

(9)

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

O.A.No. 437/89

DATE OF DECISION: 8.2.1995

Mr. Sanjeevkumar Phadke ..Applicant

Mr. V.G.Rege ..Counsel for applicant

V/s

Union of India & Ors. ..Respondents

Mr. M.I.Sethna ..Counsel for respondents

Coram:

The Hon'ble Shri Justice M.S.Deshpande, Vice Chairman

The Hon'ble Shri P.P. Srivastava, Member(A)

1. To be referred to the Reporter or not?
2. Whether it needs to be circulated to other Benches of the Tribunal ?

Vice Chairman

(10)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH, 'GUIESTAN' BUILDING NO.6
PREScot ROAD, BOMBAY 1

O.A.NO. 437/89

Sanjeevkumar Phadke

..Applicant

V/s

Union of India
and another

..Respondents

Coram: Hon. Shri Justice M.S. Deshpande, V.C.
Hon. Shri P.P. Srivastava, Member(A)

Appearance:

Mr. V.G. Rege
Counsel for the applicant

Mr. M.I. Sethna
Counsel for the respondents

ORAL JUDGMENT: DATED: 8.2.1995
(Per: M.S. Deshpande, Vice Chairman)

The applicant challenges by this application the penalty of withholding two increments cumulatively as a sequel to the departmental enquiry and the order directing that the period of suspension shall be treated as non duty for pay and allowances and for all purposes.

2. The applicant was appointed as a Preventive Officer in February 1979 and while he was on duty on 2.1.1984 at Sahar Airport and in respect of an incident of that day a charge sheet was given to him on 7.2.1985, the charges being that he did not deliberately recover the differential duty of Rs.10,214/- from the passenger Miss. Sadia Ahmed, who had overstayed in India after availing of Tourist Baggage Re-Export facilities, for almost seven months, with an intention to extract Rs.3,000/- by way of illegal gratification and that he had accepted a sum of Rs.3,000/- as illegal gratification and showed undue favour

to her by showing the date of her arrival as 4.12.83 instead of 4.12.82 and intentionally misguided the TBRE Cell by making an endorsement on 18.1.84 on the TBRE to the effect that he had verified from the passport that the passenger had arrived on 4.12.83 to coverup the lapse of not charging the differential duty for the period of overstay. The inquiry officer found that charges nos. 1 and 2 were not proved. With regard to the last charge, the inquiry officer held that there was negligence on the part of the applicant. The disciplinary authority while accepting the finding of the inquiry officer on the third charge, imposed the penalty of withholding the applicant's two increments with cumulative effect on September 25, 1986. The appellate authority dismissed the appeal by the order dated 15.5.87 and on 6.5.88 the review application addressed to the President was rejected and the applicant has, therefore, approached this Tribunal for the aforesaid reliefs.

3. The first question raised on behalf of the applicant was that though he was appointed by the Additional Collector of Customs, the chargesheet was given by the Deputy Collector of Customs who was not the appointing authority and the entire proceedings were therefore bad. We were referred to the provisions of S.2(8) of the Customs Act, 1962, which defines "Collector

[Handwritten signature]

of Customs", which except for the purposes of Chapter XV, includes an Additional Collector of Customs and S.3 which gives the hierarchy of the officers of the customs department are ennumerated as under:

- a. Principal Collectors of Customs;
- aa. Collectors of Customs
- b. Collectors of Customs(Appeals)
- c. Deputy Collectors of Customs etc.

The submission was that the Deputy Collector of Customs who had powers of adjudication in respect of amounts not exceeding Rs.2 lakhs under para 50 of the Adjudication Manual for the Customs Department was an authority higher than the Deputy Collector, who had powers of adjudication in respect of subject matter not exceeding Rs.1 lakh. Section 3 clearly makes a distinction between the different classes of officers and refers to Collector of Customs as an authority distinct from the Additional Collector of Customs.

4. There is no dispute before us that the applicant had been appointed by the Additional Collector of Customs. The submission was that in view of the provision to S.2(a) of the CCS(CCA) Rules, Appointing Authority has to be one who is described therein and the authority which is the highest shall be the appointing authority. For the purpose of class (g) the disciplinary authority would mean the authority competent under the rules to impose on a Government servant any of the penalties specified in Rule 11. Our attention was also drawn to Rule 12 and 13 of CCS(CCA) Rules and what is important for the

(13)

.4.

purpose of the present case, since the applicant belongs to Group C category, is Rule 12(2)(b) of CCS(CCA) Rules which provides that without prejudice to the provisions of sub-rule (1), but subject to the provisions of sub-rule (4), any of the penalties specified in Rule 11 may be imposed on a person appointed to a Central Civil Post included in the General Central Service, by the authority specified in this behalf by a general or special order of the President, or where no such order has been made, by the appointing authority or the authority specified in the Schedule in this behalf. Rule 13 enumerates the authorities competent to institute the proceedings. There cannot be any doubt about the position that though the applicant was appointed by the Additional Collector of Customs, the chargesheet is given by an authority lower in rank i.e., the Deputy Collector of Customs. Item 4(ii) part III of the Schedule to the CCS(CCA) Rules provides for the post in non-Secretariat office, other than posts in respect of which specific provision has been made by a general or special order of the President, the authority competent to impose penalties would be head of office. It was urged on behalf of the applicant that in view of this clear provision a charge-sheet by the Deputy Collector of Customs would be bad and would vitiate the entire enquiry. The Id. Counsel for the respondents, however, produced before us

a notification dated 7.5.83 published in the Gazette of India Part II S.3 Sub-sec.(2) under which the Deputy Collector of Customs-in-charge of personnel and establishment is constituted the appointing authority as well as the authority competent to impose penalties and penalties which it may impose (with reference to item number in rule 11). The enquiry against the applicant was initiated on 7.2.1985 i.e., after this notification dated 7.5.83 was issued. Reliance was placed on behalf of the applicant in SCIENTIFIC ADVISER TO THE MINISTRY OF DEFENCE & ORS. Vs. S. DANIEL & ORS., 1991 SCC(I&S) 355.

There the distinction has been clearly brought out in respect of the appointing authority and disciplinary authority. We may refer to the observations in para 17 of the report which reads as follows:

"It has been brought to our notice that notifications have since been issued (for example on August 29, 1979 in the case of the DERL and January 2, 1987 in the case of ordnance factories) by the President under Rule 12 empowering certain authorities to exercise disciplinary powers. We need hardly say that any disciplinary proceedings initiated by such authority from the date when such notifications came into effect will be perfectly valid."

(11)

It, therefore, follows that the Deputy Collector of Customs, who had been delegated the powers by the President by the notification for imposing penalty under sub-rule(2) of rule 9, clause (b) of sub-rule (2) of rule 12 and sub-rule (1) of rule 24 read with rule 84 of the CCS(CCA) Rules, 1965, had the authority to initiate the proceedings against the applicant and the imposition of penalty upon him. We, therefore, see no vice in the initiation of disciplinary proceedings and imposition of penalty.

5. The next point urged was that there was no charge of negligence, but the applicant was found guilty of that charge by the inquiry officer. The third head of charge was that the applicant intentionally misguided the T.B.R.E.Cell by making an endorsement on 18.1.1984 on the T.B.R.E. form to the effect that it is verified from the passport that the passenger has arrived on 4.12.83 to cover up the lapse of not charging the differential duty for the period of overstay, even though the passport of the passenger was not available with him on 18.1.1984 for verifying the date of arrival, as the passenger had left India on 2.1.1984. With regard to this the inquiry officer recorded that though there was no evidence to prove that the applicant had the intention to favour the passenger and thereby did not deliberately recover the differential duty, he has shown utmost carelessness and negligence of his duties in not going through the passport

(TB)

.7.

and T.B.R.E. form properly in order to note the date of arrival of the passenger. In the opinion of the inquiry officer the applicant should have taken appropriate action under the rules and the post-facto condonation of overstay could not be an answer for the failure on the part of the applicant in discharging his duties diligently and carefully. It is clear that there was material before the inquiry officer on the 3rd charge, though the applicant was found to be not guilty in respect of the other two heads of charge. The applicant had in his appeal memo dated 10.11.1986 referred to the defect in the charge and the finding recorded on what the inquiry officer recorded as a lapse on the part of the applicant in paras 10 onwards and also pointed out the material which was before the inquiry officer. The question is whether this aspect of the matter has been considered by the Appellate Authority. The appellate order dated 15.5.87 shows that the appellate authority had considered the material in the last two pages of that order and pointed out that the third charge referred to a lapse on the part of the applicant and that lapse was held to be proved by the disciplinary authority and mere use of the word negligence did not alter the situation. This, therefore, clearly is not a case of non-application of mind in considering the contentions raised by the applicant. It appears that there was material in the inquiry proceedings on the basis of which the finding could be arrived at. Merely because, if we were to sit as an appellate authority we could have been persuaded

(12)

to take a different view would not entitle us to interfere with what clearly was a finding of fact based on the material which was before the disciplinary authority and the appellate authority, and we see no merit in the contentions raised on behalf of the applicant on this point.

6. The next contention was regarding the valuation of the subject matter. The applicant's contention was that the applicant had the power to consider the amounts upto Rs.5,000 only and that it would have been for the Superintendent of Customs to consider the infractions in respect of the subject matter as the value was in excess of Rs.5,000 and it was his contention that he had referred the matter to the Superintendent for his approval and the Superintendent of Customs had granted his approval. In the reply filed by the respondents it has been pointed out that the Superintendent of Customs had to perform only supervisory functions and it was for the applicant who was a Preventive Officer to make the initial check. It was apparently at the time of initial check that the lapse had been committed and we see no merit in the contention that the value of the subject matter was well beyond the pecuniary power of the applicant. In any event this is a matter which relates to a question of fact and it would not be open to us to dilate upon the merits of this contention at this stage when such an issue was not raised in the domestic proceedings. We, therefore, hold that no exception can be taken to the finding recorded during the

inquiry proceedings and the penalty that has been imposed on the applicant.

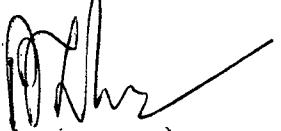
7. Shri Rege, Id. Counsel for the applicant, referred us to an order passed with regard to suspension on 2.9.88, Exhibit J, where the direction by the Deputy Collector of Customs was as follows:

Now having gone through the facts and records of the case it is found that the suspension of Shri S.K.Phadke, P.O.-I was justified as the charges against him have been sustained at all levels original as well as appellate, the undersigned, therefore orders that the period of suspension of Shri S.K. Phadke, P.O.-I, be treated as 'non-duty' for all purposes and his pay and allowances shall be restricted/limited to what he has already drawn by way of subsistence allowance."

Shri Rege stated that the applicant has received subsistence allowance for the period of suspension from 2.8.84 to 1.8.85 but it was preposterous to treat the entire period of suspension as non-duty for all purposes. He also contended that in no event could the period have been treated as a break in service with a loss of continuity in the entire service and at the most a direction could have been made with regard to withholding of the pay and allowances. However, even on that aspect he urged that no order could have been passed to applicant's prejudice without

Off

giving him an opportunity to show cause against the intended order because it resulted in civil consequences. He is supported in this respect by a decision of the Bombay High Court in VASANT RAGHUNATH GOKHALE Vs. THE STATE OF MAHARASHTRA, (Bombay Law Reporter, Vol. IXV, pp.54). It was pointed out to us that apart from the Bombay High Court decision there is a provision under FR 54(4) which requires a notice to be given before determining the quantum of the amount proposed to be paid to the applicant. We find that the applicant should have been given an opportunity to be heard before passing the order dated 2.9.1983. Now that the order has already been passed and the applicant has not been paid the wages for the period of suspension, we permit the applicant to make a representation against the manner in which his period of suspension has been treated. If such a representation is made within 30 days, the Deputy Collector of Customs shall consider that representation within 8 weeks thereof after giving a personal hearing to the applicant and then pass a reasoned order soon thereafter. With this direction the O.A. is disposed of.


(P.P.Srivastava)
Member(A)


(M.S.Deshpande)
Vice Chairman