for a period of three months calculated at the same rate at which he was drawing them immediately before his retirement, but he has not been paid the balance of salary deducting the subsistence allowance already paid to him and his gratuity has been withheld.

Ld. senior counsel for the applicant would submit that the respondents have acted contrary to the said order.

5. By an order dated 13th January, 2017 a provisional pension was directed to be granted in terms of Rule 64 of the Pension Rules which is applicable where provisional pension is payable for reasons other than departmental or judicial proceedings. Rule 64(1) of CCS Pension Rules reads as under:-

"64 Provisional pension for reasons other than Departmental or Judicial proceedings.—(1) Where in spite of following the procedure laid down in rule 59, it is not possible for the Head of Office to forward the pension papers referred to in rule 61 to the Accounts Officer within the period specified in sub-rule (4) of that rule or where the pension papers have been forwarded to the Accounts Officer within the specified period but the Accounts Officer may have returned the pension papers to the Head of Office for eliciting further information before issuing pension payment order and order for the payment of gratuity and the Government servant is likely to retire before his pension and gratuity or both can be finally assessed and settled in accordance with the provisions of these rules, the Head of Office shall rely upon such information as may be available in the official records, and without delay, determine the amount of provisional pension and the amount of provisional retirement gratuity."

6. The applicant preferred O.A.No.350/450/2017 challenging the failure of respondent authorities to disburse retiral benefits of the applicant including leave encashment, gratuity, commuted pension, arrears upon regularisation of suspension period and other accumulated dues on his compulsory retirement w.e.f. 18.03.2016 under Rule 56(J) of the Fundamental Rules. The O.A. was disposed of with a direction upon the Respondent No.1, the Secretary , Ministry of Finance, Department of Revenue, Government of India to consider and dispose of the representation of the applicant if pending consideration, by issuing a well reasoned order as per rules and intimate the result to the applicant within three months and if the applicant was found



entitled to the reliefs as claimed then to take expeditious steps to grant the same within a further period of three months.

7. By an order dated 15th June, 2017 the Additional Commissioner(P&V) issued a reasoned order which indicates that the delay occurred due to lack of original service book and vigilance status report. Provisional Pension was first sanctioned under Rule 64 of CCS(Pension) Rules. But after receipt of vigilance status report from C.B.E.C. vide letter dated 15.03.2017, the applicable rule for provisional pension was shifted from Rule 64 to Rule 69 of CCS Pension rules 1972 on the ground that "*Since he was retired while under suspension, the departmental proceedings shall be deemed to have been initiated from date of suspension.*" Post retirement benefits that were granted were as under:-

"1. *Arrear of Provisional Pension in respect of the above officer from 18th March 2016 to December 2016 under Bill No.434/PP(AMS)/Cex/Kol-I/16-17 dated 27.01.2017 amounting to Rs.5,10,419/- (Income Tax deducted) and later on, Bill for Provisional Pension of each month is being sent to PAO at the end of that month;*

2. *An Order amounting to Rs.1,64,474/- (Rupees One Lakh Four Thousand Seventy Four only) dated 31.01.2017 had been sanctioned and vide Bill No.445/CGEGIS/C. Ex./Kol-I/16-17 dated 13.02.2017 the same has been forwarded to PAO in favour of Shri Arvind Mohan Sahay, Commissioner(Retd.), Pr. C.C.O., C. Ex., Kolkata Zone towards Savings fund of C.G.E.G.I.S., 1980;*

3. *Final Payment of GPF is also a part of retirement benefit which is credited in due time."*

The said respondent cited the decisions in **Allahabad Bank Officers vs. Allahabad Bank & Others, Union of India Etc Vs. M.E. Reddy And Another; Union of India vs. Col. J.N. Sinha and Another; State of U.P. Vs. Shyam Lal Sharma and Baikuntha Nath Das and Another Vs. Chief Distt. Medical Officer** to contend that:-

- (i) Compulsory retirement under 56(J) was not punitive or stigmatic;
- (ii) Government has absolute right to take decisions of compulsory retirement without applying rules of natural justice;
- (iii) No show cause notice was required to invoke power under Rule 56(J) of Fundamental Rules;
- (iv) It was not in the nature of punishment;
- (v) Compulsory retirement order did not suffer from malafide/arbitrariness nor was it based on no evidence;

Having noted that the applicant was retired under Rule 56(J) and he was under suspension at the time of retirement and thus departmental proceedings were deemed to have been initiated, it was held that pension of the applicant was properly processed under Rule 69 of CCS(Pension) Rules, 1972. Such order of the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs(CBEC) dated 15th March, 2017 records the following:-

2. Based on the records of Directorate General of Vigilance, Customs & Central Excise and Ad.V- Section of CBEC, vigilance status for the above mentioned officer is as under:

(i) As per RC-3(A)/98-PATNA M/s G. R. Gaurishankar, Deoghar evaded duty on the aluminum wire manufactured from Aluminium Ingot imported under DEEC Scheme. They also availed modvat. M/s Jasidih Wires and M/s Shankar Conductors were not functioning during June-August, 1990 but filed monthly returns and revised returns respectively, falsely showing production of wires and their sale to M/s G R Gaurishankar, based on which they falsely claimed and received the refund of NCCD to the extent of Rs. 14,28,125/- CVC vide OM No. 99/CEX/014 dated 21.05.2003 advised initiation of RDA Minor. Chargesheet for major penalty issued vide F.No.C-14011/23/03-Ad.V dated 12.07.2004 which was however quashed by Hon'ble Mumbai High Court in Writ Petition No. 1063/06. The Chargesheet was withdrawn vide order under F.No.C-14011/23/03-Ad.V dated 24.12.08.

(ii) CBI Kolkata RC 010 2014(A) 009 against Shri Arvind Mohan Sahay, Commissioner, Central Excise, Kolkata-II, and 5 others for alleging demand and agreeing to acceptance of illegal gratification, for undue favours during adjudication of show cause notice for evasion of central excise duty amounting to Rs. 9.26 crores issued to M/s Ridhi Sidhi Udyog. A trap was laid successfully in Mumbai and Shri Sahay was arrested along with other accused persons at Kolkata on 05.04.2014. Shri Sahay was produced before the Ld. Court of Spl. Judge, CBI, Court, Kolkata on 05.04.2014. The Ld. Court remanded Mr. Sahay in Police custody upto 07.04.2014 and thereafter sent him to judicial custody up to 10.04.2014. Shri Sahay is on bail vide Court order dated 29.04.2014. Shri Sahay was placed under deemed suspension from the date of his detention i.e. 05.04.2014 vide order F.No.C-14011/9/2014-Ad.V dated 25.04.2014. The suspension of Shri Sahay was reviewed by the Competent Authority on the recommendation of the Review Committee and the Competent Authority ordered to continue his suspension from time to time, last such continuation was ordered for a further period of



90 days w.e.f. 24.03.2016 vide order dated 22.03.2016. CBI vide their report dated 04.02.2016 recommended prosecution of Shri A. M. Sahay and sought sanction for prosecution. UO Note seeking advice of CVC recommending sanction of prosecution as well as initiation of RDA for Major Penalty sent on 22.03.2016. CVC vide O.N. No. 014/CT/X/011/313475 dated 02.05.2016 advised Prosecution and RDA Major. DGoV has furnished a draft Chargesheet and other documents without authenticated copies of RUDs. Ad.V vide letter dated 20.09.2016 requested to DGoV to submit authenticated copies of RUDs. The same is awaited. Meanwhile, Shri A.M. Sahay has been retired prematurely under FR 56(j) vide order dated 18.03.2016. Therefore, sanction for his prosecution is not required. Since he was retired while under suspension, the departmental proceedings shall be deemed to have been initiated from the date of suspension. Further, SP, CBI, ACB, Kolkata vide their letter dated 23.02.2017 has intimated that Chargesheet was filed on 30.06.2016 in the said case against Shri A M Sahay, Commissioner Retd.), and others. Presently, the case is pending trial at pre-charge stage in the Court of the Ld. Special Judge (CBI), 3rd Special Court, Bankshall Street, Kolkata

4. This issues with the approval of CVO, CBEC.

Yours faithfully,

(Sukh Lal Meena)

Under Secretary to the Government of India

Phn-011-26171184

The Leave Salary due to the applicant was sanctioned vide order dated 24TH August, 2017(Annexure A/10).

8. By way of M.A.No.350/621/2018, the applicant has sought to challenge the chargesheet dated 13th April, 2018 issued to him by the Under Secretary to the Government of India on the alleged ground that he has taken bribe of Rs.50 Lakhs from M/s. Riddhi Siddhi Ugyog Limited. The said charge sheet records the following:-

MEMORANDUM NO.11/2018

In pursuance of order issued from F.No.C-14011/09/2014-Ad.V dated 25.04.2014 placing Shri A.M. Sahay under deemed suspension from the date of his detention i.e. 05.04.2014 by the CBI in RC No.010 2014 A0009, which was continued for a further period of 180 days each, vide orders dated 30.06.2014 and 30.12.2014 and for a period of 90 days each vide orders dated 26.06.2015, 24.9.2015 and 23.12.2015, and in terms of Rule 9(6)(a) of the CCS(Pension) Rules, 1972, it is proposed to hold an enquiry against Shri A.M. Sahay in accordance with the procedure laid down in the Rules 14 and 15 of the Central Civil Service (Classification, Control and Appeal) Rules 1965."

The said charge sheet has been challenged on the grounds *inter alia* that :-



(i) Once an employee is compulsorily retired, the post retirement benefits are well assured to him, he is entitled to have a peaceful post retirement life without any stigma or strain whereas by issuing a Memorandum a very serious attempt was made to take away his acquired right to post retirement benefits like gratuity, commutation of pension etc. which were otherwise guaranteed in terms of various judgments of the Hon'ble High Courts and Apex Court.

(ii) A Government servant cannot be punished twice one by way of compulsory retirement and the other by disciplinary proceedings for the same alleged offence to cause him double jeopardy;

(iii) The charge memorandum issued under Pension Rules 4 years after the alleged incident that too when deemed suspension has lost its force due to compulsory retirement, was totally unjustified. The charge memo under Pension Rules without approval of the Hon'ble President of India was grossly bad in law and liable to be quashed and set aside.

(iv) The charge memo was issued in gross violation to Government of India's own instruction contained in CBEC's Circular dated 24.02.2011 which apprehends initiation of disciplinary proceeding on the basis of photocopies of relied upon documents which were neither certified nor authenticated.



9. At hearing, Id. senior counsel for the applicant had drawn our attention to the decisions of Hon'ble Apex Court in **Biswanath Prasad Singh vs. State of Bihar & Others**[2001(2)SCC 305] to contend that:-

- (i) The order of compulsory retirement is neither a punishment nor a penalty with loss of retiral benefits;
- (ii) Object of such compulsory retirement is not to punish or penalise the Government servant but to weed out the worthless who have lost their utility for Administration.
- (iii) It does not cause any stigma;
- (iv) A Government servant who is compulsorily retired is entitled to draw all retiral benefits including pension;

Hence, applicant's payable retiral benefits could not be touched or meddled with by issuing a charge memo that too in violation of Pension rules. He would pray for quashing of the charge memo as it contained charges regarding an incident 4 years prior to retirement, which was opposed to Rule 9(2)(b) of Pension Rules.

The Id. counsel was further vociferous while articulating his concern that despite guarantee of pension and gratuity to a compulsorily retired Government servant, the present applicant was deprived of the same for no reason. The Id. counsel would also place a decision of the Hon'ble High Court of Karnataka in **State of Karnataka vs. T. Nagappa** that the object of such compulsory retirement is to weed out the worthless but not to punish or penalise any Government



servant and that the consequence of an order of compulsory retirement was that a compulsory retirement being neither a dismissal nor removal differed from both of them and a person retired compulsorily was entitled to pension and other retiral benefits proportionate to the period of his service. Lt. counsel would also place the decision in **Rajendra Singh Verma(Dead) vs. Lt. Governor (N.C.T. of Delhi) [(2011)10 Supreme Court Cases-1]** which was discussed by the Hon'ble High Court of Karnataka in the case of **T. Nagappa**.

10. Per contra the respondents would submit that in view of the decision in **Chairman L.I.C. of India & Others vs. A. Masilamani [(2013)6 Supreme Court Cases-530]** the decision to initiate proceedings should not be interfered with. It was held therein that:-

"10..... Disciplinary Authority should be given an opportunity, to complete the enquiry afresh from the point that it stood vitiated, depends upon the gravity of delinquency involved. Thus, the court must examine, the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that courts/tribunals, are not competent to quash the charge sheet and related disciplinary proceedings, before the same are concluded, on the aforementioned grounds.

The court/tribunal should not generally set aside departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limitation of judicial review. In the event that, the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court....."

11. From the materials placed on record we infer the following:-

About suspension

(i) The applicant was placed under deemed suspension from the date of his detention i.e. 05.04.2014 by the CBI in R.C.No.010 2014 A 0009, which suspension was reviewed from time to time until 23.12.2015 as indicated in the Charge Memo dated 13th April, 2018.



Rule 10(6) and (7) of CCS(CCA) Rules envisage the following :-

(6) *An order of suspension made or deemed to have been made under this rule shall be reviewed by the authority competent to modify or revoke the suspension, before expiry of ninety days from the effective date of suspension, on the recommendation of the Review Committee constituted for the purpose and pass orders either extending or revoking the suspension. Subsequent reviews shall be made before expiry of the extended period of suspension. Extension of suspension shall not be for a period exceeding one hundred and eighty days at a time.*

(7) *An order of suspension made or deemed to have been made under sub-rules (1) or (2) of this rule shall not be valid after a period of ninety days unless it is extended after review, for a further period before the expiry of ninety days.*

Provided that no such review of suspension shall be necessary in the case of deemed suspension under sub-rule (2), if the Government servant continues to be under suspension at the time of completion of ninety days of suspension and the ninety days period in such case will count from the date the Government servant detained in custody is released from detention or the date on which the fact of his release from detention is intimated to his appointing authority, whichever is later."



In absence of any record to suggest to the contrary, the respondents continued with the suspension after 23.12.2015, until compulsory retirement of the applicant on 18.03.2016. Therefore, the suspension that was reviewed periodically had to be deemed as continuous until compulsory retirement.

(ii) **Invoking Rule 69 of CCS(Pension) Rules:**

"69. Provisional pension where departmental or judicial proceedings may be pending

(1) (a) *In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.*

(b) *The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.*

(c) *No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final order's thereon :*

Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(2) *Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."*

The applicant was compulsorily retired from service vide order dated 18.03.2016 under Clause 56(J) of the Fundamental Rules with an assurance of pay equivalent to his pay and allowances for a period of 3 months.



The applicant had challenged the compulsory retirement order but was unsuccessful whereafter he started preferring representations for release of his full retiral benefits including pension and gratuity that was held up.

The provisional pension was initially ordered on 13.01.2017, in terms of Rule 64 of Pension Rules that applied for reasons other than pendency of departmental or judicial proceedings, was converted to one under Rule 69, where the provisional pension becomes payable during pendency of departmental or judicial proceedings. Such conversion was made vide order dated 15.06.2017 in terms of approval given by CVO, CBEC communicated on 15.03.2017(Annexure A/8), long before initiation of proceeding vide charge memo dated 13.04.2018.

Long after his compulsory retirement whereupon his suspension had already come to an end with his compulsory retirement (as enumerated supra), the applicant was charge sheeted for an alleged demand and acceptance of bribe in March-April, 2014 vide memo dated 13th April, 2018 in terms of Rule 9(6)(a) of the CCS(Pension) Rules, 1972 deeming the proceedings as already initiated from the date of suspension. The respondents, therefore, wanted to attach a deeming provision to a situation where it was not applicable.

We, therefore note that Rule 69 of CCS(Pension) Rules was invoked when no departmental proceeding was pending against the applicant and situation did not warrant such course of action. Therefore, invoking Rule 69 of CCS(Pension) Rules was bad.



Applicant has alleged that once the applicant was compulsorily retired he could not be proceeded with under Rule 9 of Pension Rules to penalise him.

12. From the pleadings the issues that further require to be determined in the instant matter are as follows:-

- (i) Whether departmental proceedings, initiated by the respondents under Pension Rules after compulsorily retiring Government employee invoking FR 56(J) on the same grounds which led to exercise of power under FR 56(J), was valid.
- (ii) Whether chargesheet under Rule 9(6)(a) of Pension Rules was maintainable;

(iii) If such a proceeding was not maintainable, whether gratuity could still be withheld under Rule 69 of the CCS(Pension) Rules.

13. We discern from the records that the Review Committee for ACC Appointees, that met on 12.02.2016 to consider invoking FR 56(J), recorded the following:-

"The Review Committee has very closely perused and examined the relevant material relating to the service records of Shri A.M. Sahay, Commissioner (IRS:C&CE:1990) including the APARs for the period 2000-2001 to 2014-15, IPRs filed by the Officer, material available with the Directorate General of Vigilance, CBEC and the general reputation of the Officer, Shri A.M. Sahay has attained the age of 50 years (DoB 07.07.1957) on 07.07.2007 and has completed 30 years of service in Government.

2. *The Review Committee finds that Shri A.M. Sahay has been repeatedly placed in Agreed Lists for the years 1993-94, 1995, 1997, 2001, 2002-03, 2014-15 and 2015-16. This aspect raises serious concerns on the integrity of the Officer's career spanning over three decades.*

3. *The Review Committee has also come across two cases of serious nature reported against him. In the first case, the Officer's professional ability and competence had come into question in the year 2003 for his actions as Assistant Collector of Central Excise(Prev.), Patna which resulted in erroneous sanction of refund of Central Excise duty amounting to Rs.14,28,125/- by the Assistant Collector of Central Excise, Division-Bhagalpur way back in 1992. The CBI recommended minor penalty proceedings against him in 2003. A Charge Sheet was issued to him on 12.07.2004 which was challenged by him in Bombay High Court. The said Charge Sheet was quashed by the Hon'ble Bombay High Court purely on account of unreasonable delay in the issuance of the Charge Sheet without going into merits.*

4. *In the second case, his personal integrity has come under serious cloud as Commissioner of Central Excise, Kolkata-II, in the year 2014 when he was arrested by the CBI in a case of demand of illegal gratification of Rs.50 Lakhs on the basis of material evidence available with CBI pertaining to the period, March & April, 2014. Shri A.M. Sahay had desired his share of bribe amount to Rs.50 lakhs be delivered to one Shri J.S. Chandok. Shri A.M. Sahay was arrested on 04.04.2014. He was placed under suspension on 25.04.2014 with effect from 05.04.2014 and is still continuing under suspension. The CBI has recently sought sanction for prosecution of Shri A.M. Sahay which is under scrutiny."*

A mere running over of eye exemplifies the alleged acceptance of bribe was one of the facts that led to invoking FR 56(J) to compulsorily retire the applicant while the basis of indictments in the charge Memo dated 13.04.2018 are the following:-



"Investigation has revealed that M/s. Riddhi Siddhi Udyog(RSU) was facing serious enquiry by Central Excise Department, Kolkata-II Commissionerate, on the basis of an adverse reference received from Vigilance Department of RDSO, Lucknow, M/s. RSU which was manufacturing Phosphoric Iron(Medium Phosphorous) Brake Blocks for supply to various offices of Indian Railways, evaded Central Excise Duty for one of its units. Shri Arvind Mohan Sahay, Commissioner, Kolkata-II Commissionerate and Shri Mihir Sen Barman, Superintendent, working under said Shri A.M. Sahay negotiated with Shri Prateek Bhalotia in a meeting in order to reduce the burden of evaded Central Excise Duty and to return the inculpatory statement of Shri R.K. Bhalotia recorded on 18.03.2014. They demanded Rs.1 Crore for both of them which after desperate bargaining was settled to Rs.50 Lacs for Shri Sahay and Rs.25 Lacs for Shri Barman. The bribe amount of Shri Sahay was to be delivered at Mumbai while Shri M.S. Barman agreed to accept the bribe at Kolkata. Shri Barman had accepted Rs.25 Lacs on 03.04.2014, while Shri Prateek Bhalotia arranged the delivery of Rs.50 Lacs to Mumbai through one Shri Rakkumar to Shri Jaspal Singh Chandok, Prop. Of M/s. Balu India and agent of Shri A.M. Sahay at Mumbai."

Therefore, the reason for invoking FR 56(J) as well as initiating proceeding vide charge memo dated 13.04.2018, are the same. While order under FR 56(J) is not a penalty order and it allows full pension and gratuity to the pensioner, Pension Rules can be invoked to penalise a retired employee, if situation so warrants, to affect his pension/gratuity but strictly in terms of Rule 9 of Pension Rules.

14. Legality of Invoking Rule 9(6) of CCS(Pension) Rules:

Upon his compulsory retirement the reason to put him under suspension did not exist and the suspension order lost its force. Proceedings if initiated while in service, in terms of CCS(CCA) Rules could be continued in terms of Rule 9(2)(a) of Pension Rules that reads as under:-

2)	(a)	The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which
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<input type="checkbox"/>	<input type="checkbox"/>	they were commenced in the same manner as if the Government servant had continued in service :
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Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

Proceedings if not initiated while the applicant was in service, could still be initiated after his retirement in terms of Rule 9(2)(b) which stipulates that:-

		(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -
		(i) <u>shall not be instituted save with the sanction of the President,</u>
		(ii) <u>shall not be in respect of any event which took place more than four years before such institution, and</u>
		(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.



Whereas, to penalise the present applicant who was by then a pensioner, Rule 9(B) of Pension Rules was invoked and not Rule 9(2).

The said Rule 9(6) talks of a legal fiction that if an employee was suspended proceedings shall be deemed to be initiated on the date suspension order was issued. Such legal fiction cannot apply to a compulsorily retired employee who is retired prematurely, as suspension cannot continue beyond such retirement. In this regard Sub Rule 6(a) of Rule 9 of CCS(Pension) Rules would be profitable to extract for clarity. The Rules explicitly spells out that :-

(6) For the purpose of this rule, -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date;

A plain and simple reading of the provision would suggest that in terms of this rule, while 'suspension' qualifies only a "Government servant" and not a "pensioner", issuance of "statement of charges" qualify both "a Government servant" as well as a pensioner. Therefore, a proceeding can be deemed to be initiated against a pensioner only upon issuance of "Statement of charges" and not otherwise. In absence of any proceeding already initiated Rule 9(6)(a) cannot be invoked to initiate proceedings against a pensioner on the ground that he was suspended earlier and disciplinary proceedings cannot therefore be deemed to be instituted w.e.f. the date of suspension when the suspension has already lost its force. Further, we discern that in **Union of India & Others vs. K.V. Jankiraman and Others** reported in (1991)4 Supreme Court Cases 109 it was held as under:-

"It is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee."

The decision of Hon'ble Apex Court in **Union of India vs. A.N. Saxena** [1992(2) SLR 11] followed by **Union of India vs. Upendra Singh** [(1994)3 SCC 357] holds the field. In **Special Director vs. Mohd. Ghulam Ghous** reported in (2004)3 SCC 440 the Hon'ble Supreme Court held that courts should not interfere at the show cause stage unless the show cause is "totally non est in the eye of law." The Court was categorical when it said :



".....Unless the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially before the aggrieved could approach the Court. Further, when the Court passes an interim order it should be careful to see that statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimately relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

The Hon'ble Apex Court in **Union of India vs. Kunisetty**

Satyanarayana [2007 AIR SCW 607] further explained why the Courts should not entertain a petition against the show-cause or charge sheet issued by the employer to the employee. Hon'ble Court held:



"The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge sheet is that at that stage the writ petition may be held to be premature. A mere charge sheet or show-cause notice does not give rise to any cause of action because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge sheet does not infringe the right of any one. It is only a final order imposing some punishment or otherwise adversely affecting a party is passed that the said party can be said to have any grievance."

In **Union of India vs. Ashok Kacker [1995 Supp(1) SCC 180]**, the Tribunal had quashed the charge sheet on the ground that the having earlier closed the basis as correct, could not subsequently consider it as incorrectly supplied and charge the respondent for committing misconduct. However, Hon'ble Supreme Court did not approve of the Tribunal going into the merit when the respondent had not submitted

his reply to the charge sheet. Therefore, a Court can always find out if the condition precedent for the issue of charge sheet was satisfied. In other words, the Court will certainly enquire if there was a *prima facie* case, which is the very basis for formation of an opinion by the competent authority. The Court will look into if the opinion was fairly formed that it is necessary to hold an inquiry and a charge sheet is necessary to be issued. When there is a question as to the very existence of a *prima facie* case, the Court may enquire into the process of formation of the opinion itself. The absence of a *prima facie* case will lead to arbitrariness and must rob the authority the jurisdiction to frame the required opinion. In such circumstances, it is quite possible that the "opinion" has not been fairly arrived at, and it may be tainted with bias or *mala fide*.

It is trite that when a grievance is made before the Court that fundamental right of equality has been violated, it becomes the duty of the authorities to justify their impugned decision by placing relevant material before the Court. It is no defence in any given case to argue that making a decision is complex and, therefore, Court should not interfere. In such circumstances, Court is required to brush aside such pretexts and to uphold the rule of law by quashing the decision [(2011)7 SCC 385].

Judicial review is said to be addressed to the decision-making process. Whether or not the competent authority had before him the material for "invoking the decision making process" is certainly a matter

for judicial review at the threshold of the enquiry and not after the employee has gone into the whole hog of sufferings and harassments.

Following passage from the decision in **H.B. Gandhi Excise & Taxation Officer cum Assessing Authority, Karnal vs. Gopinath & Sons [1992 Supp(2)SCC 312]** was cited by the Hon'ble Supreme Court in **Union of India Vs. Upendra Singh (supra)** to highlight the scope of judicial review:

"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."

In regard to proceedings against a pensioner, we noted that such proceeding can only be initiated under Rule 9(2) (b) of the Pension Rules as enumerated supra.

In **Uco Bank vs. Rajinder Lal [(2007)6 SCC 694]**, the Hon'ble Supreme Court held as under:-

"The aforementioned Regulation, however, could be invoked only when the disciplinary proceedings had clearly been initiated prior to the respondent's ceasing to be in service. The terminologies used therein are of seminal importance. Only when a disciplinary proceeding has been initiated against an officer of the bank despite his attaining the age of superannuation, can be disciplinary proceeding be allowed on the basis of the legal fiction created thereunder i.e. continue "as if he was in service". Thus, only when a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provision, the delinquent officer would be deemed to be in service although he has reached his age of superannuation. The departmental proceedings, it is trite law, is not initiated merely by issuance of a show-cause notice. It is initiated only when a charge-sheet is issued."

In **Coal India Ltd. Vs. Saron Kumar Mishra [(2007)9 SCC 625]** it was held that "*date of application of mind on the allegations levelled against an officer by the competent authority as a result whereof charge-sheet is issued would be the date on which the disciplinary proceedings are said to have been initiated and not prior thereto.*"

Similar view is expressed in **Ramesh Chandra Sharma vs. Punjab National Bank [(2007)9 SCC 15]** and **Punjab National Bank vs. M.L. Kalra [(2008)3 SCC 494]**.

In **Girijan Co-operative [(2010)15 SCC 322]** it was held by the Hon'ble Apex Court that "*departmental proceedings can be initiated and continued only in the terms of rules framed by the employer. In the absence of any rules (as in this case), disciplinary proceedings against the retired employees should not have been continued*".

15. We note that a charge sheet should not be normally interfered with, yet this Tribunal is not powerless to enquire into the process of formation of opinion to issue the charge sheet/memo and definitely interfere if the opinion has not been correctly arrived at. In the present case, the Disciplinary Authority has wrongly assumed that he can issue charge sheet to a pensioner referring only to Rule 9(6) of the Pension Rules and not to Rule 9(2)(b) that requires sanction of the competent authority, the President. While invoking Rule 9(6) of Pension Rules, which did not apply to a pensioner due to reasons enumerated above, the respondents wrongly assumed jurisdiction to charge sheet a pensioner and withholding his dues under Rule 69 of Pension Rules



deeming the initiation of proceedings from the date of suspension or due to issuance of the present charge sheet under Rule 9(6) *ibid*, there was a jurisdictional error that made the entire exercise a nullity.

16. In the aforesaid backdrop, we thus quash the charge memo dated 13th April, 2018 and direct the authorities to release pension and gratuity of the applicant in accordance with law, if no judicial proceeding or no other departmental proceeding is pending against him, with liberty to act in accordance with law for the purpose of initiating departmental proceedings.

Accordingly both the O.A. and the M.A. stand disposed of. No costs.



(Dr. Nandita Chatterjee)
Administrative Member

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(Bidisha Banerjee)
Judicial Member