

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 453 of 2015

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
 Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

Shri Amiya Kanti Patnaik, aged about 60 years, Son of Late Subal Chandra Das, permanent resident of Plot No. A/48, Mancheswar Industrial Estate, Bhubaneswar-751010, at present working as Deputy Commissioner, Office of the Chief Commissioner, Central Excise, Customs and Service Tax, Bhubaneswar Zone, Bhubaneswar, Dist. Khurda.

.....Applicant.

VERSUS

1. Union of India represented through the Revenue Secretary to Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs, North Block, New Delhi-110001 .
2. The Chairman, Central Board of Excise & Customs, Ministry of Finance, Department of Revenue, North Block, New Delhi-110001.
3. Member (P&V), Central Board of Excise & Customs, North Block, New Delhi-110001.
4. The Director General Vigilance, Customs & Central Excise, 2nd & 3rd Floor, Samrat Hotel, Kautilya Marg, Chanakyapuri, New Delhi.
5. The Under Secretary to Government of India, Ministry of Finance, Department of Revenue (Central Board of Excise & Customs), North Block, New Delhi.
6. The Under Secretary to Government of India, Ministry of Personnel, PG and Pensions, Department of Personnel and Training (AVD-II)(DoPT), North Block, New Delhi-110001.
7. The Superintendent of Police, CBI, Anti Corruption Branch, 14th Floor, Nizam Place, 234/4, AJC Bose Road, Kolkata.
8. The Chief Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar Zone, Bhubaneswar-751007.
9. The Under Secretary to Govt. of India, Department of Revenue, Central Board of Excise and Customs, Office of the Chief Vigilance Officer, 6th Floor, Hudco Vishala Building, Bhikaji Cama Place, R.K. Puram, New Delhi-110066.

.....Respondents.

For the applicant : Mr. J. M. Pattnaik, Counsel

For the respondents : Mr. S. Behera, Counsel (for respondent nos. 1 to 6, 8 and 9)

Mr. A. K. Mohapatra, Counsel (for respondent no. 7)

Heard & reserved on : 16.03.2020

Order on : 13.05.2020

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

The applicant by filing this OA, has prayed for the following reliefs under section 19 of the Administrative Tribunals Act, 1985 :-

*“Under the circumstances, the Applicant prays that the Hon’ble Tribunal may graciously be pleased to quash the order dated 30th June, 2015 (Annexure-A/10) and consequently hold/declare that non promotion of the applicant to the post of Joint Commissioner after finding the applicant **‘FIT’ by the DPC held on 13.12.2013** treating the same to be a **‘deemed sealed cover’** and denying subsequent promotion/Non-Functional Selection Grade (NFSG) arises out of it, as like others, is bad in law;*

And accordingly direct the Respondents to promote the applicant to the post of Joint Commissioner with all consequential service and financial benefits retrospectively when other re commended officers were promoted to the said post/grade/cadre and subsequent promotion/ Non-Functional Selection Grade (NFSG) Arises out of it, as like others;

And further be pleased to pass any other order/orders as deemed fit and proper, under the circumstances.”

2. The applicant claims that although he was eligible for promotion to the post of Joint Commissioner (in short JC) under the respondents on the ground that a criminal case is pending against him. The applicant is aggrieved since his juniors have been promoted after due consideration by the DPC meeting held on 31.12.2013 based on which the order of promotion to his juniors was issued vide order dated 31.12.2013 (Ann. A/1). The applicant has been charged by the CBI in a criminal case which is pending trial since the year 2009 and it is the case of the applicant that the prosecution is unable to specify the place of offence. Hence, his case of promotion to the post of JC was not considered treating as deemed sealed cover due to pendency of the criminal case. It is also averred in the OA that the delay in disposal of the criminal case against him is not due to the applicant. In this background, he represented for promotion and had also filed the OA No. 169/2015 which was disposed of with direction to the respondents to consider his representation. Accordingly, the respondent no. 9 on behalf of the respondent no. 1 has passed the order dated 30.6.2015 (Annexure-A/10) rejecting the case, by stating as under:-

“5. Whereas, the representation dated 08.01.2014 was duly examined in consultation with the Vigilance Division of the CBEC, who vide their OM No. 18013/1/2015-AdV/358 dated 20.01.2015 have found that there is no merit in the claim of Shri A.K. Patnaik that by virtue of the Stay order of Hon’ble High Court Calcutta vide its order dated 06.01.2014, he becomes eligible for opening of the sealed cover as if no Criminal proceeding is pending. This is for the reason that stay of the pending trial by the Hon’ble High Court does not have the effect of setting aside the prosecution and therefore the prosecution proceedings on a criminal charge are still pending, though stayed. Consequently, in terms of the DOP&T’s guidelines, the case cannot be considered as clear from vigilance for promotion purposes.

6. Whereas, the spirit of the Hon’ble Supreme Court order dated 17.10.2014 in Civil Appeal No. 9849 of 2014 (arising out of SLP (C) No. 18639 of 2012) mentioned in the representation of Shri A.K. Patnaik dated 29.12.2014 is that similarly placed persons should be treated similarly. In the instant case, Shri A.K. Patnaik cannot be treated as similar with other officers who were promoted are clear from vigilance while Shri A.K. Patnaik is not clear from vigilance.

7. Whereas, vide order dated 24.03.2015, Shri A.K. Patnaik’s representation dated 08.01.2014 was disposed of in compliance with order dated 01.12.2014 passed by Hon’ble CAT, Cuttack Bench in OA No. 260/00856 of 2014.”

3. Being aggrieved by the order at Annexure-A/10, the applicant has filed this OA. One of the ground urged in the OA is that in another case WP CrI. No. 244 of 2013 in the case of Amar Patnaik vs. Manorama Mangaraj, in Misc. Case No. 239/2014 in the above WP, Hon'ble High Court has ordered promotion of the employee against whom a criminal case was pending vide order dated 18.11.2014 (Annexure-A/9 of the OA). It is stated in the OA that the case of the applicant was similar to the case of the petitioner in WP CrI.No. 244/2013 and although the direction of the Tribunal to the respondents was to consider the matter in the light of above order of Hon'ble High Court, it was not done while rejecting his representation. Hence, the impugned order is stated to be not as per the direction of this Tribunal in order dated 8.4.2015 in OA No. 169/2015 (Annexure-A/8 of the OA).

4. Another document on which the applicant relies on in the OA is the OM dated 2.11.2012 (Annexure-A/6) of the Department of Personnel and Training (in short DOPT) which specifies the conditions under which the sealed cover procedure for promotion is to be followed for pending disciplinary or judicial proceeding. According to the applicant, as per this OM, the government servant is to be placed under suspension if the allegations are serious enough so as to follow the sealed cover procedure. The judgments in the case of **State of Punjab and others vs. Chamanlal Goyal and Susanta Nanda vs. Union of India and other in WP(C) No. 8440 of 2009** have been cited in which the government has been directed to promote the concerned officer without being influenced by the pending disciplinary proceeding. It is also averred that although the views of the CBI was called for about promotion of the applicant, no reply was received from the CBI.

5. Respondents in their counter have averred that there is no substance in the OA which is liable to be dismissed. The applicant was promoted to the grade of Assistant Commissioner on ad-hoc basis on 10.12.2002 and to the grade of Deputy Commissioner on ad-hoc basis on 10.12.2006. In the DPC held on 13.12.2013, the applicant alongwith other officers of 2002 and 2003 batch was considered for promotion to grade of Joint Commissioner on ad-hoc basis. Though the applicant was assessed to be fit for promotion, but he was not cleared by vigilance as it was informed that criminal case was initiated against the applicant by the CBI is pending trial in the Court, for which the findings of the DPC were kept in the deemed sealed cover as per the existing guidelines. It is averred that the applicant's representation dated 8.1.2014 was examined in consultation with the vigilance division of the CBEC and the same was rejected as per the impugned order dated 24.3.2015 (A/5). The applicant filed another OA No. 169/15 which was disposed of by Tribunal with direction to dispose of the representation dated 29.12.2014 of the applicant. The Vigilance Division informed that the sanction of prosecution was accorded on 9.7.2009 and the case was still pending for trial.

6. Further, it is averred in the Counter that stay of the criminal proceedings against the applicant by Hon'ble Calcutta High Court 'cannot be considered as exoneration or final disposal' and since the criminal case is pending for trial, vigilance clearance for applicant's promotion was not issued. The applicant's contention that his case is covered by paragraph 12 of the DOPT OM dated 2.11.2012 (A/6) is not correct. It is stated in Counter that action of the respondents in this matter is in accordance with the DOPT OM dated 2.11.2012 and that the applicant has approached Hon'ble Calcutta High Court challenging the criminal proceedings, the department cannot take any decision

in the matter. Applicant's contention that for ad-hoc promotion no vigilance clearance is required, has been denied in the Counter. Regarding order of Hon'ble Orissa High Court in the case of Amar Patnaik (supra) as stated in para 4.15 and 4.16 of the OA, it is averred in the Counter that the said order is applicable to the petitioner in that case and it has no general application.

7. The applicant has filed Rejoinder, reiterating the stand in the OA. It is averred that the applicant was to retire on 31.7.2015 and there was uncertainty about conclusion of the criminal proceedings which was launched on 28.7.2009 as per the contentions of the respondents. It is also averred that in the Counter, the respondents have admitted in the Counter that he was found fit for promotion to the post of JC by the DPC. It is stated by the applicant that no disciplinary proceeding was initiated against him as no misconduct against him has been alleged. Withholding of the applicant's promotion in the guise of sealed cover process when he was found fit by DPC, amounts to malafide exercise of power. The applicant has also cited the judgment in the case of **Mohinder Singh Gill AIR 1978 SC 851 and Commissioner of Police Bombay vs. Gordhan Das Bhanji AIR (39) 1952 SC 16.**

8. Heard learned counsel for the applicant. Besides stating the grounds mentioned in the OA, he submitted that during the pendency of the criminal case, the applicant was promoted as Assistant Commissioner and Deputy Commissioner on ad hoc basis, but similar promotion to the post of JC has not been allowed by the authorities. He submitted that in view of the judgments cited in the OA, the applicant is entitled for such promotion which was not extended.

9. The respondents' counsel was heard and he opposed the submissions of the applicant's counsel and stated that during pendency of the criminal case, no promotion can be granted to the applicant and the decision of the respondents in this regard is as per the guidelines of the DOPT. He further submitted that the applicant's case has been kept in sealed cover which will be opened after conclusion of the criminal case pending against the applicant.

10. We have gone through the pleadings on record and considered the submissions of learned counsels for the parties. Admittedly, further proceedings in the criminal case pending against the applicant at trial stage have been stayed by order of Hon'ble Calcutta High Court. The applicant's stand is that in view of the stay of the criminal case, his sealed cover should be opened and he should be promoted to the post of JC. The applicant has also cited the order dated 18.11.2014 (Annexure-A/9) of Hon'ble Orissal High Court in the WP CrI. No. 244/2013 in case of another officer Amar Patnaik vs. Manorama Mangaraj. The order dated 18.11.2014 stated as under:-

"Considering the submissions made, it is made clear that the pendency of the present criminal proceeding shall not be a bar for considering the case of the petitioner for promotion or any other assignment and/or post under Government/authority/ instrumentality of the State, National or International deputation."

The direction as per the order above is to consider the case of the petitioner. In the present OA, it is undisputed that the applicant has already been considered for promotion to the post of JC by the DPC, which was as per the order dated 18.11.2014, which does not direct to promote of the petitioner during pendency of the criminal proceedings if he is found suitable for promotion after consideration. Hence, the direction to consider for promotion

during pendency of criminal case cannot be construed to be the direction to promote the petitioner if found suitable, during pendency of the criminal case. Further, as contended in the Counter, the order dated 18.11.2014 is applicable to the specific case and it will not be applicable to the present case. Hence, the order dated 18.11.2014 (A/9) cited by the applicant will not be of any assistance for the applicant who has claimed promotion during pendency of the criminal case against him.

11. The applicant has cited the DOPT OM dated 2.11.2012 (Annexure-A/6) to claim that the sealed cover in his case should be opened and he should be promoted. He has stated in his representation dated 29.12.2014 at Annexure-A/3 that the vigilance clearance cannot be withheld unless the conditions in para 2 of the said OM are fulfilled. But in the case of the applicant, the condition of pendency of criminal charge is fulfilled, since the criminal case against him is pending in the trial stage and it is not claimed by the applicant that the magistrate in the criminal court has not taken cognizance of the charges against him. The fact that further proceedings in the criminal case have been stayed by virtue of the order of Hon'ble Calcutta High Court will not change the status of the pendency of that criminal case. Hence, one of the conditions in para 1 of the OM dated 2.11.2012 (A/6) is fulfilled in applicant's case, for which his case of promotion has been rightly kept in the sealed cover as stipulated in the OM dated 2.11.2012. The averment of the applicant that since no disciplinary action has been initiated against him, it should not be kept in sealed cover, is not acceptable since the pendency of the criminal case will attract the sealed cover procedure. We take note of the fact that if any government servant is convicted in a criminal case, appropriate disciplinary action can be initiated against him by virtue of such conviction under the provisions 10 of the CCS (CCA) Rules, 1965. Further, it is noticed that the OM dated 2.11.2012 (A/6) of the DOPT has been issued stipulating conditions as laid down by Hon'ble Apex Court in Union of India vs. K.V. Jankiraman case, reported in AIR 1991 SC 2010. Hence, the said OM of the DOPT is of no assistance for the applicant's case.

12. The applicant has cited the judgment in the case of Chaman Lal Goyal (supra), in which Hon'ble Apex Court, after considering the issue of delay in finalization of the disciplinary proceeding, has held as under:-

“Applying the balancing process, we are of the opinion that the quashing of charges and of the order appointing enquiry officer was not warranted in the facts and circumstances of the case. It is more appropriate and in the interest of justice as well as in the interest of administration that the enquiry which had proceeded to a large extent be allowed to be completed. At the same time, it is directed that the respondent should be considered forthwith for promotion without reference to and without taking into consideration the charges or the pendency of the said enquiry and if he is found fit for promotion, he should be promoted immediately. This direction is made in the particular facts and circumstances of the case though we are aware that the Rules and practice normally followed in such cases may be different. The promotion so made, if any, pending the enquiry shall, however, be subject to review after the conclusion of the enquiry and in the light of the findings in the enquiry. It is also directed that the enquiry against the respondent shall be concluded within eight months from today. The respondent shall cooperate in concluding the enquiry. It is obvious that if the respondent does not so cooperate, it shall be open to the enquiry officer to proceed ex-parte. If the enquiry is not concluded and final orders are not passed within the aforesaid period, the enquiry shall be deemed to have been dropped.”

In the above cited case, the disciplinary proceeding was quashed earlier on the grounds one of which was of delay in initiating the charges and it was observed by Hon'ble Apex Court that quashing of the charges on the ground of delay was not warranted as the charges against the officer were serious in

nature. But considering the facts of the case, direction was given for consideration of the charged officer for promotion and for his promotion if found suitable. It was observed that the direction was given in particular facts and circumstances of the case although the rules applicable are different. In the present OA, the facts are different, since the respondents are not responsible for delay in finalization of the criminal case unlike the case in Chaman Lal Goyal. The applicant has blamed the CBI for delay. But such contention is not supported by the factual circumstances of the case. Hence, the judgment in the case of Chaman Lal Goyal (supra) is factually distinguishable.

13. In the case of Susanta Nanda (supra), it is noticed that there was a circular for quarterly review of the sealed cover cases of I.F.S. officers, which was not complied by the Government. From the facts it was clear that the delay in finalization of the disciplinary proceedings was due to the respondents. Hence, the direction was given by Hon'ble High Court to open the sealed cover keeping in view the provisions of the circular regarding quarterly review and the judgment of Hon'ble Apex Court in the case of Chaman Lal Goyal (supra). In the cited case, there was delay in finalization of the disciplinary proceeding and non-compliance of the circular regarding quarterly review of the sealed cover cases by the authorities. It is not established in the present OA that the delay in finalization of the criminal proceeding was due to the respondents. Hence, the cited judgment is factually distinguishable.

14. The applicant has cited the judgments in the case of Mohinder Singh Gill and Gordhandas Bhauji in the rejoinder. But the cited cases are factually, different. The applicant's contention that applying sealed cover procedure in his case was malafide exercise of power by authorities is not substantiated. The applicant has objected to the fact that the respondent no. 9 while passing the impugned order dated 30.6.2015 (A/10) has not considered the order dated 18.11.2014 of Hon'ble High Court as directed by the Tribunal. In view of the discussions in paragraph 10 of this order dated 18.11.2014 is not applicable to the present case and hence, it can not be a valid ground to interfere in the matter.

15. In view of the facts and circumstances as discussed above, we are of the view that no case has been made out in the OA to call for any interference of this Tribunal in this case. The OA is accordingly dismissed with no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)