

REGISTERED

CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH
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Commercial Complex (BDA),
Indiranagar,
Bangalore - 560 038

Dated : 17-8-87

APPLICATION NO^S 293 & 294 /86(F)

W.P. NO

Applicant

Shri J. Doddanangaiah

V/s

The Collector of Central Excise
Bangalore & 4 Ors

To

1. Shri J. Doddanangaiah
Inspector of Central Excise
Cantonment Division
Bangalore - 560 001
2. Shri Y.G. Ramamurthy
Advocate
29, "Ayodhya", Mehdipatnam
Hyderabad - 500 028
3. Collector of Central Excise
Central Revenue Building
Queens' Road, B'luru - 1

4. The Asst, Collector of Central Excise
Cantonment Division
131, Infantry Road
Bangalore - 560 001
5. The Asst. Collector of Central Excise
Lalbagh Division, Richmond Road
Bangalore - 560 027
6. The Secretary
Ministry of Finance (Dept of Revenue)
North Block
New Delhi - 110 001
7. Shri D. Shankar
Suptd of Central Excise
Customs Division, O/o Asst. Collector
Customs
52, Miller Road
Vasanthnagar
Bangalore - 52

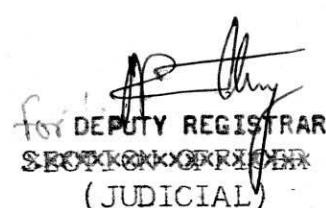
Subject: SENDING COPIES OF ORDER PASSED BY THE BENCH of Customs

Please find enclosed herewith the copy of ORDER/~~EXAM~~/
~~INTERIM ORDER~~ passed by this Tribunal in the above said

application on 11-8-87

Encl : as above

8. Shri M. Vasudeva Rao
Central Govt. Stng Counsel
High Court Buildings
Bangalore - 560 001


for DEPUTY REGISTRAR
SECTION OF ORDER
(JUDICIAL)

1/1

CENTRAL ADMINISTRATIVE TRIBUNAL:BANGALORE

DATED THIS THE 11TH DAY OF AUGUST,1987.

PRESENT:

Hon'ble Mr.Justice K.S.Puttaswamy, ..Vice-Chairman(J).

And:

Hon'ble Mr.B.N.Jayasimha, .. Vice-Chairman(A).

APPLICATIONS NUMBERS 293 AND 294 OF 1987

J.Doddanjaiah,
Inspector of Central Excise,
Contonment Division,
Bangalore-1.

.. Applicant in
both the Applications.

(By Sri Y.G.Ramamurthy, Advocate)

v.

1. Collector of Central Excise,
Central Revenue Buildings,
Queens Road, Bangalore-560 001.
2. Assistant Collector of Central Excise
Cantonment Division,
131, Infantry Division,
Bangalore-560 001.
3. Assistant Collector of Central Excise,
Lalbagh Division, Richmond Road,
Bangalore-560 027.
4. Union of India represented by
the Secretary, Ministry of Finance
(Department of Revenue)
North Block, New Delhi-110 001.
5. Sri D.Shankar,
Superintendent of Central Excise,
Customs Division,
O/o Assistant Collector of Customs,
52, Miller Road, Vasanthnagar,
Bangalore-560 052.

.. Respondents.

(By Sri M.Vasudeva Rao, Standing Counsel)

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These applications coming on for hearing this day, Vice-Chairman(J) made the following:



O R D E R

As the questions that arise for determination in these cases, in which the parties are common, are inter-connected, we propose to dispose of them by a common order.

2. From 7-II-1983 to 11-8-1985 the applicant who is common in these cases, was working as an Inspector of Central Excise ('Inspector') in the office of the Assistant Collector of Central Excise ('AC'), Lalbagh Division, Bangalore ('LD'). From 12-8-1985 he is working in the office of the Assistant Collector of Central Excise, Contonment Division, Bangalore ('CD'). When he was working in the LD office, the applicant was said to have committed a misconduct. On the basis of the same, the AC,CD, in exercise of the powers conferred on him by the Central Civil Services (Classification, Control and Appeal) Rules,1965 ('Rules') commenced disciplinary proceedings against the applicant and issued a charge memo on 5-8-1985 on him proposing to inflict one or the other of the minor penalties under Rule 11 of the Rules. In response to the same, the applicant filed his objections inter alia contending that there were no grounds to hold him guilty and impose any punishment.

3. On an examination of the records and the reply, the AC,CD by his order No.C.II/10(A)/1/86 dated 31-3-1986 administered a 'warning' against the applicant. Against this order, the applicant filed an appeal on 13-6-1986 under the Rules before the Collector of Central Excise, Bangalore ('Collector'), who by his order No.II/26/74/86-A.3 rejected the same as not maintainable.

4. On 26-8-1986 the Collector, issued notice No.C.II/10A/85-A.3 dated 26-8-1986 to the applicant proposing to review the order dated



31-3-1986 of the AC,CD on the ground 'that it was too lenient' and impose on him one or the other of the minor penalties specified in Rule 11 of the Rules. In response to the same, the applicant filed his representations/objections on 10-9-1986 opposing the same on diverse grounds, claiming an opportunity of oral hearing also. In order No.II/10-A/5/85-A.3 dated 3-11-1986, the Collector without affording an oral hearing to the applicant enhanced the punishment to one of stoppage of one increment without cumulative effect. In A.No.293 of 1987 made under Section 19 of the Administrative Tribunals Act,- 1985, the applicant has challenged the said order on diverse grounds.

5. When the suo motu review proceedings were pending before the Collector, a Departmental Promotion Committee ('DPC') considered the case of the applicant, respondent-5 and others for promotion to the post of Superintendent of Central Excise (Group-B)('Superintendent') and recommended for the promotion of respondent-5 who was junior to the applicant, however, keeping the case of the applicant in a 'sealed cover' in terms of the Sealed Cover Procedure formulated by Government. In Application No.294 of 1987 the applicant has sought for a direction to respondents 1 and 4 to promote him or consider his case for promotion from the date respondent No.5 was promoted viz., on 27-2-1987.

6. Respondents 1 to 4 who are common in both the cases, have filed their common reply justifying the order made by the Collector on 3-11-1986 on review and the non-promotion of the applicant. Respondent-5 who has been duly served has remained absent and is unrepresented.

7. We will first consider Application No.293 of 1987 filed by



the applicant.

8. Sri Y.G.Ramamurthy, learned counsel for the applicant contends that the Collector, being the appellate authority under the Rules and the Head of the Department, was incompetent either to review or revise the order of the AC and enhance the penalty either under Rule 29 or 29A of the Rules and his order was wholly without jurisdiction and illegal. In support of his contention Sri Ramamurthy strongly relies on a Division Bench ruling of the Delhi High Court in KAILAS PRASAD SINHA v. UNION OF INDIA AND ANOTHER - 1984(2) SLJ 385.

9. Sri M.Vasudeva Rao, learned Additional Central Government Standing Counsel appearing for respondents 1 to 4 sought to support the order of the Collector.

10. In his order dated 3-II-1986 the Collector had stated that he was making that order as a review. But, in their reply, respondents 1 to 4 have stated that the collector had exercised the power of revision conferred on him by Rule 29 of the Rules andnot of review under Rule 29A and that error was only a typographical or clerical error which appears to be correct also. Sri Ramamurthy, in our opinion, veryrightly does notdispute this position also. In this view, we hold and treat the order made by the Collector on 3-II-1986 as one made as a revision under Rule 29 of the Rules andnot as a review under Rule 29A and decide the other questions on that basis.

II. Rule 29 of the Rules which is material reads thus:

29.(I) Notwithstanding anything contained in these rules:

(i) the President or

(ii) the Comptroller and Auditor-General, in the case of a Government servant serving in the Indian Audit and Accounts Department, or

- (iii) the Member (Administration), Posts and Telegraphs Board, in the case of a Government servant serving in or under the Posts and Telegraphs Board, or
- (iv) the head of a department directly under the Central Government, in the case of a Government servant serving in a department or office (not being the Secretariat or the Posts and Telegraphs Board), under the control of such head of a department, or
- (v) the appellate authority, within six months of the date of the order proposed to be revised, or
- (vi) any other authority specified in this behalf by the President by a general or special order, and within such time as may be prescribed in such general or special order,

may at any time, either on his or its own motion or otherwise call for the records of any inquiry and revise any order made under these rules or under the rules repealed by Rule 34 from which an appeal is allowed, but from which no appeal has been preferred or from which no appeal is allowed, after consultation with the commission where such consultation is necessary, and may-

- (a) confirm, modify or set aside the order; or
- (b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed; or
- (c) remit the case to the authority which made the order or to any other authority directing such authority to make such further enquiry as it may consider proper in the circumstances of the case; or
- (d) pass such other orders as it may deem fit;

Provided that no order imposing or enhancing any penalty shall be made by any revising authority unless the Government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in clause (v) to (ix) of Rule 11 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in those clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in Rule 14 and except after consultation with the Commission where such consultation is necessary.

Provided further that no power of revision shall be exercised by the Comptroller and Auditor-General, the Member (Administration), the Posts and Telegraphs Board or the head of department, as the case may be, unless -



- (i) the authority which made the order in appeal, or
- (ii) the authority to which an appeal would lie, where no appeal has been preferred, is subordinate to him.

(2) No proceeding for revision shall be commenced until after-

- (i) the expiry of the period of limitation for an appeal, or
- (ii) the disposal of the appeal, where any such appeal has been preferred.

(3) An application for revision shall be dealt with in the same manner as if it were an appeal under these rules.

In this Rule, the provisions dealing with the powers of the President and other authorities specified in sub-rule (1), the powers that can be exercised, if there was power and the procedural safeguards engrafted in the first proviso before exercising the power itself are not very material to decide the question. The question really turns on the true scope and ambit of the second proviso only. We, therefore, proceed to ascertain its true scope and ambit.

12. *Craies on Statute Law, 6th Edition at page 217 explains the true functions of a proviso thus:-*

The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect'.

Applying this principle it is clear that this proviso really carves out an exception or limitation on the exercise of power of revision conferred on the authorities subject to the conditions stipulated therein.

13. The opening part of the proviso stipulates that no power

of revision conferred by the main Rule 29 of the Rules shall be exercised by (1) the comptroller and Auditor-General of India, (2) Member (personal) Postal Services, (3) Member(Personal) Telecommunications Board or (4) the Head of the Department unless or except in the circumstances stated therein. We are not here concerned with the first three authorities and are concerned with the fourth and the last authority only namely the head of the department. An head of the department can exercise the power of revision only if the conditions are satisfied or exist and not otherwise. In otherwords the conditions stipulated in the two clauses of that proviso must be satisfied or act as limitations on the exercise of power of revision by the head of the department.

14. Sub-clause (i) of the proviso stipulates that the authority which made the order in appeal must be subordinate to the head of the department. In other words, the appellate authority under the Rules that made the order must be and should be subordinate to the head of the department. Sub-clause (ii) of this proviso stipulates that the authority to which an appeal would lie, where no appeal has been preferred, was subordinate to him. In other words, the appellate authority under the Rules must itself be subordinate to the head of the department.

15. In this case, there is no dispute that the Collector who was the head of the Department, was also the appellate authority under the Rules and neither of the two requirements which are a condition precedent for the exercise of revision by him, did ~~not~~ exist. If that is so, then the Collector, was wholly incompetent to exercise the power of revision against the order of the AC,CD. We are here concerned in deciding whether the Colletcor was competent and not



as to which other authority was competent to revise. We have, therefore, no hesitation in holding that the Collector was incompetent to revise the order of the AC.

16. In Kailas Prasad Sinha's case, the Delhi High Court had occasion to examine a similar question under Rule 29 of the Rules which then provided for a review and not a revision as at present. The language of the two Rules are one and the same. In upholding a similar contention, the Delhi High Court expressed thus:

"6. The main argument of Mr. Bala Krishnan is by invoking second proviso to Rule 29, relevant of which reads as under:

"Provided further no power of review shall be exercised by the Comptroller and Auditor-General, the Posts and Telegraphs Board or the head of department, as the case may be, unless-

(i) the authority which made the order in appeal, or

(ii) the authority to which an appeal would lie, where no appeal has been preferred is subordinate to him".

7. The argument in short is that the petitioner's Disciplinary Authority was the Deputy Director, CBI. Appeal against his order would have laid to the Director, CBI. Hence, review could only be exercised by an authority which would not be subordinate to the appellate authority. The power of review could only have been exercised by an authority higher than that of Director, CBI and not by Director himself. Now it is stated in the writ petition a number of times that the appellate authority was the Director, CBI and, therefore he could not initiate the proposal for review. No doubt the power of review is given to the head of the department by virtue of Rule 29(l)(iv) but the same is subject to second proviso, which means that even if the Director CBI was head of the department he was still debarred from initiating the review because he himself being the appellate authority was not a higher officer than the appellate authority as is the requirement in second proviso. This point has been emphasised in the writ petition wherein it is stated that the head of the department can only review the matter where the appellate authority is subordinate in rank to the head of the department which portion does not exist here. The petitioner was however told as per letter dated 24-5-1973 from Director vide annexure-E to the writ



petition that notice to the appellant was issued by him not as an appellate authority but as a head of the department having power to review. This stand of the Director is a clear admission that the Director, CBI was the appellate authority but since he was exercising his power as the head of the department the power of review was available to him unencumbered by any period of limitation. That apparently was also the stand which was repeated in the counter-affidavit where in explaining the notice of 24-5-1973 issued by the Director the position taken was that it was wrong to contend that notice was issued by him as an appellate authority but in fact it was issued as a head of the department having power of review. Again this very problem of Director being the appellate authority was assumed where in para 14 it was stated that there could have been no question of respondent No.2 being the appellate authority in respect of orders dated 31-12-1971 of the Disciplinary Authority exonerating the petitioner as no appeal lies to an authority against such an order. This was also the stand which was persisted at the time of hearing of the writ petition by the learned single Judge. The learned Single Judge also as held that the Director was the head of the department. But, he went on to observe that as the appellant had been exonerated in the proceedings under Rule 14 obviously no appeal could have or in fact has been filed against the said order, the Director did not and could not act as the appellate authority. The learned Judge accepted that had an appeal been filed under Rule 14, Director would have been the appellate authority, and if he had sought to review the order then, it could be said that he had reviewed the order as an appellate authority and he therefore held that Shri Sen had acted as the head of the department in ordering the order of review and not as an appellate authority and his action would be legal. We are unable to agree with the finding of the learned single Judge. Second proviso to Rule 29 clearly says that no power of review shall be exercised by the head of the department unless the authority to which an appeal would lie where no appeal is preferred is subordinate to him (view sub-clause (ii)). Thus merely being a head of the department is not sufficient by itself to exercise a power of review. What has further to be seen is whether the head of the department is not the appellate authority can not be said to the subordinate to himself. In such eventuality review could be exercised by some authority higher than the head of the i.e. department Director CBI. In our opinion the learned single Judge was in error in holding that the question of who is appellate authority depended upon whether an appeal had been filed or could be filed. The Rules of service lay down who is an appellate authority. He remains so whether an appeal is filed or not. The object of 2nd Proviso to Rule 29 is to provide that though the head of department can exercise the power of review, it is only in those cases where the appellate authority is subordinate to the former. But, as in the present case the appellate authority and reviewing authority are the same person i.e., Director C.B.I., the condition prece-

precedent in 2nd Proviso to Rule 29 is not satisfied. In this view of the matter the finding of the learned Single Judge that the review notice could be issued by the Director C.B.I. even when he was the appellate authority cannot be sustained. The mere fact that no appeal could be filed because of the exoneration is totally immaterial because sub-clause II to 2nd proviso to Rule 29 clearly says that the authority to which an appeal would lie where no appeal had been preferred. Thus the actual filing or not of the appeal is of no consequence. What is crucial is that the appellate authority cannot exercise the power of reviewing authority under Rule 29. In that view it has to be held that the Director,C.B.I. being the appellate authority could not exercise the power of reviewing authority under Rule 29, and the impugned notice thus issued by him was not warranted in law."

We are in respectful agreement with these views expressed by their Lordships.

17. On the foregoing discussion, we hold that the Collector was wholly incompetent to revise the order of the AC,CD made on 31-3-1986 and his order made on 3-11-1986 is liable to be quashed on that ground without examining all other grounds.

18. As we have reached the conclusion that the order of the Collector made on 3-11-1986 was liable to be quashed, it now becomes necessary to examine the case of the applicant in A.No.294 of 1987. We, therefore, now proceed to examine the same.

19. Sri Vasudeva Rao does not dispute that respondent-5 who was junior to the applicant in the cadre of Inspectors had been promoted as a Superintendent on 27-2-1987 and that the DPC had adopted the sealed cover procedure in the case of the applicant and the same had not so far been opened and its results declared. If that is so, then it follows that we should direct respondents 1 and 4 to open the sealed cover and pass appropriate orders as the circumstances so justify.

20. In the light of our above discussion, we make the following orders and directions:

(a) We allow Application No.293/1987 and quash Order No.C. II/10-A/5/85-A.3 dated 3-II-1986 of the Collector of Central Excise, Bangalore. But, this order does not prevent the competent authority to revise the order of the AC in accordance with law.

(b) We direct respondents 1 and 4 to open 'the sealed cover' kept against the applicant and if the DPC had found him fit for promotion, then issue a consequential order of promotion from the date his immediate junior viz., respondent-No.5 was promoted with all consequential benefits flowing from the same. If the DPC had, however, found that the applicant was not fit for promotion on the sole ground of the order of the Collector made on 3-II-1986 viz., imposition of stoppage of one increment without cumulative effect, was a bar or did not warrant his promotion, then and then only respondents 1 and 4 are directed to re-consider the case of the applicant for promotion with the assistance of the DPC without reference to that order and then pass appropriate orders as the circumstances so justify, extending all consequential benefits flowing from such promotion, if any, with all such expedition as is possible in the circumstances of the case and in any event within a period of 90 days from the date of receipt of the order of this Tribunal.

21. Applications are disposed of in the above terms. But, in the circumstances of the cases, we direct the parties to bear their own costs.

Sd. _____

VICE-CHAIRMAN(J)
11/6/1987

Sd. _____

VICE-CHAIRMAN(A)
11.8.87

NP?

'True copy'

R. Jayaram 17/8/87
SECTION OFFICER
CENTRAL ADMINISTRATIVE TRIBUNAL
ADDITIONAL BENCH
BANGALORE