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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

OA No.89/2004

^{20/12}
New Delhi: this the December, 2006

Hon'ble Mr.Justice M.A.Khan, Vice-Chairman (J)
Hon'ble Mr.V.K. Agnihotri, Member (A)

Prafulla Chandra Mishra, aged about 57 years,
Son of Late Somnath Mishra,
Permanent resident of Village/PO/PS,
Sarankul, Dist. Nayagarh,
At present working as Special Principal Secretary,
Home Deparment, Government of Orissa,
Orissa Secretary, Bhubaneswar. ... Applicant.

(By Advocate: Shri R. Roy and Shri A.K. Apat)

Versus

1. Union of India through its Secretary,
Ministry of Home Affairs,
North Block, New Delhi.
2. State of Orissa, represented by Principal Secretary,
Home Department, Orissa Secretary, Bhubaneswar,
Dist. Khurda.
3. Shri Suchit Das, aged about 56 years,
at present posted as Director General of Polcie,
Crime Branch, Orissa, Cuttack. ... Respondents.

(By Advocate: Shri A.N. Routray, respondent no.1
(Shri Anup Kumar Bose for respondent no.2)

ORDER

By Mr. Justice M.A. Khan, VC(J):

The applicant has claimed following relief in the present OA:

- "a) Issue Notice to the Respondents.
- b) Direct to the Respondents No.2 to produce the records constituting the Screening Committee and proceedings of the Screening Committee with recommendations of Respondent No.3 for promotion.
- c) Stay operation of impugned order No.AIS.II-1/2004-34791/AISI dated 24.12.2004 (Annexure-1).
- d) Direct to the Respondent Nos.1 and 2 to declare the Applicant to have been promoted form the date the Respondent No.3 was promote and to allow him all service benefits from that date."

2. The facts are short and simple. The applicant, who is a senior member of Indian Police Service, was working as Additional Director-General and Inspector

General of Police in State of Orissa. Grievance of the applicant is that despite having unblemished record of long service he has been superseded by his junior Shri Suchit Das, Respondent No.3 herein, who has been promoted to the grade of Director General with effect from the date of his assuming charge in the promotional post by order dated 24.12.2004 (Annexure-1). The applicant is challenging this order and also seeking promotion to the aforesaid grade from the date his junior, i.e. Respondent No.3, was promoted. It is an admitted case of the parties that on the date of consideration of the applicant, Respondent No.3 and other eligible officers for promotion to the grade of Director General, a vigilance case No.40/2003 registered against the applicant at Cuttack was pending investigation and a memorandum dated 5.5.2004 (Annexure-2) had also been served on the applicant proposing to hold disciplinary inquiry into the misconduct. The articles of charge and statements of imputation framed thereto had been served on the applicant. The respondents, pursuant to the interim order of this Tribunal dated 13.5.2004 in OA 169/2004 filed by the applicant, in which challenge was made to the initiation of the departmental proceedings had stayed further continuance of the disciplinary proceedings. The statement of defence had been submitted by the applicant in terms of interim order of the Tribunal in the aforesaid OA. It will be pertinent here to mention that in vigilance PS Case No.40 dated 10.7.2003 the investigation is over and the charge-sheet for criminal prosecution of the applicant has already been filed and the case is pending before the Court.

3. The Departmental Committee / Screening Committee following the administrative instructions and guidelines found respondent no.3 fit for promotion. The said DPC also considered name of the applicant, who was senior to Respondent No.3 in service, and the recommendation about him were kept in a sealed cover.

4. Both the parties have agreed that the Administrative Instructions / Guidelines issued by the Government requiring the following category of officers falling under the zones of consideration are brought to the notice of the

Screening Committee at the time of consideration. They are i) Officers under suspension; (ii) Officers in respect of whom a charge-sheet has been issued and disciplinary proceedings are pending; and the (iii) Officers in respect of whom prosecution for criminal charge is pending.

5. As per para 11.2 of the Guidelines, the Screening Committee would assess the suitability of the officers coming within the purview of the circumstances mentioned above, along with other eligible candidates, without taking into consideration the disciplinary case/criminal prosecution, which is pending. The assessment of the Committee including fit or unfit for promotion and the grading awarded by it will be kept in sealed cover. In the written argument submitted on behalf of the applicant it has been fairly and candidly conceded that in absence of any rules to the contrary the procedure and the Guidelines laid down in the Administrative Instructions will be followed. Even otherwise Administrative Instructions in the absence of Statutory Rules or Provisions of the Act or when the Statutory Rules have become unworkable or inoperative for any reasons, will have the binding force (see B.N. Nagarajan and Others Vs State of Mysore and Others in 1966 SC1 942).

6. It is well settled principle of law that the prosecution on criminal charges commenced against a person when a charge-sheet is submitted for his trial for the offence committed, in a court of law. This view is fortified by the judgement in the case of Union of India etc. ect. vs. K.V. Jankiraman etc. etc. 1991 2 Scale SC 423 where the Hon'ble Supreme Court in para-6 has made the following observations:

"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 authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

"(1) Consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;

(2).....

(3).....

(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before;"

There is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench-has intended, the two conclusions can be reconciled with each other. 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.

We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal."

In Union of India vs. Kewal Kumar JT 1993 (2) SC 705, the Hon'ble Supreme Court had held as under:

"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

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government servant, he cannot be given the promotion, unless exonerated, even if the government servant is recommended for promotion by the D.P.C., 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 D.P. C., 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 provides the basis for disciplinary proceedings. The requisite formulation of the charges, in such a case, is no longer nebulous, being crystallised in the F.I.R. itself and, therefore, even if the charge-sheet was issued by its despatch to the respondent subsequent to the meeting of the D.P.C., this fact alone cannot benefit the respondent."

7. In the present case, at the time of consideration of the applicant and other eligible officers for promotion to the post of Director General / Inspector General of Police, no charge-sheet in a criminal case was filed and no prosecution was pending against the applicant in a Court. Further, the applicant had not been placed under suspension in contemplation of the departmental / disciplinary proceedings or criminal proceedings nor was he arrested and remained in custody for 48 hours, so he could be not deemed to be under suspension under disciplinary rules. As a result, the applicant's case did not fall in the categories of (i) and (iii) of the Guidelines mentioned above.

8. The contention of the applicant, as stated in the written arguments, is that the sealed cover procedure could not be followed by the DPC/Screening Committee for consideration of his case as per the above said guidelines for two reasons:

i) The respondents had served charge Memorandum dated 5.5.2004 proposing to hold disciplinary inquiry against him as per Rule 8 of the All India Service (Discipline and Appeal) Rules, 1969 asking applicant to submit his statement of defence to which he submitted his statement of defence in compliance of the order of the Tribunal dated 13.5.2004 in OA

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169/2004 but no order was passed thereon since the Tribunal in the same case vide order dated 20.7.2004 in MA 500/2004 had granted "interim stay" on further continuance of the disciplinary proceedings initiated against the applicant by issuing of Memorandum dated 5.5.2004. The Memorandum dated 5.5.2004, as such, cannot be said to have initiated a disciplinary inquiry against the applicant and no such proceedings would be considered as pending and ;

(ii) The Tribunal, as mentioned above, in MA 500/2004 in OA 169/2004, had stayed further continuance of the disciplinary proceedings emanating from Memorandum dated 5.5.2004, therefore, the disciplinary proceedings cannot be considered to be pending on the date on which the DPC/Screening Committee considered the case of the applicant. So it could not have been resorted to sealed cover procedure.

9. None of these submissions, to our considered view, have merit. In term of Guidelines (ii), the Screening Committee is to be apprised all cases of the officers, who are eligible and within the consideration zones for consideration, "in respect of whom a charge-sheet has been issued and disciplinary proceedings are pending". If the charge-sheet had been issued and disciplinary proceedings are pending, the Screening Committee has to follow the Guidelines and make recommendation about the affected officer in a sealed cover.

10. The moot question is as to how the disciplinary proceedings are initiated under Rule 8 of the Rules ibid. The salient feature of the Rules 8 and 9 spelt out may be noted as under:

Rule-8

If the disciplinary authority proposes to hold an inquiry against member of All India Services:

- a. The disciplinary authority shall deliver or cause to be delivered to the member of the Service a copy of the articles of charge, the statement of the imputations of misconduct or misbehavior and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the member of the Service to submit, within such time as may be specified, a written

statement of his defence and to state whether he desires to be heard in person.

- b. (a) On receipt of the written statement of defence the disciplinary authority may appoint, under sub-rule (2), an inquiring authority for the purpose of inquiring into such of the articles of charge as are not admitted, and, where all the articles of charge have been admitted by the member of the Service in his written statement of defence, the disciplinary authority shall record its finding on each charge and shall act in the manner laid down in Rule 9.
 - i. If no written statement of defence is submitted by the member of the Service, the disciplinary authority may, if it considers it necessary to do so, appoint, under sub-rule (2), an inquiring for the purpose.
 - ii. Where the disciplinary authority appoints an inquiring authority for holding an inquiry into such it may by an order, appoint a Government Servant or a legal practitioner, to be known as the "Presenting Officer" to present on its behalf the case in support of the articles of charge.

Rule-9

Action on the inquiry report.- (1) The disciplinary authority may, for reasons to be recorded by it in writing, remit the case to inquiring authority for further inquiry and report, and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of Rule 1 as far as may be.

(2) The disciplinary authority shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.

(3) If the disciplinary authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clause (i) to (iv) of Rule 6 should be imposed on the member of the Service, it shall notwithstanding anything contained in Rule 10, make an order imposing such penalty;

Provided that, in every case the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making any order imposing any penalty on the member of the Service.

(4) If the disciplinary authority having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in clauses (v) to (ix) of Rule 6 should be imposed on the member of the Service, it shall make an order imposing such penalty and it shall not be necessary to

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give the member of the Service any opportunity of making representation on the penalty proposed to be imposed:

Provided that in every case, the record of the inquiry shall be forwarded by the disciplinary authority to the Commission for its advice and such advice shall be taken into consideration before making an order imposing any such penalty on the member of the Service.

11. A cursory look over of Rule 8 of the Rules ibid would convince that service of articles of charge, statement of imputations of misconduct or misbehavior, and a list of document and witnesses including the admission or confession made by the delinquent is not a prelude but integral part ~~and parcel~~ of the inquiry procedure laid down. The Memorandum dated 5.5.2004 is in accordance with the mandate of Rule 8. In case the statement of the defence submitted by the charged official making admission of all the articles of charges delivered to him, the disciplinary authority is empowered to impose penalty on the applicant for the misconduct and misbehavior. The Memorandum by which the article of charge and the statement of imputation, the lists of witnesses and the documents etc. had been served on the applicant, therefore, by no logic, could be said to be a mere formality of procedure in a disciplinary inquiry. The Memorandum is the beginning of the disciplinary proceeding by which the article of charge and statement of imputations etc have been served on the applicant, under Rule 8 of the All India Service (Discipline and Appeal) Rules, 1969. We have no hesitation in repelling the arguments advanced on behalf of the applicant that the service of Memorandum dated 5.5.2004 does not mean that the disciplinary proceedings had commenced and were pending when the DPC/Screening Committee met to consider the promotion of the applicant to the grade of Director General and Inspector of General of Police. Needless to mention that the applicant had already submitted statement of defence against Memorandum issued by the disciplinary authority. The first argument of the applicant is, therefore, sans merit.

12. The second argument is equally fallacious. The stay of further continuance of the disciplinary proceedings under the interim order passed in OA



169/2004 by no stretch of reasoning will obliterate the disciplinary proceedings which had commenced by serving the Memorandum dated 5.5.2004 (Annexure-2). The only effect of the interim order of stay of further proceedings will be that on receipt of statement of defence, the disciplinary authority will not be able to take action as per Rule 8 and 9 of the Rules ibid during the operation of the stay order. It does not mean that the disciplinary proceedings will cease to exist in the eyes of law. Disciplinary proceedings shall remain alive and pending. Further progress will be made in accordance with the procedure laid down in All India Service (Discipline and Appeal) Rules, 1969 after the stay is vacated. The contention of the applicant in the written arguments is that the DPC/Screening Committee ought to have ignored the disciplinary proceedings and should not have resorted to sealed cover procedure in the matter of recommendations in respect of him, therefore, is devoid of any merit. As per the executive guidelines, the Screening Committee had no option but to keep its recommendations in respect of the applicant in a sealed cover as the Article of charges were served or the applicant and disciplinary proceedings were pending against him.

13. We are told that the applicant has retired from service. According to para-5 of the counter reply filed on behalf of respondent no.1, it has been submitted that as per Para 18.1 of the promotion guidelines on conclusion of the disciplinary case / criminal prosecution, the sealed cover or covers shall be opened. In case the officer is completely exonerated, the due date of his promotion will be determined with reference to the findings of the Screening Committee kept in sealed cover/covers and with reference to the date of promotion of his next junior on the basis of such findings. The officer may be promoted, if necessary, by reverting the junior most officiating person. Such promotion would be with reference to the date of promotion of his junior and in these cases, the officer would be paid arrears of salary and allowances. Furthermore, it is submitted that para 18.2 of the said guidelines has provided that if any penalty is imposed on the officer as a result of the disciplinary proceedings or if he is found guilty in the criminal prosecution against him, the findings of the sealed cover/covers shall not be acted upon. His case for

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promotion may be considered by the next Screening Committee in the normal course and having regard to the penalty imposed on him. In such cases, the question of arrears will be decided by the Central Government by taking into account all the facts and circumstances of the disciplinary / criminal proceedings. In case the salary in full or part is denied, the government will record the reasons for doing so and appropriate orders as provided in the guidelines would be passed. In regard to the promotion, reasons and justification for non promotion and grant of salary and allowances etc. would also be recorded.

14. It is well settled that in exercise of the power of judicial review, the Tribunal will only examine the deficiency in the decision-making procedure and not the decision. We do not find any irregularity, deficiently or legal flaw in the procedure which has been followed by the Screening Committee in the present case. The recommendations are in conformity with the laid down guidelines, which the Screening Committee was bound to follow, and accordingly the recommendations are kept in sealed cover and no further action would be taken in the matter till the disciplinary proceedings pending against the applicant are over.

15. This view is fortified by the judgment in the case of Union of India vs. K.V. Jankiraman etc. (supra) and Union of India vs. Kewal Kumar (supra).

16. The aforesaid judgment lays down that for denial of promotion, there must be at the relevant time a charge-memo/charge-sheet should have already been issued to the delinquent. In the present case, charge Memorandum dated 5.5.2004 (Annexure 2) had been served and the departmental proceedings shall be deemed to be pending against the applicant when the Screening Committee was convened to assess the merit of the applicant and other eligible officers for promotion to the post of Director General and Inspector General of Police and keeping in view of the pending disciplinary proceedings against the applicant resorted to sealed cover procedure is as per the guidelines.

17. As a result of the above discussions, we do not find any merit in the present OA and it is dismissed. No costs.


(V.K. Agnihotri)
Member(A)


(M.A. Khan)
Vice-Chairman(J)