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

WRIT PETITION NO.1643 OF 2021

Nagraj Nathu Borase,)
Age : about 66 years, Occu. : Retired)
Deputy Commissioner of Customs,)
Mumbai,)
R/o. A-304, Sumer Castle, Meenatai)
Thakare Chowk, Castle Mill Naka,)
Old Agra Road, Thane (W)-400 601.)... Petitioner

VERSUS

1. Union of India,)
through the Secretary to the)
Government of India, (Ad-VB))
Central Board of Excise & Customs)
Ministry of Finance, Room No.615,)
6th Floor, 'C' Wing, HUDCO,)
Vishala Building, Bhiaji Kama)
Palace, R. K. Puram,)
New Delhi-110 066.)

2. The Commissioner Customs, (Gen))
Mumbai, Customs House,)
Ballard Estate, Mumbai-400 001.)... Respondents

Appearances

Mr. Ajeet Manwani *i/b. A & A Legal, for Petitioner.*

Mr. Rui Rodrigues *a/w. Mr. A. A. Gorge, for Respondent No.1 (UOI).*

CORAM : S. V. Gangapurwala, ACJ &
Sandeep V. Marne, J.

DATE : 25th April 2023

JUDGMENT : (*Per - Sandeep V. Marne, J.*)

1. **Rule**. Rule made returnable forthwith. With the consent of the parties, petition is taken up for final hearing.

2. By this petition petitioner challenges the judgment and order dated 19th November 2019 passed by the Central Administrative Tribunal (**Tribunal**) dismissing Original Application No.241 of 2015. In his Original Application, petitioner had set up a challenge to the order dated 4th August 2014 passed by the Disciplinary Authority imposing penalty withholding of 30% of monthly pension for the period of 5 years.

3. While working as Deputy Commissioner of Customs, Central Excise petitioner was issued with memorandum of charge sheet dated 4th August 2014 alleging misconduct in respect of examination of goods of the exporter who allegedly claimed higher FOB value with a view to claim higher DEPB entitlement. In the inquiry conducted against petitioner the charges were proved. In the meantime, in proceedings initiated before the Adjudicating Authority under the provisions of Customs Act against the exporter as well as petitioner, penalty of Rs.1,00,000/- was imposed upon petitioner vide common order passed by the Adjudicating Authority on 30th April 2009. Petitioner retired from service on attaining the age of superannuation on 30th June 2013. On account of petitioner's

retirement, the proceedings were continued under the provisions of Rule 9 of the CCS (Pension) Rules 1972. After consideration of petitioner's representation, the matter was referred to the Union Public Service Commission (**UPSC**) for its advice. UPSC tendered its advice on 26th March 2014 agreeing with the findings of the inquiry officer. UPSC's advice was forwarded to petitioner for his representation and the petitioner submitted representation on 19th May 2014. After considering petitioner's representation, Presidential order was passed on 4th August 2014 imposing the penalty of withholding of 30% of monthly pension for a period of 5 years.

4. In the meantime, petitioner had preferred appeal before Customs Excise and Service Tax Appellate Tribunal (**CESTAT**) against the order of the Adjudicating Authority dated 30th April 2009 imposing penalty of Rs.1,00,000/-. The appeal was partly allowed by CESTAT vide judgment and order dated 4th June 2015 and the CESTAT remanded the matters to the Adjudicating Authority to decide the proceedings afresh. The Adjudicating Authority thereafter passed order dated 15th April 2016 dropping the proceedings against all the noticees Thus, earlier order of the Adjudicating Authority imposing penalty of Rs.1,00,000/- on petitioner did not survive.

5. Petitioner challenged the penalty order dated 4th August 2014 before the Tribunal by filing Original Application No.241 of 2015. By judgment and order dated 19th November 2019 the Tribunal has

dismissed the Original Application. Aggrieved by the decision of the Tribunal, petitioner filed the present petition.

6. We have heard Mr. Manwani the learned counsel appearing for petitioner. He would take us through the charges and the evidence to demonstrate that there was no evidence available on record for punishing petitioner. He would submit that it was not petitioner’s duty in his capacity as Assistant Commissioner of Central Excise to personally examine the exported goods. He would submit that the facilities at Customs Department at JNPT were overloaded e and therefore the exporter used to take circuitous route of carrying the goods from Mumbai to Miraj for examination and thereafter carried them back to the Mumbai port for export. That by doing so the export activities at Miraj were encouraged and the workload at JNPT was reduced. He would submit that the findings recorded in the inquiry are perverse. The petitioner has been let off in the Adjudication Proceedings initiated under the provisions of the Customs Act. He would further submit that there is no question of causing any loss to Government as the concerned consignment was intercepted before it could be actually exported. He would rely upon the judgments of the Apex Court in **Kuldeep Singh Vs. Commissioner of Police & Ors.,** (1999) SCC (L & S) 429 and **M. V. Bijlani Vs. Union of India & Ors.,** (2006) 5 SCC 88. He would also place reliance on order passed by this court in **Ashok Jagannath Ghode Vs. Union of India & Ors.**, Writ Petition No.13720 of 2022 decided on 8th March 2023 in support of contention that petitioner therein was involved in the same incident.

7. The petition is resisted by Mr. Rodrigues the learned counsel appearing for Union of India. He would submit that the findings recorded in the proceedings are well supported by the evidence on record. That petitioner committed serious misconduct which caused loss to the public at large and that therefore penalty of stoppage of 30% pension has correctly been imposed. He would submit that order the passed in the Adjudicating Proceedings initiated under the provisions of Customs Act cannot have any impact on the orders passed in the Disciplinary Proceedings.

8. We have considered the submissions canvassed by the rival parties. Petitioner at the relevant time was working in the capacity as Assistant Commissioner of Central Excise and the Customs establishment at Miraj was under his jurisdiction. True it is that being an Assistant Commissioner of Central Excise, petitioner was not supposed to personally examine the exported goods. He would be assisted in this regard by the Superintendent of Central Excise and Inspector of Central Excise posted under him. However, in the present case petitioner, being posted in a senior position as Assistant Commissioner, ought to have smelt a rat in the unusual methodology adopted by the exporter in procuring the goods meant for export at Mumbai and taking the circuitous route of carrying them to Miraj for examination by Customs Authorities. After examination, the goods were transported back to Mumbai for being exported. If the exporter weas taking such a circuitous route thereby spending extra time, energy and money for examination of

goods at Miraj, petitioner ought to have been more cautious and ought to have performed his supervisory duties by either himself examining some of the samples and/or sending them to experts/labs for examination for determination of market value. Therefore the finding of guilt recorded in disciplinary proceedings would not suffer from the vice of perversity. Petitioner's reliance on judgments in **Kuldeep Singh** (supra) and **M. V. Bijlani** (supra) would therefore be of no avail.

9. Though petitioner was not in a position to made out a case of perversity in the findings recorded in the disciplinary inquiry, we find that there is only one area where interference by this court would be necessary. The Disciplinary Authority has recorded following findings while holding petitioner guilty of charge and for imposition of penalty:

> *"It is thus not possible to accept the contention that no grave misconduct is made out in view of the categorical finding of collusive conduct on his part. Needless to point out that even in the adjudicating proceedings, the adjudicating authority imposed a penalty of Rs.1.00.000/- in his Order-in-Original dated 30.04.2009 on Shri N.N. Borse, AC, thus establishing the collusive conduct."*

10. Thus, one of the factors taken into consideration by the Disciplinary Authority is the factum of imposition of penalty by the Adjudicating Authority by order dated 30th April 2009. At the time of passing of order by the Disciplinary Authority on 4th August 2014, appeal preferred by petitioner against order of the Adjudicating Authority was pending before the CESTAT. The appeal came to be decided by judgment and order dated 4th June 2015 and the CESTAT remanded the

proceedings back to the Adjudicating Authority. After considering proceedings afresh, the Adjudicating Authority (Commissioner of Customs, Pune) passed order dated 15th April 2016 dropping the proceedings. Since the Adjudication Proceedings were dropped after passing of the penalty order, the said circumstance has not been considered while imposing penalty on petitioner. Since the imposition of penalty on the petitioner is one of the factors taken into consideration by the Disciplinary Authority for imposition of penalty on petitioner and since the penalty under the Adjudication Proceedings has subsequently been set aside, we are of the view that the matter needs to be reconsidered by the Disciplinary Authority in the light of the orders passed by the CESTAT and Adjudicating Authority. The Tribunal has glossed over this aspect while passing the impugned order. The disciplinary authority will also have to take into consideration whether any loss was indeed caused to the public exchequer in the light of the order passed by the adjudicating authority dropping the proceedings against the exporter. While reconsidering the case, the disciplinary authority would take into consideration the fact that Petitioner had already retired from service and that no penalty can be imposed under Rule 9 of the CCS (Pension) Rules unless a conclusion is reached that the Petitioner is guilty of grave misconduct. The said aspect be considered in the light of the order passed by the adjudicating authority.

11. We accordingly set aside the judgment and order dated 19th February 2019 passed by the Tribunal in Original Application No. 241 of

2015. We also set aside the order dated 4th August 2014 passed by the Disciplinary Authority imposing penalty of 30% cut in pension for a period of 5 years. We remand the proceedings to the Disciplinary Authority for reconsideration based on the orders passed by CESTAT and the Adjudicating Authority. The Disciplinary Authority shall take a decision afresh with regard to penalty, if any, to be imposed on petitioner. If the UPSC needs to be consulted, the same be done in an expeditious manner. The entire exercise (including consultation with UPSC) be completed by the Disciplinary Authority and final order be passed in the proceedings within a period of 6 months from the date of this order. Depending on the final order that may be passed by the Disciplinary Authority, further course of action be adopted with regard to refund of withheld retiral benefits to petitioner. With the above directions the petition is partly allowed. Rule is made partly absolute.

SANDEEP V. MARNE, J. **S. V. GANGAPURWALA, ACJ**