CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. NO. 66/2000

New Delhi this the 19th day of July, 2000.

HON'BLE SHRI JUSTICE ASHOK AGARWAL, CHAIRMAN

HON'BLE SHRI V. K. MAJOTRA, MEMBER (A)

Jagdish Singh Yadav
S/O Puran Mal Yadav,
R/O WZ-68, Todapur,
New Delhi-110012. ... Applicant

(By Shri P.P.Khurana, Sr. Advocate with Shri M.K.Bhardwaj, Advocate)

-versus-

1. Union of India through
Secretary, Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. Commissioner of Central Excise
Delhi-I, C.R.Building,
I.P.Estate,
New Delhi-110002. ... Respondents

(By Shri R.R.Bharti, Advocate)

O R D E R (ORAL)

Shri Justice Ashok Agarwal :

By the present O.A., applicant seeks to impugn an order issued by the Commissioner of Central Excise, Delhi on 16.12.1999 whereby his earlier order of promotion from the grade of Inspector to the grade of Superintendent Grade-B has been withdrawn. He has also claimed consequential benefits arising out of the grant of the aforesaid prayer.

2. Facts leading to the filing of the present O.A. can be summarised as under :

Applicant prior to 30.9.1997 was employed in the post of Inspector in the office of Commissioner of Central Excise. On 29.5.1997 a decision was taken for

upgrading 138 posts of Inspectors to the level of Superintendents. Based on the decision, a Departmental Promotion Committee (DPC) was constituted. The DPC met on 23/24.6.1997. Various Inspectors were upgraded to the level of Superintendents by an order dated 30.9.1997. Applicant figures at Sl.No.127 in the list of Inspectors who had been so upgraded. By an order passed on 16.12.1999 aforesaid order of promotion dated 30.9.1997 in respect of applicant was withdrawn (Annexure A-1). This was on the ground that a complaint had been filed against applicant in the Court of the Chief Metropolitan Magistrate, New Delhi under Section 120-B of the Indian Penal Code read with Section 5 of the Import and Export (Control) Act, 1947 on 8.6.1994 and the same was pending trial. Aforesaid order of withdrawal of the order of promotion was based on instructions contained in DOP&T Office Memorandum No.22011/4/91Estt.(A) dated 14.9.1992 which ordained that the findings of the DPC in cases of Government servants in respect of whom prosecution for a criminal charge is pending, are to be kept in sealed cover till the conclusion of the criminal prosecution.

3. Being aggrieved by an order of reversion dated 19.12.1997 applicant had earlier instituted O.A. No.1/1998 in this Tribunal. By an order passed on 24.2.1998 aforesaid order was quashed on the ground that the same had been issued in violation of Article 311 of the Constitution.

4. After the aforesaid order of 19.12.1997 was thus quashed, a show cause notice dated 17.12.1998 was

issued to applicant. Applicant submitted his reply on 3.5.1999. By a later order passed on 16.12.1999, the order of promotion of 30.9.1997 was withdrawn and applicant was reverted back to the post of Inspector. Aforesaid order of 16.12.1999 has accordingly been impugned by applicant in the present O.A. By an interim order passed on 12.1.2000 aforesaid order of reversion has been stayed. Applicant, in the circumstances, continues in the post of Superintendent Grade-B on the strength of the aforesaid interim order till date.

5. Shri P.P.Khurana, the learned Senior Counsel appearing on behalf of applicant has raised several contentions in order to impugn the aforesaid order of reversion. Shri Khurana has contended that a perusal of the order of promotion dated 30.9.1997 at Annexure A-2 would reveal that this is not a case of promotion from a lower post to that of a higher post; it is merely a case of upgradation of Inspectors to the level of Superintendents Grade-B; and, in the circumstances, aforesaid O.M. of 14.9.1992 will not be applicable.

6. Shri Khurana has next contended that the order of promotion cannot be faulted on the ground that the department was unaware of the prosecution which had been filed against applicant when the order of promotion was made. He has pointed out that applicant had earlier been suspended by an order passed on 10.4.1985. The order of suspension was based on the very same fact, namely, a criminal prosecution was pending against applicant. Applicant

had impugned the order of suspension by instituting O.A. No.1623/87 on the ground that no chargesheet had been issued to him within the stipulated time. In the counter filed, the department took a stand that apart from the department conducting an enquiry, the CBI had also registered an FIR RC 39/85 DLI dated 28.6.1985. The Tribunal by an order passed on 4.1.1988 quashed the suspension order. Applicant was accordingly reinstated. The department was, in the circumstances, fully aware of the prosecution at the time when the DPC had met on 23/24.6.1997. According to Shri Khurana aforesaid reason for passing the impugned order of reversion, in the circumstances, cannot be countenanced.

7. Shri Khurana has thereafter placed reliance on the case of **Union of India** v. **K.V.Jankiraman**, AIR 1991 SC 2010. In the said case, the Supreme Court has observed as under :

> "6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc., does not impress us. The acceptance of this contention would

result in injustice to the employees in many cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it would not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure..... The conclusion No.1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/ charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions."

8. As far as the case of applicant before the criminal court is concerned, Shri Khurana has placed reliance on an order passed by the criminal court on 29.5.2000 which shows that the case is pending at a pre-charge stage. Various witnesses appear to have been examined and the case was adjourned to 17.7.2000 for recording the pre-charge evidence on which date, the case has further been stated to be adjourned to 30.8.2000. Based on the stage at which the criminal prosecution against applicant is pending, as also based on the aforesaid observations of the Supreme Court, Shri Khurana has contended that it cannot be held that the criminal court has by framing a charge taken cognisance of the charge against applicant. Hence, the stage for making applicable the aforesaid office memorandum dated 14.9.1992 cannot be said to have arisen. In our judgment, the contention advanced is just and proper and the same deserves acceptance.

Aforesaid prosecution launched against applicant is at the instance of the Director General of Foreign Trade (DGFT). The same has been instituted under Section 200 of the Code of Criminal Procedure. It is thus a complaint made by a public servant. In the circumstances, the procedure prescribed in Chapter XIX of the Code is applicable to the said prosecution. Since this is a prosecution instituted on a private complaint, provisions of Section 246 of the Code will apply. The same provides that if the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under the said Chapter, he shall frame a charge in writing against the accused. Such stage, aforesaid proceedings before the criminal court show, has not yet arisen. In so far as prosecutions at the instance of State are concerned, a magistrate takes cognisance of the offence when a chargesheet is filed. The same in respect of a private complaint is taken only after a charge is framed under Section 246. As far as prosecution at the instance of the State is concerned, framing of a charge is provided under Section 240. The same provides for framing of a charge on the basis of a police report before recording the pre-charge evidence. As far as private complaints are concerned, the stage of framing of the charge is after recording of the pre-charge evidence. In the circumstances, if on the basis of the observations of the Supreme Court, requisite action can be justified only on the basis of filing of a chargesheet, the same in cases of private complaint can be justified only after framing of charge after recording pre-charge evidence. In State prosecutions a police report is lodged after due

investigations by the police machinery. The accused is furnished with the copies of chargesheet which contain the police report, statements of witnesses etc. In private complaint all that is served upon the accused is a copy of the complaint and it is only with the framing of the charge that cognisance of the offence is taken. In state prosecutions cognisance of the offence is taken on the filing of a charge-sheet and in private complaints cognisance is taken on the framing of charge. In the circumstances, we hold that no question of taking action under the aforesaid office memorandum dated 14.9.1992 can be said to have arisen. If the said stage has not so far arisen, a conclusion is inevitable, namely, the impugned order of reversion of 16.12.1999 based on the aforesaid office memorandum falls to the ground. the said order is accordingly liable to be quashed.

9. Shri Bharti, the learned counsel appearing for respondents has, however, strenuously urged that the prosecution as against applicant should be deemed to have been launched along with the lodging of the private complaint by the DGFT; the department is accordingly fully justified in the view taken in the order issued by the Commissioner of Central Excise on 16.12.1999. In our view, having regard to the aforesaid reasons which have already been enumerated we find the aforesaid contention untenable. The same is accordingly rejected.

10. Shri Khurana not being content with the aforesaid submissions so far made, has further proceeded to place reliance on the case of **Mrs.**

J.S.Pandya v. **Director General of Police, Gujarat,** decided by the Gujarat High Court and reported in 1986 (1) SLJ 473. In the aforesaid case, this is what has been observed :

> "3. Mr. M.M.Jadeja, the learned counsel for the respondent submits that there is Government Resolution No.SLT-1080-895-2, dt. 23rd Sept. 1981, wherein cl. 7 states as under :
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> > "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 charge 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."
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> Relying on the above cl.7 of the aforesaid Government Resolution, Mr. Jadeja has urged that when there is a departmental proceedings 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 dt. 31st Aug. 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 proceedings before (against?) the petitioner, they withheld the promotion. This submission of Mr. Jadeja is obviously wrong. Cl.7 of the aforesaid Government Resolution refers to 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 that such a promotion could have been 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."

11. Based on the aforesaid judgment, 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.

12. For the foregoing reasons, the present O.A. is allowed. The impugned order being Establishment Order No.298/99 dated 16.12.1999 at Annexure A-1 is quashed and set aside. Based on the present order, applicant is held to be entitled to all consequential benefits. There shall be no order as to costs.

(V. K. Majotra)
Member (A)

(Ashok Agarwal)
Chairman

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