

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH

O.A. No.
TAX NO.

282 of 1998.

DATE OF DECISION 27/08/1993

Shri Sohanlal, Petitioner

Shri Shailesh Brahmbhatt Advocate for the Petitioner(s)

Versus

Union of India and ors. Respondent

Shri R.P.Bhatt. Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. R.C.Bhatt : Member (J)

The Hon'ble Mr. H.R.Kolhatkar : Member (A)

1. Whether Reporters of local papers may be allowed to see the Judgement ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of the Judgement ?
4. Whether it needs to be circulated to other Benches of the Tribunal ?

Mr. Sohanlal,
Inspecting Assistant Commissioner,
of Income Tax,
Ahmedabad.
Resident of M-53/318,
Pragati Nagar,
Naranpura,
Ahmedabad.

....Applicant.

(Advocate : Mr. Shailesh Brahmbhatt)

Versus

1. Union of India,
(Notice to be served through
the Secretary,
Ministry of Finance,
(Department of Revenue),
North Block,
New Delhi).
2. The Chairman,
Central Board of Direct Taxes,
Ministry of Finance,
(Department of Revenue),
North Block,
New Delhi.
3. Chief Commissioner of Income Tax,
(Administration),
Gujarat,
Having his office at Ayakar,
Bhavan, Ashram Road,
Ahmedabad.
4. Mr. Achalsingh,
Inspecting Assistant,
Commissioner of Income Tax,
Thane,
Maharashtra.
5. Mr. S.C. Sarkar,
Resident of D-II/16,
I.T. Quarters,
121, Nungambakkam High Road,
Madras - 600 034.

... Respondents.

(Advocate : Mr. R.P. Bhatt)

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JUDGMENT

OLA. NO. 282 OF 1983.

Dated : 27/08/1993.

Per : Hon'ble Mr.M.R.Kolhatkar : Member (A)

This is an application under Section 19 of the Administrative Tribunals Act, 1985. The applicant joined Income Tax department as Income Tax Officer Group (A) in the year 1969. By the order of Ministry of Finance, Department of Revenue ~~order No.14011/14/78-~~ ad (vi) A dated 23.6.1980, the penalty of withholding of increments for a period of two years without cumulative effect was imposed on him. On a review petition from the applicant the penalty was modified to that of censure by the order no.C. 17012/4/80-Ad.VI(A) dated 17th March, 1982, Annexure-A-2. It is common ground that the date of penalty of censure relates back to the original order dated 23.6.1980. The applicant had filed a petition to the President against the penalty of censure on 14.6.1982 vide Annexure-A/3 but the same was rejected vide No.C 17012/4/80-Ad-VI A dated 12.1.1984, Annexure-A/4. The applicant states that his juniors were promoted to the post of Assistant Commissioner of Income-tax by the order dated 17th December, 1979, vide Annexure-A/5, and

in particular, all officers figuring at sl.no.6 to sl.no.11 headed by Achal Singh (Sl.No.6), are junior to him. The applicant states that he was promoted on the basis of the recommendation of the Departmental Promotion Committee held in April, 1983 with effect from 20.6.1983, and the deemed date of promotion of 11.5.1981, below Shri S.C.Sen, has been assigned to him vide order No. 4-3201 2/27/86-Ad.VI, L dated 10th Sept.1987. He has been placed at sl.no.266-A in the seniority list of Assistant Commissioners of Income Tax. The prayer of the applicant is to quash the order dated 10.9.1987 assigning to him 11.5.1981 as the deemed date of seniority Annexure-A-9/L to assign to him 17.12.1979, as the deemed date of promotion and on ~~xx~~ this basis to award consequential benefits to the applicant and to consider the applicant for further Ma promotions on that basis. The applicant has also prayed for treating the order dated 17th March, 1982, imposing the penalty of censure as non-est and without jurisdiction.

2. The respondents have filed a reply. According to them, the departmental enquiry was held against the Applicant and the charges levelled were held proved and hence the penalty of censure was duly imposed and also the applicant has been assigned his due date of seniority.

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According to the Respondents, as per the directions of the Government of India no vigilance clearance could have given to the applicant till 23.6.1980 and therefore, he could not be considered in the DPC held prior to 23.6.1980, the date on which the penalty of censure is deemed to have been imposed. Since the earlier penalty was that of withholding the increments for two years, he could not be considered during the currency of the penalty. But once the penalty of withholding of increments was reduced to that of censure, the applicant's case was reviewed for promotion by the Government and the Union Public Service Commission along with the candidates who were considered by the DPC's held after 23.6.1980. DPC was not held in 1982. The applicant was considered by the DPC in 1983 and he was duly promoted with effect from 20.6.1983. The applicant's case was again reviewed by the DPC which met on 14.8.1987 and by order dated ¹⁴ September, 1987, the applicant has been deemed to have been promoted as Assistant Commissioner of Income-tax with effect from 11.05.1981. The claim of the applicant that he should be given seniority with effect from 17.12.1979 is untenable for the reasons mentioned above.

3. The applicant has filed a rejoinder. In which he has quoted para-10 at page-147 of CBDT's Manual of Office Procedure (Administrative) as below :

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"An Officer whose increments have been withheld or who has been reduced to a lower stage in the time scale, cannot be considered on that account to be ineligible for promotion to higher grade, unless the specific penalty of withholding of promotion has been imposed on him."

4. The applicant has further contended that since the censure related to the work done in the year 1972-73, the penalty will have to be related to that year and not to 1979, when his juniors have been promoted. The applicant has quoted the case of one Shri P.N.Pathak who was awarded CR warning in the year 1987 but which was placed in the CR folder for the year 1976 to which it related. The Applicant has also filed "Brief resume of facts on the matter".

5. We have heard the learned advocates for the parties. In order to properly adjudicate the matter we had, on 10.3.93, M directed the respondents to put before us the minutes of the DPC's held on following dates, (a) August, 1979, (b) August, 1980, (c) October, 1981, (d) May 1983 and (e) Review DP C, August, 1987. The learned advocate for the respondents had claimed privilege for the minutes of the DPC which was held in August, 1980, but this claim of privilege was dis-allowed, relying on the judgment of New Bombay Bench of CAT in the case of Vasant Waman Pradhan, All India Service Law Journal, 1991 Page.257.

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6. According to the applicant the penalty of censure is to be treated as non-existent and without jurisdiction because the charges alleged against the applicant did not amount to mis-conduct at all. In this connection, he has relied on the judgment of the Supreme Court in the case of Union of India Versus J. Ahmed, AIR 1979 P. 1022, in which SC has observed that a single act or omission or error of judgment would ordinarily not constitute misconduct though if such error or omission, results in serious, atrocious consequences, the same amounts to misconduct. We are not persuaded by this argument.

Apart from the fact that any relief with regard to the in penalty of censure imposed ⁱⁿ March, 1982, is hopelessly time barred, on going through the reasoning given by the UPSC for imposing the penalty of censure, (Annexure-A/1), by way of moderation of earlier penalty of withholding of increments for two years, (Annexure-A/10), it cannot be said that the order is either arbitrary or malafide. According to a catena of judgments of the SC regarding the scope of judicial review of which the most well known is Union of India Vs. Paramanand (AIR-1989 SC-1185), the Tribunal cannot interfere with the findings of the competent authority where they are not arbitrary or perverse. The adequacy of penalty unless it is malafide is also not a matter for the Tribunal to be concerned with.

Apart from the point of limitation we are not persuaded

that censure can be said to be either non-existent or without jurisdiction. We therefore, proceed on the basis that the penalty of censure is duly imposed and is not to be interferred with.

7. We next come to the question of whether the deemed date of promotion allotted to the applicant is illegal. In this connection the applicant has first relied on the Judgment of Jabalpur Bench of CAT (O.A/36/89) (Gopi Kishan Agarwal Versus Union of India). The Tribunal held that the Government instructions vide DOP memorandum dated 16th February, 1979, contemplate that the employee could be promoted in his turn if the penalty is one of censure. The Tribunal, therefore, directed applicant to be confirmed from the date his juniors were promoted. The applicant has next relied on the case of S. Mukandan Menon Versus The State of *M/a* Kerala and Ors., 1970 SLR P.586. In this case the petitioner was denied promotion on account of unsatisfactory record of service, but no documents were produced before the Court to prove the allegations and therefore, the High Court had directed Government to promote the petitioner and assign him due seniority. It would be seen that the facts of the case are different inasmuch as there were no documents at all as to the unsatisfactory

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record of service of the applicant. The applicant next relied on the case of V.Jagadiswara Rao Versus The Postmaster General, Andhra Circle and others, 1978, All India Services Law Journal, P.202, in which the Court had observed that the pendency of the disciplinary proceedings cannot be a ground for overlooking the petitioner when he has been otherwise found suitable for promotion by the Departmental Promotion Committee. Since the question agitated was that of without following due procedure, withholding of promotion as a penalty the facts of the case are clearly different. The case of Gyanendra Jauhari Versus Assistant Collector, Central Excise Division-I, Khanpur and Ors., (1989) 9- Administrative Tribunals Cases P.451, was also cited. This case related to the consequences of warning as a punishment and is not applicable. Therefore, the case which is relevant for deciding the case of the applicant is that of Gopi Krishnan Agrawal.

8. Here the respondents have relied on the judgment of the Hon'ble Supreme Court in Union of India and Ors., Versus K.V.Jankiraman, (AIR-1991, SC. 2010). According to the respondents the CAT, Jabalpur's judgement relied on by the applicant is not good law in view of the Jankiraman's case.

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9. The basic issue involved in this case is the deemed date of promotion to be assigned to the applicant in the context of sealed cover procedure in the case of the officials against whom the Disciplinary Proceedings are pending. The applicant has relied on the instructions of the Department of Personnel and AR vide OM NO.22011/2/78-ESTT (A) dated 16th February, 1979, which has been reproduced vide Annexure-A/11. The same ~~are reproduced~~ have below as ~~that~~ ^{have} a vital bearing on the case.

"Where the departmental proceedings have ended with the imposition of a minor penalty, viz., censure, recovery of pecuniary loss to the Government, withholding of increments of pay and withholding of promotion, the recommendation of the D.P.C. in favour of the employee, kept in the sealed cover, will not be given effect to. But the case of the employee concerned for promotion/confirmation may be considered by the next D.P.C. when it meets after the conclusion of the departmental proceedings. If the findings of the D.P.C. are in favour of the employee, he may be promoted in his turn if the penalty is that of "censure" or recovery of pecuniary loss caused to the Government by negligence or breach of orders. In the case of employees who have been awarded the minor penalty of "withholding of increments" or "withholding of promotion", promotion can be made only after the expiry of the penalty".

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10. During the course of arguments it was contended by the advocate of the applicant that the applicant is denied promotion in the year 1979 when it was due to him on the basis of the penalty which was communicated to him in 1980 which will amount to double jeopardy in terms of (2) Article 20~~6~~ of the Constitution of India. This was precisely the argument which was advanced before the Full Bench of the CAT when it gave its judgment dated 02.03.1987, but the Supreme Court in the ^{above referred} case of Union of India Versus K.V.Jankiraman, AIR, 1991, P.2010, repelled the argument in following terms :

(Para-8). "According to us, the Tribunal has erred in holding that when an officer is found guilty in the discharge of his duties, an imposition of penalty is all that is necessary to improve his conduct and to enforce discipline and ensure purity in the administration. In the first instance, the penalty short of dismissal will vary from reduction in rank to censure. We are sure that the Tribunal has not intended that the promotion should be given to the officer from the original date even when the penalty imparted is of reduction in rank. On principle, for the same reasons, the officer~~x~~ cannot be rewarded by promotion as a matter of course even if the penalty is other than that of the reduction in rank. An employee has no right to promotion. He has only a right to be considered for promotion. The promotion to a post and more so, to a selection post, depends upon several circumstances.

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To qualify for promotion, the least that is expected of an employee is to have an unblemished record. That is the minimum expected to ensure a clean and efficient administration and to protect the public interests. An employee found guilty of a misconduct cannot be placed on par with the other employees and his case has to be treated differently. There is, therefore, no discrimination when in the matter of promotion, he is treated differently. The least that is expected of any administration is that it does not reward an employee with promotion retrospectively from a date when for his conduct before that date he is penalised in *praesenti*. When an employee is held guilty and penalised and is, therefore, not promoted at least till the date on which he is penalised, he cannot be said to have been subjected to a further penalty on that account. A denial of promotion in such circumstances is not a penalty but a necessary consequence of his conduct. In fact, while considering an employee for promotion his whole record has to be taken into consideration and if a promotion committee takes the penalties imposed upon the employee into consideration and denies him the promotion, such denial is not illegal and unjustified. If, further, the promoting authority can take into consideration the penalty or penalties awarded to an employee in the past while considering his promotion and deny him promotion on that ground, it will be irrational to hold that it cannot take the penalty into consideration when it is imposed at a later

date because of the pendency of the proceedings, although it is for conduct prior to the date the authority considers the promotion.

We therefore, set aside the said findings of the Tribunal."

11. The crucial issue to be decided is whether DOP memo dated 16th Feb.1979, which we quoted earlier and on which the Jabalpur Bench of CA T relied in the Gopi Kishan Agarwal's case applies to this case or whether the general reasoning in Jankiraman's case applies as contended by Respondents. Jankiraman's case in which judgment was delivered on 27th July, 1991, was concerned with the interpretation of DOP's instructions, re : sealed cover procedure as contained in their OM.No.22011/2/86-ESTT (A) dated 12.1.1988, in supersession of earlier instructions contained in the memo of 30.1.1982.

u Jankiraman's case did not deal with applicability of the memo dated 16.12.1979 with which we are concerned. The principle in Jankiraman's case that an officer cannot be rewarded by promotion as a matter of course even if the penalty is other than that of reduction in rank, is entitled to the greatest respect but that principle has to be applied keeping in view the policy of the Government as contained in Government Memo dated 16th Feb.1979. In terms of that memo "if the findings of the DPC are in favour of the employee, he may be promoted in his turn if the penalty is that of censure". This is precisely the fact

situation of the applicant as on 23.6.1980 when the memo dated 16.2.1979, held field and hence when he was visited with the penalty of censure, he was entitled to be considered in his turn viz., as on 16th Feb.1979, when his juniors were promoted. More-over the weighty observations in the Jankiraman's case were made in the context of the argument proceeding on the footing of double jeopardy and the Hon'ble Supreme Court rightly pointed out that the Full Bench of Tribunal could not have intended that the promotions should be given to the officer from the original date, even if the penalty imparted was a major one like a reduction in rank. In the instant case, however, the penalty was a minor one, viz., one of censure and on logical grounds as well as on the grounds of statutory instructions, the officer is clearly entitled to promotion from the original date. It may be observed that we do not in this case rely on para-10, page-147, of CBDT Manual, on which reliance was placed by the applicant as that Manual, in our view, does not have a statutory force.

12. We must in this connection refer to certain discrepancies in the record produced before us. Meetings of Departmental Promotion Committee were held on the following dates:

1. 25.10.1979,
2. 12.08.1980,
3. 30.10.1981,
4. 06. and 07.04.1983,
5. 14.08.1987.

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We have the minutes of Sl.No.1, but contents of sealed cover have not been produced. The DPC in 1980 had not considered Applicant at all which was against Rules. Minutes of 1981, DPC are incomplete. The minutes of 1983, DPC assess the applicant as "Very good". In the review DPC held on 14th August, 1987, the DPC observed as below :

"In view of the Government of India instruction no.9 under Rule 11 of the Central Civil Services (Classification, Control, and Appeal) Rules, 1965, according to which the case of an officer on whom the penalty of Censure is imposed should be considered by the next DPC when it meets after the conclusion of departmental proceedings and if the findings of the DPC are in favour of the employee he may be promoted in his turn, it becomes necessary to review the recommendations of the DPC held in August, 1980, as Shri Sohan Lal may be deemed to have been censured only on 23.6.1980 as the original order passed on this date stands modified". The problem here is that the DPC dated 12.8.1980 did not consider the Applicant at all. In other words, there was no material for review before the review DPC. Hence the Review DPC considered the character roll of Shri Sohan Lal and the committee has assessed him as Good, and on the basis of the above assessment the Committee recommended that Shri Sohan Lal may be included in

the panel for the year 1980 below Shri R.S.Aulakh as at Sl.No.130 who was the last man in the panel. It was obviously because of the failure of the DPC to consider the applicant in the year 1980 that the respondents claimed privilege for the minutes of the proceedings. Another discrepancy is that the order dated September, 1987, Annexure-A/9, shows Shri Sohan Lal, not below Shri Aulakh but below Shri S.C.Sen, in the seniority list at Sl.No.266-B, in the Civil list as on 01st March, 1987, whereas review DPC does not refer to Shri Sen but only to Shri Aulak.

13. Let us consider the reasoning of Review DPC. It has referred to Government of India instruction No.9, under Rule 11 of Central Civil Services (Classification, Control and Appeal) Rules, 1965. In Swamy's manual in Disciplinary Proceedings (1992 Edn.) we note that Govt. instruction No.9 refers to "imposition of two penalties for one lapse/offence" and the reference is to DGP & T No. 105/26/81-viz-III dated 30.3.1981. This has no application. However, on page,191, in the chapter on "Suspension : A Digest" - P.192, there is the following para :

"If any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the court proceedings against him, the

findings in the sealed cover is not to be acted upon.

His case for promotion has to be considered in the usual course by the next DPC after the conclusion of Disciplinary Proceedings having regard to the penalty imposed upon him".

14. The same para occurs on P.215 which refers to the DOP memo dated 12th January, 1988. It is thus, clear that Rules which Review DPC relied upon were the rules as promulgated on 30.1.1982, which were modified on 12.1.1983. But the Review DPC failed to take into account the fact that the rules applicable to the officer on ^{M VIZ. DOP memo dated 16-2-79. M} 23.6.1980, ought to have been noticed and relied upon it.

15. We, therefore, find that in terms of DOP memo dated 16th Feb.1979, the applicant was entitled to be considered for promotion, keeping in view of the penalty of censure imposed on him on 23rd June, 1980, as from 17th December, 1979, when his juniors were considered for promotion. There is nothing on record to show that in 1980 the applicant was not eligible to be promoted. In fact, special DPC ¹⁹⁸⁷ did include him in the panel for 1980 evidently keeping in view the fact that DPC in 1980, failed to make a contemporaneous recommendations (which was again the rules). His eligibility for promotion on the basis of the year of 1980 therefore, does not relate forward to 1981 as erroneously held by Review DPC 1987 but relates back to 1979, when his juniors were promoted. The deemed date of promotion of the applicant would therefore, be

17th December, 1979 and not 11th May, 1981 as erroneously assigned by the respondents.

16. So far as consequential reliefs are concerned Hon'ble Supreme Court in Janakiraman's case laid down the following rule :

"Whether the officer considered will be entitled to any arrears of pay for the period of notional promotion preceding the date of actual promotion and if as to what extent will be decided by the concerned authority by taking into consideration all the facts and circumstances of disciplinary proceedings/criminal prosecution.

Where the authority denies arrears of salary or part of it, it will record its reasons for doing so".

17. In the instant case, while giving the deemed date of seniority of 11th May, 1981 to the applicant the department simply stated that he would not be entitled to any arrears of pay on account of re-fixation of seniority. This is unreasonable and also against the rule that administrative orders should be in accordance laid down by the Supreme Court. We are therefore, of the opinion that in the case of arrears of pay in the context of revised date of seniority viz ., 17.12.1979, the Department should strictly follow the Supreme Court directions.

19. However, the applicant is to entitled to notional pay fixation in terms of revised deemed date of seniority and consequential benefits of being considered for promotion in the light of revised date of seniority.

19. We therefore, pass the following order :

ORDER

"The application is partly allowed.

While not interfering with the penalty of censure, we however, quash and set aside

the impugned order dated 10th September, 1987,

M Annexure A-3

and direct the respondent authorities to

assign to the applicant, 17.12.1979 as the

deemed date of promotion in the cadre of

Assistant Commissioner of Income Tax. We direct

that respondent authorities should refix the

pay of the applicant in terms of this revised

seniority and consider him for promotion at

successive stages in the light of revised date

of seniority. So far as arrears of pay for

the period between notional promotion and

actual promotion are concerned, applicant

would make a representation and the concerned

authorities taking into account all facts

and circumstances of disciplinary proceedings,

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will take a decision, record reasons for the decision and communicate the same to the applicant within four months of the receipt of the copy of this order.

It is open to the applicant to approach this Tribunal if he feels aggrieved by the decision.

No order as to costs.

Ans
(R.M. Bhatt)
Member (J)

27.08.1993.

M.R.Kolhatkar
(M.R.Kolhatkar)
Member (A)

27.08.1993.

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