
(2019) 02 CAT CK 0086

In the Central Administrative Tribunal

Case No : Original Application No. 610 Of 2015, Original Application No. 1487 Of 2016, Original Application No. 2023 Of 2016, Original Application No. 2224 Of 2015, Original Application No. 3471 Of 2016, Original Application No. 2312 Of 2015, Original Application N

Sh. B. K. Damor

APPELLANT

Vs

Union Of India through And Ors

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Central Civil Service (Pension) Rules, 1972 — Rule 6, 9, 14(6)
Constitution Of India, 1950 — Article 77

Citation : (2019) 02 CAT CK 0086

Hon'ble Judges : L. Narasimha Reddy, J; Sh. Mohd. Jamshed, J

Bench : Division Bench

Advocate : S.K. Gupta, Madhurima Tatia, Hanu Bhaskar

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J

1. In this batch of seven OAs, common questions of fact and law are involved; hence they are disposed of by this common judgment.

2. The applicants in all these OAs are members of Indian Revenue Service. While some are still in service, others have retired. Except in the case of applicants in OA No.2023/2016 and OA No.3471/2016, disciplinary proceedings were initiated against the applicants in these OAs between the years 2004 & 2008. They filed Original Applications before this Tribunal challenging the charge memos mostly on the ground that they were not approved by the Hon'ble Finance Minister. Following the judgment in Union of India vs. B. V. Gopinath (W.P. (C) No.10452/09) decided on 28.07.2009, the OAs were allowed and the respective charge memos were set aside. Liberty was, however, given to the respondents to issue charge sheets afresh. Accordingly, fresh charge sheets were issued to the applicants therein in the year 2014.

3. Against the applicant in OA No.2023/2016, a charge sheet was issued on 29.09.2011, and against the applicant in OA No.3471/2016, it was issued on 16.05.2016. In both these OAs, the charge sheets so issued are challenged.

4. The grounds urged by the applicants are that the appointing authority in respect of an officer of the rank of Income Tax Commissioner happens to be the Appointments Committee of the Cabinet (for short, ACC) and that the approval of the ACC was not obtained before the charge sheets were issued, be it at the first instance or at the second time. Reference is made to various provisions of the Constitution of India and Business Rules in this behalf.

5. The applicants also contend that the charge sheets issued on the earlier occasions were quashed as non est, and in that view of the matter, it is not permissible for the respondents to issue fresh charge sheets, notwithstanding the liberty given by the Tribunal. It is also stated that in respect of the applicants who retired from service, Rule 9 of the CCS (Pension) Rules, 1972 (for short, Pension Rules) comes into play and no charge sheet could have been issued in respect of any event that took place four years before the date of charge sheet. The applicants also contend that the charge sheets are liable to be set aside on the ground that they are not accompanied by list of witnesses. Reliance is placed upon certain judgments wherein it was held that in the absence of any witness, the department cannot prove any document and thereby the charge. Other minor grounds were also raised.

6. The respondents filed counter affidavits in the respective OAs. An objection is raised to the plea pertaining to ACC. According to them, the applicants are precluded from raising it, once it was either not raised in the first round of litigation or is presumed to have raised and rejected by applying the principles of constructive res judicata. It is also stated that the ACC is an authority which accords approval for appointment, but not the one, by itself appoints the officers.

7. The respondents further contend that the applicants cannot raise objection to the issuance of fresh charge sheets, once liberty was given to the department for issuance of the same. As regards operation of Rule 9 of Pension Rules, they contend that the time frame fixed therein, would apply only when a charge sheet is issued for the first time after the retirement of an employee, but not when the disciplinary proceedings are the continuation of the earlier ones. They too placed reliance upon certain judgments.

8. We heard Shri S. K. Gupta, learned counsel for the applicants, Shri R. D. Gupta, applicant in OA Nos.1487/2016 and OA No.2023/2016, Ms. Madhurima Tatia and Shri Hanu Bhaskar, learned counsel for the respondents.

9. While in five OAs, the charge sheets that are issued for the 2nd time are challenged, in other two OAs, the challenge is to the charge sheet issued for the first time. The relevant particulars are as under:-

OA Nos.

Date of first charge sheet and the OA in which the charge sheet and the date of order

Date of second charge sheet

Nature of allegations

OA No.610/2015

28.11.2006 (OA No.4579/2011 decided on 04.10.2013)

28.11.2006

Adjudication/ Assessment

OA No.1487/2016

04.11.2004 (OA No.1995/2010 decided on 20.08.2010)

03.06.2014

Purchase

OA No.2023/2016

29.09.2011

Adjudication/ Assessment

OA No.2224/2015

22.01.2008 (OA No.2965/2012 decided on 04.10.2013)

10.02.2014

Adjudication/ Assessment

OA No.3471/2016

16.05.2016

Adjudication/ Assessment

OA No.2312/2015

23.09.2004 (OA No.2891/2010 decided on 26.08.2011)

04.08.2014

Adjudication/ Assessment

OA No.2316/2015

04.11.2004 (OA No.2888/2010 decided on 26.08.2011)

28.07.2014

Purchase

10. The first contention advanced on behalf of the applicants is that the charge memo is required to be approved by the Appointing Authority under the CCS (CCA) Rules, 1965, and in the context of the applicants herein, the Appointing Authority is the ACC.

11. At the threshold, it needs to be observed that the Appointing Authority for any post in service is prescribed or stipulated under the Recruitment Rules, and the applicants are not able to place before us any Rule which is to the effect that the Appointing Authority for the post of Commissioner of Income Tax, or above, is ACC.

12. The applicants mainly relied upon the Rules framed by the President of India in exercise of the powers conferred under Article 77 of the Constitution of India. "The Government of India (Transaction of Business) Rules, 1961", were published on 14.01.1961, and were amended from time to time. They prescribe the procedure to be followed for disposal of the matters at the level of a Minister or the matters in which interdepartmental consultation are provided for. Rule 6 is to the effect that there shall be Standing Committee of the Cabinet as set out in the First Schedule, with the functions specified therein. The Committee shall be constituted by the Prime Minister. We are concerned with Item 1 of the First Schedule. It reads as under:-

Name of the Standing Committee

Functions

1. Appointments Committee of the Cabinet.

(i) To take decisions in respect of appointment specified in Annexure 1 to the First Schedule to the Government of India (Transaction of Business) Rules, 1961; (ii) to take decisions in respect of empanelments specified in Annexure II to the First Schedule to the Government of India (Transaction of Business) Rules, 1961;

(iii) to decide all cases of disagreement relating to appointments between the Department or Ministry concerned and the Union Public Service Commission;

(iv) to decide cases of extension of tenure, under the Central Staffing Scheme (s) or relevant central tenure norms, of officers belonging to the All India Services and other Group ?A? Services beyond the prescribed limits;

(v) to decide cases relating to lateral shift of officers serving on Central deputation.

vi) to decide cases of premature repatriation of officers serving with the Central Government to their parent cadre or Department.

vii) to decide cases relating to inter-cadre deputation or transfer of All India Services Officers;

(viii) to decide cases of extension of service beyond the age of superannuation

under Fundamental Rule 56 (d):

(ix) to decide all cases of disagreement with the recommendations of the Search-cum-Selection Committee constituted in accordance with the statutory requirements or the relevant instructions of the Department of Personnel and Training in respect of officers of the rank of pay (pay band plus Grade Pay) equivalent to or higher than Joint Secretary of the Central Government;

x) to consider and decide representations, appeals and memorials from officers of the rank or pay (pay band plus Grade Pay) equivalent to or higher than a Joint Secretary in the Central Government; except from those working in the cadre against adverse remarks;

(xi) to decide all cases of disagreement including in the order of preference of the Public Enterprises Selection Board panel, between the administrative Ministry of Department concerned and the Public Enterprises Selection Board;

(xii) to decide all cases of inter-company, transfers of Chairman, Managing Director and functional Directors of Public Sector Undertakings between holding companies and subsidiaries and within the subsidiaries including Memorandum of Understanding signing Public Sector Undertakings.

xiii) to decide cases relating to intra-company transfer of Managing Director and functional Directors of Public Sector Undertakings including Memorandum of Understanding signing Public Sector Undertakings; and

(xiv) to decided cases relating to employment of re-employment of any person, who has attained the age of superannuation, in any Department of the Government of India, any State-owned public corporation, company or enterprise, in a post, appointment to which requires approval of the Appointments Committee of the Cabinet.

From a perusal of this, it becomes clear that function attributed to the ACC is "to take decision in respect of appointments" to the posts of certain categories. Other ancillary functions are indicated in various clauses contained in this Item. What becomes common from the entire spectrum of the provisions relating to ACC is that it is conferred with the power "to take decision in respect of appointments", and allied matters such as inter cadre deputation, extension of service beyond superannuation, disagreement with the recommendations of Search-cum-Selection Committees. Nowhere in the earlier provision, it is mentioned that the ACC would function as the Appointing Authority.

13. It is fairly well known that under the relevant recruitment rules, the functions attributed or powers conferred upon the ACC are in the form of verification, scrutiny or vigilance clearance leading to appointment. The exercise undertaken by the ACC is the one that precedes the appointment. In other words, clearance by ACC would not by itself lead to appointment of an officer. It paves the way for the Appointing Authority to issue orders of appointment to the concerned officer. The appointment as such takes place only when the order in that behalf is

passed by the appointing authority.

14. It may not be out of place to mention that the appointment of a selected candidate is subject to verification of his/her antecedents. It is only when the vigilance wing of the department or some other named agency clears the name, that the order of appointment can be issued. That does not mean that the vigilance wing is the appointing authority.

15. No authoritative precedent is placed before us to suggest that ACC is the appointing authority in respect of the post held by the applicants.

16. It has already been mentioned that in five of the OAs, charge memos that were issued earlier, were challenged by filing OAs. The principal contention raised therein was that the charge memos were not approved by the appointing authority. It was clearly mentioned therein that the Finance Minister is the appointing authority whereas, the charge memos were approved by the Chairman of the CBDT. This contention was accepted in B. V. Gopinath's case (*supra*) and following the same, the OAs filed by the applicants were allowed. It was not the case of the applicants in the OAs filed by them earlier that their appointing authority was the ACC. If that is so, there was no occasion for them to plead that their appointing authority is the Finance Minister. Thus, (a) the applicants did not raise the contention as regards the ACC and, (b) even if, it was raised in any manner whatsoever, it is deemed to have been rejected or given up and the principles of constructive *res judicata* comes into play. They cannot plead that ground in the second round of litigation.

17. Reliance is placed upon the judgment of Hon"ble Supreme Court in *Union of India vs. N. P. Dhamania and Others* 1995 Supp (1) SCC 1. The questions involved therein were framed by the Hon"ble Supreme Court as under:-

"(1) whether it is open to the Appointments Committee of the Cabinet (hereinafter referred to as the ?ACC?) to differ from the recommendations of the Department Promotion Committee (hereinafter referred to as the "DPC") and

(2) if so, whether reasons must be given for so differing."

The plea as to whether the ACC is the appointing authority did not come for consideration at all. On the contrary, the respondent therein, the employee in whose favour promotion was recommend by the UPSC, but was differed by the ACC, pleaded to the contrary. It is clear from the following paragraph:-

"13. The respondent appearing in person would urge that the words "appointing authority" would show that it has to be one authority. The ACC consists of three Ministers. Its constitution can be changed any time. Naturally, such a Committee cannot be the appointing authority. Hence, the Minister concerned alone is the appointing authority. Even assuming ACC is the appointing authority, the grievance of the respondent is, without giving good and sufficient reasons, promotion cannot be denied to him, once he had been approved for promotion by the DPC in consultation with the UPSC which approval has been given by the

Minister for Communication."

In the subsequent portion of the judgment, except that their Lordships directed the ACC to follow particular procedure in the context of differing with the recommendations made by the UPSC, no clear finding was given to the effect that ACC happens to be the appointing authority.

18. Reliance is also placed upon the judgment of Union of India and Another vs. Bhaskarendu Datta Majumdar (2010) 9 SCC 38. There also specific reference was made to the judgment of N. P. Dhamania's case (supra). That was a case pertaining to appointment to the post of Director (Marketing) in State Trading Corporation. On finding that the ACC did not clear the name of the applicant and no reasons were stated thereof, the High Court directed the ACC to assess the suitability. The same was affirmed by the Hon"ble Supreme Court. Except that an observation was made with reference to another case that ACC is the appointing authority, nowhere it was held that for the post in question, ACC was the appointing authority.

19. The second contention advanced by the applicants is that fresh charge sheets could not have been issued to such of the applicants herein who have attained the age of superannuation in the meanwhile. Their plea is based upon Rule 9 of Pension Rules. The relevant provision reads as under:-

"(2) xxx xxx xxx

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -

xxx xxx xxx

(ii) shall not be in respect of any event which took place more than four years before such institution, and

xxx xxx xxx"

20. Their contention is that the charge sheet cannot be issued in respect of any incident or event which occurred four years before the charge sheet was issued. There is no difficulty about this proposition of law. The rule is very specific about it. However, if the proceedings were initiated against an officer, while in service, and the charge memo was set aside on technical grounds, leaving it open to the department to issue fresh charge sheet, totally different considerations altogether ensue. This very contention was dealt with in the case of Keshavlal Trikamlal Maru vs. Union of India & Ors. [OA No.4149/2014 decided on 26.09.2018]. The relevant portion reads as under:-

"8. Had it been a case where the impugned charge memorandum dated 08.08.2014 was the maiden attempt to initiate disciplinary proceedings against the applicant, the plea raised by him deserves to be accepted straightway. The reason is that he retired in the year 2005, and the charge-sheet is dated 08.08.2014. However, it is not in dispute that the applicant was issued a charge

memorandum dated 22.01.2008, and it was challenged by filing OA No.3271/2010 on the ground that it was issued without obtaining the approval of the competent authority, i.e., the Finance Minister. The plea was accepted and the charge-sheet was set aside through order in OA No.3271/2010. The OA was allowed by following the detailed order dated 26.08.2011 passed by the Tribunal in OA No.3732/2010 and batch, in S. Ramu & others v Union of India & others. The operative portion of the detailed order in S. Ramu's case reads as under:

"9. Considering the facts and circumstances of the cases and guided by the law laid by Hon"ble High Court of Delhi in B. V. Gopinath and S. K. Srivastava case, we are of the firm opinion that the impugned orders in all the present Original Applications where the charge sheets were issued against the applicants without getting the approval of the competent Disciplinary Authority, namely, the Finance Minister, are liable to be quashed and set aside. We order accordingly. We also grant the liberty to the respondents to proceed against the applicants in the respective OAs and frame charges if the concerned competent authority would approve the charge memo in the respective cases.

10. In terms of our above orders, all the OAs listed here are allowed. This order is subject to the final outcome of the B. V. Gopinath's case (supra) under consideration of Hon"ble Supreme Court of India. As mentioned above, the respondents would be within their right to seek recall or review of our orders if the Hon"ble Supreme Court may reverse the judgment passed by this Tribunal and the High Court."

(emphasis added)

The order in OA No.3271/2010 filed by the applicant, reads as under:

"It could not be disputed during the course of arguments that present case is covered by the decision of the Tribunal in the matter of S. Ramu Versus Union of India and others (OA No.3732/2010 and other connected OAs decided on 26.08.2011).

2. For the parity of reasons given in the order passed in OA No.3732/2010 and other connected OAs, this Original Application is also allowed in the same terms."

From this, it becomes clear that permission was accorded to the respondents to issue fresh charge-sheet after obtaining approval of the competent authority. The very fact that the applicant did not plead or press the contention that the institution of the proceedings through charge-sheet dated 22.08.2008 was not hit by sub-rule (2) (b) (ii) of rule 9 of the Pension Rules, leads to the inevitable conclusion that the initiation of the disciplinary proceedings was otherwise valid. Obviously, for that reason, permission was accorded for issuance of another charge-sheet by placing reliance upon the order in S. Ramu's case. In case the applicant was of the view that the prohibition contained in sub-rule (2) of rule 9 operates and renders the issuance of another charge-sheet impermissible, he was expected to seek remedies accordingly. He did not do so and permitted the

order in OA No.3271/2010 read with the one in S. Ramu's case, to become final.

9. Learned counsel for the applicant relied upon the judgment of the Hon^{ble} Supreme Court in *State of Bihar & others v Mohd. Idris Ansari* [1995 SCC (L&S) 1086]. In that case also the challenge to the disciplinary proceedings was on the ground that they were instituted beyond the time stipulated under rule 43(b) of the Bihar Pension Rules, which is similar to rule 9 of the CCS (Pension) Rules. On facts, it was held that the proceedings could not have been initiated in the year 1993 for the irregularity which had taken place in the year 1986-87. The respondents also did not dispute that fact, and on finding that the proceedings are in respect of the events which took place more than four years before the institution, they were set aside.

10. Once it emerges that the proceedings were validly instituted through charge-sheet dated 22.01.2008, the time between that charge-sheet and the one impugned in this OA needs to be excluded in the context of reckoning the period of time mentioned in sub-rule (2) of rule 9. In a way, this is referable to the concept of acts of law. It is well known that the time that is consumed in an adjudicatory process cannot be counted whenever an occasion arises for determining the period of limitation."

21. It is evident that if the proceedings were initiated in accordance with law, be it as regards the point of time or on other aspects, the time that intervened between second charge memo, and the one that was set aside on technical ground, is covered by the principle of acts of law. In other words, the time spent on account of litigation is liable to be ignored. Therefore, the contention of the applicants cannot be accepted.

22. It is also pleaded that the charge sheets that were issued to the applicants in the first instance were set aside as non est, and the so called liberty given to the department to issue fresh charge sheets cannot be taken as a liberty to resurrect. For all practical purposes, the applicants want the liberty given in the earlier round of litigation to be treated as of no consequence.

23. In *K. K. Kapila vs. Union of India*, a Division Bench of this Tribunal through its order dated 10.08.2016 passed in OA No.181/2016 held as under:-

"..Admittedly, the respondents have issued the impugned Annexure A-1 memorandum of charges and Annexure A-2 order appointing the PO, availing the liberty granted to them by this Tribunal and which was allowed to be retained by the Hon^{ble} Supreme Court. The applicant never questioned the liberty granted by the Tribunal in its order dated 31.08.2010 in OA no.2718/2009 filed by him on the ground now taken by him that more than four years had already elapsed since the event took place. Further, this point was also not raised by the applicant before the Hon^{ble} Supreme Court that he had retired from service on 31.01.2005 and hence no DE proceedings could be instituted against him in terms of Rule 9 (2)(b) (ii) of the CCS (Pension) Rules, 1972. The Hon^{ble} Supreme Court has allowed the retention of the liberty granted by the Tribunal to

the respondents in its judgment dated 05.09.2013. Hence, we hold that the respondents are fully justified in starting DE proceedings afresh against the applicant by way of issuing Annexure A-1 memorandum of charges and Annexure A-2 order, appointing the PO. As such, we do not find any merit in the OA. The OA is accordingly dismissed."

24. It is strongly urged on behalf of the applicants that the memorandum of charge issued to the applicants were not accompanied by the list of witnesses and thereby, a serious infirmity has crept into the proceedings. It is stated that the list of witnesses is the requirement under sub-rule (6) of Rule 14 of CCS (CCA) Rules, 1972, and non-compliance with the same must lead to nullification of the proceedings.

25. It is no doubt true that examination of witnesses on behalf of the department is an essential step in the disciplinary proceedings. Various documents that are relied upon are required to be proved by the examining witnesses. However, there may be cases where facts are not much in dispute but the issue is only about the contents or interpretation of the orders. For example, if an employee is accused of passing an order beyond his jurisdiction, or conferring undue benefit on certain individuals in contravention of law, what becomes material in the inquiry is, the factum of orders so passed by him. It is a different matter if he pleads that he did not pass any order at all. Once, he does not dispute that he passed such an order, the proof or otherwise of the charge depends upon the understanding or interpretation thereof. In such cases, hardly there exists any necessity to examine witnesses.

26. Subtle distinction in this behalf, was indeed maintained by the respondents. For example, two charge memos were issued against Shri R. D. Gupta (Applicant in OA Nos.1487 and 2023 of 2016). In the first one, the charge memo is dated 03.06.2014 (issued after the one dated 04.11.2004 was set aside). The charges therein are about the irregularities said to have been committed by the applicant in purchase of various items. A list of Witnesses is enclosed to it, wherein, 25 persons that include officials as well as private individuals are named. In contrast, the charge memo dated 29.09.2011 issued to the applicant and challenged in OA No.2023/2016, is in relation to the orders passed by him in exercise of statutory powers. The list of documents contained only a set of orders passed by him and no witnesses are proposed to be examined.

27. Similarly, in the case of Shri S. N. Prasad, two charge memos were issued earlier on 23.09.2004 and 04.11.2004, and on their being set aside in the OAs filed by him, fresh charge memos were issued on 04.08.2014 and 28.07.2014 respectively. While the subject matter of charge sheet dated 04.08.2014 is the adjudication/assessment, the one of the charge sheet dated 28.07.2014, is purchase of articles. While in former, no witnesses were cited, in the latter, as many as, 22 witnesses are proposed to be examined. When this is the clarity, which the respondents have about the purport of the inquiries initiated against the applicants, it is difficult to accept the contention that a charge memo would

become invalid, if does not accompanied by the list of witnesses. Incidentally, this very aspect was dealt with in Keshavlal Trikamlal Maru's case (supra) after referring to various provisions contained in CCS (CCA) Rules, 1972, and it was observed as under:-

"15. The list of witnesses mentioned in sub-rule (3) of rule 14 is not exhaustive or final. Rule 15 permits the disciplinary authority as well as the employee to adduce further evidence. The evidence, naturally, can be oral or documentary, and if the inquiry officer is satisfied about the relevance thereof, he can permit persons, whose names did not figure in the list furnished along with the charge memorandum, to be examined, subject to the right of cross examination by the other party. Once there exists a facility to examine witnesses whose names did not figure in the list appended to the charge memorandum, there is no reason to take the view that if no list of witnesses is enclosed to the charge memorandum, the witnesses cannot be permitted to be examined at a later stage, depending on the satisfaction of the inquiry officer.

16. The third contention raised on behalf of the applicant is that he has discharged quasi judicial functions under the provisions of the Income Tax Act, and the orders passed therein cannot constitute subject matter of disciplinary proceedings. It is no doubt true that the disciplinary proceedings cannot be treated as appeals or reviews against the orders passed by the employee concerned in exercise of power conferred under the relevant provisions of law. However, in the limited context of examining whether the exercise of power was tainted with any acts of negligence or favoritism, the disciplinary proceedings can certainly be initiated."

Same situation obtains in the instant cases also.

28. Learned counsel for the respondents relied upon the judgment of Hon"ble Supreme Court of India in Director General, Indian Council of Medical Research and Others vs. Dr. Anil Kumar Ghosh and Another (1998) 7 SCC 97. In this case also, the department did not attach any list of witnesses to the charge memo. The list of documents comprised of certified copies of the assessment registers. The charges leveled against the employee were held proved and punishment was imposed. The High Court in which the order of punishment was challenged has set aside the same by observing that there was violation of principles of natural justice. In the Civil Appeal, the Hon"ble Supreme Court dealt with various contentions and found fault with the order passed by the High Court. The plea that the certified copies of the assessment register should not have taken as evidence except through a witness was repelled. Para 13 of the judgment reads as under:-

"13. The objection that the certified copies of the Assessment Register should not have been marked without examining the officials concerned of the Municipality is untenable. The genuineness of the documents was never in dispute. In fact, the case of the first respondent is that the assessment in the Municipal Register

was only for the purpose of taxation and it is not relevant for the claim of HRA.

In other words, if the genuineness of a document is not in dispute, it would not be merely to examine witness. Therefore, the contention of the applicant in this behalf cannot be accepted.

29. Learned counsel for the applicants relied upon several judgments, such as *Brajendra Singh Yambem vs. Union of India & another* [(2016) 6 SCC 20], *State of Bihar & Others vs. Mohd. Idris Ansari* [1995 SCC (L&S) 1086] and *B. V. Gopinath & Others vs. Union of India & Others* [(2014) 1 SCC 351] and various other precedents. While some of them were dealt in *Keshavlal Trikamlal Maru's* case (*supra*), others were not found to be of immediate relevance for adjudication of these cases.

30. Written arguments are submitted by one of the applicants, R. D. Gupta. Since his case was argued by his counsel, he is not entitled to open another front. Even otherwise, such of the contentions as are relevant are taken into account.

31. We do not find any merit in the OAs. They are accordingly dismissed. There shall be no order as to costs.