**(1977) 07 CAL CK 0049**

**In the Calcutta High Court**

**Case No :** F.M.A. No. 886 of 1976

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| Collector of Customs | APPELLANT |
| Vs | |
| Bimal Das Gupta | RESPONDENT |

**Date of Decision :** 15-07-1977

**Acts Referred:**

Central Board of Revenue Act, 1924 — Section 28
Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 13, 2, 3, 6, 7
Constitution of India, 1950 — Article 226, 309
Government of India Act, 1915 — Section 96B

**Citation :** (1977) 2 ILR (Cal) 165

**Hon'ble Judges :** S.K. Datta, J;G.N. Ray, J

**Bench :** Division Bench

**Advocate :** D.K. Sen and Samarendra Nath Banerjee, for the Appellant;Tapas Roy and Aloke Chakravarti, for the Respondent

**Final Decision :** Allowed

# Judgement

S.K. Datta, J.—The Respondent No. 1 was appointed a Sub-Inspector in the Central Excise Department of the Central Government in or about September 1950 and was declared quasi-permanent with effect from July 1, 1954. He was promoted to the post of Inspector in the said Central Excise Department after passing the departmental examination in the said department.

2. The Respondent No. 1 on representation on his behalf was selected for appointment as a Preventive Officer Grade II in the Customs Department by the following order:

COLLECTORATE OF CENTRAL EXCISE, CALCUTTA

ORDER

Dated Calcutta the 27th February, 1957.

In pursuance of the Board''s Order F No. 19/23/56 ADM III-A dated the 21st

February, 1956, Shri Bimal Das Gupta, Inspector of Central Excise, attached to the Assistant Collector of Central Excise, Calcutta Division, Calcutta, has been selected for an appointment in the Calcutta Custom House as a Preventive Officer Grade II in the time scale of pay of Rs. 80-Prob-100-5-120-EB -8-200-10-220 vide Collector of Customs Calcutta''s letter No. S 13-6-55 Estt. (Pt. II) dated 26.2.57.

Shri Das Gupta will count his seniority in this grade from the date of joining the Custom House.

Shri Das Gupta is hereby relieved from this Collectorate with effect from 28.2.57 (A.N.) and directed to report himself for duty to Collector of Customs, Calcutta.

Sd/- B.S. Chawla, for Collector of Central Excise, Calcutta

3. The Respondent No. 1 joined the Customs Collectorate, Calcutta, on March 1, 1957, as Preventive Officer, Grade II, in the above pay scale wherein his pay was fixed at Rs. 128. The Respondent who admittedly was quasi-permanent when he was transferred to the Customs department claimed to carry his quasi-permanent status on transfer under the departmental rules and to acquire lien therein.

4. On April 23, 1959, the said Respondent was served with the following order:

Memo. No. S-21-82/59 Estt.

Sri Bimal Das Gupta, P.O. Gr. II, is hereby informed that the Board have ordered that he will have to pass the Departmental Examination prescribed for P.O. Gr. I and II even though he has passed the Departmental Examination prescribed for Supervisors in the Central Excise Deptt. He is further informed that the Collector has been pleased to grant him an additional chance to pass the Departmental Examination to be held in August 1959 with the warning that if he fails to pass the examination in that chance, he will have to suffer the consequence under the rules of the departmental examination.

5. According to the Respondent No. 1, under the departmental rules an officer, whether a direct recruit or on transfer, is to pass the departmental examination within two years of his appointment, but he was never required prior to the above order to pass any departmental examination. The Respondent No. 1 contended that in his transfer order there was no condition that he would have to pass such examination. He made unsuccessful representation to the Collector of Customs and then to the Central Board of Revenue for exemption from passing the examination.

6. On October 3, 1960, a Memo. No. S 21-479/59 Estt. was issued to the following effect:

In continuation of this office order of even No dated 29.8.60, Shri Bimal Das Gupta, Preventive Officer Gr. II, is hereby informed under the order of the Director of Inspection, that he has been allowed the 3rd Additional Chance to appear in the departmental examination to be held in October 1960. He is further informed that the order regarding the stoppage of increment will remain in force till such time as he passes the departmental examination.

7. The Respondent No. 1 made further representation to the Secretary, Government of India, in the Ministry of Finance, by his letter of January 2, 1961, claiming exemption from passing the departmental examination. The reason advanced was that no such condition was attached when he was selected for appointment as Preventive Officer Grade II in the Customs Department, particularly when he had already passed similar examination in the Excise Directorate. The Respondent also complained that a seniority list was prepared in the meantime on December 5, 1961, upgrading some posts from P.O. II to P.O. I to his grave prejudice as he was excluded therefrom. The Respondent failing to obtain redress moved this Court by an application under Article 226 of the Constitution challenging the aforesaid orders and obtained a rule which was, however, discharged on January 3, 1964. The appeal therefrom failed on the preliminary point as the Central Board of Excise and Customs was not made a party, though it is said, the Bench felt that the case deserved consideration.

8. The Respondent No. 1, thereafter, on service of fresh notice of demand moved this Court again by an application under Article 226 of the Constitution contending that increment in salary could not be stopped otherwise than as provided in Rule 24 of the Fundamental Rules which had no application in this case. Further, it was also contended, the order was in contravention of service conditions, illegal in its retrospective effect and in violation of the principles of natural justice. On this application a rule nisi was issued by this Court on January 18, 1966, calling upon the Central Board of Excise and Customs, Union of India and its concerned authorities to show cause why a writ in the nature of mandamus should not issue forbearing the said authorities from giving effect to the aforesaid orders and why a writ in the nature of certiorari should not issue quashing the same.

9. The rule was opposed by the Board, the Union of India and its concerned authorities by an affidavit-in-opposition affirmed by Arjun Deb Nagpaul, Assistant Collector of Customs (Estt.), contending that the executive (non-gazetted) and ministerial staff in the Customs Department appointed by promotion or transfer from other department are required, under the rules framed by the Central Board of Revenue and not being exempted by Rule 7, to pass the departmental examination within two years of promotion or transfer to avoid consequence of Rule 6. The Respondent No. 1 failed to qualify in the departmental examination within two years and accordingly, was not allowed to draw increments under the said Rule 6. Further withholding of increment for failure to pass departmental examination is not a penalty under Rule 13 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, read with explanation I under Rule II of the Central Civil Services (Classification, Control and Appeal) Rules, 1965. The promotion of the Respondent No. 1 was not approved by the

 

Departmental Promotion Committee and such non-promotion either in the substantive or officiating capacity is not a penalty. It was, accordingly, submitted that the rule should be discharged.

10. The Respondent No. 1 in his affidavit-in-reply reiterated the allegations and contentions made in the petition of motion.

11. The rule, on hearing, was made absolute by A.K. Sinha J., but on appeal the case was remanded to the trial Court for fresh hearing.

12. The rule, again, came up for hearing before Sabyasachi Mukharji J. and it was held that the rules framed by the Central Board of Revenue, as contained in the Office Procedure Manual, are in exercise of statutory powers. It was, further, held that Rule 3, chap. VI of the Office Procedure Manual is a statutory rule. Rule 24 of the Fundamental Rules, which provides for increment ordinarily as a matter of course, also provides for withdrawal of increment by an authority duly delegated under Rule 6 when the conduct of the Government servant has not been good or his work has been unsatisfactory. This withdrawal of increments can only be made, according to the learned Judge, if only Rule 3, chap. VI of the said Rules compiled in Office Procedure Manual is an independent statutory rule which applies to the Respondent No. 1. It was held that it was, accordingly, necessary for the authorities to determine first if Rule 3 applied to the Government servant and as such, determination affects his civil right to increments, the Court directed the Central Board of Excise and Customs to decide the question, after affording reasonable opportunity to the Respondent No. 1 according to the principles of natural justice as to whether he was required to pass the departmental examination in order to be entitled to the increments. The rule was, accordingly, made absolute to the extent indicated above by order dated September 24, 1975.

13. The Respondents in the rule, the Central Board of Excise and Revenue, the Union of India and its other concerned authorities have preferred this appeal against the above decision while the Government servant, the Respondent No. 1, filed a cross-objection challenging, inter alia, the finding that Rule 3 is a statutory rule. The appeal and the cross-objection have been heard together before us and will be governed by this judgment.

14. The Central Board of Revenue was constituted by the Central Board of Revenue Act, 1924 (IV of 1924), which was made subject to the control of the Central Government in the exercise of such powers and performance of such duties as would be entrusted to it by the Central Government or by or under any law. The Central Board of Revenue was thus empowered to exercise such powers and perform such duties as would be entrusted to it by the Central Government or as may be provided by or under any law. The powers of the Board are thus derived from the Central Government or by or under any law. It will appear from the Manual of Office Procedure published by the Central Board of Revenue that the members of the Board from the very outset performed their duties, in dual

 

capacity as the Central Board of Revenue and also as the Ministry of Finance (Revenue Division) for which purposes the members were conferred ex officio status of Secretariat Officers. In course of time the secretariat functions of the Board increased in volume and importance and as a result the Central Board of Revenue was conferred full secretariat-status with effect from May 22, 1948, (vide Ministry of Finance, Revenue Division, Office Memo. No. 44(3)/Estt.-(H.Q.)/49 dated May 27, 1949).

15. The Central Board of Revenue which was also thus empowered to function as a Revenue Division of the Ministry of Finance of the Central Government deals in either capacity with all matters of policy regarding direct and indirect taxation and is also responsible for the administration of the Customs, Central Excise, income tax and other departments which are subordinate offices under its control. In view of this position, the Board is concerned with the administration, control and supervision of the several subordinate offices of the said departments under its control. In the discharge of its duty as a department of the Ministry of Finance, Revenue Division, the Board has framed various rules regarding the terms and conditions of services relating to recruitment to services in the several departments under its control, reservation and concession in such services for certain communities, concession to political sufferers, departmental examination, promotion, seniority and other rules relating to such services which are and also are to be deemed as rules framed by the Central Government and are binding on the Government servants concerned as having the legal force. In Mervyn Coutindo and Others Vs. Collector of Customs, Bombay and Others, the Court proceeded on the basis of the order passed by the Board laving down the procedure for recruitment to the Customs Appraisers Service the legal validity whereof was undisputed. On the purely administrative side the Board also exercised the powers conferred by the Government on a head of a department under various services rules like Fundamental Rules and Supplementary Rules. Civil Services Regulation and other rules. The Central Board of Revenue, constituted under the 1924 Act, has since been reconstituted into two Boards of Revenue, known as the Central Board of Direct Taxes and the Central Board of Excise and Customs, under the Central Boards of Revenue Act, 1963. The Central Board of Excise and Customs is one of the Appellants before us against whom the Government servant has prayed for issuance of appropriate writs.

16. Apart from such rules regarding the services of the Government servants in respect of the departments in charge of the Central Board of Revenue, there are other statutory rules regarding the service of Government servants which are common to all employees of the Governments, State or Central, having been framed under Article 309 of the Constitution by the President or the Governor or under other authorities and accepted or adapted as such by the Government. It is also to be noted that there may be encroachment of the same area by the departmental rules framed by the Government or deemed to be so and also by the rules framed under Art 309 or other rules framed under the provisions of earlier Acts or authority and adapted and accepted as having the force of law

 

resulting in repugnancy. In case of such repugnancy, the rules framed under Article 309 or other provisions of law will override the departmental rules, so that in cases of conflict the departmental rules of the Government are to give way to the rules framed under the statute or other laws or authority and adapted or accepted as such.

17. The rules for the departmental examination have been framed by the Central Board of Revenue as an organ or department of the Central Government in respect of the Customs department. These rules, inter alia, provide for departmental examination in respect of services in the Customs department and provide further that if the Government servants, to whom these rules apply and not exempted thereunder, fail to pass the examination within the prescribed period, they will not be entitled to draw further increments and the next increment in such case would be drawn from the date on which they pass the departmental examination, the determining date being the last date of the examination (vide RR. 2 to 18 of chap. VI relating to Customs Department of the Manual of Office Procedure).

18. According to Mr. Roy, the Learned Counsel for the Government servant being the Respondent No. 1, the departmental rules framed by the Board are not statutory and have no legal force.

The Central Board of Revenue, according to him, is a creature of the statute and no such power has been conferred on it by the, Central Government nor does the Sea Customs Act, 1878, provide for such powers nor are there any published rules thereunder as required. We have seen that the Board of Revenue acts in dual capacity and as a department of the Government in charge of the administration, it is entitled, in our opinion, to frame rules containing terms and conditions of service specifically applicable to the Government servants of the departments under its administration. We, therefore, do not find that the Central Board of Revenue was incompetent in law to frame such rules as in the making of such rules it was acting as the department or organ of the Government and not as the chief Customs authority as is provided under the Sea Customs Act and such rules have the legal force binding the Government servants under its departments as submitted by Mr. Sen, Learned Counsel appearing for the Appellants.

19. Mr. Roy next submitted that even on the assumption that the rules have legal validity, Rule 6 provides for stoppage of increment for failure to pass the departmental examination. Such rule is repugnant to Rule 24 of the Fundamental Rules which is as follows:

F.R. 24. An increment shall ordinarily be drawn as a matter of course unless it is withheld. An increment may be withheld from a Government servant by the Central Government or by any authority to whom the Central Government may delegate this power under Rule 6, if his conduct has not been good or his work is not satisfactory.

 

20. As we have seen, the salary of the Respondent No. 1, on his appointment to the Customs department, was fixed at Rs. 128 in the scale above the Efficiency Bar. The increment next above the E.B. was not withdrawn while fixing the salary of the Respondent No. 1. So that it could not be said that en account of the E.B. the increment was stopped as is provided in Rule 25 of F.R. and that is also the case of the Board. The withdrawal of the increment, according to the Board, was due to the failure of the Respondent No. 1 to pass the departmental examination which Mr. Roy contends is repugnant to the provisions of Rule 24 of the Fundamental Rules framed u/s 96B of the Government of India Act, 1915, as Rule 24 over rides the provision of the departmental rules to the extent of such repugnancy.

21. It appears to us that Rule 24 of the Fundamental Rules provides that withdrawal of increment can only be made when the conduct of the Government servant is not good or his work has not been satisfactory. It is nobody''s case in this proceeding that either of the tests applies to the Respondent No. 1 or that the impugned action has been taken under Rule 24. All the same, this provision does not mean or indicate that the Government is not competent to frame rules for withholding increment on other grounds as provided in the departmental rules of service. Rule 24, in terms, provides that increment is to be withheld practically as a major penalty, but this does not preclude the Government from prescribing requisite qualification for responsible discharge of duties by the officers of the department in respect of the various duties conferred on them under the provisions of the Act. We do not, therefore, find that there is any repugnancy between Rule 24 and the departmental rule providing for withdrawal of increment in case of failure to pass departmental examination which is a mere prescription of suitability.

22. The next contention is that the relevant rule has no application to the Respondent No. 1. The relevant rule is in chap. VI as Rule 3 of the Office Procedure Manual of the Central Board of Revenue. Rule 3 is as follows:

Rule 3. Officers who will be required to pass the examination--Every direct recruit appointed to a permanent post or to a temporary post included in Rule 2 which is likely to continue for a period of three years or more and all officiating and temporary officers falling under the categories mentioned in the said rule whether appointed by promotion from within the department or otherwise will be required to pass the prescribed departmental examination unless they are exempted from doing so under Rule 7.

23 Rule 2 includes Preventive Officers Grade I and II being the category of staff for which departmental rule is provided under Rule 3. Rule 6 provides as follows:

Rule 6.--Consequences of not passing the departmental examination.--(a) No officer will be confirmed or appointed in a quasi-permanent or substantive temporary capacity unless he has passed the prescribed departmental examination or has been exempted from doing so in accordance with Rule 7.

(b)...(ii)... Officers appointed otherwise than on probation whether by direct recruitment, by promotion or transfer who are required to pass a departmental examination, will not, except in the case of those appointed as lower division clerks, be allowed to draw further increments if they fail to pass the examination within the prescribed period. The next increment in such cases should be drawn from the date on which they pass the departmental examination, the determining date being the last day of the examination.

24. Mr. Roy contends that even if these departmental rules are enforceable in law the Respondent No. 1 is not required to pass the examination as the Rule 3 does not apply to him. Rule 3 mentions the officers who are required to pass the examination as those who are direct recruits appointed to a permanent post or to a temporary post included in Rule 2 which is likely to continue for three years or more as also others. The Respondent No. 1 was not appointed as a Preventive Officer Grade II by promotion. The order whereby the Respondent No. 1 was informed of his selection of appointment could not but to be considered as an order of direct recruitment. The Respondent No. 1 further claimed that lie had attained quasi-permanent status already and he was transferred with that status in the Customs department. Even if that is the position the same does not take the Respondent No. 1 out of operation of Rule 6(b)(ii) as the quasi-permanent status, does not prevent the operation of the said rule. The Respondent No. 1 is thus to be deemed as the direct recruit appointed to a permanent post and under Rule 3 he is required to pass the departmental examination and failure to pass such examination will lead to the consequence provided in Rule 6(b)(ii) in respect of further increments.

25. Mr. Roy has next submitted that his client had already passed the departmental examination in the Excise department and the syllabuses of both examinations are similar so that the departmental examination in the Customs department is a meaningless formality. We do not think that this is a sound preposition as the syllabus in the Customs department and the syllabus in the Central Excise department are different in material aspects. Accordingly, we do not think that the passing of the examination in the Central Excise department should absolve the Respondent No from passing the departmental examination in the Customs department.

26. Mr. Roy has further submitted that though under the rules directly recruited officers should pass the examination within two years of their recruitment by promotion or transfer, there was no order asking him to appear in the departmental examination till by letter of the Assistant Collector of Customs dated April 23, 1959, the Respondent No. 1 was given a final chance to appear in the examination to be held in August 1959. The Respondent No. 1 joined the Customs department on February 27, 1957 and we have not been shown any communication made to him by the department asking him to appear in the departmental examination within two years from his appointment. After the receipt of the above communication the Petitioner was again informed by letter

 

of October 2, 1960, that he was given the last chance to appear in the examination to be held in October 1960. The Respondent No. 1, thereafter, took various legal proceedings in assertion of his supposed right culminating in the proceeding now before us. In course of argument Mr. Sen has submitted that even though the time for departmental examination of the Respondent No. 1 has expired, the authority is prepared to give him the last chance for appearance in the departmental examination at the next examination.

27. It appears that the Government servant has been discharging his duties satisfactorily as at present advised and there is no complaint in this aspect under Rule 7(d), the Board may for special reasons exempt an officer from passing either the whole or part of the departmental examination. In view of the long lapse of time and of the satisfactory discharge of duties by the Respondent No. 1 who has by now attained considerable seniority and experience in service, we direct the Board as a special case to consider after hearing the Respondent No. 1 in person or considering his written representation, if any, if he can be exempted from passing the departmental examination In case, the Board considers otherwise, the Respondent No. 1 is to be given an opportunity at the earliest possible opportunity to appear in the departmental examination and in the event of his passing such examination, the Respondent No. 1 is to be given the increments to which he is entitled under the rules from the last day of the examination held in October 1960 as the department, it appears, did not call upon the Respondent No. 1 to appear in such examination within two years of his appointment in the rules. In the event of his failure to avail of this opportunity, if required, or failure to pass the departmental examination the consequence as provided in Rule 6(b)(ii) will take place.

Section 28. In the premises, we set aside the judgment under appeal and allowed the appeal, dismiss the cross-objection and discharge the connected rule without any order as to costs in the circumstances subject to directions indicated in the preceding paragraph. All interim orders are also vacated.

G.N. Ray, J.

28. I agree.

 