

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.1678/2003

New Delhi this the 6th day of May, 2004.

HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (ADMN)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

Vimal Kumar,
R/o S-1-61, Shastri Nagar,
Ghaziabad.

-Applicant

(By Advocate Shri D.K. Gupta)

-Versus-

1. Union of India through the
Secretary of Revenue,
Ministry of Finance, New Delhi.
2. The Chairman of Central Board
of Excise and Customs, North Block,
New Delhi.
3. The Chief Commissioner of Customs,
& Central Excise Commissionerate,
Meerut Mangal Pandey Nagar,
Garh Road, Meerut (UP).
4. The Commissioner of
Customs & Central Excise
Commissionerate, Meerut-1,
Meerut (UP).

-Respondents

(By Advocate Shri R.N. Singh)

O R D E R

By Mr. Shanker Raju, Member (J):

Applicant impugns respondents' order dated 28.5.2003 as well as 5.6.2003, placing him under deemed suspension from the date of dismissal and restricting the period to subsistence allowance. Quashing of the aforesaid has been sought with treatment of period from 1.3.2000 till reinstatement as spent on duty with all consequential benefits.

2. At the outset, learned counsel for applicant Sh. D.R. Gupta has not pressed his relief pertaining to grant of scale under ACP Scheme.

3. Applicant who was working as Superintendent of

Central Excise was dismissed from service after dispensing with the enquiry under Article 311 (2)(b) of the Constitution of India.

4. Applicant challenged the impugned order in OA-2457/2001, where with the following directions OA was allowed:

"Accordingly the OA is allowed. The orders passed by the appellate authority as well as passed by the disciplinary authority are quashed and set aside. Respondents are directed to reinstate the applicant in service forthwith. However, the department may conduct the enquiry against the applicant in accordance with the CCS (CC) Rules, law on the subject as well as per instructions. No costs."

5. In pursuance of the above, applicant preferred CP-542/2002 which was disposed of on 31.1.2002, directing the respondents to comply with the directions within a period of four weeks.

6. In compliance thereof the order of dismissal was set aside. A further enquiry has been ordered and applicant was placed under deemed suspension under Rule 10 (4) of the CCS (CCA) Rules, 1965. By a subsequent order dated 5.6.2003 the suspension period was operated under FR 53.

7. Learned counsel for applicant contends that the decision of the authorities to place applicant under deemed suspension from retrospective effect i.e. from 1.3.2002 is not in accordance with Rule 10(4). According to Sh. Gupta, the aforesaid provision cannot be invoked when no enquiry has been held while imposing penalty. He places

reliance on a decision of the Apex Court in Mahender Singh v. Union of India, 1991 Supp (2) SCC 127. The learned counsel also alleges discrimination in so far as applicant's deemed suspension is concerned and in this backdrop it is stated that in an order passed by the Allahabad Bench of this Court in OA-1224/2001 in Mritunjay Tripathi v. Union of India & Ors., decided on 31.3.2003, the orders passed under Article 311 (2)(b) of the Constitution were set aside with grant of consequential benefits, including arrears of salary with liberty to proceed under CCS (CCA) Rules, 1965. As applicant contends that he is similarly circumstance he should have been meted out the same treatment in the backdrop that the aforesaid order has been implemented by the respondents.

8. Learned counsel for applicant Sh. Gupta has relied upon a decision of the Apex Court in Union of India v. Madhusudan Prasad, 2004 (1) SCC 43 to contend that on reinstatement by the Court on account of contravention of principles of natural justice one is entitled to back wages under FR 54.

9. On the other hand, respondents' counsel vehemently opposed the contentions. He contends that as per Rule 10 (4) as the earlier punishment was by way of penalty on a further enquiry applicant has been rightly placed under deemed suspension. The further enquiry is an enquiry to be instituted on generation of new circumstances on setting aside of the dismissal order.

10. The learned counsel contends that liberty was accorded by the Tribunal in its order dated 3.8.2002 to proceed against applicant in accordance with CCS (CCA) Rules, 1965.

11. Distinguishing the case in Mahender Singh's case (supra) it is stated that therein the order was not by way of penalty and a discharge simpliciter under Rule 5 (1) of the CCS (TS) Rules and accordingly Rule 10 (4) was not applicable.

12. We have carefully considered the rival contentions of the parties and perused the material on record. Rule 10 (4) of the CCS (CCA) Rules, 1965 is reproduced as under:

"Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of Law and the Disciplinary Authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders:

Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the Court has passed an order purely on technical grounds without going into the merits of the case."

13. The Apex Court in Mahender Singh's case (supra) while interpreting Rule 10(4) ibid observed as under:-

"There are three requirements for the application of Rule 10(4); (i) the government servant is dismissed, removed or compulsorily retired as a measure of penalty; (ii) the penalty of dismissal, removal or compulsory retirement is set aside or declared or rendered void by a decision of a court of law; (iii) the disciplinary authority decided to hold a further inquiry against the government servant on the allegations on which the original order of penalty was imposed. If these three requirements are satisfied then the government shall be deemed to have been placed under suspension by the appointing authority from the date of original order of penalty of dismissal, removal or compulsory retirement and he shall continue to remain under suspension until further orders."

14. Further while dealing with the issue of further enquiry the following observations have been made:

"7. The order of the Tribunal and the management as to the retrospective suspension of the appellant cannot be sustained under Rule 10(4) of the Rules. It may be relevant to remember that the original order of termination was not passed against the appellant as a measure of punishment. It was a 'simpliciter termination' of the appellants' service under Rule 5 (1) of the CCS (Temporary Service) Rules, 1965. The Tribunal has set aside the order on the ground that it amounts to punishment and the order of punishment could not have been made without holding an inquiry against the appellant. But that is not the same thing to state that the management made an order terminating the services of the appellant by way of penalty. The management treated the said order as a simpliciter discharge. Rule 10(4) therefore has no application to the case of the appellant.

8. Secondly, it would be misnomer to call it a further inquiry as contemplated under Rule 10(4). There was no question of the management deciding to hold a further inquiry since there was no earlier inquiry against the appellant.

9. The power to place delinquent officer under suspension from the date of original order of dismissal, removal or compulsory retirement from service would be available provided if the original order of dismissal, removal or compulsory retirement from service was made by way of penalty and that order has been set aside by a court of law. Since there was no inquiry leading to the removal of the appellant in the first instance, the decision to hold fresh inquiry does not attract Rule 10(4). The retrospective suspension of the appellant is therefore unjustified and without authority of law."

15. If one has regard to the above it is no more res integra that sine quo non for application of Rule 10(4) is fulfilment of all the three conditions which inter alia includes a dismissal as a measure of penalty, it is being declared void by the court of law and decision of the disciplinary authority to hold a further enquiry. It is only satisfaction of these three requirements when Rule 10(4) ibid can be invoked.

16. In the instant case, applicant who was dismissed under Article 311(2)(b) the decision has been rendered nullity not only for violation of principles of natural justice but also arbitrarily invoking Article 311(2)(b) when the enquiry was permissible. In this backdrop the dismissal was set aside. However the department has been left with the liberty to proceed applicant in accordance with rules.

17. Having regard to the aforesaid decision of the Apex Court admittedly applicant was awarded penalty under Rule 11 of the CCS (CCA) Rules which has been set aside by the Court. The only question for our determination is whether in a given case when the earlier order of dismissal is not followed after an enquiry held under CCS (CCA) Rules can it be said that further enquiry can be held to invoke deemed suspension under Rule 10(4) ibid?

18. As a sine quo non of Rule 10(4)¹ a further enquiry is to be ordered by the disciplinary authority as while invoking Article 311 (2)(b) against the applicant regular enquiry procedure has been dispensed with. It has to be concluded that no enquiry had been held. In that

event the enquiry now ordered cannot be termed as a further enquiry and applicant cannot be treated as deemed suspended from the date of dismissal but the suspension would operate prospectively, i.e. from the date of reinstatement.

19. Accordingly the intervening period from the date of dismissal to the date of reinstatement would have to be operative and decided as per FR 54 in the light of the decision of the Apex Court in Madhusudan Prasad's case (supra) where the following observations have been made:

"5. It is true that when a reinstatement is ordered in appeal or review the authorities can pass specific order regarding the pay and allowances to be paid to the government servant for the period of his absence from duty preceding the dismissal, removal or compulsory retirement, as the case may be. This is an enabling provision and the authorities can consider the relevant facts as to whether the employee should be denied the salary for the period he was kept under suspension preceding the removal, dismissal or compulsory retirement. The counsel for the appellant has placed reliance on the decision of the Constitution Bench of this Court in Managing Director ECIL vs. B.Karunakar 1993 SCC (L&S) 1184 where this Court held that the question whether the employee would be entitled to the back wages and other benefits from the date of his dismissal to the date of reinstatement, if ultimately ordered, should invariably be left to be decided by the authorities concerned according to law, after the culmination of the proceeding and depending on the final outcome. If the employee succeeds in the fresh enquiry and is directed to be re-instated, the authority should be at liberty to decide according to law how it will treat the period from the date of dismissal till the reinstatement and to what benefits, if any, and the extent of the benefits, he will be entitled. The reinstatement made as a result of the setting aside of the enquiry for failure to furnish the report should be treated as a reinstatement for the purpose of holding the fresh enquiry from the stage of furnishing the report and no more, where such fresh inquiry is held.

6. The above case was concerning an employee, who was found guilty in an inquiry but the report was not furnished to the employee and the show cause notice was not served on him. In view of the facts and circumstances of the case, the court directed that appropriate order should be passed

regarding the back wages. In the instant case, the Appellate Authority directed reinstatement of the respondent and held that he was not entitled to get back wages for the period he was out of service. It may be noticed that the respondent was removed from service without any inquiry and he was not even given a show cause notice prior to his dismissal from service. There was fault on the part of the employer in not following the principles of natural justice. These relevant facts were considered and the learned Single Judge and also the Division Bench ordered the payment of back wages. We do not think this is a fit case where fundamental rule 54 could have been invoked by the authorities. We find no merit in the appeal. The appeal is accordingly dismissed."

20. In the light of the above, decision to deem applicant under suspension from the date of dismissal cannot be sustained in law. The case of applicant does not come within the ambit of Rule 10 (4) *ibid*. Accordingly the order passed cannot be sustained in law.

21. Respondents' plea that decision of Mahender Singh's case (*supra*) would not apply in the instant case cannot be countenanced. The ratio decidendi is non-fulfilment of required conditions under Rule 10 (4). There would be an occasion for further enquiry if there had been an enquiry held earlier. The aforesaid refers to situation where the dismissal or removal has been as a consequence of disciplinary proceedings but like termination which has been set aside in Mahender Singh's case (*supra*) as a punitive order deeming a penalty imposed upon applicant without following due process of law on the same analogy an order passed under Article 311 (2)(b) is not preceded by a departmental enquiry the procedure is dispensed with. The ratio in Mahender Singh (*supra*) *mutatis mutandis* applies to an order passed under Article 311 (2)(b) of the Constitution as well.

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(2)

22. In the result, for the foregoing reasons, DA is partly allowed. Impugned orders are set aside in so far as deeming applicant under suspension w.e.f. 1.3.2000. He shall be entitled to treatment of the period and consequential benefits of pay and allowances as per FR 54. Respondents shall pass an order to this effect within a period of two months from the date of receipt of a copy of this order. No costs.

S. Raju
(Shanker Raju)
Member (J)

V.K. Majotra
6.5.04
(V.K. Majotra)
Vice-Chairman(A)

'San..'