

CENTRAL ADMINISTRATIVE TRIBUNAL
BENCH AT MUMBAI

ORIGINAL APPLICATION NO. 23 /1993

Date of Decision: 28/11/96

D.K.Nadgouda

Petitioner/s

Shri M.S.Ramamurthy

Advocate for the
Petitioner/s

V/s.

Union of India & Ors.

Respondent/s

Shri Suresh Kumar for Sh.M.I.Sethna

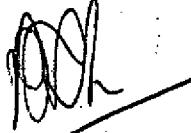
Advocate for the
Respondent/s

CORAM:

Hon'ble Shri B.S.Hegde, Member (J)

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 ?


(P.P.SRIVASTAVA)

MEMBER (A)


(B.S.HEGDE)

MEMBER (J)

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

OA. NO. 23/93

Present this the 2nd day of Aug, 1996

CORAM: Hon'ble Shri B.S.Hegde, Member (J)
Hon'ble Shri P.P.Srivastava, Member (A)

D.K.Nadgouda
residing at Flat No. 2,
Brahmachaitanya Co-op.Hsg.
Society Ltd., Pandurang Wadi,
Dombivli (East), Dist.Thane.

By Advocate Shri M.S.Ramamurthy ... Applicant

v/s.

1. Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
Govt. of India, North Block,
New Delhi.
2. Collector of Customs,
Central Excise, Bombay III
Navprabhat Chambers, 5th Floor,
Ranade Road, Dadar (West),
Bombay.

By Advocate Shri Suresh Kumar for
Shri M.I.Sethna, C.G.S.C. ... Respondents

O R D E R

(Per: Shri B.S.Hegde, Member (J))

By this OA. the applicant is challenging
the impugned order dated 27.7.1992 against initiation
of departmental enquiry proceedings and issue of
charge-sheet on 27.7.1992 under Rule 14 of the
CCS(CCA) Rules, 1965 in respect of certain action
taken by the applicant, while working as Superintendent
of Central Excise. The charges levelled against the
applicant reads as below :-

"That the said Shri D.K.Nadgouda, Supdt.,
C.Ex., while functioning as Superintendent
in charge of Range IV, Kalyan I Dn. of
Bombay III Collectorate during the period
from 14.6.88 to 20.8.91 did not maintain
devotion to his duties and acted in a
manner unbecoming of a Govt. servant in
contravention of sub-rule 1(ii) and 1(iii)
of Rule 3 of the C.G.S.(Conduct) Rules, 1964,
in as much as he was negligent in recommending
the classification of S.S.Sink under Heading No.
7323.00 vide classification list bearing No.NIL
with effect from 25.7.91 filed by M/s.Pheonix
Appliances Pvt.Ltd., Vasind."

The Tribunal after considering the rival contentions of the parties, admitted the OA. on 16.4.1993 and had granted interim relief except in terms of 9 (a) all other benefits payable to the applicant. Thereafter, the applicant states, that the respondents have not released the payment of gratuity, commutation, etc. till now.

2. The charge-sheet was issued against the applicant on 27.7.1992 one month before his retirement. He retired on assuming superannuation on 31.8.1992. It is stated by the applicant that the Company having been registered as an SSI Unit were ~~availing~~ themselves of the benefit of Central Excise Notification No.175/86 dated 1.3.1986. One of the products manufactured by the said company was "Sinks and Wash Basins". The said product was assessed to duty under sub-heading No. 73.24. The Union Budget of 1991 had amended Notification No. 175/86 C.E. by Notification No. 63/91 dated 25.7.1991 and extended full exemption to excise duty to "Table, Kitchen or other household articles or parts thereof the Stainless Steel" falling under the Heading No. 73.23. After the said changes, the assessee filed a new classification list with effect from 25.7.1991 in respect of Stainless Steel Sinks by classifying the said product under sub-heading No. 72.23 as "Kitchen Articles of Stainless Steel" instead of "Sanitary Wares" falling under sub-heading No.73.24 and claimed full exemption from Central Excise duty under the said amended Notification. The allegation against the applicant is that he failed in his duties in recommending the said product under Ch.Heading No. 73.23 instead of No. 73.24. Though he denied the said charges levelled against him, the respondents proceeded with the enquiry which he challenged before the Tribunal

and got the stay against further proceedings as per their order dated 27.7.1992. The Note put up by the applicant to the higher authorities who possess quasi-judicial power to dispose of the said recommendation indicate vide letter dated 7.8.1991 at page 40 of the OA, stating that the exemption is being extended to cover table, kitchen as other household articles and parts thereof of stainless steel falling under heading No. 73.23, the party's classification list may be approved on the basis of above. On the basis of the recommendation made by the applicant, the Asstt. Collector (competent authority possessing quasi-judicial power) vide his order dtd. 30.10.1991 approved the same and given exemption to 'Sinks and Wash basin' items which falls under the heading 73.24 and stating that it falls under the heading No. 73.23. The applicant vide his reply to the show cause notice dated 30.4.1992 has stated that he had checked up the tariff and explanatory notes of the said chapter but had doubts as to whether it was to be classified under Chapter 73.23 or 73.24. However, it was recommended under Chapter 73.23 which lapse on his part may be wrong, may kindly be condoned.

3. The contention of the applicant in this OA. is that "Sanitary Wares and Kitchen utensils" bear the same rate of tax prior to 1991. In the amended Notification 25.7.1991 Kitchen items were given exemption, therefore the Assessee filed new classification list and seeks for exemption because the contention of the assess is that the item he produces i.e. sinks and wash basins are used for kitchen purposes.

Re

On the basis of his filing a new classification the applicant has put up a note recommending his case for consideration to A.C. to decide whether the item in question would come within the Chapter 73.24 or 73.23. Further contention of the applicant is that even assuming that his recommendation is wrong, the same is liable for appeal and review under the rules, in this case his recommendation has been accepted by the Asstt. Commissioner who possess quasi-judicial authority and the department has not suffered any loss and the Assessee is continue to pay the excise duty as per rules though under protest for the items he produces and no refund has been paid to the applicant, thereby no loss is caused to the respondent department. It is further contended that there was no allegation of bias against him, not any charge that he was connived with the party or made the recommendation with any bad intention. That being the position, it cannot be said that that would amount misconduct on his part, least it may be treated as negligence. Therefore, the charge levelled against him cannot be sustained in law. At the most it may be wrong interpretation of classification and there is no malafide intention on the part of the applicant to seek any monetary benefits by recommending the S.S.Sinks case wrongly. There are appellate and revision authority who could rectify the mistake. The applicant is neither a quasi-judicial or nor any administrative power to pass any final order. He only recommended to the competent authority for consideration.

Ab

.. 5/-

4. Shri Ramamurthy, counsel for the applicant in support of his contention has cited decisions, such as V.K.R.Dhawan vs. Union of India, 1993 9240 ATC,SC p.74., (1989) 9 ATC 500 M.N.Qureshi vs. Union of India and P.L.Khandelwal vs. Union of India (1989) 9 ATC 509. In all these decisions it was held that mere fact that the petitioner made wrong assessment does not amount to misconduct and the distinction between culpable misconduct and interference with exercise of independent judgement will be blurred and not only the cause of justice but even of administrative efficiency will be badly affected.

5. The respondents in their reply denied the various contentions of the applicant and stated that the application filed by the applicant is premature and requires dismissal and whatever pleas taken by the applicant that are raised before the Tribunal, the same should have been raised before the enquiry officer or disciplinary authority, instead of exhausting the statutory remedies, he has approached this Tribunal which is pre-mature and not to be entertained. Further, it is contended that the applicant has to act in good faith while making recommendation. If there is any doubt, he should have sought clarification and his conduct should have been reasonable, fair and just and he should use his discretionary powers and act as a prudent person would have done in the circumstances. In the instant case, admittedly, the S.S.Sinks and wash basins the assessees were paying excise duty on their product under S.H. 73.24 of the Schedule to the Central Excise Tariff Act, 1985 prior to issuance of the Notification No. 63/91-CE dated 25.7.91. By virtue of the above mentioned notification the excisable goods falling under sub-heading 73.23 and

of the description of 'Table, Kitchen or other House hold articles and parts thereof 'attract 'Nil' rate of duty w.e.f.25.7.91. The said assessee to avail of the exemption under the amended Notification, filed a classification list No. 'Nil' w.e.f. 25.7.91 seeking classification of their product 'S.S.Sinks' under S.H. 73²³ of Schedule to Central Excise Tariff Act, 1985 as 'Kitchen article of stainless steel'. If the applicant has any doubt, he should have issued a notice to the parties before recommending the exemption claim by the S.S.Sinks to the higher authorities which he did not do so in the instant case. Since he is a trained official of the department, he ought to have taken utmost care while verifying and recommending the said classification list since the classification list was having an effect of reduction in revenue. The applicant has given the recommendation without any responsibility, etc. Though the interim order was passed by the Tribunal as way back as in 1993, the respondents have not taken any efforts to vacate the interim order and allowed the matter to rest.

6. We have heard the arguments of Mr.M.S. Ramamurthy, counsel for the applicant and Shri Suresh Kumar for Shri M.I.Sethna, counsel for the respondents and have perused the papers carefully.

7. In the case before us, all that is alleged in the charge-sheet is that the applicant was negligent and careless in proper discharge of his duty as a Supervisory officer. No doubt there is a lapse on the part of the applicant while recommending for exemption to higher authority quoting a wrong heading.

Sh

The Apex Court in S.Govinda Menon vs. Union of India (A.1967 SC 1274) held that if there was prima facie material for showing recklessness or misconduct on the part of the public servant in the discharge of his official duties, Govt. was entitled to institute disciplinary proceedings. In the said judgement it is also observed that the protection available to the public servant while discharging judicial/quasi judicial functions is that no action can be taken against him for discharge of his quasi-judicial function if the same have been discharged in good faith, however, action can be initiated against him only if lack of good faith, i.e. dishonesty or deliberate negligence is prima facie shown to have been discovered against him by the disciplinary authority. In other words, it would mean that if the provisions of the Act (or) rules have been disregarded by a public servant while discharging his judicial functions which has resulted in an erroneous judgement or order the correctness or legality of the order or decision can be challenged by way of appeal or revision ^{under} the relevant provisions of the Act, then a Govt. servant is merely guilty of negligence he will be entitled to protection under the immunity clause etc. Keeping the aforesaid ratio in view, the short question for consideration in this case is whether in the facts and circumstances of the case by recommending the case of the assessee under wrong classification whether the applicant has misconducted himself in terms of conduct Rules. Courts have held that mere negligence/carelessness in performance of duty, not misconduct unless the degree of culpability is very high. On a

th

reading of the charge-sheet framed against the applicant, it was made out that the applicant was negligent in recommending the classification list of S.S.Sinks under the heading 73.23 and thereby committed gross misconduct. The basis of the said allegation is that he had not exercised his proper scrutiny of the various notifications issued by the department from time to time. Even if it is accepted that the applicant was negligent and careless as alleged by the respondents that would not constitute a misconduct. The apex court in Union of India vs. J.Ahmed, AIR 1979 SC 1022 has held quoting Stroud's Judicial Dictionary that "misconduct means, misconduct arising from ill motive: acts of negligence, errors of judgement, or innocent mistakes do not constitute such misconduct". In the case before the Supreme Court the concerned officer was charged with misconduct on the ground of lack of efficiency and failure to attain high standard of administrative ability. The Supreme Court held that these allegations would not themselves constitute misconduct. It is also further observed that "negligence in performance of duty and a lapse in performance of duty or error of judgement in evaluating the situation may be negligence in discharge of duty, that would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high." This decision was rendered in the facts and circumstances of the case.

8. Applying the ratio laid down by the Supreme Court, to the facts of this case before us, all that is alleged in the charge-sheet is that the applicant was negligent and careless in recommending wrong classification as Supdt. of Central Excise, nowhere it is mentioned what was the consequential loss to department because of his negligence or carelessness of the applicant. Since his decision or recommendation even if it is wrong, the same is liable to appeal or revision as per the provisions, and in fact in appeal the decision of the Assistant Collector was set right by quashing the same. Therefore, from the averment in the charge-sheet the degree of culpability as observed by the Supreme Court cannot be assessed. So in the absence of that, we are constrained to hold that the allegations made against the applicant would not constitute misconduct so as to initiate a disciplinary enquiry against the applicant, that too at the fag end of his service. In such circumstances, it is obligatory on the part of the disciplinary authority to discover and establish prima-facie facts constituting malice or deliberate negligence before it can proceed to initiate disciplinary proceedings against a public servant.

9. It is true that the applicant was negligent in recommending exemption of payment of excise duty by virtue of the amended notification issued by the department vide 25.7.1991. Normally, we will have no hesitation in continuing the disciplinary process as proposed in the charge-sheet dated 27.07.1992. However, we find that the applicant has since retired from service in the meanwhile, although the disciplinary authority in this case would be entitled to complete the disciplinary proceedings, the

: (b) :

punishment can only be imposed by the President, since the employee has retired. The punishment after retirement would be governed by the provisions in the Pension Rules. Para 9(1) of the C.C.S. Pension Rules reads as below :-

"9.(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement."

10. Since the punishment after retirement is given, the President is empowered to withhold full pension or in part, either permanently or for a specific period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, etc. In the present case, in our opinion the same does not come in any one of the category referred to above. In view of the position stated above, in the facts and circumstances of the case, we are of the opinion that it will not be desirable to permit the respondents to proceed with the disciplinary proceedings against the applicant. Further, in the instant case, the approval made by the Asst. Collector was set aside by the Appellate Authority, thereby no prejudice is caused to either party and the assessee continues to pay the excise duty as he was paying prior to 25.07.1991.

10

: (1) :

11. Accordingly, we allow the O.A. and quash and set aside the impugned order dated 27.07.1992. Since the applicant has retired from service, any retiral benefit, if due, shall be released and paid within a period of two months from the date of receipt of a copy of this order.

12. The O.A. is disposed of with the above directions.
No order as to costs.


(P.P. SRIVASTAVA)

MEMBER (A).


(B. S. HEGDE)
MEMBER (J).

OS*