IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7568 OF 2019
ALONGWITH
INTERIM APPLICATION NO. 1388 OF 2021

(for withdrawal of the amount)

1. The Union of India, through the Chairman, Central Excise & Customs, North Block, New Delhi-110 001.

2 The Chief Commissioner of Central Excise, Mumbai Zone-I, 115, Maharshi Karve Road, New Central Excise Building, Churchgate, Mumbai-400 020.

3. The Commissioner of Central Excise, Thane-I, Nav Prabhat Chambers, Ranade Road, Dadar (West), Mumbai-400 028.

4. The Additional Commissioner (P & V) Central Excise, Thane-I, Nav Prabhat Chambers, Ranade Road, Dadar (West), Mumbai-400 028. **...PETITIONERS**

VERSUS.

1. Balakrishnan Thiruvengadam Mudaliar Last employed at : Central Excise, Thane-I, Commissionerate, Nava Prabhat Chambers, Ranade Road,

Dadar (West), Mumbai-400 028,
Residing at BDD Chawl, No.18, Room
No.6, Worli, Mumbai-400 018. **...RESPONDENT**

Ms. Neeta Masurkar a/w. Mr. P. Khosla, for the Petitioners.

Ms. Gayatri Singh a/w. Mr. Sangram Chinnappa i/by. Kranti & Co., for the Respondent.

CORAM : NITIN JAMDAR, ACJ &
SANDEEP V. MARNE, J.

JUDG. RESD. ON : 08 June 2023.
JUDG. PRON. ON : 20 June 2023.

JUDGMENT (*Per : SANDEEP V. MARNE, J.*) :-

Rule. Rule is made returnable forthwith. Heard finally with the consent of learned Counsel for the Petitioner and the learned Counsel for the Respondent.

2. This petition is filed by the Union of India challenging the judgment and order dated 9th August 2018 passed by the Central Administrative Tribunal (**Tribunal**) in Original Application No. 787/2010. Petitioners are aggrieved by the direction of the Tribunal

for payment of arrears of salary during the intervening period of compulsory retirement till reinstatement in service.

3. The case has a checkered history. Respondent was appointed as a Driver in the Central Excise Commissionerate at Mumbai on 30 March 1989. He was deputed to drive a vehicle to Alibaug, Murud, Srivardhan and Mahabaleshwar in connection with some wireless maintenance work at the relay stations during 4 June 2003 to 8 June 2003. One Shri. S. A. Keer, Cashier wanted to join the journey till Mahabaleshwar in connection with his own work. It is alleged that one person identified as Shri. A.K. Pasha handed over some money to Shri. Keer, who requested Respondent to count the same. After counting Respondent returned the money to Shri. Keer. The amount was handed over by Shri. Keer to Shri. M. S. Kamble, a Clerk in the office. The Anti-Corruption Bureau of Central Bureau of Investigation had laid a trap and they apprehended Shri. Keer, Shri. Kamble and the Respondent. Respondent was arrested and kept under deemed suspension w.e.f. 5 June 2003, which was revoked in April 2004. While Shri. Keer was prosecuted, no prosecution was launched against Respondent. A Memorandum of Chargesheet for holding departmental enquiry was issued to Respondent on 13 September 2004 on the allegation of knowledge about receipt of amount by Shri. Keer towards illegal gratification and not discouraging Shri. Keer from doing so.

4. After holding Departmental Enquiry, punishment of compulsory retirement was imposed on Respondent by order dated 8 January 2008. Respondent's appeal and revision were rejected. He therefore filed Original Application No.787/2010 before the Tribunal challenging the orders of the Disciplinary Authority, Appellate Authority and the Revisional Authority and sought reinstatement in service with arrears of salary, continuation of service etc.

5. The Tribunal held Shri. M.S. Kamble, who was facing almost identical charge, was imposed lesser punishment of stoppage of one increment for a period of three years. The Tribunal therefore partly allowed the Original Application of Respondent directing Petitioner-Union of India to reinstate him in service with continuity of service. The Tribunal however directed that Respondent would not be entitled to any arrears of salary for the period from his compulsory retirement till his reinstatement on the principle of 'No Work No Pay'. The penalty imposed on him was reduced to stoppage of one increment for three years on par with Shri. M.S. Kamble.

6. The judgment and order dated 21 February 2013 passed by the Tribunal became subject matter of challenge both by Petitioners as well as by Respondent. Writ Petition No. 6368/2013 filed by the Petitioners questioning Tribunal's direction for reduction of penalty and reinstatement came to be dismissed by this

Court vide judgment and order dated 21 June 2017. Petitioners preferred Special Leave Petition (Civil) Diary No. 14835/2018 before the Apex Court challenging this Court's decision, which came to be dismissed by order dated 17 July 2018. In the meantime, Writ Petition No. 11391/2013 filed by the Respondent to the limited extent of denial of backwages came to be partly allowed by this Court vide order dated 25 January 2018 with following directions :

> "*7. Thus, as of today the order of reinstatement passed by the Tribunal stands. The petitioner has filed this Petition seeking relief that he be reinstated with effect form 08/01/2008 with continuity in service, full backwages and all other consequential benefits.*
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> *8. In respect of the incident which took place on 04/06/2003, the petitioner was proceeded with departmentally and by order dated 08/01/2008, the penalty of compulsory retirement was imposed on him. The Appeal came to be rejected on 30/03/2009. Revision Petition was rejected on 27/08/2010. The Tribunal granted reinstatement by order dated 21/02/2013. The Tribunal while granting reinstatement has observed that there cannot be any discrimination in the penalty imposed on the petitioner and Shri M.S.Kamble who were both found guilty of misconduct on almost identical charges in the departmental proceedings in a similar incident. Shri M.S. Kamble was imposed with the penalty of stoppage of one increment for a period of three years. The petitioner thus had to wait till 21/02/2013 for order of reinstatement whereas Shri M.S. Kamble continued in service and draw salary as a result of differential treatment given to him in the matter of penalty.*
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> *9. Learned Counsel for the petitioner points out that even as on today the petitioner has not been reinstated. According to him, aspect of backwages ought to have been considered in the context of Shri M.S. Kamble being imposed with punishment of*

stoppage one increment for a period of three years and Shri M.S. Kamble allowed to discharge duties whereas the petitioner was virtually kept out of employment till his reinstatement. Learned Counsel submits that even as of today order passed by the Tribunal has not been complied with and he has not been reinstated. In the interest of justice, we feel that the issue of backwages needs to be reconsidered by the Tribunal afresh. As the challenge of the petitioner is limited to the grant of back-wages & determining the date from which the petitioner is entitled for reinstatement, the matter needs to be remitted back to the Tribunal to the limited extent of deciding the issue of backwages and arrears of salary. It is the specific contention of the learned Counsel that the petitioner is entitled to be reinstated from 08/01/2008. This aspect needs to be considered by the Tribunal. Hence, the following order.

O R D E R

i) The O.A. is remitted back to a limited extent. The judgment and order dated 21/02/2013 passed by the Tribunal in OA No. 787 of 2010 only to the extent of 'the petitioner should not be paid any arrears of salary for the period from his compulsory retirement till his reinstatement' is set aside. The Tribunal to also determine the date from which the petitioner is entitled for reinstatement.

ii) The Tribunal to hear and decide the issue of payment of arrears of salary on its own merits.

iii) The Tribunal is requested to hear and decide OA on this limited aspect as expeditiously as possible, preferably within a period of 16 weeks from today.

iv) All contentions as regards the issues remitted are kept open to be decided on its own merits without being influenced by any observations made by us.

10. Writ Petition is partly allowed with no order as to costs."

7. It appears that the Respondent was reinstated in service on 20 July 2018. He retired from service on attaining the age of superannuation on 31 August 2019. The Tribunal proceeded to hear Original Application No. 787/2010 consequent to order of remand by this Court on the limited aspect of payment of backwages as well as exact date from which the penalty of stoppage of one increment for three years was to be made effective. After hearing both the parties, the Tribunal delivered judgment and order dated 9 August 2018 directing that Respondent shall be reinstated in service w.e.f. 8 January 2008 by imposing penalty of stoppage of one increment for a period of three years. The Tribunal further directed the Petitioners to pay arrears of salary from 8 January 2008 till Respondent was allowed to resume duties. Petitioners are aggrieved by Tribunal's direction for grant of salary during intervening period of compulsory retirement and reinstatement and have challenged the judgment and order dated 9 August 2018 in the present petition.

8. This Court, by order dated 23 July 2020, directed the Petitioner-Union of India to deposit the amount under the impugned order alongwith calculations in this Court. It appears that in pursuance of the orders passed by this Court, the Petitioner-Union of India has deposited amount of Rs.24,73,034/- in this Court. Respondent has filed Interim Application No. 1388/2021 for withdrawal of the said amount.

9. Appearing for Petitioner-Union of India, Ms. Masurkar, the learned Counsel would contend that the Tribunal has erred in awarding backwages to Respondent though he was not completely exonerated in the departmental enquiry. She would submit that Respondent is ultimately visited with the penalty of stoppage of one increment for three years and as per the Fundamental Rules-54 (**FR-54)**, Respondent could not have been awarded arrears of salary during the intervening period of compulsory retirement till reinstatement. That Respondent failed to produce any evidence of his non-employment during the intervening period and therefore there was no question of awarding of any backwages to him. She would submit that the law is well settled that award of backwages is not automatic. That Respondent is already reinstated in service despite being found guilty of misconduct and award of backwages in such circumstances would be like rewarding him. She would also rely upon the judgment of the Apex Court in **Rajasthan State Road Transport Corporation, Jaipur V/s. Shri. Phool Chand (Dead) through L.R.s**[1]

10. Petition is opposed by Ms. Gayatri Singh, learned Senior Advocate appearing for Respondent. She would submit that the Respondent was illegally visited with harsh penalty of compulsory retirement, which now stands substituted with the penalty of stoppage of one increment for three years. That the reduced penalty was required to be imposed in the first instance and Respondent lost

1 **AIR 2018 SC 4534**.

an opportunity to serve during the intervening period only on account of the mistake of Petitioners in imposing harsher penalty on him. She would submit that the Respondent did make a specific averment in Writ Petition No. 11391/2013 of not having been gainfully employed. She would submit that after imposition of penalty of compulsory retirement, he was required to first exhaust departmental remedies. His Appeal against the order of compulsory retirement dated 8 January 2008 was belatedly decided on 30 March 2009. That Respondent thereafter filed Revision Petition. which came to be rejected on 27 August 2010. That since Respondent was pursuing departmental remedy upto 27 August 2010, there was no question of he taking any alternate employment. She would further submit that after the Original Application was earlier allowed by the Tribunal on 21 February 2013, the Petitioners ought to have reinstated Respondent immediately, which they failed to do. That Respondent was kept away from service from 21 February 2013 till 27 February 2018 when he was ultimately reinstated. She would therefore submit that the orders of the Tribunal awarding arrears of salary from the date of compulsory retirement till the date of reinstatement does not suffer from any infirmity. She would pray for dismissal of the petition.

11. Rival contentions of the parties now fall for our consideration.

12. The short issue which arose before the Tribunal upon remand of the Original Application and which again arises for our consideration is whether the Respondent could be denied arrears of salary and allowances during intervening period from the date of compulsory retirement till the date of reinstatement. Respondent was compulsory retired by order dated 8 January 2008 and has been reinstated in service on 20 July 2018. Thus, the intervening period is from 9 January 2008 to 19 July 2018. This period can be divided into two parts viz. (i) 9 January 2008 to 21 February 2013 i.e. period during date of compulsory retirement and date of Tribunal's order; and (ii) 22 February 2013 to 19 July 2018 i.e. the period during which Petitioners failed to reinstate Respondent despite direction by the Tribunal.

13. So far as the second period from 22 February 2013 to 19 July 2018 is concerned, we see no difficulty why the Respondent can be denied arrears of pay and allowances. The Tribunal directed the Respondent's reinstatement in service. The order of reinstatement (with substituted penalty of stoppage of one increment for three years) attained finality on account of dismissal of Petitioner's Writ Petition No. 6368/2013 by this Court on 21 June 2017 as well as dismissal of Special Leave Petition by the Apex Court on 17 July 2018. Thus, Petitioners are solely responsible for keeping the Respondent away from duties after 21 February 2013 when they failed to reinstate him by violating the Order of the Tribunal.

Therefore, the Respondent cannot be denied arrears of salary and allowances during the period 21 February 2013 to 19 July 2018.

14. Now we turn to the period from the date of compulsory retirement (8 January 2008) till the date of Tribunal's decision (21 February 2013). Petitioners are challenging the Tribunal's order for payment of salary and allowances during this period on twin grounds; (i)non-exoneration of the Petitioner in the disciplinary proceedings; (ii)non-production of evidence of non-employment during this period. Reliance is placed by the petitioners on provisions of FR-54 to suggest that since Respondent is not exonerated altogether, the intervening period cannot be treated as duty. Reliance on behalf of Petitioners on the provisions of FR-54 does not appear to be serious as the said provision is neither referred to in the Memo of Writ Petition nor the said provision is placed before us by the learned Counsel appearing for the Petitioners during the course of her submissions. We have nonetheless gone through the provisions of FR-54, which applies to a situation where a dismissed/removed/compulsory retired Government Servant is reinstated as a result of appeal or review. It is sought to be contended that government servant is entitled to full pay and allowances only in the event he being fully exonerated in the proceedings. Since Respondents' reinstatement is not consequent to decision in appeal or revision, FR-54 would have no application. FR 54-A governs a situation where dismissal/removal/compulsory retirement is set aside by a Court of law and the Government

Servant is reinstated without holding further enquiry. Under FR 54-A if dismissal/removal/compulsory retirement is set aside solely on the ground of non-compliance with requirements of Article 311 of the Constitution and where he is not exonerated on merits, he would be entitled to such pay and allowances as may be determined by the Competent Authority. Only in the event of dismissal/removal/compulsory retirement being set aside by the Court on merits of the case, the intervening period is required to be treated as duty for payment of full pay and allowances.

15. In our view, the provisions of FR 54-A are also wholly inapplicable to the present fact situation. In the present case, the Tribunal in the earlier round of litigation recorded a finding that penalty imposed on Respondent was discriminatory and harsh and directed the penalty of compulsory retirement to be substituted by stoppage of one increment for three years. This direction of the Tribunal has been upheld upto the Apex Court and has attained finality. Thus what is held essentially is that penalty of stoppage of one increment for three years was warranted for the misconduct proved and ought to have been imposed on the date on which penalty order was issued. Thus as on 8 January 2008, the Disciplinary Authority ought to have imposed penalty of stoppage of one increment for three years. On account of imposition of harsher penalty of compulsory retirement, the Respondent remained out of service from 8 January 2008 onwards, without his fault. Thus this is not a case where provisions of FR-54A would apply. All that

was directed by the Tribunal is to substitute the penalty of compulsory retirement with that of stoppage of one increment for three years as on 8 January 2008. The Respondent was thus wrongfully kept out of duties from 8 January 2008, for which he is awarded salary and allowances.

16. So far as objection of non-production of evidence of not being gainfully employed is concerned, we find that Respondent was pursuing departmental remedies of filing appeal and revision petition which came to be belatedly decided and dismissed on 30 March 2009 and 27 July 2010 respectively. Since the Respondent was availing departmental remedies, there was no question of he taking up any alternate employment till his Revision was decided on 27 July 2010. So far as period after institution of O.A. No. 787 of 2010 is concerned, Respondent did aver in Writ Petition No. 1139/2013 that he was not gainfully employed during the period of his compulsory retirement. This position is reiterated by him in the Affidavit-in-reply filed to the present petition. Petitioners have not countered the said assertions on the part of Respondent by producing any evidence to the contrary. As observed earlier, there was no necessity for Respondent to produce evidence of non-employment till decision of his departmental appeal/revision and after passing of tribunal's order dated 21st February 2013. This leaves a narrow window between28 July 2010 till 21 February 2013, which is covered by uncontroverted averments on the part of Respondent that he was not gainfully employed. Therefore, the objection of non-

production of evidence of not being gainfully employed during the period of compulsory retirement raised by the Petitioners cannot be sustained.

17. There is yet another factor which is required to be borne in mind while deciding the issue of entitlement of Respondent to salary and allowances during the intervening period. Respondent was visited with the penalty of compulsory retirement, which made him entitled to grant of monthly pension. Petitioners contend that the Respondent cannot be paid any amount towards pay and allowances during intervening period on the principle of 'No Work No Pay'. This would result in a situation where Respondent will have to refund the amount of pension paid during the intervening period and receive nothing towards salary and allowances during that period. Thus reduction of penalty of compulsory retirement and reinstatement in service would work against the Respondent, where he would be denied any backwages during the long period from 8 January 2008 till 20 July 2018 while making him liable to refund the entire amount of pension and pensionary benefits. It must be kept in mind that Respondent retired from service shortly after his reinstatement on 31 August 2019. Therefore, acceptance of Petitioners' contention would lead to anomalous situation where Respondent will have to refund pension received for over ten years during 2008 to 2018 and receive nothing in return. This is yet another factor why Respondent deserves to be granted salary and allowances during the intervening period.

18. The Tribunal has considered the aspect that Respondent was kept away from duties on account of erroneous penalty of compulsory retirement and has held that that if Petitioners were to maintain parity in the matter of imposition of penalty, the situation of Respondent's compulsory retirement could have been prevented. These factors have been taken into consideration by the Tribunal while allowing the prayer for grant of salary and allowances during the intervening period. The findings recorded by the Tribunal do not suffer from any perversity and therefore no case is made out by Petitioners for our interference in exercise of writ jurisdiction.

19. The reliance of Ms. Masurkar on the judgment of the Apex Court in ***Rajasthan State Road Transport Corporation*** (supra) is of no avail. In that case, the Labour Court had granted full backwages as a matter of course upon setting aside the punishment of removal from service. There were no pleadings in that case about the workmen being not gainfully employed during the period of removal from service. Yet, the Apex Court granted 50% backwages in favour of the workmen. In the present case, there are specific pleadings to the effect that the Respondent was not gainfully employed during the period of his compulsory retirement. Furthermore, the Petitioners are to be blamed for delay in reinstatement of Respondent after Tribunal's direction to reinstate him on 21 February 2013. Thus, the judgment in *Rajasthan State Road Transport Corporation* (supra) is clearly distinguishable.

20. Considering the overall conspectus of the case, we do not find that any valid ground is made out by the Petitioners for our interference in the findings recorded by the Tribunal. The view taken by the Tribunal is plausible. We therefore do not find any merit in the present petition and the Writ Petition deserves to be dismissed. Since Respondent is held entitled to salary and allowances during the period of his compulsory retirement till reinstatement, he will have to refund the amount of pension and pensionary benefits received during that period. We are informed that the Respondent has already refunded that amount to Petitioners. If any amount is still outstanding, the Petitioners are free to adjust the same from various amounts receivable by Petitioner consequent to his retirement on superannuation on 31 August 2019.

21. Writ Petition is accordingly dismissed with no orders as to costs. Respondent is permitted to withdraw the amount deposited in this court towards salary and allowances for intervening period along with the accrued interest. Interim Application also stands disposed of. Rule is discharged.

SANDEEP V. MARNE, J. **ACTING CHIEF JUSTICE**