

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1605/1994

New Delhi, this ^{April} 17th day of ~~March~~, 1996

Hon'ble Shri B.K. Singh, Member(A)
Hon'ble Dr. A.Vedavalli, Member(A)

19

Shri E. Lakra
s/o late Shri P.K. Lakra
49, East Kasidih, Road No.2,
Road No.2, PO Sakchi, Jamshedpur(Bihar) .. Applicant
(Dy.Commissioner of Income Tax, Calcutta)

By Shri Vikas Singh with
Shri Younis Malik, Advocate

versus

Union of India, through

1. Secretary
Deptt. of Revenue, Min. of Finance
North Block, New Delhi
2. Chairman
Central Board of Direct Taxes
M/Finance, North Block, New Delhi
3. Secretary
UPSC, New Delhi
4. Shri H.O.K. Srivastava
Commissioner of Income Tax
Nasik, Maharashtra .. Respondents

By Shri V.P. Uppal, Advocate

ORDER
(Hon'ble Mr. B.K. Singh, Member(A))

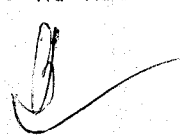
The present application is directed against the order dated 23.6.94 whereby the applicant has been awarded a penalty of censure for having sent a legal notice(Annexure A-7 to the OA) to his superior. The brief facts are that the applicant joined the Revenue Service (Income Tax) as a direct recruit, Group A in the year 1969. He was promoted as Assistant Commissioner, redesignated as Deputy Commissioner in April, 1980. He was due for promotion in the selection grade alongwith his batchmates. Orders placing the Commissioners of Income Tax (Dy. Commissioner of IT(non-functional) in the pay scale of Rs.4500-5700 were issued on 23.8.90 and the officers' mentioned in the said



20

the order were granted/said ~~the~~ selection grade with effect from different dates. The name of the applicant was missing from this list. According to his seniority, he claims that he was entitled to have been placed before Shri G.R. Joshi and after Shri P.L. Dass. In this connection a copy of the civil list is enclosed as Annexure A-1. On enquiry regarding supercession, he came to know that the case of the applicant was considered by the DPC but his case was kept in a sealed cover by the DPC. It has been stated that no disciplinary proceedings were pending against him on the date his name was kept in the sealed cover.

2. The applicant had filed another OA No.1639 before this Tribunal. It is stated that, in that OA, an interim order had been passed by this Tribunal (Annexure A-2) and in pursuance of the direction of the Tribunal the applicant was given selection grade with effect from 1.1.86. The DPC had met on 20 and 21st September, 1990 but did not recommend the name of the applicant for promotion on the basis of the adverse entries in his ACR for the year 1989-90. It is stated that these remarks were communicated to him on 21.1.90 but the date of communication is shown as 12.7.90. The applicant made a representation against the said adverse entries to the Central Board of Direct Taxes (CBDT) on 20.11.90. Since the communication was of a later date, the DPC, according to him, should have ignored the adverse remarks in his ACR. He has further stated that he has an unblemished record of service throughout except for the year 1989-90. He has also filed Annexure A-3 to show that his meritorious service was recognised and he has made a claim for reward vide Annexure A-4 of the paper book. He has further stated that he had

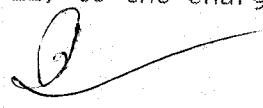


21

disposed of appeal at an average rate of 250 cases per month as against the quota fixed of 165 cases per month while he was posted as Appellate Assistant Commissioner of IT, Kota. He has further mentioned that in 1987-88, the Chief Commissioner of IT, Rajasthan abolished the two offices of Appellate Astd. Commissioner of IT at Jaipur and all the pending appeals were transferred to the office of the applicant at Kota for quick and effective disposal. The disposal according to him was almost double the target fixed by the Board. In token of the good work done, he was transferred to Raipur (MP) almost adjacent to his native place, i.e. Tata Nagar.

3. In response to the applicant's legal notice, Respondent No.1 issued memorandum dated 22.11.90 (Annexure A-8) asking the applicant to explain his conduct and to justify the legal notice sent by him to his superior officer. The applicant vide his letter dated 2.1.91 (Annexure A-9) replied to the memo dated 22.11.90 explaining the detailed circumstances in which he had sent the legal notice to his superior.

4. The applicant's grievance is that in spite of his explanation, the respondents issued charge sheet dated 17.6.92 ((Annexure A-10) under Rule 16 of CCS(CCA) Rules, 1965 considering the conduct of the applicant in sending the legal notice to his superior to be a conduct unbecoming of a government servant. The applicant submitted his reply on 7.12.93 (Annexure A-11) to the charge sheet.



(4)

22

5. The applicant moved the Principal Bench of CAT through OA 2307/92 challenging the very basis of the respondents in issuing the charge sheet and requested therein for quashing of the charge sheet issued against him. This OA was dismissed on 17.3.93 (Annexure A-12). The applicant filed SLP 20983 before the Hon'ble Supreme Court vide its order dated 6.12.93 (Annexure A-13) which allowed the applicant to withdraw his petition and also directed the respondents to complete the enquiry against him and pass an order on the charge-sheet within two months from the date of receipt of the order. It also gave liberty to the applicant to approach the Supreme Court again in case the enquiry was not completed and order not issued within the time stipulated by it. When this direction was not complied with, he filed another SLP and the Supreme Court issued notice on the complaint and the matter was listed after notice on 9.5.94. On 9.5.94 (Annexure A-14) the Supreme Court issued notice to the UPSC directly directing them to communicate their final decision to the UOI within 3 weeks so that UOI can pass final order in the matter. On 11.7.94, when the matter was listed before the Hon'ble Supreme Court, UOI informed the court that final order had been passed in the case and the applicant had been awarded a penalty of censure. Since the IA was for expediting the enquiry, the Supreme Court held that the proceedings do not survive. A copy of order is at Annexure A-15 to the paper book. Aggrieved by this, the applicant had also filed OA 2768/92 which was decided on 30.1.95. There were malafides alleged in this OA against his superiors. The main ground for malafide was that the applicant had challenged the selection by the DPC of which Shri Srivastava was reported to be a Member and an OA is pending before the Jabalpur Bench of the Tribunal. During the course of hearing

(5)

23

Shri Srivastava categorically stated in his counter affidavit that he is not a party to the OA and this statement has remained unrebutted even in the rejoinder filed by the applicant. It was held that once it is established that Shri Srivastava is not a party to the OA, the very foundation of the malafide on the part of Shri Srivastav disappears and the entire structure built there on falls on the ground like a house of cards. It was further held that the entries given by Shri Srivastava to the applicant and confirmed by Shri Mehrotra were subjected to a scrutiny by the CBDT and the entire orders passed by the Board have been produced before the Bench by the respondents. It was found that each and every member of the Board had agreed that the substantial portion of the entries given to the applicant should be retained. Even the Chairman of CBDT was taken into confidence and the Tribunal found that the entire Board was unanimous and there was no allegation of malafide against any member of the Board that they were part of the conspiracy alongwith S/Shri Mehrotra and Srivastava. The applicant had made a prayer before the Tribunal that S/Shri Mehrotra and Srivastava should be summoned by the Tribunal for being subjected to cross examination. The Tribunal did not find any discrepancy or anomaly in the contents of the counter affidavit filed by them and the averments made by them were corroborated by the material placed before the Tribunal and as such the prayer for summoning them was rejected. The Tribunal declined to interfere with the decision of CBDT substantially maintaining the adverse remarks given to the applicant. The OA failed and was dismissed accordingly.

6. The reliefs prayed for in the present OA are:

(a) To quash the order dated 23.6.94;



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(b) To direct the respondents to open the sealed cover of the DPC and to promote the applicant in case he was eligible; and

(c) To direct the respondents to hold a review DPC (in case the applicant is not promoted by virtue of earlier DPC) and reconsider his claim for promotion to next higher post of Commissioner of IT with all consequential benefits.

7. On notice, the respondents filed their reply contesting the application and grant of reliefs prayed for. We have heard the learned counsel for the parties and perused the records of the case.


8. The learned counsel for the applicant argued that sending a legal notice will not constitute misconduct and therefore the award of penalty of censure was not justified. He relied on two propositions of law laid down by the Hon'ble Supreme Court in A.L. Kalra Vs. Project Equipment Corporation, Govt. of India 1984 3 SCC 316. In this case the question arose whether it would amount to misconduct if the loan taken by an employee is not utilised for the purpose for which the loan is drawn. The Hon'ble Supreme Court at page 330-331 (para 22 & 23) of the judgement analysed whether the moral and ethical standards expected of a government servant and non-adherence to these standards will amount to misconduct or not and held the view that there must be specific provisions in the Civil Service Conduct Rules to bring it under the purview of misconduct. An act of omission or commission as unbecoming of a civil servant must be based on objective evaluation of the facts and circumstances of the case. Merely saying that non-adherence to a particular standard expected of a civil servant will amount to misconduct is not enough. In the instant case the learned counsel on the above proposition of law vehemently argued that the conduct did not envisage that such a notice will

(7) 25

bring it under the purview of misconduct and will result in penalty of censure. There is no specific mention in the conduct rules whether a legal notice issued by an employee can constitute misconduct. It is admitted that the applicant did issue the legal notice but it is further clarified that he did not take any further action in pursuance of the notice. The legal notice was sent on 9.6.90 on the basis of which a memo was issued on 22.11.90, to which the reply was sent by the applicant on 2.1.91. The charge sheet was issued on 17.6.92 and reply that was submitted on 19.12.92 and finally he was censured on 23.6.94.

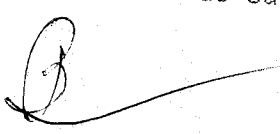
9. It was further argued that the constitution of the DPC which ignored the applicant was not properly constituted, that the circular issued by the DOPT on the subject clearly indicates that if there is a proposal to promote 30 officers or more then a member of SC/ST category must be coopted as a member of DPC. He pointed out that more than 30 officers were promoted and no SC/ST officer was coopted as member of the DPC. This is a matter still pending before the Jabalpur Bench of the Tribunal. Therefore, this Tribunal is not concerned with that aspect of the matter.

10. In addition, there was a pseudonymous complaint filed in the name of P. Ashokan & Company that the applicant had wanted Rs.25,000/- from them for showing some favour in a particular case. This pseudonymous complaint was forwarded and the comments of the company were called for but the company denied having sent any such complaint. It was argued by the learned counsel for the applicant that instructions on the subject are very clear that no action should be taken on such a pseudonymous complaint. This contention is only



26

(8) **concrete instance** partly true since there is a ~~concrete instance~~ given and as such it can not be filed in a routine manner. In the instant case comments have to be called for before closing the enquiry on that complaint. In this case the **firm's name** **P.A. Ashokan & Company** was mentioned and the demand of Rs.25,000 was also indicated. It is another matter that the company denied having sent any such complaint and that the applicant was not at all concerned with that company as he was not dealing with them. The judgement of the Hon'ble Supreme Court relied on another judgement of the court given in case of Glaxo India Ltd., Vs. Presiding Officer of the Labour Court 1984 1 SCC page 1. In this judgement the Hon'ble Supreme Court had laid down the proposition of law that there must be specific provision in the rule to indicate its violation in order to make out a case for misconduct since in the absence of such a provision employee will be left to the vagaries of the employer. The learned counsel for the applicant also cited the judgement of the Tribunal in case of S.S.Roy Vs. UOI 1992 20 ATC page 423. It also deals with an Income Tax Officer. The recordable warning issued to the applicant in the aforesaid case was expunged because it was held by the Tribunal that unless a particular provision prohibits a person from doing a thing or restrains one to do a particular thing it will not amount to misconduct. It was argued that in the instant case there is no violation of any specific provision in regard to serving a legal notice on a superior officer for launching a defamation suit against him. A person according to him under section 9 of the CPC can file a civil suit except when the same is expressly or impliedly barred. **For** filing defamation suit there is no specific bar under section 9 of the CPC and as such it will not amount to misconduct.



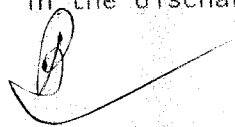
11. He further argued that there are specific allegations of malafide and the same have not been rebutted by Shri Srivastava. This contention of the learned counsel for the applicant was rebutted by the learned counsel for the respondents who cited portions of the judgement dated 30.1.95 in OA 2768/92 wherein the question of malafide has been dealt with and the Tribunal was not convinced that the allegations made against Shri Mehrotra and Srivastava make out any case of malafide since the adverse remarks recorded by them were upheld by the Member of the Board including the Chairman. It is true that in the matter of malafide the onus lies on the applicant to prove the malafide. Casual allegation will not prove the charge of malafide. That needs adequate proof and concrete pleadings to substantiate and therefore that OA was rejected.

12. The learned counsel for the respondents argued that the conduct of the applicant in sending a legal notice was unbecoming of a government government as it amounted to ill-motive as was held by the Hon'ble Supreme Court in the case of UOI Vs. J. Ahmed AIR 1979 SC 1022. This case dealt with all India service rules which according to him are similar to those of CCS(Conduct) Rules, 1965. Any act of omission or commission if not in conformity with the expected good conduct by the employer will amount to misconduct. He specifically referred to para 9 of the judgement and stated that the facts and circumstances of the particular case will determine whether this is a misconduct in a particular context or not. Facts and circumstances of the particular case will determine the ratio decidendi.



13. It may be pointed out that a misconduct on the part of an employee is basically a violation of the conditions of service. Such conditions of service may be regulated by law, service rules or contract of service. Wherein an employee is charged with misconduct, it is somewhat necessary to find out the exact scope of service condition and to decide whether a particular punishment could be imposed or not on the employee for sending a legal notice.

14. We have carefully gone through Annexure A-7 (pages 56-60 of the paper book). The basic question that arises is whether the charge sheet can be issued on the basis of this legal notice or not and whether this tantamounts to misconduct. A charge sheet can be issued for insubordination, if the words used are abusive or insulting towards the superior officer. The language used may be in a sense that it was not intended to use words in a provocative manner. A perusal of the notice does not indicate that the language used is insulting or offending and this will not amount to insubordination. If it is not insubordination, it does not mean misconduct. Insubordination can also be inferred from rude behaviour, threat or assault on superior. Assault is not putting or resorting to physical violence against any one. Nor does it mean a threat to use criminal force. Threat also would imply obstructing the superior officer in performance of his duty. A perusal of the legal notice does not go to show that the applicant has tried to obstruct Shri Srivastava or Shri Mehrotra in the performance of their duties. It can not also be called insubordination. The basic ingredients of insubordination is wilful attempt to obstruct the superior officer in the discharge of his duty.

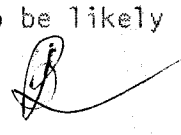


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15. The learned counsel for the respondents vehemently argued that his entire attempt was to obstruct the superior officer from reporting correctly in his ACR about his performance. Wilful attempt to obstruct a person from performing his duty is an essence of insubordination and indiscipline. To prove that he was involved in discipline and insubordination, which were unbecoming of a government servant, there must be circumstances and conduct which implies declaration of the subordinate officer "I am not going to take orders from you". Such **action** will be treated as wilful.

16. Chargesheet for impertinent conduct or for arrogant conduct or for illwill has to state specifically the instance in what manner and what action applicant had resorted to or adopted tactics which obstructed the superior officer in the discharge of his duty. Writing legal notice also will not amount to assault or scandalous behaviour against a superior officer. It is neither an attack on the personal reputation or property, there is no intention of using any criminal force as defined in section 350 of the IPC. It reads as follows: "Whoever intentionally uses force to any person without that persons's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other".

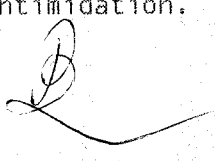
17. The word 'assault' is defined in Section 301 of the IPC that "Whoever makes any gesture, or any preparation intending to knowing it to be likely that such gesture or



30
preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault"

18. The learned counsel for the applicant vehemently argued that that it was not a threat. What is threat? When a kind of declaration either by a word or by action that he will do something to the detriment of other person, if the other person does not act according to his wishes, then in common language he is said to have threatened him. Every threat is made forcing the other person to do or not to do something which he has a right to do or not to do. Threat is a conditional statement that if the other person acts according to the wishes of the person who threatens him, then the threat will not be carried out, otherwise the threat will be carried out. Whenever any such threat is given, it causes anxiety and mental anguish in the mind of the person of threatened injury and the effect may be as great as actual injury itself.

19. Section 503 of the IPC defines criminal intimidation as under: "Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation". Threat involves injury to a person, reputation or property. If the threat is not in respect of any vested right in a person, his reputation, it can not be treated as a threat or intimidation.



(31)

20. We have extracted the above extracts from IPC to show whether the legal notice served by the applicant will amount to a threat, intimidation or assault. To our mind, it is difficult to place such a threat, even if it is treated as threat, which will cause anxiety or mental anguish. A person can file legal notice under section 9 of the CPC for damages, if his reputation is jeopardised because of the action of a person. Respondent No.4 is stated to have called for the comments of P.Ashokan & Company and also asked an enquiry to be made in the complaint and the grievance of the applicant is that his reputation was damaged and that it is he who suffered the anxiety and mental anguish and not vice versa. Secondly under the instructions of the Board he had gone to hear appeals by holding Camp Court. He has also cited other instance to indicate illwill on the part of the superior officer. It was not only the question of lowering his image in public by calling his explanation and also making enquiry but also adversely commenting on the performance and sending the same to Shri J.K. Goel. According to the applicant these are all directed towards damaging his reputation.

21. It is a common knowledge that in Government service as also in cases of persons holding public offices filing of defamation suit is permissible. Recently, the Hon'ble Telecommunication Minister has got a verdict in his favour delivered by a London Court. The damage suit was filed by him in London Court claiming damages against a particular company since it tried to tarnish his image. In yet another case, the former Vice-Chancellor of Pant Nagar University Dr. D.P. Singh filed a damage suit against Shri R.K. Karanjia of Blitz and the damage was decreed in his favour. Dr.



32

Singh was a member of the (14) IAS and he took voluntary retirement to join as VC, Pant Nagar University where he continued to work for 9 years.

22. Issuing legal notice for filing a damage suit is not an act of misconduct by any stretch of imagination nor can it be treated as an act of intimidation or insubordination or indiscipline or holding a threat. A person has come to serve the government to the best of his capacity in an honest and devoted manner and in the performance of his duty, if he is subjected to attempts to tarnish his reputation either by press or by any other person, he has a right to approach the Civil court by filing suit for damages. This in itself will not amount to misconduct and no charge sheet can be issued for such an action. If the charge is based on such a legal notice, it will be totally inconsistent with freedom of speech under Article 19 of the Constitution which guarantees freedom of speech and expression. The action on legal notice will be treated as part of the ingredients of the freedom enshrined in the constitution and the person has a right to issue such legal notice for tarnishing his reputation. Such a notice can be issued to a superior officer and this can not tantamount to any indiscipline or insubordinate behaviour.

23. Article 19(1)(a) on freedom of speech and expression states that there has to be a balance between individual right under Article 19 and the exigency of state which is the custodian of general interest of the public at large. The restriction that may be imposed in any class must be a reasonable restriction. The requirement that a restriction must be reasonable is of great constitutional significance

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33

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for it acts as a limitation on power of the legislator and
secondly guarantees the scope of judicial review of law
restricting exercise of freedom guaranteed by Article 19.

24. Legislation by legislature of what constitutes
reasonable restriction is not final order or conclusive as
has been held in the judgement of Hon'ble Supreme Court in
case of Babu Ram Vs. B. Baidyanath Singh AIR 1962 SC 1476.
The Hon'ble Supreme Court in a catena of judgements have held
the view that while ^{exercising} judicial review under Article 226, the
Court or Tribunal must also consider whether the discretion
of the executive in imposing penalty purported to be imposed
in a particular order is in conformity with the statutory
provisions or fundamental rights ^{guaranteed by} of the constitution. The
other factor which should need judicial verdict should
underline the purpose of the restriction being imposed by the
legislature or the executive, the extent of urgency of the
event sought to be established, description of the
imposition, prevailing condition of the time and variation of
restriction. The standard is an elastic one and varies from
time to time and the condition from case to case.
Reasonableness demands proper consideration. Limitation
imposed upon a person in enjoyment of his right should not be
arbitrary or of an ^{arbitrary} ~~excess~~ nature. Discretion of the
executive or the legislature in acting on the legislation, if
exercised arbitrarily or excessively invading any of this
freedom can not be said to be a condition guaranteeing
reasonableness unless it has a proper balance guaranteed
under article 19(1) and control of social remedy.

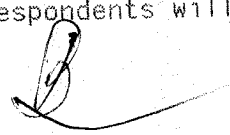
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34

25. It is not disputed that the applicant has a right to file a defamation suit against any one who tries to tarnish his reputation and to that extent, he had issued a legal notice.

26. As stated above, legal notice does not contain any intimidation, assault or threat and it does not restrict the right of the respondents to record their opinion in regard to the work, conduct and performance of the applicant in his ACR. Therefore right to file a damage suit and to initiate departmental proceedings based on that indicates that the right has not been reasonably restricted. The applicant has a right to sue any one for damages if his reputation is being tarnished and the court/tribunal has a right to see whether that right has been reasonably restricted as has been held by the Hon'ble Supreme Court in case of Kishan Chand Arora Vs. Commissioner of Police AIR 1961 SC 705.

27. The principles of natural justice are an element in consideration of reasonableness of restriction. Thus this can not be made a foundation of charge-sheet against the applicant because there is nothing in the legal notice which either intimidates or assaults or holds out a threat. All the ingredients are missing and therefore the only conclusion is that Section 9 of the CPC gives liberty to any one to file a suit for damages and the suit can be filed for tarnishing the image of someone, for example in the instant case, calling for the comments of the applicant and also writing to P. Ashokan & Company to know whether they have filed any complaint and the denial of the latter coupled with the fact that the applicant was not dealing with this subject at all which was known to the respondents will mean wilful attempt



to tarnish his image by indulging in all such gimmicks. There are other instances cited in the legal notice which also go to prove that the applicant was being treated in a manner not befitting his rank and seniority. When he issued the legal notice, there is no bar to such a notice under section 9 of the CPC and secondly by issuing a charge-sheet there is an attempt to place unreasonable restriction on the right of freedom of expression and speech, and this can not be sustained in the eyes of law. There is a conflict between the junior officer and senior officer and no public interest is involved in this. Freedom of speech and expression can be restricted only in the interest of security of the state, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence..

28. In view of what has been stated above, we declare that the legal notice issued by the applicant can not be treated as something unbecoming of a government servant since the same is neither expressly nor explicitly barred under section 9 of the CPC as argued by the learned counsel for the applicant. Move to start DE based on the legal notice is placing unreasonable and arbitrary restriction on freedom of speech and expression as enshrined under Article 19(1)(a) and therefore the penalty of censure can not be sustained since none of the ingredients which can permit reasonable restriction are present in the instant case. We hold that the respondents have tried to place arbitrary and unreasonable restriction on the freedom of speech and expression of the applicant and it is against the fundamental rights of the applicant and also provisions of section 9 of the CPC.

36

29. The impugned order of penalty of censure dated 23.6.94 is therefore quashed and set aside. The respondents are further directed to open the sealed cover and if the applicant was found fit for promotion by the DPC, he should be considered for promotion from the date his junior was promoted.

30. The OA is thus disposed of but without any order as to costs.

A. Vedavalli

(Dr. A. Vedavalli)
Member (J)

/gtv/

B.K. Singh
(B.K. Singh)
Member (A)