

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3869 OF 2021

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Capt. Sushant Kumar,
Age : 41 yrs, Occupation : Service,
Residing at Flat No. D3, Officers
Quarters, Maritime Training
Institute, 52-C, Adi Shankaracharya
Marg, Powai, Mumbai 400 072. } ...Petitioner

Versus

The Shipping Corporation of India
Limited, Registered Office at
Shipping House, 245, Madame Cama
Road, Mumbai - 400 021. } ...Respondent

Dr. Abhinav Chandrachud, a/w Adv. Vidya Kulkarni a/w
Adv. Reshma Kulkarni i/by UV and Asso for Petitioner.

Adv. Sandeep V. Marne a/w Adv. Vishal P. Shirke for
Respondent.

CORAM : PRASANNA B. VARALE &
S.M. MODAK, JJ.

RESERVED ON : DECEMBER 06, 2021.
PRONOUNCED ON : APRIL 01, 2022.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. By way of present Petition, Petitioner challenges the award dated 06th March, 2020 passed in Disciplinary Enquiry Proceedings against Petitioner and the ultimate conclusion drawn by the Authority that out of four charges leveled against the Petitioner only charge no. 4 partly establishes, resultantly awarded

the punishment in the nature of penalty causing reduction of two increments in the time scale of pay for a period of one year from the date of order. The order further states that the employee will not earn increment of pay during the period of such reduction and on expiry of such period, the reduction will have the effect of postponing the future increment of pay.

2. Dr. Chandrachud, learned Counsel appearing for Petitioner submitted that on an erroneous appreciation an order in the nature of major penalty is passed against the Petitioner. It is further submitted that the Petitioner who had earned higher qualification after having been trained in merchant navy occupied various posts and is one of the well decorated officers in the shipping industry.

The Petitioner entered in the services of Respondent – Shipping Corporation of India Limited way back in the year 1998. On 14.02.2010, the Petitioner signed off as master of Respondent No. 1 as the Petitioner wanted to join one of the reputed organizations in shipping namely, Visakhapatnam Port Trust, India in view of vacancy being available. By

taking recourse to clause 127 of the agreement between MUI-INSA, Petitioner submitted a notice/intimation of his resignation dated 16.02.2011. The copy of the said notice/intimation under caption 'notice to leave the organization' is placed on record at Exhibit 'A', page 34.

Perusal of the document show that it is submitted in the notice by the Petitioner that he has joined the organization in the year 1998 and by expressing his gratitude for an opportunity giving him to serve the said organization, Petitioner further submitted that he is desirous of joining a job vacancy with Visakhapatnam Port Trust, India and accordingly served three months prior notice.

3. Then on 09.04.2011, the Petitioner again submitted notice of resignation with request to release him within 24 hours and stated in the communication that due to unavoidable reasons he needs to join new organization on 11.04.2011.

In response to said communication forwarded by the Petitioner, one of the Officer of Respondent No. 1 informed the Petitioner by communication dated

12.04.2011 that the Respondent No. 1 had received his notice/resignation and the Respondent No. 1 shall release him after completion of required notice period. Then on 19.04.2011, Respondent in response to the communication of Petitioner dated 09.04.2011 informed the Petitioner that his letter regarding resignation is received. His another communication requesting the Corporation to release him is also referred and further it was informed to Petitioner that the Respondent No. 1 shall endeavor to relieve him from SCI services subject to approval of SCI Management. It was also informed to the Petitioner that for any further action he shall be in touch with one officer namely, Mr. Adhangale, GM(FP).

4. Then Petitioner was appointed in Visakhapatnam Port Trust, India and the copy of the order is placed on record at Exhibit E, page 38. It was informed to the Petitioner vide order dated 26.04.2011 that the appointment of Petitioner is temporary and same will not confer any right for claiming regular appointment against the post of seniority etc.

5. It is submitted before this Court that one of the Directors of SCI requested the Petitioner to withdraw his resignation on account of acute shortage of qualified masters. It is submitted by the Petitioner that as there was shortage of masters specially for the gas tankers, the then Director – Kailash Gupta requested him to withdraw his resignation and assured him that if he withdraw his resignation and join Respondent No. 1, his seniority would be maintained.

6. The Petitioner who had worked with Respondent for sufficient long time and as goodwill gesture, decided to withdraw his resignation and by way of communication dated 26th May, 2011 expressed his wish to the Senior Officers to withdraw his resignation dated 09th April, 2011.

By way of communication dated 14th December, 2012 the Petitioner was selected as one of the candidates for the post of Master Mariners and Chief Engineer Officer. Along with Petitioner there were as many as 9 other candidates were selected. In furtherance to the order dated 14th December, 2012 the Petitioner immediately joined LPG/C Vessel Nanga Parbat

as Master on 17.07.2011.

7. It may not be out of place to state that the application of the Petitioner for joining Respondent No. 1 was considered favourably and order passed in favour of the Petitioner and by way of communication dated 12th April, 2012 the Petitioner's application for absorption in Shore Cadre as DGM and Chief Officer SG was allowed. It is then submitted in the Petition that his selection in the Corporation came to his knowledge only after he signed off from a Vessel of Respondent No. 1 vide letter dated 26th November, 2013.

8. It seems that post joining of the Petitioner in the services of Respondent No. 1 by seeking withdrawal of his resignation the Respondent No. 1 initiated an action against the Petitioner and in that course issued a memorandum on 28th March, 2018.

The Petitioner immediately replied to the memorandum on 06th April, 2018. Then by communication dated 19/24.09.2018 under caption memorandum, the Petitioner was informed as to why disciplinary action should not be initiated against him on the ground of non informing the SCI regarding his employment with

Visakhapatnam Port Trust, India and by this memorandum the Petitioner was further informed that he is subjected to the procedural aspects.

9. It is submitted by the Petitioner that after 7 years of his reinstatement and after five years since his appointment as Shore Cadre in the rank of DGM, the Petitioner was subjected to memorandum for initiation of disciplinary action against him.

In furtherance of second memorandum dated 26th August, 2019, the Disciplinary Enquiry was initiated against the Petitioner thereby appointing a Enquiry Officer and a Presenting Officer. The Petitioner was served with copy of charge-sheet. Following charges leveled against the Petitioner:

"Charge No. -1: Capt. Sushant Kumar, while in service of SCI as permanent/regular SCI Officer, joined Visakhapatnam Port Trust (VPT) on 26.04.2011 as Class-1 Pilot Officer. Capt. Sushant Kumar notice to leave organization bearing the date 16.02.2011 was received by SCI on 11.04.2011. Capt. Sushant Kumar unauthorisedly left the services of SCI and joined another organization on the 16th day of receipt of notice and that too without completing the 3 months' notice period as required by Rule XI, 2 of Functional Guidelines for Fleet Personnel Department of SCI. By this act the Capt. Sushant Kumar joined in employment while

in service of SCI, thereby violating Rule XII 2.1 and 2.1.1 of Functional Guidelines for Fleet Personnel Department of SCI.

Charge No – 2: *Capt. Sushant Kumar forwarded an email on 13/04/11 to VPT, which was sent by Capt. Mukund Kumar, GM (FP), SCI, Mumbai to Capt. Sushant Kumar on 12/04/11 at 17:06 hrs. In the forwarded message the contents of the original e-mail of 12/04/11 at 17:06 hrs. from Capt. Mukund Kumar have been altered / tampered and this e-mail has been presented to Visakhapatnam Port Trust, Visakhapatnam (VPT), a Central Govt. entity by Capt. Sushant Kumar as an instrument of acceptance of his resignation by his then existing employer namely SCI.*

By the submission of altered / tampered e-mail Capt. Sushant Kumar misled and misrepresented to Visakhapatnam Port Trust, Visakhapatnam (VPT) authorities that his then existing employer i.e. SCI had accepted Capt Sushant Kumar's resignation and only procedural formalities were to be completed for Capt. Sushant Kumar relieving from SCI. This resulted in the message being accepted by Visakhapatnam Port Trust, Visakhapatnam (VPT) as acceptance of his resignation from the services of SCI, which was not the fact.

By the above act of tampering and forgery Capt. Sushant Kumar has violated Rule XII 2.1 of "Functional Guidelines for Fleet Personnel Department" of SCI.

Charge No. -3: *While processing Capt. Sushant Kumar's resignation, SCI specifically asked him for a declaration that he has not taken up any employment elsewhere. Capt. Sushant Kumar's refrained from answering the direct question in his reply.*

Capt. Sushant Kumar's vide his letter

dated 26.05.2011 requested for withdrawal of his earlier submitted resignation which was approved by SCI and subsequently he was posted to SCI vessel LPGC Nangaparat on 11.07.2011 as Master.

Capt. Sushant Kumar's suppressed the fact of his employment from 26.04.2011 to 20.06.2011 and drawing of salary in Visakhapatnam Port Trust, Visakhapatnam (VPT), either at the time of withdrawal of resignation or at the time of posting to SCI vessel LPGC Nangaparat.

By this suppression of fact the Petitioner non-sailing period from 15.02.11 to 11.07.11 was treated as on leave by SCI, as usual for floating staff.

By the aforesaid conduct Capt. Sushant Kumar's has contravened rule XII 2.1, Rule XII 2.1.1 of "Functional Guidelines for Fleet Personnel Department" of SCI and clause 29 of the MUI-INSIA agreement 2010-12.

Charge No. - 4: *Capt. Sushant Kumar, EC No. 7563020, Senior Manager, who was a permanent / regular floating staff of SCI suppressed the fact of his joining and employment in Visakhapatnam Port Trust, Visakhapatnam (VPT) from 26.04.2011 to 20.06.2011 from SCI.*

SCI Management approved a proposal dated 24.09.2012 for absorption for shore employment from among the permanent floating staff employee in the rank of Master and Chief Engineer. By the suppression of this material fact of his employment with Visakhapatnam Port Trust, Visakhapatnam (VPT). Capt. Sushant Kumar remained eligible for absorption as a shore employee by SCI and thus he was considered for absorption for shore employment. This led to his selection as shore employee on absorption from permanent floating staff on contract wages for which he was not eligible.

Capt. Sushant Kumar again suppressed the fact of his employment in Visakhapatnam Port Trust, Visakhapatnam (VPT), in the form "Bio-data of Shore Officers" submitted to the Personnel & Administration Division at the time of his joining as shore employee. By the aforesaid conduct, Capt. Sushant Kumar has contravened the rules of CDA Rules-2011 of SCI, applicable to shore employees."

10. The Petitioner had submitted his detailed representation dated 07th October, 2018 to the statement of charges. An Enquiry Report was submitted along with the documents and evidence of witnesses recorded in the proceedings, and the then Director (P&A) & Disciplinary Authority passed the award dated 06.03.2020.

In the award, it was held that charge nos. 1 to 3 were not established. Charge no. 4 in respect of non-disclosure of his past service with VPT in MD-14 is established.

11. Dr. Chandrachud, learned Counsel appearing for Petitioner submitted that the Petitioner being aggrieved by the award and as there is no other remedy for redressal of his grievance as well as the Respondent No. 1 may undergo the process of privatization, award may adversely affect the future

prospects of the Petitioner as a blot in his career; the Petitioner left with no choice but to approach this Court by filing the present Petition.

12. Learned Counsel appearing for Petitioner vehemently submitted that the sequence of events would show that the Petitioner cannot be faulted on the ground of suppression of any fact. Learned Counsel further submitted that in the very first communication at the instance of Petitioner it is clearly stated that he is desirous of availing new job opportunity at Visakhapatnama Port Trust, India. He had also stated in the notice that since year 1998 he is working with the Respondent No. 1, namely, SCI and even expressed his gratitude for providing support to him in his service tenure. Learned Counsel then by inviting our attention to the documents placed on record at Exhibit C, page 36 dated 12.04.2011 forwarded from Capt. Mukund Sharma, an Officer of SCI, submitted that this communication issued from Harjeet Kaur Joshi, Chairperson and Managing Director of SCI admits that receipt of notice issued by the Petitioner with regards to his resignation and it was informed to the Petitioner that

the Respondent No. 1 shall release him after completion of required notice period. Then by communication dated 19.04.2011, which is placed on record at Exhibit D, page 37, issued by Capt. Mukund Kumar again informed the Petitioner that his letter dated 09.04.2011 tendering resignation is received by Respondent No. 1 and he shall be relieved from SCI services. Learned Counsel then submitted that after joining in the new job organization within a short period due to personal reason the Petitioner thought it fit to withdraw his resignation and accordingly, forwarded a communication to General Manager, Fleet Personal Department, SCI through Capt. Mukund Kumar to withdraw his resignation. The copy of the same is placed on record at Exhibit F, page 39.

Learned Counsel further submitted that an endorsement note on this very document clearly indicates that the attending officer had recorded no objection for rejoining of the Petitioner in SCI. The endorsement note reads "since no objection has been taken on his resignation, we may reinstate him as before" (Emphasis supplied).

13. Our attention was invited to another document, placed on record at Exhibit I, page 42 dated 14.12.2012, to submit that the Petitioner along with other 9 officers were recommended by a panel of SCI as a Master Mariners and it was stated in the communication that those enlisted persons in order of merit shall be offered Shore Cadre Absorption. In the said list name of the Petitioner finds place at sr. no. 5.

On perusal of these documents, we find that the panel of members approved the recommendation and one of the panel member had observed that there is a great need of engineers. At page 44 of the Petition the list of eligible candidates is placed on record and the caption of the documents reads thus: "List of eligible masters who have applied for Shore Absorption & evaluation by promotion committee on 30.11.2012 (in order of merit)". In this list the name of the Petitioner finds place at serial no. 5. The document bears signature of all the committee members. At page 49 of the Petition posting order of the Petitioner dated 16.01.2014 is placed on record.

14. Vide memorandum dated 28.03.2018 the Petitioner was subjected to a show cause notice for initiation of disciplinary action and the charges against the Petitioner is reflected in the said memorandum in clause 2 and 3 and the same reads thus:

2. While requesting for withdrawal of your resignation from SCI vide your letter dated 26.05.2011 you did not inform SCI regarding your employment with VPT.

3. By the aforesaid conduct, you have concealed the fact of your employment with VPT, which is in contravention to the Rules of the Corporation.

15. The Petitioner in his reply dated 06.04.2018 submitted all the necessary details to deny the charges of suppression. In the report of Enquiry Officer dated 28.02.2019 the finding and conclusion in so far as the Charge No. 3 suppression of fact finding is recorded and same reads thus:

"It is clear from findings and conclusions recorded in Charge no. 3 that Capt. Sushant Kumar did not suppress the facts about his employment with VPT till he was reinstated as before and posted back in SCI fleet. Officer remained as fleet officer and was governed by MUI-INSA agreement".

16. In so far as Charge No. 4 is concerned, the observations are thus:

Charge No. 4 has two parts: first pre joining shore cadre and is related to suppression of facts about his employment with VPT and his absorption from fleet shore cadre and second part is about after joining shore cadre and is not declaring VPT employment in his Bio Data Form (MD-14).

The conclusion drawn is, "In view of all above, Charge No. 4 partly with respect to non-disclosure of his past service with VPT in MD-14, is established."

17. It is important for our purposes to refer to observations and analysis of the Disciplinary Authority and the Disciplinary Authority by referring to CDA rules, the documents placed on record may refer to deposition of Capt. Mukund Kumar and further observed thus:

vi. Capt. Sushant Kumar did not suppress fact of his employment with VPT as his email dated 08.05.2011 (MD-10) clearly shows his signature as 'Pilot, VPT'.

viii. It is clear from findings and conclusions recorded in Charge No. 3 that Capt Sushant Kumar did not suppress the facts about his employment with VPT till he was reinstated as before and posted back in SCI fleet. ED (FP) 'reinstated' the CE and fleet personnel, thereby treating his period of employment at VPT as leave in SCI and then the CE was posted as a Master on LNG fleet. Otherwise, FP Dept. would have

simply 'Regularized the LWP period' and not 'Reinstated' the CE. Nothing in the course of inquiry points out that the CE had any role in the internal process of reinstatement followed by FP authority at that time and therefore can't be penalized for procedural/technical lapses. The CE remained as fleet officer and was governed by MUI-INSA agreement till he was absorbed ashore by SCI subsequently.

x. The CE is under the wrong impression that, since SCI Management provided him continuity of service by reinstating him and regularizing intervening period as leave, knowing fully well his engagement with VPT, he therefore, correctly filled in Bio-data form by filing in "Form 01.01.1998 to "continued" with SCI", post absorption ashore, even though the field asked for "Details of Past Service" with particulars of Employer(s).

18. Ultimately the Disciplinary Authority forms the conclusion and passed the order impugned in the Petition.

19. Dr. Chandrachud, learned Counsel appearing for Petitioner vehemently submitted that on one hand finding is recorded by the Disciplinary Authority that the Petitioner cannot be held responsible for the charge of suppression of facts and on the other hand, records finding that the charge is partially proved and awarded punishment which is a major penalty. Learned Counsel then invited our attention to the documents

placed on record at the instance of Respondent No. 1 along with affidavit-in-reply at Exhibit 'B' under caption SCI Limited Conduct, Discipline and Appeal Rules, 2011. It is also submitted that the only allegations against the Petitioner is suppression of facts and the Corporation nowhere stated that by such alleged suppression, what loss caused to Corporation. Learned Counsel for Petitioner further submitted that firstly, the record placed before the competent Committees in the disciplinary proceedings clearly indicated that the Petitioner had not suppressed any fact and secondly, no pecuniary loss or otherwise is caused to the Corporation. As such, it was not the case even for awarding a minor penalty to the Petitioner but by misleading all the facts imposed major penalty to the Petitioner and thus, the order impugned in the Petition is unsustainable as such, required to be quash and set aside.

In support of his submissions, learned Counsel appearing for Petitioner place heavy reliance on following judgments: Salim Babu Shaikh Vs. Satate of Maharashtra and Anr¹, Vasu D. Mestha vs. Kadamba

1 2019 SCC OnLine Bom 12824

Transport Corporation Ltd and Anr², Anand Nishkawa Co. Ltd vs. Commissioner of Central Excise, Merrut³.

20. Per contra, Mr. Marne, learned Counsel appearing for Respondent No. 1 opposed the Petition. It was the submission of learned Counsel that as the Petitioner is having an efficacious remedy of filing an appeal as provided under Rule 32, this Court may not cause any indulgence in the order impugned in the Petition. Our attention was also invited to provisions of Appellate Authority which is placed on record at page 182. In support of his submissions, learned Counsel relied on the judgment in the matter of S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Anr⁴. Learned Counsel further submitted that the charge against the Petitioner of suppression of fact is serious. It is submitted that when the Petitioner submitted his letter for withdrawal of resignation he has purposely not stated the fact of his joining at Visakhapatnam Port Trust, India and working there. Learned Counsel then submitted that the Petitioner had unauthorizedly left his services with Respondent No. 1

² 1997 (2) L.L.N 131

³ (2005) 7 SCC 749

⁴ (1984) 1 SCC 158

for joining his service at Visakhapatnam Port Trust, India and while submitting the Bio-data for fresh appointment, the Petitioner had not stated the fact of his working at Visakhapatnam Port Trust, India. Our attention was also invited to the copy of the Bio-data submitted by the Petitioner.

In support of his submission that as charge leveled against the Petitioner was of serious nature and it was partly approved, an appropriate penalty awarded to the Petitioner and said penalty cannot be said to be shockingly disproportionate, learned Counsel placed reliance judgment in the matter of Om Kumar and Others Vs. Union of India⁵ & B. C. Chaturvedi Vs. Union of India and Anr⁶.

21. Dr. Chandrachud, learned Counsel appearing for Petitioner in reply to Mr. Marne in respect of Petitioner having an appellate remedy, submitted that when the admitted facts placed on record before this Court clearly indicates that there was no suppression of facts at the hands of Petitioner and a shockingly disproportionate punishment is awarded to the

5 (2001) 2 SCC 386

6 (1995) 6 SCC 749

Petitioner, the Petitioner may not be asked to avail the alternate remedy and this Court by exercising its power under Articles 226 and 227 of Constitution of India can entertain the Petition and pass appropriate orders.

22. On going through the material placed on record referred to above, we find considerable merit in the submissions of Dr. Chandrachud, learned Counsel appearing for Petitioner. Dr. Chandrachud was justified in submitting before this Court that right from first communication the Petitioner made it clear to the Respondent No. 1 that he was desirous of joining the new job vacancy at Visakhapatnam Port Trust, India. The said disclosure of the fact was also admitted in the communication forwarded by Respondent No. 1 in response to Petitioner's communication. The documents placed on record further show that when the Petitioner submitted his letter for withdrawal of his resignation and endorsement is made on the documents by attending officer that withdrawal permission be granted and the Petitioner be reinstated. Thus, the attending officer was of the opinion that the reinstatement of Petitioner

is in the interest of Respondent No. 1. It is also not in dispute that while in the process for selection of Master Mariners, the competent Panel had assessed the merit of the candidates and accordingly, the Petitioner was enlisted in selected candidates and there is the note of panel members supporting the candidature of Petitioner as one of the eligible candidates.

23. Dr. Chandrachud, learned Counsel appearing for Petitioner was justified in placing reliance in the judgment of Anand Nishikawa Co. Ltd (supra) and the relevant observation reads thus:

27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceutical Co. Vs. Collector of Central Excise, Bombay [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the

manner indicated in proviso to section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to the CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik vs. Collector of Central Excise [2003 (11) SCC 390], this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be willful misstatement or "suppression of facts". This view was also reiterated by this Court in Collector of Central Excise, Baroda, vs. LMP Precision Engg.Co.Ltd.

24. Though Mr. Marne, learned Counsel appearing for Respondent No. 1 vehemently resisted the Petition, we are unable to accept the submissions in view of the above referred facts.

25. Considering all the above observations, the Writ Petition is allowed in terms of prayer clause 'a'. Rule made absolute in above terms.

(S.M. MODAK, J.)

(PRASANNA B. VARALE, J.)