

(2012) 12 SC CK 0081

In the Supreme Court Of India

Case No : Civil Appeal No. 9082 of 2012 (Arising out of S.L.P. (C) No. 27821 of 2012) and Civil Appeal No. 9089 of 2012 (Arising out of S.L.P. (C) No. 34671 of 2012)

Pradip Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 311(2)
Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1987 — Rule 8, 8(1), 8(2), 8(3), 9

Citation : (2013) 1 AD 181 : (2013) 3 ALLMR 431 : (2013) 2 AWC 1965 : (2012) 286 ELT 641 : (2013) 136 FLR 1079 : (2013) 1 JT 199 : (2013) 1 LLN 23 : (2013) 1 MLJ 857 : (2012) 12 SCALE 592 : (2013) 2 SCT 24 : (2013) 1 SLJ 228 : (2013) 1 UPLBEC 1

Hon'ble Judges : Altamas Kabir, C.J.; Surinder Singh Nijjar, J; J. Chelameswar, J

Bench : Full Bench

Advocate : Mukul Rohatgi and B.H. Marlapalle, Saurbh Kirpal, Bhaskar Baisal and Nikhil Jain, for the Appellant; K. Radhakrishnan S. Wasim A. Qadri, Charul Sarin and B. Krishna Prasad, for the Respondent

Final Decision : Partly Allowed

Judgement

Surinder Singh Nijjar, J.—Leave granted in both the special leave petitions.

2. By this common order, we propose to dispose of the aforesaid two appeals as they are both directed against the same judgment delivered by the High Court of Delhi in Writ Petition [C] No. 98 of 2011 decided on 27th July, 2012. Appeal arising out of SLP No. 34671 of 2012 has been filed by the Union of India challenging the judgment on various legal grounds. By the aforesaid judgment the High Court has set aside the order passed by the Central Administrative Tribunal [hereinafter referred to as the "CAT"] Principal Bench, New Delhi, dismissing OA No. 3544 of 2009 on 9th December, 2010 whereby the Respondent was discharged from service. Appeal arising out of SLP No. 27821 of

2012 has been filed by Pradip Kumar challenging the judgment of the High Court, in so far as the said judgment limits the relief granted to him only to the extent of quashing of the order passed by the CAT and the order dated 20th November, 2009, whereby he was discharged from service as Member [Judicial] in the Customs Excise and Service Tax Appellate Tribunal ["the CESTAT"].

3. We will firstly take up the Civil Appeal No. of 2012 arising out of SLP No. 34671 of 2012, filed by Union of India, for consideration.

4. The Respondent was a practising Advocate in the Calcutta High Court as well as before the CESTAT for over twenty years mainly dealing with the customs, excise and service tax matters. On 22nd April, 2006 he appeared for an interview before the Selection Committee for the post of Member [Judicial] in CESTAT. On being duly selected, he assumed charge as Member [Judicial] in the CESTAT on 22nd November, 2006. Service conditions of the Member of the CESTAT are governed by Customs, Excise and [Service Tax] Appellate Tribunal Members [Recruitment and Conditions of Service] Rules 1987 [hereinafter referred to as the "Rules"]. The controversy in the present proceedings is limited to the interpretation of Rule 8 and Rule 9[2] of the aforesaid Rules. The said Rules are as under:

Rule 8. Probation - [1] Every person appointed as a member shall be on probation for a period of one year.

[2] The Central Government may extend the period of probation for a further period of one year at a time so that the period of probation in aggregate may not exceed three years.

[3] A member may be discharged from service at any time during the period of probation without assigning him any reason.

Rule 9. Reversion or termination of the service of members. - [1] In case of a person appointed as a technical or a judicial member from any post under the Union or a State, unless such a person is confirmed, the Central Government may at any time revert him to his parent post without assigning any reason, after giving him one month's notice of such reversion and in case a technical or a judicial member wishes to revert to his parent post, he shall be required to give one month's notice to the Central Government:

Provided that in case such technical or judicial member has already superannuated according to the relevant rules of his parent post, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice of such termination and in case such technical or judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

[2] In case of a person appointed as a judicial member directly from the Bar, unless he is confirmed, the appointment may be terminated by the Central Government at any time without assigning any reason after giving him one

month's notice of such termination and in case such judicial member wishes to resign, he shall be required to give one month's notice to the Central Government.

5. Under the aforesaid Rules, Member of the CESTAT is put on probation for a period of one year [Rule 8(1)]. Furthermore, under Rule 8(2), the period of probation may be extended for a further period of one year at a time. However, the total period of probation cannot exceed three years. Under Rule 8(3) a Member may be discharged from service at any time during the period of probation without assigning any reason. This rule makes a general provision regulating the period of probation of members Technical or Judicial, irrespective of their source of recruitment. Rule 9(1) and (2), on the other hand, deals with Technical or Judicial Members, recruited from two different sources. Rule 9(1) deals with members, who have been appointed whilst already in the service of the Central Government. In the case of such Members a provision is made in Rule 9(1) to enable the Central Government to revert him to his parent post without assigning any reason, unless such a person is confirmed. Such Member can be reverted to his parent post after giving one month's notice of such reversion. If such a Member wishes to revert to his parent post, he is required to give one month's notice to the Central Government. Under the proviso, services of such member can be terminated by giving one month's notice, without assigning any reason, if he has already superannuated under the relevant rules of his parent post. Such member has a corresponding right to resign by giving one month's notice. We are, however, concerned only with Rule 9(2) which provides that in the case of a person appointed as Judicial Member directly from the Bar, unless he is confirmed, his appointment may be terminated by the Central Government at any time without assigning any reason after giving him one month's notice. Similarly in case the Judicial Member wishes to resign, he is required to give one month's notice to the Central Government. Rule 8 clearly operates within the period of the three years, during which a member can be continued on probation. Rule 9(2) would apply only in cases where the Judicial Member is still not confirmed even after the maximum period of three years, on probation. Rule 9(2) would have no application within the period of three years. Rule 8 provides for discharge of probationer. Rule 9(2) talks of termination of service. In such circumstances, it provides that notice of one month shall be given before termination. But this procedure would become applicable only if the Judicial Member has been in service for three years or more. Otherwise, provision of one month notice would have been made in Rule 8 itself. Rationale underlying the provision in Rule 9(1) is to enable the member recruited from a Central Government post to be reverted to his parent post. To put Judicial member recruited directly from the Bar at par with those recruited from Central Government posts, the necessary provision of one month notice has been made in Rule 9(2). No such notice would be required if the Judicial Member is discharged within a period of three years, if not confirmed.

6. Keeping in view the aforesaid interpretation of Rules 8 and 9, let us now

examine the facts. It appears that no order extending the period of probation of the Respondent was passed at the end of the mandatory period of probation on 21st November, 2007 or soon thereafter. The Respondent, therefore, continued to work as Member [Judicial]. However, he received an order dated 19th November, 2009 extending his period of probation; first upto 21st November, 2008 and then upto 21st November, 2009. Receipt of the letter dated 19th November, 2009 resulted in the Respondent tendering his resignation from the post of Member [Judicial] CESTAT on 20th November, 2009. On that very date an order was issued whereby the Respondent was discharged from service on the post of Member [Judicial] CESTAT. The said order is reproduced below:

F. No. 26/8/2006-Ad.IC. Government of India Ministry of Finance Department of Revenue New Delhi the 20th Nov. 2009

ORDER No. 5 of 2009

In pursuance of Rule 8(3) of the Customs, Excise and Service Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules 1987, the President hereby discharges forthwith Sh. P.K. Das, Member (Judicial) in Customs Excise & Service Tax Appellate Tribunal from service.

2. By order and in the name of the President.

Sd/- (Victor James) Under Secretary to the Govt. of India

To,

Sh. P.K. Das, Member (Judicial) CESTAT, West Block No. 2 R.K. Puram, New Delhi

Copy to:

1. President, Customs, Excise & Service Tax Appellate Tribunal, New Delhi.
2. Registrar, Customs Excise & Service Tax Appellate Tribunal, New Delhi.
3. Establishment Officer, Department of Personnel & Training North Block.
4. Pay and Accounts Officer, Department of Revenue
5. Notification Folder

Sd/- (Victor James) Under Secretary to the Govt. of India

It appears that thereafter by letter dated 23rd October, 2009 the Respondent withdrew his resignation under Rule 9(2), which was well within the prescribed period of one month.

7. During the period of his service the Respondent had served under three Presidents, CESTAT, namely, Justice Abichandanani, Justice S.N. Jha and Justice R.M. Khandparkar. It is the case of the Respondent that he never received any adverse comments from any of the Presidents during his tenure of service as a Member [Judicial], CESTAT. In fact, he was given the annual increments in the

years 2007 and 2008. Since, he had received no adverse reports, the Respondent assumed that he would be confirmed on the post of Member [Judicial] CESTAT. But to his utter shock and dismay, he received the order dated 19th November, 2009 which extended his period of probation; first upto 21st November, 2008 and then further upto 21st November, 2009. It is further the case of the Respondent, on the basis of the information obtained under the Right to Information Act 2005, that there is a note dated 26th November, 2007 in File No. 27/22/2005-AD.IC in which it has been mentioned that the action for initiation of the process of confirmation of the Respondent, which was due on 22nd November, 2007, would be initiated in a new file. There is further noting on 23rd January, 2008 calling for the ACRs of the Respondent and two other Members. On 6th June, 2008 Justice S.N. Jha, President, CESTAT, wrote to the Secretary, Department of Revenue, requesting him to take steps for the confirmation of some of the Members of the CESTAT including the Respondent. The Vigilance Cell had also conveyed its clearance from its own angle, in so far as the Respondent was concerned.

8. However, the circumstances did a complete about turn when, like a bolt out of the blue, on 14th September, 2009, the Respondent received a note from the President of the CESTAT annexing therewith a copy of the complaint from the members of the Bar about an incident which was alleged to have occurred in the Respondent's Court on 9th September, 2009 and requesting for a report about the incident. The President of the CESTAT prepared a report on 18th November, 2009 regarding the incident, which inter alia, contained the following observations regarding the conduct of the Respondent:

15. It must be noted that whenever any act of misbehavior on the part of the parties or their representatives takes place in the court, it is essentially for the Presiding Officer to administer proper control and to try to defuse the tension if any caused on that count and not to retire immediately to the chamber. Abstaining from and abandoning the court in such a situation and leaving it open and free for all court result is encouraging indiscipline in the court. Merely because some of the representatives of the parties start raising voice or make allegations against the Bench, it would not be proper to abandon the court functioning and to retire to chamber. Rather the Presiding Officer has to try to control such situation by use of administrative acumen. In the case in hand, there does not appear any efforts made by the Presiding Officer in that regard.

The Respondent claims that his services were terminated as a direct consequence of the complaint made by the representatives of the Bar and the report of the President, CESTAT.

9. Aggrieved by the aforesaid order, the Respondent challenged the same before the CAT by way of OA No. 3544 of 2009 on 7th December, 2009. On 9th December, 2009, the OA was dismissed by the CAT. The CAT rejected the submission that the Respondent was deemed to be confirmed upon completion of one year period of probation. In any event it seems Respondent had dropped the

contention regarding the deemed confirmation after some arguments initially and upon considering the judgment of the CAT in OA No. 1895 of 2009 - Dr. Vineet Sodhi v. Union of India decided on 6th December, 2010. CAT also rejected the submission of the Respondent that the order of discharge from service was punitive in nature. It was held by CAT that even though report had been received from the President, CESTAT regarding the complaint made by the Members of the Bar, ultimately the discharge of the Respondent was on the basis of his unsuitability of the job and unsatisfactory performance of duty. It was also observed by the CAT that there was no full scale formal inquiry, but only facts have been brought to the notice of the competent authority about the unsatisfactory performance of the Respondent. With these observations, the OA was dismissed.

10. The Respondent being aggrieved challenged the order before the High Court of Delhi by way of Writ Petition [C] No. 98 of 2011. The High Court allowed the writ petition only on the interpretation of Rule 8(3) and Rule 9(2) of the Rules, although the Respondent had raised four specific points for the consideration of the High Court. It was submitted that the order of discharge could not be sustained as it had been passed in arbitrary exercise of power. It was said to be a product of malice in law. Secondly it was submitted that the discharge order was punitive in nature inasmuch as it was stigmatic and, therefore, it was essential that inquiry under Article 311(2) of the Constitution of India ought to have been conducted. Thirdly, it was submitted that the relevant rules and in this case Rule 9(2) of the said Rules, requires giving of one month's notice prior to termination. That notice was admittedly not given and, therefore, the termination was bad. Fourthly, it was submitted that by virtue of Rule 8 of the Rules the Respondent could be deemed to have been confirmed. The High Court on interpretation of Rules 8 and 9 of the Rules has held that since the Respondent had completed more than three years service and he was a Judicial Member, under Rule 9(2) his services could not be terminated without serving upon him one month's notice. In our view, the interpretation given by the High Court on Rule 9(2) is not correct. In the case of Judicial Member directly recruited from the Bar, the procedure prescribed under Rule 9(2) is required to be followed only if such member without being confirmed continues for three years or more.

11. Nonetheless the order of discharge cannot be upheld, as it is stigmatic and punitive in nature. It is a matter of record that during three years of service no order was issued extending the period of probation of the Respondent. He completed the mandatory period of probation on 21st November, 2007, therefore, it was expected of the department to take a decision about the performance of the Respondent within a reasonable period from the expiry of one year. It is also a matter of record that the Respondent continued in service without receiving any formal or informal notice about the defects in his work or any deficiency in his performance. This Court, in the case of Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others, , emphasised the importance of timely communication of defects and deficiencies in performance to a

probationer, so that he could make the necessary efforts to improve his work. Non-communication of his deficiencies in work would render any movement order of such an employee on the ground of unsuitability arbitrary. In Paragraph 5 of the judgment, it is observed:

5. We must emphasise that in the relationship of master and servant there is a moral obligation to act fairly. An informal, if not formal, give-and-take, on the assessment of work of the employee should be there. The employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiencies; indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, in our opinion, it would be arbitrary to give a movement order to the employee on the ground of unsuitability.

In our opinion, the aforesaid observations are fully applicable in the facts and circumstances of this case.

12. It is also a matter of record that the procedure for confirmation of the Respondent had been initiated on 26th November, 2007. It is also not disputed that vigilance report for his confirmation had also been received. Therefore, it is difficult to accept the submission of learned Counsel for the Union of India, that the discharge of the Respondent is not founded on the complaint made by some of the advocates. The report prepared by the President, CESTAT on 18th November, 2009, clearly indicated that the only reason for issuing the order of discharge was contained in the aforesaid report. In our opinion the order of discharge passed by the Union of India was clearly vitiated by the legal malice. It was clearly founded upon the report submitted by the President, CESTAT. In our opinion the controversy herein is squarely covered by a number of earlier judgments of this Court, which have been considered and reaffirmed in the case of Union of India (UOI) and Others Vs. Mahaveer C. Singhvi, . Considering the similar circumstances this Court observed as follows:

25. In the facts of the case the High Court came to the conclusion that a one-sided inquiry had been conducted at different levels. Opinions were expressed and definite conclusions relating to the Respondent's culpability were reached by key officials who had convinced themselves in that regard. The impugned decision to discharge the Respondent from service was not based on mere suspicion alone. However, it was all done behind the back of the Respondent and accordingly the alleged misconduct for which the services of the Respondent were brought to an end was not merely the motive for the said decision but was clearly the foundation of the same.

13. In our opinion, there is clearly a live nexus between the decision to discharge the Respondent vide order dated 19th November, 2009; the disturbance caused by the members of the Bar in the Court of the Respondent and his leaving the Bench and retiring to his Chamber. The report of the President leaves no manner

of doubt that the Respondent had been condemned unheard on the basis of the aforesaid incident and the report of the Chairman, CESTAT dated 18th November, 2009. The order of discharge, being based upon the report of the President, is clearly stigmatic and could not have been passed without giving an opportunity to the Respondent to meet the allegations contained in the report of the President, CESTAT. We may notice here the observations made by this Court in the case of Mahaveer C. Singhvi [supra]:

46. As has been held in some of the cases cited before us, if a finding against a probationer is arrived at behind his back on the basis of the enquiry conducted into the allegations made against him/her and if the same formed the foundation of the order of discharge, the same would be bad and liable to be set aside. On the other hand, if no enquiry was held or contemplated and the allegations were merely a motive for the passing of an order of discharge of a probationer without giving him a hearing, the same would be valid. However, the latter view is not attracted to the facts of this case.

14. This apart, we are also of the opinion that the order of discharge has been passed in order to avoid the procedure of giving one month's notice as required under Rule 9(2). The aforesaid Rule has made a distinction between the members of the CESTAT who were working in the Central Government prior to their recruitment as Members of the CESTAT and the Judicial Member directly recruited from the Bar. In the case of members recruited from the various services of the Central Government, a provision has been made for their reversion to the parent department. In their case a provision has also been made for them to be reverted to the parent department without assigning any reason. However, the same can only be upon giving one month's notice. In the case of Judicial Member, directly recruited, it has been specifically provided [Rule 9(2)] that upon completion of three years if the Judicial Member has not been confirmed, his services can only be terminated upon being given one month's notice. To avoid this provision, an order was passed on 19th November, 2009, extending the Respondent's period of probation from 21st November, 2007 to 21st November, 2008 and further upto 21st November, 2009. This was clearly done with an oblique motive of issuing the order of discharge on the very next day, i.e., 20th November, 2009. The action of the Union of India is undoubtedly a colourable exercise of power. The order of discharge is in utter violation of Article 14 of the Constitution of India, rendering the same void. In view of the above, we have no hesitation in holding that the SLP No. 34671 of 2012 filed by the Union of India is wholly devoid of merit and has to be dismissed.

15. This now brings us to the appeal arising out of SLP No. 27821 of 2012 filed by Pradip Kumar claiming the relief of reinstatement and for the grant of consequential benefits including full back wages. Although, the High Court had allowed the writ petition of the Respondent only on the ground that there had been a violation of Rule 9(2), we have come to a conclusion that the order of discharge was vitiated being colourable exercise of power, stigmatic and punitive

in nature and such order cannot be sustained in law. In our opinion, the order of discharge is arbitrary and therefore violates Article 14 of the Constitution. Consequently, we hold that the Appellant-Pradip Kumar is entitled to be reinstated in service. He shall be entitled to full back wages during the period he has been compelled to remain out of service. Union of India is directed to release all consequential benefits to the said Pradip Kumar within a period of two months of the receipt of a certified copy of this order.

16. With these observations, the appeal filed by Union of India being Civil Appeal No. 9089 of 2012 arising out of SLP [C] No. 34671 of 2012 is dismissed and Civil Appeal No. 9082 of 2012 arising out of SLP [C] No. 27821 of 2012 filed by the Pradip Kumar is allowed.

17. Leave granted in both the petitions.

18. Civil Appeal No. 9089 arising out of SLP (C) No. 34671/2012 is dismissed and Civil Appeal No. 9082/2012 arising out of SLP (C) No. 27821/2012 is allowed in terms of the signed judgment.