IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5302 OF 2004

D.S. Karant
residing at Flat No.712,
Shashi Kiran Apts. 9/89,
18th Cross, Malleshwaran,
Bangalore. ....Petitioner

V/S

1. Union of India
through the Secretary
in the Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.

2 Chairman,
Central Board of Excise & Customs,
North Block, New Delhi – 110 001. ....Respondents

…

Mrs. Sheetal D. Gulhane for the Petitioner.
Mr. Yogeshwar Bhate a/w Mr. N.R. Prajapati for Respondents-UOI.

…

CORAM: S.V. GANGAPURWALA, ACJ &
SANDEEP V. MARNE, J.
DATE : 10 FEBRUARY 2023.

JUDGMENT (per: SANDEEP V. MARNE, J.)

1 By this Petition, Petitioner challenges judgment and order dated 27 May 2004 passed by Central Administrative Tribunal (hereinafter referred to as ‘Tribunal’) dismissing Original Application No.1062 of 1999.

2 The case has chequered history of multiple litigations between the parties. Petitioner is 1969 batch Indian Revenue Service Officer. He came

to be promoted to the post of Additional Commissioner and at the relevant time, was posted at Mangalore. Petitioner claims to have received information through Mr. K.A. Nayar, Appraising Officer about landing of contraband silver at Mangalore, which was intercepted on the high sea in the night of 17/18 December, 1990. The informer was entitled a reward of Rs.1,000/- per kg. of silver seized and therefore Mr. Nayar requested Petitioner to recommend reward to the informer. Petitioner made such a recommendation for disbursal of amount of Rs.87,77,000/- to the Informer. The Department however disbelieved the theory of seizure being done on the basis of alleged information given by the informer through Mr. Nayar.

3. Petitioner was issued memorandum charge-sheet dated 7 August, 1995 alleging two charges. In the first charge it was alleged that the seizure of smuggled silver was not based on any prior information received by Mr. Nayar nor such informer existed. That Petitioner actively helped Mr. Nayar in planting a non-existing informer with malafide intention of appropriating the reward amount. In the second charge, it was alleged that the Petitioner failed to discharge his official duties as senior supervisory officer inasmuch despite availability of officers to look after preventive and anti-smuggling activities at Mangalore, he authorized Mr. Nayar, Appraiser to do preventive and anti-smuggling work by passing regular preventive orders.

4 After holding disciplinary enquiry, the Enquiry Officer submitted report holding charge No.1 as proved and charge No.2 as not proved. The Disciplinary Authority however proposed to disagree with finding of the Enquiry Officer with regard to charge No.2 and issued a show cause notice dated 24 July, 1997. Petitioner submitted his reply to the show cause notice. However, nothing happened for a considerable period of time. In the meantime, Petitioner came to be promoted to the post of Commissioner of Customs and Central Excise retrospectively with effect from 29 April, 1990 in pursuance of an order of the Tribunal passed in separate Original Application. Petitioner filed Original Application No.455 of 1999 for quashing the disciplinary proceedings pending for over 9 years, which came to be disposed of with a direction to the Disciplinary Authority to conclude the proceedings within four months. Petitioner approached this Court by filing Writ Petition No.1631 of 1999 and during pendency of that Petition, the punishment order dated 15 October, 1999 came to be passed imposing the punishment of reduction in the rank as Deputy Commissioner carrying the pay scale Rs.10,000-325-15,200. On Petitioner’s Application, this Court was pleased to stay the punishment order vide its order dated 25 October, 1999. Later Petitioner withdrew Writ Petition No.1631 of 1999 on 3 December, 1999 with liberty to approach the Tribunal to challenge the penalty order. Original Application No.1062 of 1999 was filed challenging the punishment

order dated 15 October, 1999. The Tribunal declined to continue stay on penalty which was granted by this Court which laid to filing of Writ Petition (L) No.3110 of 1999 (Writ Petition No.25 of 1999), which was disposed of directing the Tribunal to decide Original Application within three months and continued *status quo* during pendency of the Original Application. The Tribunal disposed of Original Application No.1062 of 1999 with a direction to Respondents to decide Review Petition filed by Petitioner against the penalty order dated 15 October, 1999. The order of *status quo* was continued. Since review was not getting decided, Petitioner was required to adopt contempt proceedings in which order dated 11 April, 2002 was passed by the Tribunal directing that the disciplinary proceedings were deemed to have abated. The Respondents filed Writ Petition No.2749 of 2002 in this Court challenging Tribunal's order dated 5 December, 1999. By consent, the Tribunal's order was set aside restoring Original Application No.1062 of 1999 on the file of the Tribunal for decision on merits. In the meantime, the Review Petition filed by Petitioner came to be decided and rejected by an order dated 31 December, 2001. The Tribunal thereafter proceeded to decide Original Application No.1062 of 1999 on merits and by judgment and order dated 27 May, 2004, was pleased to dismiss the same. That judgment and order of the Tribunal is the subject matter of the challenge in the present Petition. In the meantime, the Petitioner retired on attaining age of superannuation on 31 October, 2004.

5 Appearing for the Petitioner, Ms. Gulhane the learned Counsel has made detailed submissions with regard to merits of both the charges leveled against the Petitioner. She made strenuous attempt to demonstrate perversity in the findings of the Enquiry Officer as accepted so also disagreed with by the Disciplinary Authority. She has submitted that evidence of DW1 and DW2 produced by Petitioner came to be ignored altogether by the Enquiry Officer and Disciplinary Authority. That there is no evidence on record in support of proof of charge No.1. That charge No.2 was already held to be disproved by the Enquiry Officer and the Disciplinary Authority erroneously disagreed with finding of Enquiry Officer to hold the same as proved. That there is gross violation of principles of natural justice on account of non-supply of advice UPSC. That even though Petitioner had not offered himself as a witness, the orders impugned before the Tribunal erroneously proceed on the basis of nonexistent deposition of the Petitioner. That despite request made by the Petitioner he was not given an opportunity to be heard by the Disciplinary Authority. That the main accused in the matter Mr. K.A. Nayar has been let off with insignificant penalty of reduction of pay in same post that too without cumulative effect, whereas the Petitioner is reduced by two posts from Commissioner to that of Deputy Commissioner. Lastly, Ms. Gulhane would submit that both Disciplinary Authority as well as UPSC intended to reduce Petitioner by one level

whereas the penalty order resulted in reduction of rank of Petitioner by two levels. She would submit that such a penalty is grossly disproportionate to the misconduct proved.

6 Petition is opposed by Mr. Bhate, the learned Counsel appearing for the Respondents. He would submit that this Court would not sit as an appellant authority over the findings recorded by the Enquiry Officer, Disciplinary Authority and UPSC. That the Tribunal has considered all the aspects while deciding the Original Application and has not committed any jurisdictional error warranting interference by this court in writ jurisdiction. That, there is sufficient evidence available on record in support of proof of both the charges. That the deposition of DW1 was also taken into consideration while recording findings. That the penalty imposed on Petitioner is proportionate. He would pray for dismissal of the Petition.

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

8 We first deal with the issue of perversity raised by Ms. Gulhane. Though she made strenuous efforts to take us through the evidence recorded in the enquiry to set up a case of perversity, we are not able to hold that there is absolutely no evidence in support of the charges levelled against Petitioner. We cannot go into the issue of sufficiency or adequacy of evidence. As long as it is established that there is some evidence in support

of the charges, neither Tribunal nor this Court would act as an appellate court to determine correctness of findings of guilt recorded in the enquiry based on such evidence.

9. We find that the principles of natural justice are fully adhered to during the course of Disciplinary Enquiry and the Petitioner is given sufficient opportunity to defend himself. Even though the point of non-grant of an opportunity of personal hearing by the Disciplinary Authority (as granted to Shri Nayar) is raised by Ms. Gulhane, we do not find that any prejudice is caused to the Petitioner by denial of such an opportunity. There could possibly only one area where there appears to be some infraction of principles of natural justice, as the advice of UPSC was not supplied to Petitioner before taking final decision in the matter. In **Union of India Vs. S. K. Kapoor** (2011) 4 SCC 589, the Apex Court has held that supply of advice of UPSC is mandatory. The Department of Personnel & Training has issued various instructions from time to time culminating into final OM dated 29 November 2022 making it mandatory to supply advice of UPSC before relying on the same. In the present case, non-supply of UPSC's advice would, in normal circumstances, entail remand of proceedings to the Disciplinary Authority. However, we do note that no practical perverse would be served in now remanding back the proceedings for supply of UPSC advice and for calling Petitioner's representation at such a distant date.

Petitioner has already retired from service on 31 October, 2004 and a period of 19 long years has elapsed. Petitioner is at an advanced stage of his life. We, therefore, do not consider it appropriate to remand the proceedings for calling Petitioner's representation on advice of the UPSC in the light of peculiar facts and circumstances of the present case. More pertinent reason to do so is another flaw noticed by us in the penalty order, where we propose to interfere.

10 Perusal of advice of UPSC indicates that after receipt of representation of the Petitioner on the report of Enquiry Officer and on show cause notice for disagreement, the Disciplinary Authority recorded its tentative findings about proof of charges and decided to impose penalty of reduction in the rank of the Petitioner (Additional Commissioner in pre-revised selection grade of Rs.4500-5700) to the post of Deputy Commissioner in the pre-revised ordinary grade of Rs.3700-5000 until he was found fit after a period of one year to be restored to the post of Additional Commissioner (Selection Grade). Thus, what was intended was to reduce the Petitioner in rank by one level from Additional Commissioner to Deputy Commissioner. The UPSC agreed with the tentative findings of Disciplinary Authority about proof of charges but recommended slightly modified penalty of reduction to the lower post in the grade of Rs.10,000-15200 (Deputy Commissioner) for unspecified period till he is found fit to be

restored to the higher post. However, after the UPSC tendered its advice on 24 August, 1998, Petitioner came to be promoted to the post of Commissioner of Income Tax by order dated 19 May, 1999 retrospectively with effect from 29 April, 1990. This was done in pursuance of DPC held in February, 1990 in which Petitioner was ignored and he had knocked the doors of the Tribunal seeking his promotion. In the year 1999, the Tribunal had ordered grant of promotion retrospectively from the date of promotion of his junior. This is how Petitioner came to be promoted to the post Commissioner of Customs and Central Excise vide order dated 19 May, 1999 retrospectively with effect from 29 April, 1990. Thus, at the time of passing of the final penalty order by the Disciplinary Authority on 15 October, 1999, Petitioner was already functioning on the post of Commissioner of Customs and Central Excise. He was to be reduced by only one rank. However, the Disciplinary Authority inflicted the penalty of reduction to the lower post in the grade of Rs.10,000-15,200 (re-designated as Deputy Commissioner) for unspecified period till he was found fit by Competent Authority to be restored to the higher post. The net result of the penalty order is that Petitioner came to be reduced by two ranks from the post of Commissioner to that of Deputy Commissioner. This in our view is totally erroneous. The Disciplinary Authority blindly followed the penalty suggested by UPSC by ignoring the fact Petitioner, in the meantime, was promoted for the higher post of Commissioner of Customs and Central Excise by order dated 19 May, 1999. The Disciplinary Authority ought to have taken into consideration the rank, on which Petitioner was functioning (Commissioner of Customs and Central Excise) at the time of passing of the penalty order dated 15 October, 1999. However, the Disciplinary Authority erroneously proceeded ahead as if Petitioner was still working on the post of Additional Commissioner of Customs and Central Excise and directed reduction of his rank to that of Deputy Commissioner of Customs and Central Excise. In our view, since the intended penalty was to reduce Petitioner's rank by only one level, he ought to have been reverted from the post of Commissioner of Customs and Central Excise to that of Additional Commissioner of Customs and Central Excise.

11. The net result of imposition of penalty of reduction to the rank of Deputy Commissioner is that the Petitioner is brought back to the level he was initially appointed (as Deputy Commissioner is redesignated post of Assistant Collector/Commissioner). On account of interim order of stay on penalty order sought by Petitioner which operated tight till his retirement, he was not considered for further promotions, resulting in fixation of his pension in the pay scale of Deputy Commissioner. Thus for the misconduct of erroneously recommending reward to an informer (when the reward has actually not been paid), Petitioner is apparently brought down to his initial

post of appointment and he has retired without getting any further promotions. We are conscious of the fact that this Court cannot substitute the penalty imposed by the Disciplinary Authority on the ground that the penalty is disproportionate. However, in the present case we are not directing reduction of penalty, but implementation of penalty intended to be imposed by the Disciplinary Authority and UPSC. We, therefore, feel that the penalty of reduction to the rank of Additional Commissioner needs to be imposed on the Petitioner. By doing so, Petitioner would loose his promotion to the post of Commissioner of Customs and Central Excise by a period of atleast 9 years and will have to be considered afresh for such promotion prospectively after the date of penalty order (15 October, 1999). This in our view would be adequate penalty in the facts and circumstances of the present case.

12 Resultantly, we hold that Petitioner has rightly been held guilty of both the charges in the disciplinary proceedings and findings recorded by Enquiry Officer, Disciplinary Authority, UPSC as well as by the Tribunal in that regard need not be disturbed. However, the penalty order dated 15 October, 1999 needs to be modified by reducing Petitioner’s rank by only one level instead of two as erroneously done by the Disciplinary Authority.

13 Resultantly, we proceed to pass the following order:

O R D E R

i) The order dated 15 October, 1999 passed by the Deputy Secretary to the Government of India in the name of the President is set aside to the extent of the penalty imposed. The penalty imposed on Petitioner shall stand modified to that of "reduction to the lower post of Additional Commissioner of Customs and Central Excise with effect from 15 October, 1999 for unspecified period, till he is found fit by Competent Authority to be restored to the higher grade in terms of Government of India decision (13) below Rule 11 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965."

ii) After being reduced to the rank of Additional Commissioner of Customs and Central Excise with effect from 15 October, 1999, the case of the Petitioner shall be considered for promotion/restoration of rank of Commissioner of Customs and Central Excise in the DPC which met after 15 October, 1999 and if found fit, he be promoted to that post. His case be also considered for further promotions till the date of his retirement. This exercise be carried out within 4 months from today.

iii) As a result of modification of the penalty order, Petitioner shall be entitled all the monetary benefits on notional basis, arising out of modified penalty as well as further promotions, if any, up to the date of his retirement.

His pension shall be re-fixed taking into consideration modified order of penalty together with promotions, if any, effected in his favour and arrears of pension and other pensionary benefits shall be paid to him on actual basis within a period of four months from today.

iv With the above directions, the Writ Petition is partly allowed. Rule is made partly absolute.

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

SUDARSHAN RAJALINGAM KATKAM Digitally signed by SUDARSHAN RAJALINGAM KATKAM Date: 2023.02.16 16:18:36 +0530