

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3600 OF 2020

J. N. Meena,)
 Aged 64 years, Lastly working as)
 Assistant Commissioner of Customs,)
 Central Excise and Service Tax,)
 Anand Division under the Chief)
 Commissioner of Central Excise and)
 Customs, Vadodara Zone, Gujarat)
 AND)
 residing at Flat No. 502, Building)
 No. 198, Sher-e-Punjab Society,)
 Mahakali Caves Road, Andheri West,)
 Mumbai – 93.)...**Petitioner**

Versus

1. Union of India through the)
 Secretary, Ministry of Finance,)
 Department of Revenue,)
 Government of India, North Block,)
 New Delhi 110 011.)
)
 2. The Chief Commissioner of Customs,)
 Mumbai Zone-1, New Customs House,)
 Ballard Estate, Mumbai 1)...**Respondents**

Mr. Ramesh Ramamurthy with Mr. Saikumar
 Ramamurthy for the petitioner.

Mr. Advait M. Sethna with Mr. Prasenjit Khosla
 and Mr. Eshaan Saroop for the respondents.

**CORAM: DIPANKAR DATTA, CJ
& V. G. BISHT, J.**

DATE: MAY 4 & 5, 2022

ORAL JUDGMENT: (Per, CHIEF JUSTICE)

1. Aggrieved by dismissal of his original application (O.A. No. 455 of 2013) by the Central Administrative Tribunal, Mumbai Bench, Mumbai (hereafter "Tribunal") with costs of Rs.75,000/-, the original applicant (hereafter "petitioner") has invoked the writ jurisdiction of this Court by instituting this application dated 28th October 2020 under Article 226 of the Constitution of India. He seeks multiple relief. First, prayer is made for setting aside the impugned order of the Tribunal dated 20th February 2020. Secondly, it is prayed that the order dated 13th May 2013 (hereafter "revisional order") passed by the petitioner's appellate authority, in exercise of power conferred by rule 29(1)(v) read with rule 31 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 [hereafter "CCS(CCA) Rules"], imposing punishment of reduction in pay be quashed. Thirdly, direction is prayed on the respondents to extend such financial and other relief to the petitioner as if he had not been fastened with the revisional order of punishment. Fourthly, claim is for awarding costs of the proceedings.

2. Before examining whether the petitioner is at all entitled to any relief as claimed, it would be appropriate to notice the facts and circumstances that gave rise to the original application before the Tribunal.

3. The petitioner, at the relevant time, was posted in the Customs House Kandla, Gujarat as Customs Appraiser. A charge-sheet dated 21st August 1998 was drawn up against him for alleged misconduct and he was sought to be

proceeded against under rule 14 of the CCS (CCA) Rules. The charges were:

"ARTICLE-I

That the said Shri J. N. Meena, while functioning as an Appraiser at Dock Examination Section of Customs House, Kandla during the period from July 1972 to July 1993 failed to examine properly the consignment of declared description as 'Lead Scrap' which concealed the 'Ball Bearings' covered under Bill of Entry No. 3058 dt. 09.06.93 of Ms. R. K. International, Ahmedabad and thereby wrongly confirmed the description of the goods on reverse of the said B/E.

ARTICLE-II

That during the aforesaid period and while functioning in the aforesaid capacity, the said Shri J. N. Meena has written a false examination report by examining only two drums out of a total 80 drums and that too in a wrong manner and without ensuring the packing list.

Thus, Shri J. N. Meena, Appraiser has aided/abetted in smuggling of 'Ball Bearings' of foreign origin into India.

By the aforesaid acts of omission and commission, Shri J. N. Meena, Appraiser committed gross misconduct by exhibiting lack of integrity and lack of devotion to duty and thereby acted in a manner unbecoming of a Govt. Servant and thus violated the provisions of Rule 3(1) (i) (ii) (iii) of the Central Civil Services (Conduct) Rules, 1964."

4. The petitioner having denied the charges, an inquiry followed. It was conducted by the Commissioner for Departmental Inquiries (hereafter "inquiry officer"). The inquiry culminated in a report of the inquiry officer dated 30th October 1999 holding that the charges were not proved and hence, the petitioner was not guilty. The said report upon being placed before the petitioner's disciplinary authority, viz.

the Commissioner of Customs (General), Mumbai, he agreed with the inquiry officer and held that the report prepared by him appeared to be reasonable. However, the successor-in-office disagreed with the inquiry report and recorded a note of disagreement dated 30th August 2001. The petitioner was called upon to explain within 15 days, why major penalty prescribed under rule 11 of the CCS(CCA) Rules should not be imposed on him.

5. Challenging the disagreement note dated 30th August 2001, the petitioner had the occasion to approach the Tribunal by instituting an original application (O.A. No. 49 of 2002). The said original application was heard along with Original Application No. 875 of 2002 (Ajay Banik vs. Union of India and Ors.). The said Ajay Banik, who was proceeded against simultaneously with the petitioner, had also challenged a similar note of disagreement. By a common judgment and order dated 17th May 2003, the Tribunal allowed both the applications by passing, *inter alia*, the following order

"16. For the reasons stated above, the applications are liable to be allowed and thus allowed. The impugned orders F. No. S/9-22/98 VIG./1637 dt. 30.8.2001 (in OA No. 875/2001), F. No. S/9-22/98 Vig/1698 dt. 30.8.2001 (in OA No. 49/2002 are liable to be set aside and accordingly set aside. The Respondent No. 3 is directed to take action on the Inquiry Report in accordance with law and pass appropriate order accordingly without being influenced by extraneous consideration and/or instructions issued by any authority within the scope of the statutory rules. The Respondents are directed to complete the exercise as early as possible, preferably within two months from the date of

receipt of the order. The application is thus allowed. There shall be, however, no order as to costs."

6. The judgment and order of the Tribunal dated 17th January 2003 was challenged by the Union of India in two separate writ petitions before this Court. In Writ Petition No. 2478 of 2003, the petitioner was the respondent. A coordinate Bench by its judgment and order dated 11th August 2009 dismissed the writ petition holding, *inter alia*, that once the disciplinary authority agreed with the report of the inquiry officer, who exonerated the charged officer, there was no occasion for the disciplinary authority to seek advice of the Central Vigilance Commission. It was further held that the Central Vigilance Commission cannot, in the peculiar facts and circumstances, influence the decision of the disciplinary authority. Recording that the Court was *ad idem* with the decision of the Tribunal, the Rule was discharged.

7. The Union of India, thereafter, appealed before the Supreme Court. Incidentally, the appeal was barred by 321 days' delay. The Supreme Court, by an order dated 10th January 2011, refused to grant the prayer for condonation of delay. The Special Leave Petition, thus, stood dismissed. As a corollary thereof, a full round of litigation beginning from the Tribunal and reaching the Supreme Court was complete.

8. The Supreme Court having dismissed the Special leave petition on the ground of delay, an order-in-original dated 18th August 2011 was issued by the disciplinary authority of the petitioner whereby the disciplinary proceedings initiated against the petitioner stood dropped. In view thereof, the

petitioner might have felt a sense of relief; however, it was short lived. He received a communication dated 15th February 2012 from the Additional Commissioner of Customs conveying to him that the appellate authority, namely, the Chief Commissioner of Customs, Mumbai, Zone-I had desired to revise the said order-in-original under rule 29 of the CCS(CCS) Rules for which the appellate authority, in exercise of power conferred by rule 31 thereof, had extended the time limit to revise the said order up to 16th May 2012.

9. The petitioner responded to the communication through his learned advocate, vide reply dated 5th March 2012. It reveals therefrom that the petitioner claimed to have received the communication dated 15th February 2012 on 3rd March 2012. Various contentions were urged in such reply and it was ultimately requested that the communication dated 15th February 2012 be withdrawn and/or cancelled. The appellate authority did not agree with the contentions urged on behalf of the petitioner and proceeded to pass an order contained in memorandum dated 13th March 2012, signed on 14th March 2012, the operative part whereof reads as follows: -

“19.0 In view of the above, the undersigned, the Appellate Authority, is of the opinion that Shri J. N. Meena, Appraiser has committed gross misconduct by exhibiting lack of integrity, lack of devotion to duty and thereby acted in a manner unbecoming of a Government servant and thereby contravened the provisions of Rule 3.1 (i), (ii) & (iii) of CCS (Conduct) Rules 1964.

20.0 I, the Appellate Authority, Chief Commissioner of Customs, Mumbai Zone-I propose to revise the said Order-in-Original under Rule 29 of CCS(CCA) Rules, 1965.

21.0 Shri J. N. Meena, Appraiser, is called upon to Show Cause to the undersigned within 15 days of the receipt of this Memorandum, as to why the Order-in-Original No. CCG/SLM/18/2011-Vig./1243 dated 18.08.2011, passed by Shri S. L. Meena, Commissioner of Customs (General), the Disciplinary Authority, should not be revised and the penalty prescribed under Rule 11 of CCS (CCA) Rules, 1965, should not be imposed on him.

22.0 This notice is issued without prejudice to any other evidence/evidences coming forth during the course of review proceedings and the Reviewing Authority reserves the right to incorporate such evidence/evidences."

10. The petitioner questioned the memorandum dated 13th March 2012 (signed on 14th March 2012) before the Tribunal in an original application (O.A. No. 205 of 2012). By an order dated 9th July 2012, the Tribunal disposed of the original application by granting liberty to the respondent to pass appropriate order in the matter strictly on merits and in accordance with law. It was also made clear that the petitioner should be offered sufficient opportunity of hearing before any decision is taken. Review Petition No.77 of 2012 was then filed by the petitioner before the Tribunal which, by its order dated 4th October 2012, proceeded to dismiss it. Although the orders dated 9th July 2012 and 4th October 2012 were challenged by the petitioner in Writ Petition No. 11681 of 2012, the writ petition was permitted to be withdrawn by an order dated 18th December 2012 keeping all issues open.

11. Finally, by the revisional order dated 13th May 2013, punishment was imposed on the petitioner by the appellate authority. The concluding paragraph of the order reads as follows: -

"ORDER

I order a penalty of reduction in salary under Rule 11 of the CCS(CCA) Rules, 1965, be imposed on Shri J. N. Meena, Appraiser and his pay be reduced by three (3) stags from Rs. 24110 + Rs. 5400 (Grade Pay) to Rs. 21600 + Rs. 5400(Grade Pay) in the time scale of Rs. 15600-39100 + 5400(Grade Pay) for a period of two (2) year with effect from 01.06.2013. it is further directed that Shri J. N. Meena, Appraiser, will not earn increments of pay during the period of reduction and that, on expiry of this period, the reduction will not have the effect of postponing his further increments of pay."

12. The order dated 13th May 2013 was once again challenged by the petitioner before the Tribunal by instituting O.A. No. 455 of 2013 which, as noted above, was dismissed by the Tribunal by its order dated 20th February 2020 giving rise to this writ petition.

13. It would reveal from the factual narrative sketched above that the disciplinary authority of the petitioner, by the order dated 18th August 2011, had dropped the disciplinary proceedings. However, the communication dated 15th February 2012 of the Additional Commissioner of Customs reveals that the appellate authority was desirous of exercising the power of revision, *suo motu*, as conferred by rule 29 of the CCS(CCA) Rules and for such purpose had extended the time limit, in terms of rule 31 thereof, till 16th May 2012.

14. To appreciate what rule 29 is all about, it is profitable to read it first. The relevant part thereof reads as follows: -

"29. (Revision)

- (1) 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 (Personnel) Postal Services Board in the case of a Government servant serving in or under the Postal Services Board and Adviser (Human Resources Development), Department of Telecommunications in the case of a Government servant serving in or under the Telecommunications 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 to or 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 Clauses (v) to (ix) of Rule 11 or to enhance the penalty imposed by the order sought to be revised to any of the penalties specified in those clauses,

Provided further that ...

...

(2) ...

(3) ..."

15. Since the communication dated 15th February 2012 of the Additional Commissioner of Customs refers to rule 31 of the CCS(CCA) Rules, we further consider it appropriate to quote the same below: -

"31. Power to relax time-limit and to condone delay

Save as otherwise expressly provided in these rules, the authority competent under these rules to make any order may, for good and sufficient reasons or if sufficient cause is shown, extend the time specified in these rules for anything required to be done under these rules or condone any delay."

16. We would also be required to consider, in the course of our discussion, the provision in rule 30 of the CCS (CCA) Rules; hence, the same is quoted below: -

"30. Service of orders, notices, etc.

Every order, notice and other process made or issued under these rules shall be served in person

on the Government servant concerned or
communicated to him by registered post."

(emphasis ours)

17. Before we move on to consider the contentious issues, we need to notice the reasons for the Tribunal to impose costs of Rs.75,000/- and make certain observations about how proceedings before the tribunals, constituted under the Administrative Tribunals Act, 1985 (hereafter "1985 Act"), ought to be dealt with by them.

18. In the proceedings before the Tribunal, the petitioner had prayed for an amendment which was allowed on 3rd March 2016. However, such amendment was not carried out in the original application by the petitioner. This infuriated the Tribunal so much so that the petitioner was penalized and ordered to pay "costs of Rs.50,000/-" to the Swachh Bharat Trust within 2 (two) weeks of receipt of the order, failing which the respondents were granted liberty to first pay and "recover the said amount along with interest from the applicant by any means known to law including from his pension". Thereafter, the Tribunal dealt with the several contentions raised on behalf of the petitioner and held against him on all counts. Before dismissing the original application by imposing further costs of Rs.25,000/- on the petitioner, the Tribunal observed as follows:

"35. *** We observe that where the first disciplinary authority did not even give the delinquent a slap on the wrist for an act that led to loss of revenue as alleged by the respondents but which they could not prove before the appropriate forum, the punishment imposed by the Appellate Authority in the present matter can only be considered a light clap on the shoulder".

19. We have read the order of the Tribunal in between the lines. It appears from the first page of the order that the Tribunal did not reserve its judgment on the original application and the order was dictated immediately after hearing was concluded. Further, the order appears to express the irritation of the Tribunal, born from the very inception of dictation when, as early as in paragraph 3, it noticed that its previous order dated 3rd March 2016 had not been carried out by the petitioner or his advocate which was utter carelessness and irresponsibility on their part towards adjudication that they seek from the Tribunal. This omission arising out of neglect or carelessness led to imposition of Rs.50,000/- as costs on the petitioner. We advert to this aspect of the matter only to emphasize that courts/tribunals having been constituted to administer justice to litigants according to law, the members presiding over such courts/tribunals ought not to feel irritated or express anger merely because of aberrations on the part of a party before it. The latent irritation or anger ingrained in the expressions employed in the judgment and/or order could, at times, denude the same of impartiality. The members of the tribunals constituted under the 1985 Act must realize that indiscriminate exercise of power does not help to sustain the dignity and status of the courts/tribunals but may sometimes affect it adversely. In many a case, the party may not be knowing what he is required to do should his advocate, on whom he has reposed complete faith and trust, fail to comply with an order. Punishing the party for the negligence or carelessness of the advocate serves no real purpose. The Supreme Court, while

dealing with a contempt matter almost 6 (six) decades back, said that *wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearlessness, fairness and objectivity of their approach, and by the restraint, dignity and decorum which they observe in their judicial conduct.* These words of wisdom are relevant even today. Since the tribunals constituted under the 1985 Act comprise of Administrative Members too, who may not be abreast of qualities that anyone occupying the seat of a Judge should possess, we have purposely referred to this observation of the Supreme Court with the expectation that all the tribunals functioning across the country, in future, ought to refrain from repeating indiscriminate exercise of power as the one in the present case. Be that as it may.

20. Appearing in support of the writ petition, Mr. Ramamurthy, learned advocate has raised several contentions.

21. First, Mr. Ramamurthy questions the jurisdiction of the appellate authority to reopen proceedings after the disciplinary proceedings were dropped in view of dismissal by the Supreme Court of the special leave petition. According to him, the appellate authority could not have reopened the proceedings on the face of the order dated 11th August 2009 of the Division Bench of this Court in Writ Petition No. 2478 of 2003, which effectively put a quietus to the matter of allegations that were levelled against the petitioner by his disciplinary authority.

22. We, however, do not find merit in this contention of Mr. Ramamurthy. Despite the order of the Division Bench dated 11th August 2009 resulting in dropping of the disciplinary proceedings, nothing prevented the appellate authority to exercise the power conferred on him by rule 29(1)(v) of the CCS(CCA) Rules. The Division Bench, in fact, did not restrict the power of the appellate authority. What the Division Bench did was to validate the order of the Tribunal dated 17th January 2003, and also hold that once the report of the inquiry officer was accepted by the disciplinary authority by agreeing with its contents, it was not open to the successor-in-office to take a different view. The Division Bench did not observe that the appellate authority was also precluded to reopen the proceedings even though the facts might justify such course of action. We are inclined to the view that the power to reopen proceedings under rule 29(1)(v) and to revisit the order-in-original passed by the disciplinary authority being a definite and distinct power conferred on an appellate authority, which has to be exercised within its parameters, it was well-nigh open to the appellate authority to exercise such power but in accordance therewith. The position would have been otherwise if the Division Bench had, in clear and unambiguous terms, restrained the appellate authority from exercising such power. We have not found in the order dated 11th August 2009 of the Division Bench any such restriction. Hence, we hold that the appellate authority did have the power to reopen the proceedings. We hasten to reiterate that the earlier round of litigation touched upon the legality and/or propriety of the incumbent succeeding the

former disciplinary authority to reopen proceedings upon recording a note of disagreement with his predecessor. It is such aspect of the matter that did not find favour with the Division Bench of this Court, resulting in the order-in-original dated 18th August 2011 being passed dropping the proceedings. However, such order of this Court did not preclude the appellate authority from applying his own mind and to decide whether, on facts and in the circumstances, it would be prudent and proper to take a re-look at the proceedings having regard to the seriousness of the charges that were levelled against the petitioner. Whether the appellate authority did or did not apply his mind is a different aspect altogether, which we propose to consider a little later, but to urge that the appellate authority did not have the jurisdiction to proceed against the petitioner after the full round of litigation till the Supreme Court was over, does not appear to us to be well-founded. We, therefore, reject this contention of Mr. Ramamurthy.

23. Secondly, Mr. Ramamurthy takes exception as regards extension of time limit ordered by the appellate authority, as conveyed to the petitioner by the communication dated 15th February 2012 and passing the revisional order well beyond 6 (six) months of the order-in-original dated 18th August 2011. According to him, exercise of power under rule 29(1)(v) is not dependent on any other rule in the CCS(CCA) Rules and the time limit of 6 (six) months ordained by rule 29(1)(v) for the appellate authority to reopen proceedings and revise any order being mandatory, such time limit could not have been extended relying upon rule 31. To buttress his contention, Mr.

Ramamurthy invites our attention to the opening words of rules 29 and 31 of the CCS(CCA) Rules (extracted supra). Rule 29 begins with a non-obstante clause; also, rule 31 begins with the words "(S)ave as otherwise expressly provided in these rules, ...". Drawing inspiration therefrom, it is his contention that not only was the revisional power required to be invoked within the period of 6 (six) months, but also the entire exercise of revising the order-in-original of the disciplinary authority, if at all, should have been completed within such period of 6 (six) months.

24. Once again, we are not in agreement with Mr. Ramamurthy that the process of revising the order-in-original and passing the ultimate order must have been completed within 6 (six) months as in rule 29(1)(v). Notwithstanding that the time limit of 6 (six) months is mandatory, according to us, the power of revision that rule 29(1)(v) confers on the appellate authority does not make it obligatory for such authority to complete the process of decision making within 6 (six) months. It would amount to substantial compliance with rule 29(1)(v), if the appellate authority decides to reopen proceedings within 6 (six) months and informs the charged officer of such a decision with brief and tentative reasons for such reopening either personally or by sending a communication in this behalf, which must be put into transmission before expiry of 6 (six) months (obviously for reaching the charged officer). Once this exercise of personal service or dispatch by registered post of the communication containing brief and tentative reasons is complete, it is open to the appellate authority to conclude the process of decision

making and to pass the final order in the proceedings for revision, upon extending to the charged officer reasonable and adequate opportunity of defence, within a reasonable time thereafter which could even run beyond the period of 6 (six) months prescribed by rule 29(1)(v) of the CCS(CCA) Rules. We are fortified in our view by reason of judicial pronouncements of various high courts cited by Mr. Sethna, learned advocate for the respondents, being the decision of the Madras High Court in **Union of India, represented by the Secretary to Government of Pondicherry, Revenue Department and anr. vs. V. Sekar**¹, the decision of the Division Bench of the Delhi High Court in **Union of India vs. Dharam Pal Gupta**², wherein rule 29 of the CCS (CCA) Rules came up for consideration, as well as this Court while it considered *pari materia* provisions of the Gramin Dak Sevaks (Conduct and Employment) Rules, 2011 in its decision in **Union of India & ors. vs. Pashupati Digambar Swamy**³. The consistent view is that although the relevant provision refers to revision of an order within 6 (six) months, it is not the mandate of the statute that the entire exercise has to be completed within 6 (six) months but what is required is invocation of the power, in a legal and valid manner, within such period. This contention of Mr. Ramamurthy too, thus, stands rejected.

25. Thirdly, Mr. Ramamurthy argues that during the pendency of proceedings before the appellate authority, the

¹ 2005(1) CTC 566

² WP (C)/3622/2013 decided on 24th July 2013

³ MANU/MH/0509/2022

petitioner was promoted as Assistant Commissioner with the result that his disciplinary authority changed. The President of India became the petitioner's disciplinary authority and, thus, the appellate authority in this case could not have exercised powers of revision against the petitioner.

26. This argument, the Tribunal held, was not tenable having been dealt with before by the Tribunal while disposing of Review Petition No.77 of 2012, filed by the petitioner, by its order dated 4th October 2012.

27. We see no reason to disagree with the Tribunal. On the date the disciplinary proceedings were sought to be reopened, i.e., 31st January 2012, the Chief Commissioner was undisputedly the appellate authority of the petitioner. That apart, delinquencies that were noticed related to such period when the petitioner's appellate authority was undoubtedly the Chief Commissioner. Mere promotion to a higher post in the interregnum would not have the effect of vitiating the proceedings on the ground of incompetence of the Chief Commissioner to invoke rule 29(1)(v) of the CCS (CCA) Rules. This argument, therefore, has no merit and stands rejected.

28. Fourthly, Mr. Ramamurthy urges that having regard to the lapse of time since the alleged incident giving rise to the charge-sheet and date of issuance thereof, there was no reason for the appellate authority to reopen proceedings for exercising the power of revision. At least, no reason appears on perusal of the communication dated 15th February 2012 of the Additional Commissioner of Customs and this is a serious

flaw for which the proceedings must be held to be bad and *ultra vires*.

29. We have read Rule 29(1), which has come up for an interpretation. It confers power on various authorities to revise an order but a mandatory time limit is imposed for the authorities covered by clauses (v) and (vi) only. There can, however, be no gainsaying that the *suo motu* power under rule 29(1)(v) of the CCS(CCA) Rules has to be invoked and exercised upon due and proper application of mind. Not only that, such power conferred by rule 29(1)(v) being a special power, it has to be used sparingly and only in exceptional cases where administrative exigency demands its invocation and exercise. The *suo motu* power of revision has been conferred not for being invoked and exercised in each and every case where the disciplinary authority considers it inappropriate to impose any punishment on the charged officer and, resultantly, drops the disciplinary proceedings. While invoking and exercising the *suo motu* power under rule 29(1)(v), the appellate authority is required to satisfy the test of utmost good faith and complete fairness bearing in mind the evidence that was adduced in course of the inquiry, while he proceeds to reopen the proceedings for the purpose of revisiting the order-in-original of the disciplinary authority dropping the disciplinary proceedings. More diligence is required, particularly in a case of the present nature, where the inquiry was conducted not by a departmental officer but by an officer holding a high office such as the Commissioner of Departmental Inquiries with whose report there was a concurrence by the disciplinary authority.

30. It in the aforesaid context that we did look into the communication dated 15th February 2012 which, allegedly, was put into transmission by the respondents before expiry of the period of 6 (six) months of the order-in-original dated 18th August 2011. The said communication reads as follows:

"Please refer the Order-in-Original No. CCG/SLM/18/2011-Vig.1243 dated 18.08.2021 passed by Shri S.L. Meena, Commissioner of Customs (General), Mumbai in the Disciplinary proceedings against you.

I have been directed to convey you that the Appellate Authority, Chief Commissioner of Customs, Mumbai Zone-I has desired to revise the order said Order-in-Original under Rule 29 of the CCS (CCA) Rules, 1965.

In view of the above, the Appellate Authority in exercise of powers conferred under Rule 31 of the CCS (CCA) Rules, 1965 has extended the time limit to revise the said Order-in-Original upto 16.05.2012.

You will be given a notice and an opportunity to present your case before Appellate Authority in due course of time."

31. Having read it, we requested Mr. Sethna to place before us the official records to ascertain what exactly was the order passed by the appellate authority and whether the aforesaid communication truly reflected the order of the appellate authority. We also intended to ascertain whether the decision to reopen the disciplinary proceedings for revising the order-in-original was communicated to the petitioner prior to expiry of the aforesaid period of 6 (six) months.

32. In deference to our request, Mr. Sethna placed before us the entire records. The same was voluminous obviously because it contained papers of yesteryears. While placing the official records before us, it was Mr. Sethna's appeal to the Court that no part of the contents of the relevant

departmental notes should be ordered to be shared with the petitioner's advocate or he be permitted to take inspection, since the same are confidential in nature. Accepting Mr. Sethna's prayer, we did not grant inspection of the records including the relevant file noting to Mr. Ramamurthy. However, looking into the contents of the departmental notes that preceded the handwritten one-line order dated 31st January 2012 recorded on the file by the appellate authority, we find nothing substantial therein which can be regarded as confidential and hence, ought to be kept away from the petitioner's gaze.

33. Perusal of the file noting reveals this. Two departmental notes, dated 24th January and 30th January 2012, were prepared by 3 (three) officers of the Customs Department for being placed before the Additional Commissioner of Customs/Chief Commissioner's Office (hereafter "ADC/CCO"). The notes read thus:

"A copy of SLP filed in the Supreme Court was not available in the records of the case forwarded by the Vigilance Section. Hence, as directed by the ADC/CCO, the case file from CAT Cell was called. The scrutiny of the file from CAT Cell also revealed that the copy of SLP was not available with CAT Cell also. AC/CAT Cell Shri S. H. Kuvavala verbally informed ADC/CCO that the SLP was filed by Law Ministry and hence, a copy is not available with them.

The file is submitted for acceptance or otherwise of the Order-in-Original to the Chief Commissioner.

Sd/- (24.1.2012) Sd/-(24.1.12) Sd/- (24.1.2012)"

"In continuation of the above notes, it was informed by the ADC/CCO that the matter was discussed with the Chief Commissioner and the Chief Commissioner has desired to revise the said Order of Disciplinary Authority.

The Original Case file was received in the C. C. Unit on 28.12.2011, after perusing the matter with Vigilance Section vide letters dated 21.10.2011, 13.12.2011 and 26.12.2011 and the matter was put up immediately on 03.01.2012 for perusal.

The ADC/CCO has also observed that the Disciplinary Authority does not appear to have referred the matter to DGOV/CVC, after the receipt of Supreme Court's judgment. If the same is to be done, it will take some more time. As per Rule 29 of CCS(CCA) Rules, 1965, '*the Appellate Authority*'. The period of 6 months in instant case (Order-in-Original F. No. CCG/SLM/18/2011-Vig. dtd. 18.08.11 expires on 17.02.2012. Therefore, the time limit for revision needs to be extended by 3 months.

The Rule 31 of CCS(CCA) Rules, 1965, is reproduced below:

'.....'.

For the reasons stated above, the file is submitted to the Chief Commissioner, for extending the time limit for revision for a period of three months from 17.02.2012 to 16.05.2012.

Sd/- (30.1.2012) Sd/-(24.1.12) Sd/- (30.1.2012)"

34. What is revealed from the aforesaid notes is that based on an information given by the ADC/CCO that the appellate authority desired to exercise power under rule 29 of the CCS(CCA) Rules, the time wherefor expires on 17th February 2012 and that the time limit for revision needs to be extended by 3 (three) months, a reference was made to rule 31 of the CCS(CCA) Rules and the file submitted to the Chief

Commissioner for extending the time limit to revise the order-in-original for a period of 3 (three) months from 17th February 2012 to 16th May 2012. It is as if extension of time could be had as a matter of course.

Such note on being placed before the ADC/CCO on 31st January 2012, it was endorsed as follows:

"File is submitted seeking extension of time limit for revision upto 16.05.2012, for reasons stated above. Proviso to Rule 29 placed opp may pl be seen."

It was thereafter that on 31st January 2012, the Chief Commissioner, acting as the appellate authority of the petitioner, made a handwritten endorsement as follows: -

"Timelimit extended upto 16/5/12."

Copy of the said departmental notes shall be retained with the records and marked 'X' for identification.

35. It is clear from the above that though the appellate authority by his order dated 31st January 2012 endorsed extension of time limit till 16th May 2012, he did not assign any reason, much less tentative reason, upon an independent application of mind that the order-in-original of the disciplinary authority dated 18th August 2011 suffers from such gross infirmity or otherwise that the situation calls for invocation of the *suo motu* power of revision under rule 29(1)(v) of the CCS(CCA) Rules and that such power ought to be exercised on facts and in the circumstances of the case. Having regard to the purpose for which revisional power is conferred by rule 29(1)(v) of the CCS(CCA) Rules, we would have expected the appellate authority to show due and proper

application of mind; however, that is completely lacking. We are impelled to hold the view that the order dated 31st January 2012 is an order of extension of time limit simplicitor made by the appellate authority, without he having made his opinion known why the order-in-original deserves to be revised.

36. Mr. Sethna has contended that the order of the appellate authority dated 31st January 2012 ought to be read in the context of the note dated 30th January 2012 prepared by the 3 (three) officers; and, if so read, it would be clear that the appellate authority extended the time limit with the intention of revising the order-in-original.

37. We may accept this part of Mr. Sethna's submission only as regards intention. The appellate authority's order being based on the preceding departmental notes, the underlying intention no doubt was to reopen the proceedings; hence, mere omission to refer in the handwritten order of 31st January 2012 that the appellate authority had extended the time limit desirous of exercising the power of revision may not *per se* be seen to vitiate the proceedings. But there is one factor of vital importance which the appellate authority did not bear in mind, i.e., whether the departmental notes did in fact bring to the fore any illegality or material irregularity in the order-in-original of the disciplinary authority dated 18th August 2011, sufficient enough to invalidate the same upon exercise of the revisional power. The aforesaid note of the 3 (three) officers dated 30th January 2012, we repeat, would reveal that the same was prepared merely based on a conversation which the ADC/CCO had with the appellate

authority. In course thereof, it was informed by the latter that he was desirous of revising the order-in-original. Not a single reason evincing formation of opinion that the situation calls for *suo motu* exercise of the revisional power, does exist on the records. This, we hold, was a condition precedent for invoking the power of revision, which was not satisfied. The appellate authority could not have invoked the power of revision without indicating any reason therefor. It would not be an overstatement on our part that the *suo motu* power was invoked by the appellate authority based on his *ipse dixit*. Also, no reason for explaining the delay [the file started moving fast in the last month of the prescribed period of 6 (six) months] appears to be recorded and hence, the question of examining whether such explanation amounted to sufficient cause being shown, does also arise. We need not in this case labour to decide whether the appellate authority could have, on his own showing and satisfaction of sufficient cause, condone the delay and extend the time limit. It would require interpretation in an appropriate case, not involving rule 29(1)(v), whether rule 31 is intended for the benefit of the authorities under the CCS (CCA) Rules or the charged officer. Suffice it to observe that omission to record any reason in the order dated 31st January 2012 as to why the order-in-original deserves to be revisited and/or revised is one substantial ground on which the appellate authority's formation of opinion to reopen the proceedings is required to be tested.

38. Here, we feel tempted to test invocation of the *suo motu* power of revision by the appellate authority under rule 29(1)(v) of the CCS (CCA) Rules bearing in mind the oft-

quoted words of Justice Felix Frankfurter in **Vitarelli v. Seaton**⁴, which has met with approval of our Supreme Court in a catena of decisions. The following passage is worth recalling:

“ . . . if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.”

(emphasis ours)

39. Observance of procedural safeguards is not an empty formality. There can be no deprivation of the Right to Life except in accordance with procedure established by law is what Article 21 ordains. Judicial pronouncements of our Supreme Court have recognized the right to livelihood as a facet of the Right to Life. The impugned revisional order of the appellate authority does affect the livelihood of the petitioner and, therefore, must conform to the procedure established by law. A statutory law guaranteeing procedural safeguards to a charged officer from illegal and arbitrary treatment can neither be allowed to be construed in a manner that leads to its distortion or dilution nor can such law be left to a warped mind to suit his convenience. It could not have been, and is not, the legislative intent that the period of limitation of 6 (six) months, which rule 29(1)(v) of the CCS (CCA) Rules envisages, can be halted from expiring simply by recording an

⁴ 359 US 535

order that the appellate authority, desirous of invoking the power thereunder, has extended the time limit under rule 31.

40. At this stage, it ought to be placed on record what we noticed from paragraph 20 of the impugned order of the Tribunal. While countering the contention raised on behalf of the petitioner that power had been invoked beyond 6 (six) months of the order-in-original dated 18th August 2011, the respondents had referred to and relied on a departmental circular dated 27th July 1972 issued by a different department (Posts and Telegraph) on how to reckon the period of revision of 6 (six) months given as "*Decision (4)*" therein. Such circular was issued in view of a "recent judgment" of a high court, details whereof are not revealed. The material part reads as follows:

"*** Accordingly, it is hereby clarified that it will be incumbent upon the Appellate Authority to make a specific mention of the fact that it proposes to revise the order already passed, when calling for the papers. In other words the Appellate Authority should clearly indicate in the order calling for the records of the case that it proposes to revise the order and it is in this connection the papers are being called for. At the same time, the Government servant should also be informed that that the Appellate Authority proposes to revise the order. It is necessary to ensure that the intention of the Appellate Authority to revise the orders in this way is conveyed to all concerned within the stipulated period of six months from the date of the order proposed to be revised."

41. This circular, which is an instruction given to the administrative officers, was considered in **Dharam Pal Gupta** (supra) although the point under consideration before us did not arise there. If any of the terms of such circular are

violated, the same would not infringe any legal right of a charged officer and cannot be enforced by him in a court of law against the administration. However, the officers are bound by such instruction failing which they could expose themselves to disciplinary action. This is the position of law flowing from the decision of the Supreme Court in **South Central Railway vs. G. Ratnam**⁵.

42. The respondents advanced the contention before the Tribunal that in terms of the said circular, the petitioner was informed of the desire of the appellate authority to reopen proceedings within 6 (six) months of the order-in-original and, therefore, such action was in order, leaving no cause for the petitioner to feel aggrieved. The contention was accepted by the Tribunal by holding that "*Decision No.4 under these Rules ... is in conformity with the judgment of the Hon'ble High Court*".

43. We must make it clear at this stage that the said circular is merely an explanatory instruction and not an explanatory amendment of rule 29; thus, it has no force of a statute. It is rule 29(1)(v) having statutory character that has to prevail over all explanatory instructions that are issued subsequently. It is the duty of the Court to interpret the law engrafted in the subordinate legislation, not an administrative instruction (given to the officers of the department) for compliance the breach whereof does not give rise to a judicially enforceable right to the charged officer. As we have observed above upon consideration of the mandatory nature of rule 29(1)(v),

⁵ (2007) 8 SCC 212

conveying of the decision of the appellate authority to the charged officer that such authority wishes to reopen proceedings for revising an order-in-original must be accompanied by the tentative reasons therefor which must be borne out from the communication forwarded to such officer; or else, the purpose of placing an embargo by way of time limit for averting an abuse of the power would lose all its meaning. The clock would not stop only by communicating the desire or intention; it would stop if the tentative reason in support of the desire or intention is communicated. Such communication conveying the appellate authority's desire or intention could either be contained in a show-cause notice or an official letter. However, if the tentative reason is not made part of the communication conveying the decision to reopen proceedings, that would not serve the purpose of the relevant statutory provision to amount to a substantial compliance thereof.

44. What would amount to a legal and valid invocation of the *suo motu* power under rule 29(1)(v)? We have indicated our answer hereinabove. We summarize by observing that if indeed a genuine case emerges calling for invocation of the *suo motu* power under rule 29(1)(v), the minimum that is required of the appellate authority is to record brief and tentative reasons for reopening of the proceedings for revisiting the order-in-original and to put the resultant decision with such tentative reasons in transmission before the expiry of the period of 6 (six) months. This course of action has to be read into rule 29(1)(v) as part of the rule of fairness and non-arbitrariness in administrative action. Unless

this course is followed and if officers of the department are allowed to invoke and exercise power under rule 29(1)(v) in such manner they think convenient, it could lead to chaotic results. Our legal system, wedded as it is to the rule of law, does not permit any administrative officer to play truant with public service laws and subvert the same, though it cannot be overemphasized that corruption that is now experienced at almost all levels of public service might sometimes drive senior officers, who are honest to the core, crazy (and, at times, may lead to their temporary loss of senses), in pursuance whereof recourse to disciplinary action could be taken with genuine intention to cleanse the system of corrupt officers but, unknowingly, in a manner not authorized by law. This case stands out as a fine example.

45. Having considered the departmental notes, which provide the only foundation for reopening of the proceedings under rule 29(1)(v) of the CCS (CCA) Rules to revise the order-in-original dated 18th August 2011, we have no hesitation to hold that the power of revision has been invoked without complying with the parameters for such invocation. The opinion of the appellate authority for reopening the proceedings, for the first time, finds reflection in the memorandum containing the order dated 13th March 2012 (signed on 14th March 2012), which was issued well beyond 6 (six) months of the order-in-original dated 18th August 2011. The order dated 31st January 2012, even if read with the preceding departmental notes, does not demonstrate any application of mind, not to speak of due and proper application of mind, rendering it vitiated for absence of

reference to any invalidating factor in the order-in-original of the disciplinary authority leading to formation of an opinion that a revision was indeed called for. Even assuming that the order dated 31st January 2012 is not an order simplicitor extending time but one that seeks to reopen proceedings concluded by the order-in-original, it seems that the power was exercised mechanically for no good reason than that the order-in-original went on to drop the proceedings against the petitioner though the charges were serious. This was despite the department pursuing the matter till the Supreme Court and failing. The submission of Mr. Sethna that the appellate authority by his order dated 31st January 2012 extended the time limit for the purpose of exercise of the power of revision conferred by rule 29(1)(v) of the CCS(CCA) Rules could be factually correct, but legally speaking, it falls short of a valid invocation of power. We are unable to be *ad idem* with him that the power of revision was invoked in the manner required by law, i.e., *bona fide* and for good reason, and did contain the brief and tentative reason for proposing a revision of the order-in-original. The manner in which the appellate authority proceeded to invoke the power of revision is brazenly in violation of the statutory mandate and, thus, illegal, arbitrary and *ultra vires*.

46. This is the first ground for us to interfere with the revisional order dated 13th May 2012.

47. There is one other vitiating factor, not equally significant as the first but nonetheless crucial, which renders the process of invocation and exercise of the *suo motu* power by the

appellate authority under 29(1)(v) of the CCS(CCA) Rules bad in law and unsustainable.

48. Having regard to the time limit mandated by rule 29(1)(v) of the CCS(CCA) Rules, we also proceeded to inquire of Mr. Sethna as to when was the communication dated 15th February 2012 of the Additional Commissioner of Customs put into transmission for reaching the petitioner. Mr. Sethna brought before us the original of the communication dated 15th February 2012 issued by the Additional Commissioner of Customs, which bears a rubber stamp endorsement that it was "Issued by Speed Post" and the initial of an unnamed officer dated 15th February 2012.

A copy of such communication shall be retained with the records and marked 'Y' for identification.

49. We need to place on record that such query was made by us, given the claim of the petitioner that he received such communication on 3rd March 2012, i.e., beyond the period of 6 (six) months from the date of the order-in-original dated 18th August 2011. This claim of receipt of the communication on 3rd March 2012, significantly, has not been disputed before us. We can take judicial notice of the fact that in the normal process of dispatching articles by Speed Post, it ordinarily does not take more than a couple of days for an article dispatched from one city to reach the addressee within the same city. Here, assuming that the communication dated 15th February 2012 was sent on that very day by Speed Post from the office of the Additional Commissioner of Customs at Mumbai – 400 001, it took more than a fortnight to reach the petitioner at his official address at Mumbai – 400 099. Such

delay made us suspicious and inquisitive. The said query was made by us, also upon ascertaining from the records itself that there had been no effort on the part of the respondents to effect personal service of the communication dated 15th February 2012 on the petitioner in terms of the first part of rule 30 of the CCS(CCA) Rules.

50. It is indeed true that the petitioner, as contended by Mr. Sethna, has not raised the point that the communication dated 15th February 2012 was not put into transmission by 17th February 2012. However, as part of the exercise of judicial review (which is intended to examine the process of decision making), we are of the opinion that the respondents being public authorities ought not to take shelter behind inappropriate and inadequate pleadings to save illegal acts from interference by the writ court. There can hardly be any doubt that compliance with rules of pleadings, which are of course intended to serve a salutary purpose, must be insisted upon. This is because no party should be taken by surprise by his adversary while raising a point in the midst of any proceeding. Since this writ petition arises from an order of the Tribunal, a point not taken in the pleadings before the Tribunal should not ordinarily be permitted to be raised before the higher courts is well settled. It is also settled law that a case must not be decided by the Court on a point which the party losing had no opportunity to meet. However, such a principle may not apply with the same vigour in writ proceedings in case there arises a question of law, or a mixed question of law and fact where (i) the fact is decipherable and discernible from the records of the case (which the Court

exercising jurisdiction of certiorari is entitled to look into), (ii) such fact, when brought to its notice, is not disputed by the party raising the objection, and (iii) when the party against whom the objection is raised has/had no access to the records. There could be cases, such as this, where the charged officer may not even know what incidents transpired behind the screen because he could not be and was not privy to it. We cannot also keep aside from our consideration that before us too, a prayer was made by Mr. Sethna either not to share the contents of the file noting with Mr. Ramamurthy or to allow him to take inspection of the records. In view of such approach of the respondents of seeking to keep the records away from the petitioner, even at this stage, we wonder whether it could have been and was at all possible for him to raise points in the relevant pleadings for consideration arising out of infirmities in the decision-making process. We have not been shown any authority holding that the writ court, despite perceiving an infirmity in the decision-making process from the records, ought to dissuade itself from querying the decision-maker on such infirmity. It could amount to abdication of a judicial duty if the writ court, despite perceiving an infirmity in the decision-making process which is serious enough to warrant invalidation of the decision, were to distance itself on the specious ground that such infirmity is not a point raised in the pleadings. We are inclined to the view that this Court, exercising its plenary jurisdiction, is not bound in proceedings for a writ of certiorari to test an order only on the basis of the grounds raised by the party aggrieved. If the Court perceives an infirmity from the records including the file

noting produced by its custodian, serious enough to go to the root of invocation and exercise of jurisdiction by the decision-maker and *prima facie* sufficient to invalidate the decision flowing from the process, and such infirmity is brought to the knowledge of the decision-maker, it would be his duty to effectively respond, explain that there is no such infirmity as perceived by the Court and persuade the Court not to take a view adverse to his interest.

51. In this particular case, as discussed hereafter, the respondents have been given sufficient time to come up with a plausible answer. Consequently, we do not consider that the respondents have been taken by surprise and deprived of sufficient opportunity to answer the Court's query.

52. We called upon Mr. Sethna to satisfy us that the communication dated 15th February 2012 was dispatched by Speed Post within 17th February 2012, being the last day of the period of 6 (six) months, within which the power of revision had to be invoked and the charged officer informed of the decision in that behalf. Apart from the endorsement in the document marked 'Y' and a part of the file noting on page XIV that the decision regarding revision was sent to the petitioner on 15th February 2012, Mr. Sethna could not produce any documentary evidence to support his contention that the communication was dispatched by Speed Post on 15th February 2012, or even before 17th February 2012. We had adjourned hearing for a week to enable the respondents to search out documentary evidence in that behalf. An affidavit has been filed on 4th May 2022 placing on record that despite vigorous search, no documentary evidence could be traced. In

the absence of any documentary evidence like postal receipt or an entry in a dispatch register or tracking report or an Acknowledgement Card or any other material worth consideration in the bulky records, which were placed before us and perused, to the effect that the communication dated 15th February 2012 was dispatched by Speed Post on 15th February 2012 or even by 17th February 2012, it stands to reason that the appellate authority might have been desirous of invoking the *suo motu* power under rule 29(1)(v) within the time limit specified therein but the decision to invoke the power of revision had not been put into transmission for onward communication to the petitioner within 6 (six) months of 18th August 2011. If the authority does not convey the decision of reopening of the proceedings within 6 (six) months, we are also of the considered view that it cannot fall back on rule 31 of the CCS(CCA) Rules and extend the time limit prescribed in rule 29(1)(v) which we have held to be mandatory.

53. We are persuaded to accept the argument of Mr. Ramamurthy that rule 31 had/has no application in the present case for these reasons. First, rule 29 of the CCS(CCA) Rules starts with a non-obstante clause, hence, it overrides rule 31 of the CCS(CCA) Rules; next, rule 29(1)(v) specifically imposes a time limit of 6 (six) months; additionally, rule 31 has no applicability insofar as rule 29(1)(v) is concerned since rule 31 itself says that it would be applicable “save as otherwise expressly provided in these rules” (emphasis ours). The period of 6 (six) months having been expressly provided in rule 29(1)(v), any other construction would defeat the

purpose for which the special power of revision has been conferred on the appellate authority.

54. Mr. Sethna has placed several decisions of the Supreme Court to dissuade us from drawing any adverse inference consequent upon non-production of documentary evidence to support the endorsement made in the document marked 'Y' that the communication was indeed dispatched on 15th February 2012.

55. Gujarat Electricity Board and Ors. vs. Atmaram Sungomal Poshani⁶ has been relied on for the proposition that since there is a presumption of service of a letter under registered cover and if the party challenging the factum of such service fails to place any material before the Court to show that the endorsement made by the postal authorities was wrong and incorrect, the burden to rebut the presumption is not discharged and a mere denial made by the party in such circumstances would not be sufficient to rebut the presumption relating to service of the registered cover; consequently, the service is complete.

56. Next, the decision in **Mahendra L. Jain and Ors. vs. Indore Development Authority and Ors.⁷**, is cited for the proposition of law that if any document is called for without any pleadings, the same is not relevant and an adverse inference need not necessarily be drawn only because it is lawful to do so.

57. Proceeding further, Mr. Sethna places reliance on the decision in **Manager, R.B.I., Bangalore vs. S. Mani and**

⁶ AIR 1989 SC 1433

⁷ AIR 2005 SC 1252.

Ors.,⁸ where it was held that only because the appellant failed to prove the plea of abandonment of service by the respondents, the same in law cannot be taken as a circumstance that the respondents have proved their case.

58. Reliance has also been placed by Mr. Sethna on the decision in **Punjab National Bank and Ors. vs. Kunj Behari Misra**⁹, in support of the stand that natural justice principles were duly complied with by the respondents before the appellate authority inflicted punishment on the petitioner.

59. The disagreement note of the successor-in-office as disciplinary authority dated 30th August 2001 has been the subject matter of litigation right from the date O.A. No.49 of 2002 was instituted by the petitioner before the Tribunal. The order dated 31st January 2012 and the communication dated 15th February 2012 are part of the same process by which disciplinary action was sought to be taken against the petitioner. It is in peculiar circumstances, i.e., upon perusal of the records maintained by the respondents and relevant to this case, that we called upon the respondents to show that the communication dated 15th February 2012 was dispatched on that date or any time before 17th February, 2012. The decision in **Mahendra L. Jain** (supra), relied upon by Mr. Sethna, is distinguishable because in that case the appellants relied on letters of appointment issued to them by the respondents but did not produce such letters themselves. Also, the appellants had called upon the respondents to produce other documents without there being any pleadings in

⁸ AIR 2005 SC 2179

⁹ AIR 1998 SC 2713

regard thereto. The law to be found in the penultimate sentence of paragraph 40, relied on by Mr. Sethna, was declared by the Court bearing in mind the fact situation encapsulated in the immediately preceding sentence, i.e., the Court had referred to the said fact only for the purpose of showing that it would not be correct to contend that the appellants had no access to the said documents (emphasis ours). Here, the petitioner had/has no access to the records. The burden to prove that the communication dated 15th February 2012 was put into transmission by Speed Post on that date itself or latest by 17th February 2012 lies on the respondents, who have been asserting the same. The common legal phraseology that "*he who asserts must prove*" has its due application in the matter of proof called for by the Court. If a presumption could be drawn of due dispatch by 17th February 2012, the petitioner could have been called upon to rebut such presumption. However, that situation does not arise here. Since rule 30 of the CCS(CCA) Rules enables service of orders, notices, etc. made or issued under such Rules to be served in person on the Government servant, it would have been eminently desirable if the respondents had elected the first option or course instead of the second option or course, which ordains communication by Registered Post. It is not that the petitioner was not available in the office. We have ascertained that during the pendency of the entire proceedings, he was promoted and continuously performed his duties till retirement. He was not placed under suspension even. It is in such facts and circumstances that the approach of the respondents not to personally serve him the

communication dated 15th February 2012 appears to be rather strange and inexplicable. Mr. Sethna could not advance any justification and/or had no explanation to offer as to why the first option or course of personal service was not adopted. When the first part of rule 30 specifically refers to “shall be served in person on the Government servant”, the same cannot be bypassed except on the ground that honest attempts to personally serve the order/notice have proved abortive. It would logically follow that the second option or course, referred to in rule 30, is required to be followed if the honest attempt to serve in person fails. If indeed it were open to an authority to straightaway pursue the second option or course without exploring the first option or course, the latter would be a mere surplusage. Certainly, that could not have been the legislative intent. Since there has been a breach of a mandatory statutory rule, such breach does give rise to a cause of action for an aggrieved employee and he can have recourse to the Court for redress. This position in law is well-settled by the Constitution Bench decision of the Supreme Court in **State of Mysore vs M.H. Bellary**¹⁰. However, following the decision in **Mahendra L. Jain** (supra), we need not draw any adverse inference against the respondents owing to non-production of the requisite evidence by them although it would have been lawful for us to do so.

60. Even if we discount the first option or course and proceed to hold that the second option or course was also available to be explored, without exploring the first option or

¹⁰ AIR 1965 SC 868

course, and the respondents had acted within the parameters of law by dispatching the communication dated 15th February 2012 by Speed Post, it would not be unreasonable on our part to hold the respondents rigorously to the standard by which they profess their action to be judged, i.e., by rule 30 of the CCS(CCA) Rules, and to suffer the pain of invalidation of any such action in violation of such standard, relying upon the law declared by the Supreme Court in its decision in **Ramana Dayaram Shetty vs. International Airport Authority of India**¹¹. Since rule 30 of the CCS(CCA) Rules refers to communication by Registered Post, one may fall back on section 27 of the General Clauses Act, 1897 reading as under:

“27. Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression ‘serve’ or either of the expressions ‘give’ or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.”

61. Section 27 of the General Clauses Act, 1897 has been considered by the Supreme Court in several decisions arising out of rent control laws and the Negotiable Instruments Act, 1881, namely, **Harcharan Singh vs. Smt. Shivrani and Ors.**¹²; **M/s. Madan and Co. vs. Wazir Jaivir Chand**¹³; **K.**

¹¹ AIR 1979 SC 1628

¹² (1981) 2 SCC 535

¹³ (1989) 1 SCC 264

Bhaskaran vs. Sankaran Vaidhyan Balan and Ors.¹⁴; and **D. Vinod Shivappa vs. Nanda Belliappa**¹⁵. Drawing guidance from such decisions, we hold that the respondents have partially failed to discharge the burden of proof and such partial failure proves fatal to their interest. That the petitioner received the communication by Speed Post on 3rd March 2012 is by itself proof of the fact that the envelope containing the communication was properly addressed, pre-paid and dispatched. However, the question here centres around the date of dispatch. Even if the respondents could not lay their hands on the receipt granted by the postal authority manifesting that the communication dated 15th February was dispatched on that very date, or even by 17th February 2012, or the tracking report or the Acknowledgement Card that returned to them, if any entry made in any dispatch register maintained in the normal course of official business were produced, drawing a presumption of invocation of the power traceable in rule 29(1)(v) of the CCS(CCA) Rules and due communication of the resultant decision in terms of rule 30 would have been in order. Since due communication of the decision to invoke rule 29(1)(v) is an integral part of the process of revision of the order-in-original, the respondents ought to have preserved evidence of putting such decision in transmission. Since they have not preserved the evidence despite the lis being *sub judice*, they have to suffer the consequence. In the absence of production of either the postal receipt or any such register containing any entry or tracking

¹⁴ (1999) 7 SCC 510

¹⁵ (2006) 6 SCC 456

report or Acknowledgement Card or any other material, coupled with the undisputed fact that the petitioner's version of having received the communication dated 15th February 2012 as late as on 3rd March 2012 has not been disputed by the respondents, we find sufficient reason to hold that invocation of power and communication of such invocation may not have been made within the time limit of 6 (six) months. In the absence of requisite evidence of worth being placed before the Court, we are left with no other option but to conclude that the respondents have failed to persuade us hold that they did put the communication dated 15th February 2012 in transmission any time before 17th February 2012. Thus, invocation of power under rule 29(1)(v) must also be held to be barred by time; and exercise of the power being the logical corollary of such time barred invocation, is *void ab initio*. For the reasons that we have assigned above, the law laid down in **Atmaram Sungomal Poshani** (supra) and **S. Mani** (supra) in completely different facts and circumstances would not aid the respondents.

62. It is in view of the findings returned above on the aforesaid two points that we hold invocation and exercise of the power under rule 29(1)(v) of the CCS (CCA) Rules for review of the order-in-original of the disciplinary authority by the appellate authority to be vitiated by illegality and arbitrariness; hence, we propose to interfere with the revisional order of the appellate authority.

63. The revisional order dated 13th May 2013 stands set aside with the result that the petitioner shall be entitled to all benefits, had he not been fastened with such order. The

benefits be restored in favour of the petitioner immediately, but not later than 2 (two) months from date of receipt of an authenticated copy of this judgment and order.

64. In the result, the impugned order passed by the Tribunal too stands set aside and the writ petition is allowed. There shall, however, be no order as to costs.

65. At this stage, Mr. Sethna prays for stay of operation of the order. Since we have granted sufficient time to the respondents to comply with the order, the request of Mr. Sethna is considered and refused.

(V. G. BISHT, J.)

(CHIEF JUSTICE)

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signed by
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