

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION NO. : 212/2001

Date of Decision : 19-03-04

D.P.Kholamkar

Applicant

Shri G.K.Masand

Advocate for the
Applicant.

VERSUS

Union of India & Ors.

Respondents

Shri V.S.Masurkar

Advocate for the
Respondents

CORAM :

The Hon'ble Shri A.K.Agarwal, Vice Chairman

The Hon'ble Shri S.G.Deshmukh, Member (J)

- (i) To be referred to the reporter or not ?
- (ii) Whether it needs to be circulated to other Benches of the Tribunal ?
- (iii) Library


(A.K. AGARWAL)
VICE CHAIRMAN

mrj.

CENTRAL ADMINISTRATIVE TRIBUNAL

MUMBAI BENCH, MUMBAI

OA.NO.212/2001

Dated this the 19th day of March 2004.

CORAM : Hon'ble Shri A.K.Agarwal, Vice Chairman

Hon'ble Shri S.G.Deshmukh, Member (J)

D.P.Kholamkar,
R/at 3-C, Bindiya Co-op.Hsg.
Society, Plot No.20,
Opp.Rangsharada Theatre,
Bandra Reclamation,
Bandra (W), Mumbai.

...Applicant

By Advocate Shri G.K.Masand

vs.

1. Union of India
through the Secretary,
Ministry of Finance,
Dept. of Revenue,
North Block, New Delhi.

2. Central Board of Excise
& Customs, North Block,
New Delhi.

...Respondents

By Advocate Shri V.S.Masurkar

O R D E R

{Per : Shri A.K.Agarwal, Vice Chairman}

This OA. has been filed by the applicant D.P.Kholamkar under Section 19 of the Administrative Tribunals Act for quashing and setting the order of respondents imposing a penalty of 40% (Forty per cent) cut in his monthly pension.

..2/-

2. The facts of the case in brief are as follows. The applicant joined the Bombay Customs House as a Junior Clerk and thereafter was promoted as Senior Clerk. He was promoted as an Appraiser of Customs w.e.f.3.4.1995 and retired from service on reaching the age of superannuation on 31.7.1995. He was served with a chargesheet after a gap of more than one year of retirement levelling following charges :-

- (a) That while examining 10% of the packages (as per the examination Order) all the 13 shipping bills mentioned therein, Applicant had failed to mention in the examination report as to actual which packages were selected by him for physical examination.
- (b) That he failed to notice that non declaration of market value in the exporters declaration pasted with the aforesaid shipping bills.
- (c) That above acts of commission and omission on the part of the applicant has resulted in loss amounting to Rs.1,11,20,000/- to the Government."

3. After completion of the enquiry proceedings, the disciplinary authority vide its order dated 19.12.2000 imposed a penalty of 40% cut in the monthly pension of the applicant. However, in this order by mistake the designation of the applicant at the time of his retirement was wrongly mentioned as Superintendent (Retd.) instead of Appraiser (Retd.). This mistake was corrected by the respondents by Corrigendum dated 19.1.2001.



6. The learned counsel for the applicant further submitted that the action taken by the applicant was as per the practice in vogue though it may not be strictly in conformity with the instructions given in the Department Manual. He said that holding the applicant guilty, for not observing the instructions contained in the Department Manual when no Appraiser was following that procedure is highly discriminatory. Secondly, the applicant was promoted as an Appraiser only a few months ago. Thirdly, the action taken by him nowhere indicates any malafide on his part. Even then, the applicant vide letter dated 8.6.1998 had requested the Commissioner of Customs for making available a copy of the Manual so that he could make his representation well in time. When the Vigilance Section did not make the concerned Manual available to the applicant, he submitted his reply highlighting that the examination of the Export Cargo done by him was as per the established practice. The learned counsel further mentioned that the concerned Manual was last published in or about 1990 and thereafter it was not even reprinted. Perhaps, due to such reason, the manual was not readily available to the field officers. In this background, to fix the responsibility on the applicant on account of a minor fault of strictly not complying with the certain provisions of the Manual is unwarranted. Moreover, the enquiry officer in his report has mentioned that one Abu Sama in the reply to the question by the Investigating Officer has accepted his responsibility when he said that :-

"Since P.M.V. was declared on the shipping bill, the non-declaration of the P.M.V. in the declaration pasted to the shipping bill by the exporter was over-looked through oversight."

In the background of such a statement, the responsibility cannot be fixed on the applicant for non-completion of all the columns of shipping bills.

7. It was further mentioned by the learned counsel for the applicant that in the advice of UPSC, they had held Charge No.1 as established on the ground that no proof has been submitted during the enquiry that he had examined 10% of the packages. It is further established that C.O. did not mention the specific packages which he selected for physical examination as a part of thorough shipment check. The UPSC held the view that if some other officers were also defaulting in following the correct procedure, that cannot give any relief to the charged officer.

8. The learned counsel for the applicant mentioned that advice of the UPSC was given to the applicant only along with the punishment order. It should have been given earlier so as to allow the applicant to furnish comments on the observations of the UPSC. In support of his contention, he cited a Supreme Court ruling in the case of State Bank of India & Ors. vs. D.C. Agarwal & Anr. 1993 SCC 13 wherein it was held that non-furnishing of the recommendations of the CVC violates the principles of natural justice and vitiates the disciplinary proceedings. He mentioned that the advice of UPSC, which is a constitutional body, also falls in a similar category and the very fact that the applicant had no opportunity for replying to the observations of UPSC vitiates the disciplinary proceedings.

The UPSC in its advice dated 31.10.2000 held Article-I and Article-II of the charge as proved against the applicant and Article-III of the charge was declared as not established. In the case of Article-II, the UPSC had concluded that the Charged Officer exhibited carelessness. In Article-I the UPSC has considered non observance of the procedure laid down in the manual as objectionable.

9. The learned counsel for the respondents mentioned that the evidence on the record clearly proves that the applicant did not discharge his duties diligently. Whenever any responsibility is entrusted to a Government servant, it is his duty to discharge the same with utmost sincerity and in accordance with rules. It is no excuse that the manual was not handed over to him. The report of the enquiry officer indicates that in inspection report the applicant did not indicate the numbers of the packets inspected out of each consignment. This was absolutely essential. The UPSC has held the view that this is a serious lapse. The report of the enquiry officer contains statements of two Export Firms which confirmed purchasing of reject material and earning quick money by sending sub-standard cargo. The exporter thus made quick money under duty drawback scheme by exporting goods of inferior quality purchased at lower price. It is clearly mentioned in enquiry report that the charged officer failed to ensure whether the goods are of prime quality or not and whether the price declared in the invoice confirms with the quality as well as quantity of the goods exported. All these

resulted in a substantial revenue loss to the Government. The contention of the applicant that he was new on that type of job and therefore had sought opinion from his colleagues is also not borne out from the facts. Because the applicant, during the course of enquiry, failed to give any name of person whom he had consulted.

10. The learned counsel for the respondents further mentioned that the Apex Court ruling cited by the learned counsel for the applicant relates to the advice of CVC and not to the advice of UPSC. In this case, the advice of CVC was already given to the applicant. He drew our attention towards para 10 of the Affidavit filed on behalf of respondents filed on 7.7.2001. However, he admitted that towards the end of this para, the word "CVC/ UPSC" had been wrongly typed and it should be "CVC" only. He further said that in the case of applicant, in normal course, there was no need for taking advice of UPSC since he belongs to Non-Gazetted category. However, because the disciplinary proceedings were started after retirement under Rule 9 of CCS (CCA) Rules, 1972 and the order was required to be issued by the President, it became essential to follow the procedure akin to Group 'A' delinquent officer and consequentially the case was referred to UPSC for advice. He cited the case of Chiranjilal vs. Union of India & Ors. decided by Full Bench of CAT at New Delhi in OA.NO.1744/97. It has been held that the advice given by UPSC has construed as an additional material before the disciplinary authority in those cases where the UPSC advices



imposition of a penalty when the disciplinary authority has given a provisional conclusion that no penalty is called for or when the UPSC recommends enhancement of penalty proposed by the disciplinary authority. It was finally held as follows :-

"We cannot therefore say that non-supply of the advice at the pre-decessional stage to the charged officer is a denial of fair hearing to the applicant as he has already exercised his right to fair hearing when he had made a representation on the same material as is before the UPSC."

11. The learned counsel for the respondents cited another case of Keshav Gopal Chandanshive vs. Union of India & Ors. decided on 8.8.2003 by Mumbai Bench of CAT in OA.NO.101/2002 holding in addition the observation of the Full Bench referred to above as follows :-

"In any case, the UPSC's advice is a second stage consultation and after the 42nd Amendment the need for second stage consultation has been done away with."

12. The learned counsel for the respondents mentioned that the applicant has been given all the opportunities to present his case. The advice of UPSC was not very material and in any case it did not recommend the enhancement of punishment vis-a-vis the provisional decision of punishment by the disciplinary authority. In addition, commenting on the scope of judicial review, he cited the judgement of Apex Court in the case of State of Tamil Nadu & Anr. vs. S.Subramaniam, 1996 SCC (L&S) 627, wherein it has been held that :-

"In judicial review, it is settled law that the Court or the Tribunal has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in view of the Court or Tribunal."

13. The learned counsel for the applicant mentioned that in an Affidavit filed by respondents on 7.7.2001, it is mentioned that the advice of CVC/UPSC was given to the applicant while the advice of UPSC was not really made available to the applicant. Secondly, he drew our attention to Para 5 of main OA. where it has been clearly mentioned that the advice tendered by UPSC was made available to the applicant only along with the impugned order of penalty. Since, this advice was taken into consideration by the disciplinary authority while deciding the penalty without affording an opportunity to the applicant against the same, it has vitiated the disciplinary proceedings. The report of the enquiry officer was made available to the applicant vide letter dated 25.9.1988 stating therein that the disciplinary authority will take a suitable decision after considering the report and if the delinquent wishes to make any representation, he may do so within a period of 15 days. This shows that at that time the disciplinary authority had no intention of seeking the advice of UPSC. Referring to the case of Full Bench cited by the learned counsel for the respondents, he said that the circumstances of this case are different. He further reiterated the judgement of the Apex Court in the case of State Bank of India vs. D.C. Aggarwal is very relevant only on the ground of

non-furnishing of advice of UPSC, the impugned order deserves to be quashed and set aside. The applicant would have no objection if the disciplinary authority passes order of penalty after taking into consideration his comments on advice of UPSC.

14. After hearing both the counsels and going through the facts of the case, we feel that the material issue in this case is whether non-furnishing of advice of UPSC to the applicant before taking the decision of imposing a penalty has vitiated the proceedings or not. On this issue, there is a Full Bench judgement of Central Administrative Tribunal, New Delhi in the case of Chiranjit Lal vs. Union of India & ors. (supra) that such advice is of material significance when the disciplinary authority have come to a provisional conclusion that no penalty is called for and UPSC recommends penalty or even if UPSC recommends enhancement of penalty. However, in this case, the disciplinary authority had in its provisional conclusion decided to impose penalty while referring the matter to the UPSC for its advice. Since there was no additional material before the UPSC and also it has not made any recommendation for enhancement of penalty. Therefore, this case is covered by the aforementioned judgement of the Full Bench holding that non-supply of advice at pre-decisional stage to the charged officer is not a denial of fair hearing because he has exercised his right while making representation on the same material which was before the disciplinary authority.

15. We find that in the disciplinary proceedings of the applicant due procedure has been followed by the concerned authorities and there has been no violation of the principles of natural justice. This OA., therefore, deserves to be dismissed and is dismissed accordingly. No order as to costs.

Deshmukh
(S.G.DESHMUKH)

MEMBER (J)

Agarwal
(A.K.AGARWAL)

VICE CHAIRMAN

mrj.