IN THE CENTRAL ADMINISTRATIVE TRIAUNAL
AHMEDABAD BENCH

O.A. No. 444 OF 1990.
~~T.A. No.~~

DATE OF DECISION 13-5-1993.

R.K.S. Nim, Petitioner

Mr.J.S.Yadav withMr.R.S.Dinker, Advocate for the Petitioner(s)

Versus

Union of India & Ors. Respondents

Mr. Akil Kureshi, Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. R.C.Bhatt, Judicial Member.

The Hon'ble Mr. V.Radhakrishnan, Admn. Member.

1. Whether Reporters of local papers may be allowed to see the Judgement ? ~
2. To be referred to the Reporter or not ? X
3. Whether their Lordships wish to see the fair copy of the Judgement ? X
4. Whether it needs to be circulated to other Benches of the Tribunal ? X

R.K.S. Nim,
Enforcement Officer,
Enforcement Directorate,
Ahmedabad. ..... Applicant.

(Advocate: Mr.J.S. Yadav)
with Mr.R.S. Dinker)

Versus.

1. Union of India
(Notice to be served
through Secretary,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi).

2. Director of Enforcement,
Enforcement Directorate,
Foreign Exchange Regulation Act,
6th Floor, Lok Nayak Bhavan,
Khan Market, New Delhi.

3. Assistant Director,
Enforcement Directorate,
Building-B, Stadium House,
Opp.Municipal Swimming Pool,
Navrangpura, Ahmedabad. ..... Respondents.

(Advocate:Mr. Akil Kureshi)

J U D G M E N T

O.A.No. 444 OF 1990

Date: 13-5-1993.

Per: Hon'ble Mr. R.C.Bhatt, Judicial Member.

Heard Mr. J.S.Yadav for Mr. R.S. Dinkar, learned advocate for the applicant and Mr.Akil Kureshi learned advocate for the respondents.

2. The applicant, an Enforcement Officer, in the Enforcement Directorate(FERA) Ahmedabad, has filed this application under section 19 of the Administrative Tribunals Act, 1985, against Establishment order No. 71/90 dated 24th August, 1990 whereby the applicant has been reverted from the post of Chief

Enforcement Officer to the post of Enforcement Officer with effect from 1st September, 1990 for a period of one year. The applicant has sought relief as prayed for in para 9(A) to(E) as under:

> "(A) The impugned Establishment Order No.71/90 dated 24.8.1990 may be quashed and set aside with consequential reliefs.
>
> (B) The Honourable Tribunal may be pleased to declare that the applicant had continued to work as Chief Enforcement Officer as if the said impugned order has not been passed at all.
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> (C) The Honourable Tribunal may be pleased to declare that the period of his reversion shall not affect applicant's seniority, further promotion in the Enforcement Directorate.
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> (D) The Honourable Tribunal may be pleased to grant such other and further relief as deemed fit in the facts and circumstances of the case.
>
> (E) The Honourable Tribunal may be pleased to allow this application with costs."

3. The case of the applicant as pleaded in the application is that he joined the Enforcement Directorate as Assistant Enforcement Officer on 24th May,1971 and then he was promoted as Enforcement Officer. He was further promoted as Chief Enforcement Officer vide Establishment Order No. 51/85 dated 31st December,1985 issued by the Enforcement Directorate from their F.No. A-4/3/85, the copy of which is annexed at Annexure A-1. The applicant was promoted to the post of Chief Enforcement Officer along with others on probation for a period of two years from the date of their taking over the charge of the post of Chief

Enforcement Officer on regular basis and he took the said charge on 18th March,1986. It is alleged by the applicant that he continued to work on that post upto 31st August, 1990 and during that period he had performed his work satisfactorily and was never intimated that his performance was not upto the mark or he was lacking in some respect in the performance in his duties, nor he has been communicated any adverse remarks. It is alleged by him that inspite of satisfactory performance of his duties for over four years as Chief Enforcement Officer,he has been illegally arbitrarily reverted to the post of Enforcement Officer vide Establishment Order No. 71/90 dated 24th August,1990 issued by the Enforcement Directorate New Delhi on the ground that his performance has not been found satisfactory till 24th August, 1990 by the competent authority. Copy of which is produced at Annexure A-2. It is alleged by him that it is nowhere laid down in the manual of office procedure issued by the Enforcement Directorate that the Chief Enforcement Officer on promotion from the post of Enforcement Officer would be on probation for a period of two years. It is alleged by him that he has been subjected to the humiliatory treatment only on the basis of bias against him and not on the basis of any record. The applicant has produced at Annexure A-5, the guideline for for regularising, extending and terminating the probation period of the officers who are appointed or

promoted on probation basis. It is alleged by him according to memorandum Ann. A-5 that the normal probation may be extended in suitable cases, it is not desirable that an employee should be kept on probation for years and except for exceptional reasons, it is provided that probation period should not be extended for a period of more than double than the probation period. It is alleged that the impugned order of reversion has been passed in violation of Articles 14 & 16 of the Constitution of India, that his normal period of probation was over on 17th March, 1988 and double of that period was over on 17th March, 1990 and therefore, the question of extension or termination of the said probation period did not arise. It is alleged by him that large number of other officers, who are junior to him, are appointed as Chief Enforcement Officer and he has produced seniority list of the Chief Enforcement Officer as on 1st March, 1989 at Annexure A-6. It is alleged by him that the promotion order dated 31st December, 1985 was on regular basis and the words "on probation basis" appearing in the said order were not called for and were superfluous for the reason that a regular employee can not be put on probation as and when there is a change in his grade. It is further alleged that the impugned order of reversion is ex-facie illegal being violative of the mandate under the clause (2) of Article 311 of the Constitution of India and there is also violation of principle of natural justice.

4. The respondents have filed reply contending that the application deserves to be dismissed as the applicant has not exhausted the alternative remedy available under Rule 23 as per CCS(CCA) Rules which provides that according to Rule 23(v) when an order is passed reverting a Government servant while officiating in a higher service, grade or post, to a lower service, otherwise than as a penalty he may prefer an appeal against the said order. It is contended by the respondents that this rule is mandatory in the nature and when the applicant has not exhausted this alternative remedy for which a period of limitation under Rule 25 is 45 days from the date on which the copy of the order appealed against is delivered to the Government service, the application deserves to be dismissed. It is contended by the respondents that the applicant was under suspension during his tenure as Chief Enforcement Officer as his services were not found to be satisfactory. It is contended that the order of promotion clearly shows that the applicant was promoted on the said post on probation subject to his taking a charge of the post as Chief Enforcement Officer on regular basis. It is contended that the post of Chief Enforcement Officer and the duties and responsibilities assigned to this Civil Service are that of sensitive nature and as the applicant was lacking in the same, and the applicant has been reverted to the post of Enforcement Officer with effect

from 1st September, 1990 for a period of one year. The respondents have denied that the applicant's reversion for a period of one year was passed in violation of Articles 14 & 16 of the Constitution or in violation of principle of natural justice. It is contended that there is no infringment of Article 311(2) of the Constitution of India. It is contended that the application is barred under Section 20 of the Administrative Tribunals Act, 1985. It is contended that the applicant has tried to mislead this Tribunal by referring to the manual of office procedure which is a guide issued for ready reference for the use of staff and not an authenticated documents as mentioned in introductory of the said manual. The respondents have produced introductory part namely the Chapter I, which is introductory part at Annex. A-1. It is denied that there cannot be any timing faction that if a person who has been appointed or promoted on a higher post after the expiry of the probation period, he is deemed to have been confirmed on the said post without there being any order to that effect. The respondents have denied that there was any bias against the applicant. It is contended by the respondents that to assess the performance of the applicant, the assessment return were called for from the reporting officer under whom he had worked and after considering the assessment report, the applicant who was on probation was reverted to a lower grade for a period of one year.

It is contended that the application be dismissed.

5. The applicant has filed rejoinder contraverting the contention taken by the respondents in the reply. He has stated in his rejoinder that he was not placed under suspension as Chief Enforcement Officer on the ground that his services were not found to be satisfactory but he was placed under suspension as the C.B.I. had booked a false case against him for allegedly not paying an amount of Rs. 192/- to M/s. Minaxi Jewellers for booking an Air Ticket to Delhi, which incident took place between 5th and 7th of September, 1985 when the applicant was working as Enforcement Officer at Bombay. He contended that he had filed filed a Criminal Writ Petition No. 62/88 in the High Court of Bombay which by order dated 6th July, 1988 was pleased to quash the said prosecution against him and hence the said incident has nothing to do with the passing of the impugned order. The applicant has further stated in his rejoinder that the Assistant Director of Enforcement at Ahmedabad office had never informed by him that he has not satisfied with his working. It is contended that after the decision of the Bombay High Court in Criminal Writ Petition No. 62/88, the suspension period was regularised by the respondents and he was paid all the dues as if the period of suspension was the period spent on duty. It is contended by the applicant in rejoinder that the impugned order having

been passed in violation of principle of natural justice and infringment of the Articles 14 & 16 & 311(2) of the Constitution of India this application is entertainable without exhausting the alternative remedies which in fact do not assessed in so the applicant is concerned.

6. The learned advocate for the applicant has raised several points before us. The first point raised by him was that it is nowhere laid down in the manual of office procedure issued by the Enforcement Directorate that Chief Enforcement Officer on promotion from the post of Enforcement Officer would be on probation for a period of two years and hence according to him the order Annexure A-1 dated 31st December, 1985 being No. 51/85 showing the applicant on probation for a period of 2 years was not legal. Secondly, he submitted that after the said period was over the respondents should not have kept the applicant on probation in any case. Thirdly, he submitted that after the period of probation originally given for two years was completed and even after double the period of probation i.e., four years was over the applicant should be deemed to have been confirmed in the post of Chief Enforcement Officer. Fourthly, he submitted that the applicant in any case was promoted on probation for a period of two years from the date of taking over the charge as Chief Enforcement Officer on regular basis. He submitted that the regular

promotion on probation can not be vitiated and therefore, in fact there was no probation. Fifthly, he submitted that the applicant is sought to be reverted by order Annexure A-2 dated 24th August, 1990, i.e., after about more than 4½ years without any notice. He submitted that no adverse remarks were served on the applicant and therefore, there was no reason to revert him. Sixthly he submitted that the reversion speaks of bias. Seventhly, he submitted that the juniors to the applicant have been continued while the applicant has been reverted. Eighthly, he submitted that the applicant was never intimated that his performance was not found satisfactory as mentioned in Annexure A-2 and hence also the impugned order Annexure A-2 is bad in law. Ninethly, he submitted that the impugned order of reversion amounts to reduction in rank and so it amounts to violation of Article 311(2) of the Constitution and without hearing the applicant and without proper enquiry such order can not be passed.

7. The main contention taken by the respondents in para 7,8 & 9 of the reply is that the application is barred under section 20 of the Administrative Tribunals Act, because according to the respondents, the applicant has not exhausted the alternative and efficacious remedy available to him under CCS(CCA) Rules,1965. The respondents have taken many other contentions resisting the application as mentioned

their reply
in / but the main contention is that as per Rule 23(V) of the CCS(CCA) Rules, 1965 the applicant ought to have filed an appeal within a period mentioned under Rule 25 against the order of reversion and having not preferred that appeal and having not exhausted that statutory remedy, this application is deserves to be dismissed under section 20 of the Administrative Tribunals Act, 1985. He submitted that the order of reversion of the applicant vide Annexure A-2 by which he was reverted from the Chief Enforcement Officer to the post of Enforcement Officer with effect from 1st September, 1990 for a period of one year on the ground of his performance not being found satisfactory till the date by the competent authority was appealable order and the applicant having not exhausted that remedy the application should be dismissed.

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Therefore, we shall /deal with this contention raised by the respondents. The learned advocate for the respondents submitted that the applicant having not preferred appeal as provided in Rule 23(V)(b) which is an appealable order but having rushed this Tribunal without exhausting that remedy, this application deserves to be rejected under section 20 of the Administrative Tribunals Act, 1985. The applicant in his rejoinder has stated in para 5 that the impugned order having been passed in violation of principle of being an
natural justice and/infringement of Articles 14, 16 & 311(2) of the Constitution of India, this application

is entertainable without relegating the applicant to alternative remedies, which infact do not exist in so far as the applicant is concerned. In our opinion, having examined Rule 23 of the CCS(CCA) Rules, 1965 we find that an appeal is provided to the Government servant against the orders mentioned in that rule and clause V(b) shows that an appeal lies against the order "reverting him while officiating in a higher service, grade or post, to a lower service, grade or post, otherwise than as a penalty." The learned advocate for the applicant submitted that the order is punitive or penal and Article 311(2) of the Constitution of India is attracted and therefore, Rule 23 is not applicable to the applicant. The learned advocate for the applicant has relied on the decision in the State of Bihar V/s. Gopi Koshore Prasad, AIR 1960 SC 689, which says that the provisions of Article 311(2) of the Constitution are applicable to a probationer in the Bihar Subordinate Civil Service who had been discharged from service on enquiry, as being unsuitable to the post on grounds of notoriety for corruption and unsatisfactory work in the discharge of his public duties. It was, therefore, held that discharge was clearly by way of punishment and hence the said probationer was entitled to protection of Article 311(2) In this judgment, the law relating the termination of service or discharge of a probationary public service laid down in Dhingra's case, AIR 1958 SC 36 is reliedon

and the elaborate discussion in that judgment has reference to all stages of employment in the public services, including temporary post, probationers, and also confirmed officers. The Hon'ble Supreme Court has in the judgment cited by the learned advocate for the applicant has observed "2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him of any right to a post and is, therefore, no punishment". In para 5 of the judgment, it is held that "if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable charge of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer though him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such cause." Therefore, the ratio of this judgment, is that if the employee on probation is discharged from services by the Government without casting any aspersions on his honesty or competence, his discharge would not, in law, have the effect of a removal from service by way of punishment and he would, therefore, have no grievance to ventilate in any court. In our opinion, therefore, this decision, on the contrary goes against the applicant as the impugned order does not cast any stigma

and therefore, there is no question of applicability of Article 311(2) of the Constitution of India. Thus when the termination of employment of a person holding a post on probation without any enquiry whatsoever can not be subjected to deprive him to any post and is therefore have no punishment in the impugned order, there is a reversion for the period of one year in the present case on the ground of applicant's performance not found satisfactory and therefore, it can not be said that it is penal in nature nor under Article 311(2) of the Constitution is attracted. He also relied on the case in State of Gujarat V/s. Akhilesh C. Bhargav & Ors. 28(2) GLR 1286. The Hon'ble Supreme Court was considering the case of a Police Officer who was discharged from service after about five years from the date of his appointment and hence the Rules under Indian Police Service (Probation) Rules, 1954 were referred. The decision is given on the point of administrative instructions but in that decision the case of State of Orissa V/s. Ram Narayan Das, 1961(1) SCR 606 is referred in which it was decided that the order of discharge of a police officer on probation with the observation like unsatisfactory work and conduct would not amount to stigma. Therefore, even this decision would not help the applicant. The learned advocate for the applicant submitted that the applicant was never informed by the respondents that his performance was not satisfactory and hence the impugned order is bad

in law and he relied on the decision in Dr.Mrs. Sumati P. Shere V/s. Union of India & Ors., AIR 1989 SC 1431. The Hon'ble Supreme Court has considered in this decision, the case of an ad hoc employee and it is held in this decision that if the services of an employee to be discontinued on ground of unsuitability, it is proper and necessary that he should be told in advance that his work and performance are not upto the mark. It is important to note that in para 6 & 7 of this judgment the Hon'ble Supreme Court has referred to the decisions in Champaklal Chimanlal Shah V/s. Union of India, AIR 1964 SC 1854 and Oil and Natural Gas Commission V/s. Dr.M.D.S. Iskender Ali, AIR 1980 SC 1242 relied on by the counsel of the Union of India and the Hon'ble Suprem Court in this connection observed as under:

> "Both the cases pertain to the termination of a temporary Government servant who was on probation. The termination was on the ground that his work had never been satisfactory and he was not found suitable for being retained in the service. This Court held that the termination of service in such cases on the ground of unsuitability for the post does not attract Article 311(2) of the Constitution.

The Hon'ble Supreme Court has observed in para 7 of the judgment that there cannot be any dispute about this proposition. Therefore, in the instant case, the reversion of the applicant for one year on the ground that his performance had not been found satisfactory would not attract under Article 311(2) of the Constitution and the above decision does not help the

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applicant at all.

8. The learned advocate for the respondents submitted that the impugned order of reversion for one year to the applicant was not a penalty and it is not a punitive order. He referred to Rule 11 of CCS(CCA) Rules, 1965 in which in the explanation it is enumerated as to what shall not amount to penalty. In clause V it is mentioned "V. Reversion of a Government servant appointed on probation to any other service, grade or post, to his permanent post, grade or post through or at the end of probation in accordance with the terms of his appointment or the rules and orders governing such probation". He also relied on Rule 23(iv) of CCS(CCA) Rules, which says that"an appeal lies against an order which denies varies to the Government servants disadvantage is pay, allowance, pension or other conditions or service as related by rules or by agreement". He submitted that according to Government of India's decision mentioned at page 1040 in the Book "Disciplinary Action Against Government Servants and its Remedies" by K.D. Shrivasta Ministry of Home Affairs it is clarified that an appeal against supersession in the matter of promotion will fall within the purview of Rule 23(iv) of the CCS(CCA) Rules. He,therefore,submitted that in a case of reversion,the applicant ought to have filed an appeal. It was open to him to rest satisfied with the impugned order,but if he was dissatisfied with that order,he ought to have filed an appeal under Rule 23 of

the CCS(CCA) Rules reading the Rule 23(iv)(a) & (v)(b), but he having not done,so this application is barred under Section 20 of the Administrative Tribunals Act, 1985. He submitted that unsuitability can not be considered as penal. He also relied on the decision in Governing Council of Kidwai Memorial Institute of Oncology V/s. Dr. Pandurang Godwalkar & Ors., AIR 1993 SC 392. It was the case under the I.D.Act. The probationer in that case was terminated from service and it was held as a termination simpliciter even after some prelimnary enquiry and it was held that he was terminated as a punishment. The Hon'ble Supreme Court relied on the previous decisions in Ravindrakumar Misra V/s. U.P.State Handlook Corporation Ltd.,AIR 1987 SC 2408, State of Uttar Pradesh V/s. Kaushal Kishore Shukla, 1991 AIR SCW 793 and Triveni Shankar Saxena V/s. State of U.P., 1992 AIR SCW 110. The learned advocate for the applicant submitted that the impugned order was nothing but the reduction in rank,and therefore also, Article 311(2) of the Constitution of India would be attracted. We do not agree with this submission of the learned advocate for the applicant. There is also a decision in Unit Trust of India & Ors. V/s. T.Brahmkumari 1992(3)Scale page 100, in which it is held that if the probationer is discharged for unsatisfactory performance, there was no question of giving hearing before termination of services. Therefore, all the

decisions show that if a probationer's services are terminated on the ground of unsuitability the order is not penal. We, therefore, find much force in the submissions of the learned advocate for the respondents that the order in question was not a penal one and therefore, the applicant ought to have filed an appeal against the impugned order under Rule 23 of the CCS(CCA) Rules, if he was really aggrieved by that order and having not exhausted alternative remedy this application is not maintainable. The learned advocate for the applicant has relied on the decisions in R.K. Bharati V/s. Union of India & Ors. ATR 1989 (2) CAT page 456 and 1988(2) SLJ page 86, which are the decisions about deemed confirmation but it is not necessary for us to go into that question because we do not want to give any finding which may be prejudicial to either of the parties in the appeal which the applicant may file before the proper forum. However, it is important to note that in those cases the decision of the State of Gujarat V/s. Akhilesh 1988(2) SLJ page 86 is referred which says that even after the period of probation is over, confirmation would not ipso facto follow and the there are other decisions on this point to that effect. The learned advocate for the applicant submitted that he has relied on the decisions to show that extension of probation beyond double than normal period stipulated in the promotion order can not be justified from the legal

point of view. We do not go into those points because we are dismissing the application on the ground that it is barred under section 20 of the Administrative Tribunals Act, 1985. The learned advocate for the respondents relied on the decision in The Indian Iron & Steel Co.Ltd. & Ors. V/s. Lt.Col. Dipankar Bhattacharya & Ors., 1990(6)SLR page 743 in which it is held that probationer continues to be on probation until he is confirmed or discharged from services. He also referred another decision, 1988 (6) SLR CAT p.450.

9. In view of our finding that the impugned order under challenge, Annexure A-2 dated 24th August,1990 by which the applicant was reverted from the post of Chief Enforcement Officer to the post of Enforcement Officer not being penal and he having not exhausted the alternative remedy provides under Rule 23 of the CCS(CCA) Rules, 1965, this application is premature and is not maintainable. It is for these reasons that we are not discussing and giving our findings on the other points raised and also for the reason that our findings may result in prejudice to one of the parties which may affect them in the appeal that may be filed by the applicant. The applicant can take all the grounds available to him before the appellate authority but as observed above we do not decide other points for the reasons mentioned herein. We also want to make it clear that though the applicant has not filed an appeal as provided under Rule 23 of CCS(CCA) Rules, we should give him an

opportunity to file such appeal if he so desires before the competent authority and if he makes an application for condonation of delay in filing that appeal, the competent authority should grant that application and treat the appeal in time and should dispose it of according to rules. Hence we pass the following order.

ORDER

The application is held not maintainable and deserves to be dismissed as barred under section 20 of the Administrative Tribunals Act, 1985. However, the applicant, if he so desires, prefer an appeal to the competent authority of the respondents under Rule 23 of the CCS(CCA) Rules, 1965 and if he files such appeal within one month from the date of receipt of this order, and also simultaneously makes an application for condonation of delay in filing that appeal, the competent authority shall condone the delay in filing that appeal and shall decide it according to law and rules applicable to the applicant. If the order of the appellate authority is adverse to the applicant in the appeal, it would be open to the applicant to approach this Tribunal according to law. Application is disposed of accordingly with no order as to costs.

(V.Radhakrishnan)
Member(A)

(R.C.Bhatt)
Member(J)

vtc.