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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI.

Date of decision: 20.7.93.

OA-1872/87

Bhim Sain. ... Petitioner.

Versus

Union of India
through
The Secretary,
Ministry of Home Affairs,
New Delhi. ... Respondent.

CORAM:

THE HON'BLE MR. JUSTICE V.S. MALIMATH, CHAIRMAN.
THE HON'BLE MR. S.R. ADIGE, MEMBER(A).

For the petitioner. Mrs Shyamla Pappu, Sr.
Counsel with Shri
A.K. Bajpai, Counsel.

For the Respondent. Shri Virender Mehta,
Counsel.

JUDGEMENT (ORAL)
(By Hon'ble Mr. Justice V.S. Malimath, Chairman)

It is surprising that the application for condonation of delay in this case has remained without being disposed of. The application in this case was filed on 11.12.1987 challenging the order under revision dated 21.1.1985 and other orders. The explanation for the delay is stated to be the fact that the petitioner was bonafide pursuing his remedy by invoking the jurisdiction of the High Court by filing a writ petition on the 11.7.1986. As by that time the Central Administrative Tribunal had come into existence and the jurisdiction of the High Court had been taken away, the High Court transferred the case to the Tribunal whereupon it was numbered as T-122/87. The Tribunal on 11.11.1987 held that it is only cases which are

pending in the High Court as on 1.11.1985 that stood statutorily transferred to the Tribunal. Any case filed after 1.11.1985 in the High Court does not stand statutorily transferred. This position was clearly noticed by the Tribunal when it made the order on 11.11.1987 wherein it held that the transfer of case by the High Court to the Tribunal is not in accordance with law. Liberty was, however, given to the petitioner to file a fresh application under Sec.19 of the Act. It is accordingly this application that has been filed.

2. We are satisfied on the materials placed before us that the petitioner was bonafide pursuing his remedy before the wrong forum. That being the position, the time spent by the petitioner in pursuing his remedy before the High Court has to be taken into account. We are satisfied that the mistake committed by the petitioner in approaching the High Court and not the Tribunal is a bonafide one. Hence, the delay in filing the application before the Tribunal is condoned.

3. This case is by Shri Bhim Sain, who was police Constable posted in the Delhi Air Port. A disciplinary inquiry was held against him on the allegation that he gave some foreign currency in the Air Port to one Shri Ram Bahadur Rai, a passenger, bound for Nepal and requested him to buy scotch whisky at the Departure

Transit Lounge duty free shop. The said Shri Ram Bahadur Rai obliged him by purchasing the liquor with the foreign currency provided by the petitioner and handed over to him those bottles. The hand baggage of Ram Bahadur Rai was examined and he was questioned whereupon he gave the aforesaid story. It is on the basis of these allegations that a departmental inquiry was held against him. He was found guilty by the Inquiry Officer and accepting his finding a penalty of removal from service by order dated 27.6.1984 was awarded. The said order was affirmed on appeal by order dated 23.8.1984 passed by the Addl. Commissioner of Police (S&T), Delhi. It is the said order that is challenged in these proceedings.

4. Our attention was drawn by the learned counsel for the petitioner during the course of the arguments to the proceedings held under the Customs Act against the petitioner and Ram Bahadur Rai in respect of the same incident. It is clear from the same that the petitioner was exonerated of the charges levelled against him under the Customs Act. The petitioner's case is that the order was passed by the Customs Authorities only after the decision of the Appellate Authority and that, therefore, he brought the same to the notice of the Revisional Authority. The Revisional Authority has dismissed his revision petition on

21.1.1985. We do not find any reference to the decision taken by the Customs Authorities in favour of the petitioner in this behalf.

5. The principal contention of the learned counsel for the petitioner is that the petitioner was not afforded reasonable opportunity of defending himself in the inquiry. It is further contended that it is manifestly unreasonable to hold the petitioner guilty solely relying upon the statement of Ram Bahadur Rai said to have been recorded on the date of the incident without giving him an opportunity of cross-examining Ram Bahadur Rai.

6. The entire case rests on the statement of Ram Bahadur Rai. Even though there are statements of other witnesses, all of them speak what Ram Bahadur Rai told them on his being questioned in regard to his not being in a position to account for the whisky bottles which he purchased from the duty free shop. So far as the main witness Ram Bahadur Rai is concerned, the Inquiry Officer has stated that it is not possible to summon and examine him without delay and without incurring considerable expenditure. He was of the opinion that his previous statement should be brought on record and used as evidence against the petitioner. Support for this action is drawn from Rule 16(iii) of the Delhi Police (Punishment and Appeal) Rules, 1980. Though the

provision enables the Inquiring authority to bring the previous statement of the witness on record without examining the said witness and tendering him for cross examining on the ground that examination of such a person would entail delay and expense, it is obvious that the discretion has to be exercised having regard to all the relevant circumstances in a fair and just manner. It cannot be forgotten that the mandate of Article 311 of the Constitution is to afford reasonable opportunity to a delinquent for imposing a major penalty. That being paramount duty mandated by the Constitution mere existence of the statutory power of enabling character cannot be made use in a mechanical manner to bring statement of witnesses on record without tendering them for cross-examining. It is in this back ground that we have to examine the facts concerning in this case. It is necessary to notice that Ram Bahadur is really in the position of a co-accused. He was primarily responsible for the breach of the provisions of Customs Act in accepting foreign currency, as alleged, from the petitioner and making use of the same for purchasing foreign liquor from the duty free shop in the Air Port and giving it to the petitioner. When Ram Bahadur Rai was caught red handed in this case, he had to save himself. The possibility of his making a false statement to extricate himself cannot easily be excluded. It was, therefore, very necessary for the Inquiry Officer to have

exercised great caution in the matter of exercising his discretion and making use of the statement of Ram Bahadur Rai without summoning him as a witness and tendering him for cross-examining. Having regard to the special facts and circumstances that the only evidence in this case is of Ram Bahadur Rai who was himself involved in the case, the exercise of the discretion by the Inquiry Officer appears to be manifestly unreasonable and arbitrary. But for the exercise of this discretion to bring Ram Bahadur Rai's statement on record, the Inquiry Officer was required to summon him as a witness tendering the previous statement made by him and then to permit the petitioner to cross-examine. All this valuable opportunity of the petitioner of shaking the statement of Ram Bahadur Rai has been denied to him. This, in our opinion, has led to denial of reasonable opportunity of showing cause guaranteed by Article 311 of the Constitution. It is on this short ground that we are inclined to interfere in these proceedings.

7. The consequence of the same would be to remit the case to the Inquiry Officer for further inquiry to enable him to summon Ram Bahadur Rai as a witness and to proceed to complete the disciplinary proceedings after giving reasonable opportunity of cross-examining Ram Bahadur Rai. At this stage we put to the learned counsel for the petitioner whether he

would like to forgo the backwages and claim for promotion if he is reinstated in service. When we asked the response of the learned counsel for the respondents, he, on obtaining instructions of his client who was present in the court submitted that the petitioner would be grateful if the further disciplinary proceedings are avoided and he is willing to forgo the backwages as also the claim for promotion in respect of the vacancies that were filled up by the promotions so far. In the light of the undertaking given by the petitioner through his counsel to give up the back wages and claim for promotion, we thought it improper to regulate our discretion in the matter of remitting the case for further inquiry. We are inclined to take into account two other factors in this behalf, namely, that the incident in question which led to the disciplinary proceedings took place a decade back. Another circumstance is that under the Customs Act in the same proceedings the petitioner stands exonerated. Bearing in mind these circumstances, we are inclined to take the view that it would be just and fair to conclude the entire proceedings denying the petitioner the backwages as also the claim for promotion, as aforesaid. This, we are doing on the statement made by the counsel giving up the claim as aforesaid with due instructions from his client who was present in the court.

8. For the reasons stated above, we dispose of this application with the following directions:

- (1) The orders of the disciplinary authority, appellate authority and revisional authority are hereby quashed.
- (2) The respondents are directed to reinstate the petitioner in service as Police Constable within three months from the date of receipt of a copy of this judgement.
- (3) The petitioner shall not be entitled to receive any backwages till the reinstatement of the petitioner in service.
- (4) The petitioner shall not be entitled to claim any promotion on the ground that any of his juniors were promoted on any date before the date of his reinstatement in pursuance of this order.

(5) The period from the date of his removal till the date of his reinstatement shall not be treated as break in service and the same shall be regulated by granting extraordinary leave, if necessary, making it clear that it does not amount to break in service. When he is qualified, he may be considered for promotion in the vacancies arising after his reinstatement in service.

(6) On reinstatement, the petitioner shall be fixed in the same scale which he would have got had he continued in service without impugned orders being passed giving him the benefit of the revision of the pay scales, if any, which have come into force subject to the condition that he would not be entitled to any arrears.

(7) The parties shall bear their respective costs.

Adige
(S.R. Adige)

Member(A)

Malimath
(V.S. Malimath)

Chairman