CAT/J/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

AHMEDABAD BENCH

~~NEW DELHI~~

O.A. No. 338 OF 1986.

~~TRANSFER APPLICATION NO.~~

DATE OF DECISION 25-5-1990

SHRI B.M. SHAH — Petitioner

Mr. SHAILESH BRAHMBHATT — Advocate for the Petitioner(s)

Versus

THE UNION OF INDIA & ORS. — Respondents

MR. J.D. AJMERA — Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. A.V. HARIDASAN, JUDICIAL MEMBER.

The Hon'ble Mr. M.M. SINGH, ADMINISTRATIVE MEMBER.

1. Whether Reporters of local papers may be allowed to see the Judgement? yes
2. To be referred to the Reporter or not? yes
3. Whether their Lordships wish to see the fair copy of the Judgement? No
4. Whether it needs to be circulated to other Benches of the Tribunal? yes.

MGIPRRND—12 CAT/86—3-12-86—15,000

Shri B.M. Shah,
Resident of 32/188,
Ellora Park,
Race Course Circle,
Baroda - 390 007. .... Petitioner.

(Advocate: Mrs. D.N. Mehta &
Mr. Shailesh Brahmbhatt)

Versus.

1. The Union of India
(Notice to be served through the
Secretary to the Government,
Ministry of Finance, New Delhi).

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

3. Collector of Central Excise & Customs,
Ahmedabad Collectorate, Having his
Office at Custom House, Navrangpura,
Ahmedabad - 380 009. ..... Respondents.

(Advocate : Mr. J.D. Ajmera)

J U D G M E N T

O.A.No. 338 OF 1986

Date: 25-5-1990.

Per: Hon'ble Mr. M.M. Singh, Administrative Member.

The applicant, when posted as Assistant Collector, Central Excise (Technical) Headquarter Office, Ahmedabad Collectorate, Ahmedabad, was retired with immediate effect in public interest under clause (j) of Rule 56 of the Fundamental Rules, by the Government of India, Ministry of Finance (Department of Revenue) order No. A-38012/30/85-Ad.II dated 29th January 1986. He filed this application under section 19 of the Administrative Tribunals Act challenging this order. His date of birth being 23.3.1930, his superannuation was due on 31.3.1988.

2. The applicant had started his service in Central Excise & Customs Department in the year 1951 in the rank of Inspector and earned his promotions attaining the rank he held when he gave in to premature retirement. In his challenge to the impugned order, he apparently flashed back to his total service career to recollect and to recapitulate the good, the bad and the indifferent in it and whether the same, put under the microscope for evaluation in the light of the rules, the Government instructions and guidelines on the subject of premature retirement and the judicial precedents, merited the impugned order. He came to the conclusion that it did not. In addition, he also assailed the impugned order on the ground that less than full payment of notice pay and emoluments was made to him and the order bad on this ground alone.

3. The respondents resisted the challenge by filing the reply affidavit of the Under Secretary, Government of India, Ministry of Finance, Department of Revenue.

4. The applicant filed Miscellaneous Application No. 153/86 urging that the respondents should be directed to produce minutes of the review committee, all the documents considered by the review committee and all the Annual Confidential Reports of the applicant considered by the respondents for coming to the decision to issue the impugned order. The applicant submitted that according to judicial decisions, the Government cannot claim privilege in regard to these records. The respondents resisted the Miscellaneous Application on grounds that the records are Confidential containing communication made in official confidence

and therefore privileged and the applicant not entitled to inspect the same. The Secretary to the Government of India, Ministry of Finance, Department of Revenue, the first respondent, filed affidavit dated 21.10.1988 claiming privilege against disclosure of the documents to the applicant. A bench of this Tribunal, after hearing the parties on this subject, directed, by order dated 21.7.1989, that the required documents should be abstracted by the respondents and produced on record with copies to the petitioner. When the matter came up for hearing before us, the learned advocate for the applicant complained that the required abstracts have not been furnished and the order dated 21.7.1989 of this Bench not complied with by the respondents. The learned advocate for the respondents was therefore directed to comply with the order and, with written submissions by the applicant on 6.4.1990 and by the respondents on 11.4.1990, the hearing completed.

5. With the required abstract given to the applicant, the real reason behind the impugned order revealed and with that happening much narrowed the field of contest.

6. It is an admitted position in the Confidential record that the applicant's confidential character roll has nothing adverse or objectionable to justify the issue of the impugned order. However, a specific case in which a refund of more than Rs. 37 lakhs was sanctioned by the applicant (vide applicant's order dated 7.7.1984) though, allegedly, the refund was not due and staff members allegedly heard to be saying that the applicant had granted this refund for a big

monetary consideration and their such talk was confirmed through a number of sources weighed as an instance throwing very serious doubts on the integrity of the applicant spurring recommendation of action under F.R. 56(j). The Review Committee agreed with the recommendation, submitted the papers to the Government which decided that the suggested action should be taken and the same was taken.

7. The applicant, perhaps fearing that his sanction of refund in the remanded case may have prevailed against him in the issue of the impugned order, expressed his fears in this respect in the original application in the following words in para 6(v)

> "The applicant states and submits that he has reasons to believe that the impugned order has been passed because the respondent authorities have taken totally irrelevant and extraneous factors while passing the impugned order. The applicant states and submits that in the year 1983, Collector (Appeal) Bombay had remanded a case to the applicant who was serving as Assistant Collector, Division IV, Ahmedabad for denovo decision. However, it is pertinent to note that the case which had gone into the appeal to the Collector was decided by applicant's predecessor. Alongwith this remand, there was a specific instruction to the effect that the applicant was required to decide the case in light of the Supreme Court judgment given in Bombay Tyres International Limited case and accordingly, the applicant decided the case. As per the tradition and rules, the said decision was communicated to the Collector, Ahmedabad who okayed the decision but however as an after thought, he decided to prefer an appeal against the said decision given by the applicant and the said appeal was allowed by the Collector (Appeals) and applicant has reason to believe that only this seems to be the reason for prompting his premature retirement thought the said factor ought not to have gone into consideration for assessing the applicant for premature retirement. Thus, the impugned order dated 29-1-1986 is bad and is prompted by extraneous reasons and therefore, the same is bad in law, and requires to be quashed and set aside. The applicant states and submits that he has made a detailed representation against the impugned order dated 29-1-1986 at Annexure 'A', to the Secretary, Ministry of Finance, Respondent No.1 herein by his letter dated 18-2-1986. True

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copy of the said representation alongwith the annexures is annexed hereto and marked Annexure 'B'."

8. In his representation dated 18.2.1986 referred to above, the applicant had, elaborately and exhaustively in over twelve foolscap typed pages, brought out the various implications of the refund order case he was directed to decide denovo. The theme of the partsof the representation dealing with this subject is that the applicant decided the case in accordance with the direction of the Collector, Central Excise (Appeals) Bombay that the case be decided in accordance with the enunciation of the Supreme Court in order dated 9.5.1983 in Bombay Tyres International Limited case. After his decision, the applicant sent the record of the case to the Collector, Customs & Central Excise, Ahmedabad, for examination whether his decision was in order or required a reference/appeal under section 35(E)(2) of the Central Excise & Customs Act, 1944. After some queries and correspondence, vide Collector's Office No. V/2-209/0/0/84 RRA dated 27.9.1984 (page 51 of paper book) the applicant was informed that the case had been examined and considered not fit for reference/appeal. However, the Collector, for the various motives and allegations mentioned by the applicant in the representation including a contrary judgment of the Andhra High Court, became shaky as the large amount of refund was involved, lacked courage of conviction and moral courage to accept any responsibility though the applicant's order was correct. The Collector, Ahmedabad, went back over the approval and, besides entrusting an enquiry to the Deputy Collector (P & E), filed an appeal also and

the Collector, Central Excise (Appeals) Bombay, also retracted from his previous directions by allowing the appeal so filed. The affected company then filed a writ petition in the High Court of Bombay and stay was granted against the recovery of the refunded amount of Rs. 37 lakhs. The matter is still pending decision in the High Court. The applicant has also alleged that the Dy. Collector (P&E) who held the inquiry in the matter did not, at any stage, ask the applicant for a clarification or explanation and at no stage he was called upon to justify his de novo order. The applicant has also stated that the Supreme Court set aside the contrary judgment of the Andhra High Court.

9. It is admitted by the respondents that the applicant's above representation has not yet been decided and that it has been referred to the Representation Committee. The respondents therefore submitted that the present application is, seeing the provisions of Section 20 of the Administrative Tribunals Act, premature and therefore not maintanable. We have no hesitation in rejecting this submission. The applicant has clarified in the representation that he preferred it under the provisions of OM No. 25013/14/77-Estt.(A) dated the 5th January, 1978. Clause(1) para III of this office memorandum lays down that the affected government employee may submit a representation within three weeks from the date of service of the premature retirement order. The time schedule and the procedure for consideration of the representation so made is also laid down in this office memorandum. These instructions are extracted below:

..... 8/-

"On receipt of a representation, the administrative Ministry/Department/Office should examine the same to see whether it contains any new facts or any new aspect of a fact already known but which was not taken into account at the time of issue of notice/order of premature retirement. This examination should be completed within two weeks from the date of receipt of the representation. After such examination, the case should be placed before the appropriate committee for consideration. The composition of the Committee for the purpose of considering the representations against premature retirement shall be as indicated in Appendix II.

The Committee considering the representation shall make its recommendations on the representation within two weeks from the date of receipt of the reference from the administrative authorities concerned. The authority which is empowered to pass final orders on the representation should pass its orders within two weeks from the date of receipt of the recommendations of the Committee on the representation.

If, in any case it is decided to reinstate a prematurely retired govt. employee in service after considering his representation in accordance with these instructions, the period of intervening between the date of premature retirement and the date of reinstatement may be regulated by the authority ordering reinstatement as duty, or as leave or dies-non as the case may be, taling into account the merits of each case."

The impugned order is dated 29.1.1986. The representation against it is dated 18.2.1986 and thus timely, made within the prescribed time of three weeks. However, the respondents have not adhered to the time schedule of six weeks for passing their order on it and it is still pending. Applications can be, under clause (b) of subsection (1) of Section 20 of the Administrative Tribunals Act, filed and admitted on expiry of six months from the date of making such a representation. This application was filed on 16.9.1986, over six months after the filing of the representation. In fact the applicant could have validly filed it soon after the prescribed time schedule expired, that is in about two months from the date of making the representation irrespective of the decision on it. The respondents'

submissions in this regard are altogether baseless.

11. Perusing the bulky record of the case, we feel we should first examine the case for its two uppermost aspects, the first being the respondents' failure to decide the applicant's representation dated 10.2.1986 against the impugned order and the second being one provision in the office memorandum dated 5.1.1976 saying that Government employees of doubtful integrity will be retired and the other saying that they should not be so retired on grounds of specific acts of misconduct as short-cut to initiating departmental inquiries.

12. Taking the first aspect first, para 6 (v) of the application and the exhaustive representation of the applicant against the impugned order has been covered by the following in the respondents' reply:

> "Referring to paragraph 6(v) of the application, it is denied that the impugned order has been passed because the respondent-authorities have taken totally irrelevant and extraneous factors while passing the impugned order as alleged. It is true that the case which was remanded back by the Collector, Central Excise (Appeals) was decided by the applicant's predecessor. It is denied that the Collector, Central Excise, Ahmedabad had okayed the decision taken by the applicant in that case and that as an after-thought he decided to prefer an appeal against that decision, as alleged. It is submitted that the impugned order dated 29th January, 1986 retiring the applicant under FR 56(j) is legal and valid. It is denied that the impugned order is prompted by extraneous reason and, therefore, the same is illegal and bad, as alleged. It is true that the applicant has made a representation against the impugned order. It is submitted that the same is under consideration as stated above. It is submitted that the impugned order was passed on adequate and valid material and in public interest.

The respondents preferred not to explain how else than the applicant explains do they explain Collector of Customs and Central Excise Office No.V/2-209/0/0/84 RRA

dated 27.9.1984 (page 51 of paper book). If not effectually the Collector's approval to the applicant's order, what else does it convey ? Saying that the "case has been examined and considered not fit for Reference/Appeal under section 35E(2) of Central Excise & Salt Act 1944" is to say, albeit in different words, that the case has been properly decided. After the approval, the claim of refund was worked out by the applicant and sent for post audit to Dy. Collector, Central Excise, (Audit) from which stage started the alleged backtracking consisting of the Collector, Customs & Central Excise, Ahmedabad deciding to prefer an appeal, an inquiry being set up and even the Collector of Customs (Appeals) Bombay entertaining and allowing the appeal.

13. In the above context, it is necessary to tell here the contents of Note dated 25.9.1985 which is seen as the foundation of the impugned order. It is found to be an open note in the sense that it bears no security grading like confidential, secret or top-secret and it is noticed that it is neither addressed to any authority nor marked for submission to any. However, below this note figures the comment. "This is much too serious will he please discuss" and furnished with a scroll of a signature and date which is not easily readable though appears to be in September 1985. Designation of the author of this comment does not appear. With this, the note was marked to DC(N). How the DC(N) processed it is not in the record and essential links after that upto the note reached the screening committee are missing in the record.

14. The fact that the applicant had submitted his de novo order on its case file to the Collector of Customs & Central Excise, Ahmedabad and the Collector effectually approved it does not even find mention in the note dated 25.9.1985 or in any other confidential record on which the impugned order is found to have been issued. The Screening Committee, the Reviewing Committee and the deciding authority therefore made their respective recommendations and decision while in the dark about it and its implications which has only been further compounded by the admitted fact that the representation dated 18.2.1986 the applicant made against the impugned order which contains elaborate account of this fact and its implications has not yet been decided. We feel that the impugned order therefore suffers from the weakness of having been made by the authority which was in the dark about an important fact which, if taken into account, could have resulted in a different decision and different recommendations by the Screening and Reviewing Committees on which the decision rests. This weakness continued for above of four years as no decision has been taken on the representation despite the time schedule prescribed. The right to make representation against the impugned order which, by its very nature, is ex parte can be satisfied only with the authorities considering the representation and issuing a speaking order within the prescribed time frame. In so far as no order has been issued in the last over four years, we are of the clear view that the applicant's right has not been satisfied and the impugned order liable to be set aside on this ground alone.

15. In connection with the second aspect, we feel we should advert to aspects of the note which should not escape just eyes without in any manner examining the refund order on merits. According to the note, the refund case was put up to the author of the note for post audit in January 1985. The note bears the date 25.9.1985 which is eight months after January. Then, the part of the note which says "The party then contended before Shri B.M. Shah that discount of the different kinds should be allowed deduction from the price list" appears to be at variance with the very next sentence, namely "Shri Shah allowed the discount even though the matter regarding discounts was never agitated by the party....." (underscoring provided). Unless to the author "contended" does not mean the same or similar as "agitated" in the context in which the two words have been used, the point of view of the author himself seems, on the face of it, a bundle of contradictions. Further, it is clear that the author of the note made enquiry and found that "Shri B.M.Shah has manipulated the brief facts of the case by bringing the concept of discounts which was not the case of the assessee" and thus Shri Shah "intentionally favoured the party". It is not for us to say that if such be the record of the case, it should have been considered a fit case for strong disciplinary action against the applicant. But we are nevertheless required to examine whether the respondents did examine the feasibility of disciplinary action so that instruction (a) of instruction (5) of II Criteria Procedure and Guidelines figuring in OM No. 25013/14/77-Estt(A) dated 5.1.1978 (the instruction in which are relied upon by the respondents also in support of the impugned order) which is reproduced below is complied with :

"(5) The rules relating to premature retirement should not be used -

(a) to retire a government servant on grounds of specific acts of misconduct as a short cut to initiating formal disciplinary proceedings".

The above figures in the application also. The respondents have justified the impugned order on the grounds that the same come to be issued by the authority who was of the opinion, on the basis of the material which came to be placed before such authority properly after the prescribed steps of screening and review taken by the prescribed committees, that it was in the public interest to do so. Saying that is merely repeating the relevant instructions in this regard. Logically this is as untenable as claim to strap-hanging but no hanging strap seen. We have earlier discussed the serious short-comings of the note dated 25.9.1985. Even regarding the instructions the respondents rely upon, the same instructions also say that the powers are not to be exercised to retire on grounds of specific acts (in the case herein only one act) of misconduct as a short cut to initiating disciplinary proceedings and with the admitted position that the confidential character roll of the applicant does not warrant resort to FR 56(j) and only the specific case of the refund order does on grounds of doubtful integrity, it is for the respondents to convince us that the provision of FR 56(j) has not been resorted to as a short cut instead of disciplinary proceedings to deal with the specific case of misconduct. We feel that the respondents miserably failed to convince us in this regard and in such a case "the onus is on the administration, not a matter where the victim must make out the contrary"(Baldevraj V/s. Union of India, AIR 1981 SC 70). It is not sufficient for the respondents to say that proper procedure was

followed and that it is not for us to go into the sufficiency of the material on which the authority acted to issue the impugned order especially when even the material considered suffers from the weakness we earlier noticed. It did not even cross the minds of the concerned authorities to examine and give their views on the very important issue, namely whether, in their suggesting resort to FR 56(j) on grounds of a specific act of doubtful integrity, they are violating the instructions against resort to FR 56(j) as substitute for disciplinary action for a specific act of misconduct. If the note of 25.9.85 is to be believed, it is a case of manipulation of the brief facts of the case. The instructions in the office memorandum of 5.1.1978 contain DOs and DONTs with regard to invoking of FR 56(j) and the respondents' contention that the invoking of the provision is in accordance with the DOs cannot be supported if simultaneously DONTs are disregarded. We are thus of the clear view that resort to FR 56(j) has been made by the authority as short cut to taking disciplinary action on an alleged specific misconduct of the applicant and is therefore bad in law.

16. In view of above conclusions and our opinion that the impugned order is bad in law with regard to the two aspects alone, we feel it unnecessary to consider other contentions of the applicant to challenge it, including that full notice money not paid with the order. In support of various contentions, a good number of judicial decisions have also been relied upon for the applicant.(i. Union of India V/s. Col.J.N. Sinha & Ors. 1970 SLR 748, (ii) State of U.P. V/s.Chandra Mohan Nigam & Ors., AIR 1977 S.C.2411, (iii) Senior Superintendent, R.M.S., Cochin & Anrs. V/s. K.V.Gopinath, 1973 SCC(L&S) 277, (iv) Smt. Kusum Gupta Alias Kusum Bansal V/s.

Haryana State Small Industries & Export Corpn., Chandigarh, 1986 SCC 506, (v) H.C. Gargi V/s. State of Haryana, 1986 SCC(L&S)738, (vi)P.C. Abrol V/s. Union of India & Ors., A.T.R. 1988(1) C.A.T. 322, (vii) A.N.Saxena and S.L. Behel V/s. Chief Commissioner (Adm.) and Commissioner of Income Tax, A.T.R. 1988(1) C.A.T.326, (viii) Mahmood Hussain V/s. Osmania University & another, 1978(1) SLR 721, (ix) Baldev Raj Chadha V/s. Union of India & Ors., AIR 1981 S.C. 70, (x) Hansx Raj V/s. State of Punjab & Ors., (1985) 1 SCC 134, (xi) J.D. Shrivastava V/s. State of M.P. & Ors., AIR 1984 S.C. 630, and (xii) Union of India V/s. M.E. Reddy, AIR 1980 SC 563). For the respondents came to be cited three decisions (i) Baldev Raj Chadha V/s. Union of India & Ors., AIR 1981 S.C. 70, (ii) Hari Nandan Sharan Bhatnagar V/s. S.N. Dixit and Anrs., AIR 1970 S.C. 40, and (iii) Bahadur Singh V/s. The State of Rajasthan & Ors., 1981(2) SLR 582), but with no elucidation about what portions of the same are relied upon to support what.

17. We are conscious that "it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious means" (see Mc Dowell & Co. Ltd., V/s. Commercial Tax Officer, AIR 1986 SC 649). It will be even more wrong if a tax authority resorts to dubious methods to facilitate avoiding the payment of taxes. But provisions of FR 56(j) cannot be used as a short cut to initiating formal disciplinary proceedings in such allegations based only on a specific act or acts of this nature. The respondents will be at liberty to take appropriate action against the applicant for any specific act of misconduct in accordance with law if so advised. It is clarified that our direction below is not intended to

preclude that.

18. We hereby declare order No.A-38012/30/85-Ad.II dated 29th January 1986 issued by the Government of India, Ministry of Finance(Department of Revenue) by which the applicant B.M.Shah was retired with immediate effect under clause (j) of Rule 56 of the Fundamental Rules illegal and hereby quash and set aside the said order with effect from the date it was issued. The applicant will be deemed to have continued in service as if the impugned order of premature retirement did not take effect and/to have retired on 31.3.1988, the date of his superannuation. The respondents are directed to disburse to the applicant full pay and allowances for the period between the date of the illegal premature retirement and the date of his superannuation on 31.3.1988 within a period of three months from the date of this order. His service till 31.3.1988 should also be regularised as on duty and pensionary benefits should be given to him accordingly. There will be no order as to costs.

M. M. Singh 25/5/90

(M.M.SINGH)
ADMINISTRATIVE MEMBER

(A.V.HARIDASAN)
JUDICIAL MEMBER