

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

O.A. No.650/2016

CORAM:

HON'BLE MR. SWARUP KUMAR MISHRA, MEMBER(J)
HON'BLE MR. ANAND MATHUR, MEMBER(A)

Shri Amiya Shankar Behra, aged about 37 years, son of Sri Bholanath Behera, at present working as Junior Accounts Officer, Office of the SDO Phone-VII, 8/B Jaydurga nagar, Bhubaneswar-751006, and residing in Plot No. 58, 1st floor, Jayadurga Nagar, Bhubaneswar-751006.

..... Applicant.

VERSUS

1. The Chairman cum Managing Director, Bharat Sanchar Nigam Ltd. Bharat Sanchar Bhawan, Harish Chandra Mathur Lane, JanPath, New Delhi – 110001.
2. The Chief General Manager, Bharat Sanchar Nigam Ltd. Odisha Circle, BSNL Bhavan, Bhubaneswar-751002.

..... Respondents.

For the applicant : Mr. T. Rath, Advocate

For the respondents: Mr. L. Jena, Advocate

Heard & reserved on : 07.01.2021

Order on :04.03.2021

O R D E R

Per Mr. Swarup Kumar Mishra, Member (J)

The applicant has filed this Original Application under Section 19 of the A.T. Act, 1985, seeking for the following reliefs:-

- i) To allow the Original Application.
- ii) To quash the letter No. ST/161/502/2011/15 dated 14.07.2016 (As per annexure-A/14) issued by the Respondent No. 2 for being bad and not sustainable in law.
- iii) To direct the respondents to open the sealed cover and to grant two financial upgradations to the next higher IDA scales of pay to the applicant as per BSNL's Executive Promotion Policy w.e.f. 16.06.2007 and 16.06.2012 and consequently direct the Respondents to promote the applicant to the post of Sub-Divisional Engineer w.e.f. 2.7.2013 i.e. the date from which his juniors are promoted to such posts with all consequential benefits after he has been acquitted in the criminal case and when there are no other legal impediments for granting him financial upgradation and promotion on all these dates.
- iv) To order and direct that the cost of litigation be paid to the applicant by the Respondent No. 2 for torturing the applicant and dragging him into unnecessary litigation.
- v) To issue any other order/orders, direction/directions as the Hon'ble Court deems fit and proper to meet the ends of justice.

2. The factual matrix of the case is that the applicant while working as Junior Telecom Officer, Rairangpur Exchange for the period from June, 2003 to February, 2006, a criminal case was initiated by the CBI, Bhubaneswar vide T.R. No.03/10 of 2013/2008 arising out of R.C. 34(A)/2006 under Section 120-B and 420 IPC and under Section 13(1) (d) of Prevention of Corruption Act alleging illegal creation, addition, alteration and deletion of telephone numbers etc from switch room whereby the BSNL sustained a loss to the tune of Rs.38.5 lakhs. The CBI Court vide judgment and order dated 24.12.2014 acquitted the applicant of

the criminal charges. In the time between juniors to the applicant were granted 1st and 2nd financial upgradations to the next higher IDA scale, besides being promoted to the SDE(T) having come out successful in the Limited Departmental Competitive Examination (LDCE). Grievance of the applicant is that since he was not granted both the financial upgradations coupled with promotion as SDE(T) even on his qualifying the LDCE whereas his juniors were so granted, he submitted a representation to the authorities concerned and there being no response, he moved this Tribunal in O.A. No.332/2016. This Tribunal vide order dated 23.05.2016 disposed of the said O.A. with a direction “to respondent no.2 to consider and dispose of the representation within two months and after such consideration if it is found the applicant is entitled to the relief claimed then the same may be extended to him within a further period of three months from such consideration”.

3. Complying with the aforesaid direction of the Tribunal, the respondents issued a speaking order dated 14.07.2016 (Annexure-A/14) whereby the grievance of the applicant has not been met. Aggrieved by this, the applicant has filed the present O.A. praying for the reliefs as mentioned above.

4. The respondents by filing counter opposed the prayer of the applicant and have brought to the notice of the Tribunal that after applicant's acquittal by the CBI Court vide judgment dated 24.12.2014, a departmental proceeding was initiated against him as per the provisions of Rule-5(22) of BSNL, CDA Rule, 2006 vide Memorandum No.Vig.11/3003/06(Pt.) dated 06.02.2016, in response to which the applicant has already submitted his reply vide his letter dated 19.02.2016. Thereafter, Shri Narahari Das was appointed as IO to enquire into the charges. But the applicant requested the CGM, BSNL, Odisha Circle vide his letter dated 27.04.2016 to change Shri Das as IO which has also been rejected vide communication dated 05.05.2016. It is the case of the respondents that challenging the Memorandum of charge dated 06.02.2016 and the letter of rejection for change of IO dated 05.05.2016 the applicant has already filed O.A. No.392/16 before

this Tribunal and while issuing notice, this Tribunal, vide order dated 21.06.201, as an interim measure, directed to continue the departmental proceedings, but to pass the final order with the leave of the Tribunal. According to respondents, the said departmental proceeding is in progress and unless and until the applicant is exonerated of the charges levelled against him, it is not possible to consider and settle his grievance.

5. It is further submitted that the departmental proceedings are in no manner vitiated or illegal in the light of several decisions of the Hon'ble Supreme Court holding that the acquittal of a public servant in a criminal proceeding is no bar against instituting a departmental proceeding on the same allegations. The reason for the same is that the burden of proof in criminal cases is "beyond reasonable doubt" whereas in departmental proceedings, the threshold of burden of proof is reduced to a mere "preponderance of probabilities". The threshold for burden of proof in departmental proceedings being lower than in a criminal proceeding is emphasized to state that the public employer has the discretion to independently initiate departmental proceeding and take such action as is warranted in law. The law enunciated by the Hon'ble Apex Court is as under;

The Hon'ble Supreme Court, in *Pandian Roadways Corporation V. N. Balakrishnan* (2007) 9SCC 755 held that whether the decision of a criminal court would be binding on the disciplinary authorities would depend upon other facts as well.

6. It is further submitted that if the employee is found not guilty his cause may be vindicated, and in case he is found guilty, administration may get rid of him at the earliest. This was articulated in *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Ors.*, AIR 2005 SC 4217. Generally, acquittal or initiation of criminal proceedings does not preclude departmental proceedings on a similar subject. This was again declared in *Nelson Motis V. Union of India and another*, AIR 1992 SC 1981 when the Court held that the nature and scope of a criminal case are different from those of a departmental

disciplinary proceedings and an order of acquittal, therefore, cannot conclude the departmental proceedings. Likewise in State of Karnataka and another V.T. Venkataramanappa, (1996) 6 SCC 455 it was held that acquittal in a criminal case does not bar a departmental enquiry for the same misconduct. It is further submitted that in the case of Union of India and Another vs. Kunisetty Satyanarayana, [(2006) 12 SCC 28], while considering the scope and extent of judicial review and interference in charge sheet permissible under Article 226 of the Constitution of India.

7. It is well settled by a series of decisions that ordinarily no writ lies against a charge sheet or show cause notice vide Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh and others, [(1996) 1 SCC 327], Special Director and another Vs. Mohd.Ghulam Ghouse and another, [(2004) 3 SCC 440], Ulagappa and others vs. Divisional Commissioner, Mysore and others, [2001 (10) SCC 639], State of UP vs. Brahm Datt Sharma and another, [(1987) 2 SCC 179],

In the matters of Ministry of Defence v. Prabhash Chandra Mirdha, (2012) 11 SCC 565 the Hon'ble Supreme Court has held that the charge-sheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings, and that neither the disciplinary proceedings nor the charge-sheet are liable to be quashed at an initial stage as it would be a premature stage to deal with the issues.

8. It is further submitted that the Hon'ble Supreme Court in the decision reported in (2013) 1 SCC 598 (Deputy Inspector General of Police v. S. Samuthiram) considered the very issue regarding the effect of acquittal in a criminal case with respect to the punishment imposed in the departmental proceedings. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witness since few of the others witness turned hostile, etc. Reference may be made to the decision

reported in (2008) 5 SCC 554 (Usha Breco Mazdoor Sangh v. Management of Usha Breco Limited).

In view of the above submissions, the present OA filed by the applicant is misconceived and without any merit. Hence the O.A. is liable to be dismissed with cost.

9. By filing rejoinder Ld. Counsel for the applicant submits that the Govt. of India O.M. dated 23.01.2014 (Annexure-A/18) have reiterated their stand by clarifying that when a junior has been promoted on the recommendations of the Original DPC, the official will be considered for promotion if he/she is clear from vigilance angle on the date of promotion of the junior even if the provision of Para-2 of DOP&T O.M. dated 14.09.1992 get attracted on the date of actual promotion is considered as provided in O.M. dated 21.11.2002. It is further submitted that the law on sealed cover based on the judgment of the Hon'ble Apex Court in Union of India vs. K.V. Janakiraman (AIR 1991 SC 2010) is well settled. The 14.09.1992 O.M. confined the circumstances for adopting sealed cover to the three situations mentioned in para-2 of the said OM. Therefore, these are the only three conditions where the promotion can be held up and sealed cover procedure can be followed by the DPC. But after acquittal of the applicant from the criminal charges on 24.12.2014 there did not exist any legal impediment for opening of the sealed cover to give financial benefits to the applicant w.e.f. 16.06.2007 and 16.06.2012 and promotion to the applicant from 02.07.2013 i.e., the dates from which these were given to the juniors of the applicant.

10. Applicant's counsel relied on few citations including the following:-

- (1) Govt. of India O.M. dated 23.01.2014
- (2) DOP&T O.M. dated 14.09.1992
- (3) O.M. dated 21.11.2002.
- (4) Union of India vs. K.V. Janakiraman (AIR 1991 SC 2010)
- (5) Delhi Jal Board -v- Mahundar Singh decided on 1st September, 2000 reported in JT 2000 (10) SC 158.
- (6) Bank of India -v- Degala Suryanarayana reported in 1999(5) SCC 762

11. Respondents' counsel relied on few citations including the following:-

- (1) Pandian Roadways Corporation V. N. Balakrishnan (2007) 9SCC 755
- (2) Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Ors., AIR 2005 SC 4217. 14.
We have heard learned counsels for both sides, gone through the pleadings and citations relied upon by them.
- (3) Nelson Motis V. Union of India and another, AIR 1992 SC 1981
- (4) in State of Karnataka and another V.T. Venkataramanappa, (1996) 6 SCC 455
- (5) Union of India and Another vs. Kunisetty Satyanarayana, [(2006) 12 SCC 28],
- (6) Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh and others, [(1996) 1 SCC 327],
- (7) Special Director and another Vs. Mohd.Ghulam Ghose and another, [(2004) 3 SCC 440],
- (8) Ulagappa and others vs. Divisional Commissioner, Mysore and others, [2001 (10) SCC 639],
- (9) State of UP vs. Brahm Datt Sharma and another, [(1987) 2 SCC 179],
- (10) In the matters of Ministry of Defence v. Prabhash Chandra Mirdha, (2012) 11 SCC 565
- (11) (2013) 1 SCC 598 (Deputy Inspector General of Police v. S. Samuthiram)
- (12) (2008) 5 SCC 554 (Usha Breco Mazdoor Sangh v. Management of Usha Breco Limited.

12. We have heard learned counsels for both sides, gone through the pleadings and citations relied upon by them. The punishment order dated 03.12.2019 although was not filed as annexure by the applicant the same has been filed along with written submission by his side. As per the said punishment order the disciplinary authority has imposed the punishment of "Reduction to two stages down in the time scale of pay for a period of one year without cumulative effect and without effect of postponing of future increments of pay and the applicant will earn increments of pay during the period of such reduction". It is not known if the applicant has filed any appeal before the appellate authority against the said punishment. The other OA filed by the applicant ie. OA No. 392/2016 has been disposed of on 19.07.2019, as submitted by

learned counsel for the applicant, but copy of the said order has not been filed in this case. It is revealed from Annexure A/14 that speaking order dated 14.07.2016 that the said OA was filed by the applicant praying to quash the memorandum of charges vide no. Vigilance 11/303/2006/ET dated 06.02.2016. It has also been mentioned in the said Annexure A/14 that the alleged misconduct of fraud committed by the applicant relates to the same period and for the same incident for which FIR by vigilance department was filed vide TR No. 3/2010 of 2013/08 arising out of RC 34(A)/2006 under section 120 B, 420 IPC and under section 13 (2) read with section 13 (1) (d) of Prevention of Corruption Act for cheating the telecom department/BSNL by unauthorized and illegal creation of non existing telephones and providing ISD Calls without metering by the applicant while he was functioning as JTO Rairangpur during the period from June 2003 to February 2006. Accordingly memorandum of article of charges dated 06.02.2016 was served on him on 11.02.2016. The fact remains that the memorandum of charge was not served on the applicant by the time juniors to the applicant were promoted on 02.07.2013. But in the background and circumstances of this case, it is clear that the department was in contemplation for initiating departmental proceeding in question for the same allegation for which CBI had registered case against the applicant way back in the year 2008. The applicant was acquitted in the said case on 24.12.2014. The fact that the applicant has been subsequently imposed with punishment in question in the departmental proceeding was also not brought to notice of the department by filing any subsequent representation by the applicant.

13. It has been held by Hon'ble Supreme Court in decision reported in (1993) 3 SCC at page 204 (Union of India vrs Kewal Kumar) in para 2 to 4 of the judgment which is quoted as below:

"2. The question in the present case, is : Whether the decision in Jankiraman was correctly applied in the present situation ? In Jankiraman itself, it has been pointed out that the sealed cover procedure is to be followed where a Government servant is recommended for promotion by the DPC, but before he is actually promoted if 'he is either placed under suspension or disciplinary

proceedings are taken against him or a decision has been taken to initiate the proceedings or criminal prosecution is launched or sanction for such prosecution has been issued or decision to accord such sanction is taken'. Thus, the sealed cover procedure is attracted even when a decision has been taken to initiate disciplinary proceedings, or 'decision to accord sanction for prosecution is taken' or 'criminal prosecution is launched or ... decision to accord sanction for prosecution is taken'. The object of following the sealed cover procedure has been indicated recently in the decision in Civil Appeal No. 1240 of 1993 - Delhi Development Authority v. H. C. Khurana pronounced on April 17, 1993, and need not be reiterated

3. It is obvious that when the competent authority takes the decision to initiate a disciplinary proceeding or steps are taken for launching a criminal prosecution against the Government servant, he cannot be given the promotion, unless exonerated, even if the Government servant is recommended for promotion by the DPC, being found suitable otherwise. In a case like the present, where the First Information Report was registered by the Central Bureau of Investigation, and on that basis the decision had been taken by the competent authority to initiate disciplinary proceedings for imposition of major penalty on the respondent prior to the meeting of the DPC, the applicability of the sealed cover procedure cannot be doubted. The formulation of the charges required for implementing the decision of the competent authority to initiate the disciplinary proceedings, is satisfied in such a case by the recording of the First Information Report by the Central Bureau of Investigation which records the allegations against the respondent, and provided the basis for disciplinary proceedings. The requisite formulation of the charges, in such a case, is no longer nebulous, being crystallised in the FIR itself and, therefore, even if the charge-sheet was issued by its despatch to the respondent subsequent to the meeting of the DPC, this fact alone cannot benefit the respondent

4. The question to examine in each case, is : Whether, the decision to initiate the disciplinary proceedings had been taken or steps for criminal prosecution initiated before the date on which the DPC made the selection ? The decision would depend on the facts of the case, keeping in view the object sought to be achieved by adopting the sealed cover procedure. It would be incongruous to hold that, in a case like the present, where the CBI had recorded the FIR; sent the same to the superior authorities of the respondent for taking necessary action; and the competent authority had taken the decision, on the basis of the FIR, to initiate disciplinary proceedings against the respondent for imposition of major penalty, there can be any doubt that the sealed cover procedure is attracted to avoid promoting the respondent, unless exonerated of those charge. These facts, which led to the adoption of the sealed cover procedure, are undoubtedly very material to adjudge the suitability of a person for promotion to a higher post. A decision to follow the sealed cover procedure in these circumstances cannot, therefore, be faulted."

14. Thus in view of the said observation and principle of law as decided by Hon'ble Supreme Court and in view of the background and circumstances of the present case this Tribunal in the absence of detailed facts before it does not want to go into claim made by the applicant at this stage and gives opportunity to the applicant to file comprehensive representation by giving detailed facts and

subsequent development that took place after filing of this OA so that Competent Authority/Respondent No. 2 shall consider the said representation along with all relevant circular and decision of Hon'ble Supreme Court as quoted above and thereafter shall pass a reasoned and speaking order to be communicated to the applicant within a period of four months of receipt of this order.

15. OA is accordingly disposed of with above direction but in the circumstances without any order to cost.

(ANAND MATHUR)
MEMBER (A)

(SWARUP KUMAR MISHRA)
MEMBER (J)

(csk)