CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO.2611/2001

New Delhi this the 4th day of ~~November~~ December, 2002.

HON'BLE SHRI JUSTICE V.S. AGGARWAL, CHAIRMAN

HON'BLE SHRI S.A.T. RIZVI, MEMBER (A)

Shri Anil Kumar Gupta,
S/o Shri Om Prakash Gupta,
R/o 27-A/AC-IV, Shalimar Bagh,
Delhi-52 ...Applicant

(Shri G.D.Gupta,Sr.counsel with Shri S.D.Raturi, counsel).

-versus-

1.Union of India through the
Secretary to the Government of India,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi-11

2.The Chairman
Central Board of Excise & Customs,
North Block,
New Delhi-11

3.The Commissioner of
Central Excise (Delhi-I)
C.R. Building,
I.P.Estate,
New Delhi-2 .....Respondents

(By Shri R.R. Bharti, Advocate)

O R D E R

JUSTICE V.S.AGGARWAL:-

Shri Anil Kumar Gupta (hereinafter described as the applicant) was working as an Inspector in Central Excise department. Two cases were registered against him. The first case was registered against the applicant for allegedly possessing assets disproportionate to his known sources of income. The second case was registered against him on the

directions of the Sub Judge/Special Court. The applicant was arrayed as co-accused. The allegation pertained to payment of illegal gratification. It is not disputed that so far as the second case in which the applicant was arrayed as co-accused is concerned, he had preferred a revision petition in the High Court of Judicature at New Delhi and the proceedings qua the present applicant had since been quashed. The first case registered against the applicant for allegedly possessing assets disproportionate to his known sources of income is still pending trial.

2. Applicant had been placed under suspension vide the order dated 7.6.1988 on the ground that disciplinary proceedings were contemplated against him. He was served with a charge-sheet for major penalty, namely:-

"ARTICLE OF CHARGE NO.1

That Shri Anil Kumar Gupta while functioning as Inspector, Central Excise and Customs, New Delhi during the period from 1981 to 02.6.88 failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of Public servant in as much as he sold three residential plots for Rs.17000/- to different persons in 1984 and 1986 without obtaining prior permission of the competent authority and has not intimated these transactions to the Department.

Thus, Shri Anil Kumar Gupta has committed gross misconduct and has violated Rule 3(1)(I)(ii) &(iii) of CCS (Conduct) Rules, 1964.

ARTICLE OF CHARGE NO.II

That Shri Anil Kumar Gupta while functioning as Inspector, Central Excise and Customs, New Delhi during the year 1988 failed

to maintain absolute integrity and devotion to duty as much as he adopted dilatory tactics for supplying details as required in proforma I to VI to his Department as asked for.

Thus, Shri Anil Kumar Gupta by his above act has committed misconduct and acted in a manner which is unbecoming of a Public Servant thereby violating Rule 3(1)(I)(ii) & (iii) of CCS (Conduct) Rules, 1964."

The suspension of the applicant was revoked on 10.2.1992. Ultimately, the departmental enquiry was held against the applicant and he was exonerated of the said charges. In the meantime, an order was passed on 17.6.1994 whereby the applicant was sought to be placed under suspension under contemplated disciplinary proceedings but the said order had been revoked within three months.

3. While the prosecution of the applicant had been underway and the vigilance case was pending, a Departmental Promotion Committee meeting was held for the post of Superintendent. It was kept in sealed cover. The applicant was ultimately given notional promotion vide order of 29.6.1998. It was given with effect from 6.1.1992. He had joined his duties. The said order of promotion was cancelled vide order of 7/10.8.1998. The applicant had assailed the said order by filing OA No.1594/1998. The same had been contested and this Tribunal quashed the said order on the ground that it had been passed without affording any opportunity to the applicant to put forward his case. Opportunity had been given to the respondents to proceed in accordance with law. It was thereafter that a show cause notice had been served and the reply

considered. The earlier order so passed was recalled on the ground that there was an inadvertent mistake during the deliberations of the Departmental Promotion Committee. The reasons given were:-

"The criminal proceedings against the two Inspectors was dropped on 17.9.96, ultimately and the Department was also informed of the same. However,still there was one case pending against Shri A.K.Gupta i.e.RC-28(A)/88/DLI. Thus, it can be said that Shri A.K.Gupta could not be promoted on account of pendency of a criminal prosecution against him. It can further be said, that an inadvertent mistake occurred during the deliberations of the DPC and it gave promotion where it was not due. The alphabetical register although is not a prescribed record, but, the same is maintained as a ready reckoner for staff convenience. Apart from the register the case files also are seen by the DPC and because of this, Shri A.K.Gupta was not given promotion in the DPCs held earlier i.e.after 1996 after the dropping of his prosecution in one case. However, in the DPC held in 1998, due to a lapse, it was presumed that no further prosecution was pending against Shri Gupta and he was given notional promotion from 6.1.92. The arguments of Shri Gupta do not stand the test that the DPC had seen his files and then decided to give him promotion on a notional basis from 6.1.92, because in such cases, only ad-hoc promotion can be given as per instructions. The DPC is fully aware of its responsibilities and would not have overlooked the pending prosecution case to grant promotion with full knowledge of this case.

15. As regards the points relating to the granting of promotion on ad-hoc basis to Shri Gupta, he has cited ample reasons for according him the same. I do not dispute or deny the grounds of reasoning for according him promotion on ad-hoc basis and also would not like to discuss the same for the reason that I, though being the Appointing Authority for Superintendents, am only a member of the DPC which deliberates the promotions from Inspectors to Superintendents and no decision on the same can be taken by me in my individual capacity in this Order. It is for the DPC to decide whether he should be given ad-hoc promotion or not. The opinion of the CBI is sought in cases where prosecution is launched on their initiative and

the same is taken into account as per the DOP&T OM No.22011/4/91-Estt.(A) dated 14.9.92."

By virtue of the present application, the applicant assails the said order and that of the appellate authority primarily on the ground that once a promotion had been granted, the said order could not be recalled. The case of the applicant had been kept in a sealed cover and despite the criminal case pending against him, he had been promoted. There was hardly any mistake in this regard.

4. The application has been contested asserting that the applicant was promoted to the grade of Superintendent of Central Excise. He had been granted promotion mistakenly by the Departmental Promotion Committee because the facts had not been brought to the notice of the same. This was unintentional mistake that had occurred.

5. As already pointed above, the submissions of the applicant were confined to the question as to if when the applicant had been promoted despite the pendency of the abovesaid case against him pertaining to possessing of assets disproportionate to his known sources of income under the Prevention of Corruption Act, whether the said order could be recalled or not.

6. We are conscious of the decision of the Apex Court in the case of **State of Punjab and others** v. **Chamal Lal Goyal**, (1995) 29 ATC 546.The Supreme Court had considered the delay in such matters and whether

it would vitiate the charges. It was held that factors have to be weighed and taken note of. In the cited case, a Superintendent of Jail was charged after a period of 5-1/2 years for being responsible for escape of the prisoners involving death of a number of persons. It was held that because of the delay, the said person could be considered for promotion and if found fit could be so granted the promotion. Simultaneously, it was held that quashing of the charges may not be permissible. The precise finding of the court is:-

> "11. The principles to be borne in mind in this behalf have been set out by a Constitution Bench of this Court in A.R.Antulay v. R.S.Nayak,(1992) 1 SCC 225. Though the said case pertained to criminal prosecution, the principles enunciated therein are broadly applicable to a plea of delay in taking the disciplinary proceedings as well. In paragraph 86 of the judgement, this Court mentioned the propositions emerging from the several decisions considered therein and observed that "ultimately the court has to balance and weigh the several relevant factors- balancing test- or balancing process- and determine in each case whether the right to speedy trial has been denied in a given case". It has also been held that, ordinarily speaking, where the court comes to the conclusion that right to speedy trial of the accused has been infringed, the charges, or the conviction, as the case may be, will be quashed. At the same time, it has been observed that that is not the only course open to the court and that in a given case, the nature of the offence and other circumstances may be such that quashing of the proceedings may not be in the interest of justice. In such a case, it has been observed, it is open to the court to make such other appropriate order as it finds just and equitable in the circumstance of the case."

The cited decision in the peculiar facts will not come to the rescue of the applicant and must be taken to be

confined to the peculiar facts of the case. That was not a decision in which the question was as to if the order so passed could be recalled or not.

7. Reverting back to the controversy in question, as has been noticed above, the plea offered by the respondents in this regard has been the mistake in not noticing the pendency of the said case against the applicant when the Departmental Promotion Committee meeting took place and as a result, the applicant was promoted. Our attention by the learned counsel for the applicant was drawn towards a decision of the Gujarat High Court in the case of **(Mrs.) J.S.Pandya v. Director General of Police and Others**, 1985 G.L.H.557. In the cited case, Mrs.Pandya joined the service on 3.9.1978. She was promoted as a Senior Clerk in 1984 and was posted in the office of the Commissioner of Police, Ahmedabad. She was transferred but she was not allowed to join on the ground that a departmental enquiry was pending against her. On behalf of the State, reliance was placed on the Government Resolution of 23.9.1981. The Gujarat High Court rejected the contention of the respondents and held that the said Resolution refers to withdrawing of the promotion. But once promotion has been given, it cannot be cancelled. We take liberty in producing the relevant extract from it which

reads:-

"3. Mr.M.M.Jadeja, the learned counsel for the respondent submits that there is a Government Resolution No. SLT-1080-895-2, dated 23rd September 1981, wherein clause 7 states as under:-

> "A Government servant whose name is included in the select list but who is subsequently placed under suspension or against whom criminal proceedings/departmental proceedings have been initiated should not be promoted on the basis of his inclusion in the select list until he is completely exonerated of the charges against him. If the Government servant is completely exonerated of the charges, he will be promoted on the basis of his position in the select list, to the post which has been filled on a temporary basis pending disposal of the charges against him. If the exoneration is not complete, the question of his suitability for promotion will have to be adjudged afresh as mentioned in para 5 above."

Relying on the above clause 7 of the aforesaid Government Resolution, Mr.Jadeja has urged that when there is a departmental proceeding pending before a Government servant, his promotion could be withheld, if such a person is included in the select list. In this case, Mr.Jadeja has urged that the order dated 31st August 1984 was passed through mistake and that the promotion should not have been given to the petitioner. According to him, as soon as the Government came to know that there was a pending proceeding against the petitioner, they withheld the promotion. This submission of Mr.Jadeja is obviously wrong. Clause 7 of the aforesaid Government Resolution refers the withholding of promotion which means that the promotion may be withheld only when it is not yet given. But once the promotion is given it cannot be cancelled even though it turns out subsequently withheld. The respondent should have considered the position before passing the order of promotion. The promotion cannot be cancelled subsequently on the ground that it was passed in ignorance of a pending departmental inquiry. The provision of clause 7 of the aforesaid Government Resolution does not apply

> to a case where the promotion is already given. In this case, the petitioner has been prevented from taking charge of her promotional post on the ground that the order of promotion was passed in ignorance of the pending departmental inquiry. This action of the respondent is obviously wrong and untenable in law. Once the promotion order is passed the respondent has no power to delay or withhold the implementation of the order and the same must be given effect to immediately."

Following the said decision of the Gujarat High Court in the case of **Jagdish Singh Yadav** v. **Union of India and anr.** in OA No.66/2000 decided on 19.7.2000, this Tribunal had quashed the order whereby the promotion had been recalled. The findings reached are:-

> "11. Based on the aforesaid judgement, Shri Khurana has contended that the aforesaid office memorandum of 14.9.1992 can be made applicable only at the stage of grant of promotion. The same can have no application in case promotion is already given. Such a promotion, based on the aforesaid office memorandum, cannot be withdrawn. In our judgment, the contention is well founded and deserves to be accepted. No other decision taking a view contrary to the one taken by the Gujarat High Court has been brought to our notice. In the circumstances, we have no hesitation in following the same. In the circumstances, we hold that applicant having been promoted by an order passed on 30.9.1997 could not have been reverted based on the aforesaid office memorandum of 14.9.1992."

8.It is a settled principle of law that a judgement would be confined to its peculiar facts and would be a binding precedent when it lays a principle of law.

9. In the case of Mrs.Pandya (supra) the question in controversy was as to whether she could be

allowed to join on the said post or not. The argument before the Gujarat High Court was that if she was not allowed to join, it would tantamount to reversion of Mrs.Pandya to the post of Junior Clerk. In the present case, the position is different. It is asserted on behalf of the respondents that a show cause notice was given pertaining to the mistake that had occurred in promoting the applicant keeping in view the pendency of the case against him before the Special Judge under the Prevention of Corruption of Act. This fact had not been noticed by the Departmental Promotion Committee. The position herein, therefore, is totally different and consequently both the aforesaid decisions referred to above will have no import and impact in the peculiar facts of the present case.

10. Can a mistake that has occurred be not corrected? The answer to that would certainly be not an emphatic no. The mistake that has been committed cannot be allowed to be perpetuated. Having committed the mistake, the department or the Ministry cannot become a silent spectator. We would hasten to add that if the facts were known and were ignored, it was a different situation. But that was not so in the present case. Seemingly when the Departmental Promotion Committee took place, the fact of the pendency of the criminal case against the applicant had not been noticed. The Committee had not noticed

that irrespective of that the applicant deserved to be promoted. If that was so, we would have strayed our hands of it. But it was not correct. It appears that the mistake that has crept in for some reasons with we need not delve into.

11. Reference to the instructions in this regard to state whether they would apply if the promotion was not to be made is of no consequence. There are no instructions on the question involved. Still we are of the considered opinion that erroneous decisions based on of facts can always be taken note of and corrected. More so when as in the present case a show cause notice had been served and on consideration of the reply, the impugned order had been passed. Resultantly we must hold that the said argument which was so conveniently put forward must be rejected.

12. For the reasons recorded above, the original application being without merit must fail and is dismissed. No costs.

(S.A.T.RIZVI)
MEMBER (A)

(V.S.AGGARWAL)
CHAIRMAN

/sns/